Case No. 5D2023-2368

IN THE FIFTH DISTRICT COURT OF APPEAL
STATE OF FLORIDA

HOLDING INSURANCE COMPANIES ACCOUNTABLE, LLC,

Appellant,

v.

AMERICAN INTEGRITY INSURANCE COMPANY OF FLORIDA,

Appellee.

BRIEF OF AMICUS CURIAE FLORIDA JUSTICE REFORM INSTITUTE IN SUPPORT OF APPELLEE

On Appeal from a Final Judgment of the Fifth Judicial Circuit
L.T. Case No. 2021-CA-000523

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STATEMENT OF IDENTITY AND INTEREST OF AMICUS CURIAE

The Florida Justice Reform Institute ("the Institute") is Florida's leading organization of concerned citizens, business owners and leaders, and lawyers who are working towards the common goal of promoting predictability and personal responsibility in Florida's civil justice system and promoting fair and equitable legal practices.

This appeal presents an issue of paramount importance to Florida's property insurance industry: ensuring the application of legislative reforms designed to prevent abuse of assignments of benefits. As one of the entities at the forefront of the reforms that resulted in the adoption of section 627.7152, Florida Statutes, the Institute can provide unique insight into the crisis plaguing the insurance industry that prompted the statute's creation. Thus, the Institute offers this amicus brief in support of Appellee, American Integrity Insurance Company of Florida ("American Integrity"), and in support of upholding the trial court's judgment below.

SUMMARY OF ARGUMENT

In 2019, assignments of benefits ("AOBs") were overrunning property insurance litigation. As shown by studies conducted by the Institute and others, litigation brought by holders of AOBs—e.g., service providers, like roofers and mold assessors and remediators—was a substantial segment of all property insurance litigation filed and was steadily driving up industry costs. Further, these AOBs had concerning features, often requiring the broad assignment of rights to the assignees which left the assignor policyholders little in the way of protections. After hearing the significant evidence that AOBs were generating an outsized portion of insurance litigation, and that such litigation jeopardized the affordability of property insurance across the state, the Legislature enacted section 627.7152, Florida Statutes, to provide policyholders with basic protections when granting AOBs and to limit AOB abuse.

Appellee Holding Insurance Companies Accountable, LLC ("HICA") believes it has found a way around those statutory protections. Specifically, HICA contends its AOB falls outside the scope of section 627.7152 because its agreement is not directly for

the repair of the policyholder's wind-damaged home; instead, it says, its only service is to file a lawsuit to secure insurance benefits that would be used to repair that home. But that "service" does not take HICA's agreement outside the ambit of the statute, and as the Second District Court of Appeal found in rejecting a service provider's similar attempt to avoid section 627.7152, if it walks like a duck, and quacks like a duck, it is a duck. The Court should reject HICA's erroneous interpretation of the statute and affirm the trial court's judgment in favor of Appellee American Integrity.

ARGUMENT

I. SECTION 627.7152 WAS INTENDED TO ADDRESS AOB ABUSE BY UNSCRUPULOUS SERVICE PROVIDERS AND TO REDUCE EXCESSIVE INSURANCE LITIGATION

An AOB in the property insurance context usually involves a policyholder agreeing to assign to a service provider—e.g., a roofer—the policyholder's right to file an insurance claim, make repair decisions, and collect insurance benefits directly from the policyholder's insurer. While policyholders simply seek to be made whole for losses, service providers and their attorneys using AOBs are unfortunately motivated to increase their own scope of work and

to maximize profit and litigation fees. As a consequence, AOBs are abused, often including provisions clearly designed to benefit the service provider rather than the policyholder and which tend to delay the timely resolution of a claim.

