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

RESTORATION 1 CFL, LLC
a/a/o Alex Tchekmeian,

Appellant,

v.

ASI PREFERRED INSURANCE CORP.,

Appellee.
_____/

Case No.: 5D17-755
L.T. Case No.: 2015-CA-6586

INITIAL BRIEF

ON APPEAL FROM
THE HON. BOB LEBLANC
NINTH JUDICIAL CIRCUIT COURT
IN AND FOR ORANGE COUNTY, FLORIDA

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INTRODUCTION AND QUESTIONS PRESENTED

Restoration 1 CFL LLC ("Restoration 1") appeals the order granting the motion to dismiss filed by ASI Preferred Insurance Company ("ASI"). Restoration 1 claims standing as the holder of a post-loss assignment of benefits ("AOB") from ASI's insured, Alex Tchekmeian.

In 2012, ASI inserted an anti-AOB clause into its policy, which the Office of Insurance Regulation never reviewed. Instead, ASI was permitted to certify – without review – that Florida law permitted it to disregard any AOB not signed by the mortgagee as well as the insured. Restoration 1 performed emergency water remediation at the residence of Mr. Tchekmeian. Restoration 1 eventually sued ASI, alleging underpayment. Because the mortgagee had not signed the AOB, the lower court found that Restoration 1 lacked standing because the AOB was invalid.

The questions presented in this case are:

1) Does Florida's rule against restrictions on AOBs prohibit an insurer from encumbering the homeowner's benefits with a restriction on alienation that requires third-party consent?

2) If so, does ASI have standing to contest the AOB where it is not a party to the assignment contract?

3) If so, can a motion to dismiss be granted where the unresolved issues of fact in this case are present?

4) Should the Court consider any other arguments raised in support of the decision below?

STATEMENT OF THE CASE AND FACTS

On or about May 1, 2015, the residence of Alex Tchekmeian ("the insured") was damaged by a water event. (R. 7). The insured contracted with Restoration 1 to provide emergency cleanup services, in exchange for an AOB. (R. 8). The AOB provided that:

> I, hereby, assign any and all insurance rights, benefits, proceeds and any causes of action under any applicable insurance policies to Restoration 1 . . . , for services rendered or to be rendered . . . . In this regard, I waive my privacy rights. I make this assignment in consideration of [the] Company's agreement to perform services and supply materials and otherwise perform its obligations under this contract, including not requiring full payment at the time of service. I also hereby direct my insurance carrier(s) to release any and all information requested by Company, its representative, and/or its Attorney for the direct purpose of obtaining actual benefits to be paid by my insurance carrier(s) for services rendered or to be rendered.

(R. 142). Restoration 1 submitted two invoices, in the amounts of $10,390 for "water mitigation estimate" (R. 159) and $13,127.15 for "mold remediation estimate." (R. 151). The amended complaint alleges that ASI breached the contract of insurance by leaving the invoices unpaid or underpaid. (R. 136). Restoration 1 claimed standing under the AOB and under an equitable assignment. (R. 138).

In the motion to dismiss (R. 160), ASI argued that the AOB violated the anti-assignment clause in the insured's policy (R. 161), which provided that "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 all mortgagee(s) named in this policy." (R. 222). Acknowledging recent cases rejecting various arguments that would restrict AOBs, ASI contended that the anti-assignment clause was legal because "this Assignment of Claim Benefits provision does not prohibit assignment or require that the insurer consent to any assignment. Instead ... the provision merely requires that those with an interest in the policy benefits, all 'insureds', additional insureds and named mortgagees give written consent to such an assignment." ASI contended that the clause "seeks to protect all parties with an insurable interest in the subject property, who would necessarily be affected by assignment of rights under the policy to a third party." (R. 165).

