Free markets. Real solutions.

R STREET POLICY STUDY NO. 129
February 2018

ADDRESSING FLORIDA'S ASSIGNMENT-OF-BENEFITS CRISIS

R.J. Lehmann

CONTENTS

INTRODUCTION

A hurricane-free decade allowed Florida's property insurers and its state-run property insurance mechanisms—Citizens Property Insurance Corp. and the Florida Hurricane Catastrophe Fund—to recover and recapitalize after the historic storm seasons of 2004 and 2005, to the extent that the market appears to have absorbed the $7.21 billion strike of Hurricane Irma in 2017 without incident.[1]

But while the once-fragile market was able to rebuild its surplus in the absence of major storms, not all areas of the state have enjoyed falling property insurance premiums. An explosion of lawsuits that arose primarily from water-damage claims, and that were concentrated most intensely in the tri-county area of Broward, Miami-Dade and Palm Beach, have driven up rates even as the skies stayed quiet. Last year, Citizens requested average rate increases of 10.5 percent for Miami-Dade, 10.4 percent for Broward and 9.3 percent for Palm Beach—the second time in three years that it sought significant rate hikes in South Florida.[2] The company also was clear about what it saw as the primary driver of these rate trends: abuse of the state's assignment-of-benefits law.

Under an assignment of benefits, the beneficiary of an insurance contract may transfer the right to collect benefits to a third party. In property insurance claims, this third party is commonly a contractor, such as a roofer or a water-mitigation firm, who may then directly bill the insurance company for services rendered. Under Florida law,[3] an insurance contract may require that the insured seek the insurer's consent to assign benefits "pre-loss." However, under Florida common law, consent cannot be required for "post-loss" assignments.

In most cases, an assignment of benefits proves to be an efficient arrangement in which contractors appropriately bill insurers for services rendered, while customers are saved the hassle of submitting bills to their insurance company after they have already paid them out of pocket. But in recent years, unscrupulous vendors and trial attorneys have conspired to exploit weaknesses in the assignment-of-benefits process to file abusive litigation.

Under a typical abusive scenario, a water-extraction company may pressure a homeowner to assign their contract benefits to clean up the result of a burst pipe, warning that mold will set in if the work is not done immediately. Once the AOB is executed, the company submits an inflated bill to the insurer and threatens a lawsuit if the bill is not paid immediately. All of this happens even before the insurer has had the opportunity to inspect the work. Due to quirks in Florida law, there are strong incentives for attorneys to take and even solicit such cases, and few potential negative consequences for bringing even frivolous cases to trial.

According to the Consumer Protection Coalition, AOB lawsuits in Florida are up 90,000 percent since the turn of the

1. "Hurricane Irma Claims Data," Florida Office of Insurance Regulation, as of Jan. 5, 2018. https://www.floir.com/Office/HurricaneSeason/HurricaneIrmaClaimsData.aspx.

2. Mary Ellen Klas, "That drip, drip, drip you hear is the cost of your homeowners insurance rising," *Miami Herald*, June 20, 2017. http://www.miamiherald.com/news/business/article157169199.html.

3. § 627.422 Fla. Stat. http://www.leg.state.fl.us/Statutes/index.cfm?App_mode=Display_Statute&Search_String=&URL=0600-0699/0627/Sections/0627.422.html.

21st century.[4] The trend also has spread beyond South Florida and is projected to contribute to property insurance rate increases of more than 50 percent over the next five years in cities like Jacksonville and Orlando. With efforts to seek relief in the courts now thoroughly exhausted, it is incumbent upon the state Legislature to enact reforms as part of the in-progress 2018 session, something it has failed to do in each of the past five sessions.

The R Street Institute first identified AOB abuse as a worrisome trend in Florida's property insurance market in 2013.[5] This paper highlights the nature of the problem, summarizes findings on its severity and evaluates proposed legislation currently working its way through the Florida Legislature.

A PERFECT STORM OF LEGAL INCENTIVES

While assignments of benefits are a standard part of insurance law in every state, Florida has become a locus of AOB-related litigation primarily due to the confluence of three elements of state law that may be exploited by bad actors: a liberal interpretation of a primary-named insured's right to assign, a lack of statutory clarity on the circumstances under which insurers may be accused of operating in bad faith and an asymmetrical treatment of attorney's fees at trial.

