

THE ABUSE OF AUTO GLASS AOBs CONTINUES

Executive Summary

Certain auto glass vendors have partnered with attorneys to create a profitable litigation arrangement. In this arrangement, an auto glass vendor agrees to make a repair likely covered by an insurance policy in exchange for the insurance policyholder's right to sue his insurer via an assignment of insurance policy benefits (AOB). The auto glass vendor then often uses that acquired right to force the insurer to pay grossly inflated costs or risk even higher litigation costs. While policyholders simply seek to be made whole for losses, auto glass vendors and their attorneys are likely motivated to increase scope of work and to maximize profit and litigation fees.

Windshields are excepted from an auto insurance policy's deductible requirements by law. Unfortunately, the prospect of a "no risk" windshield replacement has fueled a niche market in which auto glass vendors promise consumers a free windshield in exchange for an AOB and the right to sue an insurer.

Since 2015, the Florida Justice Reform Institute (FJRI) has exhaustively examined the available data to research, understand, and communicate the problems surrounding AOBs generally. As identified by FJRI, the underlying driver of AOB litigation is section 627.428, Florida Statutes, which offers a one-way attorney's fee award to insureds and named beneficiaries, but has been expanded by the common law to also apply to assignees. The fees are "one way" because insurers that prevail are not entitled to be reimbursed for their defense fees under the statute.

In July 2019, Florida saw its first real AOB reform. HB 7065 (2019) replaced the one-way attorney fee statute with a more equitable formula in AOB lawsuits arising under property insurance policies. In those cases, an award of attorney's fees is based on the difference between the amount recovered and the amount offered during settlement negotiations:

- If the difference between the judgment obtained and the settlement offer is less than 25% of the disputed amount, then the insurer is entitled to attorney's fees.
- If the difference between the judgment obtained and the settlement offer is at least 25% but less than 50% of the disputed amount, neither party is entitled to fees.

- If the difference between the judgment obtained and the settlement offer is at least 50% of the disputed amount, the assignee is entitled to attorney's fees.

HB 7065 also afforded additional protections for insureds, including, among other things, a requirement that assignees provide detailed estimates in advance of performing work under AOBs and a requirement that AOBs contain a grace period in which an insured may elect to rescind the assignment.

But those AOB reforms were restricted to the property insurance context. Auto glass AOBs were left untouched. Unfortunately, FJRI's review of the available data shows that the abuse of AOBs for auto glass damage claims continues nearly unabated in 2020, notwithstanding the COVID-19 pandemic which has reduced travel and, presumably, opportunities for windshield damage to occur.

AOBs Generally

An assignment is innocuous enough; it is simply a transfer of some right or interest in property from one person to another. All contractual rights are assignable unless the contract prohibits assignment, the contract involves obligations of a personal nature, or public policy dictates against assignment.¹ So, for example, a chose in action—which is “the right to bring an action to recover a debt, money, or thing”²—arising out of contract is assignable and “may be sued upon and recovered by the assignee in his own name and right.”³ A claim arising under an insurance policy is a chose in action and is thus assignable.⁴ Once an assignment is made, the assignor no longer has a right to enforce the interest assigned.⁵

The typical insurance AOB relationship begins when a policyholder signs a contract assigning rights, benefits, proceeds, and causes of action arising under his insurance policy to a third party. This third party is often a vendor that agrees to make the repair or provide the service for which insurance coverage will be sought. Indeed, often the repair or service is conditioned upon the assignment. In many cases the AOB includes language which divests the policyholder of any benefits under the policy, privacy rights, and any direct payment of insurance proceeds.⁶ Based on a survey conducted of various insurance trade associations in 2015, most assignments reviewed shared the following characteristics:

¹*Kohl v. Blue Cross & Blue Shield of Fla., Inc.*, 988 So. 2d 654, 658 (Fla. 4th DCA 2008).

²Black's Law Dictionary.

³*Spears v. W. Coast Builders' Supply Co.*, 133 So. 97, 98 (Fla. 1931).

⁴*United Cos. Life Ins. Co. v. State Farm & Fire Cas. Co.*, 477 So. 2d 645, 646 (Fla. 1st DCA 1985).

⁵*Cont'l Cas. Co. v. Ryan Inc. E.*, 974 So. 2d 368, 376 (Fla. 2008).

