IN THE COURT OF APPEAL FOR THE FIFTH DISTRICT
STATE OF FLORIDA

SECURITY FIRST INSURANCE COMPANY,

Appellant,

v.

FLORIDA OFFICE OF INSURANCE REGULATION,

Appellee.
_____/

Case No.: 5D16-3425

AMICUS CURIAE BRIEF OF FLORIDA JUSTICE ASSOCIATION

ON APPEAL FROM
FINAL ADMINISTRATIVE ORDER
OFFICE OF INSURANCE REGULATION
No. 182865-15

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

STATEMENT OF INTEREST

The Florida Justice Association ("FJA") is a large voluntary statewide association of more than 3,000 attorneys concentrating on litigation in all areas of the law. For almost half a century, the FJA has fought to protect the rights and safety of Florida's consumers. The members of the FJA are pledged to the preservation of the American legal system, the protection of individual rights and liberties, the evolution of the common law, and the right of access to courts.

This case is of interest to the FJA because Security First's position, if accepted by this Court, would undo more than a century of common law. The common law disfavors restraints on the alienation of personal property. FJA represents the interests of homeowners who depend on insurance benefits and transfer the right to collect benefits in return for emergency services and other repairs. Contractors who accept an assignment of insurance benefits in lieu of advance payment would be deprived of access to the courts if Security First succeeds in making new law; the FJA represents their interests as well.

ARGUMENT

Florida and the forty-eight other common-law states[1] agree that, after a covered loss, an insurer cannot prevent the insured from executing an assignment

[1] Louisiana appears to be the only exception. In re Katrina Canal Breaches Litig., 63 So. 3d 955, 962-63 (La. 2011).

of benefits ("AOB"). A covered loss extinguishes the insurer's interest in the risk profile associated with the policy, and the right to benefits is "worth what it is worth." Thus, no legitimate interest could justify limiting the insured's right to assign or otherwise dispose of the right to benefits, which becomes a species of personal property known as a *chose in action* after the loss occurs. Courts therefore recognize insurer consent as a categorically unreasonable restriction.

There does not appear to be any case law directly addressing the mortgagee consent clause Security First advocates here. *Amicus* returns to first principles to illustrate why the OIR correctly determined that the clause violates the rule against restrictions on AOBs. Requiring mortgagee consent to an AOB serves no legitimate interests of the insured or mortgagee., and is not a justifiable restraint on an insured's right to dispose of his property.

The Rule Against Restrictions on AOBs Covers Indirect Restrictions, Including Security First's Proposed Mortgagee Consent Requirement.

Florida courts have recognized as black-letter law the rule against restrictions on AOBs as applied to insurer consent. "Even if an insurance policy contained a specific, articulate provision precluding an insured's post-loss assignments of benefits without the insurer's consent, Florida case law yields deep-rooted support for the conclusion that post-loss assignments do *not* require an insurer's consent." Bioscience W., Inc. v. Gulfstream Prop. & Cas. Ins. Co., 185 So. 3d 638, 642-43 (Fla. 2d DCA 2016); see also, e.g., One Call Prop. Servs. v.

Sec. First Ins. Co., 165 So. 3d 749, 754 (Fla. 4th DCA 2015) ("an assignable right to benefits accrues on the date of the loss, even though payment is not yet due under the loss payment clause"). Courts have observed that there exists "an unbroken string of Florida cases over the past century" affirming that insurance benefits are freely assignable after a loss. Security First Ins. Co. v. Fla. Dep't of Fin. Servs., 177 So. 3d 627, 628 (Fla. 1st DCA 2015). As this court recently noted, "'[t]he right of an assignee to sue for breach of contract to enforce assigned rights predates the Florida Constitution the right to sue for a breach of contract to enforce assigned rights was recognized early in Florida history." Accident Cleaners, Inc. v. Universal Ins. Co., 186 So. 3d 1, 3 (Fla. 5th DCA 2015) (quoting Nationwide Mut. Fire Ins. Co. v. Pinnacle Med., Inc., 753 So. 2d 55, 57 (Fla. 2000)).

