



**2016 CLM Annual Conference  
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**FAQs about AOBs and H2O**

**I. AOB & H2O – What's is The Connection?**

**A. AOB & H2O Overview.**

The typical AOB lawsuit scenario in Florida arises from a homeowner with water loss such as a leaky pipe or an overflow from a sink or toilet that causes water to seep into the baseboards, flooring and furniture. The homeowner calls a water mitigation company. The water mitigation company sends a technician with a truck full of air blowers, dehumidifiers and other equipment. The technician removes the baseboards and dries the inside of the house. Along the way, the water mitigation company presents the homeowner with an Assignment of Benefits form. The homeowner assigns all of his or her rights under the policy to recover insurance proceeds to the contractor. Sometime soon after, the homeowner files a claim with the insurance company.

The claim is denied because the losses are frequently not covered by the policy. The loss typically arises from long-term wear and tear or faulty workmanship, neither of which is covered under the typical homeowner's policy. The water mitigation company is left with an unpaid bill so the water mitigation company sues the "deep pockets" insurer and, in some states, hopes to recover not only its billed services, but also attorney's fees.

A similar scenario plays out with hail and wind storms, with roofing companies advertising heavily in neighborhoods in which roofs are nearing the end of their functional life.

In Texas, if the insurance policy contains an anti-assignment clause that only allows assignment of the policy with the carrier's written consent, a policyholder cannot assign insurance claims pre- or post- loss without getting the carrier's written consent. Therefore, in contrast to roofers or contractors in Florida signing up claims with AOBs in Texas Public Adjusters try to sign up claims and act as the policyholder's representative. So for instance, after a storm, Public Adjusters will go door to door asking to inspect roofs and offering to assist the policyholder with making a claim on the policyholder's

insurance carrier, often whether or not there is evidence of damage from the storm at issue. The Public Adjuster enters into a contingency fee agreement with the policyholder that gives the Public Adjuster a percentage interest in amount of the insurance settlement on the claim, which is typically a 10% contingency interest. (10% is the maximum allowed by law.) The Public Adjuster's role in Texas is to investigate a loss on behalf of the policyholder and negotiate a settlement on the policyholder's behalf with the carrier. The Public Adjuster therefore, often writes up a repair/replacement estimate that gets submitted to the carrier. The Public Adjuster's damage estimate is generally for full roof replacement, whether or not full replacement is justified from damage caused by the storm at issue. This is because the Public Adjuster's incentive is have the estimate be as large as possible since he has a 10% contingency fee interest.

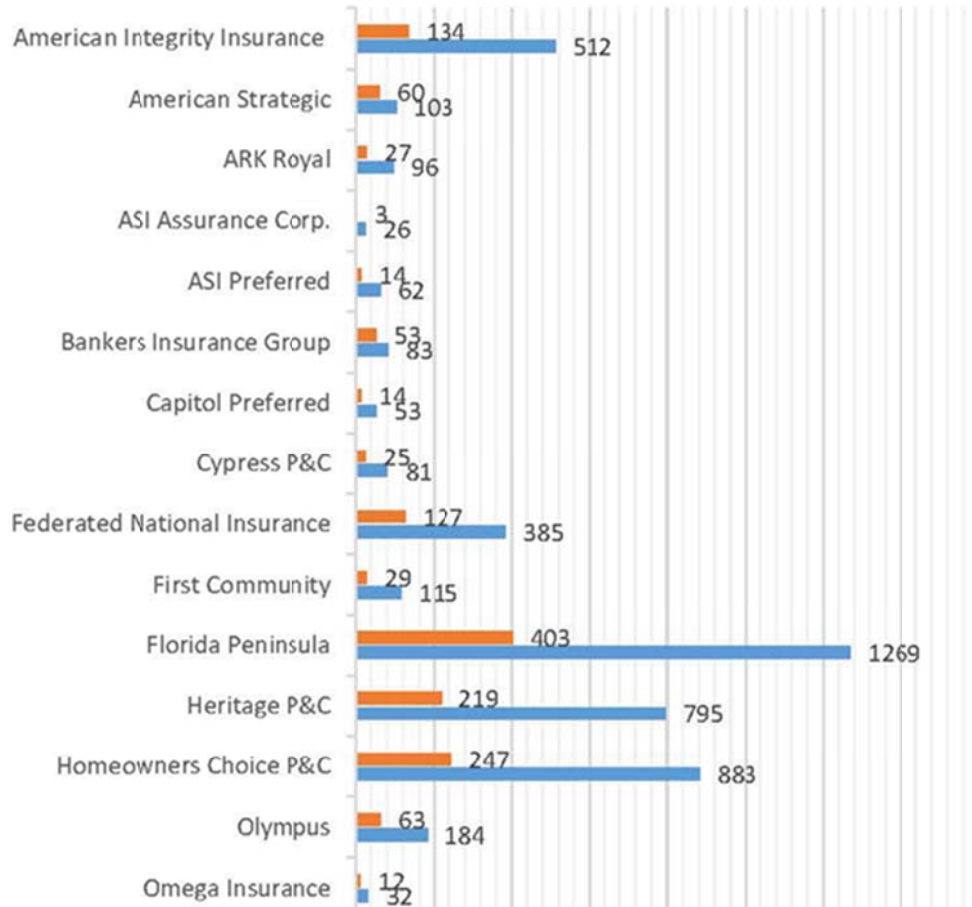
Texas has been aware of abuses that result from such a system and therefore, provisions in the Texas Insurance Code that relate to Public Adjusters attempt to rein in abuses. For instance, Public Adjusters must be licensed with the Texas Department of Insurance, and a Public Adjuster may not "participate directly or indirectly in the reconstruction, repair, or restoration of damaged property that is the subject of a claim adjusted by" the Public Adjuster. Tex. Ins. Code, Sec. 4102.051(a), and 4102.158(a)(1).

