FIFTH DISTRICT COURT OF APPEAL
STATE OF FLORIDA

CASE NO.: 5D17-755

RESTORATION 1 CFL, LLC a/a/o ALEX TCHEKMEIAN,

Appellant,

vs.

ASI PREFERRED INSURANCE CORPORATION,

Appellee.

ANSWER BRIEF

OF

ASI PREFERRED INSURANCE CORPORATION

On Appeal from the Ninth Judicial Circuit
Orange County, Florida
Lower Court Case No.: 2015-CA-6586

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STATEMENT OF THE CASE AND FACTS

I. STATEMENT OF THE FACTS

Appellee, ASI Preferred Insurance Corp ("ASI") issued a homeowner's insurance policy to Alex Tchekmeian ("Mr. Tchekmeian"). (R. 135, 184). Wells Fargo Bank NA #936 ISAOA/ATIMA ("Wells Fargo") is a named mortgagee under this policy. (R. 79, 132, 195).

The policy includes a condition on assignments of claim benefits that requires the consent of all insureds and all named mortgagees:

> **SPECIAL PROVISIONS FOR FLORIDA**
> * * *
> **SECTION I – CONDITIONS**
>
> *** * ***
>
> **18. Assignment of Claim Benefits.** *No assignment of claim benefits*, regardless of whether made before loss or after loss, *shall be valid without the written consent of all 'insureds', all additional insureds and* <u>*all mortgagee(s)*</u> named in this policy.
>
> *** * ***

(emphasis added).[1]

According to the Amended Complaint, on or about May 1, 2015, Mr. Tchekmeian's home was damaged by a water event. (R. 135). Mr. Tchekmeian

[1] Restoration's Amended Complaint referenced the insurance policy and attached the purported written "assignment," thereby incorporating them both. (R. 135, 142); *see One Call Prop. Servs. Inc. v. Sec. First Ins. Co.*, 165 So. 3d 749 (Fla. 4th DCA 2015) (holding that the trial court properly considered the contents of the insurance policy that was filed in connection with the insurer's motion to dismiss, where the complaint impliedly incorporated the policy by reference); *Veal v. Voyager Prop. & Cas. Ins. Co.*, 51 So. 3d 1246 (Fla. 2d DCA 2011).

thereafter contracted with Appellant, Restoration 1 CFL, LLC ("Restoration") to fix the water damage and signed Restoration's blanket "Assignment of Insurance Benefits" agreement that purported to assign to Restoration the insurance rights, benefits and proceeds Mr. Tchekmeian had under "any applicable insurance policies . . . for services rendered or to be rendered by" Restoration. (R. 136, 142). Wells Fargo, a named mortgagee, did not sign or otherwise give written consent to the assignment as required by the ASI policy. (R. 142, 222).

Restoration submitted two invoices for the remediation work to ASI in the amounts of $10,390 and $13,127.15. (R. 151, 159). Restoration's Amended Complaint alleges ASI either did not pay or underpaid these invoices. (R. 136).[2]

II. STATEMENT OF THE CASE

On July 15, 2015, Restoration filed a two-count complaint for breach of contract and breach of contract "with implied equitable assignment of benefits" against ASI seeking recovery for the unpaid balance of the invoices. (R. 6-12). Alleging that it was "as an assignee of Alex Tchekmeian (hereinafter "Insured") pursuant to the valid assignment" or alternatively that it obtained an equitable assignment, Restoration asserted ASI had breached the insurance policy by failing to pay or by underpaying the bill as submitted. (R. 7). After ASI moved to dismiss

[2] The record also indicates that ASI sent Mr. Tchekmeian a letter in June 2015 explaining that Restoration had sent the purported assignment of benefits document but that the assignment was not valid because Wells Fargo did not consent. (R. 248).

the complaint, Restoration filed an Amended Complaint asserting the same two claims as the original complaint. (R. 134-159).

ASI moved to dismiss the Amended Complaint. (R. 160-249). It asserted that because Wells Fargo did not sign the Assignment of Insurance Benefits Agreement, and the Amended Complaint did not otherwise allege that Wells Fargo provided written consent to the purported assignment, the assignment was "facially invalid and unenforceable." (R. 161). And, without a valid and enforceable assignment, Restoration had no standing to sue under the policy. (R. 161, 163-167). ASI also asserted that the "assignment in equity based upon contracted services" claim in Count II failed as a matter of law. (R. 162, 168-173).

ASI explained that the policy did not require the insured to obtain *ASI's* consent to the assignment of claim benefits, but instead protected all insureds (including a named mortgagee) by ensuring they all consented to an assignment that would potentially affect their rights to claim benefits under the policy. (R. 163-168). Given that the assignment Restoration relied upon did not have the consent of the named mortgagee, as the contract required, ASI argued the assignment was invalid. (R. 167).