However, because insurers only recently began to challenge "the widely accepted industry practice of allowing post-loss assignments of rights," the case law is relatively undeveloped as to what exceptions the rule permits, if any. Fluor Corp. v. Superior Court, 354 P.3d 302, 333 (Cal. 2015). It has long been settled that an explicit requirement of advance consent to an AOB violates Florida law. W. Fla. Grocery Co. v. Teutonia Fire Ins. Co., 77 So. 209, 210-11 (Fla. 1917) (explaining "it is a well settled rule that the provision in a policy relative to the consent of the insurer to the transfer of an interest therein, does not apply to an assignment after loss"). Insurers have shifted their tactics accordingly.

Thus, we now know that insurance companies cannot use policy language to separate the right to enforce an AOB from the ownership of the proceeds. Restoration 1 CFL v. State Farm Fla. Ins. Co., 189 So. 3d 340, 341 (Fla. 5th DCA 2016) (rejecting argument that AOB "transferred the right to collect benefits but not the right to participate in a suit to determine coverage"); United Water Restoration Grp., Inc. v. State Farm Fla. Ins. Co., 173 So. 3d 1025, 1027 (Fla. 1st DCA 2015). We also know that insurers also cannot separate the right to determine the value of the benefits due from the ownership of the benefits. One Call,165 So. at 755. And, the insurer cannot invoke use policy language to keep a right to invoke appraisal with the insured instead of the AOB holder. Certified Priority Restoration v. State Farm Fla. Ins. Co., 191 So. 3d 961 (Fla. 4th DCA 2016).

The mortgagee consent requirement at issue here is the functional equivalent of an insurer consent requirement, simply because the insurer could invoke it as a legal defense regardless of whether the mortgagee objected to the AOB.[2] It is also an invalid restraint on the alienation of property, which cannot be justified by any legitimate interest of the insurer or mortgagee. Therefore, the mortgagee consent requirement is within the rule against restrictions on AOBs, and illegal.

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[2] E.g., Bio Logic, Inc. a/a/o Morgan v. ASI Preferred Ins. Co., No. 2D16-3798; Restoration 1 of CFL, LLC, a/a/o Tchekmeian v. ASI Preferred Ins. Co., No. 5D17-755.

A. All restrictions on transfers of personal property must be justified by an important interest.

Security First faces a high burden to justify its attempt to place in the mortgagee the power to block an assignment of the homeowners' interest. Celauro v. 4C Foods Corp., 958 N.Y.S.2d 644, 644 (Sup. Ct.) (citing cases establishing the "general rule that ownership of property cannot exist in one person and the right of alienation in another"). Courts consider indirect disadvantages that arise when property is transferred. Delta Casualty Co. v. Pinnacle Medical, Inc., 721 So. 2d 321 (Fla. 5th DCA 1998) (holding unconstitutional a statute that imposed higher burden on AOB-holders to recover attorney fees and barred access to courts).

An insured's right to proceeds is a vested property right, because after a loss the contract right "ripens into a chose in action, a type of personal property, which, pursuant to fundamental principles of debtor-creditor relationships, may not, ordinarily, be restrained from alienability." Wehr Constructors, Inc. v. Assur. Co. of Am., 384 S.W.3d 680, 685 (Ky. 2012). The rules against restricting alienation of real property apply to personal property as well. In re Estate of Walkerly, 108 Cal. 627, 657 (1895) ("The common-law rule against perpetuities does not, as counsel argue, apply only to landed estates. Executory devises, springing and shifting uses, and trusts whether of realty or personalty were all within its terms."). And, "as an incident to ownership the owner of personal property has an inherent right to sell and transfer personal property." Sanders v. Hicks, 317 So. 2d 61, 63-

64 (Miss. 1975). Any restraints on the right to transfer personal property are disfavored. Kirtsaeng v. John Wiley & Sons, Inc., 133 S. Ct. 1351, 1363 (2013) (noting "common law's refusal to permit restraints on the alienation of chattels"); see also, e.g., Sebastian Int'l, Inc. v. Consumer Contacts (PTY), Ltd., 847 F.2d 1093, 1096 (3d Cir. 1988) (noting "common law aversion to limiting the alienation of personal property"); RTS Landfill, Inc. v. Appalachian Waste Sys., LLC, 598 S.E.2d 798, 802 (Ga. App. 2004); In re Winters, 69 B.R. 145, 147 (Bankr. D. Or. 1986).