⁶See, e.g., Harvey V. Cohen, *Insider Secrets: Legal Assignment of Insurance Benefits* 15, available at <https://prezi.com/id8o7vqzsvsr/copy-of-assignment-of-benefits/> (last visited Oct. 27, 2020) (providing example AOB: “Assignment of Insurance Benefits: I, hereby, assign any and all insurance rights, benefits, proceeds and any causes of action under any applicable insurance policies to [Insert Your Company Name], for services rendered or to be rendered by Company. In this regard, I waive my privacy rights. . . . I also hereby direct my insurance carrier(s) to release any and all information requested by Company, its representative, and/or its Attorney for the direct purpose of obtaining actual benefits to be paid by my insurance carrier(s) for services rendered or to be rendered. I believe the appropriate insurance carrier to be (Insert Property Owners Insurance Company).”).

- Irrevocable in nature, meaning the policyholder, insured, or beneficiary had no ability to rescind the assignment (79.55%);
- Transferred all causes of action, divesting the policyholder of any legal recourse under the insurance policy (79.55%);
- Waived the policyholder’s privacy rights (37.5%); and
- Included a “hold harmless” provision for the benefit of the vendor (53.4%).⁷

Another feature of these assignments is often a binding arbitration clause, requiring the insured to pursue any claims against the vendor through arbitration and not a court, and significantly limiting the insured’s ability to collect damages under the assignment in the event of the vendor’s breach.⁸

Once executed, the newly assigned vendor performs work for which reimbursement is then sought directly from an insurer, usually in the form of a demand letter. Demand letters provide an insurer a certain number of days to pay and “avoid any potential legal action in this matter.”⁹ When the insurer fails to pay, the vendor brings a lawsuit against the insurer.

A telltale sign that an AOB is sought to be enforced through litigation is the use of “a/a/o” or “as assignee of” in the plaintiff’s name in the case caption or style. A case caption might indicate that it is being brought by “Auto Glass Company a/a/o John Smith,” which means Auto Glass Company is suing as an assignee of insured John Smith.

Auto Glass AOBs Continue to be Exploited

Auto insurance policies often provide physical damage coverage, meaning coverage for loss to the vehicle that resulted from an occurrence other than a collision. Events covered by physical damage insurance include fire, theft, vandalism, falling objects, natural disasters, and the like.¹⁰ Windshields are excepted from an auto insurance policy’s deductible requirements by law.¹¹ Unfortunately, the prospect of a “no risk” or “free” windshield has fueled a very predictable moral hazard: manufactured windshield repair claims. A number of auto glass vendors have developed a niche market of promising “free” windshields in exchange for an AOB and the right to sue an insurer.

⁷See FJRI, *Restoring Balance in Insurance Litigation: Curbing Abuses of Assignments of Benefits and Reaffirming Insureds’ Unique Right to Unilateral Attorney’s Fees* at 11-12 (2015), <http://www.fljustice.org/files/123004680.pdf>.

⁸See, e.g., *Jasper Contractors a/a/o Crenshaw v. United Prop. & Cas. Ins. Co.*, Ex. A to Compl. (Fla. 9th Cir. Ct. 2020); *Jasper Contractors Inc. a/a/o Montanez v. Sec’y First Ins. Co.*, Ex. A to Compl. (Fla. 9th Cir. Ct. 2020).

⁹Cohen, *supra* at 22.

¹⁰Florida Department of Financial Services, *Automobile Insurance: A Toolkit for Consumers* 7, <http://www.myfloridacfo.com/Division/Consumers/understandingCoverage/Guides/documents/AutoToolkit.pdf> (last visited Oct. 27, 2020).

¹¹§ 627.7288, Fla. Stat.

