

# Restoring Balance in Insurance Litigation

*An **Update** on the Abuse of Assignments of Benefits  
and its Correlation with One-Way Attorney's Fees*



FLORIDA  
Justice Reform  
I N S T I T U T E

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## Executive Summary

As discussed in FJRI’s 2015 paper,<sup>1</sup> the prospect of one-way attorney’s fees has encouraged a growing number of lawyers to partner with various service providers to solicit assignments of benefits (“AOBs”) from policyholders. The typical AOB relationship begins when a policyholder signs a contract assigning rights, benefits, proceeds, and causes of action arising under her insurance policy to a third party. This third party is often a service provider that agrees to make a repair or provide care for which insurance coverage will be sought. Indeed, often the repair or care is conditioned upon the assignment, which the provider will then enforce against the insurer in its own right. This transforms first party litigation—in which a policyholder enforces her own rights against the insurer from whom she purchased coverage—into a mutated first party litigation, whereby a third party purports to act as the policyholder.

One reason AOB litigation is so lucrative is because of the statutory, “one-way” attorney’s fees available for attorneys that represent prevailing service providers. Notably, the one-way attorney fee statute<sup>2</sup> speaks to a “named insured,” “omnibus insured,” or “named beneficiary” being afforded the benefits of that one-way attorney’s fee. In fact, the Florida Supreme Court has recently reiterated that this fee-shifting statute was intended “to ‘level the playing field’ between the economically-advantaged and sophisticated insurance companies and the individual citizen,” as “the average policyholder has

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<sup>1</sup> *Restoring Balance in Insurance Litigation: Curbing Abuses of Assignments of Benefits and Reaffirming Insureds’ Unique Right to Unilateral Attorney’s Fees*, Florida Justice Reform Institute, October 2015 (“*Restoring Balance*”).

<sup>2</sup> § 627.428, Fla. Stat.

neither the finances nor the expertise to single-handedly take on an insurance carrier.”<sup>3</sup> This goal is best served when the statute is used to award fees to the policyholder, or any beneficiaries specifically designated by the policyholder at the time of contract formation—not sophisticated service providers and their attorneys.

However, as discussed in our previous paper, Florida courts have consistently expanded this interpretation to include non-insureds to whom an insured has given an assignment. Courts have also indicated that one policyholder can give multiple AOBs. Essentially, this transforms first party policyholder litigation into multiple third party litigation whereby each third party has the policyholder’s rights, including the right to sue the insurer.

The Department of Financial Services’ Service of Process (“SOP”) database<sup>4</sup> provides a comprehensive look at both insurance litigation and the subset of that litigation which represents AOB suits. The database logs all lawsuits against insurers for which service of process is required.<sup>5</sup> Using specific search criteria, one may cull lawsuits filed against insurers by plaintiff, attorney, county, court, and date. AOB litigation often is denoted in the plaintiff field by “a/a/o,” and since the first paper was written, it was learned that “assignee” and “aao” are also commonly used. Searching the SOP database for lawsuits by party using the terms “a/a/o,” “assignee,” and “aao” has provided an even deeper look into the scope and scale of AOB litigation in Florida. It is important to note that the SOP database is not representative of all AOB *claims*, as many claims never make it to litigation. Rather, this only captures the amount of AOB claims that have ripened into litigation, whereby a notice of service of process was required.

This paper provides a summary of legal developments since October 2015 concerning AOBs, as well as enhanced data extracted from the Department of Financial Services’ SOP database to empirically illustrate the ongoing use of AOBs across insurance markets.

## **AOB Case Law Update**

Absent direction from the Legislature, Florida courts continue to enforce AOBs, placing the responsibility for change with the Legislature.

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<sup>3</sup> *Johnson v. Omega Ins. Co.*, 200 So. 3d 1207, 1215 (Fla. 2016).

<sup>4</sup> <https://apps.fldfs.com/LSOPReports/Reports/Report.aspx>.

<sup>5</sup> § 624.423, Fla. Stat.

In *Bioscience West Inc. v. Gulfstream Property & Casualty Insurance Co.*,<sup>6</sup> the Second District Court of Appeal reaffirmed that Florida law prohibits an insurer from restricting an insured's post-loss assignment of policy benefits. Armed with an AOB, a water mitigation company sued after the insurer denied coverage for the claim. The court rejected the insurer's argument that the policy prohibited post-loss assignments, based on the policy's language as well as the "unbroken string of Florida cases" holding that an insured has the right to assign post-loss claims without insurer consent. The insurer's public policy concern that post-loss assignments may allow service providers to unduly influence the adjustment process was misplaced, the Second District said. Such influence did not prevent the insurer from denying coverage, an option the court said was "available to any insurer if done in good faith."<sup>7</sup> The court also deemed it "imprudent to place insured parties in the untenable position of waiting for the insurance company to assess damages any time a loss occurs," as "insurance benefits represent the most ready means of paying for post-loss emergency repairs."<sup>8</sup> If competing policy considerations demanded a different result, the court said, those "policy considerations are for the legislature to decide, not our court."<sup>9</sup> A few months later, the Second District rejected almost identical arguments in *Start to Finish Restoration, LLC v. Homeowners Choice Property & Casualty Insurance Co.*,<sup>10</sup> continuing to adhere to the principle that post-loss insurance claims are freely assignable without insurer consent.

*Allstate Indemnity Co. v. Markley Chiropractic Acupuncture, LLC*<sup>11</sup> illustrates that AOB litigation is being driven by something other than the pursuit of unpaid benefits, and that multiple service providers may obtain AOBs under the same policy. In *Markley*, a chiropractor billed a personal injury protection ("PIP") insurer \$3,522 and a diagnostic imaging center billed \$165; the insurer paid \$2,628.44 and \$57.74, respectively, based on statutes limiting PIP reimbursement according to the Medicare fee schedule of maximum charges. The insured executed AOBs in favor of the chiropractor and diagnostic imaging center, who in turn sued the insurer. The dispute centered on whether the policy language sufficiently noticed the election to use the statutory Medicare fee schedule; the insurer won, but only after defending a full appeal.

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<sup>6</sup> 185 So. 3d 638 (Fla. 2d DCA 2016).

<sup>7</sup> *Id.* at 643.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> 192 So. 3d 1275 (Fla. 2d DCA 2016).

<sup>11</sup> Nos. 2D14-3818, 2D14-6058, 2016 WL 1238533 (Fla. 2d DCA March 30, 2016).

The Fifth District Court of Appeal confirmed in *Restoration 1 CFL v. State Farm Florida Insurance Company*<sup>12</sup> that an AOB entitles the service provider to fully participate in a lawsuit to determine coverage under the policy. The trial court had previously rejected this view, observing that, based on the insured’s deposition, the insured intended to retain control of her right to participate in the lawsuit. On appeal, the Fifth District overruled this finding in the face of the “clear” language of the AOB, which had assigned all rights to the service provider.

In *Certified Priority Restoration v. State Farm Florida Insurance Co.*,<sup>13</sup> the Fourth District Court of Appeal rebuffed a service provider’s attempt to resist the appraisal process provided for in the policy. The service provider argued that the trial court had erroneously compelled an appraisal with the named insured and not the assignee service provider. The Fourth District affirmed, noting that the policy did not preclude assignment of benefits, including the appraisal process, to a service provider and thus the trial court appropriately compelled appraisal.

One type of anti-assignment provision has been upheld. In *La Ley Recovery Systems-OB, Inc. v. United Healthcare Insurance Co.*,<sup>14</sup> the Third District upheld a health insurance policy’s provision prohibiting reimbursement for third parties that had been assigned benefits under the policy by a physician. Although the policy’s payment of benefits provision permitted a subscriber to assign benefits to the provider upon written authorization, the court said that the provision specifically precluded the physician or other provider from further assigning the benefits to third parties, such as La Ley.

## Other Considerations

### AOBs Also Affect the Nonadmitted Market

Section 626.9373, Florida Statutes, contains a nearly identical fee-shifting provision in the context of surplus lines insurers. Just like the one-way attorney fee statute in section 627.428, this statute entitles the named or omnibus insured or named beneficiary of a policy to reasonable attorney’s fees “[u]pon the rendition of a judgment or decree by any of the courts of this state” in its favor. Although section 626.9373 applies to surplus lines insurers and section 627.428 applies more broadly to “insurers,”<sup>15</sup> the statutes are otherwise applied identically.<sup>16</sup> Consequently, if section 627.428 is

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<sup>12</sup> 189 So. 3d 340 (Fla. 5th DCA 2016).

<sup>13</sup> 191 So. 3d 961 (Fla. 4th DCA 2016).

<sup>14</sup> 193 So. 3d 16 (Fla. 3d DCA 2016).

