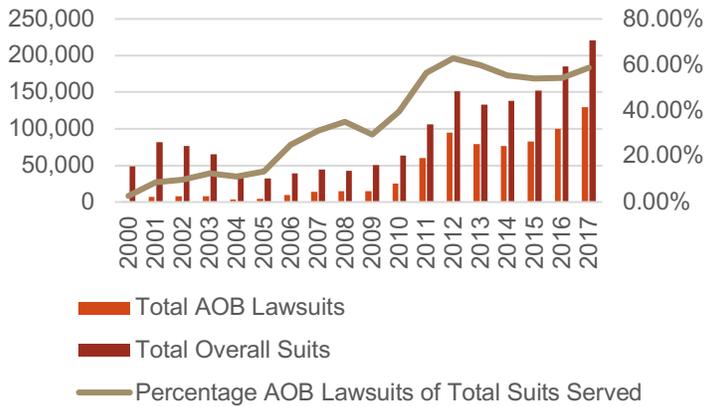


ASSIGNMENT OF BENEFITS

Litigation reform is necessary to prevent trial lawyers and vendors from stripping rights away from policyholders and inflating premiums for Florida's consumers

AOB Litigation as a % of Total Insurance Litigation



HOW BIG IS THE PROBLEM?

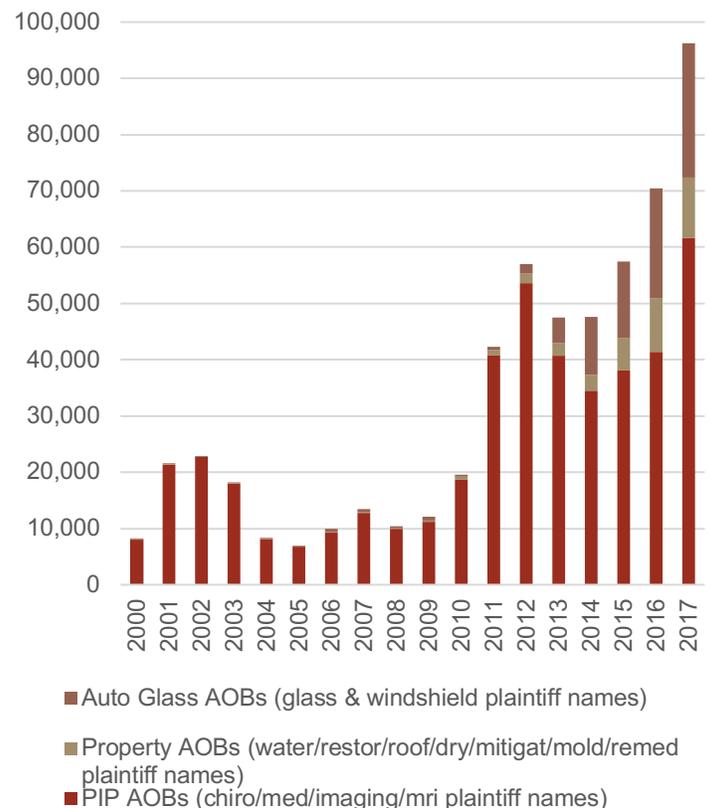
Assignments of benefits (AOBs) are legal mechanisms that transfer policyholder rights and benefits to a third party, and their prevalence exploded in the context of Personal Injury Protection (PIP). When PIP was reformed in 2012, there was a dip in the overall amount of AOB litigation, which unfortunately, has started to creep back up due to workarounds developed in PIP and the rise of non-PIP AOBs in property insurance and auto glass. In 2017, AOB litigation represented over half of all insurance litigation statewide.

The timing of the rise of property and auto glass litigation is telling—it happens to coincide very closely with the Florida's Legislature's most recent PIP reform. Anecdotally, we know that many PIP lawyers took their same PIP business model and developed relationships with non-PIP vendors such as water remediators and auto glass shops, then applied the PIP template—assignments that transfer the one-way attorney fee—to property and auto glass coverages. Data from the Department of Financial Services' Service of Process website bears out this trend, showing property and auto glass becoming a greater share of total AOB litigation after the 2012 PIP legislation.

WHAT IS THE CAUSE?

Unquestionably, the cause is the no-risk proposition of attorney's fees, enabled by Florida's one-way attorney fee law and court cases that have extended it past the Legislature's original intent, beyond policyholders to third-party corporate vendors. AOB litigation is unique in that it has developed in a very patchwork way. For example, Tri-County has represented almost all property insurance AOB litigation through 2016,ⁱ while the Tampa Bay area has an outsized proportion of auto glass AOB litigation. While opponents of meaningful AOB reform blame insurers for claims handling practices,

