

“Assigning” Blame



Armed with opposing allegations, glass shops and the insurance industry face-off over assignment of benefits

BY DREW VASS

According to historians, the insurance industry was born in 1752, at the hands of Benjamin Franklin, with a focus on protecting citizens from loss. In recent years, some proactive groups and individuals - ranging from industry associations and reform institutes, to legal experts and legislators - all claim that one clause component of insurance agreements has been up ended: the assignment of benefits (AOBs). Like a legal gun, they allege that AOBs are being turned on insurance companies by some glass shops that demand unwarrantable fees for their auto glass repair and replacement services. Proponents are leaning on statistics gleaned from the insurance and legal industries, along with anecdotal evidence and public relations campaigns, to sway

lawmakers into ending what they describe as fraudulent practices. Meanwhile, some auto glass retailers say that AOBs simply allow them to charge what's fair and reasonable, while also protecting consumers from a sometimes-arduous litigation process. From their perspective, at least, giving up AOBs might be the final cog in what they say is an effort by insurance companies to corner every glass shop into network pricing.

"If you're like me, I just want a new windshield and then I want to get back to my life," says Gary Wickert, an insurance trial lawyer and expert on subrogation of insurance. "The easiest way to do that is to throw everything in the lap of the auto glass company or windshield repair people, and let them take care of not only repairing the

vehicle, but also making a claim and getting reimbursement."

And that, Wickert, and others say, is the intended purpose behind AOBs. The AOB is a legal document that, in essence, allows the auto glass shop (as well as other types of contractors and service providers) to assume the role of a policyholder amid a claim, in order to deal directly with insurance companies to secure payment. And for those purposes, Wickert says, AOBs have their place. Yet he also contends that, in some cases, AOBs come equipped with a suite of protective clauses that were never designed to be in the hands of glass shops. Rather, he says, those clauses were designed to shield consumers from the costs for litigation against insurance companies. In Florida, for instance, where statistics show

that AOB-related litigation has skyrocketed, laws there require that insurance companies pick up the tabs for their customers' legal fees, in the event that customers launch and win legal actions against them. Through AOBs, it's those compensatory rights that Wickert and others allege some glass shops are utilizing in order to take advantage of insurance companies.

"This is causing a great deal of expense for the [insurance] industry, which is fighting back, because they're not going to pay three times what it should cost to repair a windshield," he says.

Once glass shops have a signed AOB in hand, Wickert says, in Florida at least, those shops have the ability to charge more or less whatever they want for their services, because they can then enter into free litigation over short payments (shortpays). Meanwhile, he says that insurance companies are forced to either pay the glass shops what they 're asking, or, in some cases, fork over the costs for their attorneys' fees.

But some glass shops offer an alternate take on the practice, by suggesting that AOBs merely allow them to pursue fair payment.

"I understand that some of the insurance companies and their attorneys might be saying, 'Look, the assignments of [benefits] is allowing (glass shops) to overcharge," says Rick Rosar, owner of Rapid Glass in Minneapolis, Minn. "But that's not the case. It's merely allowing them to have a discussion over what's fair and reasonable."

And for that reason, Rosar supports litigation over shortpays. He says it is inevitable and must be part of a glass shop 's overall business plan.

"Every glass shop has to decide what their pricing is," he says. "And what they feel is fair and reasonable depends on quality of products, services, technicians, certifications and those sorts of

things." Meanwhile, he says that insurance companies want every glass shop to conform to the prices they negotiate with their network providers, which he says doesn't allow for variances in those areas. Tommy Lee, owner of Lee and Cates in Jacksonville, Fla., says his company declines to use AOBs, while also opting to operate solely within insurance providers' networks. Shops that enter into litigation, Lee says, "... are billing what they feel they need to bill for and then the insurance company is only paying what they agreed to with the third-party administrator." And that, he says, is where lawsuits come in. Further, he says that by agreeing to pay more than network pricing, insurance companies risk encouraging more auto glass companies to operate outside of those parameters, in turn making third party administrators less viable.

Wickert, however, sees it differently. "The illusion is that insurance companies are these endless deep pockets of money and all you've got to do is make a claim and they just carelessly send you a check," he says . "That's why it's attracting the flies."

Fraud Allegations

By "flies," Wickert is referring to what he and numerous others allege is a small number of glass shops, which they say are entering into copious amounts of litigation with insurance companies.

