IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC2018-1624

RESTORATION 1 OF PORT ST. LUCIE a/a/o John and Liz Squitieri,

Petitioner/Cross-Respondent

vs.

ARK ROYAL INSURANCE COMPANY,

Respondent/Cross-Petitioner

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# REPLY BRIEF IN SUPPORT OF CROSS-INITIAL BRIEF

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On Appeal from the Fourth District Court of Appeal
Lower Court Case No.: 4D17-1113

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## PRELIMINARY STATEMENT

This appeal has been taken to resolve a certified conflict in Florida's common law. In *West Florida Grocery Co. v. Teutonia Fire Insurance Co.*, 77 So. 209 (Fla. 1917), this Court adopted 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." *Id.* at 210-11 (emphasis added). Resolving the decisional conflict between the Fourth and Fifth District Courts of Appeal requires this Court to answer one narrow question: Does this common law rule apply to an assignment of benefits provision that requires *the consent all insureds and the mortgagee* before any assignment? *See Restoration 1 of Port St. Lucie v. Ark Royal Ins. Co*., 255 So. 3d 345, 347-49 (Fla. 4th DCA 2018).

Answering this question requires a critical analysis of the legal reasoning applied by the Fourth and Fifth District Courts of Appeal. Ark Royal's Initial Brief provides that analysis. Tellingly, Restoration 1's briefing fails to provide a competing analysis. Instead, its Answer Brief wanders down irrelevant paths hoping to avoid any contact with the Fourth District's decisive reasoning.

This Court should affirm the Fourth District's decision. Expanding the common law rule from *West Florida Grocery* to preclude the conditions on assignments at issue is a public policy decision for Florida's legislature.

## ARGUMENT

### I. THE ISSUE IS WHETHER THE COMMON LAW RULE ADOPTED IN *WEST FLORIDA GROCERY* APPLIES TO ARK ROYAL'S DISTINCT ASSIGNMENT CLAUSE.

#### A. Restoration 1 fails to critique the Fourth District's opinion, particularly the three flaws it found in the *Security First* opinion.

The thrust of the Fourth District's opinion and Ark Royal's Initial Brief is that a post-loss claim is freely assignable unless otherwise provided by law or contract. Under the common law rule adopted in *West Florida Grocery*, courts refuse to enforce an insurance contract provision conditioning the assignment of post-loss benefits on having the consent of the insurer. The reason for this narrow common law rule is that the insurer's consent is "superfluous" because its interests are in "no way affected by" the assignment. *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 directing the reader to the notes in 3 Ann. Cas. 472).

Paragraph 18 of Ark Royal's insurance contract contains a distinct assignment of claim benefits provision that requires a post-loss assignment of claim benefits have the consent of all insureds and named mortgagees. As the Fourth District determined, this provision is not contrary to *West Florida Grocery* and its progeny. *Restoration 1*, 255 So. 3d at 345.

Inexplicably, Restoration 1's final brief again fails to confront the three bases the Fourth District gives for disagreeing with the Fifth District's decision in

*Security First Ins. Co. v. State, Office of Ins. Regulation*, 232 So. 3d 1157 (Fla. 5th DCA 2017). The Fourth District first established that *West Florida Grocery* and its progeny have only been applied to provisions requiring the insurer's consent (like Paragraph 7 of Ark Royal's policy). *Security First* rejected that precise argument and cites four cases in support. 232 So. 3d at 1158-59. As the Fourth District correctly determined, "[n]one of the cases cited in *Security First* discuss a condition on assignment that requires the consent of the insureds and mortgagees" (like Paragraph 18 of Ark Royal's Policy). *Restoration 1*, 255 So. 3d at 347; *see also Security First*, 232 So. 3d at 1158. Restoration 1 cannot and does not dispute this first error in *Security First*.