Restoration responded first by asserting that ASI lacked standing to contest the validity of the assignment. (R. 287-288). Restoration next argued that the assignment of claim benefits clause in the policy was invalid because it prohibited

Mr. Tchekmeian from freely assigning the rights to his post-loss benefit. (R. 288-292). In support, Restoration relied upon case law that prohibits an insurer from requiring the *insurer's* consent to a post-loss assignment of claim benefits and an Office of Insurance Regulation ("OIR") determination regarding a different insurer's assignment of benefits clause. (R. 288-292).

Alternatively, Restoration argued that the assignment was valid under either an equitable assignment theory or apparent authority theory that it claimed was properly pled in the Amended Complaint. (R. 292-294). Restoration did not seek leave to further amend its allegations or argue that a further amendment would cure any defects in the Amended Complaint.

ASI replied first by asserting that it had standing to enforce the terms of the insurance policy between ASI and Mr. Tchekmeian that required him to obtain the consent of the named mortgagee, Wells Fargo. (R. 296-298). ASI then explained that the case law prohibiting an insurer from requiring its consent to a post-loss assignment of claim benefits was inapplicable because ASI's contract does not require the insurer's consent. (R. 298-302). Instead, Wells Fargo—as the named mortgagee—has an insurable interest in the property, and Florida law allows an insurer to require the consent of the mortgagee in order to protect the mortgagee's interest in the claim benefits. (R. 298-302). ASI then reiterated its argument regarding the failure of Restoration to properly plead equitable assignment and

apparent agency and explained that without allegations regarding Wells Fargo's consent to the assignment, these arguments failed as a matter of law. (R. 302-303).

Restoration filed a Supplemental Response, Cross-Motion for Partial Summary Judgment, and Request to Take Judicial Notice. (R. 423-731). Restoration reiterated its prior arguments. (R. 425-426, 427-437, 438-441).

Following the hearing on the motion to dismiss, the trial court granted ASI's motion. (R. 739). The trial court reasoned that "the mortgagee has a higher interest under the insurance policy and it is not unlawful to require the mortgagee's consent to an assignment of benefits." (R. 739). At Restoration's request, the trial court entered final judgment on March 6, 2017. (R. 747). Restoration then timely filed its notice of appeal.

SUMMARY OF ARGUMENT

The trial court properly dismissed Restoration's breach of contract action. The assignment of claim benefits provision lawfully requires an assignment of claim benefits to have the written consent of all insureds and mortgagees named in the policy. Because Restoration's Amended Complaint does not allege that the named mortgagee—Wells Fargo—consented to the assignment, Restoration's assignment is invalid.

It is the duty of courts to enforce private contracts unless they are against public policy. The assignment of benefits provision here imposes a permissible condition precedent to ASI honoring an assignment. This condition precedent is not against public policy. The provision protects all insureds, including named mortgagees like Wells Fargo, that have a vested interest in the claim benefits being assigned.

The narrow, common law rule Restoration relies upon is inapplicable, and it should not be extended to invalidate ASI's provision. That common law rule holds that an assignment clause requiring the *insurer's consent* to an assignment of post-loss benefits will not be enforced. The rationale for this rule is that the clause is superfluous because the *insurer's rights and interests* are not affected by such an assignment. That case law does not apply here because this assignment provision does not require ASI's consent. Instead, it simply requires the consent of those

with a vested interest in the benefits being assigned, including the named mortgagee who typically has a priority right and interest in those benefits. And, unlike in the insurer's consent context, here the insurer's rights and interests are affected if the clause is not enforced because permitting one insured to unilaterally assign the claim benefits impacts the insurer's statutory duties to all insureds and named mortgagees. Given the courts' fundamental duty to enforce private contracts absent a clear directive from the Legislature that it violates public policy, the common law rule that is limited to insurer's consent clauses should not be judicially extended to a provision that protects parties with a vested interest in the insurance proceeds being assigned.

In an effort to avoid these well-settled principles, Restoration asserts the assignment of benefits provision should not be enforced for two other reasons. Both reasons should be rejected. First, Restoration argues that a right to insurance proceeds is a property right to which rules regarding alienation apply. Procedurally, this argument was not preserved below. It was never raised before the trial court and is therefore waived on appeal. If considered on the merits, this argument should be rejected. Florida law dictates that any property right arising out of the contract is subject to the contractual restraints on assignment. Secondly, Restoration argues that the OIR has found ASI's assignment of benefits provision

violates Florida law. In fact, the OIR has never found that ASI's provision violates Florida law, and thus, the provision remains enforceable.

Restoration next asserts that ASI does not have standing to contest the validity of the assignment. This argument also fails. ASI is a party under the contract whose obligations Restoration seeks to enforce. That contract requires Mr. Tchekmeian to obtain the consent of all parties with a vested interest in the claim benefits before the right to those benefits can be assigned. ASI is simply enforcing the provision in the contract, and as such, has standing to raise Mr. Tchekmeian's noncompliance with this condition precedent.

