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IN THE FLORIDA SUPREME COURT

CASE NO.: SC18-1624

RESTORATION 1 OF PORT ST. LUCIE,
Petitioner/Cross-Respondent,

v.

ARK ROYAL INSURANCE COMPANY,
Respondent/Cross-Petitioner.
_____/

AMICUS BRIEF OF COALITION AGAINST INSURANCE FRAUD IN SUPPORT OF RESPONDENT/CROSS-PETITIONER ARK ROYAL INSURANCE COMPANY

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INTEREST OF THE AMICI

The Coalition Against Insurance Fraud ("Coalition") is a national alliance, founded in 1993, composed of consumer advocates, insurers, regulators, legislators, state and local law enforcement officials, and other interested parties seeking to combat all forms of insurance fraud through public advocacy and consumer education. The Coalition supports insurance consumers having a voice in controlling any assignment of their insurance claims, disposition of policy proceeds, the filing of litigation and all other rights they hold, individually and/or jointly with other insureds, under the insurance contract.

A. PREFACE

The principal issue in this appeal is to what extent Florida law protects consumers' rights to assign their own insurance benefits to a third party who is not an insured. Clearly consumers have that right. Consumers' rights should be of paramount concern to the Court, as innumerable Florida homeowners or condo owners' policies are held in the names of spouses, or increasingly in the names of unrelated individuals who live under the same roof or own a home together.

Under such circumstances, each insured has an equal and independent right and entitlement to control and direct the proceeds of a property damage claim on their home or other insured building. As Petitioner Restoration 1 of Port St. Lucie ("Restoration 1") concedes, those rights perdure up until the insurance company

issues the claim check, upon which each named-insured is entitled to be listed as a payee. See Restoration 1 Brief, p. 37. acknowledging that Respondent/Cross-Petitioner Ark Royal Insurance Company ("Ark Royal") "protected the insureds… by including them all on Restoration 1's check." *Id.*

But the policyholder's insurance rights do not spring into existence for the first time at the moment the claim check is written; rather those rights also exist equally at the start of the claim requiring all named insureds to have a right and a voice in making key claim decisions. It is inescapable that each individual policyholder must consent before their very right to submit the claim directly or assign it to another, including the right to control the claim and seek civil redress against their insurer, is assigned away. A contractual insurance policy provision requiring written consent of each insured furthers and assures each consumer/policyholder's interests are protected. Informed and participating consumers are better protected consumers.

B. STANDARD OF REVIEW

A trial court's ruling on a motion to dismiss based on a question of law is subject to *de novo* review. See *Morin v. Fla. Power & Light Co.,* 963 So.2d 258, 260 (Fla. 3d DCA 2007); *The Fla. Bar v. Greene*, 926 So.2d 1195, 1199 (Fla. 2006).

C. ARGUMENT ON THE MERITS

ISSUE I

AN INSURANCE CONSUMER'S RIGHTS CANNOT BE ASSIGNED WITHOUT THEIR EXPRESS CONSENT WHEN THEIR INSURANCE POLICY REQUIRES THEIR EXPRESS CONSENT.

The Coalition Against Insurance Fraud urges affirmance of the Fourth District's ruling dismissing this matter for lack of standing on the part of Restoration 1, because insurance policy provisions requiring the consent of all insureds protect *individual policyholders* from having their right of assignment taken away without their consent. This principle of protecting each insured mirrors a principle neither Restoration 1 nor Ark Royal disputes – that all policyholders must be listed as joint payees on the claim check. If an insured has written consent rights when payment is issued, then an insured certainly has written consent rights when the claim arises in the first place.

Each insured has a right to assign their benefits. Each named insured has a right to participate in fully and agree in the decision to assign their contractual right to assign benefits due from an insurer. As the Florida Restoration Association has pointed out, the Court must protect "a homeowner's ability to assign insurance benefits," and this protection applies to every homeowner – not just the first insured of several named-insureds who may elect to assign the claim. Florida has long espoused a "policy that favors the enforcement of contracts." *Sanislo v. Give Kids*

the World, Inc., 157 So. 3d 256, 260 (Fla. 2015). This should include enforcing each policyholder's individually protected contractual right to receive and direct claim proceeds.