As for the assignment in equity, ASI argued that no equitable remedy existed because Restoration 1 had an adequate remedy at law. (R. 168). ASI also claimed that the amended complaint failed to allege that ASI itself intended to create an equitable assignment (R. 170), that Restoration 1 could not have reasonably relied on any assignment (R. 171), and that Restoration 1's hands were unclean. (R. 172). According to ASI, these arguments corresponded to fatal flaws in any assignment in equity.

In response, Restoration 1 explained that ASI was not a party to the assignment, and that only the homeowner could challenge the AOB's validity. (R. 287). Restoration 1 also contended that the provision was functionally an anti-assignment clause which violated Florida's rule against restrictions on AOBs. (R. 288-92). ASI's actions were not relevant to whether there existed an assignment in equity; the equitable assignment could be established by the conduct of the insured. (R. 293). Finally, the insured was an authorized agent of the mortgagee, empowered to assign the relevant benefits on its behalf. (R. 293-95).

In the reply, ASI claimed standing to challenge the AOB (R. 296-96), and that Florida's rule against restrictions on AOBs did not extend beyond provisions requiring insurer consent to assignment. (R. 298-301). ASI also argued that the doctrine of apparent agency did not apply where only the insured represented he was authorized to act for the mortgagee (R. 203).

Restoration 1 then filed a supplemental response and cross-motion for summary judgment. (R. 423). It argued that an AOB conveyed standing as long as it was executed by "an individual with an insurable interest." (R. 425). ASI could not legally restrict an insured's right to assign benefits (R. 427-30). Restoration 1 included additional authority for positions advanced earlier, most notably documents showing that the Office of Insurance Regulation ("OIR") had rejected

similar language and that ASI's anti-assignment clause had been added during a window wherein the OIR did not review policy changes. (R. 438-42).

A hearing occurred on February 9, 2017. (R. 764). The court reasoned that, in order to hold the anti-assignment clause enforceable, he would "have to specifically find that a mortgagee is not in the same position as an insured. It just makes more sense to me that they have a higher interest . . . ." (R. 788). The fact that the insurance policy was not lender-placed did not change the court's conclusion, (R. 788-89), nor did case law refusing to enforce a requirement that all insureds must sign any AOB. (R. 792-94). Ultimately, the court reasoned that:

> I guess we all look at things differently; don't we? I mean, I completely agree with the courts as to the insured and additional insureds, but I'm specifically finding that a mortgagee has a higher interest, and, therefore, it is not unlawful to require a mortgagee's consent to an assignment of benefits; and so I guess the motion to dismiss is granted.

(R. 796). "[A] mortgagee is in a different position that the insurance company, and you're not going to get me to change my mind on that, unless an appellate court tells me I'm stupid, which they have before." (R. 797-98).

On February 16, 2017, the court entered an order dismissing the complaint because "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).

Restoration 1 appeals.

SUMMARY OF ARGUMENT

After a loss, the insured's right to benefits becomes a vested personal property right: a *chose in action*. The right to insurance benefits is freely assignable after a loss occurs. Whatever right the mortgagee retains is not impaired by the substitution of an AOB-holder for the insured. Permitting the insurer to invoke a mortgagee consent clause, especially in the absence of any indication that the mortgagee objects, is to allow an end run around Florida's rule against restrictions on AOBs. Wells Fargo can raise any issues with the allocation of benefits with Restoration 1, instead of with Mr. Tchekmeian.

Additionally, ASI lacks standing to argue that the AOB is invalid because it is not a party to the AOB contract. Even if the anti-assignment clause were valid and enforceable, dismissal would be inappropriate at this stage because Restoration 1 has alleged that an equitable assignment existed, and that the insured was authorized to act on behalf of the mortgagee.

STANDARD OF REVIEW

This appeal presents an issue of law that is reviewed de novo. *Scott v. Busch*, 907 So.2d 662, 665 (Fla. 5th DCA 2005); *Regis Ins. Co. v. Miami Mgmt., Inc.*, 902 So. 2d 966 (Fla. 4th DCA 2004) (stating that because a ruling on a motion to dismiss raised issues of law, it is reviewed de novo); *McKey v. D.R. Goldenson & Co.*, 763 So. 2d 409 (Fla. 2d DCA 2000) (holding failure to state a cause of action is question of law reviewed by de novo standard); *Palumbo v. Moore*, 777 So.2d 1177, 1178 (Fla. 5th DCA 2001) ("Generally, the standard of review of an order dismissing a complaint with prejudice is de novo.").