AOBs Lawsuits by Type of AOB

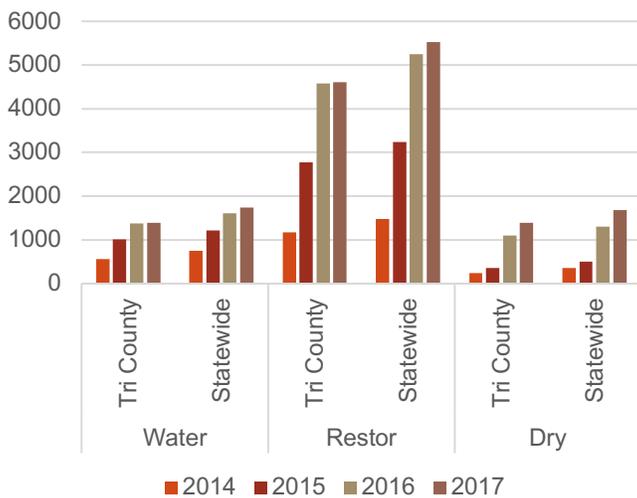


the data shows that the AOB problem affects *all* insurers, and because every insurer has different claims handling practices, this cannot reasonably be a cause. Second, in researching the development of AOB litigation, there has been no meteorological or other explanation for why pipes are bursting at breakneck speed in Miami or windshields are cracking disproportionately in Tampa Bay. However, the litigation trends do crystallize when one searches AOB lawsuits by attorney—alliances with vendors and proportionate increases in litigation become clear.ⁱⁱ Further, we have materials from AOB attorneys that specifically reference attorney’s fees as the main reason to get an AOB over other contractual payment arrangements.ⁱⁱⁱ

WHY DOES IT MATTER?

It matters because everyone pays more in insurance premiums to make a handful of lawyers and vendors rich. In its series of reports about the AOB problem, FJRI found that about a dozen attorneys contribute to a quarter of all AOB litigation statewide.^{iv}

Property Assignee Litigation: Tri County vs. Statewide



The Office of Insurance Regulation estimates that, over a two-and-a-half-year period, water loss severity increased 42.1% per year and frequency increased 44.1%.^v This translates into increased homeowners’ insurance rates for everyone,^{vi} particularly for private market policyholders who do not have the luxury of artificially underpriced insurance. For Citizens Property Insurance Corporation, which charges underpriced rates that are subsidized by the ability to assess all Florida insurance policyholders (home, renters, auto, commercial, etc.), the impact is potentially more muted because of the 10% rate cap. This has contributed to a 96.7% rate need for multi-peril personal residential policies, yet a less than 10% rate increase per year for Citizens’ policyholders.^{vii}

FAQ

AREN’T THESE ASSIGNMENTS OF BENEFITS JUST LIKE ASSIGNING YOUR BENEFITS TO A HEALTH CARE PROVIDER, LIKE YOUR DOCTOR?

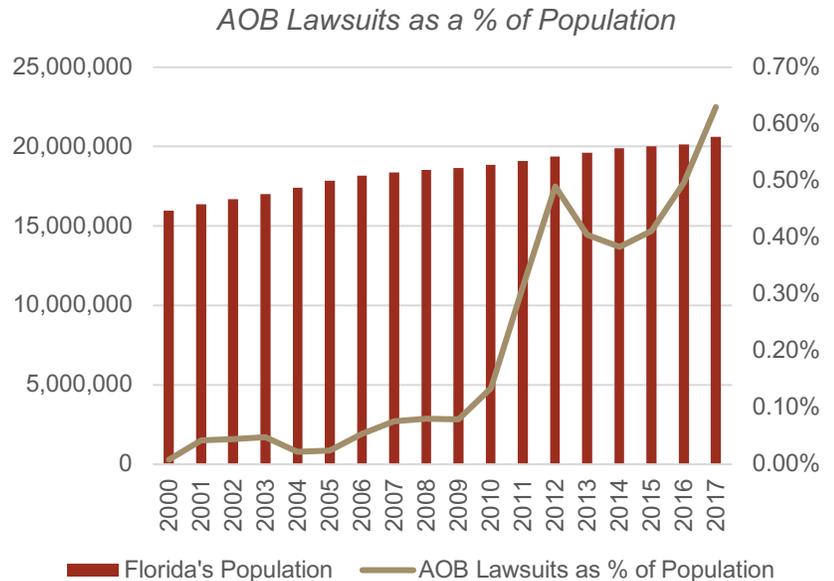
No. Anti-assignment clauses are permissible in health insurance. Florida common laws says that public policy favors anti-assignment clauses in health insurance contracts.^{viii} In fact, the First District Court of Appeal recently addressed the differing treatments of anti-assignment clauses in the health and property insurance contexts, saying that the “one exception” from the principle that insureds can assign post-loss claims is “health care insurance policies that prohibit insureds from using and assigning post-loss rights or benefits to health care providers outside an insurer’s network.” So, health insurers can

prohibit AOBs and prevent policyholders from using out-of-network providers while property and auto insurers cannot do the former, and under SB 1168, property insurers would also be prevented from doing the latter.

WHY CAN THE INDUSTRY SAY THAT RATES WILL GO UP, BUT NOT WHETHER THEY WILL GO DOWN, BASED ON THE PASSAGE OF A BILL?

Actuaries use a mix of data, including historical information, to accurately determine what will happen in the future. This is easy when no variables are introduced, because it can reasonably be understood that trends will continue without interruption.