As the Florida Justice Association has pointed out, in its summary of the history of Florida law on assignments of benefits, "any 'condition' or 'restriction' of an assignment of benefits violates the constitutionally-protected right to 'freely' assign one's post-loss insurance claim." See Florida Justice Association *Amicus* Brief, p. 3. The Coalition agrees with the Florida Justice Association on these statements of principle. And it is for that very reason that a single insured cannot have the absolute right to take away every other insured's rights. By requiring written consent to assignments of benefits, insurance companies are not placing restrictions or conditions on the right to assign the claim; just the opposite – they are protecting the right to assign the claim. Such provisions only make certain that all insurance consumers as policyholders have the right to decide whether or not to assign their own benefits, rather than have their rights disposed-of by someone else.

As this Court has further recognized, "it is a matter of great public concern that freedom of contract be not lightly interfered with." *Bituminous Cas. Corp. v. Williams*, 17 So.2d 98 (Fla. 1944) (declining to void a contract on grounds of public policy). See also *State Farm Mut. Auto. Ins. Co. v. Pridgen*, 498 So.2d 1245 (Fla. 1986). That principle should include the individual policyholder's right to enter into

an insurance contract which in turn requires that same policyholder's written consent to assign their claim or direct insurance funds which belong to them.

One policyholder cannot assign away another policyholder's rights without consent. A policyholder cannot freely assign or retain their rights if another policyholder already has disposed of their right of assignment without their consent. Therefore, an insurance policy requirement that all policyholders consent in writing to an assignment of benefits post-claim is in furtherance of protecting the rights of each individual policyholder.

The Fourth District proceedings revolve around whether Restoration 1 has standing. The Coalition is concerned about the standing of the individual policyholder and their right to make decisions regarding their claim. It is the individual policyholder who is being divested of their absolute, concrete and particularized right to control their own insurance funds, when their right to decide upon an AOB is made without their written consent. The Coalition respectfully urges the Court to enforce insurance policy provisions requiring the written consent of each policyholder, and further recognize that contractors not having a valid Assignment of Benefits signed by each policyholder have no standing to sue for those benefits.

Assignments of benefits are best addressed in the insurance policy. Restoration 1 suggests these matters are best dealt with by the legislature as a matter

of public policy. See Restoration 1 Brief, p. 31 (referring to the "free assignability" of contract rights). Yet, the legislature already has charged insurers with obligations toward their insureds to make sure that each insured's claim proceeds are handled in good faith, and in accordance with the insured's wishes. Accordingly, policy provisions of this nature, which protect non-consenting policyholders, can and should be enforced as consistent with existing Florida public policy as expressed by the legislature.

For example, an insurance company already has a statutory duty to each insured to communicate and act promptly with respect to each insured, and to pay promptly once claim funds are due. See Fla. Stat. § 626.9541(1)(i). Each individual policyholder has the right to hold his or her insurer to a standard of good faith in the claim handling. See Fla. Stat. § 624.155 (referring to an insurer's duty to act "fairly and honestly toward its insured and with due regard for her or his interests"). Florida law already provides an adequate system of remedy to assure that insurers treat policyholders fairly in the disposition of their insurance funds, *including* the handling of assignments of benefits.

Indeed, the law specifically protects each insured's rights individually. The Florida Insurance Code, in outlining bad faith remedies, does not simply refer amorphously to "their interest" collectively, or to "the insured's interest" as an amalgam, but to "her ***or*** his interest***s***," in the masculine and feminine, and in the

plural (emphasis added). The term "insured" is not formally codified, and accordingly the Court has recognized that it is all the more important to look directly to the language which that particular section of the statute does specify. See generally *Dadeland Depot, Inc. v. St. Paul Fire & Marine Ins. Co.*, 945 So.2d 1216 (2006).

Applying these principles of construction, the use of the male and female pronouns combined with the disjunctive "or" demonstrates a legislative intent to recognize that each individual insured has a separate and independent relationship with the insurer. Further, the use of the plural "interests" rather than simply "interest" demonstrates legislative recognition that there is not just one undivided "interest," with all policyholders functioning as one unit, but rather each insured has her or his own separate interests.