The Fourth District next establishes that *Security First* misquotes and "thereby overstates" the holding of *West Florida Grocery* in finding that "it is a well-settled rule that [anti-assignment provisions do] not apply to an assignment after loss." *Restoration 1*, 255 So. 3d at 347; *see also Security First*, 232 So. 3d at 1158-59. The "actual quote, without alterations, merely states that '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.'" *Restoration 1*, at 347 (quoting *W. Fla. Grocery*, 209 So. at 210-11 (emphasis added by the Fourth District)). "Thus, by its plain terms, *West Florida Grocery* does not

stand for the pronouncement that *any* restriction is per se invalid." *Id*. at 347. Restoration 1 cannot and does not dispute this second error in *Security First*.

The third basis the Fourth District gives for disagreeing with *Security First* is that the rationale for the *West Florida Grocery* rule does not apply to Paragraph 18. As the Fourth District explains:

> [B]y its plain terms, *West Florida Grocery* does not stand for the pronouncement that *any* restriction is per se invalid. Instead, the supreme court addressed and invalidated only a provision requiring the consent of the insurer, with the court concluding that it is "superfluous" who the insurer ultimately pays as the insurer will *still* have to cover the insured loss.

*Id.* at 347 (emphasis in original).

*Security First* wholly ignores this public policy foundation of the common law rule adopted in *West Florida Grocery*. And, as the Fourth District recognized, "it is impossible to brand the contested provision as superfluous—as both of the insureds, as well as the mortgagee, have a vested interest that a reputable, legitimate third-party contractor perform repairs on the home." *Id.* at 347. Restoration 1 fails to dispute both this finding and the additional valid purposes articulated in Ark Royal's Initial Brief and the amici briefs. [Ans./Cross-Initial Br., at 13-15].

After articulating these three flaws in the *Security First* opinion, the Fourth District applied a foundational principle ignored in Restoration 1's briefs and the *Security First* opinion: "[A]bsent some great prejudice to the dominant public

interest or specific pronouncement by the Florida Legislature, courts strive to uphold the parties' freedom of contract." *Id*. at 348 (citing *Bituminous Cas. Corp. v. Williams*, 17 So. 2d 98, 101 (Fla. 1944)). The Fourth District determined it could not conclude that the condition imposed by Paragraph 18 creates "some great prejudice to the dominant public interest" and left the public policy concerns raised by both parties to the legislature. *Id*.

Free of critique in Restoration 1's briefs, the Fourth District opinion well-articulates how the *Security First* decision erred in its analysis of Florida common law, failed to uphold the parties' freedom on contract; and, in doing so, implicitly made a public policy decision that must be left to the legislature.

### B. The *West Florida Grocery* common law rule does not apply to consent of "the insurer and the other valid claimants" as Restoration 1 argues.

Unable to refute the Fourth District's analysis, Restoration 1 tries to circumvent the distinction between requiring the consent of named insureds and mortgagees from the consent of the insurer. It does so by arguing that under *West Florida Grocery*, "an assignment between an insured and a third-party is valid absent consent of the insurer and the other valid claimants." [Cross Ans./Reply, at 8]. This "other valid claimants" characterization is an effort, in part, to equate those having a vested interest in the claim benefits with generic creditors having no

vested or secured interest in the proceeds, but who may wish to have the proceeds to apply to a debt owed. This effort fails.

The common law rule in *West Florida Grocery* and its progeny only addresses the application of a provision requiring the insurer's consent to assignments to a post-loss assignment. Because no right or interest of the insurer is affected by such an assignment, the common law of Florida deems that restriction superfluous, and therefore, unenforceable. *Security First* is the first and only Florida appellate court to apply that common law rule to a condition requiring post-loss assignments to have the consent of others with a vested interest in the benefit being assigned.

As the Fourth District recognized, the rationale for the *West Florida Grocery* common law rule does not apply to a clause conditioning a post-loss assignment on the consent of all insureds and named mortgagees. Instead, that clause assures all parties with a vested interest in the insurance proceeds have the opportunity to consent to the assignment of their interest. *Id.* at 348. And, contrary to Restoration 1's assertion, those having a vested, contractual interest in the claim benefit cannot be equated with generic creditors of an assignor. [Cross Ans./Reply, at 8-10].

### C. *Space Coast* supports the assertion that Paragraph 18 is not superfluous because it avoids the problem of split causes of action caused by partial assignments.