In 2013, a Tampa news station completed a two-year undercover investigation into windshield repairs and replacements. The news station discovered windshield repair shops that offered gift cards, steaks, and cash in exchange for a car owner's right to file an insurance claim for a "free" windshield replacement. Often undamaged windshields were targeted, but windshield repair shops alleged damage in order to seek insurer payment for replacement work.¹²

Not much has changed since 2013. Express Auto Glass, which filed 527 AOB lawsuits in 2019,¹³ advertises "Up to \$125 Cash Back with Windshield Replacement Insurance Claim!"¹⁴ Auto Glass America, which contributed 417 lawsuits in 2019, advertises a "SUMMER SPECIAL" to insureds of "up to \$150 cash back (with qualifying insurance) and a \$100 discount card" to restaurant.com for windshield claims.¹⁵

These and other tactics have prompted at least one insurer to sue Auto Glass America, LLC and its owner, Charles Isaly, stating claims for tortious interference and violation of the Florida Deceptive and Unfair Trade Practices Act, among others. In *Allstate Insurance Co. v. Auto Glass America, LLC*,¹⁶ currently pending in federal court in Orlando, Allstate alleges that Auto Glass America and Isaly devised a scheme "to pressure Allstate's insureds into hiring AGA for windshield replacements, obtain assignments of benefits from the insureds, submit invoices to Allstate for excessive and unreasonable amounts, and file over 1,400 lawsuits for recovery of the excessive and unreasonable amounts."¹⁷ That Auto Glass America's invoices are excessive is demonstrated by the fact that, according to Allstate, "the average amount of [Auto Glass America's] invoices to Allstate between January 1, 2015, and September 30, 2018, is approximately **\$900.00**, whereas the average amount submitted during that timeframe by all other glass vendors in Florida is **\$350.00**."¹⁸

Allstate also outlines a number of concerning sales tactics used by Auto Glass America. For example, Allstate alleges that Auto Glass America "solicits customers by using 'harvesters' that approach potential customers in parking lots, at their places of employment, at other businesses, and by going door-to-door in neighborhoods"; the harvesters then "inform potential customers of windshield damage to their vehicles, and after confirming that the customers have comprehensive automobile insurance use high pressure sales tactics to convince the potential customers to hire [Auto Glass America] to replace their windshields."¹⁹ Auto Glass America also misleads Allstate's insureds, telling insureds, for example, that Allstate prefers replacement over repair and suggesting it is working closely with Allstate, and not informing insureds of Allstate's guarantee of

¹²First Coast News, *Glass companies push unnecessary windshield replacements* (May 3, 2013), available at <https://www.firstcoastnews.com/article/news/local/florida/glass-companies-push-unnecessary-windshield-replacements/322372423>.

¹³As in prior reports, FJRI's data comes from the Florida Department of Financial Services Service of Process database.

¹⁴Express Auto Glass Website (last visited Oct. 27, 2020), available at <https://expressautoglass.biz/windshield-replacement-gift-card.html>.

¹⁵Auto Glass America Website (last visited Oct. 27, 2020), available at <https://www.auto-glassamerica.com/>.

¹⁶No. 6:18-cv-2184 (M.D. Fla.).

¹⁷Doc. No. 1 ¶ 1, 6:18-cv-2184 (M.D. Fla.) (filed in 2018).

¹⁸*Id.* ¶ 8.

¹⁹*Id.* ¶¶ 66-68.