<sup>15</sup> *Century Sur. Co. v. Korkoske*, 8:14-CV-616-T-23MAP, 2014 WL 8844500, at \*1 n.4 (M.D. Fla. July 14, 2014).

<sup>16</sup> See *Arvat Corp. v. Scottsdale Ins. Co.*, 14-CV-22774, 2016 WL 5795122, at \*2 n.3 (S.D. Fla. Sept. 12, 2016), *report and recommendation adopted*, 14-CV-22774, 2016 WL 5661633 (S.D. Fla. Sept. 30, 2016) (“Because they are virtually the same, whether

amended to exclude third parties like service providers from the protection of the unilateral attorney's fee, section 626.9373 should likewise be amended.

## **One Insurance Policy Can Often Be the Source of Multiple AOB Claims**

Exacerbating the problems with post-loss AOBs is that multiple AOBs (and multiple lawsuits) may arise from a single policy or even a single claim because insureds may assign their post-loss rights to multiple service providers.

Ordinarily, an insured's unconditional AOB deprives the insured of standing to sue the insurer.<sup>17</sup> That is because, "once transferred, the assignor no longer has a right to enforce the interest because the assignee has obtained all rights to the thing assigned."<sup>18</sup> Thus, in the typical case, only one party can own a claim and maintain a lawsuit under the policy, and with an unconditional AOB given to a service provider, that right belongs to the provider.<sup>19</sup> This is so even though the insured may continue to be on the hook to perform post-loss duties under the policy.<sup>20</sup>

That said, it is clear that multiple AOBs may arise under the same policy and potentially from a single claim. For instance, in *Allstate Indemnity Co. v. Markley Chiropractic Acupuncture, LLC*,<sup>21</sup> the insured executed two AOBs under a single PIP policy—one to the insured's chiropractor and another to a diagnostic imaging center, for different claims made under the PIP policy. Such AOBs are typically treated as partial in nature, with each assignment to a particular service provider bestowing only the right to pursue a claim associated with that provider's work.

To defend against partial AOBs, insurers often cite a line of cases for the proposition that a partial assignment cannot be enforced against a "debtor"—such as the insurer—without the debtor's consent or joining all persons entitled to the various parts of the debt in an equitable proceeding.<sup>22</sup> In more recent reported decisions, Florida courts have declined to rule on the issue of whether a partial assignment is valid,<sup>23</sup> although the Second District has opined that the case law barring partial

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the fees are predicated upon Florida Statute § 626.9373 or § 627.428 is a distinction without a difference. These two fee-shifting statutes are applied using the same analytical framework and require an award of fees to the prevailing insured in coverage matters.”).

<sup>17</sup> *Olgesby v. State Farm Mut. Auto. Ins. Co.*, 781 So. 2d 469 (Fla. 5th DCA 2001).

<sup>18</sup> *Continental Cas. Co. v. Ryan Inc. E.* 974 So. 2d 368, 376 (Fla. 2008).

<sup>19</sup> *See id.*; *Livingston v. State Farm Mut. Ins. Co.*, 774 So. 2d 716, 718 (Fla. 2d DCA 2000); *Garcia v. State Farm Mut. Ins. Co.*, 766 So. 2d 430, 432-433 (Fla. 5th DCA 2000).

<sup>20</sup> *Citizens Prop. Ins. Corp. v. Ifergane*, 114 So. 3d 190, 196 (Fla. 3d DCA 2012).

<sup>21</sup> Nos. 2D14-3818, 2D14-6058, 2016 WL 1238533 (Fla. 2d DCA March 30, 2016).

<sup>22</sup> *See Space Coast Credit Union v. Walt Disney World Co.*, 483 So. 2d 35, 36 (Fla. 5th DCA 1986).

<sup>23</sup> *Start to Finish Restoration, LLC v. Homeowners Choice Prop. & Cas. Ins. Co.*, 192 So. 3d 1275, 1276 n.1 (Fla. 2d DCA 2016); *One Call Prop. Servs. Inc. v. Sec. First Ins. Co.*, 165 So. 3d 749, 755 (Fla. 4th DCA 2015).

assignments “would likely be subsumed in this context by Florida’s longstanding precedent that insurance policy benefits are freely assignable, even without the insurer’s consent.”<sup>24</sup>

Thus, courts seem willing to honor multiple, partial AOBs which permit numerous providers to sue an insurer pursuant to the same policy, and case law barring partial assignments may no longer be a refuge for insurers. Moreover, even though most AOBs should deprive the insured of a right to sue, that does not necessarily prevent an insurer from having to defend against multiple lawsuits from holders of AOBs as well as the insured.

For instance, one Florida insurer reported to the Institute anecdotally of eight instances in which it has had to defend against multiple suits regarding the same claim under the same policy:

- Six of these instances involved two lawsuits resulting from one claim (i.e., one lawsuit filed by the holder of an AOB and one lawsuit filed by the insured)
- One instance involved four lawsuits arising out of one claim (three AOB lawsuits and one lawsuit by the insured)
- One instance involved three lawsuits arising from one claim (two AOB lawsuits and one lawsuit by the insured)

Citizens Property Insurance Company shared similar stories. For instance, in one case Citizens was confronted with two suits by holders of AOBs resulting from one claimed loss—one suit by a plumber and the other by a mitigation company. The AOB in favor of the plumber was executed two years after the loss. In another case, one claimed window leak gave rise to three AOBs and consequently individual lawsuits by a mitigation company, a mold testing company, and a mold remediation company. Citizens also reported numerous instances in which the insured filed its own lawsuit against Citizens, in addition to lawsuits filed by multiple AOB holders such as mold remediation and water mitigation companies.

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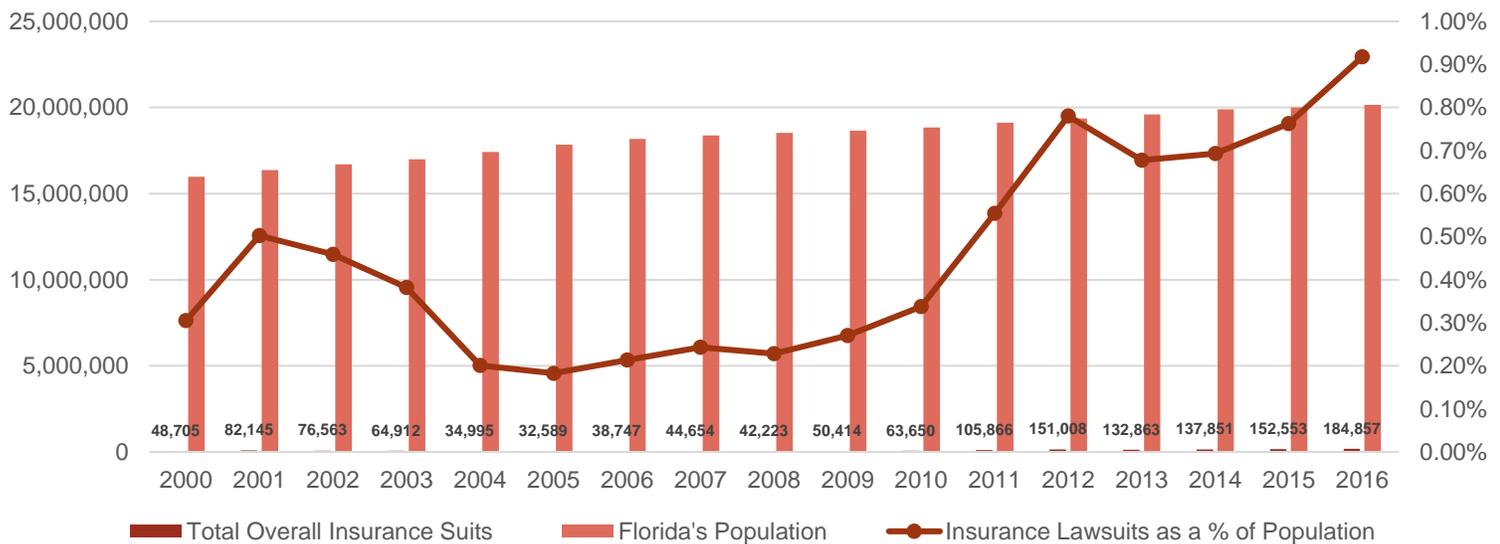
<sup>24</sup> *Start to Finish Restoration*, 192 So. 3d at 1276 n.1.

## Insurance & AOB Litigation Continues to Increase Rapidly

Overall, the SOP database demonstrates an increase in Florida’s litigiousness as it relates to insurers. From 2000 to 2016, Florida’s population has increased by 26%,<sup>25</sup> while total litigation filed against insurance companies has increased by approximately 280%.<sup>26</sup>

There are significant peaks leading up to 2001 and 2012, both which decline rapidly thereafter. We attribute this to the passage of PIP reform in the 2001 and 2012 legislative sessions, which is explored in more detail later in this paper. In addition, the litigation trend begins to spike again around 2014, which coincides with anecdotal information presented by insurers and other stakeholders alleging a dramatic increase in property insurance and auto glass AOB litigation, also explored in more detail later in this paper.