Restoration's equitable assignment or agency arguments should also be rejected. Restoration did not properly plead an equitable assignment or agency theory. Restoration simply alleged that Mr. Tchekmeian intended to assign the benefits to Restoration and added a conclusory allegation that all conditions precedent to assignment were satisfied or waived. Restoration failed to allege an essential element of equitable assignment: that *all* parties to the contract had acted as if they had consented to the assignment. And, given that Restoration never moved for leave to further amend its allegations or otherwise asserted that it could cure the defects in its claims, Restoration cannot now argue a further amendment is appropriate or that issues of fact remain. Finally, if this Court were to find that the trial court reached the right result but for the wrong reason, it may still utilize the

tipsy coachman doctrine to affirm the trial court's decision. Accordingly, the trial court's order on appeal should be affirmed.

ARGUMENT

I. STANDARD OF REVIEW

The standard of review on an order granting a motion to dismiss is *de novo*. *Morin v. Fla. Power & Light Co.*, 963 So. 2d 258, 260 (Fla. 3d DCA 2007). This standard applies to each of Restoration's arguments on appeal.

II. THE ASSIGNMENT OF BENEFITS PROVISION DOES NOT REQUIRE THE INSURER'S CONSENT; THEREFORE, THE NARROW COMMON LAW RULE PRECLUDING ENFORCEMENT OF A CLAUSE REQUIRING THE INSURER'S CONSENT TO A POST-LOSS ASSIGNMENT OF BENEFITS DOES NOT APPLY.

The assignment of benefits provision is clear: for an assignment to be valid, it must include the written consent of all insureds and named mortgagees in the policy. This provision is a permissible condition precedent to the disbursement of claim proceeds and is consistent with Florida law and public policy because it protects those with a vested interest in the claim benefits. It is undisputed that Restoration failed to obtain the named mortgagee's written consent to the assignment. As such, that assignment is invalid; and, without a valid assignment, Restoration lacks standing to sue for breach of contract.

A. A narrow common law rule precludes enforcement of a contract provision requiring the insurer's consent to a post-loss assignment of benefits.

Florida common law has long-recognized a narrow exception to the fundamental freedom to contract. That exception prohibits an insurer from requiring an insured to obtain the insurer's consent to an assignment of post-loss claim benefits; such provisions are invalid as a matter of common-law public policy. *W. Fla. Grocery Co. v. Teutonia Fire Ins. Co.*, 77 So. 209, 210-11 (Fla. 1917) ("[I]t is the 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."). *See also Bioscience W., Inc. v. Gulfstream Prop. & Cas. Ins. Co.*, 185 So. 3d 638, 643 (Fla. 2d DCA 2016) ("[P]ost-loss insurance claims are freely assignable without the consent of the insurer." (citations omitted)).

The rationale for this rule is that the consent of the insurer to post-loss claim benefits is "superfluous" because the insurer's rights and interests are in "no way affected by" the assignment. *See W. Fla. Grocery*, 77 So. at 211(quoting *Ga. Co-Operative Fire Ass'n v. Borchardt & Co.*, 51 S.E. 429, 430 (Ga. 1905) and directed the reader to the notes of that case in 3 Ann. Cas. 472). Recently, the Second District expressed the additional concern that the insurer, as the obligor, could delay repairs by delaying or withholding its consent to assignment, thus injuring the public without any commensurate justification for the interference. *See, e.g.*,

Bioscience W., Inc., 185 So. 3d at 643 (explaining that it is "imprudent to place insured parties in the untenable position of waiting for the insurance company to assess damages any time a loss occurs.").

In the Georgia Supreme Court decision relied upon by the Florida Supreme Court in *West Florida Grocery*, that court further explained that:

> No right of the *insurer* being affected by the assignments of the policies, *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.

Ga. Co-Operative, 51 S.E. at 430 (emphasis added).

In such circumstances, the assignee simply stands in the shoes of the assignor. *Id.* Any valid defense the insurer had against the insured could be asserted against the assignee (such as denial of coverage), and as such, there is no basis for the insurer to deny the validity of the assignment. *Id.* Its rights have been unaffected by the assignment, and public policy prevents it from obstructing the ability of the insured to timely obtain relief from the loss. *See Bioscience W., Inc.*, 185 So. 3d at 643. This narrow common law rule is a judicial public policy decision that balances competing policy considerations in favor of prohibiting insurance companies whose rights are not affected by a post-loss assignment from obstructing an assignment.

The judicial public policy decision at common law to not enforce "insurer's consent" clauses does not mean, as Restoration asserts, that Florida law has a general rule against restrictions on assignments. (I.B. 16-21).[3] In fact, Florida law expressly provides that an insurance contract "may be assignable, or not assignable, as provided by its terms." Fla. Stat. § 627.422 (2012); *Lexington Ins. Co. v. Simkins Indus., Inc.*, 704 So. 2d 1384, 1386 (Fla. 1998); *One Call Prop. Servs., Inc.*, 165 So. 3d at 752.