ARGUMENT

This case is about standing only. ASI contends that the mortgagee's interest justifies its anti-AOB clause, rendering it enforceable in the face of cases holding that assignability may not be impaired.

The extent of the mortgagee's interest here is not clear, however. The mortgagee, Wells Fargo, has not appeared, and has taken no position on whether it has any interest in the benefits owed to Restoration 1. Indeed, the mortgage agreement itself is not in the record, and ASI has not even established the amount of Mr. Tchekmeian's debt. ASI's position raises many questions that, fortunately, are not currently before the Court.

For example, it is not necessary to identify now the precise insurable interests of the homeowner or the mortgagee, Wells Fargo. 44 Am. Jur. 2d Insurance § 945 (explaining that "a mortgagee's insurable interest . . . is limited to the amount of the debt"); Couch on Insurance, § 42:32; 44 Am. Jur. 2d Insurance § 946 (describing mortgagor's insurable interest in property "to the extent of its full value"); 44 C.J.S. Insurance § 340. Nor is it necessary to determine whether Wells Fargo's interest could extend beyond "any loss payable under coverage A or B," which "will be paid to the mortgagee and [the insured], as interests appear." (R. 91). Similarly irrelevant is whether Mr. Tchekmeian's mortgage grants Wells Fargo rights to the proceeds, or merely to have them applied to protection of the property. 54A Am Jur 2d Mortgages § 239; Couch on Insurance, § 65:2 (observing that only terms of contract, and not mortgage relationship itself, create right of mortgagee to receive proceeds).

In this appeal, it is enough to observe that the homeowner does have a separate interest in insurance proceeds. 44 Am. Jur. 2d Insurance § 944 ("The insurable interest of the mortgagee in the mortgaged property is entirely separate and distinct from that of the mortgagor"); Couch on Insurance, §42.28. It is only Mr. Tchekmeian's interest that was assigned, and grants standing to Restoration 1 here. Just as Mr. Tchekmeian could contest whether ASI underpaid him, so too can Restoration 1. In the event any hypothetical dispute about allocating those benefits

materializes, Wells Fargo can take up the issue with Restoration 1, as it would otherwise against Mr. Tchekmeian.

Because Florida law prohibits ASI's anti-assignment clause, the AOB is valid, and Restoration 1 has standing to sue for breach of contract. This case should be reversed and remanded for further proceedings.

I. ASI's anti-assignment clause violates Florida's rule against restrictions on AOBs.

ASI seeks to create a loophole in the rule against restrictions on AOBs. 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"). In the face of novel arguments against that doctrine, Florida courts have reaffirmed as black-letter law the rule against restrictions on AOBs. *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"). Indeed, Courts have remarked upon "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).

ASI now argues that it can condition the right to assign benefits on the approval of a third party, the mortgagor. Again, due to the novelty of the legal arguments advanced in this campaign against AOBs, no mandatory authority squarely addresses whether the law permits such a restriction. The issue is pending before this Court, in *Security First Insurance Company v. Florida Office of Insurance Regulation*, No. 5D16-3425, and the Second DCA. *Bio Logic Inc. v. ASI Preferred Ins. Co.*, No. 2D16-3798.

The rule against restrictions on AOBs is a special case of the general rule against restraints on alienation of property. Accordingly, it is appropriate to seek guidance from the foundations of restrictions on alienability of personal property before turning to the specific issue of AOBs.

A. The general rule against restrictions on alienability would limit ASI's power to create non-transferable property rights through an insurance policy.