*Lawsuits Filed Against Insurers Compared with State Population*



Regarding AOB lawsuits particularly, our data has been updated to include 2015 and 2016 information. Additionally, new search terms were identified and utilized to get a fuller picture of AOB litigation trends; while our previous paper searched by plaintiff term “a/a/o,” a frequently used term in case styles denoting “as assignee of,” we have discovered that many lawsuits also use the full phrase,

<sup>25</sup> The author estimates Florida’s 2000 population at 15,982,824 and its 2016 population at 20,148,654. See <http://edr.state.fl.us/Content/population-demographics/data/MSA-2016.pdf>.

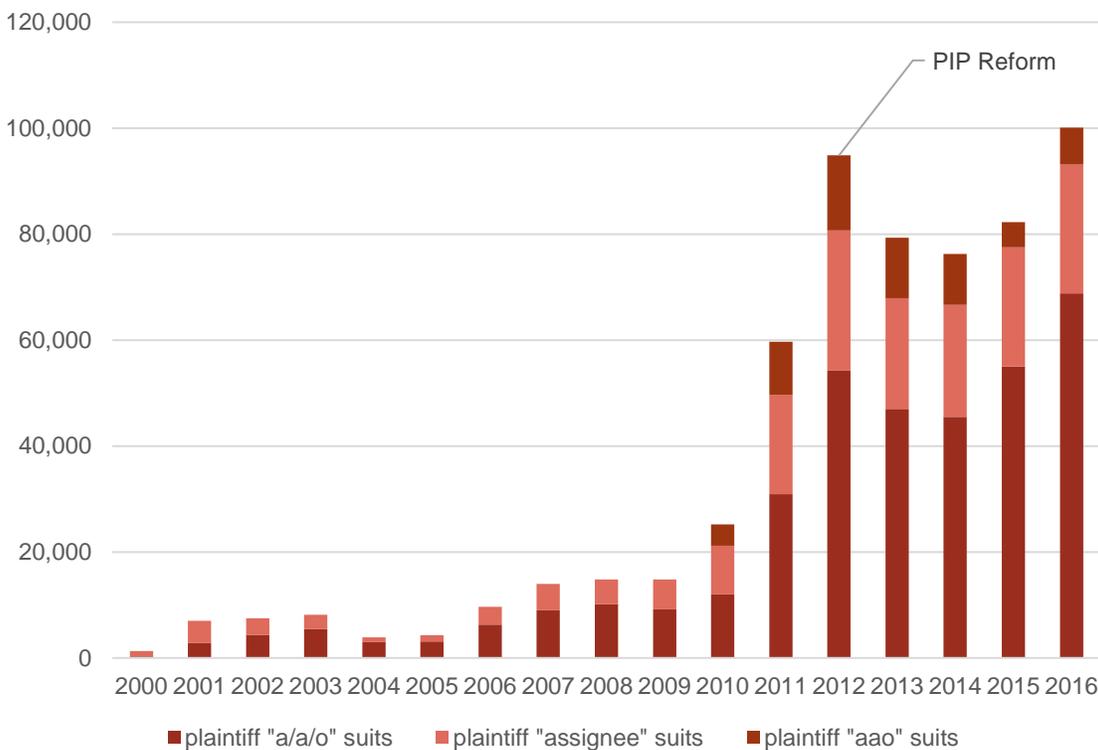
<sup>26</sup> The SOP database reflects total overall suits at 48,705 in 2000 and 184,857 in 2016.

necessitating searching by the word “assignee,” while other lawsuits omit the backslashes in “a/a/o” and simply use “aao.”

While we discovered the use of “assignee” last year and updated our data accordingly, we recently began using “aao” as a search term. Unfortunately, sometime in late 2016, the Department of Financial Services cleared data prior to 2010, meaning we were unable to cull cases prior to that date that included the plaintiff term “aao.”<sup>27</sup> For cases from 2010 and on, that term is now included. Below is a chart displaying the multiple search criteria used to identify AOB cases. Because “aao” is a more infrequently used abbreviation, and because AOB litigation was less common prior to 2010, we do not believe that its omission in years prior to 2010 is significant.

A search of AOB litigation demonstrates sharp increases in AOB litigation corresponding with the “PIP Crisis”<sup>28</sup> for which legislation was crafted in response prior to 2012. For example, from 2010 to 2011, AOB litigation increased by over 66%. From 2012 to 2013, after the PIP legislation became

*AOB Cases: SOP Search Criteria*

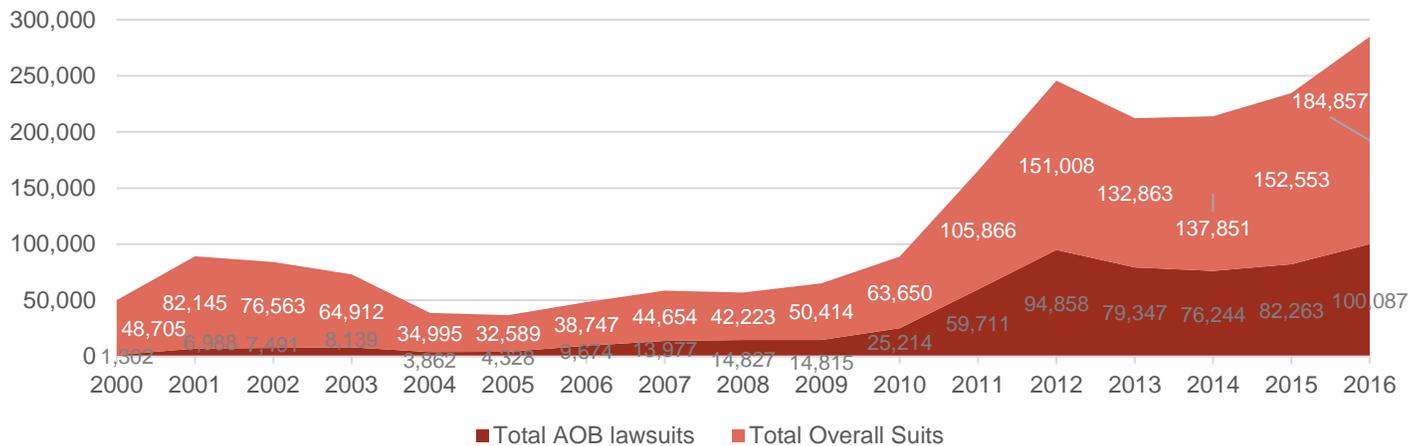


effective, a decline of 12% is noted. Later, corresponding to public conversations about the increase in the use of AOBs in property insurance and auto glass litigation, an increase of 10.7% is seen from 2014 to 2015 and a subsequent increase of over 21% is seen from 2015 to 2016.

<sup>27</sup> State agencies are only required by law to store public records for a certain number of years. It is our understanding from the Department that older records were cleared to preserve information storage availability and reduce associated storage costs, and that this was done in accordance with Chapter 119, Florida Statutes, and all applicable rules.

<sup>28</sup> Office of Insurance Regulation, *Cabinet Presentation—Personal Injury Protection*, August 2011, <http://floir.com/siteDocuments/PIPPresentation08162011.pdf>

## All Lawsuits in Database vs. Total AOB Lawsuits

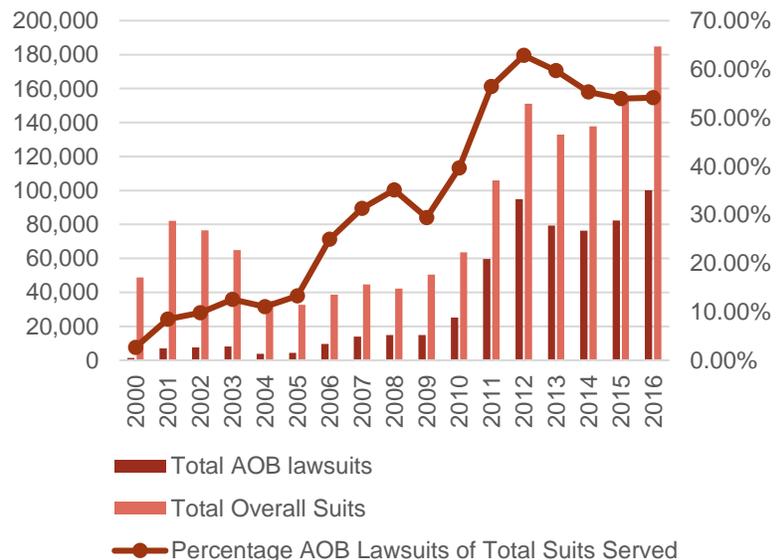


The ebbs and flows of insurance litigation are most visible when viewed as a percentage of overall insurance litigation, as seen here.