Under these circumstances, as discussed next, Florida courts should not extend this narrow common law exception beyond insurer's consent clauses. As three of this Court's sister courts have recently decided, the competing interests involved in any modification of the "insurer's consent" clause common law rule is a public policy decision to be made by the Legislature, not the judiciary. *See id.* at 755 (noting that the legislature was in the best position to weigh the competing interests and determine public policy); *Sec. First Ins. Corp. v. State, Office of Ins. Regulation*, 177 So. 3d 627, 630 (Fla. 1st DCA 2015) ("[I]t is for the legislative branch to consider this public policy problem, not the courts at this juncture . . .

[3] As elaborated below in Section II.B., Restoration's argument that the rules regarding alienability of property rights and its confusing argument that the "rule against restrictions" prohibits an assignment of benefits clause from including conditions that have "the effect of nullifying" the clause or "diluting its value" were never raised before the trial court. (I.B. 10-21). As such, that argument was not preserved and is waived on appeal.

courts are ill-equipped to pass judgment on the merits of the policy debate at hand, and less likely to be able to formulate a remedy that is mutually beneficial to insureds and insurers."); *Bioscience W., Inc*., 185 So. 3d at 643 ("We are mindful that there are competing policy considerations here. These policy decisions are for the legislature to decide, not our court.").

B. Florida law favors enforcement of contract absent a violation of law or public policy.

Restoration fails to acknowledge that 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). "It is only in clear cases that contracts will be held void as contrary to public policy as 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, 101 (Fla. 1944) (reversing lower tribunal determination that contract was void as against public policy).

Consequently, Florida courts have exercised "extreme caution" before invaliding a contractual provision freely entered into by private parties:

> [C]ourts should be guided by *the rule of extreme caution* when called upon to declare transactions void as contrary to public policy and should refuse to strike down contracts involving private relationships on this ground, unless it be made clear to appear that there has been some great prejudice to the dominant public interest sufficient to overthrow the fundamental public policy of the right to freedom of contract.

Johnson, Pope, Bokor, Ruppel & Burns, LLP v. Forier, 67 So. 3d 315, 318 (Fla. 2d DCA 2011) (internal quotation marks omitted).

Moreover, "if [an insurance] policy provision is clear and unambiguous, it should be enforced according to the terms whether it is a basic policy provision or an exclusionary provision." *Hagen v. Aetna Cas. Sur. Co.*, 675 So. 2d 963, 965 (Fla. 5th DCA 1996). Courts may not "rewrite contracts, add meaning that is not present, or otherwise reach results contrary to the intentions of the parties." *Id.*; s*ee also State Farm Mut. Auto. Ins. Co. v. Pridgen*, 498 So. 2d 1245, 1248 (Fla. 1986). Thus, under Florida law, the intent of the parties as reflected within the contract is paramount.

Accordingly, conditions on assignability are a matter of contract to be determined by the parties. *See Abraham K. Kohl, D.C. v. Blue Cross & Blue Shield of Fla., Inc.*, 955 So. 2d 1140, 1143 (Fla. 4th DCA 2007) ("All contractual rights are assignable *unless the contract prohibits the assignment*, the contract involves obligations of a personal nature, or *public policy dictates against the assignment*." (internal quotation marks omitted)). The only restriction on that right are clear pronouncements from the Legislature. *See Univ. of Miami v. Echarte*, 618 So. 2d 189, 196 (Fla. 1993) (noting that "[t]he Legislature has the final word on declarations on public policy."); *see also Griffin v. ARX Holding Corp.*, 208 So. 3d 164, 170-72 (Fla. 2d DCA 2016) (recognizing that courts should not ignore

legislative directives regarding the insurance business where they appear to protect the public welfare).

In sum, with no insurer's consent clause at issue and with no "great prejudice to the dominant public interest sufficient to overthrow the fundamental public policy of the right to freedom of contract," *Johnson, Pope, Bokor, Ruppel & Burns, LLP*, 67 So. 3d at 318, this Court should uphold the freedom to contract and enforce ASI's assignment provision. Any decision to do otherwise is a public policy judgment for the Florida Legislature.

C. A contract may require all insureds and mortgagees with a vested interest to consent to an assignment of claim benefits; this rule does not violate public policy.

ASI's assignment of benefits provision is consistent with Florida law and public policy, which permits parties to condition the assignment of claim benefits on obtaining the consent of all insureds and named mortgagees with a vested interest in those benefits. Such a provision is not an impermissible anti-assignment clause as Restoration argues; it is simply a condition precedent to the payment of claims benefits.