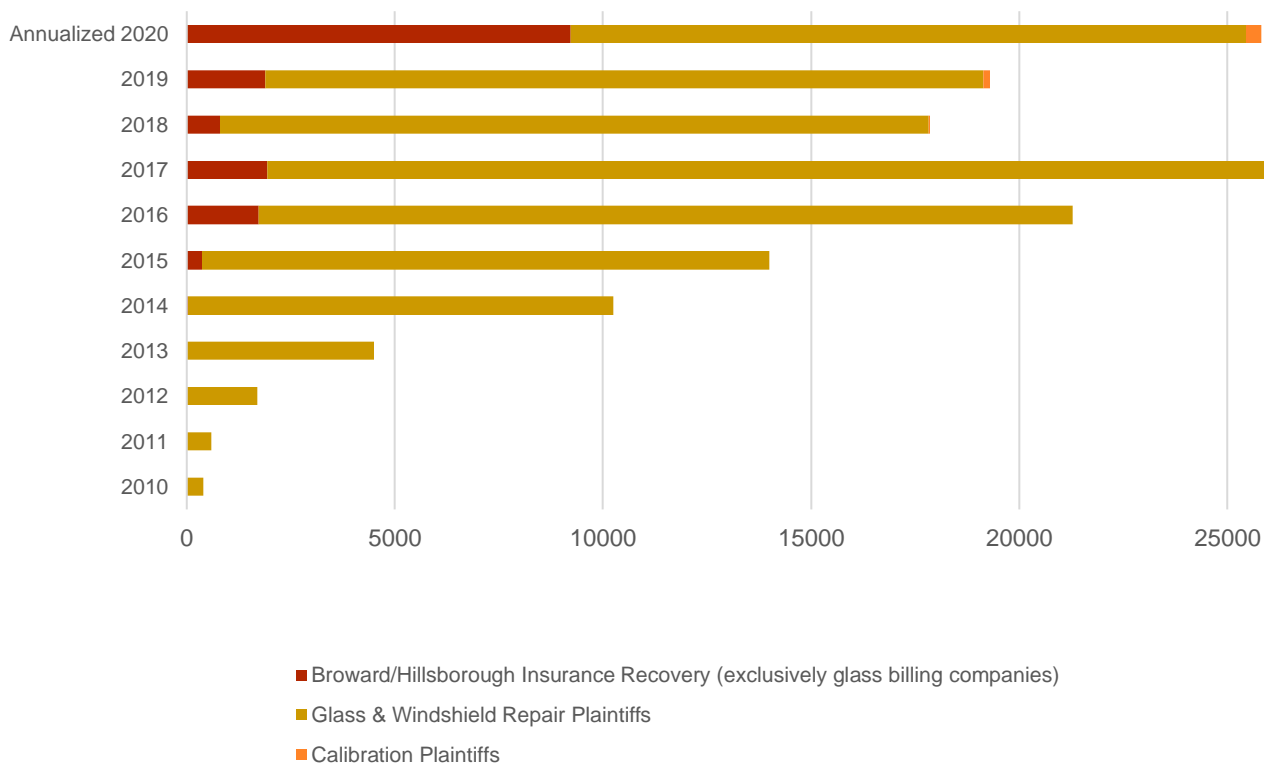
workmanship for work done by auto glass vendors participating in Allstate’s network (in which Auto Glass America does not participate).²⁰ Auto Glass America also does not always provide the promised gift card in exchange for an AOB and/or the terms of the cards make them difficult for insureds to use.²¹

Litigation Continues to Increase, Taking Different Forms

While questionable, such practices have clearly proven lucrative, as the Department of Financial Services’ Service of Process database shows an exponential increase in such litigation since 2000. From 2000 to 2005, the database logged only 212 services of process filed by plaintiffs with names containing the words “glass” or “windshield.” Now, the number of lawsuits involving such plaintiffs has not fallen below 10,000 in a single year since 2014.

Even for 2020, FJRI’s annualized estimate for traditional auto glass litigation is still more than **16,000** auto glass AOB lawsuits—an impressive feat given the global pandemic that presumably reduced the opportunities for windshield damage as many consumers were not on the roads.

Auto Glass AOB Litigation



Source: Service of Process Database

²⁰*Id.* ¶¶ 70-82.

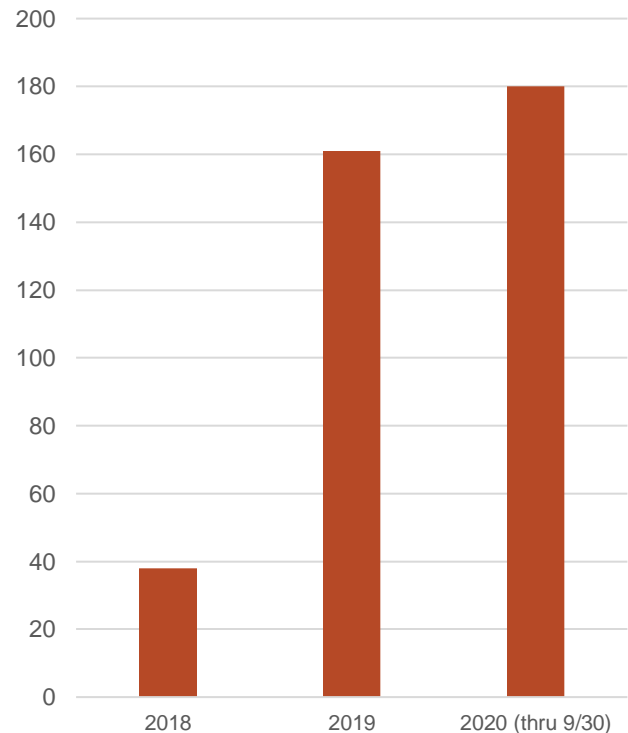
²¹*Id.* ¶ 63.