However, when variables are introduced, it becomes much trickier to predict how that will affect current trends. It's like a soccer ball rolling downhill that then gets kicked. When the ball was rolling downhill, it was pretty easy to see where the ball was going and how fast, but when it got kicked, a great deal of uncertainty was introduced. From what direction was it kicked? How hard? What is the slope of the road on which it will now travel? It's the same with insurance. You can't predict the future accurately when a host of variables are introduced.



What we *do know* is this: legal reform works.

It worked to *significantly* lower both medical malpractice and workers' compensation rates in 2003. In addition, before PIP reform in 2012, more than 85% of rate filings had increases; after, 72% resulted in decreases or no changes.^{ix}

If the Legislature passes a strong AOB bill which addresses the heart of the problem, losses will stop inflating costs, which will put downward pressure on rates. But several variables will determine *how much* impact legislation will have on any given company, including:

- ? What is the insurer's current rate need? (e.g. Citizens currently has a rate need of well over 90%, but can only raise rates 10% per year)
- ? What will the legislation that ultimately passes look like?
- ? Will the legislation be challenged in the courts? If so, how long will the challenges last? Will an injunction be issued? If so, for how long? (e.g. PIP reform was challenged in the courts for nearly 2 years)
- ? Will lawyers find workarounds that neuter the impact of the legislation? (e.g. after PIP was passed, 64.3% of claims were non-emergency, and subject to the lower coverage limit; in 2014, less than 5% of claims were non-emergency, meaning that certain providers and lawyers found a workaround to the non-emergency limitation)^x

WHY CAN'T INSURERS USE THE OFFER OF JUDGMENT/PROPOSAL FOR SETTLEMENT STATUTE TO CONTROL LITIGATION COSTS?

There are several ways in which plaintiff's attorneys subvert an insurer's ability to invoke a proposal for settlement so that they can recovery fees under s. 627.428, the one-way attorney's fee statute. One way they do this is by asking for declaratory relief as part of their complaint, because even though the main cause of action is for alleged breach of contract, adding a count for declaratory relief prevents the enforceability of a proposal for settlement.^{xi} Second, because assignees take all the benefits of an insurance contract—but none of the burdens—and usually include hold harmless language in their AOB contracts, judges are reluctant to enforce proposals for settlement since an assignee who should be assessed fees could then turn around and use their contract with the policyholder to recover expenses incurred in pursuing the claim.

Perhaps more commonly, according to research and information provided by various practicing AOB defense attorneys, there is a widespread judicial reluctance to assess fees against a vendor in favor of a larger insurance company; unfortunately, the same reluctance is not seen when fees are available in the other direction. Another problem with applying the current proposal for settlement process to AOBs is that because assignees have no responsibilities or duties under the policy, they are not required to communicate with the insurer to allow the insurer to understand the details of the AOB claim. Such details are necessary for insurers to adequately make a proposal for settlement.

ⁱ From 2014 to 2016, over 80% of lawsuits filed by vendors with the name “water,” “restor,” “dry,” “mitigate/mitigation,” “mold,” or “remediate/remediation” in their names, were found in Tri-County. In 2017, that number dropped to just below 75%, demonstrating that the property AOB problem is likely becoming more diversified across the state.

ⁱⁱ Specific attorney examples available upon request.

ⁱⁱⁱ Harvey Cohen, *Insider Secrets and Are You Leaving Money on the Table? Legal Assignment of Insurance Benefits*; see also Cohen Battisti Legal Blog, *How to get an Attorney for Free!*, October 28, 2013 (on file with FJRI).

^{iv} Florida Justice Reform Institute, *Restoring Balance in Insurance Litigation: An Update on the Abuse of Assignments of Benefits and its Correlation with One-Way Attorney's Fees*, 2017.

^v Office of Insurance Regulation, *Report of the 2017 Assignment of Benefits Data Call*, January 8, 2018.

^{vi} Office of Insurance Regulation, *5-Year Rate Projections for Homeowners (HO-3) Insurance by Florida County and Risk Type* (excludes Citizens).

^{vii} Citizens Property Insurance Corporation, *2017 Rate Changes and Assignment of Benefits*.

^{viii} *Kohl v. Blue Cross*, 955 So.2d 1140 (Fla. 4th DCA 2015).

^{ix} Office of Insurance Regulation, *Presentation on Personal Injury Protection (PIP) Insurance*, Senate Banking & Insurance Committee, April 2, 2013.

^x Pinnacle Actuarial Resources, *Final Actuarial Study on PIP Insurance*, September 14, 2016.

^{xi} See *Diamond Aircraft is it, Diamond Aircraft Indus., Inc. v. Horowitz*, 107 So. 3d 362, 374 (Fla. 2013); see also Merlin Law Group Property Insurance Coverage Law Blog, *Florida's Offer of Judgment Statute is Not Applicable to Actions in Equity*, January 24, 2013. Examples of AOB lawsuits that include a request for declaratory relief in their complaints are on file with FJRI.