In Florida, lawsuits involving an amount in controversy of \$15,000 or less—exclusive of interest, costs, and attorney’s fees—must be filed in county court.<sup>29</sup> Therefore, searching county court records is a meaningful way to identify low value cases, and cases involving relatively low amounts of coverage. PIP suits, wherein the value of the insurance coverage does not exceed \$10,000, are a good example.<sup>30</sup>

The interesting dynamic is that while the overwhelming majority of AOB cases are relatively low value cases filed in county court, the available attorney’s fees in these cases are essentially unlimited. In the absence of a fee-shifting statute, plaintiff’s lawyers are often compensated through a contingency fee arrangement, whereby an attorney agrees to take a percentage of the total proceeds secured for his

## AOB Litigation as a % of Total Insurance Litigation



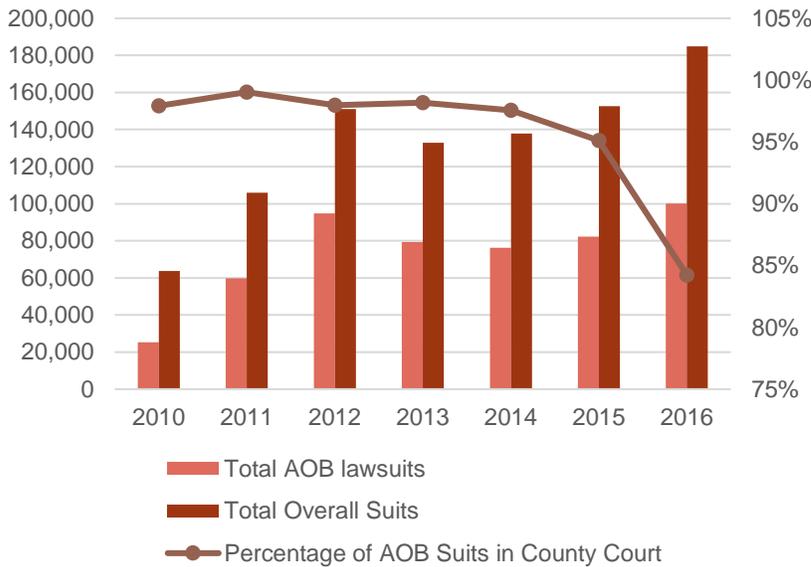
<sup>29</sup> § 34.01, Fla. Stat.

<sup>30</sup> See § 627.736, Fla. Stat.

client as his fee.<sup>31</sup> However, in these cases, a prevailing plaintiff’s attorney is entitled to collect his fee from the losing insurer under the one-way attorney fee statute, and the statute imposes no limitation on attorney’s fees. Instead, the attorney is able to submit the entirety of his bill, most often calculated on

an hourly basis, for payment by the losing insurer.

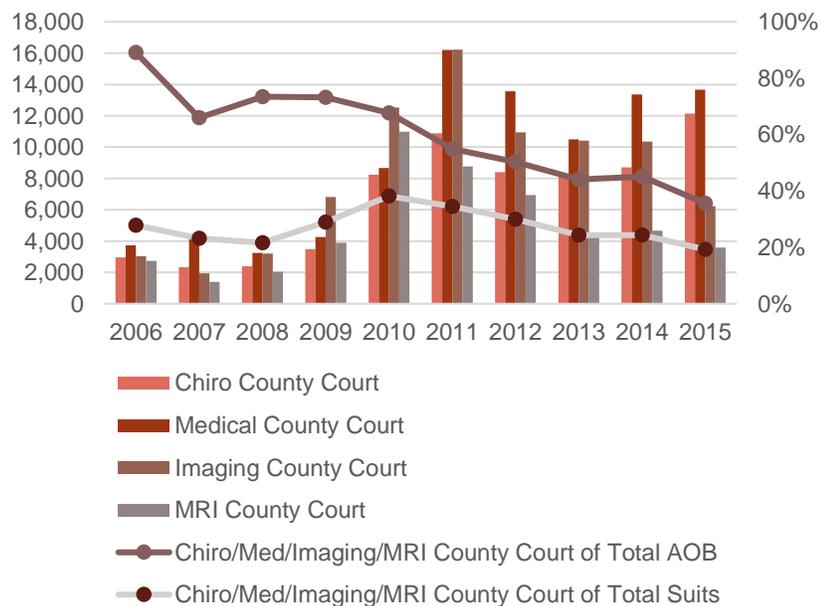
### AOB Cases are Increasingly Over the Jurisdictional Limit of County Courts



While section 627.428, Florida Statutes, speaks to a “reasonable sum as fees or compensation,” anecdotal and empirical evidence suggests an imbalance between the amount secured by an attorney for his client and the amount secured by an attorney for his own fees. In our last paper, we reviewed claim surveys sent to insurers and found that, based on that sample, attorney’s fees represented an average of 274% of the total amount paid to the assignee on the insurance claim.<sup>32</sup>

SOP data also demonstrates that AOB cases are becoming more expensive. This could be attributable to a number of factors, but one that is particularly apparent to us is that, due to a decline in the number of PIP cases as a result of the 2012 PIP reform, other AOB cases, such as against property insurers, have filled the void. Given that property insurance coverage amounts are more expensive, claims are correspondingly higher.

### PIP Litigation in County Court



<sup>31</sup> See R. Regulating the Fla. Bar 4-1.5(f)(1)-(2); see also *Brickell Place Condo. Ass’n v. Joseph H. Ganguzza & Assocs., P.A.*, 31 So. 3d 287, 290 (Fla. 3d DCA 2010).

<sup>32</sup> See *Restoring Balance*, page 16.

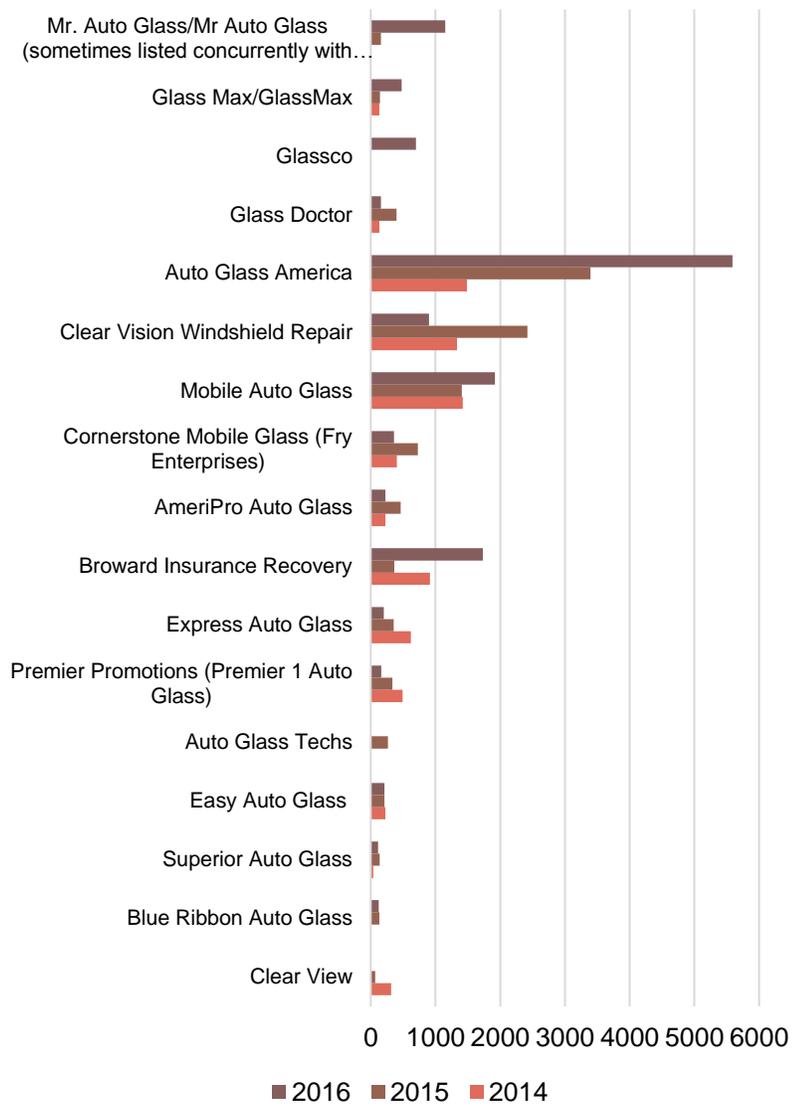
A more in-depth look at litigation from common PIP providers—including chiropractors, imaging/MRI centers, and medical providers—appears to support this connection. Cases brought by these service providers have become a smaller share of both total AOB litigation and of county court litigation. Because PIP is first party coverage, the mere fact that litigation on a PIP policy is initiated by a chiropractor, imaging/MRI center, or medical provider means that an AOB under the PIP policy was given to that respective provider or center.