"In 2000, these cases were virtually unheard of," says William Large, president of Florida Justice Reform Institute (FJRI, a not-for-profit organization that's funded by Florida -based businesses and designed to protect them from abusive litigation. The 2016 tax return lists the organization as a 501(c)4 whose mission is "To promote public awareness of the benefits of meaningful tort reform for the state of Florida." In 2004-05, Large

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Florida Lawsuit Feast

Florida Justice Reform Institute (FJRI), a Tallahassee-based organization that's funded by Florida-based businesses and designed to protect them from abusive litigation, cites assignment of benefit contracts, along with the state provisions for one-way attorney's fees and zero-deductible auto glass work, as cause for increases in lawsuits among Florida-based auto glass shops and insurers. (FJRI's funders include some insurance companies.) According to an FJRI-funded report, compiled from the Florida Department of Financial Services' Service of Process (SOP) database:



The top plaintiff filed more than **5,000 auto glass suits** in 2016 alone.

C)e)

85% 75%

of Florida-based auto glass shops do not have to employ litigation in order to be reimbursed.

of Florida's auto glass litigation centers on five counties: Pinellas, Orange, Hillsborough, Broward and Miami-Dade.

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says a string of hurricanes hit the state, prompting massive amounts of reconstruction. That, he says, led to increases in AOB contracts for emergency restorations among homes and businesses, many of which he says were overbilled and ended up in litigation. Meanwhile, other industries took notice of how, in those cases, Florida's laws worked in favor of contractors-including some auto glass shops.

"People realized that this was a mode I that could be replicated in a non-hurricane situation," Large alleges.

In 2015, FJRI took up the issue by commissioning research and funding the report *"Restoring Balance in Insurance Litigation,"* followed by an amended version in January 2017, further entitled *"An Update on the Abuse of Assignments of Benefits and its Correlation with One-way Attorney's Fees."* According to Large, data gleaned from Florida's Department of Financial Services' Service of Process database shows that, from 2011 to 2016, the bulk of AOB-related litigation occurred in Broward, Palm Beach and Miami-Dade counties, where auto glass claims rose by more than 3,000 percent - from 591 to 19,588. Large, Wickert and others all allege these increases are fueled by fraudulent practices. Beyond what they say is overcharging for their services, they allege that glass shops have deployed schemes in which they're placing employees out in public, where they approach drivers in parking lots, at car washes and just about any other location, offering to fix or replace wind-shields with no out-of-pocket costs or paperwork for policyholders. Insurance provider The Hartford has posted a warning against such scenarios on its website, claiming that, "The resulting litigation ends in thousands of extra costs, which drives up insurance rates."

Bob Passmore, assistant vice president for Property Casualty

Auto glass claims rose by more than

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from 2011 to 2016 in Broward, Palm Beach and Miami-Dade counties.

Source; Florida's Department of Financial Services' Service of Process database.

Insurers Association of America (PCIAA), says that his association believes that many of Florida's auto glass claims don't even include real damages. He alleges that glass shops are pointing out everything from tiny, inconsequential chips, to even "bird bombs," all in the name of obtaining AOBs. Passmore refers to this alleged practice as harvesting.

"Every glass shop has to decide what their pricing is. And what they feel is fair and reasonable depends on quality of products, services, technicians, certifications ..."

- Rick Rosar, Rapid Glass

"There are a lot of examples of cases where claims were submitted that were for work that wasn't done or wasn't necessary," says Passmore. He also contends that the issue isn't confined to Florida, but is spreading to other states - particularly anywhere there's a zero-deductible requirement for auto glass.

"We seem to see some of these same patterns going on around the country," he says. "We know that the costs associated with glass claims are much higher in those

states that have zero deductibles. Not coincidentally, that tends to be where you see the assignment of benefits issues happening most."

So far, there's some evidence that courts are willing to take the side of insurers. In July 2016, for instance, insurance provider Geico entered into litigation with several glass companies and related individuals, alleging that they engaged in a fraudulent scheme in Florida by collecting insurance info and AOBs in order to then make claims for work that wasn't actually performed. Meanwhile, defendants claimed that the insurer was merely trying to avoid paying full price for glass work. The company settled with several of the defendant glass shops in March 2017, but in May 2017, a further court order ruled in favor of Geico and against the remaining defendants, Dwayne Johnson (DJ Johnson), Matthew Mika, M&J Glass Company LLC and ABS Enterprise Inc., ruling that those companies implemented a fraudulent billing scheme.

