CLM 2016 New York Conference
December 1, 2016
New York, NY

The Florida AOB Crisis: A Case Study in Collaboration

I. Emergence of Property Assignment of Benefits

A. Understanding Key Business Imperatives

In the past several years Florida has experienced an explosive growth of a peculiar property insurance claim, near-exclusively in the homeowners market, where a post-loss remediation contractor, as part of its service contract, requires the insureds to assign their insurance claim rights over to the contractor to present its service charges directly to the insurer for separate payment of policy benefits. These assigned claims and their service contracts have been dubbed "AOB" (Assignment of Benefits) claims. Many such claims have generated a whole new breed of lawsuits to demand payment.

B. Legal Context of Assignments

While as a general rule and per standard insurance policy provisions, an insurance policy cannot be assigned, insurance claims, post-loss, are assignable. Lexington Ins. Co. v. Simkins Indus., Inc., 704 So. 2d 1384, 1386 (Fla. 1998). Accord, One Call Prop Services, Inc. v. Security First Ins. Co., 2015 WL 2393353 (Fla. 4th DCA 2015); Kohl v. Blue Cross Blue Shield of Fla., Inc., 988 So. 2d 654, 658 (Fla. 4th DCA 2008); United Cas. Life Ins. Co. v. State Farm and Fire Cas. Co., 477 So. 2d 645, 646 (Fla. 1st DCA 1985). Florida Courts have recently held that an assignee of the insureds' claim does not have to have an insurable interest in the property to pursue an assigned post-loss cause of action against the property insurer. See, e.g., Accident Cleaners Inc. v. Universal Ins. Co., 186 So. 3d 1 (Fla. 5th DCA 2015); Continental Cas. Co. v. Ryan Inc. E., 974 So. 2d 368 (Fla. 2008) citing, W. Fla. Grocery Co. v. Teutonia Fire Ins. Co., 77 So. 209, 210-211 (Fla. 1917). Further, the Florida Office of Insurance Regulation has instructed that the consent of the insurer to such assignment is not only not necessary but cannot be required. Security First Ins. Co. v. Florida Office of Ins. Regulation, 177 So. 3d 627 (Fla. 1st DCA 2015); Better Construction Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh, 651 So. 2d 141, 142 (Fla. 3d DCA 1995).

C. Comparison to Florida PIP Lawsuits and the Florida Attorney Fee Statute

Even more problematic for the insurer's management control of these AOB claims, cases in the analogous PIP (Personal Injury Protection) setting hold that an assignee-claimant in this posture even though standing in the policyholder's shoes for presentation of the claim, is not bound by the same duties after loss policy cooperation mandates ordinarily governing the named insured's obligation to sit for an Examination Under Oath, ("EUO"), to produce supportive claim records or provide some Sworn Statement in Proof of Loss upon request. Shaw v. State Farm Fire & Cas. Co., 37 So. 3d 329, 332 (Fla. 5th DCA 2010); Marlin Diagnostics v. State Farm Mutual Auto. Ins. Co., 897 So. 2d 469 (Fla. 3d DCA 2004).

To put these rising AOB suits in context, recent Florida insurance litigation trend reports and court website searches indicate that AOB suits now account for 35% or more of all first party lawsuits in 2016 as to the top ten insurers by number of lawsuits. The number of these lawsuits is growing, due to a related twist involving attorneys' fees. As most of you already know, certainly our Florida contingent, Florida is a very pro-insured jurisdiction. By statute, the insured's attorney is entitled to award of fees and costs on top of indemnity payments in any first party action for non-payment of a claim wherever a recovery is obtained by way of settlement or verdict against an insurer for a disputed claim. Fla. Stat. § 627.428. These AOB claimants assert the same statutory fee-shifting rights under these assignment contracts as assignee of the policy holder's rights to policy benefits. Courts have generally held that the AOB contractor-claimants are treated the same as the policyholder under these fee-shifting statutes.

The availability of attorneys' fees, often many multiples of the otherwise small contractor charge, has led to a massive proliferation of these claims and lawsuits. This is why these AOB claims are often viewed as Florida's new PIP (Personal Injury Protection) lawsuits where collection lawyers for medical providers historically sued the policyholder-patient's auto insurer for treatment charges as assignee and the attendant attorney fee claims engulf the underlying bills in dispute. There are still thousands of PIP suits in Florida but these property AOB suits are rapidly overtaking the PIP niche for the plaintiff attorney bar.

II. Challenges for Carriers

A. The Insured's Separate Claim

As you would expect, these AOB claims always start out accompanied by the insureds' own property damage claim for the water leak or other peril giving rise to the AOB services. The best (often the only) time to get the most comprehensive information as to how the AOB contract was signed, the AOB claimant's actual work and the reasonableness of later-submitted charges is on first inspection of the insured's loss by the field adjuster. This is where the collaboration between the in-house claims examiner and the outside field adjuster as to these issues and claim inspection goals are key. Care must be taken on several fronts. Initial loss inspections need to include the seemingly side issue of what work is being done by the AOB mitigation vendor.

Details from the policyholders are critical as to when and how the AOB contractor was called to the scene and what equipment or work actually performed. If the equipment is still on scene good photos will be essential down the road in the event of disputes over reasonableness of charges.

On another front there needs to be coordination as to any coverage decisions involving the insureds' claims relative to any consideration of payment to the AOB. Plaintiff attorneys representing the insureds have argued that an AOB payment without some ROR or non-waiver caveat should operate as a waiver of the insurer's post-loss grounds to decline the underlying claim.