As with real property, "[t]he right of alienation is one of the essential incidents of a right of general property in movables, and restraints upon alienation have been generally regarded as obnoxious to public policy, which is best subserved by great freedom of traffic in such things as pass from hand to hand." Miles Med. Co. v. John D. Park & Sons Co., 220 U.S. 373, 404 (1911); see also Tully v. Mott Supermarkets, Inc., 337 F. Supp. 834, 846 (D.N.J. 1972); Ritchie v. Rupe, 339 S.W.3d 275, 292 (Tex. App. 2011). In fact, "every consideration, suggested by the wants of commerce, and by the policy which discountenances restraint on alienation, applies with greater force to personal property, than to real property." Jordan v. Roach, 32 Miss. 481, 600 (1856).

Accordingly, the Supreme Court of Florida observed long ago that "[p]ersonal property, as well real property, at common law was subjected to the rule against restraints on alienation." Reimer v. Smith, 105 Fla. 671, 675, (1932).

B. A homeowner's interest in executing an AOB is particularly important, and the advance consent requirement creates an onerous burden.

AOBs help homeowners by providing liquidity in times of need.[3] Liquidity is a public good because "free alienability of property fosters economic growth and commercial development." Aquarian Found., Inc. v. Sholom House, Inc., 448 So. 2d 1166, 1168 (Fla. 3d DCA 1984) (discussing consent to transfer required under condominium agreement). Free assignment "contribut[es] to the efficiency of business by minimizing transaction costs and facilitating economic activity and wealth enhancement." Hartford Cas. Ins. Co. v. Fireman's Fund Ins. Co., No. 15-cv-02592-SI, 2015 U.S. Dist. LEXIS 118031, at *9 (N.D. Cal. Sep. 3, 2015);

[3]Lower courts have explained how AOBs benefit Florida citizens by increasing liquidity and allowing a more rapid response to emergencies. Anderson Restoration & Emergency Servs., LLC a/a/o Myrna Hill v. Universal Ins. Co., No. 13-CC-2940 (Fla. Duval Cty. Ct. Sept. 23, 2013) ("If [the insured] had to wait for claims adjuster from the insurance company to arrive before beginning water extraction after a loss, additional damage from the water event could occur. The same would occur if the insured did not have the funds immediately available to pay for water extraction and water extraction companies were not able to rely on assignments of benefits…."); see also Anderson State Farm & Emergency Servs. LLC v. Fla. Peninsula Ins. Co., Case No. CC13-0550 (Fla. St. Johns Cty. Ct. June 3, 2013)

Travelers Cas. & Sur. Co. v. United States Filter Corp., 870 N.E.2d 529, 544 (Ind. Ct. App. 2007) (remarking on "the benefits of promoting the free transferability of assets and compensating those injured as a result of an insured risk").

After a loss, "it is of the first importance" that the insured "immediately realize the amount of their insurance, to replace the property destroyed [and] prevent the utter ruin of the sufferer." Goit v. Nat'l Prot. Ins. Co., 1855 N.Y. App. Div. LEXIS 175, 25 Barb. 189, 194 (App. Term Apr. 2, 1855). As the OIR points out, (Answer Br. 19-21), obtaining the necessary signatures imposes a substantial burden on insureds. By definition, emergencies are not limited to business hours, or whatever the availability of the mortgagee happens to be. When fast action is required, the mortgagee may not be available. Indeed, the policy itself may be unavailable, perhaps due to the very incident requiring immediate remediation. It may not be clear what individual is authorized to sign the AOB on the mortagagee's behalf, or even whether the named mortgagee has securitized or otherwise transferred its interest in the dwelling.

Moreover, without assignments that enable repairs to commence immediately, the insured "may be in the power of the company and subjected to such terms as the managers may see fit to impose." Goit, 25 Barb. at 194. Restrictions on assignments – including doctrines that make accepting an AOB a riskier proposition – allow insurance companies to:

> say, in effect, to the man who has bargained with them for absolute indemnity, and to whose business prospects delay is utter ruin, or whose family are in pinching want for the relief which this indemnity would afford, "accept of the pittance we offer or we will contest your claim and avail ourselves of such delays as a litigation will afford; and as you cannot realize the amount by sale or pledge, without incurring a forfeiture of the claim, you must await our inclination, or the slow result of a lawsuit, before you can recover the money to which you are entitled and which you so much need."