As discussed later in the section on efforts to resolve the crisis through the courts, the right of Florida consumers to assign benefits was established under a century-old state Supreme Court precedent. Though the decision itself is not unusual, state courts in recent years have been reluctant to recognize virtually any contractual limit to assignees' rights to transfer post-loss benefits, with or without an insurer's consent. Assignees' rights have been upheld even for "contingent" post-loss benefits that arguably have not yet accrued to the insured.

A second concern is that the language of Florida's bad faith statute is somewhat unclear about the duties that an insured possesses before lodging a claim of bad faith. The statute spells out the prohibition on an insurer "not attempting in good faith to settle claims when, under all the circumstances, it could and should have done so, had it acted fairly and honestly toward its insured and with due regard for her or his interests."[6] However, it does not speak to an insured's reciprocal duty to act in good faith.

Writing in the *Florida Bar Journal* in February 2011, Gwynne A. Young and Johanna W. Clark note that this raises the potential for insureds or other claimants to create the conditions for a bad faith claim by refusing to cooperate with the settlement process.[7] They note recent decisions in which insurers have been held to be acting in bad faith, for example, because one claimant refused to sign a global release settlement that was signed by another claimant:

> [The statute's] one-sided provisions as to the insurer's good faith obligations is being exploited in some cases to create bad faith claims through the settlement process, even when it is clear the insurer is perfectly willing and attempting to settle the claim. Lawyers for insureds/claimants sometimes affirmatively seek to avoid — contrary to the public policy favoring settlements — in an effort to convert $10,000 policy limits into a multi-million-dollar recovery under the policy. That plainly was not the intent behind this statute, which instead is intended to encourage settlement of insurance claims.[8]

But perhaps the most important driver of the uptick in AOB-related litigation is what is commonly referred to as Florida's "one-way attorneys' fees" law. Under Florida statute,[9] in any suit in which "any named or omnibus insured or the named beneficiary" prevails in a judgment against an insurance company, he or she is entitled to "a reasonable sum as fees or compensation for the insured's or beneficiary's attorney prosecuting the suit in which the recovery is had." Thus, rather than take cases on a contingency-fee arrangement in which counsel agrees to be compensated with a percentage of the total award, the Florida statute allows plaintiffs' attorneys to bill hours directly to the losing insurer at theoretically unlimited rates.

In an AOB context, the statute entitles the attorneys for a water-mitigation company or other contractor assigned rights to recover benefits under the insurance contract to bill the insurer directly if a court awards any amount greater than the insurer's original settlement offer. The attorneys' fees are "one way" because insurance companies that prevail in such challenges do not have the same right to collect attorneys' fees from the plaintiff.

The combination of these three factors helped to create a litigation mill in which contractors, standing in the shoes

4. Consumer Protection Coalition "At-a-Glance," Florida Chamber of Commerce, 2016-2017. http://www.fightfraud.today.

5. R.J. Lehmann, "Ten reforms to fix Florida's property insurance marketplace — without raising rates," *The James Madison Institute Backgrounder* 74 (November 2013), pp. 1-14. http://www.rstreet.org/policy-study/ten-reforms-to-fix-floridas-property-insurance-marketplace-without-raising-rates.

6. § 624.155(1)(b)(1), Fla. Stat. http://www.leg.state.fl.us/statutes/index.cfm?App_mode=Display_Statute&URL=0600-0699/0624/Sections/0624.155.html.

7. Gwynne A. Young and Johanna W. Clark, "The Good Faith, Bad Faith, and Ugly Set-up of Insurance Claims Settlement," *The Florida Bar Journal* 85:2 (February 2011), p. 8. https://www.floridabar.org/news/tfb-journal/?durl=%2Fdivcom%2Fjn%2Fjournal01.nsf%2F8c9f13012b96736985256aa900624829%2Fd608f361a5b9d32a852578250050864c.