## AOB Litigation is Concentrated within a Small Subset of Vendors & Attorneys

Litigation involving AOBs is unique in that it is abundant, yet derives from a very small set of attorneys, law firms, and vendors. Given that PIP reform has typically been discussed in a separate conversation than this, we have not focused on those vendors (e.g., imaging/MRI centers, chiropractors, etc.) here.

However, our review of the data shows identical trends in PIP as it does in auto glass and property, in that a few vendors file hundreds, sometimes thousands, of AOB cases each year. Below is information about common plaintiffs in both auto glass and property litigation that were identified as part of our review of the SOP data. Interestingly, data provided by Safelite Solutions,<sup>33</sup> a claims management solutions provider for many large auto insurance companies, saw 218,114 auto glass claims in 2015 and 251,676 in 2016. Of those claims, for both

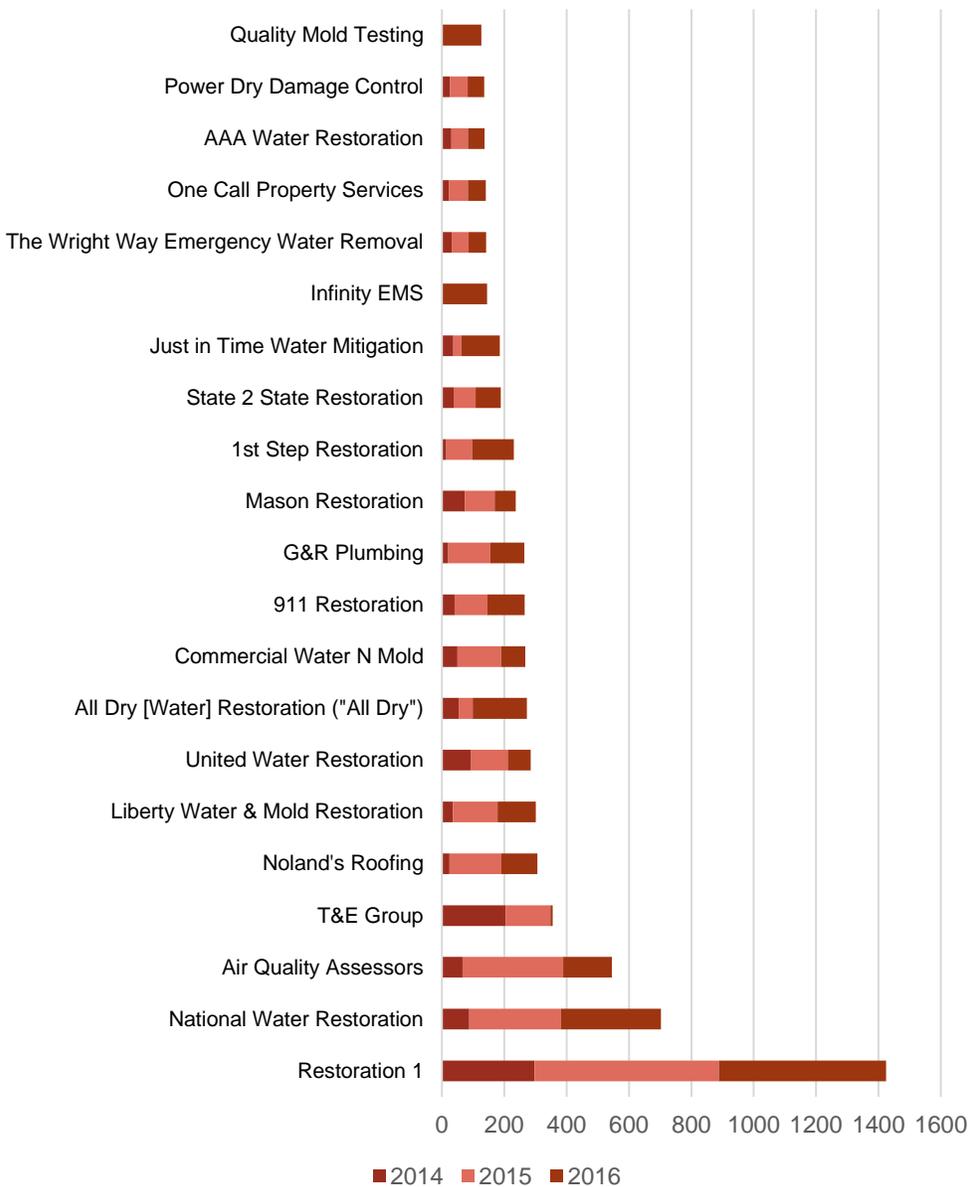
*Top Auto Glass Plaintiffs*



<sup>33</sup> <https://www.safelitesolutions.com/>

years, less than 15% of those claims came from the vendors below, as well as others that overwhelmingly sue insurers through AOBs. However, our review of the SOP data shows that these vendors represent almost all auto glass litigation in Florida. In other words, 85% of auto glass shops do not have to employ litigation in order to be reimbursed. Similar findings can be made in the property insurance marketplace as well, as shown here.

### Common AOB Property Vendors



Logically, it follows that the lawyers involved in these cases are similarly a small group of individuals who also file a great deal of lawsuits each year. In the chart below, 6 of the 10 attorneys listed filed thousands of cases in a two-year period. Additionally, these are all lawyers whose cases are predominantly AOB cases, and therefore the representation is on behalf of vendors rather than policyholders. Nearly 25%<sup>34</sup> of ALL AOB cases—from PIP to auto glass to property—filed in Florida between 2013 and 2016 were filed by 12 attorneys. These lawyers predominately represent property insurance service firms, auto glass repair shops, and PIP providers. Eleven of these attorneys are shown in the next chart.

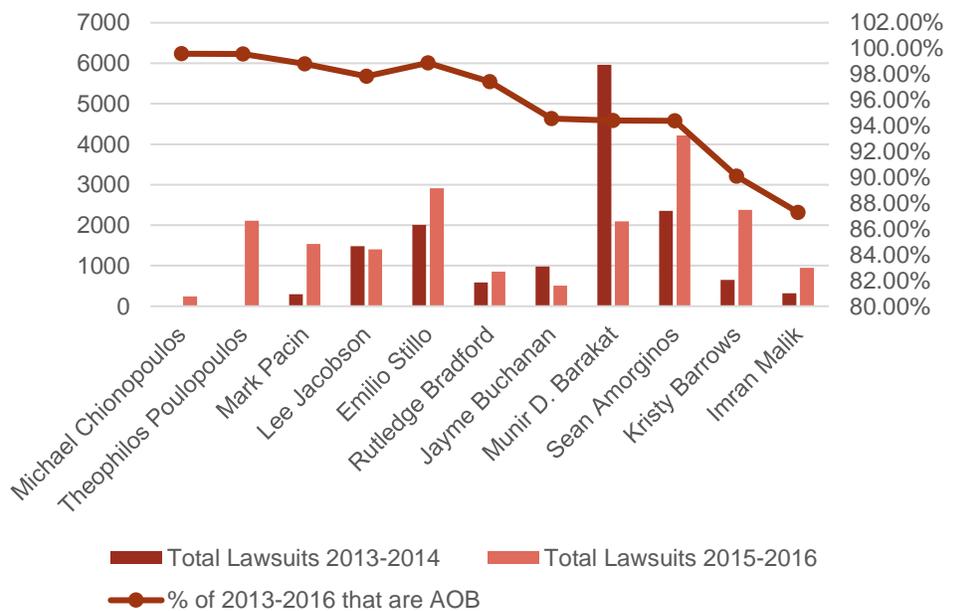
<sup>34</sup> 23.60%.

The twelfth attorney, and also the attorney who has filed far and away the most AOB lawsuits that we could identify, is Todd Landau with Landau & Associates, who filed 20,386 lawsuits from 2013 to 2014 and 31,792 from 2015 to 2016, with AOB cases representing 96.22% of those. A review of Mr. Landau's data from the SOP database indicates that his practice is predominantly PIP-oriented.