In its Answer/Cross-Initial Brief, Ark Royal's argues that a partial assignment of a contract or contractual claim (a/k/a chose in action) is *enforceable as provided by the terms of the parties' contract*. And Paragraph 18 is simply a contractual provision that places conditions on the assignment of claim benefits. This contractual condition is not superfluous because it prevents the problem of split causes of action created when one insured attempts to assign away the rights of other insureds and named mortgagees without their consent. The *Space Coast Credit Union v. Walt Disney World Co*., 483 So. 2d 35 (Fla. 5th DCA 1986) discussion of split causes of action is cited because it supports this argument. [Ans./Cross-IB, at 9-12].

Restoration 1 opens its Reply/Cross-Answer Brief by mischaracterizing this argument by stating "[t]he main theme of Ark Royal's answer brief is that Ms. Squitieri's assignment cannot be enforced against Ark Royal because the assignment was a 'partial assignment.'" [Cross Ans./Reply, at 1]. Restoration 1 further asserts *Space Coast* is inapplicable because it "completely rejected any

argument that all insureds and the mortgagee must consent to assignment." [Cross Ans./Reply, at 1-6].[1]

Ark Royal does not cite *Space Coast* for the contention that partial assignments are unenforceable as a matter of law. Instead, it cites *Space Coast* to support the fact that a contractual provision requiring the consent of all insureds and named mortgagees to a post-loss assignment is not superfluous. In a similar context, *Space Coast* describes the problem of split causes of action. *Id.* at 35-36.

Restoration 1 further errs by arguing that *Start to Finish Restoration, LLC v. Homeowners Choice Property & Casualty Insurance Co.*, 192 So. 3d 1275 (Fla. 2d DCA 2016) "summarily disposes of the argument that *Space Coast* applied to post-loss assignments of insurance benefits." [Cross Ans./Reply, at 2]. That court found it could not reach the merits of that issue. Unlike this appeal, there was no evidence in *Start to Finish* of other insureds or a named mortgagee that might suggest the homeowner had only a partial interest in the chose. As that court recognized:

> Homeowners Choice provided no evidence before the circuit court that Mr. Williams actually assigned any part of his policy benefits to any entity other than *Start to Finish* or retained any part of the

[1] Though Restoration 1 places its discussion of *Space Coast* in its Reply, that discussion is a response to Ark Royal's broader contention in its Initial Brief that its provision is not superfluous because it provides all parties with a vested right in the proceeds with an opportunity to consent to the assignment. [Ans./Cross Initial Br., at 43-45]. Thus, Ark Royal addresses the issue here.

> assignment benefits for himself. On this record, then, we cannot, and therefore do not, reach the merits of this argument.

*Id.* at 1276 n.1. *Start to Finish* is further distinguishable because it concerned a clause requiring the insurer's consent—not the insured or named mortgagee's consent. *Id.* at 1276.

### D. The Squitieris' mortgage lender has a superior, vested right to the claim benefits.

Finally, Restoration 1 further errs in asserting the assignment of the chose by Ms. Squitieri—without the consent of her husband and the named mortgagee—provided Restoration 1 with a complete assignment. [Cross Ans./Reply, at 3-4]. In fact, Ms. Squitieri could only assign the rights to the chose that she had; and, the mortgage of record establishes that she and her husband had earlier agreed with their mortgage lender that, in the event of a loss covered by fire, flood and other hazard insurance:

> 1. The insurer is "authorized and directed to make payments for such loss directly to Lender, instead of to Borrower and Lender jointly";
>
> 2. "All or any part of the insurance proceeds may be applied by Lender, at its option, either (a) to the reduction of the indebtedness . . . or (b) to the restoration or repair of the damaged Property."