8. Ibid.

9. § 627.428, Fla. Stat. http://www.leg.state.fl.us/STATUTES/index.cfm?App_mode=Display_Statute&URL=0600-0699/0627/Sections/0627.428.html.

of a policyholder by way of an AOB, have every incentive to submit inflated bills to insurance companies and then to work with attorneys to file suit should the insurer show any hesitation about paying. The potential rewards for bringing litigation are considerable, while the negative consequences are virtually nonexistent. It is, in effect, "heads, I win; tails, you lose."

SEVERITY OF THE PROBLEM

Concerns about assignment-of-benefits abuse in Florida have been on the radar for some time, but it is only in recent years that they have been elevated to what reasonably could be called a crisis. According to Florida Department of Financial Services' legal-service-of-process data, the number of AOB lawsuits filed in the state grew from just 405 in 2006 to more than 28,000 in 2016.[10]

The state-run Citizens Property Insurance Corp. alone faced 3,280 AOB lawsuits in 2016, after seeing less than 100 combined from 2006 through 2010.[11] In 2015, Citizens noted that it received water-damage claims from 1 in 8 of its Miami-Dade County policyholders that year, compared with 1 in 12 in 2012.[12] The average costs of those claims also grew from less than $9,000 to nearly $15,000. As of July 31, 2017, Citizens was facing more than 10,000 AOB lawsuits, 93 percent of them from the South Florida counties of Broward, Miami-Dade and Palm Beach.[13]

In February 2016, the Florida Office of Insurance Regulation (FLOIR) issued a report that collated the results of a data call and found that water losses experienced by Florida insurers—combining the effects of increases in both frequency and severity—rose at a rate of 14.2 percent annually from 2010 through 2015.[14] A follow-up to that call in January 2018 found that, since 2015, the rate of increase has been 42.1 percent per year, with an 18 percent aggregate increase in the severity of water claims.[15]

Assignments of benefits also are being used in a growing proportion of water claims. From 2015 to 2017, the number of water claims that made use of AOBs grew from 12.8 percent to 17.0 percent. AOB claims have generally been at least 85 percent more severe than water claims without an AOB, FLOIR found.[16]

These trends threaten to destabilize the already-fragile Florida property insurance market, and even its housing market more generally. Acknowledging the inherent uncertainty created by the claims environment, credit rating agency Demotech completely suspended its ratings criteria for Florida-based insurers in February 2017, putting 10-15 of the 57 Florida companies it rates on notice of potential downgrades.[17] Given that Fannie Mae and Freddie Mac require property collateral in mortgaged loans to be insured by companies with ratings of A or better, this raised the prospect that thousands of mortgages across the state could move into technical default.[18]

In response to the news, Florida insurers rated by Demotech added $200 million in loss and loss adjustment expense reserves, as well as $155 million in capital contributions toward policyholder surplus.[19] In March 2017, the rating agency announced that it had partially downgraded just one Florida insurer, while it continued to monitor three others. As future ratings action continues to loom as a potential threat, there is evidence that the AOB litigation problem, once thought confined to South Florida, is spreading statewide. According to the FLOIR, not only has the frequency of water claims risen by 44 percent since 2015, but every region of the state has experienced at least double-digit increases.[20]

As demonstrated in Table 1, projections by the Florida Office of Insurance Regulation show that, without reform, average homeowners insurance premiums for standard HO-3 policies written for a $150,000 new home are projected to rise 29.5 percent over the next five years.[21] South Florida remains the epicenter of the AOB crisis, with average rates in Broward and Miami-Dade counties both expected to rise more than 60 percent. But Northeast Florida's Clay and Duval

10. Consumer Protection Coalition, "Assignment of Benefits Legal Service of Process Data," Florida Chamber of Commerce, 2017, p. 2. http://www.fightfraud.today/files/CFOAtwaterLSOPAOBSnapshots.pdf.

11. Ibid., p. 4.

12. Jim Turner, "Citizens Property Insurance seeks changes for water claims," *Miami Herald*, Dec. 9, 2015. http://www.miamiherald.com/news/business/article48890230.html.

13. Property Casualty Insurers Association of America, "Florida Insurers Identify AOB Abuse & Auto Safety as Two of the Top Priorities for 2018 Legislative Session," Press release, Jan. 8, 2018. http://www.pciaa.net/pciwebsite/Cms/Content/ViewPrint?sitePageId=51251.