Id. As Justice Allen remarked long ago, "Public policy forbids that the [insurer] should, without any reason except such as grows out of caprice or some worse motive on his part, have this power over his creditor." Id. A later case found that restrictions on assignment, regardless of the motive behind them, have a "quite obvious" effect: "It puts it in the power of the insurer to prescribe terms of adjustment in disregard of the rights of its weaker adversary." Courtney v. N.Y.C. Ins. Co., 1858 N.Y. App. Div. LEXIS 114, at *4-9, 28 Barb. 116, 117-18 (App. Term Sep. 14, 1858).

The OIR correctly observes that Security First ignores all competing policy considerations. Obtaining consent to an AOB would take more effort than Security First acknowledges, and assignability is important to Florida's homeowners.

C. The mortgagee consent requirement at issue here is a complete restraint on alienability that can be exercised arbitrarily.

Aside from the problems inherent in obtaining the necessary signature, consent itself is not certain. The clause as written grants complete discretion to the

mortgagee. It unlawfully gives the mortgagee the power to "arbitrarily, capriciously, and unreasonably withhold its consent to transfer." Aquarian, 448 So. 3d at 1170; see also Metro. Dade Cnty. v. Sunlink Corp., 642 So. 2d 551, 565 (Fla. 3d DCA 1994) (Cope, J., dissenting) (urging court to find an unlawful restraint on alienation by Dade County where due to conditions for waiver of restrictive covenant Sunlink had to "obtain the neighbors' consent to sell this property", which could be withheld "at their whim"). Florida courts have held that "where a restraint is absolute and may be exercised for any reason or no reason," it is unenforceable unless the owner's interest is protected. Webster v. Ocean Reef Cmty. Ass'n, 994 So. 2d 367, 370 (Fla. 3d DCA 2008) (explaining why restriction on transfer of condominium was unenforceable unless accompanied by obligation to purchase unit from owner at market price).

Under the policy, the mortgagee can withhold consent to assignment for any reason, or no reason at all, regardless of whether it has an interest in subject of the benefits (e.g., emergency services or temporary repairs). This "arbitrary power to forbid a transfer" is exactly the kind of restraint that "amounts to annihilation of property." Hill v. Warner, Berman & Spitz, P.A., 484 A.2d 344, 351 (N.Y. Super. Ct. App. Div. 1984). Other courts have found similar restraints on alienation to be invalid. Hill v. Warner, Berman & Spitz, P.A., 484 A.2d 344, 351 (N.Y. Super. Ct. App. Div. 1984) ("the consent restraint agreement between Blessing and Levitt has

no limitation as to time, does not provide that the consent to act by the other shareholder will not be unreasonably withheld and does not promote the interest of the corporation"); Sanders v. Hicks, 317 So. 2d 61, 63-64 (Miss. 1975) (reversing where "restraint on alienation in the deed of trust" had "no relation to any threat to the legitimate interests of the mortgagee"). This Court should follow suit.

D. Anti-AOB clauses like the one here would impair AOBs generally, because the possibility of restrictions would make accepting an AOB a risky proposition.

The possibility or even probability that the mortgagee will be willing to sign the AOB does not save the anti-assignment clause. Unless and until the proposed assignment is signed by the mortgagee, its value to a remediation contractor is too speculative to justify accepting it in return for emergency repairs. See Aquarian, 448 So. 2d at 1169 (consent requirement to transfer of condominium unreasonable because "no reasonable likelihood that a potential purchaser, apprised by the condominium documents that the consent of the association is required and that a purchase without consent vitiates the sale, would be willing to acquire the property without the association's consent"). "After all, the assignment is only as good as payment if the provider can enforce it." N. Jersey Brain & Spine Ctr. v. Aetna, Inc., 801 F.3d 369, 373 (3d Cir. 2015) (citing Conn. State Dental Ass'n v. Anthem Health Plans, Inc., 591 F.3d 1337, 1352 (11th Cir. 2009)).