Even when a property right is created by contract, there are limits on the restrictions that can be imposed. Many attorneys are most familiar with the rules restricting alienation of real property. These rules 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."). 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) ("there is a general public policy against restraints on the transfer of personal property"); *Ritchie v. Rupe*, 339 S.W.3d 275, 292 (Tex. App. 2011) ("One of the general reasonable expectations of any property owner . . . is the right of free alienation of that property.").

Thus, 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).

An insured's right to proceeds is a property right, not merely a contractual one, 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). 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) (discussing long history of the "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) (remarking on the "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) ("restraints on alienation of personal property are disfavored"); *In re Winters*, 69 B.R. 145, 147 (Bankr. D. Or. 1986) (remarking on state "policy prohibiting restraints on alienation of personal property").

ASI 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"). (discussing consent requirement in stock certificate"). Although ASI did not take the power for itself, it nevertheless seeks to give another 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"). Under the policy, the mortgagee can withhold consent to assignment for any reason, or no reason at all. 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).

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").

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 property right not subject to restraint, contractors will not have to incur the costs necessary to determine what kind of AOB each particular policy creates. *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). In evaluating the reasonableness of restraints on transfer of AOBs, the Court should consider "the measurement costs they impose on strangers to the title" and how they impair market efficiency as a whole. *Id.* at 26-27.

It is unclear how the anti-assignment clause creates additional protection for either ASI or a mortgagee. The policy itself already requires that any payments in which the mortgagee has an interest be made payable jointly to the insured and the mortgagee. (R. 222 (loss payable under coverage A or B will be made to mortgagee and insured)). After an AOB, the payment would be made to the AOB-holder and the mortgagee if the mortgagee were an interested party. The mortgagee can withhold consent to payment and thereby protect any interest. ASI can protect itself through a declaratory action, or joining together all potential claimants after a suit is filed.

The anti-assignment clause here is permanent, it may be enforced for any reason, and does not promote any interest of the insurer or the mortgagee. 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"). On the other hand, the value of benefits payable under the policy is reduced or destroyed, not just for those insureds whose policy

includes the language at issue here, but for all insureds who might otherwise use an AOB to promptly access benefits owed. The anti-AOB clause would be an impermissible restraint on the alienation of property even if Florida law did not extend special protection to homeowners transferring their insurance rights.

B. The rule against restrictions on AOBs prohibits conditions with the effect of nullifying an AOB, or diluting its value.

To recap: any restraint on alienation requires a convincing justification. In the context of post-loss AOBs, unique factors mandate that the balancing test can only go one way. As this Court has explained, "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).

AOBs are a special, categorical case of the general balancing test for restraints on the transfer of property. Post-loss AOBs do not affect any legitimate interest of an insurer. *Int'l Sch. Servs., Inc. v. AAUG Ins. Co., Ltd.*, No. 10-62115-CIV, 2012 WL 5192265, *9 (S.D. Fla. July 25, 2012) (explaining that "allowing an insured to assign its right to the proceeds of an insurance policy after a loss has occurred hurts the insurer not at all."). The only legitimate purpose of an anti-assignment clause is 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 according to the identity of the holder. *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). "[T]he need to protect the insurer no longer exists after the insured sustains the loss because the liability of the insurer is essentially fixed." *Conrad Bros. v. John Deere Ins. Co.*, 640 N.W.2d 231, 237 (Iowa 2001) (citing cases).

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). Nevertheless, as a profit-seeking entity, 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).

AOBs help homeowners by providing liquidity in times of dire need. 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). The rule against restrictions "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); *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). 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 transferred its interest in the residence.

Moreover, without assignments that enable repairs to commence immediately, "he 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, as HCPCC promotes here – 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).

Thus, the Second District Court of Appeal correctly observed that "Florida stands apart from a minority of jurisdictions that permit an insurer to contractually restrict its insured's post-loss assignment without the insurer's consent." *Bioscience W., Inc*, 185 So. 3d at 643 n.1. The cases cited above demonstrate that courts throughout Florida have applied this rule to functional equivalents of explicit consent requirements.