This statutory language demonstrates a legislative intent that each individual insured has an independent right to fairness from the insurance company with regard to claim handling, including protecting each insured's separate interest in controlling her and his claim proceeds. Such individually-protected rights should also apply to each policyholder approving of any assignment of their right to make a claim for payment of benefits, or to seek redress directly from their insurer. In the absence of any statutory language suggesting different insureds can be treated disparately, there is no public policy support for allowing one policyholder to assign away the other

policyholder's rights without all other policyholder's written consent. Therefore, insurance policy provisions requiring that individual insureds consent to assignments of benefits are perfectly consistent with Florida public policy as already articulated by the legislature, and they advance that public policy.

Consent substitutes are subject to fraud and abuse. Restoration 1 suggests that written consent of every policyholder should not be required; rather it contends the Court should require insurers to recognize something short of a full written consent. Such an amorphous standard would then subject courts to becoming involved in multiple claims to determine whether any of the panoply of fact-intensive *consent substitutes* identified by Restoration 1 and the Florida Restoration Association apply. Those circumstances are rife with vulnerability to fraud, and at best uncertainty.

Courts will be forced to adjudicate numerous proceedings by and among policyholders on the issue of whether the assigning policyholder "may have been acting as the actual or apparent agent" of any policyholder who was left out. See Restoration 1 Brief, p. 41. See also *Amicus* Brief of the Florida Restoration Association, p. 9, identifying similar complex legal issues regarding agency principles, such as the following: Did the assigning policyholder act with "implied authority" of the other insured? *Id.* Was the left-out insured "unavailable"? *Id.* Was the left-out insured "incapable"? *Id.* Was the left-out insured "infirm"? *Id.*

Were they "incapacitated"? *Id.* Did the left-out insured later "ratify" a previously unauthorized assignment on their behalf? See Restoration 1 Brief at p. 41. Even more fact-intensively, do all circumstances suggest the non-consenting policyholder actually made an "equitable assignment?" *Id.*

Alternatively, did the left-out policyholder simply have no idea what was going on, and someone else assigned the claim and directed the funds unbeknownst to them? As Restoration 1 points out, absent enforcement of policyholder written consent requirements, such issues will now have to be dealt with by the courts as issues for the "trier of fact." *Id.* In most instances, it will be after the money is already gone. In every such instance a court likely will need to handle the mess of deciding whether the non-consenting policyholder who did not give express consent to an assignment of benefits should be legally deemed to have done so under a consent-substituting alternative theory *post hoc*.

Further, such complex fact issues will only incentivize insurers to withhold payments, or inter-plead repair funds, pending investigations or Court determinations to address who is entitled to control those funds based on fact-intensive issues as to whether an assignment of benefits actually took place. Without the certainty of a written assignment of benefits signed by all named-insureds, insurers will need to take all necessary measures to assure they are complying with their statutory duties to protect each policyholder. Rather than take Florida down

this road, the Coalition respectfully urges this Court to protect the rights of each individual policyholder by enforcing written consent requirements as to assignments of benefits.

Joint payees must assign jointly. Restoration argues that placing the non-assigning insured's name on the check as a payee somehow cures the lack of prior consent. But merely presenting the non-consenting policyholder with a *fait accompli* in the form of a check with a contractor's name on it cures nothing. Gone is the policyholder's right to sign or approve the assignment of benefits, their right to submit and direct the claim, their opportunity to seek direct payment, and their right to sue their insurer if the insurer fails to abide by the contract in the handling of the claim.

From a practical perspective this is an all-or-nothing proposition. Accompanying the policyholder's right to have their name on the claim check, is the policyholder's predicate right to assign or retain the benefits in the first place. Eliminating the non-consenting policyholder's right of assignment effectively eliminates the right to control the funds, that right having been given over in part to the assignee, now listed as a co-payee. Accordingly, insurance policy provisions requiring the written consent of all policyholders to assignments of benefits must be enforced, in furtherance of Florida law and public policy.

D. CONCLUSION

The Coalition Against Insurance Fraud urges the Court to protect consumers in Florida from fraud and abuse stemming from their rights being assigned-away without their written consent. Requiring all named-insureds to sign the assignment of benefits assures that all insureds are involved in decisions about the handling and disposition of their insurance claim proceeds. Insurance is a contract and each insured has the full right to the benefits of that contract, including to make decisions regarding their claim, their recovery, and their right to sue for any breach. Accordingly, the Coalition urges affirmance of the Fourth District.

Date: March 22, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via email on the 22nd day of March, 2019, upon all counsel listed below.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing complies with the font requirements of this Court in accordance with the requirements of Rule 9.100(l).

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