14. Kevin M. McCarty, "Report on Review of the2015 Assignment of Benefits Data Call," Florida Office of Insurance Regulation, Feb. 8, 2016, p. 6. https://www.floir.com/siteDocuments/AssignmentBenefitsDataCallReport02082016.pdf.

15. David Altmaier, "Report of the 2017 Assignment of Benefits Data Call," Florida Office of Insurance Regulation, Jan. 8, 2018, p. 2. https://floir.com/siteDocuments/AssignmentBenefitsDataCallReport02082017.pdf.

16. Ibid, p. 3.

17. Amy O'Connor, "Demotech Suspends Florida Insurer Rating Criteria; Says Downgrades Coming," *Insurance Journal*, Feb. 7, 2017. https://www.insurancejournal.com/news/southeast/2017/02/07/441177.htm.

18. Mary Ellen Klass, "Thousands of Florida mortgages could be at risk because of insurance abuse," *Miami Herald*, Feb. 14, 2017. http://www.miamiherald.com/news/business/article132728639.html.

19. Amy O'Connor, "Florida Property Insurers Largely Avoid Downgrades, For Now: Demotech," *Insurance Journal*, March 17, 2017. https://www.insurancejournal.com/news/southeast/2017/03/17/444778.htm.

20. Altmaier, p. 5.

21. "5-Year Rate Projections for Homeowners (HO-3) Insurance by Florida County and Risk Type," Florida Office of Insurance Regulation, January 2018. https://www.floir.com/siteDocuments/RateProjectionsbyCounty.pdf.

counties also both project to see rate hikes of more than 50 percent, as do Central Florida's Orange and Seminole counties. In the Orlando suburbs of Osceola County, rates are projected to rise more than 60 percent.

TABLE I: PROJECTED HOMEOWNERS RATE INCREASES BY COUNTY

County	2017 ($)	2022 ($)	Projected Increase (%)
Central			
Hardee	1,050.12	1,411.93	34.5
Lake	906.19	1,224.19	35.1
Marion	916.62	1,164.29	27.0
Orange	981.60	1,524.20	55.3
Osceola	986.35	1,588.53	61.1
Polk	1,164.02	1,478.54	27.0
Seminole	952.97	1,493.36	56.7
Sumter	864.34	1,140.41	31.9
Central East			
Brevard	1,427.25	1,883.10	31.9
Indian River	1,827.97	2,612.11	42.9
Okeechobee	1,277.01	1,653.24	29.5
St. Lucie	1,939.28	2,797.06	44.2
Volusia	1,104.23	1,534.32	38.9
Central West			
Citrus	1,263.33	1,714.67	35.7
DeSoto	1,095.75	1,405.17	28.2
Hernando	2,274.71	2,240.81	-1.5
Hillsborough	1,532.12	1,846.20	20.5
Manatee	1,335.01	1,361.92	2.0
Pasco	1,890.97	2,067.40	9.3
Pinellas	1,524.32	1,733.06	13.7
Sarasota	1,370.02	1,497.84	9.3
North Central			
Alachua	810.23	1,063.97	31.3
Bradford	817.28	1,063.12	30.1
Columbia	880.29	1,166.96	32.6
Dixie	930.20	1,215.72	30.7
Gadsden	884.02	1,155.38	30.7
Gilchrist	880.44	1,150.70	30.7
Hamilton	854.63	1,059.94	24.0
Jefferson	893.59	1,102.96	23.4
Lafayette	922.05	1,127.23	22.3
Leon	735.85	1,012.91	37.7
Levy	970.99	1,311.71	35.1
Madison	865.12	1,130.68	30.7
Suwannee	896.77	1,172.06	30.7
Taylor	901.31	1,270.06	40.9
Union	857.13	1,047.84	22.2
Wakulla	1,055.03	1,507.60	42.9
Northeast			
Baker	873.81	1,158.36	32.6
Clay	703.63	1,082.63	53.9
Duval	778.30	1,170.30	50.4
Flagler	900.48	1,210.75	34.5
Nassau	829.05	1,093.86	31.9
Putnam	730.91	992.03	35.7
St. Johns	826.31	1,180.76	42.9
Northwest			
Bay	1,306.23	1,723.45	31.9
Calhoun	966.81	1,210.61	25.2
Escambia	1,489.17	1,900.58	27.6
Franklin	1,453.29	1,701.17	17.1
Gulf	1,261.12	1,617.24	28.2
Holmes	930.11	1,256.47	35.1
Jackson	892.48	1,177.54	31.9
Liberty	960.99	1,250.03	30.1
Okaloosa	1,422.30	1,738.77	22.3
Santa Rosa	1,463.94	1,656.30	13.1
Walton	1,282.35	1,652.28	28.8
Washington	947.43	1,238.25	30.7
Southeast			
Broward	2,182.58	3,531.08	61.8
Martin	2,147.10	2,997.36	39.6
Miami-Dade	2,732.95	4,441.60	62.5
Monroe	2,796.54	3,849.52	37.7
Palm Beach	2,280.44	3,139.08	37.7
Southwest			
Charlotte	1,492.70	1,640.01	9.9
Collier	1,845.46	1,997.90	8.3
Glades	1,299.01	1,689.71	30.1
Hendry	1,289.50	1,466.08	13.7
Lee	1,584.95	1,707.44	7.7
Statewide	1,232.08	1,595.07	29.5