Calibration Lawsuits, a New Trend

The data also shows a new tactic by some auto glass vendors to maximize recovery from insurers. Many auto glass shops have negotiated specific repair prices with insurers, so the auto glass vendor holding an AOB has less incentive to use the auto glass repair itself as the reason for suing. Instead, the auto glass vendor is forwarding the bills from the auto glass repair shop on to a calibration company.

Windshields in newer vehicles are equipped with safety features and sensors—often called Advanced Driver Assistance Systems (ADAS)—that require a vehicle’s computer system to be recalibrated upon replacement of the windshield. This additional repair presents the auto glass vendor with a “new” opportunity to contend that the insurer underpaid a different claim—a recalibration claim—and a new opportunity to sue and obtain attorney’s fees. Cases brought by calibration companies first emerged in 2018, and 180 were identified in the service of process data for the first half of 2020.

Auto Glass Calibration AOB Lawsuits



Source: Service of Process Database

The Rise of AOB Use by Billing Companies through Double Assignments

Increasingly, billing companies are being used as the ultimate plaintiff in an action, by virtue of what can be characterized as a double assignment. As examples, both Broward Insurance Recovery and Hillsborough Insurance Recovery acquire policyholder assignments from auto glass repair shops, typically by acquiring a shop’s accounts receivable. The billing company then files a lawsuit in the policyholder’s name, even though the policyholder has no relationship with the billing company. This is usually laid out in the pleadings; for example:

Clear Vision Windshield Repair, LLC provided the necessary material and labor to repair the insured’s windshield and/or other glass damage, and in exchange, the Insured agreed to assign the rights and benefits under the automobile policy to Clear Vision Windshield Repair, LLC, who in turn assigned the benefits of same to Plaintiff, Broward Insurance Recovery Center, LLC. The insured equitably assigned to Clear Vision Windshield Repair, LLC and also executed a written assignment of benefits, assigning to Clear Vision Windshield Repair, LLC certain rights and benefits payable pursuant to the policy of insurance issued by Defendant. Further, the assignment was intended to transfer to Clear Vision Windshield Repair, LLC the right to obtain direct payment from Defendant and bring suit against Defendant directly in the event of a claim dispute over Plaintiff’s charges. The

Assignment of Benefits from Clear Vision Windshield Repair, LLC to Plaintiff, Broward Insurance Recovery Center, LLC will be filed under separate cover.²²

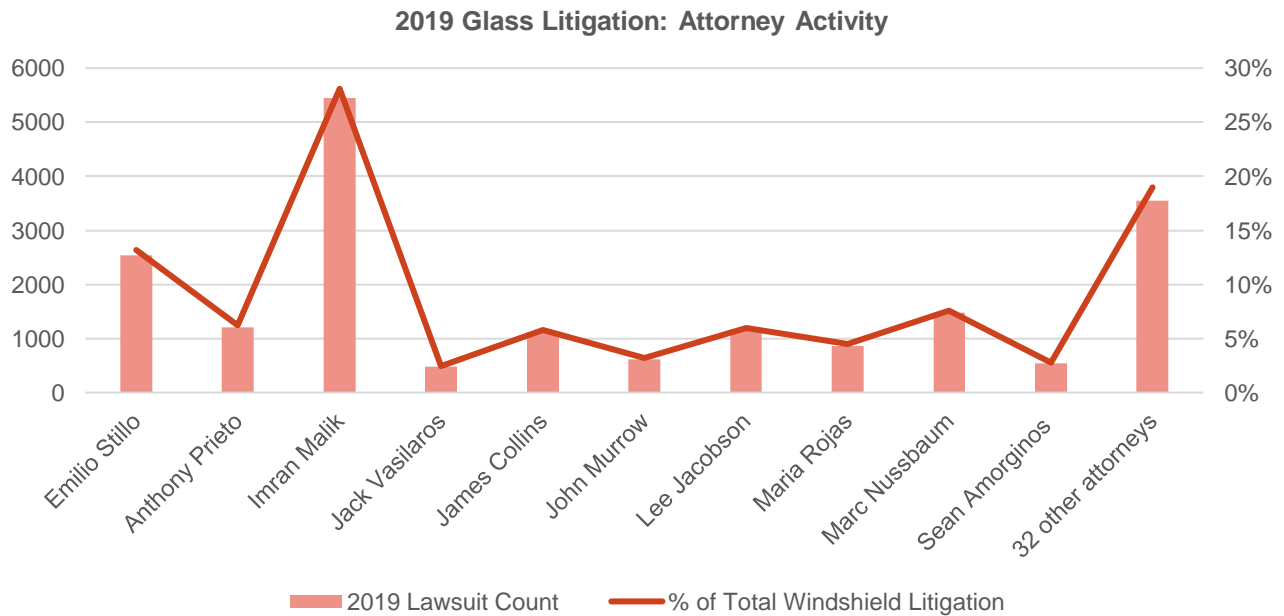
Auto glass AOB suits filed by billing companies known to FJRI reached almost 2,000 cases last year, and has already doubled that in the first half of 2020.

