ASSIGNMENT OF BENEFITS

LESSONS TO BE LEARNED

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A CLAIMS CRISIS IN FLORIDA
Introduction

- **GROWING PROBLEM – ISSUE**
  - **STATISTICS REVIEW**
    - OIR – “Data Call” 14.2% increase water losses each year since 2010
    - In 2015 – 40% all AOB suits filed by 5 law firms
    - AOB suits have increased more than 16,000% since 2000
  - **OTHER STATES (e.g. Texas, Nebraska)**
  - **IMPACTS OF RATES/MARKETING**
Definition of AOB Issues

Sample Policy Provisions

- Commercial
  - 02 PP 618 (09/02) 1999-2000
  - Transfer Of Your Rights and duties Under This Policy
    - Your rights and duties under this policy may not be transferred without our written consent except in the case of death of an individual named insured.
  - CP 00 90 07 88 (1983, 1987)
    - NO BENEFIT TO BAILEE
    - No person or organization, other than you, having custody of Covered Property will benefit from this Insurance.

- Homeowners
  - (HO 00 03 04 91 (1990)
    - No Benefit to Bailee. We will not recognize any assignment of grant any coverage that benefits a person or organization holding, storing or moving property for a fee regardless of any other provision of this policy.
Definition of “Assignment”

- Merriam-Webster (online dictionary)
  - The act of assigning
    ...
    The transfer of property; *especially*: The transfer of property to be held in trust or to be used for the benefit of creditors.

- The Free Dictionary
  “A transfer of right in real property or personal property to another that gives the recipient- the transferee- the rights that the owner or holder of the property- the transferor- held prior to the transfer.”

- Black’s Law Dictionary
  “In contracts. 1. The act by which one person transfers to another, or causes to vest in that other, the whole of the right, interest, or property which he has in any realty or personally, in possession or in action, or any share, interest, or subsidiary estate therein.”
Distinction between Assignments

- Claim or Benefits
- Policy
Post-loss Claim Assignment Is Allowable and Enforceable

- *Couch on Insurance* § 35:8 (3d ed. 2017) “Although there is some authority to the contrary, the great majority of courts adhere to the rule that general stipulations in policies prohibiting assignments of the policy, except with the consent of the insurer, apply only to assignments before loss, and do not prevent an assignment after loss, for the obvious reason that the clause by its own terms ordinarily prohibits merely the assignment of the policy, as distinguished from a claim arising under the policy, and the assignment before loss involves a transfer of a contractual relationship while the assignment after loss is the transfer of a right to a money claim” (footnotes omitted).

- Annotation: Claim under contract of property insurance as assignable after loss, 56 A.L.R. 1391 (Supp.2014) “There seems to be no dissent whatever, except in a very few early cases, from the now universally accepted rule that, after a loss in respect of insured property has been incurred, the claim to recover that loss may be effectively assigned by insured, so as to vest in the assignee the absolute right to the insurance, provided, of course, the insured himself had that right at the time when the loss was incurred, and that the assignment itself was otherwise valid.”

Post-loss Claim Assignment Is Allowable and Enforceable (Cont.)

- **Bioscience West, Inc. a/a/o Elaine Gattus vs. Gulfstream Prop. & Cas. Ins. Co.,** 185 So. 3d 638 (Fla. 2d DCA 2016)(anti-assignment clause of policy did not prohibit assignment of benefits to mitigation contractor. The court further found that post loss claims are freely assignable without the insurer’s consent.)

- **Accident Cleaners, Inc. a/a/o Joseph Gerena vs. Universal Ins. Co.,** 186 So. 3d 1 (Fla. 5th DCA 2015)(contractor not required to have an insurable interest **at the time of the loss** to pursue suit against the insurer.)
Post-loss Claim Assignment Is Allowable and Enforceable (Cont.)

- **West Florida Grocery Co. v. Teutonia Fire Ins. Co., 77 So. 209, 211 (Fla. 1917)** (seminal case allowing post loss AOB without insurer’s prior consent, reasoning that the post loss claim assignment “in no way affected the rights of the insurer”)

- **ASAP Restoration & Construction, Inc. a/a/o Suzanne Xasaey vs. Tower Hill Signature Ins. Co., 165 So. 3d 736 (Fla. 4th DCA 2015)** (court reversed dismissal of suit, finding assignment not precluded by either anti-assignment clause or the policy’s loss payment provision)

- **Nationwide Mut. Fire ins. co. v. Pinnacle Med., Inc., 753 So. 2d 55 (Fla. 2000)** (the rights of an assignee to file suit for breach of a contract in order to enforce rights obtained through assignment predates the Florida Constitution, citing Robinson v. Nix, 22 Fla. 321 (1886).)
Impact of Coverage Denial by Insurer on How AOB Is Handled/Addressed
AOB Requirements