NOTE: Premium figures assume an HO-3 policy for a new home valued at $150,000.
SOURCE: R Street analysis of Florida Office of Insurance Regulation data.

EXHAUSTED JUDICIAL RELIEF OPTIONS

The right of Florida consumers to assign the benefits they are due under an insurance contract was definitively established in a century-old precedent. In the 1917 case of *West Florida Grocery Co. v. Teutonia Fire Insurance Co.*, the Florida Supreme Court declared that "it is a well-settled rule that [anti-assignment provisions do] not apply to an assignment after loss."[22]

But as attorneys David J. Salmon and Andrew A. Labbe note in a February 2015 piece, the analysis does not end there.[23] For an assignment of some right to be valid, the right must be "present" in the party assigning that right and it must transfer a "complete" interest in the thing assigned. Where a property stands as collateral for a mortgaged loan, a homeowner may lack full assignment rights, as the mortgagee also holds interest in the insurance proceeds. Moreover, an insured does not accrue rights to insurance proceeds until he or she complies with his or her post-loss duties, such as undergoing a loss adjustment. As Salmon and Labbe argue:

> In the context of homeowner's insurance, virtually every policy includes post-loss duties of the insured, post-loss rights of the insurer, and conditions precedent to the accrual of a right to receive benefits. Pursuant to the holding in *West Florida Grocery*, until post-loss duties are complied with, there is a coverage determination, and a right to payment accrues, there is nothing for the insured to assign and an AOB is invalid as a matter of law. The assignment is not a 'present' transfer, because the right to payment has not accrued, nor is it 'complete,' as both the insured and mortgagee maintain an interest in the claim and policy. Moreover, as in *West Florida Grocery*, benefits under these policies are contingent and may never accrue.[24]

Several Florida insurers have picked up this thread in seeking to challenge assignments, particularly "partial" ones in which insureds seek to assign their post-loss rights to multiple service providers, creating a situation in which multiple AOB-related lawsuits can arise from a single policy or even a single claim. Insurers argue that all persons entitled to various parts of a debt owed must be joined in an equitable proceeding. However, such challenges have met with little success in the courts, which underscores the need for a legislative solution.

In 2015, Florida's 5th Circuit Court of Appeal upheld the rights of an assignee to enforce a policy's provisions as a third-party beneficiary.[25] Just a month after that decision, the 4th District Court of Appeal handed down opinions in a trio of cases that left no question about the right of a contractor who receives a post-loss assignment to enforce the policy.[26] The 4th District also declined to rule on whether a partial assignment is valid, as did the 2nd District in a 2016 case.[27]

The most significant recent challenge involved an attempt by Security First Insurance Co. to add endorsements to its homeowners, renters, condo and dwelling fire policies restricting policyholders' rights to assign post-loss benefits without the consent of all insureds, additional insureds and mortgagees named in the policy. The Florida Office of Insurance Regulation rejected the proposed forms as violating Florida's AOB law. Security First challenged that decision, first in an unsuccessful plea for administrative review and ultimately to the 5th District Court of Appeal.