Consequently, FJRI projects that the total number of auto glass AOB lawsuits—filed by plaintiffs with “glass” or “windshield” in their names, calibration companies, and known billing companies—will cross the threshold of **25,000 cases** in 2020.

Litigation: The Tail that Wags the Dog

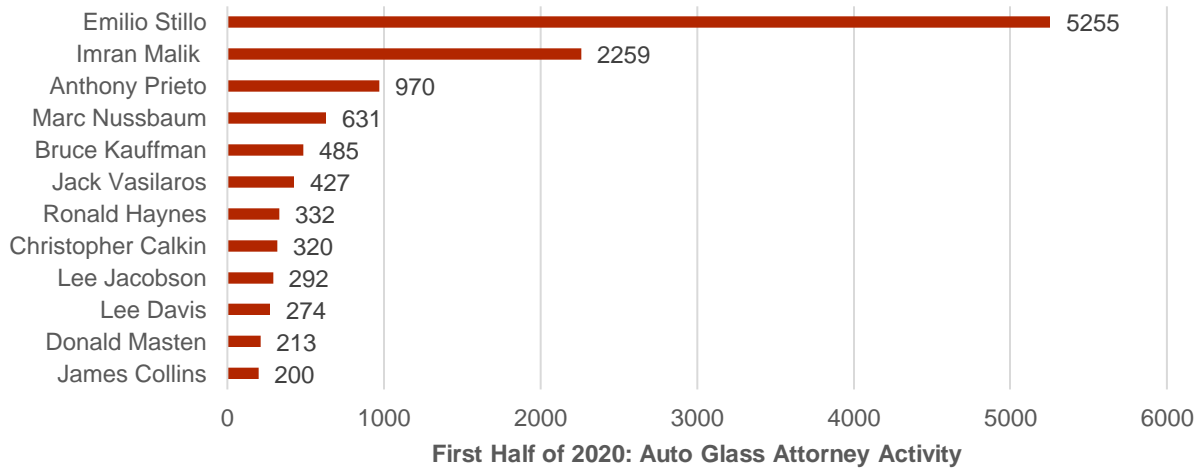
Auto glass AOB lawsuits are fairly straightforward and involve relatively little money in controversy. Their true value is this: these claims may be brought in large volumes and the prevailing assignee may recover attorney’s fees under section 627.428, Florida Statutes.

These lawsuits are also unsurprisingly concentrated in a handful of law firms. For the first six months of 2020, 12 law firms were each responsible for at least 200 auto glass AOB cases in Florida court.