- Signed, witness and notarized
- Identify what specifically is being assigned
  - Entire claim
  - Partial claim
- Practical Considerations
  - Verify signatures
  - Verify work performed and to satisfaction of insureds
  - Evaluate whether invoices/services were reasonable and necessary or indicate duplication of efforts
Other Considerations

- Does the policyholder still have an open claim or has a denial been issued?
- Who signed the AOB document?
  - Assuming coverage, all insureds must sign or may not be enforceable
- Proximate causation: How soon after the loss were the AOB services provided?
Power of Attorney Issues

- Check language of document
- Verify signatures
- Statutory requirements example
  
  §709.2105 (2), Fla. Stat.
  709.2105 Qualifications of agent; execution of power of attorney.

(2) A power of attorney must be signed by the principal and by two subscribing witnesses and be acknowledged by the principal before a notary public or as otherwise provided in s. 695.03.
Partial Versus Full Assignment/Power of Attorney

- *Space Coast Credit Union vs. Walt Disney World Co.*, 483 So.2d 35 (Fla. 5th DCA 1986) (partial assignment of debt cannot be enforced against debtor without either consent of debtor or joinder of all persons entitled to parts of total debt)
Exceptions

- Homestead Exemption
  - Florida’s homestead exemption provides in pertinent part as follows:
    - (a) There shall be exempt from forced sale under process of any court, and no judgment, decree or execution shall be a lien thereon, except for the payment of taxes and assessments thereon, obligations contracted for the purchase, improvement or repair thereof, or obligations contracted for house, field or other labor performed on the realty, the following property owned by a natural person: (1) a homestead …

F.S.A. Const. Art. 10 § 4. Homestead; exemption

- *Chames vs. DeMayo*, 972 So.2d 850 (Fla. 2007) (homestead exemption can be waived in mortgage but not in an unsecured creditor agreement)
Exceptions (Cont.)

- **Quiroga vs. Citizens Prop. Ins. Co.,** 34 So. 3d 101 (Fla. 3d DCA 2010) (hurricane claim involving effort of law firm to enforce claim for fees. The court found that the insurance proceeds are “imbued” with the same constitutional protection as the homestead itself.)

- **One Call Property Services, Inc. a/o Carl Schlanger v. St. Johns Insurance Co.,** 183 So. 3d 364 (table) (Fla. 4th DCA 2016)(final summary judgment affirmed finding purported assignment invalid due to homestead protection and also lack of execution by both insureds)
Rights of Insurer

- Assignee generally stands in shoes of Insured
  - *Certified Priority Restoration a/o Albert Molena v. State Farm*, 2016 WL 1133809 (Fla. 4th DCA 2016) (allows consideration of assignee as appraisal participant)
  - *Restoration 1 CFL a/o Joy White v. State Farm Florida Ins. Co.*, 2016 WL 1600331 (Fla. 4th DCA 2016) (allows assignees to litigate coverage to issues)

- Is Assignee subject to policyholder duties?
- Payment can generate POL/Release
Indispensable Party Defenses to Suits by Assignee without Joinder of Policyholder(s)

- *Carbon Capital II vs. Estate of Tutt*, 107 So.3d 1239, 1245 (Fla. 3d DCA 2013) (citing *Santiago vs. Sunset Cove Investments, Inc.*, 988 So.2d 10, 14 (Fla. 2d DCA 2008))(garnishment proceeding- business entity with interest in the land was an indispensable party.)

- *Millsaps vs. Orlando Wrecker, Inc.*, 634 So.2d 680 (Fla. 5th DCA 1994)(dismissal is generally without prejudice to allow joinder of the alleged indispensable party.)
Impact of Failure to Deal with AOB

- Exposure to pay twice
- Attorney’s fees/costs/interest
Lessons Learned

- Verify if any AOB exists **BEFORE** conclude claim with insureds and include language as to the lack of any AOBs in release
- Respond to assignee communications when contacted
- Verify whether there is any coverage issue pending
- Ascertain if assignment is valid and enforceable
- Determine what is being assigned
- Verify with policyholder that policyholder executed assignment and whether work performed was satisfactory to the policyholder
- Include assignee on checks where appropriate
Challenging the AOB

- Educate policyholders as to what/how to handle emergency claims
- Defend on merits where able
- Take away the profit by timely and appropriate communications and payments
- Challenge where appropriate (i.e., staged loss, exorbitant dollars)
Legislative/Regulatory Changes

- Policy language through OIR
  - Dollar limit on emergency repairs after water losses
  - Bar permanent repairs until the insurer has a reasonable opportunity to inspect
- Lobby for legislative intervention
Conclusions