B. Understanding the Various Types of Demands Presented

These assigned claims can take several forms. The contractor will usually demand the policyholder-property owners sign a "partial" assignment, transferring to the contractor the right to collection of its service charges from the insurer. At times, perhaps unwittingly, the AOB contract may contain "total" assignment language effectively assigning all of the insureds' recovery rights for the entire loss over to the AOB contractor. The former can create split causes of action against the insurer often in two different courts due to amounts in dispute where both the AOB vendor and the insureds sue for non-payment of their respective interests. The latter version of a "total" assignment can create substantial legal questions as to the continued standing of the insureds to pursue their own claims for the non-remediation expense portions of a claim (structural repair, contents, loss of use).

The typical AOB contractors are water dry-out companies, mold testing/remediation vendors and fire clean-up companies but they may be plumbers, drywall/kitchen, cabinetry/flooring repair contractors and other kinds of service providers as well. There may be more than one AOB vendor seeking payment (water dry out contractor and the plumber, etc.). Managing these claims for avoidance of, or needed legal defense of inevitable lawsuits present a number of challenges. Where the conduct of the careless or over-aggressive contractor causes additional damages to the house there is a separate set of problems to be addressed. Then again, where the underlying property damage claim (fire, A/C leak, corroded piping) is itself a coverage problem worthy of declination, the assignee's claim becomes its own decline candidate.

C. Impact on the Investigation Process

An additional challenge presented by the AOB's is the interference with the insurance company's ability to fully investigate the claim and the Insured's ability to comply with the conditions contained within the policy. Most insurance policies require that the Insured promptly report the loss and exhibit the damaged property. In many situations, the Insured is under the assumption (for better or for worse), that the AOB is now "handling" the insurance claim on their behalf. Rather than contact the insurance company to report the claim, the AOB company requires the Insured to execute

documents and the services are performed before the insurance company ever receives notice of the loss. More often than not, the insurer is not afforded the opportunity to inspect the property before it is in a materially altered condition and at the time of first reporting, the AOB has performed extensive mitigation services.

More specifically, during the first inspection conducted on behalf of the insurer, the baseboards have been removed, the property has been damaged from the drilling of holes in cabinets and walls and large mitigation expenses have already been incurred. Not only does this create unnecessary damage at the property, it drives up the overall cost of the claim. Several AOB's perform multiple functions and in addition to performing water mitigation services, they complete plumbing repairs as a result of the loss. Unfortunately, due to the lack of regulation and lack of obligation under the policy, the AOB's will discard the failed plumbing part, making it next to impossible for the insurer to ever evaluate the cause and origin of the claimed damage.

Hundreds of these relatively low value AOB property claims, each with a set of challenges, each with an ever-escalating, grossly disproportionate attorneys' fees component require effective collaboration between the internal claims staff, outside experts support consultants, field adjusters and outside counsel all working in tandem to assure cost-effective risk management.

This panel presentation offers some insight into these kinds of claims with perspectives from seasoned claims managers and litigators experienced in these cases on ways to be pro-active in early investigation, regulatory compliance and litigation oversight. Our panel believes the approach is well-suited for other types of property and liability claims as well.

We will review both the practical claim loss adjustment challenges and the litigation realities in this group discussion.

III. Special Claim Investigation Considerations

While the insurer could demand an appraisal of such AOB contractors' charges (assuming a policy provision mandating appraisal upon either party's request), Cert. Priority Restoration v. State Farm Fla. Ins. Co., 191 So. 3d 961 (Fla. 4th DCA 2016), as noted above the traditional investigation tools of an EUO or demand for a Proof of Loss are not likely to be permitted as part of these AOB claim investigations. Thus, more creative and less direct methods of determining the validity or reasonableness of charges submitted are needed in these kinds of post-loss mitigation/ remediation assigned claims.

The following techniques have been used with increasing success:

- Peer reviews by support vendor consultants of the water mitigation/remediation vendor's service charges relative to scope of dry out/clean-up reported to provide comparative pricing estimates;

- Requests for dry out/remediation logs showing number of crew deployed and days for use of dehumidifiers and other equipment; and

- Requests for photos from the AOB contractor.

In some instances, the recorded statements of the insureds and/or taking the insured's EUO as part of their own claim can be useful to corroborate the AOB contractor's story of what was needed and what was actually done. Sometimes this kind of background investigation uncovers arguments not just as to excessive billings by the AOB contractor but information to show the assignment was done under duress or in a suspect, overreaching manner. Not all policyholders are satisfied with the services provided and some will be useful to show fraud by the contractor.

Armed with this information the AOB charge can often be the subject of effective negotiations to reach an agreed-upon, reduced price for the work. It is highly recommended, however, where a negotiated payment is the approach, that the insurer does whatever possible to get a written confirmation of the acceptance of the reduced payment, possibly even a release, to assure finality. All too often we see a later-filed lawsuit by the AOB contractor demanding the unpaid difference in a partial payment situation because in the haste to try to resolve that part of the claim the discounted payment was not adequately memorialized as an agreed settlement.

IV. Collaboration between Carriers and Counsel

These AOB claims present a challenge but also an opportunity for effective claims management provided the insurance company claims adjusters, their field people, their outside support experts and their legal counsel are all engaged in hands-on, coordinated collaboration for the common goal of prompt, cost-effective risk management.