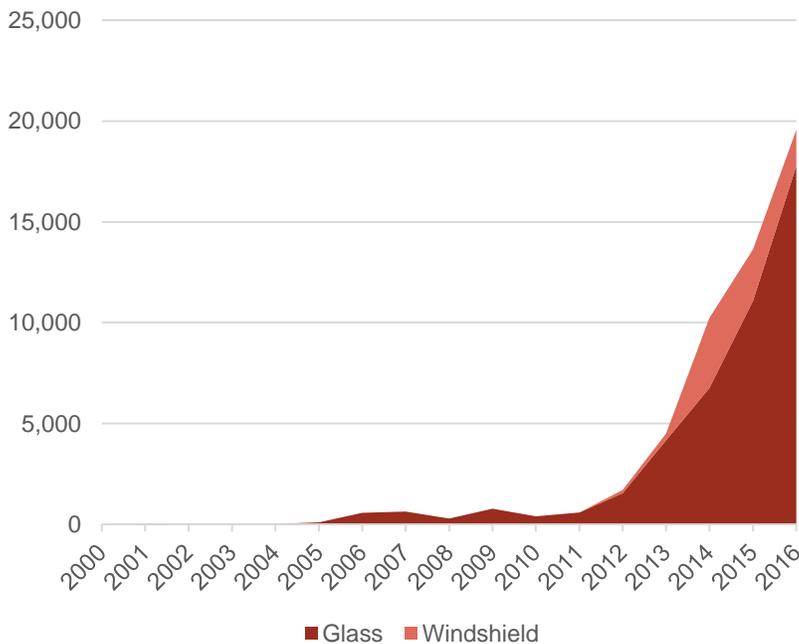
Auto glass litigation provides us a compelling look at the AOB problem because searching for "glass" and "windshield" plaintiff names provides us a near comprehensive picture of that subset of litigation, whereas

property insurance vendors can take many different names, from construction to emergency (which is also commonly used for PIP vendors), carpet, dry, restoration, mitigation, remediation, and the like.

*Top AOB Attorneys*



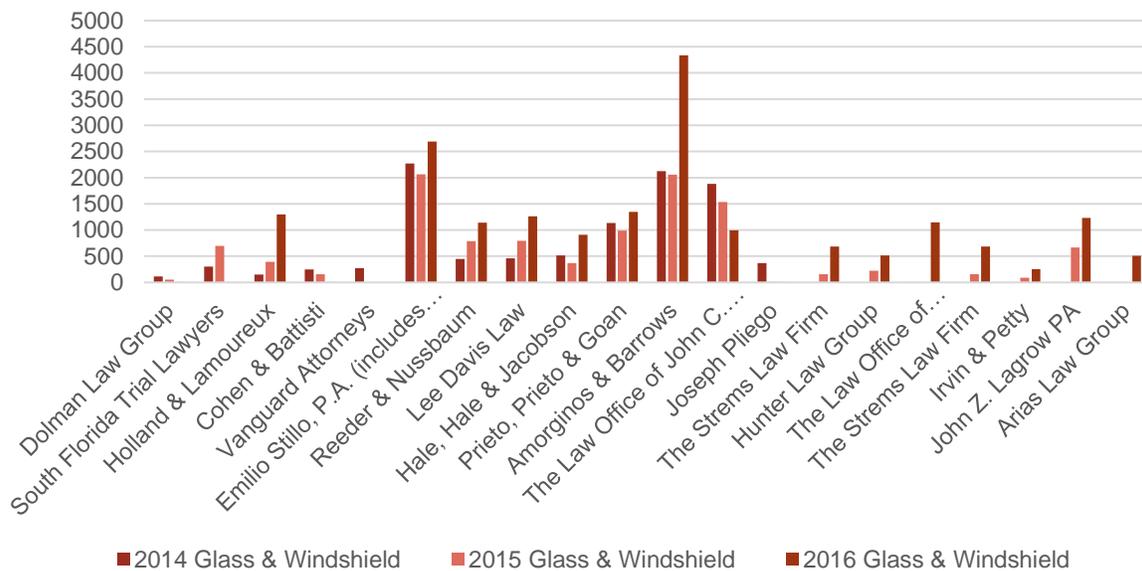
*Auto Glass Lawsuits*



The finite nature of the search terms in auto glass litigation allows us to, with a great deal of confidence, extrapolate trends and numbers. Like PIP and property, auto glass coverage is a first party coverage. Therefore, when a plaintiff's name includes "auto glass," "glass" (except for last names), or "windshield," the policyholder has allowed a vendor to step into her shoes and litigate on her behalf.

In the next chart, we identified the most common glass and windshield attorneys and identified their respective

## Auto Glass Law Firms: "windshield" & "glass" plaintiff names



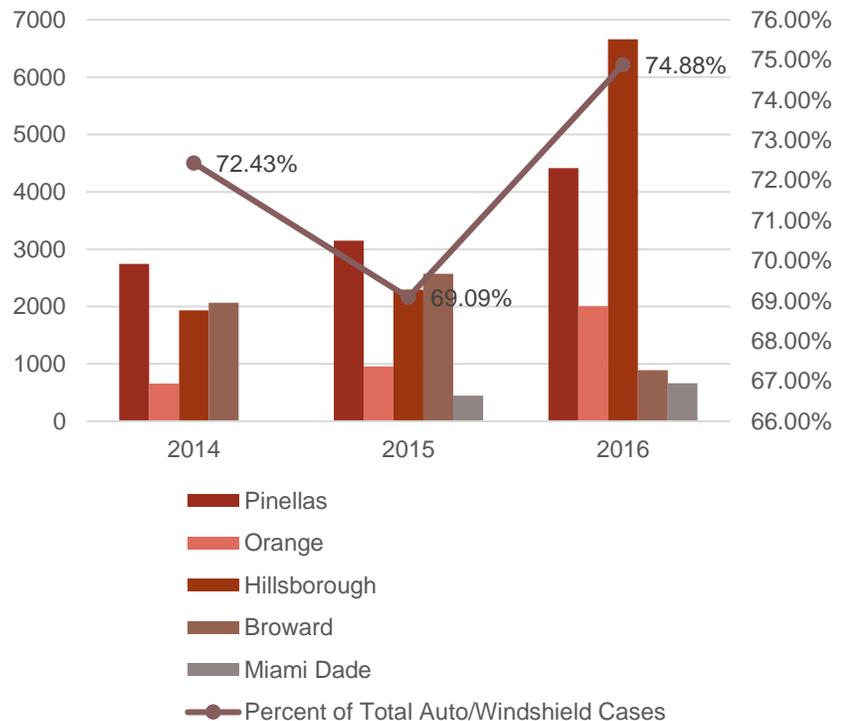
firms, in order to provide a firmwide glimpse of auto glass litigation, instead of only a snapshot of the individual attorney's lawsuits. Again, this information shows the abundance of litigation coming from a small number of firms.

## AOB Litigation is Localized

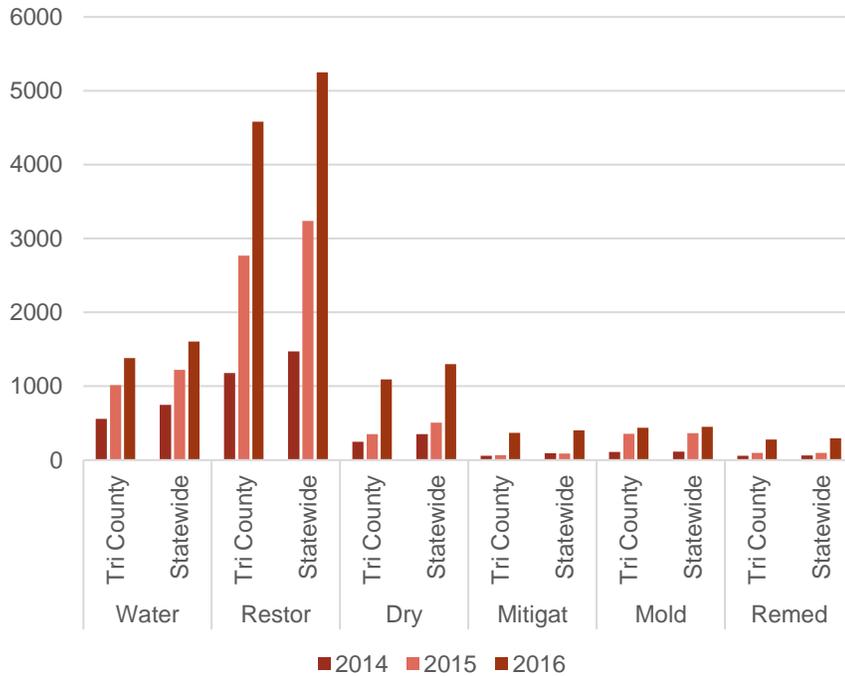
An expected byproduct of AOB litigation being from a small number of vendors and lawyers is that it is also localized. Data bears this out, and the chart below illustrates that three-quarters of auto glass litigation statewide comes from 5 counties.