In fact, even the possibility of anti-assignment clauses like the one at issue here will significantly impair the liquidity associated with an AOB. A post-loss AOB is a definite property right. If insurance policies can create variations of this right, contractors will be forced to determine whether and how any AOB is encumbered. With real property, recording deeds makes it possible, with effort, to determine whether restrictions exist. There is no such mechanism for insurance contracts; indeed, there is no particular reason to believe that an insured facing an emergency will have immediate access to his or her policy to determine the conditions under which assignment is permitted. Thus, allowing ASI's anti-assignment clause to stand will impair all AOBs, to the detriment of homeowners who "simply cannot afford to wait" to repair the damage, and for whom "insurance benefits represent the most ready means of paying for post-loss emergency repairs." Bioscience, 185 So. 3d at 643.

On the other hand, if an AOB remains a standardized, alienable property right, contractors will not have to puzzle over what an AOB is for each policy. See Thomas Merrill and Henry Smith, *Optimal Standardization in the Law of Property: The Numerus Clausus Principle*, 110 YALE L. J. 1 (October 2000) (discussing benefits associated with fewer forms of property). The Court should consider "the measurement costs [AOB restrictions] impose on strangers to the title" and how they impair the free market. Id. at 26-27.

E. Insurers have no legitimate interest in restricting AOBs.

In Florida, an anti-assignment clause in a contract cannot bar a transfer of the right to receive payments unless some important policy justifies restricting the insured's property rights. E.g., Kohl v. Blue Cross & Blue Shield of Fla, Inc., 955 So. 2d 1140, 1143 (Fla. 4th DCA 2007) (allowing restrictions of AOBs to in-network medical providers); Rapid Settlements, Ltd. v. Dickerson, 941 So. 2d 1275, 1277 (Fla. 4th DCA 2006) (observing that general rule is that "a prohibition against assignment of a contract will prevent assignment of the contractual duties, but does not prevent assignment of the right to receive payments due;" holding that Florida's Structured Settlement Protection Act permitted contact clause which prohibits assignment of payments). No such policy exists here.

i. The amount due from the insurer is fixed at the time of loss.

The only legitimate purpose of an anti-assignment clause is to prohibit transfer of the entire policy, to protect the insurer against "an increase of risk and hazard of loss by a change of ownership without the knowledge of the insurer." Lexington Ins. Co. v. Simkins Indus., Inc., 704 So. 2d 1384,1386 (Fla. 1988) (citation omitted). After loss, a debt is created in the amount of covered loss, which does not vary. Williams v. Auto Owners Ins. Co., 779 So. 2d 563 (Fla. 2d DCA 2001) ("rights under a fire insurance policy . . . are fixed both as to amount and standing to recover at the time of the fire loss"). The loss "extinguishes the

insurer's interest in the risk profile of the insured," Globecon Group, LLC v. Hartford Fire Ins. Co., 434 F.3d 165, 171 (2d Cir. 2006), and thereafter "[t]he claims are worth what they are worth" regardless of the owner. In re Ambassador Ins. Co., 965 A.2d 486, 490-92 (Vt. 2008).

An article in the American Bar Association's Tort and Insurance practice magazine explained that the "mere change in the identity of the payee on a check" causes no "increased risk to the insurer:"

> Before loss, the insured has only an inchoate or a contingent right to compensation, but after loss that right has "bec[o]me absolute" and transferable without consent, since the relationship of the insured and insurer is now one of "creditor and debtor" and the policy no longer significant except as evidence of the existence and amount of the debt.

(Catherine M. Colinvaux and Kristen S. Heres, *The Assignment Clause in First-Party Property Insurance Policies: Are Post Loss Assignments of Policy Proceeds Enforceable?*, THE BRIEF, Winter 2010, at 22 (ABA Tort Trial & Insurance Practice Section), available at http://www.zelle.com/news-publications-64.html).

Thus, even if an insurer could require consent to any AOB, "it would be a mere act of caprice or bad faith for it to take advantage of the stipulation that the transfers were subject to its consent, by withholding such consent, in order to defeat the claim of the assignee." Int'l Rediscount Corp. v. Hartford Acci. & Indem. Co., 425 F. Supp. 669, 672-73 (D. Del. 1977). Such bad faith would be

rational; an insurer "would be foolish to consent to the transfer of insurance if, by withholding such consent, it could shed itself of past liability." Travelers Cas. & Sur. Co. v. United States Filter Corp., 870 N.E.2d 529, 545 (Ind. Ct. App. 2007). Therefore, with respect to the amount due under the policy, the insurer has no legitimate interest in restricting AOBs, and the law forbids restrictions.

ii. The partial assignment doctrine does not support restricting AOBs.