Cries for Help

Court cases aren't the only way in which proponents of change are chiming in. In July 2017, PCIAA issued a press release, in which it warns against "fraud," urging consumers in Florida to take heed against the use of AOBs in auto glass claims. In its release, the association shares anecdotal stories, suggesting that bad actors, "...may inflate the glass claim and then turn around and sue the insurance company, often without the policyholder's knowledge." That press release, Passmore says, was partly a matter of routine, as the association frequently issues information for raising consumer awareness around issues. But he also admits that the association's media campaign - which is echoed in articles across the Internet - also is partly

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about earning the attention of legislators. According to information published on its website, PCIAA claims to be "the only trade with a retained lobbyist in every state and 12 experienced regional managers in key state capitols." Passmore says **that** while the association is starting with states like Florida and Arizona, where statistics show the largest numbers of AOB-related cases, it's also keying in on states like Connecticut, Kentucky, Massachusetts, Minnesota, New York and South Carolina. So far, no legislative proposals have surfaced in those states, but Passmore and others indicate that they may be forthcoming.

In the meantime, all of the groups and associations agree that an undoing of AOBs usage will require legislative changes at the state level. (Since 1945, following the McCarran Ferguson Act, the insurance industry has been regulated on a state-by-state basis.) So far, however, no legislative proposals have cleared all of the necessary hurdles to effect changes. Attempts have ranged from bills that void the abilities by glass shops to obtain AOBs or revoke their abilities to capitalize on one-way attorney's fees, to those that eliminate deductible-free auto glass work or require pre-inspection of damages. Arizona House Bill 2500, however, went a step further, by pro posing that glass shops found guilty of utilizing AOBs should be charged with class six felonies. That bill was ultimately shot down by Arizona Senate's Military Affairs and Public Safety Committee.

All those interviewed for this article agree that instead of cutting AOBs out of the fabric of the insurance and auto glass industries a better avenue includes limiting the rights that those documents assign. So far, no legislative proposals have managed to do that, but currently two remain on the boards seeking approval: Arizona Senate

The difference between what auto glass companies charged and what they were paid post litigation was typically

\$200-\$300

less per claim.

Source: FJRI database.

Bill 1169, which would eliminate zero-deductible glass claims in that state, and Florida Senate Bill 396, which would require pre-inspection of damages

With or without legislative changes, some suggest that there's a need for increased consumer awareness of what AOBs are and how they work. A representative for the National Association of Insurance Commissioners (the U.S. standard -setting and regulatory support organization, created and governed by chief regulators from 50 states) suggests that policyholders may be fueling the alleged issues, albeit unintentionally. A reliable NAJC source says that, by accepting discounts on auto insurance policies that stipulate the use of network-approved auto glass providers, consumers who then sign AOBs with other glass shops essentially break those contractual agreements, leaving insurers in a bind.

"In comes Mr. Auto Glass," the NAIC representative says, "Who tells them, 'Just assign the benefits to me and we'll get this taken care of.' Well, now you have a contract problem ... the policyholder has created a conflict, by agreeing to a conflicting contract that gives the benefit assignment to that auto

glass guy." Meanwhile, the representative says, according to their policy discount agreements, those policyholders are bound contractually to contact their insurance companies to use a network provider. In those instances, the NAIC representative says an insurer is most likely to stick to their guns and insist on what they've contractually agreed to pay.

"The insurance company is probably going to tell that auto glass company, 'I've agreed, contractually, to pay \$250 for this, regardless of what you decide to charge,'" the NAJC representative says. "That's what my policyholder agreed to, so when he assigned the benefits to you, he assigned them \$100 short in your case. Here's your \$250, have a nice day."

Consumers, the representative says, aren't entering into and then ignoring those contractual agreements with insurance companies, so much as they're signing for the associated discounts, while skipping over the details.

Passmore likens the situation to emergency towing services. When consumers pay for services like AAA, for instance, he says they aren't entitled to accepting towing

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from the first truck that happens to come along, expecting their programs to pay for it. Instead, he says, policyholders have the responsibility for checking to ensure that their roadside assistance programs are willing to pay for providers outside of their networks, or at least that they're willing to pay the amount an outsider is demanding.

Once AOBs are signed, legal experts say they're nearly impossible to reassign or undo, making it extremely difficult for network providers to leverage their way back into the equation. And that might explain why at least one auto glass company is backing legislative attempts to ban their use.

Auto Glass Industry Support?

When Arizona H.B. 2500 was shot down (calling for class six felonies), representatives for Safelite Auto-Glass expressed disappointment, with vice president of legislative affairs Scot Zajic describing the use of AOBs as an "unscrupulous and predatory practice," further vowing that his company would continue working toward such laws.

