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# AOB's Have Been Valid Since 1917 And

# If You Like Your Health-Care Plan, You Can Keep It

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*What is an Assignment of Benefits?*

An Assignment of Benefits ("AOB") is a document utilized by water mitigation companies and other vendors to extract payment from insurance companies for services they allegedly provide. AOBs in the context of homeowner's policies have become prevalent in Florida only within the last few years, but have become the largest cost-driver in the insurance industry and are having a widespread, detrimental effect on consumers throughout the state.

In practical application, an AOB works like this:

An insured has a pipe burst in his home and calls a plumber to come fix it. The plumber fixes the pipe, and then refers a water mitigation company[1] to the insured to dry out the home. The water mitigation company comes to the insured's home and tells him it needs to be dried immediately, but he will need to sign an AOB or they cannot begin work. Typically, the AOB will be explained to the insured as allowing the vendor to "bill the insurance company directly." The insured, under the stress of the event, with no knowledge of the legal implications of what he is signing, and wanting to get his house dried immediately, invariably complies. The vendor then takes the position that it "owns" the insured's claim, oftentimes preventing the insured from maintaining a separate lawsuit for other portions of the claim. All this occurs ***before*** there is any agreement as to cost or scope of repairs. At this point, rather than restoring the property to its pre-loss condition and making the insured whole, the focus of the claim becomes vendor's profit.

*The Law of Assignments*

Plaintiffs' attorneys like to argue that the assignment of post-loss benefits have been recognized in Florida since 1917, a reference to the Florida Supreme Court's decision in *West Florida Grocery Co. v. Teutonia Fire Ins. Co.*, 77 So. 209 (Fla. 1917). However, the fact is that there has ***never*** been a case in Florida in the context of property insurance holding that the post-

[1] Generally in exchange for a referral fee.

loss assignment of an unaccrued right to payment is valid. To assess the validity of AOBs in this context, we need to start at the beginning.

Unless a specific statutory exception applies, an "assignment" is the transfer of a ***complete*** and ***present*** right from one person to another. *See Continental Cas. Co. v. Ryan Inc. E.*, 974 So. 2d 368, 376 (Fla. 2008). In order to be "complete," the assignment must transfer a ***complete interest*** in the thing assigned. In order to be "present," the assigned right must have ***accrued and vested*** in the assignor.

So the first step in the analysis of any assignment is whether it is ***complete***. In the first party property context, there is often a mortgagee. A homeowner simply cannot enter into a subsequent assignment with a restoration company for services to a house, which is the collateral for the mortgagee's loan, and then assign away the insurance proceeds to a third-party ***after*** having entered into an agreement with the mortgagee over the same insurance proceeds and ***after*** having entered into an agreement with the insurance company that the mortgagee will be listed as a loss payee in the policy. Furthermore, any assignment of a policy with a mortgagee holding an interest in the insurance proceeds is never valid because it is not a ***complete*** assignment.

At the time of a loss, the insured does not yet have any rights to insurance proceeds; the insured has duties following a loss under the policy that must be met before any benefits accrue, which include adjusting the loss with the insurer. Additionally, before any benefits accrue, the insurer must first make a determination that coverage exists under the policy and has various other contractual rights, such as the option to repair, it may avail itself of. Hence, there is no present right that may be transferred at the time of the loss because nothing has yet accrued. All the homeowner possesses is an expectation.

Despite the universal reliance by Plaintiffs' attorneys on *West Florida Grocery*, a plain reading of that case demonstrates the invalidity of AOBs in this context. In that case, the Florida Supreme Court stated that the insurance company had waived its right to challenge the assignment when it filed the interpleader, and emphasized that it was ***not*** ruling on the validity of the assignment. *Id.* at 211. However, the court's analysis on the validity of the writs of garnishment would also have applied to the assignment, as the court focused on whether the right to insurance claim proceeds had ***accrued*** at the time the writs were issued. *Id.* at 211-212. The court stated that "until the conditions of the insurance policy have been complied with by the insured, or compliance . . . waived by the insurer, and until it has exercised its option to replace or restore the property," the writs were invalid. *Id.* "If the amount of the claim is not capable of being ascertained, if there may never be any indebtedness, if there are certain things unperformed upon the performance of which liability depends," the writs were not effective because there was not a ***complete and present right***. *Id.* Accordingly, the court held that the writs were "premature and ineffectual." *Id.* at 212.

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.

This is consistent with the general rule in Florida, that a policy may be assignable, or not assignable, as provided by its terms. *See* Fla. Stat. §627.422. Unless an exception exists, this is the rule of law. The insurance contract governs the parties' actions from the moment of loss until final resolution of a claim. When the right to the payment has fully accrued under the policy and vested in the insured, notwithstanding the terms and conditions of a policy, an assignment may be valid. *See Aldana v. Colonial Palms Plaza, Ltd.*, 591 So. 2d 953, 955 (Fla. 3d DCA 1991). Under this scenario¸ where there are no contingencies to payment and no third parties with priority interests, an insured can direct the insurer to pay a third party, as the money belongs to the insured regardless of whether the funds have been paid.