Also, note that roofing contractors have attempted to act as Public Adjusters and then do the repair work themselves. This is a violation of the Public Adjuster statute because a "roofing contractor may not act as a public adjuster or advertise to adjust claims for any property for which the contractor is providing or may provide roofing services, regardless of whether the contractor holds a license under this chapter." Tex. Ins. Code Sec. 4102.163.

Although the Texas Insurance Code states that a Public Adjuster "shall prepare each claim for an insured represented by the license holder [Public Adjuster] in accordance with the terms and conditions of the contract of insurance under which recovery is sought," (Tex. Ins. Code. Sec. 4102.102), this rarely occurs. For instance, Public Adjusters rarely take into consideration prior existing damage, lack of maintenance, wear and tear, et al. in their estimates that get submitted to the carrier.

**B. Why the concern? Rapid Growth of AOB & H2O Claims.**

Florida property insurers have seen AOB lawsuits double or even triple between 2014 and 2015.



Working with plaintiff firms, some water mitigation and roofing companies have filed hundreds of AOB lawsuits, often before repairs have taken place.

Similarly, Texas hails claims are up 84% since 2010. Texas also led the country in hail claims from 2010-2012 with more than 100,000 hail claims per year.<sup>1</sup> Texas also led the nation in the number of questionable claims for hail from 2010 through 2012 with a total of 1,053 claims or 28% of the U.S. claims.<sup>2</sup> The upward trend continues with the most common attributes for these questionable hail claims including bogus hail damage, vendor fraud, , prior loss or damage, and inflated damage figures.

**C. AOB & H2O - Current Legal Landscape.**

<sup>1</sup> And Texas is not alone when it comes to hail claims. Missouri, Kansas, Colorado, Oklahoma, Illinois, Tennessee, Indiana, Arizona and Kentucky had almost 1.3 million hail claims between 2010 and 2013.

<sup>2</sup> Texas, Illinois, Colorado, Arizona, Oklahoma, Missouri, Georgia, Minnesota, Louisiana and South Carolina, comprised 76% of the questionable claims during this period with 2,915.

May 20, 2015 was a day Florida property insurers would like to forget. Three appellate decisions addressing Assignment of Benefits lawsuits - *Security First v. Florida Office of Insurance Regulation*, *Accident Cleaners v. Universal Insurance Co.*, *One Call Property Services, Inc., a/a/o William Hughes v. Security First Insurance Company*. Three appellate decisions, three losses. In each decision, the courts not only rejected the insurers arguments, the courts went on to say that the public policy arguments raised by insurers were best addressed by the Legislature.

Unfortunately, the Legislature has also failed Florida property insurers. As one example, HB 669, which would have allowed insurance policies to prohibit post-loss assignments, died in the Regulatory Affairs Committee.

By comparison, in Texas anti-assignment clauses are enforceable to invalidate an insured 's pre loss and post loss assignments without the insurer's written consent. *Keller Foundations v. Wausau Underwriters*, 626 F.3d 871 (5th Cir. 2010). Moreover, where the Florida legislature has seemingly abandoned Florida insurers, the Texas legislature has recently enacted laws to restrict the influence of Public Adjusters. See Tex. Ins. Code sec. 4102.158 and .160 and .164

In Texas, Public Adjusters often referred roof repair work and other work to roofing companies, contractors, and lawyers and/or appraisers when the Public Adjuster has not been able to settle the policyholder's claim himself with the carrier, in exchange for remuneration. The Texas Legislature recently passed new provisions to the Texas Insurance Code that became effective on September 1, 2015, which prohibit such referral payments. For instance, a Public Adjuster may not accept referral payments from "any third-party individual or firm, including an attorney, appraiser, umpire, construction company, contractor or salvage company." Tex. Ins. Code. Sec. 4102.16(a). Under this new provision, Public Adjusters can only receive compensation from their policyholder clients.