Although it conceded that the Florida law did not allow for an endorsement that would require an insurer's consent to assign benefits, Security First argued that Florida case law did not preclude requiring the consent of all insureds. Indeed, the company argued, such an assignment would both violate lenders' contractual rights and force an insurer to violate its own duty to act in good faith for all insureds.

In a December 2017 decision, a three-judge panel of the 5th District rejected Security First's argument, finding that while many Florida cases that rejected restrictions on an insured's AOB rights involved insurer consent, not all did.[28] Moreover, the decision noted that Florida courts repeatedly have deferred determining whether such restrictions are permissible in the absence of explicit statutory guidance: "We agree that the asserted public policy concerns are best addressed by the Legislature," Associate Judge George Paul wrote for the panel.[29]

22. *West Florida Grocery Co. v. Teutonia Fire Insurance Co.*, 77 So. 209, 210-11 (Fla. 1917). https://www.westlaw.com/Link/Document/FullText?cite=72FL220&VR=3.0&RS=da3.0.

23. David J. Salmon and Andrew A. Labbe, "AOB's Have Been Valid Since 1917 And If You Like Your Health-Care Plan, You Can Keep It," Groelle & Salmon, Feb. 13, 2015. http://www.gspalaw.com/aobs-valid-since-1917-like-health-care-plan-can-keep.

24. Ibid.

25. *Accident Cleaners, Inc. v. Universal Ins. Co.*, 2015 WL. 1609973, *2 (Fla. 5th DCA Apr. 10, 2015). http://caselaw.findlaw.com/fl-district-court-of-appeal/1697397.html.

26. *One Call Prop. Servs. Inc. v. Sec. First Ins. Co.*, 165 So. 3d 749, 755 (Fla. 4th DCA 2015). http://caselaw.findlaw.com/fl-district-court-of-appeal/1703598.html; ASAP Rest. & Const., Inc. v. Tower Hill Signature Ins. Co., 2015 WL 2393302 (Fla. 4th DCA May 20, 2015); and Emergency Services 24, Inc. v. United Property & Cas. Ins. Co., 2015 WL 2393357 (Fla. 4th DCA May 20, 2015). http://caselaw.findlaw.com/fl-district-court-of-appeal/1701470.html.

27. *Start to Finish Restoration, LLC v. Homeowners Choice Prop. & Cas. Ins. Co.*, 192 So. 3d 1275, 1276 n.1 (Fla. 2d DCA 2016). https://law.justia.com/cases/florida/second-district-court-of-appeal/2016/2d15-2206.html.

28. *Security First Insurance Co. v. Florida Office of Insurance Regulation*, 5D16-3425 (Fla. 5th DCA Dec. 1, 2017). https://www.insurancejournal.com/app/uploads/2018/01/Security-First-Insurance-Co.-v.-Florida-Office-of-Insurance-Regulation.pdf.

29. Ibid., p. 8.

PROPOSED LEGISLATIVE SOLUTIONS

Having failed to enact AOB reforms in 2013, 2014, 2015, 2016 and 2017,[30] the Legislature currently is weighing four primary pieces of legislation that are intended to address the problem of AOB abuse. This year's regular session convened Jan. 9 (also the deadline for filing bills), and will recess March 9.[31]