Plaintiffs' attorneys rely on case law under life, health, or automobile policies to support their arguments. However, these situations are distinguishable from assignments in the property context because there are ***statutory exceptions*** as respects health, life, and automobile policies. See §§627.422, 627.736, Fla. Stat. (2012). These exceptions affect both the definition of assignment and an insurer's right to restrict same. Unlike other policies, the only exception with regard to property insurance policies relates to assignment of proceeds ***due*** under the policy. The justification behind this exception is that there is no effect on the rights of the insurer or the risk it undertook to insure. *See Int'l Sch. Servs. v. AAUG Ins. Co., Ltd.*, 2012 U.S. Dist. LEXIS 153683, *25 (S.D. Fla. 2012) ("[A]llowing [post-loss assignment of insurance proceeds] ***hurts the insurer not at all***. . .The assignment ***does not increase or decrease the financial exposure of the company in any way***") (emphasis added). In fact, the Restatement (Second) of Contracts §317 provides that a contractual right cannot be assigned if *inter alia*, it would materially increase the risk imposed on the obligor.

Clearly the exception in this context only applies to the post-loss assignment of an accrued right to payment, where the assignee has no influence over the amount of the proceeds. If the only issue is whose name to write on the check, these cases would not be flooding courts throughout Florida. However, a vendor's ability to influence the claim amount has a distinct, cognizable effect on an insurer's rights, and clearly increases its financial exposure. The Florida legislature has recognized the inherent dangers of such a conflict with the 2011 Florida bill once entitled, "Contractors Adjusting Claims," making it a third degree felony for a contractor to act as an unlicensed public adjuster. *See* §626.8738, Fla. Stat. (2011).

An insurer enters into a contract with a homeowner, providing coverage and setting premiums based on information gathered about that individual. In adjusting a loss, the insurer should not then be forced to deal with a different party that routinely makes insurance claims and files suit if their unilateral demand is not paid by the insurer. ***An insured's interest is to restore the property to its pre-loss condition and receive only those proceeds sufficient to do so; a contractor's interest is maximizing its profit from the loss***. ***This represents a fundamental change in the risk bargained-for by the insurer***. The purpose of insurance is to restore an insured to their pre-loss condition, ***not to provide profit on such loss***, as this would increase moral hazard and undermine the entire concept of insurance. *See DeCespedes v. Prudence Mut. Cas. Co.*, 193 So. 2d 224, 227 (Fla. 3d DCA 1966).

*The Problem*

Vendors and their attorneys try to couch AOBs as a way to protect insureds. In reality, insureds receive ***no*** benefit from these AOBs and, in fact, can be severely prejudiced.[2] The only people that benefit are the vendors and their attorneys.

A recent lawsuit handled by our office helps demonstrate the abuse that occurs through use of AOBs. The insureds, a couple in their 70s, suffered a water loss at their home and retained a vendor to perform water mitigation and restoration services. The vendor provided a verbal quote of $8,000.00-$9,000.00, but never put anything in writing. The vendor subsequently submitted 3 invoices totaling over $31,500.00. When the insureds received these invoices, they noticed numerous discrepancies and duplicate billing entries, and contacted their insurer. After inspecting the property, it was discovered that the invoices did, in fact, contain numerous fraudulent charges, such as charging for replacing the entire kitchen ceiling when only a small portion was performed, performing work in rooms that were not affected, removal of furniture from an office (the furniture was built-in and could not be removed), and cleaning the property though the insureds were forced to clean the property themselves. It was determined that the actual amount due for work performed by the vendor was about half of what was billed.

Despite being made aware of these issues, the vendor still brought suit against the insurer and placed a lien on the insureds' home. The 3 invoices were attached to the Complaint and relied on by Plaintiff for settlement negotiations. However, once the insurer moved to dismiss the lawsuit for fraud on the court, the vendor asserted that the documents were merely estimates, which is why they included charges for work that was never performed. However, they could not explain why they sought payment for these services both before and after filing suit. The lawsuit was ultimately dismissed for fraud[3].

[2] In addition to potentially preventing an insured from maintaining his or her own lawsuit, these AOBs can have other detrimental effects on insureds with respect to underwriting.

[3] Despite the attempts of the vendor's attorney to withdraw the invoice the day prior to the hearing and claim it was attached to the Complaint in error.

AOBs have a significant negative impact on the insurance industry. They are "cost drivers," which increase premiums without any benefit to insureds. AOBs have spurred a "cottage industry" in which vendors and attorneys carry out a "litigation for profit" scheme through a network of referrals and exploitation of insureds, insurers, and the judicial system. Not only do these AOBs drive up insurance premiums, this litigation scheme has flooded courts throughout Florida with these unmeritorious claims, at the cost of judicial resources and taxpayer dollars. The situation is akin to the crisis experienced in Florida as a result of PIP claims except, unlike PIP, AOBs abridge the rights of third parties, are unregulated, and have a prejudicial effect on insureds.