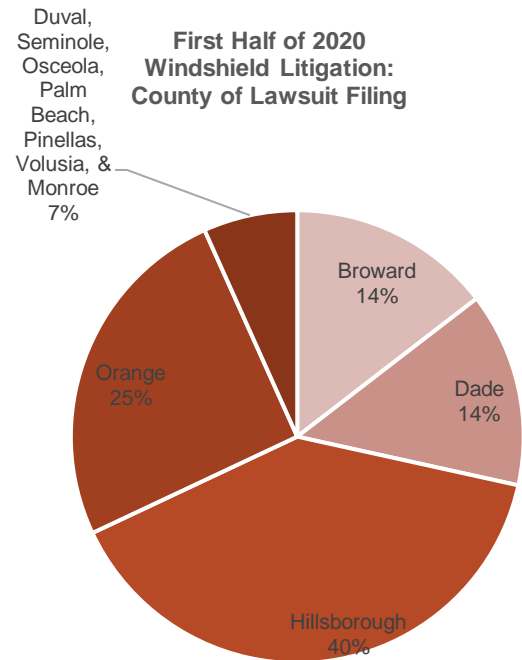
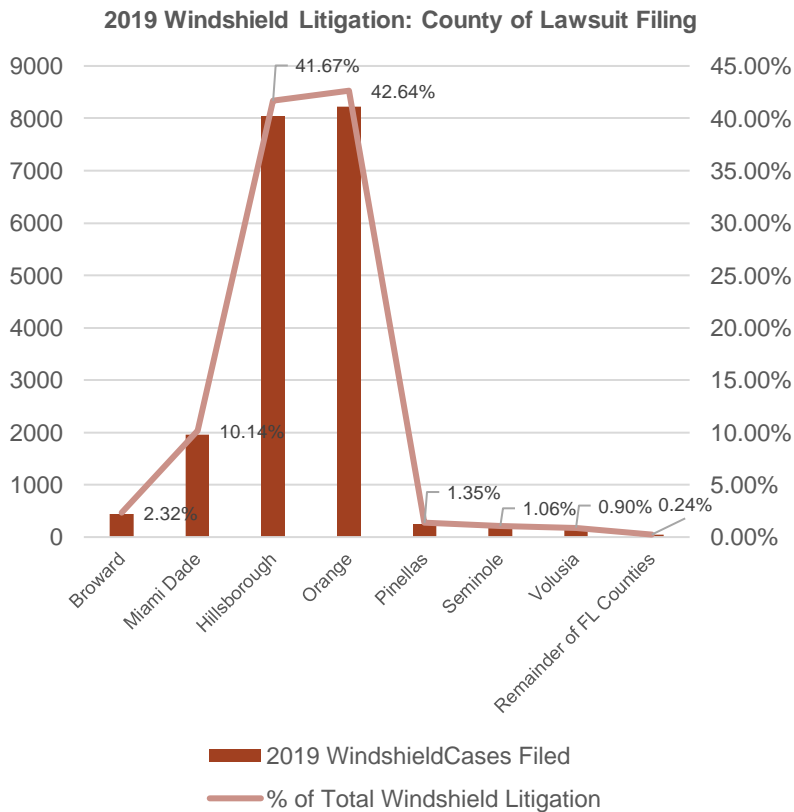
Source: Service of Process Database

²²Broward Ins. Recovery Ctr., LLC a/a/o Heather Moy v. State Farm Mut. Auto. Ins. Co., Case No. 20-SC-011258 (Orange Cty. Ct.).



Source: Service of Process Database

Overwhelmingly, these cases are filed in just a few counties, which typically align with the situs of the assignee’s attorney’s firm. A manual examination of various complaints filed in these counties, however, reveals that affected consumers come from all over the state.



Source: Service of Process Database

The Florida Bar Scrutinizes AOB Practices

Unsurprisingly, the no-risk prospect of obtaining attorney’s fees for bringing these easy, high-volume type cases has tempted many law firms to devote practices to AOBs. But that type of practice is often incompatible with the high standards of professional responsibility that govern lawyers. At the urging of several Florida state court judges, the Florida Bar recently took a closer look at one such practice.

Scot Stremms was the owner and sole named partner of the Stremms Law Firm, P.A., based in Coral Gables, Florida.²³ The 20-attorney law firm primarily represented homeowners against property insurers, although in the past it had also sued using auto glass AOBs. The law firm’s practice was high volume, with some reports indicating that it handled as many as 10,000 files at once.