The decision below squarely endorses functional restrictions on AOBs by giving insurers grounds to challenge them and decreasing the value of AOBs generally. The identity of the party empowered to destroy the assignment matters not. "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)). Moreover, here it is the insurer, not the third-party contractually empowered to block transfer, who invokes the anti-AOB clause to deny consent to the assignment. Thus, the anti-assignment clause at issue here is within the reason for the rule against restrictions on AOBs.

It may be tempting to proceed as though the right to freedom of contract should be weighed against prohibiting anti-assignment clauses. "Along with liberty of contract, free alienation is one of the keystones of the twin policies of promoting individual autonomy and free exchange in competitive markets." Gregory Alexander, *The Dead Hand and the Law of Trusts in the Nineteenth Century*, 37 STAN. L. REV. 1189, 1191 (May 1985). But it would be a mistake to proceed as though this case was about any issue other than free alienation of property. Homeowners have no meaningful ability to negotiate individual terms – they can only take it or leave it. *Wehr Constructors, Inc. v. Assur. Co. of Am.*, 384 S.W.3d 680, 687 n.8 (Ky. 2012) (observing that an "individual member of the general public [] will normally have considerably less bargain power than the insurance company from whom he purchases his policy, and thus will generally be compelled to accept the company's standardized adhesion contract"). The clause at issue here is squarely within the reason for the rule against restrictions on AOBs, and should be invalidated.

C. The Office of Insurance Regulation has determined that ASI's anti-assignment clause violates Florida law.

Generally, language in any insurance policy has been approved by the Office of Insurance Regulation ("OIR"), the agency charged with administering Florida's insurance laws. Prior to delivering or issuing insurance policy forms, an insurer is required to file, for the OIR's approval, all forms it seeks to use in Florida. *See* §

627.410, Fla. Stat. Section 624.11 prohibits any person from transacting insurance in this state without complying with the applicable provisions of Florida's insurance laws. Section 627.412 (1) requires use of "standard provisions" in insurance contracts, and prohibits substitute provisions that are "less favorable in any particular to the insured or beneficiary than the provisions otherwise required."

ASI's anti-assignment clause was not reviewed or approved by the OIR. In fact, the OIR has disapproved the language when other insurers have submitted it for review.

On December 3, 2012, the OIR's Commissioner issued an order intended to address the high volume of form filings by property and casualty insurers. (R. 454). The order exempted, *inter alia*, homeowners insurance forms from review, as long as the form was submitted at least thirty days before its effective date and accompanied by a statement that the forms were "in compliance with all applicable Florida laws." On June 24, 2013, the Commissioner extended the order until December 31, 2013. (R. 458).

On December 30, 2013, the ASI filed the form adding the anti-assignment clause. (R. 483). General Counsel for ASI, Angel Bostick, certified that the filing complied "with all applicable Florida Laws, including but not limited to statutes, rules, regulations and court decisions," bypassing OIR review and approval. (R. 520).

After the review exemption expired, the OIR consistently rejected attempts by other insurers to import ASI's anti-assignment clause into their own policies. (R. 529, 536 and 548, 553 (Security First Insurance Company)); (R. 626, 712 (Heritage Property & Casualty Insurance Company)). The OIR's decision is not clearly erroneous; in fact, it is correct. Under any standard of review, the Court should find in favor of Restoration 1.

II. ASI lacks standing to challenge the assignment.

As an officious intermeddler in the agreement between Mr. Tchekmeian and Restoration 1, ASI has no independent standing to challenge its validity. "Standing is, in the final analysis, that sufficient interest in the outcome of litigation which will warrant the court's entertaining it." *Martin Props. v. Fla. Indus. Inv. Corp.*, 833 So. 2d 825, 827 (Fla. 4th DCA 2002). The standing doctrine prevents debtors from challenging the contractual assignment of their debts. *Livonia Prop. Holdings, L.L.C. v. 12840-12976 Farmington Rd. Holdings, L.L.C.*, 717 F. Supp. 2d 724, 736-37 (E.D. Mich. 2010) (citing cases treating assignments particularly). "As long as no creditor of the assignor questions the validity of the assignment, a debtor of the assignor cannot do so." *Blackford v. Westchester Fire Ins. Co.*, 101 F. 90, 91 (8th Cir. 1900).