[R. 302]. As such, Ms. Squitieri and her husband had already "assigned" to their lender the rights to the chose Restoration 1 claims. This nature of a mortgagee's rights and interest to such a "chose in action" or claim benefit under Florida law is further addressed in the amici briefs. [Florida Bankers' Association Amicus Brief,

at 10-20 (explaining the constitutional, statutory and contractual rights of mortgagees); Florida Insurance Council Amicus Brief, at 6-8 (describing standard mortgage form recognizing that parties agree that the mortgagee or lender has certain rights regarding the insurance proceeds); Florida Justice Reform Institute Amicus Brief, at 6-7 (recognizing mortgagee has continued insurable interest in the chose)].

### E. Making benefit payments jointly does not solve the problem of split causes of action.

Restoration 1 argues the problem of split causes of action is solved when Ark Royal makes the check for Restoration 1's services payable to Restoration 1, the insureds, and the mortgagee as allowed by the Loss Payment Provision and Mortgage Clause. [Cross Ans./Reply, at 5]. It asserts that by doing so, "all parties [are] protected," and Ark Royal could not be subject to multiple suits. [Cross Ans./Reply, at 5]. This *ipso facto* protection argument fails for at least three reasons.

First, as stated above, the Squitieris have contracted with their mortgage lender that the insurer is to make the benefit payments directly to their lender. They also had given their lender the right to decide whether the insurance proceeds are "applied to reduction of the indebtedness" or "the restoration and repair of the damaged Property." [R. at 302]. Paragraph 18 is not superfluous because it avoids a breach of this agreement between the insureds and named mortgagees regarding

these claim benefits.[2] It also assures Ark Royal fulfills its duty to the named insured.

Second, as the Fourth District stated, the other insureds and named mortgagees have the right to decide who will do the restoration work and whether or not it is necessary and appropriate to assign their chose to a third party. *Restoration 1*, 255 So. 3d at 347-48 (recognizing parties "have a vested interest that a reputable, legitimate third party contractor perform repairs on the home"). Paragraph 18 honors and protects these rights. Contrary to Restoration 1's assertion, the *ipso facto* joint payment option does not protect these rights.

Third, as well-expressed in the Florida Roofing and Sheet Metal Contractors ("FRSMC") amicus brief, Ark Royal's consent provision helps combat fraudulent and abusive assignment of benefits practices. [FRSMC Amicus Br., at 8-10]. That brief also explains that a consent provision like Paragraph 18 does *not* impair timely completion of restoration work. [FRSMC Amicus Br., at 8-10].

[2] Contrary to Restoration 1's contention, Ark Royal has a contractual right to assert that an assignment without the required consents is not valid. As a party to the contract, Ark Royal has the right to seek enforcement of its provisions. And, as an assignee, Restoration 1 cannot challenge the terms of the contract. As such, *Alterra Healthcare Corp. v. Estate of Shelley*, 827 So. 2d 936 (Fla. 2002) (nursing facility could not assert privacy right of employee under Florida Constitution on behalf of employee) and *Powers v. Ohio*, 499 U.S. 400, 410 (1991) (criminal defendant could assert equal protection rights of juror excluded from service), are irrelevant to the enforceability of the contract between Ark Royal and its insureds.

As the Fourth District correctly found, unlike the insurer's consent clause addressed by *West Florida Grocery* and its progeny, Paragraph 18 serves valid, non-superfluous purposes.

### F. The OIR decision is not entitled to any deference.

Contrary to Restoration 1's suggestion, the OIR's prior orders disapproving other policy language are not entitled to any deference. *See Fair Ins. Rates in Monroe, Inc. v. State, Office of Ins. Reg.,* 244 So. 3d 396, 400 (Fla. 1st DCA 2018). If considered, OIR disapproved Security First's form because OIR found it would mislead policy holders by stating that post-loss assignments must have the consents of all insureds, including a named mortgagee. *Security First*, 232 So. 3d at 1158. OIR's "misleading" finding was premised solely on its opinion that the common law rule adopted in *West Florida Grocery* applied. As the Fourth District correctly determined, that common law rule does not apply to a provision like Paragraph 18. As such, Restoration 1's discussion of OIR's actions regarding a different policy should not affect the Court's resolution of the certified conflict.

## II. THE OIR HAS THE AUTHORITY TO WITHDRAW APPROVED POLICY FORMS AND HAS SPECIFICALLY NOT WITHDRAWN APPROVAL OF ARK ROYAL'S FORM.