Similarly, AOB lawsuits initiated by vendors who provide water cleanup, restoration, drying, mitigation, mold detection, or remediation services were overwhelming concentrated in Palm Beach, Broward, and Miami Dade counties. On average, 80.12%, 84.83%, and 88.79% of litigation from these vendors was in the tri-county area in 2014, 2015, and 2016, respectively.

## Auto Glass & Windshield Cases: 5 Counties Comprise 3/4 of all Litigation

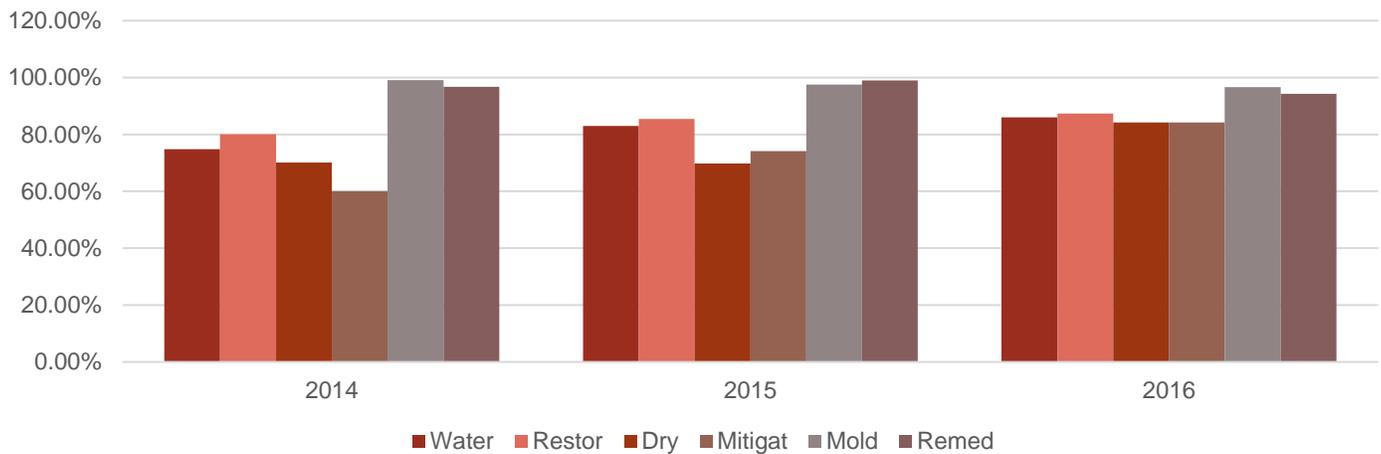


## Property Assignee Litigation: Tri County vs. Statewide



While we made attempts to determine the existence of severe weather over the last few years in the tri-county area, and similarly, any geological or meteorological event that may have caused windshields to break more frequently in these five counties, we have been unable to identify any explanation—except for litigation incentives and changing dynamics in other markets that have caused litigation to spill into new markets—to explain these trends.

## Percentage of Statewide Property Assignee Litigation From Tri-County



## Property Insurance Litigation

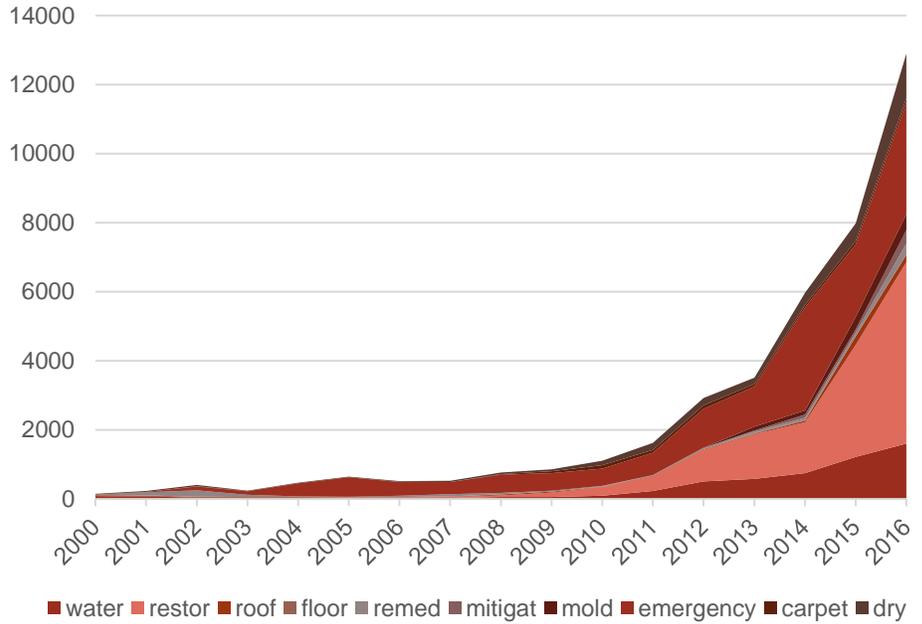
While this paper has discussed AOB litigation, the consistent usage of AOBs in PIP and the increasing utilization of AOBs in auto glass litigation, property insurance has been a particular focus of the Florida Legislature. The attention is warranted, as demonstrated by the increasing number of

lawsuits against property insurers brought by water, restoration, roofing, flooring, remediation, mitigation, mold, emergency,<sup>35</sup> carpet, and drying service vendors.

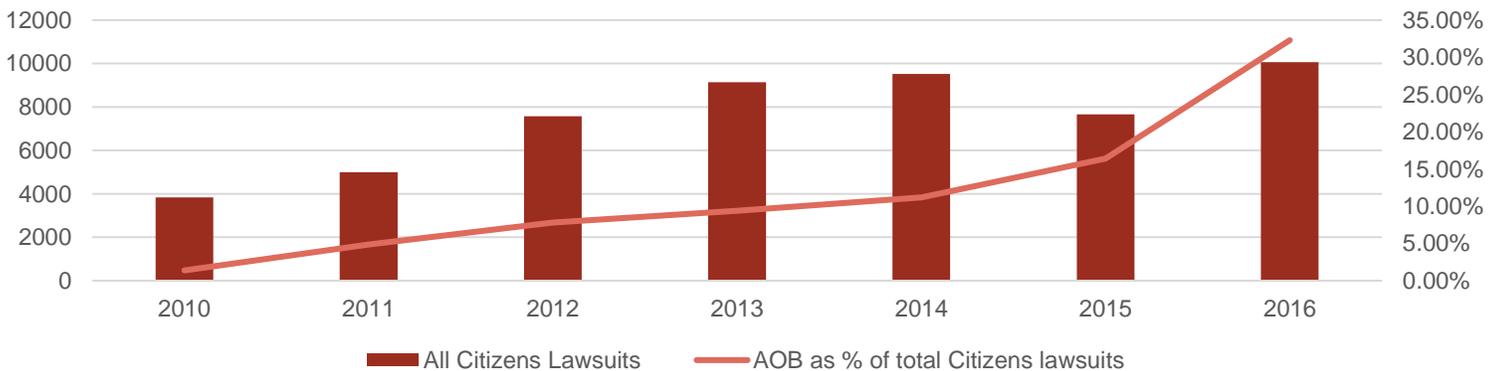
Due to property AOB litigation’s concentration in the tri-county area, and because Citizens Property Insurance Corporation only writes property insurance, an analysis of SOP data specific to that insurer supports the supposition that property insurance AOB usage is increasing, it is far outpacing population growth, it is not attributable to events in years when significant weather events have occurred, and that overall litigiousness is also growing.

In fact, while Citizens’ policy count has been shrinking, its litigation, including AOB litigation, has been increasing rapidly. We anticipate those in opposition to AOB reform to allege that this is due to changed claims behavior on behalf of this insurer; however, a look at AOB claims and litigation against other domestic property insurance companies bears similar