Although Security First cites no authority, in other cases insurers have cited Space Coast Credit Union v. Walt Disney World Co., 483 So. 2d 35 (Fla. 5th DCA 1986), for the propositions that AOBs generally are unenforceable partial assignments. Space Coast involved garnishment of an employer under a partial assignment of unearned future wages. Although the court declared the partial assignment was valid, the employer was not liable to respond to a writ of garnishment absent the joinder of all parties entitled to the wages, "unless joinder is not feasible and it is equitable to proceed without joinder." Id. at 36. (quoting Restatement (Second) of Contracts § 326(2)).

It is true that most AOBS can be described as "partial" in the sense they do not cover all benefits paid in connection with a single loss event. But as the recent decisions by the District Courts show, Florida courts have recognized AOBs like this for at least century. It would be more consistent with Florida law to conceive of an AOB as a complete transfer of all rights to benefits for the services rendered.

Case law supports this view of wholeness and partialness. For example, the Third District has explained: "A provision in a policy of insurance which prohibits assignment thereof except with the consent of the insurer does not apply to prevent assignment of the claim or interest in the insurance money then due, after loss." Gisela Inv. N.V. v. Liberty Mut. Ins. Co., 452 So. 2d 1056, 1057 (Fla. 3d DCA 1984 (emphasis added). The statement in Gisela that an insured may assign "an interest in the insurance money then due" was later quoted with approval. Prof'l Consulting Servs., Inc. v. Hartford Life & Accident Ins. Co., 849 So. 2d 446, 447-448 (Fla. 2d DCA 2003). Using similar language, the Supreme Court described an assignment as "'a transfer . . . of property, or of some right or interest therein.'" Continental Casualty Co. v. Ryan, Inc., Eastern, 974 So. 2d 368, 376 (2008).

Florida law recognizes that the "breach of each coverage provision gives rise to a separate cause of action [which] may be separately asserted." Bryant v. Allstate Ins. Co., 584 So. 2d 194, 195 (Fla. 5th DCA 1991) (citing Couch on Insurance 2d (Rev. Ed.) § 74:825); see also State Farm Mut. Auto. Ins. Co. v. Yenke, 804 So. 2d 429 (5th DCA 2001) (rejecting argument against splitting causes). Florida law also recognizes a duty to deal fairly with multiple claimants. Farinas v. Florida Farm Bureau Gen. Ins. Co., 850 So. 2d 555 (Fla. 4th DCA 2003).

Additionally, if a party contracts to "perform separately" any portion of a contract, it may be separately assigned. Restatement (Second) of Contracts §

326(2)); see Bioscience W., Inc. v. Gulfstream Prop. & Cas. Ins. Co., 185 So. 3d 638, 641 (Fla. 2d DCA 2016) (standard loss payment clause anticipates "the need to pay those 'legally entitled to receive payment' under the policy"). Various insurance coverages are frequently payable to different claimants, for example rebuilding under Coverage A and emergency mitigation as an additional coverage.

Thus, AOBs are not partial assignments, because the "whole" is not the entire policy, nor all benefits under the claim number. At law and as a matter of policy, the "whole" is all benefits associated with work performed by the AOB-holder. Any contrary interpretation of the law violates Florida's rule against restrictions on AOBs. Start to Finish Restoration, LLC v. Homeowners Choice Prop., 41 Fla. L. Weekly D1385 n.1 (Fla. 2d DCA June 10, 2016) (explaining that rule on partial assignments "would likely be subsumed . . . by Florida's longstanding precedent that insurance policy benefits are freely assignable").

iii. AOBs do not otherwise subject insurers to an unfair multiplicity of expensive lawsuits.

Security First argues generally that AOBs unfairly subject it to increased litigation costs. (Initial Br., at 23-27). Amicus assumes *arguendo* that a long-term increase in AOBs exists.[4] Nevertheless, any wounds resulting are self-inflicted.