- **House Bill 7015** – Sponsored by state Rep. Jay Trumbull (R-Panama City), this bill would establish a formula for the award of attorneys' fees in insurance coverage disputes that is based on the disparity between the judgment and the pre-litigation settlement offer.[32] In some cases, fees could be awarded to the insurer or to neither party. An insurer would have to be presented with an assignment of benefits agreement within three days and policyholders would have seven days to rescind an AOB. Assignment agreements would have to include a written, itemized list of the work to be performed and assignees would have to show they are licensed to perform that work. Assignees also would have to file notice of an intent to initiate litigation and submit that to both the policyholder and the insurer. As this report went to press, the measure had passed the full Florida House of Representatives Jan. 12 by an 82-20 margin.
- **Senate Bill 1168** – Sponsored by state Sen. Greg Steube (R-Lakewood Ranch), this bill would stipulate the conditions under which agreements to assign post-loss benefits on a residential property insurance policy are valid.[33] It requires that contractors provide a written scope of the work to be performed and grants consumers seven days to rescind an assignment. It otherwise bars personal lines insurers from restricting the assignment of post-loss benefits. The bill also would bar property insurers from including attorneys' fees and costs in their rate filings. It does not address the state's one-way attorney fee statute. As this report went to press, the measure cleared the Senate Banking and Insurance Committee Jan. 23 by a 7-3 margin.
- **Senate Bill 62** – Sponsored by state Sen. Dorothy Hukill (R-Port Orange), this measure is identical to her previous Senate Bill 1038, which was backed by the insurance industry in the 2017 legislative session.[34] The bill would require that assignments of benefits be in writing and be executed by all insureds. Insurers must be presented with a copy of the agreement within three days of its execution and insureds would have seven days to rescind an assignment. Essentially, the measure would also repeal the state's "one-way attorneys' fee" for counsel representing assignees, while retaining it for the original insureds. As this report went to press, the measure was introduced Jan. 9 but had not yet been the subject of a hearing.
- **Senate Bill 256** – Sponsored by Sen. Gary Farmer Jr. (D-Lighthouse Point), this bill mirrors many of the provisions included in S.B. 1168.[35] It would require assignees to submit a written estimate of work to be performed and to prove that they are licensed to do that work. Insureds would have seven days to rescind an assignment of benefits unilaterally. Insurers would have ten days to provide settlement offers to assignees. Insurers also would be prohibited from including attorneys' fees in their rate filings. In addition, the bill would bar insurers from even suggesting the names of appropriate contractors to insureds for policies that provide replacement coverage. As this report went to press, the measure was introduced Jan. 9 but had not yet been the subject of a hearing.

In addition to these pieces of legislation that look to address assignments of benefits in the context of property insurance, the Legislature also is considering Senate Bill 396, which like S.B. 62, is sponsored by state Sen. Dorothy Hukill.[36] The measure would provide that, in assignments of benefits stemming from personal auto insurance policies that provide comprehensive coverage, an insurer may require inspections of damaged windshields to be conducted by specified adjusters and within a set time frame. The measure was cleared Jan. 16 in an 11-0 vote by the Senate Banking and Insurance Committee.

CONCLUSION

As neither S.B. 62 nor S.B. 256 were the subject of pre-session hearings, neither is considered likely to advance in the 2018 session.

S.B. 62 is bottled up in the Senate Banking and Insurance Committee, where Chairwoman Anitere Flores (R-Miami) has already made clear that she will not bring the measure

30. Ron Hurtibise, "Lawmakers to take another stab at ending claims abuses blamed for rate hikes," *Sun-Sentinel*, Jan. 7, 2018. http://www.sun-sentinel.com/business/fl-bz-insurance-bills-before-legislature-20180105-story.html.

31. "2018 Session Dates," Florida Senate, July 26, 2017. https://www.flsenate.gov/Session/Calendar/2018/Session_Dates_2017-07-26_102214.PDF.

32. "HB 7015 - Property Insurance Assignment Agreements," Florida House of Representatives, accessed Jan. 22, 2018. http://www.myfloridahouse.gov/Sections/Bills/billsdetail.aspx?BillId=61116&SessionId=86.

33. "SB 1168: Insurance," Florida Senate, accessed Jan. 23, 2018. https://www.flsenate.gov/Session/Bill/2018/01168.

34. "SB 62 - Assignment of Property Insurance Benefits," Florida Senate, accessed Jan. 22, 2018. https://www.flsenate.gov/Session/Bill/2018/00062.

35. "SB 256: Property Insurance," Florida Senate, accessed Jan. 22, 2018. https://www.flsenate.gov/Session/Bill/2018/00256.