Restoration relies on case law concerning the consent of the *insurer*, not co-insured, to post-loss assignments for its convoluted contention that there is some generic rule prohibiting *any* conditions on post-loss assignments. (I.B. 9-10, 16-21). Specifically, the Florida cases Restoration relies on have only declined to

enforce an insurance contract provision which required the insured to obtain *the insurer's consent* to the assignment of post-loss benefits. (I.B. 9-10 (citing *Bioscience W., Inc.*, 185 So. 3d at 642-43 ("[P]ost-loss assignments do not require an insurer's consent"); *Sec. First*, 177 So. 3d at 628 (policyholders have the right to assign proceeds without insurer consent); *W. Fla. Grocery*, 77 So. at 210-11 (recognizing that consent of insurer is not required for post-loss assignment)).

There is no basis to extend this narrow insurer's consent exception to the assignment of benefits clause at issue here. First, unlike the insurer consent cases, here only the parties with a direct and vested interest under the contract to the proceeds being assigned (and the repair work being done correctly)—the insureds and the named mortgagee in this case—must consent to the assignment. Their consent is not "superfluous" because the named mortgagee and insureds have an interest affected by the assignment. *See W. Fla. Grocery*, 77 So. at 211(quoting *Ga. Co-Operative*, 51 S.E. at 430). Moreover, addressing the Second District's concern in *Bio Science West, Inc.*, the assignment of claim benefits clause here does not give the insurer the right to give or withhold consent to the assignment of claim benefits or to otherwise delay the repairs.

Requiring the named mortgagee's consent is particularly appropriate. A mortgagee named in the policy has a vested interest in mitigation and loss payments made under such a policy. Its mortgage gives it an interest in protecting

the property and the policy acknowledges that interest. As such, Florida has long recognized a mortgagee's interest in any insurance proceeds derived from insurance which protects the mortgagee's interest in the insured property. *See Langford v. Wauchula State Bank*, 148 Fla. 236, 4 So. 2d 10 (1941); *Atwell v. W. Fire Ins. Co.*, 120 Fla. 694, 163 So. 27 (1935); *Nat'l Title Ins. Co. v. Lakeshore 1 Condo. Ass'n*, 691 So. 2d 1104 (Fla. 3d DCA 1997). This includes, but is not limited to, the express interests in any loss payable under Coverage A or B, and any payments made therefor, pursuant to the mortgage clause of the policy.

Mortgagees named in an insurance contract also have a vested interest in ensuring that any damage to the property given as security for its loan is properly repaired. Payment of insurance benefits in a proper amount for the proper repair or mitigation of damage to its security is of vital interest to any such named mortgagee. A named mortgagee also has an interest in avoiding unnecessary litigation with the insurer, its borrower and any purported assignee of benefits after payment has already been issued by the insurance company, especially if the assignment was contrary to the terms of the insurance contract. Additionally, requiring the consent of insureds and the named mortgagee to such an assignment protects these co-insureds from losing their respective rights and benefits under the insurance policy without their knowledge and consent. *See Sumlin v. Colo. Fire Underwriters*, 158 Fla. 95, 98 (Fla. 1946).

Second, Florida law has long-recognized that an insurer may write a policy to impose reasonable conditions precedent on the payment of claims designed to protect the interests of the insurer, other insureds, and named mortgagees. *See, e.g.*, *Cont'l Cas. Co. v. Shoffstall*, 198 So. 2d 654, 657 (Fla. 2d DCA 1967) ("[T]he requirements in the standard insurance policy that the insured shall give notice of loss and make proofs of loss are conditions precedent to the right to sue."). In such circumstances, the failure to comply with that condition precedent relieves the insurer of its duty to make payment. *See Edwards v. State Farm Fla. Ins. Co.*, 64 So. 3d 730, 731 (Fla. 3d DCA 2011) ("Failure to comply with a condition precedent to payment relieves the insurer of its duty to make payment.").

Finally, the logical conclusion of Restoration's generic rule would be that one party to an insurance policy may unilaterally assign benefits to a third party without the consent of others with a vested interest in those benefits. That conclusion is untenable. For example, it would condone partial assignments of the same claim benefits by only one of multiple insureds with a vested interest in those benefits. This would improperly lead to split causes of action by the insureds and named mortgagees who did not consent to the assignment. *See MDS (Canada), Inc. v. RAD Source Techs., Inc.*, 720 F.3d 833, 857 (11th Cir. 2013) (Pryor, J. concurring) (explaining that a transfer of less than all the rights to the contract assigned would wrongly permit both the assignor and assignee to sue the obligor in

split causes of action). And, given the insurer's statutory duty to act in good faith regarding *all* insured's interests, Fla. Stat. § 624.155, the insurer's interest in preventing such split causes of action is not "superfluous" at all.