[4] Other sources show that the severity and frequency of AOB claims are declining. Charles Elmore, Palm Beach Post blog, February 22, 2017, available online at:

Florida law already gives Security First the tools it needs to deal with these hypotheticals. If more than one party seeks to recover the same benefits, insurers can and do join them into a single action, or seek declaratory judgments to clarify their liabilities. Similarly, litigation expenses are manageable to insurers who act in good faith. Florida's one-way attorney fees statute for insurance claims only applies to plaintiffs who win. If insurers are paying more to plaintiff's attorneys, it is because they have failed to pay benefits to their insureds and their assignees.

As for fees to their defense attorneys, insurers can use proposals for settlement to shift their costs to plaintiffs who bring frivolous claims. If insurers are paying more to their own attorneys, they are defending the wrong cases.

iv. The mortgagee consent requirement does not materially advance any interest of the mortgagee.

The brief of Amicus Florida Banker's Association *et al*. ("FBI") similarly fails to identify any legitimate interest. Example 1 concerns the homeowner who unilaterally assigns benefits to an unscrupulous remediation company, without the mortgagee. (Amicus Br., at 13-15). The problems with this example are many.

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http://protectingyourpocket.blog.mypalmbeachpost.com/2017/02/22/crisis-maybe-but-top-fl-insurer-says-severity-of-aob-claims-falling/

First: The interests of the homeowners and the mortgagor are all parallel. There is no reason to believe one would act against the other, and that Homeowner A would be content with substandard work to which the others objected.

Second: FBI fails to differentiate between different coverages under the policy. Coverage for debris removal or for temporary repairs exists only after expenses are incurred, and only to the extent reasonable and necessary. (E.g., R. 150-51 (payment for expenses incurred). Coverage A (Dwelling) and Coverage B (Additional Structures), on the other hand, can be paid prospectively.

Third: The insurer is able to monitor the work done to the covered property and adjust payment accordingly. Assuming coverage for reasonable expenses incurred under an additional coverage, the insurer would be liable for only part of or none of Company X's invoice if the repairs were substandard. If the benefits were for Coverage A or B, the insurer could withhold full payment until the repairs were complete. (R. 163, sub. 3(d)); see also § 627.7011(3), Fla. Stat. (allowing insurers to make payment as repairs are completed rather than beforehand).

Fourth: An AOB-holder cannot unilaterally negotiate any payment if the mortgagee has an interest in the benefits. The standard mortgage clause (R. 165) provides that "If a mortgagee is named in this Policy, any loss payable under coverage A or B will be paid to the mortgagee and you, as interests appear."

Fifth: As noted above, insurance companies use declaratory actions, impleader, and joinder to protect themselves from paying the incorrect party.

FBI's example 2 merely adds homestead protection and assumes the homeowners are married. The proceeds at issue, however, are not homestead protected. The Supreme Court has held that the constitutional homestead exemption protects against every claim except those exempted by the provision itself, which includes "obligations contracted for the . . . repair" of the homestead. Osborne v. Dumoulin, 55 So. 3d 577, 582 (Fla. 2011); Havoco of America, Ltd. v. Hill, 790 So. 2d 1018, 1022 (Fla. 2001). This situation is vastly different from a general creditor recovering those same funds. (See Amicus Br. at 15 (citing Quiroga v. Citizens Property Ins. Corp., 34 So. 3d 101 (Fla. 3d DCA 2010)).

FBI offers nothing to justify the extreme measure of preventing AOBs.

CONCLUSION

The OIR correctly rejected Security First's mortgagee consent clause. As a functional (albeit imperfect) equivalent of an insurer consent requirement, the clause violates Florida's clearly established rule against restrictions on AOBs. And as with an insurer consent requirement, the mortgagee consent requirement is categorically an unreasonable restraint on the homeowner's right to use his property. By analogy and by application of fundamental principles, the mortgagee consent requirement violates the rule against restrictions on AOBs.

Respectfully Submitted,

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This 10th day of April, 2017.

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CERTIFICATE OF TYPEFACE COMPLIANCE

I further certify that this brief is typed in Times New Roman 14-point font in compliance with Florida Rule of Appellate Procedure 9.210(a)(2).

/sGray R. Proctor
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