36. "CS/SB 396: Motor Vehicle Insurance Coverage for Windshield Glass," Florida Senate, accessed Jan. 22, 2018. https://www.flsenate.gov/Session/Bill/2018/00396.

for a vote unless it is amended to include mandatory rate rollbacks.[37] Flores has announced her support for S.B. 1168. S.B. 256 is the most trial lawyer-friendly of the measures before the 2018 session, which probably should not be surprising. The measure's sponsor, Sen. Gary Farmer, is a Fort Lauderdale-based trial attorney and the former president of the Florida Justice Association.[38] However, given the legislation's similarity to S.B. 1168, and that Farmer is a Democrat while both chambers of the Legislature are controlled by Republicans, Farmer's bill is unlikely to be a primary legislative vehicle this year.

That leaves H.B. 7015 and S.B. 1168 as the only two measures with any reasonable chance to make it to Gov. Rick Scott's desk this year. The House bill is opposed by the Florida Justice Association, particularly for its changes to the "one-way attorneys' fee."[39] The Senate bill is opposed by the Personal Insurance Federation of Florida and other insurance trade associations, both for its failure to address attorneys' fees and for its requirement that insurers not be able to account for them in rate filings.[40] Such divides raise the likelihood that the chambers will once again be at loggerheads, as they were in 2017, when the Senate failed to act on the House-passed reforms.

The most obvious path forward would be a slimmed-down bill that includes only those elements common to all of the legislative proposals: namely, that policyholders be granted a seven-day period to rescind assignments of benefits and a requirement that assignees must detail the scope of the work to be performed, as well as prove they are certified to perform that work. Such a legislative package would qualify as reform, and at the margins, could help to curb the most egregious abuses. But given the scope of the problem, these would be exceedingly modest reforms, akin to trying to combat an infestation with a fly swatter.

One option that could break the impasse would be to scale back the attorneys' fee changes proposed in H.B. 7015. Reform legislation could retain the formulary that would make fees commensurate with the spread between an insurer's initial settlement offer and the final payment amount, while eliminating the fee-shifting element that would in some cases see insurers' fees paid by the losing plaintiff. The fees would remain "one-way," but they would no longer be, as they are now, theoretically unlimited.

Whether or not lawmakers ultimately find a deal that gains sufficient support to pass both chambers of the Legislature in 2018, it remains the case that AOB abuse is a crisis that will require a comprehensive response. Given this, it is particularly unfortunate that neither of the active pieces of legislation would address the lack of statutory clarity that lies at the heart of, for instance, the 5th District's *Security First* decision. For years, the courts have sought legislative guidance on how the interests of additional insureds and mortgagees are to be acknowledged and handled in assignments of benefits. With S.B. 62 stuck in committee and no other moving legislative vehicle to address that issue, it appears almost certain this will remain an unanswerable "political question" for at least one more year.

ABOUT THE AUTHORS

R.J. Lehmann is senior fellow and director of finance, insurance and trade policy for the R Street Institute, overseeing the institute's research into effective and efficient regulation of financial services and the benefits of the international rules-based trading system. R.J. was a co-founder of R Street in June 2012, having previously served as deputy director of the Heartland Institute's Center on Finance, Insurance and Real Estate. Before joining Heartland, he spent nearly a decade covering the insurance and financial services industries, first as manager of A.M. Best Co.'s Washington bureau and later as a senior industry editor with SNL Financial (now S&P Global Market Intelligence).

R.J. lives in St. Petersburg, Florida, with his wife, Arin Greenwood, their dog, Murray Rothbark and their cats, Elf, Jack and Chaplin.

37. Peter Schorsch, "In first week of Session, Florida House took big steps toward insurance reform," *Florida Politics*, Jan. 15, 2018. http://floridapolitics.com/archives/253581-first-week-session-florida-house-taken-big-steps-toward-insurance-reform.

38. Julie Kay, "Lauderdale Attorney Gary Farmer Running for State Senate," *Daily Business Review*, Oct. 14, 2015. https://www.law.com/dailybusinessreview/almID/1202739818821.

39. Timothy Engelbrecht, "AOB Reform Bill Passes Florida House, Senate Future Uncertain," *JD Supra*, Jan. 17, 2018. https://www.jdsupra.com/legalnews/aob-reform-bill-passes-florida-house-16634.

40. Personal Insurance Federation of Florida, Facebook posting, Jan. 22, 2018. https://www.facebook.com/personalinsurancefederationofflorida/photos/a.156522854971194.1073741829.154214385202041/163791104244369/?type=3&theater.