*Lawsuits by Plaintiff Keyword*

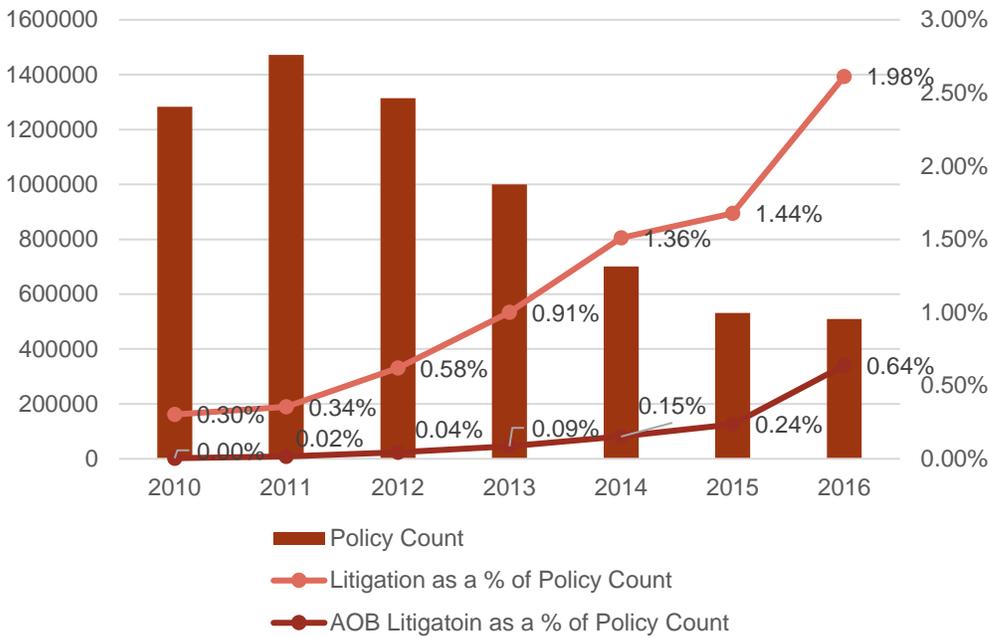


*Citizens Property Insurance Corporation: Lawsuits & AOB*



<sup>35</sup> “Emergency” is a common term for many vendors. It is pervasive in the property insurance litigation space, and is also common in PIP litigation. However, because we equally note the prevalence of this term in each year, the demonstrated increase in litigation is still accurate because we used consistent search methodology for each year.

### Citizens Litigation as a % of Policy Count



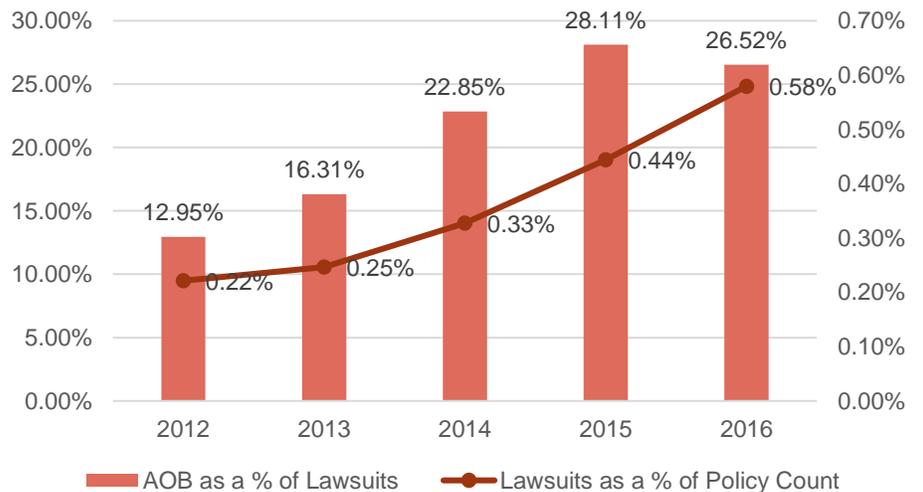
trends. Therefore, in order for that claim to be true, it must also be true that every property insurer has made similar changes in claims behavior.

Therefore, to test the possible hypothesis that Citizens “could” be an outlier based on possible changes in its behavior, we also measured the experience of four private companies. As with Citizens, litigation data was measured

against policy count to ensure a true comparison. What the graph below shows is that private property insurers are experiencing similar upticks in AOB litigation, and similar upticks in litigation as a percentage of policy count.

While Citizens’ experience appears to be more acute in sheer volume than that of private insurers, much of that can likely be attributed to policy mix in various geographic regions. For example, Citizens *must* write certain policies whereby private insurers may exclude those policies in their underwriting guidelines. Based on a geographic analysis of property AOB litigation, we know that much of that is concentrated in the tri-county area. We also know that Citizens writes a disproportionate share of policies in that same tri-county area than in other areas of the state, which are more diversified with private carriers. However, because of the trendlines

### Private Property Insurers Aggregated: Heritage P&C, Florida Peninsula, American Integrity, Security First

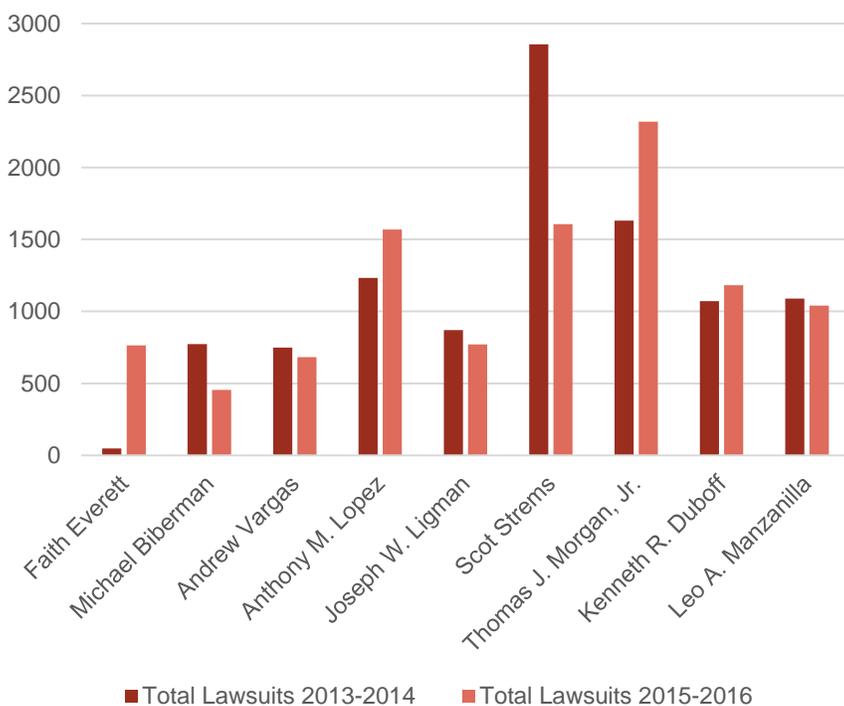


showing upticks in litigation generally as a percent of policy count, and in AOB litigation specifically, the allegation that Citizens’ litigation experience is different than the private market as a whole does not hold water.

Speaking of water, we cannot forego speaking about the general litigation problem experienced by property insurers, particular in the tri-county area concerning water loss claims,<sup>36</sup> as well as other first party litigation issues.

This is borne out by high volume litigation that is unassociated with AOBs and defies variation in policy counts, but that shares the localized, centralized nature of litigation brought by a small group of firms and in concentrated geographic areas. Many of the “high volume” attorneys on the chart below

*High Volume Litigation Attorneys*



also filed AOB lawsuits; however, AOB does *not* represent more than *half* of their litigation volume.

The frequency of lawsuits within a small group of attorneys may demonstrate that there is a way to circumvent any ‘fix’ of the one-way attorney fee statute, whereby lawyers convince policyholders to file suit against their insurer in their own name, also allowing the attorney to collect one-way fees. However, we cannot argue that this would be against the spirit or intent of the one-way statute, in the way that AOB litigation is.

Notwithstanding this point, the fact that individual attorneys file close to a thousand, or more, lawsuits a year, may be an indication that some other type of imbalance currently exists. Because that is beyond the scope of this paper, we do not speculate on what that is, absent empirical research to support such a theory.

<sup>36</sup> Citizens Property Insurance Company/Barry Gilway, *ICA Forum: Finding a Balanced Approach to Florida’s Water Loss Crisis*, June 2016, [https://www.citizensfla.com/documents/20702/1633811/20160614\\_ICA+Forum/9310c827-eb99-4a03-9347-5504b05e40d0](https://www.citizensfla.com/documents/20702/1633811/20160614_ICA+Forum/9310c827-eb99-4a03-9347-5504b05e40d0).

## Conclusion

Despite the Florida Supreme Court's recent reminder that the one-way attorney fee statute is designed to "level the playing field' between the economically-advantaged and sophisticated insurance companies and the **individual citizen**,<sup>37</sup>" courts continue to allow third party vendors to avail themselves of this statute, generating substantial sums of money in attorney's fees, which are unfortunately losses passed onto consumers.

This litigation-for-profit scheme permeates the property insurance, auto glass, and PIP marketplaces. While this scheme has been prevalent for many years in PIP, contributing significantly to the problems with that coverage over the years, it has recently been exported to the property and auto glass marketplaces. Often, consumers who are asked to sign AOBs are unaware of the full consequence of this transfer of rights.

Concurring with a number of courts that have encouraged legislative action on this topic, we believe it is critically important for the Legislature to return the one-way attorney fee statute to its original intent, as summarized above by the Florida Supreme Court, and affirm that it is a tool *exclusively designed* for policyholders/insureds.

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<sup>37</sup> See footnote 3 (emphasis added).