The Supreme Court of Florida addressed a similar case in *Lugassy v. Independent Fire Ins. Co.*, 636 So. 2d 1332, 1335 (Fla. 1994). In *Lugassy*, an

insurance company argued that a lack of consideration prevented the insureds and their attorneys from altering the terms of their original retainer agreement. 636 So. 2d 1332 at 1335. The Florida Supreme Court found that the insurer could not raise lack of consideration to challenge the new retainer agreement because it was not a party or a third-party beneficiary to that retainer agreement. *Id.* (citing *Thompson v. Commercial Union Ins. Co.*, 250 So. 2d 259, 262 (Fla. 1971) (requiring clear intent to benefit third party before standing is conveyed)); *see also Liu v. T&H Mach., Inc.*, 191 F.3d 790, 797-98 (7th Cir. 1999) (finding that, under Illinois law, third party lacked standing to challenge adequacy of consideration for AOB); *Stanfield v. W.C. McBride, Inc.*, 88 P.2d 1002 (Kan. 1939). Similarly, in *Progressive Express Ins. Co. v. McGrath Community Chiropratic*, 913 So. 2d 1281, 1289 (Fla. 2d DCA 2005), the appellate court found that Progressive's challenge to an equitable assignment for lack of consideration was improper because the insurer was a third party to the assignment.

Just as the insurers in *Lugassy* and *Progressive*, ASI not a party to the AOBs. It has not demonstrated that any party to the AOBs intended to benefit ASI, and it lacks standing to step into the shoes of either. The mortgagee is not attempting to block the AOB. Indeed, it would appear to be to the mortgagee's benefit to permit the AOB, to allow timely repairs and thereby protect its interest in the residence. If

the anti-assignment clause is legal, it is the mortgagee who should attempt to enforce it, not ASI.

III. Dismissal would be inappropriate even if the anti-assignment clause were valid due to unresolved issues of fact.

If the anti-AOB clause is valid and ASI can enforce it, the court should not have granted the motion to dismiss. Restoration 1 alleged that an equitable assignment existed, and could have amended the complaint to allege that the insured granted the AOB as an agent of the mortgagee. Other key issues are also not suitable for resolution at this stage.

A. Equitable assignment.

Assuming *arguendo* there were some technical defect in the assignment, Restoration 1 would still hold an equitable assignment in the insurance benefits associated with the work it performed. No particular verbal formula is necessary for an equitable assignment. *McClure v. Century Estates*, 96 Fla. 568, 583 (Fla. 1928); *SourceTrack, LLC v. Ariba, Inc.*, 958 So. 2d 523, 526 (Fla. 2d DCA 2007). If words or actions demonstrate an intent on one side to assign a right, and intent on the other to receive, an equitable assignment occurs if there is consideration. *Giles v. Sun Bank, N.A.*, 450 So. 2d 258, 261 (Fla. 5th DCA 1984). The contract itself demonstrates the requisite intent, and Restoration 1 provided consideration by rendering services in exchange for the assignment. Thus, even if the AOB here was void, Restoration 1 has an equitable right to payment for its services. As

Restoration 1 and ASI are not otherwise in privity of contract, there would be no adequate remedy available at law. *State Farm Fire & Cas. Co. v. Silver Star Health & Rehab*, 739 F.3d 579, 584 (11th Cir. 2013) (discussing equitable remedies against assignee).