In short, requiring the consent of those with a vested, contractual right in and to the claim benefits being assigned does not prevent the assignment of those benefits; it simply protects all parties with a vested interest. This clause is not an anti-assignment clause as Restoration mischaracterizes it; and it does not violate the narrow common law exception to freedom of contract prohibiting a clause that requires an insurer's consent to post-loss assignment of benefits.

This Court should not extend the common law rule refusing to enforce insurer's consent clauses to the ASI clause. Unlike an insurer, the insureds and named mortgagees have a vested interest in whether and how the post-loss benefits are assigned—making the public policy reasoning for the common law rule inapplicable. And because "the Legislature has the final word on declarations of public policy," *Echarte*, 618 So. 2d at 196, this Court should not exercise the powers delegated to the legislative branch and extend the limited common law rule refusing to enforce insurer consent clauses. ASI's assignment of benefits clause should be upheld and the trial court's dismissal affirmed.

D. There is no other basis to invalidate the assignment of benefits provision.

Restoration raises two additional arguments. The first argument is that the OIR has found the provision violated Florida law. The second argument is that the rules regarding restraints on alienability applicable to property rights also applies to rights to insurance proceeds. Both arguments fail.

1. The OIR has not determined that ASI's assignment of benefits provision violates Florida law.

Contrary to Restoration's assertion, the OIR has not questioned or challenged the enforceability of ASI's assignment provision. ASI submitted the required certified, informational filing to the OIR, which includes the policy language at issue. (R. 222). Since that filing, the OIR has not taken any action against ASI based on its disapproval of language in another insurer's policy. Thus, at most, the OIR's long, post-submission failure to disapprove or otherwise question ASI's right to include this language in its policies is entitled to deference by this Court and supports affirmance of the order on appeal here. This is especially so because the OIR is statutorily required to retroactively disapprove any submitted forms that do not meet the requirements of the code. *See* Fla. Stat. § 627.411(1). It has not done so regarding ASI's policy.

Restoration's argument relies on its assertion that the OIR rejected a later application of another insurer, Security First Insurance Company ("Security

First"), as well as the submission of Heritage Property & Casualty Insurance Company ("Heritage"). (I.B. 23). Restoration vaguely suggests that these communications by the OIR are rulings binding on this Court in its consideration of the ASI policy. (I.B. 23). In addition to the fact that the OIR has never rejected or otherwise disapproved of ASI's form, this argument is flawed for at least two reasons.

Most importantly, neither Security First nor Heritage's assignment of benefits provisions are identical to ASI's provision. For example, Security First's policy proposed amendment contains this extra requirement not found in ASI's contract:

> a. For any assignment of benefits after a loss:
> (1) You must disclose the assignment to us prior to the payment of any claim; and
> (2) You must comply with all of the Section I – Conditions, B. Duties After Loss. We have no duty to provide coverage under this policy if you fail to comply with these duties.

(R. 529). Heritage's provision, which it subsequently withdrew, is virtually identical to Security First's. (R. 440, 626). The ASI policy at issue here does not include this same language. (*Compare* R. 222).

The OIR must read the assignment of claim benefits provisions of these policies as a whole, commensurate with standard rules of contractual interpretation. *See Wash. Nat'l Ins. Corp. v. Ruderman*, 117 So. 3d 943, 948 (Fla.

2013) ("In construing insurance contracts, 'courts should read each policy as a whole, endeavoring to give every provision its full meaning and operative effect,'" (quoting *U.S. Fire Ins. Co. v. J.S.U.B., Inc.*, 979 So. 2d 871, 877 (Fla. 2007)). These provisions in their entirety create the potential for different implications on coverage depending on the facts and circumstances surrounding an assignment and a claim. They are materially different in that regard from ASI's policy—and thus, the OIR's consideration of the other companies' policies is inapplicable to this case.

Second, the OIR's decision regarding Security First is not final. That decision is currently on appeal before the Fifth District Court of Appeal and thus may be overturned. *See Sec. First Ins. Co. v. Fla. Office of Ins. Regulation*, case no. 5D16-3425 (oral argument scheduled for October 12, 2017).[4] And while an agency decision on a particular case is entitled to deference by the appellate court when that decision is on direct appeal, *see BellSouth Telecomm., Inc. v. Johnson*, 708 So. 2d 594 (Fla. 1998), that deference does not extend to an agency decision involving an unrelated insurer in an unrelated appeal.

[4] A nearly identical appeal not involving the OIR as a party but raising the same issues in this appeal is pending in the Second District Court of Appeal: *Bio Logic, Inc. v. ASI Preferred Ins. Corp.*, case no. 2D16-3798. That court heard oral argument on August 23, 2017.

In sum, Restoration's assertion that the OIR has rejected the language in ASI's provision is false. ASI's language has never been rejected, and the OIR's decision to reject different language from different insurer's contracts is irrelevant to the provision on appeal before this Court.

2. Restoration never raised an argument that rights to insurance proceeds are subject to rules regarding alienability. If considered, the argument fails as a matter of law.