When we reached out to Safelite for this article, Keriak Lucas, director of corporate communications, clarified, "There are two distinct sides to the AOB process. The first is the assignment of payment, which allows the insurer to direct payment to a third party for covered services. There is little argument that this assignment is in the best interest of the vendor, the insurer and the consumer. The second is the assignment of rights. This occurs when a vendor receives an assignment from an unsuspecting policyholder and allows that vendor to access contract benefits that were only meant for the policyholder. This has resulted in a deluge of litigation, higher costs and increased premiums over the past five years and provides no benefit to the consumer."

Lucas says Safelite will continue

"If you're like me, I just want a new windshield and then I want to get back to my life."

**-Gary Wickert,
insurance trial lawyer**



pursuing legislative changes on a nationwide basis.

According to the latest available data from NAIC, states collect as much as tens of billions of dollars in revenues from insurance sources—a generous portion of which goes to general state funds. With that in mind, and propagation for legislative changes stemming from groups representing the insurance industry, there are compelling reasons why auto glass shops might ask: What indicates that the statistics show fraud and not just cases of mass underpayment by insurers? In response to that question, Passmore and Wickert both say that if auto glass companies were billing even remotely close to what insurers consider a fair price, insurers wouldn't elect for the costs of litigation. To further defend the position of insurers, activists also point to anecdotal reports that they say they've collected from policyholders, which they say parallel the scams outlined by media stories.

Howard Goldblatt, director of government affairs for Coalition Against Insurance Fraud, a Washington, D.C.-based group that claims to be the only anti-fraud alliance speaking for consumers, insurance companies and government agencies, says that his organization fields calls from consumers, sharing those sorts of stories on a regular basis. **Meanwhile, Large says that FJRJ has collected the same anecdotal evidence. But even more telling, perhaps, are the statistics FJRI collected, showing that**

the bulk of auto-glass-related litigation (in Florida) can be linked to a very small subset of attorneys, law firms and auto glass companies. According to Large, data gleaned from the Florida Department of Financial Services' Service of Process database shows that 16 auto glass companies are responsible for the bulk of litigation. Even more disturbing, he says, is the fact that in some cases—individual shops were involved in hundreds and even thousands of cases between the years 2014 and 2016. That pattern, many suggest, shows evidence for business plans that hinge on litigation.

But glass shop owner Rosar says: Not so fast. He suggests that such practices may not be reflective of fraud, so much as they make sense from a business perspective. In Minnesota, for instance, he says that his company has up to six years to file for cases against short payment. Meanwhile, because those cases often repeatedly involve the same insurance companies, he suggests that packaging them together only makes sense.

"Often times, when we go into arbitrations like this, we have hundreds or thousands of invoices that we're dealing with," he says. Pursuing those cases on an individual basis, would be arduous and inefficient. "They're all the same argument," he says. "Even though there are 1,000 invoices with a particular insurance company, each invoice is essentially the same. We billed them a certain percentage of NAGS." Meanwhile, he says, insurers paid those invoices based on

their own formulas. Large, on the other hand, suggests that while litigation might be a necessary evil for some, it's part of an overall scheme for others.

"This whole racket has been put together by a few attorneys who have taught vendors through seminars how to do this," he alleges. "They tell them, 'Don't just submit a bill. Ask for the assignment [of benefits].' Ninety-nine percent of the time, lawsuits are brought in the name of the insured and the insured has no idea there's litigation."

There again, some auto glass retailers suggest that by keeping their customers out of those litigations, AOBs are shielding them from what are often ugly and arduous processes.

In the end, a close look at the cases in FJRI's data shows that, in most cases at least, the differences between what those glass shops were charging and what they were ultimately paid (post litigation) was typically \$200-\$300 per claim.

"Everything comes down to what the definition of underpaid is," says Lee. "What's a fair profit? What's a fair price? We get told what we can charge by the networks and that's distasteful and then we all feel like you want to be able to get a decent price for what you did.' Especially when it comes to labor, Lee says, where he feels glass shops should be allowed to place additional value and given some leeway. "The guys using AOBs are the ones billing what they feel is fair for them to get. And if they don't get paid, they have lawyers that take care of it for them."

In the meantime, because insurance companies are often forced to also cover glass shops' legal expenses, it appears that- for now at least-the real winners in AOB-related cases might just be the involved attorneys.

Drew Vass is a contributing editor for AGRR magazine.

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