Relief in Sight for Florida's Assignment of Benefits Crisis

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Over the last several years, a crisis has engulfed Florida's insurance market and threatened to spread nationwide. South Florida has been the epicenter for the proliferation of a cottage industry led by water mitigation and restoration contractors focused on gouging insurance companies and taking advantage of innocent policyholders. A select group of these vendors are charging well beyond usual and customary fees for services rendered and adding made-up expenses, such as "mortgage processing" and "check processing" fees. Adding insult to injury, these vendors required policyholders to sign an assignment of benefits, or AOB, depriving them of their right to potentially take legal action against their insurance company and requiring that insurance claim proceeds be paid directly to the contractor—even under circumstances where the work was not performed or was substandard. These agreements often contain a power of attorney that allows the contractor to negotiate directly with the insurance company and file suit in the name of the insured.

The Florida Legislature has taken action to end these AOB abuses with wide-sweeping reform expected to be signed into law by Gov. Ron DeSantis. This legislation will not only curtail the manner in which contractors sign up policyholders and submit their bills to insurance companies, but will also dictate how disputes are resolved both pre-litigation and during a lawsuit.

HB 7065 and SB 122 are the culmination of a seven-year, hard-fought battle that is not only good for insurance companies, but equally beneficial for consumers and businesses. The legislation significantly alters the manner in which contractors and so-called mitigation professionals operate; the manner in which insurance companies will be required to handle AOBs upon receipt; drastically changes the landscape on how attorney fees are awarded in property damage litigation; and provides consumers with a number of protections against unscrupulous contractors and ever-increasing insurance rates that have resulted from the widespread abuses.

From the insurance company standpoint, one of the most important aspects of the legislation is the establishment of a prevailing party fee shifting provision. Once the law goes into effect, if an AOB company refuses a pre-suit offer to settle a dispute, it may be liable for all of the insurance company's attorneys' fees and costs incurred during litigation. In addition, the legislation requires insurance companies to monitor and compile data on AOB lawsuits, paving the way for home insurance premium stabilization. Lastly, the legislation permits insurance companies to issue policies that prohibit or permit post-loss assignments of claims.

The bills require an assignment to be in writing and allow the policyholder to rescind,

without penalty, the AOB as long as it is done within 14 days after the assignment is executed, at least 30 days after the date work on the property is scheduled to commence (if the work has not been substantially performed), or at least 30 days after the execution of the agreement if the agreement does not contain a commencement date and substantial work has not been performed. In addition, the contractor is required to provide a copy of the executed assignment agreement to the insurer within three business days after the AOB is executed or the date on which work begins (whichever is earlier), and it must contain a written, itemized, per-unit cost estimate of the services to be performed by the contractor. Finally, an AOB will not be permitted to modify or eliminate any term, condition or defense relating to any managed repair arrangement provided in the policy.

In addition, the new law will prohibit fees for check or mortgage processing, penalty or fees for cancellation of the agreement or administrative fees. These hidden contractor fees can range from a few hundred dollars into the thousands and serve no benefit to the policyholder and artificially inflate the cost of the claim.

Another consumer protection within the legislation provides that if the policyholder acts under an urgent or emergency circumstance to protect property from damage and executes an AOB to protect, repair, restore, or replace property or to mitigate against further damage to the property, the contractor may not receive an assignment of post-loss benefits under a residential property insurance policy in excess of the greater of $3,000 or one percent of the Coverage A limit under such policy. In addition, contractors may not seek payment from the policyholder exceeding the applicable deductible under the policy unless the policyholder has chosen to have additional work performed at their own expense.

Contractors that perform work pursuant to an AOB must: provide the policyholder with accurate and up-to-date, revised estimate of the scope of work to be performed as supplemental or additional repairs are required; perform work in accordance with accepted industry standards; as a condition precedent to filing suit under the policy, and, if required by the insurer, submit to examinations under oath (EUO) and recorded statements conducted by the insurer or the insurer's representative that are reasonably necessary; as a condition precedent to filing suit under the policy, and, if required by the insurer, participate in appraisal or other alternative dispute resolution methods in accordance with the terms of the policy.

The new law will also provide strict pre-suit requirements for both the contractors and the insurance companies and re-shapes Florida's longstanding attorney fee provisions governing litigation between insurance companies and insured or assignees. Under the legislation, a contractor must provide the named insured, insurer, and the assignor, if not the named insured, with a written notice of intent to initiate litigation before filing suit under the policy. Such notice must be served by certified mail, return receipt requested, or electronic delivery at least 10 business days before filing suit. The notice must specify the damages in dispute, the amount claimed, and a pre-suit settlement demand. Concurrent with the notice, and as a precondition to filing suit, the contractor must provide the named insured, insurer, and the assignor, if not the named insured, a detailed written invoice or estimate of services, including itemized information on equipment, materials, and supplies; the

number of labor hours; and, in the case of work performed, proof that the work has been performed in accordance with accepted industry standards. The insurer than must respond in writing to the notice within 10 business days after receiving the notice specified in paragraph (a) by making a pre-suit settlement offer or requiring the assignee to participate in appraisal or other method of alternative dispute resolution under the policy. An insurer must have a procedure for the prompt investigation, review, and evaluation of the dispute stated in the notice and must investigate each claim contained in the notice in accordance with the Florida Insurance Code.

As it relates to entitlement to attorney fees under the new law, if the difference between the judgment obtained by the contractor and the pre-suit settlement offer is less than 25 percent of the disputed amount, the insurer is entitled to an award of reasonable attorney fees; at least 25 percent but less than 50 percent of the disputed amount, no party is entitled to an award of attorney fees; and at least 50 percent of the disputed amount, the contractor is entitled to an award of reasonable attorney fees.

In addition to requiring insurance companies to provide data on claims paid for AOBs to the Financial Services Commission, insurance companies pursuant to Florida Statute 627.7153 will now be permitted under strict circumstances to issue policies that prohibit post-loss assignments. In order to do so, companies will be required to offer a potential insured the exact same policy without such restrictions. In addition, the policy restricting assignments will be required to be offered at a lower premium than the unrestricted policy. This provision will give policyholders unprecedented control of how claims are handled after a loss prior to making their purchase decision.

When signed into law by DeSantis as anticipated, the legislation will apply to all AOBs executed on or after July 1. Any AOB that does not comply with the requirements of Florida Statute 627.7152(2)(a) will be invalid and unenforceable.

This AOB legislation, the first of its kind in the nation, is truly a wide-reaching compromise that should benefit consumers, businesses and insurance companies while reining in out-of-control litigation that has overrun our courts.

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