Restoration spends much of its Initial Brief proffering a convoluted argument that the rules of free alienability of personal property apply to the assignment of contractual claims to insurance benefits. (I.B. 10-21). This argument was never raised or argued before the trial court. Accordingly, this argument was not preserved and cannot be considered on appeal. *See Sunset Harbour Condo. Ass'n v. Robbins*, 914 So. 2d 925, 928 (Fla. 2005) ("In order to be preserved for further review by a higher court, an issue must be presented to the lower court and the specific legal argument or ground to be argued on appeal or review must be part of that presentation if it is to be considered preserved." (internal quotation marks omitted)).

If the Court were to consider the merits of Restoration's unpreserved argument, it should be rejected because the case law on which Restoration relies (almost entirely from jurisdictions outside Florida) involves alienability of tangible property, not the assignment of claim to benefits under an insurance contract. *See,*

e.g., *Tully v. Mott Supermarkets, Inc.*, 337 F. Supp. 834, 846 (D.N.J. 1972); *Sebastian Int'l, Inc. v. Consumer Contacts (PTY), Ltd.*, 847 F.2d 1093, 1096 (3d Cir. 1988); *In re Winters*, 69 B.R. 145, 147 (Bankr. D. Or. 1986).

Instead, Restoration cites marginally-tangential principles of property law to ask this Court to travel down the following distorted path: Restraints on transfers of personal property are generally disfavored; real property is similar to personal property; a contractual right to an insurance claim is a personal property right; and thus a restraint on alienability of insurance proceeds should require ASI to meet some "high burden" given the "rule against restrictions." (I.B. 10-21). And ASI cannot meet this "high burden" based on cases discussing anti-assignment clauses in the *insurer's* consent context. (I.B. 16-21). This unpreserved argument, for which Restoration cites no cases actually in support, is nonsensical.

ASI's provision requiring that a named mortgagee—who has an insurable interest in the damaged real property—agree to an assignment of its contractual benefits if that real property is damaged is far different from the case law Restoration cites. For example, in *Aquarian Foundation, Inc. v. Sholom House, Inc.*, 448 So. 2d 1166, 1166 (Fla. 3d DCA 1984), the Association gave *itself* the right to withhold consent to transfer of property ownership. Thus, *Aquarian* is, at best, consistent with cases in which an insurance policy required the *insurer's* consent—an issue not found in the policy here. Meanwhile, to the extent the

dissent in *Metro. Dade County v. Sunlink Corp*, 642 So. 2d 551 (Fla. 3d DCA 1994); and the *New York trial court order* in *Celauro v. 4C Foods Corp*, 958 N.Y.S.2d 644 (Sup. Ct.), could have some persuasive value, neither case involves insurance policies or assignment of contractual rights, and neither are binding on this Court.

Accordingly, Restoration's unpreserved argument fails as a matter of law.

III. ASI HAS STANDING TO CONTEST THE FAILURE TO OBTAIN WELLS FARGO'S CONSENT TO THE ASSIGNMENT.

Restoration's argument that ASI lacks standing to contest Mr. Tchekmeian's failure to comply with the conditions precedent in the insurance contract is self-contradicting and should be rejected. Restoration contends that ASI cannot enforce the assignment of claim benefits clause in the ASI insurance policy because ASI is not a party to the attempted assignment of a claim benefit. (I.B. 23-24). Yet, Restoration at the same time contends the assignment gives it standing to challenge the validity of a clause in a contract to which it was not a party. (I.B. 23-24). In other words, Restoration suggests it is in contractual privity with ASI because of Mr. Tchekmeian's execution of the assignment, but ASI has no standing to enforce the policy's conditions precedent to a valid assignment because ASI is not privy to the assignment itself. This argument is nonsensical.

The case law Restoration cites does not support its argument. For example, *Lugassy v. Independent Fire Ins. Co.*, 636 So. 2d 1332 (Fla. 1994), which is most

heavily relied upon by Restoration, is not on point. (I.B. 23-24). In *Lugassy*, the insurance company attempted to challenge the validity of an amendment to a retainer agreement between the insured and its attorneys on the basis of lack of consideration. *Id.* at 1334-35. The Court found that the amendment was valid because there was consideration. *Id.* at 1335. And, unlike this case where ASI is enforcing the requirements of the agreement it entered into with the insured, in *Lugassy*, the insurance company was attempting to invalidate an amendment to a different agreement, not enforce the agreement it had signed. *See id.* The other main principle authority relied upon by Restoration, *Progressive Express Ins. Co. v. McGrath Community Chiropractic*, 913 So. 2d 1281, 1283, 1287 (Fla. 2d DCA 2005), is similarly inapposite. *Id.* (granting insurance company's motion to dismiss for lack of standing on the basis that the insured had failed to appropriately assign the PIP benefits at the time the lawsuit was filed).

