FIRST DCA REJECTS INSURER'S ATTEMPT TO FIGHT FRAUDULENT POST-LOSS ASSIGNMENTS OF BENEFIT CLAIMS THROUGH CHANGE IN POLICY PROVISION

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Above: Colodny Fass Shareholders Maria Elena Abate and Amy Koltnow Comment on First DCA Insurance Assignment of Benefits Opinion This Week

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The increase in claims and litigation, spurred on by water remediation companies fortified with an insured's assignment of insurance benefits ("AOB") and right to bring a cause of action has been a hot topic of debate in recent years. Despite industry-wide acknowledgment of a growing problem resulting in inflated or fraudulent post-loss claims filed by remediation companies, insurers have not yet found success implementing change.

Security First Insurance Company ("Security First") is one carrier at the forefront of fighting AOB fraud and is committed to bringing about change. Two years ago, Security First requested the Florida Office of Insurance Regulation ("OIR") to allow a change in its policy terms to specifically address an insured's assignment of post-lost benefits and rights. The proposed provision was clear and simple:

Assignment of this policy or any benefit or post-loss right will not be valid unless we give our written consent.

The OIR, however, disapproved of Security First's proposed provision, stating it was "misleading [and] contrary to Florida law." Security First challenged the OIR's decision and requested an informal administrative hearing. At the hearing, Security First presented testimony from industry professionals and other insurers evidencing the AOB crises. Security First also presented evidence that inflated or fraudulent post-loss claims filed by remediation companies exceeded comparable services by 30 percent; policyholders were asked to sign away their rights without understanding the implications; and that a "cottage industry" of vendors, contractors, and attorneys exists that use the assignment of benefits and the threat of litigation to extract higher payments from insurers.

Despite the unrefuted evidence, the First District Court of Appeal ("First DCA") issued an opinion yesterday, June 22, 2015, in which it affirmed the OIR's disapproval of policy language proposed by Security First that would require the insurer's consent to any post-loss assignments of insurance benefits. The First DCA held that by denying the proposed policy language as "misleading," the OIR did not err in its interpretation of Florida law. The court referred to "an unbroken string of Florida cases over the past century holding that policyholders have the right to assign such claims without an insurer's consent."

Security First, however, did not challenge an insured's common-law right to assign post-loss benefits due under a policy. Rather, the primary argument of Security First was that an insurer could contractually restrict a post-loss assignment provided the policy language is clear and unambiguous.

Security First argued that, pursuant to 627.414, Fla. Stat., insurers are free to include provisions in their policies that are not "prohibited by law," nor in conflict with any required provisions. Section 627.422, Fla. Stat. authorizes an insurer to restrict the assignability of its policy "by its terms." The Florida Insurance Code contains no express*prohibition* against an insurer's ability to contractually restrict the assignment of post-loss rights, nor has any Florida appellate court construed a provision restricting a post-loss assignment and held it to be "prohibited by law." To the contrary, Florida appellate courts have upheld contractual restrictions against assignments of benefits after a loss.

Additionally, Security First argued that the OIR could not reject proposed policy language based on the OIR's interpretation of Florida common law. The OIR is a creature of statute and its authority to act is proscribed by statute.

The First DCA did not directly address either of Security First's arguments. The decision follows on the heels of a flurry of recent AOB cases from the Fourth DCA upholding the validity of an assignment of insurance proceeds after a loss, as well as the assignee's right to bring a cause of action against an insurer for breach of the insurance policy.

The First DCA acknowledged the evidence supporting a "cottage industry" resulting in "inflated or fraudulent" claims by remediation companies and quoted from the Fourth DCA's recent opinion in One Call Property Services. Both appellate courts concurred that these policy issues are more appropriately addressed by the Florida Legislature.

The Fourth DCA, however, appeared to leave open the possibility that an insurer could include policy language that restricts an assignment after loss. In One Call Property Services, the Fourth DCA acknowledged that an insurance claim, and the policy itself, may be assigned-unless the contract prohibits the assignment, or public policy dictates against assignment. Nevertheless, the court concluded the anti-assignment provision and the standard loss payment provision in the policies at issue in those cases fell "far short of creating a contractual bar to a [post-loss] assignment."

The impact of the First DCA's decision is that an insurer may not be able to draft a policy provision that restricts assignments after a loss-unless, of course, it is authorized by the Florida Legislature.

The opinion is not final until the time for rehearing expires, and any motion for rehearing is decided. Security First is currently exploring its available options and remains committed to its change initiatives.

Should you have any questions or comments, please contact Colodny Fass.

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