B. Agency.

Homeowners generally preserve their residences – and the interest of the mortgagee therein – without the involvement of the mortgagee. Accordingly, here the insured may have had been acting as the mortgagee's agent, with permission to authorize an AOB on its behalf. "An agency relationship can arise by written consent, oral consent, or by implication from the conduct of the parties." *Stalley v. Transitional Hosps. Corp. of Tampa, Inc.*, 44 So. 3d 627, 630 (Fla. 2d DCA 2010) (citing *Thompkin Corp. v. Miller*, 156 Fla. 388, 24 So. 2d 48, 49 (Fla. 1945)). Additionally, the mortgagee may be held to have ratified the creation of the AOB after the fact. *Frankenmuth Mut. Ins. Co. v. Magaha*, 769 So. 2d 1012, 1022 (Fla. 2000). Whether an agency relationship between two related parties exists is decided by "the trier of fact." *S. Fla. Coastal Elec., Inc. v. Treasures on the Bay II Condo Ass'n*, 89 So. 3d 264, 267 (Fla. 3d DCA 2012) (citing *Moore v. River Ranch, Inc.*, 642 So. 2d 642, 643-44 (Fla. 2d DCA 1994). Thus, granting the motion to dismiss was error.

C. Other issues of fact.

A motion to dismiss is not intended to "determine issues of ultimate fact." *Roberts v. Children's Med. Servs.*, 751 So. 2d 672, 673 (Fla. 2d DCA 2000). Several key factual issues render dismissal premature here. Most importantly, the mortgage agreement itself is not in the record, rendering it impossible to determine the extent of Wells Fargo's interest. Additionally, Restoration 1 alleged generally that all conditions had been performed. (R. 9, ¶ 14). That allegation satisfies Restoration 1's pleading burden. Fla. R. Civ. P. 1.120(c) ("In pleading the performance or occurrence of conditions precedent, it is sufficient to aver generally that all conditions precedent have been performed or have occurred."). Moreover, Restoration 1 alleged in the alternative that any conditions precedent had been waived, a question for the trier of fact. *Bolin v. State*, 793 So. 2d 894, 897 (Fla. 2001). Assuming *arguendo* that ASI can impose conditions on Mr. Tchekmeian's right to assign the benefits from his policy, this case nevertheless cannot be resolved without further factual development.

IV. The Court should not consider any basis for affirming the lower court except the reasoning in the order granting the motion to dismiss.

The trial court committed legal error by holding that ASI's anti-assignment clause applied to the insured's insurance benefits. The Court should not consider any other issues in this appeal. In *Van v. Schmidt*, 122 So. 3d 243, 261-62 (Fla. 2013), the Florida Supreme Court refused to apply the doctrine when reversing an

error of law because "the trial court's order… was premised, at least in part, on an error of law." *Id.* at 261-262. The Court explained that appellate courts faced with errors of law should "remand[] to trial courts for reconsideration of findings in light of the proper standard." *Id.* The same course should be followed here. *See also One Call Prop. Servs. v. Sec. First Ins. Co.*, 165 So. 3d 749, 755-56 (Fla. 4th DCA 2015).

CONCLUSION

As with the other novel anti-AOB arguments recently rejected by the courts, ASI's mortgagee consent requirement should be rejected. Even without the special protection afforded assignments of post-loss homeowners insurance benefits, ASI's anti-assignment clause is an invalid restraint on the alienation of personal property. The anti-assignment clause is also squarely within the rule against restrictions on AOBs, and has been disallowed by Florida's Office of Insurance Regulation.

Even if the anti-assignment clause were legal and ASI had standing to raise it here, dismissal is inappropriate because Restoration 1 raised the issues of equitable assignment and an agency relationship. No meritorious grounds for dismissal exist because the AOB is valid and Restoration 1, at the very least, has alleged facts that would establish its standing to bring this suit.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was provided by electronic mail to Anthony Russo and Thomas Keller, Esq., Butler Weihmuller Katz Craig, LLP, 400 North Ashley Drive, Suite 2300, Tampa, Florida 33602l, at arusso@butler.legal, tkeller@butler.legal, and fmoschenik@butler.legal this 15th day of June, 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).

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