In addition, some Public Adjusters in Texas were signing up policyholder clients with no intention of actually investigating a loss and trying to negotiate a settlement with the carrier. Rather, they were signing up policyholder clients and then "flipping" the claims to lawyers, such that the lawyers got a contingency fee and the Public Adjuster got paid his 10% contingency fee. And in some cases, Public Adjusters and lawyers had referral contracts between them.

The new provisions in the Texas Insurance Code, also effective September 1, 2015, state that a Public Adjuster "may not enter into a contract with an insured and collect a commission as provided by Section 4102.104 without the intent to actually perform the services customarily provided by a licensed public adjuster for the insured." Tex. Ins. Code. Sec. 4102.103(d). Further, new Section 4102.158(d) prevents Public Adjusters from violating Texas barratry laws by signing up clients for lawyers in

improper ways. A new provision states that “[a] license holder [Public Adjuster] may not directly or indirectly solicit, as described by Chapter 38, [Texas] Penal Code, employment for an attorney to enter into a contract with an insured for the primary purpose of referring an insured to an attorney and without the intent to actually preform the services customarily provided by a licensed public insurance adjuster.” Note, however, that the provision does not prevent a Public Adjuster “from recommending a particular attorney to an insured.” And further, Section 4102.158(e) states that a Public Adjuster “may not act on behalf of an attorney in having an insured sign an attorney representation agreement.”

### **III. Strategic Approaches To Minimize Exposure To Questionable Wind, Hail, and Water Claims.**

#### **A. Adjusting Approaches**

Claim issues typically involve the cause of damage, and the retention of a qualified engineer capable of determining the actual cause of loss – whether included or excluded from coverage by the insurance policy – is one method for making an appropriate coverage determination.

The carrier’s adjuster/independent adjuster should:

1. Document everything in writing, and with photographs.
2. Use pictometry/google earth for before and after aerial photos
3. Check city records to see if property has been red-tagged at times prior to the loss at issue
4. Attempt to obtain maintenance records on the property, which will generally show pre-existing problems, lack of or improper maintenance, that the interior water damage is from pipe leak as opposed to roof leaks, etc.
5. Attempt to obtain records on prior claims at the property and whether insured used prior monies received to effectuate repairs
6. Check weather databases for prior storms/storm damage
7. Carefully assess insured’s consultants’ Xactimate or other pricing, because often inflated or includes non-sensical items
8. If roof claim, possibly solicit roofing bids rather than using Xactimate pricing
9. Try to agree on depreciation holdback amount if it is a Replacement Cost policy
10. Inspect the entire roof
11. If the insured is claiming interior water damage from roof leaks, and the roof damage from the storm at issue is minor, still inspect the interior units, because if you have not, then when it ends up in litigation, looks like you did not do your job properly. Plus, need to show that the interior water leaks were not from the storm at issue.
12. Hire building consultants and/or engineers when needed.

13. Do not delay inspections, partial payments, etc. In Texas, we have a Prompt Pay Statute that must be complied with, otherwise penalties.

**B. Use of Technology.**

One positive to come from the rapid expansion of AOB and questionable hail claims is the development of new technology to assist insurers. For example, one well know industry source now analyzes hundreds (sometimes thousands) of sampling points collected from various sources on the ground following a hail event and uses a proprietary methodology to determine what size hail fell in a particular location, as well as the likelihood of damage for an area being investigated. Insurers now have several sources for critical data such as hail size; storm speed, direction, length and intensity; as well as latitude, longitude, elevation and value and other storm details and most of this information is available only a few minutes after a storm passes through a given area. This information and readily-available wind speed data is critical for insurers trying to handle large numbers of questionable hail and storm claims.

**C. Legal Issues/Defenses/Approaches**

Here are a few things to consider:

1. In Texas, the policy holder has the burden to allocate its alleged damage between covered and uncovered losses. So make the insured allocate.
2. Did the storm at issue cause any of the damage observed? Is there pre-existing damage? Prior claims at the property? Prior monies paid by not used to repair/replace.
3. Apply all coverage defenses, whether it be certain property that is not covered under the policy, such as fences, or whether there are excluded causes of loss.
4. Did the insured mitigate its damages and how?
5. Did the insured or its consultants inflate the extent of the damage?
6. Did the insured or its consultants inflate the costs of repairs/replacement?
7. Has the insured used monies paid the by the carrier to actually repair/replace?

**D. To Report or Not Report?**

Report, report, report. Industry data on the scope of questionable claims is crucial to understanding and dealing with the unique challenges presented by these claims. In addition, industry data is essential for legislative efforts.