At the prompting of several state court judges, the Bar began investigating. That investigation resulted in a petition to suspend Mr. Stremms from the practice of law. According to the Bar’s allegations in support of suspension, the law firm’s large property insurance AOB practice went like this:



Source: Service of Process Database

- The law firm secures the plaintiff often through a third-party loss consultant without any initial consultation before the prospective client signs a contingency fee agreement.
- With a signed retainer agreement in hand, the law firm arranges for a mold remediation company, All Insurance Restoration Services, Inc. (AIRS), to go to the client’s property and obtain an AOB.
- Suit is filed, with Mr. Stremms usually signing the complaint; in many if not most cases, the law firm would file separate lawsuits for separate alleged losses, even though the losses occurred under the same policy, at the same property, and at the same time.
- After suit is filed, the law firm’s service provider of choice, AIRS, would subsequently file multiple lawsuits in county court relating to the same losses. While the Stremms Law Firm did not typically represent AIRS in these cases, the fact remains that AIRS proceeded under an AOB executed by the law firm’s clients.

²³These facts come from the Florida Bar’s allegations in its petition to the Florida Supreme Court regarding Mr. Stremms’ suspension in *Florida Bar v. Stremms*, SC2020-806 (filed June 5, 2020).

- Furthermore, while the many lawsuits are all related and attorneys are obligated to alert courts to related litigation, the Strems Law Firm and AIRS’ lawyers would endeavor to keep the related suits separate, “resulting in an absolute duplication of attorney fees and a complete waste of judicial time and effort.”
- From the commencement of suit, the Strems Law Firm would often engage in an apparent strategy of delay, ignoring deadlines for discovery and duly noticed depositions.
- Naturally, that led to the law firm repeatedly ignoring and violating court orders which compelled discovery responses or attendance at depositions.
- The law firm also engaged in “mendacious, bad-faith conduct,” making “dishonest or even fraudulent statements to opposing counsel and to the court.”
- As a result, the court would sanction the law firm and/or its clients, including in many cases dismissing the action.

According to the state court judges that instigated the investigation, the law firm’s high volume of cases was “done for the purpose of maximizing the firm’s attorney’s fee recovery under Fla. Stat. § 627.428.”²⁴

In an order entered on June 9, 2020, the Florida Supreme Court granted the Bar’s petition for emergency suspension and ordered the appointment of a referee to hear the matter further and make recommendations to the court. After a weeklong trial, the referee found that the Bar had proven Mr. Strems violated 14 ethics rules and recommended that the supreme court suspend Mr. Strems from practicing law for two years. The referee’s recommendation will ultimately be heard by the Florida Supreme Court, who will decide what additional actions should be taken.

Although the practice under scrutiny in the Strems case was in large part based on property insurance AOBs, same or similar problems are likely to arise in any high-volume practice—including a practice devoted to auto glass AOBs.

The Legislature Must Curb the Abuse of Auto Glass AOBs

Although the Florida Legislature has resolved some of the issues surrounding property insurance AOBs, it has done nothing as of yet to address auto glass AOBs.

Some insurers have responded to the lack of policy action by entering into pricing agreements with the most litigious repair shops in an effort to obtain some certainty surrounding auto glass repairs and to avoid lawsuits; unfortunately, the prices these shops demand in exchange for not litigating is usually well in excess of what the market supports. However, due to the unequal negotiating power between these parties by virtue

²⁴Bar Pet. ¶ 24.

of the one-way attorney's fee, insurers are often faced with this Hobson's choice. With the advent of calibration lawsuits, these pricing arrangements may become even more unattractive of a choice.

Other insurers have included policy language that references the National Auto Glass Specifications (NAGS) manual,²⁵ a publication produced by a company called Mitchell. While this has produced some increased marketplace certainty for carriers, NAGS is privately questioned by some in the marketplace for bearing little relationship to costs of glass and material acquisition. In that same vein, NAGS has publicly acknowledged that their pricing is "stagnant" and lacks key industry involvement in its development.²⁶

While correcting the common law's expansion of the application of the one-way attorney fee past its plain text—and ensuring the statute only protects named insureds, omnibus insureds, and named beneficiaries—would be the most potent and cost-effective fix, other options may also have an impact. For example, most consumers named in these lawsuits have no idea that lawsuits have been filed in their names. Enhancing disclosures required to perfect an assignment agreement and requiring informed consent from a policyholder before a lawsuit is filed may help curb the effects of runaway, rampant litigation.

Regardless, the time is now to address the abuse of auto glass AOBs.

²⁵<https://www.mitchell.com/products-services/collision-repair-shop-solutions/repair-procedures/nags>.

²⁶<https://www.glassbytes.com/2018/09/mitchell-international-announces-sweeping-changes-to-nags-at-auto-glass-week/>.