Much of Restoration 1's brief is premised on OIR having taken action against policy forms of other insurers. It also argues that Ark Royal avoided

disapproval of its form by "sliding" it by through an informational filing. These arguments should be rejected.

First, Restoration 1 asserts that "[e]very time OIR has reviewed the exact same assignment restriction relied on by Ark Royal in its Policy, OIR has rejected that language." [Cross Ans./Reply, at 11]. It further contends that "[t]he OIR determined this exact same policy language violated § 627.411." [Cross Ans./Reply, at 17]. OIR has never rejected Ark Royal's policy language; and Fla. Stat. § 627.411, which simply states the grounds on which OIR may disapprove a form, has not been applied by OIR to disapprove the Ark Royal policy.

Second, Restoration 1 argues that "Ark Royal was able to slide [its language] past OIR using an information filing." [Cross Ans./Reply, at 12-13]. What Restoration 1 fails to acknowledge it that OIR is fully aware of Ark Royal's policy, has the authority—and duty—to withdraw approval of all noncompliant policy forms, and has chosen not to withdraw the approved Ark Royal form. OIR is statutorily required to retroactively disapprove any submitted forms that do not meet the requirements of the Insurance Code. Fla. Stat. § 627.411(1) ("The office shall disapprove any form . . . or withdraw any previous approval thereof.") So, while OIR may not have approved the form language for those insurers identified by Restoration 1 under Fla. Stat. § 627.411, OIR has not withdrawn approval of the

Ark Royal form. One can surmise OIR has stayed its hand awaiting the Court's resolution of the conflict in Florida's common law.

## III. HOUSE BILL 7065 IS IRRELEVANT TO THE COMMON LAW DECISIONAL CONFLICT AT ISSUE.

How this Court resolves the conflict in Florida common law will apply to the numerous pending cases and claims. House Bill 7065 will not apply because its statutory changes are not effective until July 1, 2019 and are not retroactive.

If considered, the Fourth District's conclusion that the common law rule adopted in *West Florida Grocery* does not extend to Ark Royal's Paragraph 18 is consistent with the new law. The new law will impose various requirements for an enforceable "assignment agreement" between the "assignor" and "assignee", but those requirements will not disallow conditioning post-loss assignments on obtaining the consent of all insureds and named mortgagees under the policy. [HB 7065, at 3].

Restoration 1 contends that because the definition of "assignor" does not expressly state that "all insureds" and "named mortgagees" must expressly agree to the assignment, Ark Royal's policy would be invalid under the new law. [Cross Ans./Reply, at 14-15]. That is not true. That the term "assignor" as used within the context of the "assignment agreement" does not expressly include "all insureds" and "named mortgagees" does not mean an insurer and insured cannot contractually agree to such a condition in the insurance contract itself. And, to

read that definition so narrowly would be contrary to a new statute that expressly allows an insurance contract to restrict such assignment in whole or in part.

Section 2 of House Bill 7065 creates Section 627.7153, which provides "[a]n insurer may make a policy available that restricts *in whole or in part* an insured's right to execute an assignment"; but, the insurer may do so only if it meets the four enumerated requirements. [HB 7065, at 13 (emphasis added)]. Those requirements do not prohibit the insurer and insured from agreeing to condition a post-loss assignment of benefits on obtaining the consent of all insureds and named mortgagees under the policy. This legislative public policy decision to allow insurers to restrict, in whole or in part, an insured's right to execute an assignment of benefits is consistent with the Fourth District's interpretation of Florida's common law and inconsistent with *Security First*.

## CONCLUSION

The issue on appeal is the certified conflict between the Fourth and Fifth District Courts of Appeal regarding the application of a narrow common law rule first announced in *West Florida Grocery*. The Fourth District correctly determined that rule does not extend to an insurance contract provision that conditions the assignment of post-loss benefits on having the consent of other insureds and named mortgagees. That decision should be affirmed.

Dated the 24th day of May, 2019

Respectfully submitted,

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