ASI has standing to contest the validity of the purported assignment of rights under the insurance policy Restoration seeks to enforce against ASI by way of a breach of contract action. And, under the terms of that policy, the failure to comply with the condition precedent to a valid assignment— in this case, obtaining the consent of the named mortgagee—renders that assignment invalid.

IV. RESTORATION'S REMAINING ARGUMENTS FAIL AS A MATTER OF LAW.

A. The Amended Complaint did not allege a claim for equitable assignment.

Restoration argues that its Amended Complaint alleged an equitable assignment of the insurance benefits, and thus, the trial court erred in dismissing the Amended Complaint. (I.B. 25-26). This argument fails as a matter of fact and law.

The Amended Complaint does not allege an equitable assignment, and the cases Restoration cites do not support such a claim. An equitable assignment may only arise where *all* parties involved behave as though the contract was assigned. *See Giles v. Sun Bank, N.A.*, 450 So. 2d 258, 260-61 (Fla. 5th DCA 1984) (equitable assignment recognized when all parties to assignment and third party treated agreement as assigned). For example, in *SourceTrack, LLC v. Ariba, Inc.*, 958 So. 2d 523, 526 (Fla. 2d DCA 2007) the Second District Court of Appeal recognized an equitable assignment because all parties to the transaction in question —both parties to the assignment, as well as the insurer who was party to the underlying contract that was assigned—treated the contract as assigned, even if no formal assignment was memorialized in writing. *Id.* at 526. Indeed, the evidence for the insurer's consent was its agreement to make payments directly to the assignee. *Id.*

Restoration pled no facts alleging that either ASI or the named mortgagee behaved as though the insurance proceeds were assigned to Restoration. Instead, Restoration relies solely on its assertion that "[i]t was the intent of [Restoration] and [Mr. Tchekmeian] that the right to pursue a claim against [ASI] for the payment of [Restoration's] invoices . . . be transferred to [Restoration]." (R. 138). It is undisputed that only Mr. Tchekmeian consented to the assignment of the insurance proceeds to Restoration. Wells Fargo, the named mortgagee, is not alleged to have so consented. And there is no allegation that ASI ever treated the claim benefits as having been assigned. Without any allegation that the named mortgagee, Wells Fargo, and ASI consented or impliedly consented to the assignment, the equitable assignment claim fails as a matter of law.

B. The Amended Complaint did not allege an agency claim, and Restoration has waived its argument that it should be permitted to amend its allegations.

Restoration also asserts that the assignment is somehow valid because Mr. Tchekmeian "may have been acting as the mortgagee's agent," when he attempted to assign the insurance proceeds to Restoration. (I.B. 26). Restoration's Amended Complaint does not allege that Mr. Tchekmeian was Wells Fargo's agent. (R. 134-140). Restoration also asserts that it "could have amended the complaint to allege that the insured granted the [assignment of benefits] as an agent of the mortgagee." (I.B. 25).

Both arguments fail because Restoration cannot now assert on appeal that it may be able to plead agency when it never sought leave to amend or otherwise argued before the trial court that it could amend its allegations to state a claim. *See Merkle v. Health Options, Inc.*, 940 So. 2d 1190, 1198 (Fla. 4th DCA 2006) (party's failure to seek leave to amend waives on appeal the argument that it should have been permitted to amend allegations to add claim).

Restoration's assertion that its conclusory allegations satisfy the pleading requirements of the Florida Rules of Civil Procedure must be rejected as well. (I.B. 27). Florida is a fact pleading jurisdiction; Restoration may not survive a motion to dismiss on the basis of conclusory allegations and speculative assertions that there may be issues of fact that are not implicated by the allegations contained within its Amended Complaint. *See Horowitz v. Laske*, 855 So. 2d 169, 172-73 (Fla. 5th DCA 2003) ("Florida's pleading rule forces counsel to recognize the elements of their cause of action and determine whether they have or can develop the facts necessary to support it."). Accordingly, Restoration's allegations of an equitable assignment was properly dismissed with prejudice, and Restoration has waived any right to amend its allegations.

C. The tipsy coachman doctrine may be applied if needed.

The tipsy coach doctrine is a well-settled principle of appellate law. It allows an appellate court to affirm a trial court's decision that is right, but for the

wrong reason. *See, e.g., Salas v. State*, 972 So. 2d 941, 957 (Fla. 5th DCA 2007). The only limitation on this rule is that the support for the alternative theory or principle of law must be present in the record before the trial court. *See, e.g.*, *Porter v. Porter*, 913 So. 2d 691, 694 (Fla. 3d DCA 2005).

As such, and despite Restoration's argument to the contrary, this Court may affirm the dismissal of the Amended Complaint on any basis supported by the record below.

CONCLUSION

For the foregoing reasons, Appellee, ASI Preferred Insurance Corporation respectfully requests this Court affirm the judgment of the trial court.

Respectfully submitted,

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