For one, while insurance policies typically impose certain duties on an insured in order to be covered under a policy, such as requiring an insured to file proof of loss, produce records, and submit to examination under oath, Florida courts held that assignees were not bound to the same duties, as they agreed only to an assignment of insurance benefits and did not agree to assume any of the duties of the insurance policy. *See, e.g.*, *Citizens Prop. Ins. Corp. v. Ifergane*, 114 So. 3d 190, 197 (Fla. 3d DCA 2012); *Shaw v. State Farm Fire & Cas. Co.*, 37 So. 3d 329, 332 (Fla. 5th DCA 2010), *disapproved on other grounds by Nuñez v. Geico Gen. Ins. Co.*, 117 So. 3d 388 (Fla. 2013).

AOBs were also often broadly written, assigning numerous rights under the policy to the assignee. Typically, an unqualified assignment transferred all of the insured's interest under the policy, and after assignment, the insured had no right to make any claim

unless authorized to do so by the assignee. *State Farm Fire & Cas. Co. v. Ray*, 556 So. 2d 811, 813 (Fla. 5th DCA 1990). An insured entering such a broad AOB was often unknowingly assigning his or her right to determine whether to file a lawsuit against their insurer in the insured's name.

While courts acknowledged the concerning features of AOBs, including insurers' concerns that AOBs "allow[ed] contractors to unilaterally set the value of a claim and demand payment for fraudulent or inflated invoices," courts deferred to the Legislature's judgment on how to handle such abuses. *See One Call Prop. Servs. Inc. v. Sec. First Ins. Co.*, 165 So. 3d 749, 755 (Fla. 4th DCA 2015). For instance, the Fourth District reasoned that, "[i]f studies show that these assignments are inviting fraud and abuse, then the legislature is in the best position to investigate and undertake comprehensive reform." *Id.*

Soon, studies confirmed those abuses, and underlined further that AOBs were one of the driving forces of insurance-related litigation in Florida since 2000. *See* Fla. Justice Reform Inst., *Restoring Balance in Insurance Litigation: Curbing Abuses of*

Assignments of Benefits and Reaffirming Insureds' Unique Right to Unilateral Attorney's Fees (2015) [hereinafter *Restoring Balance*].[1] The Institute's own study demonstrated that, based upon the data found on the Department of Financial Services' service of process website—which catalogues all lawsuits filed against insurers—there was a ***16,000 percent increase*** in lawsuits brought by holders of AOBs since 2000, even though the total number of service of process notices increased by only 183 percent over the same timeframe. *Restoring Balance*, *supra*, at 13.

The Office of Insurance Regulation also reported to the Legislature concerning trends arising over the period of 2010 to 2016, including a 28 percent increase in the average severity of domestic property insurance claims,[2] a 46 percent increase in the frequency per 1,000 policies of water loss claims associated with personal residential insurance policies,[3] and an increase from 5.7 percent to

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[1] *Available at* https://www.fljustice.org/files/123004680.pdf.
[2] Commissioner David Altmaier, *The Florida Property Insurance Market and Assignment of Benefits*, Presentation to the Financial Services Commission, Feb. 7, 2017, at 4, https://www.floir.com/siteDocuments/FSCAOBPresentation02072017.pdf.
[3] *Id.*

15.9 percent in the use of AOBs.[4] Citizens Property Insurance Corporation also reported that, within that same time period, the percent of litigated water claims with an AOB rose from 9.7 percent to ***55 percent*** for Citizens.[5]

The Commissioner of Insurance warned that, based on these concerning trends, his office foresaw "higher insurance premiums for consumers and a lack of availability of insurance policies as insurers exit the market." *See* Fla. H.R. Subcomm. on Civ. Just., CS/CS/HB 7065 (2019), Final Bill Analysis at 6 (May 28, 2019).

To address this crisis, the Legislature enacted section 627.7152, Florida Statutes, in 2019, along with other AOB reforms. *See* Ch. 2019-57, Laws of Fla. (HB 7065). The final bill analysis states that the statute "addresses the abuse of post-loss AOBs for property insurance claims" by "[e]stablishing requirements for the execution, validity, effect, and rescission of an AOB" and "[t]ransferring certain pre-lawsuit duties under the insurance contract to the assignee." *See* Fla. H.R. Subcomm. On Civ. Just., CS/CS/HB 7065 (2019), Final

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[4] *Id.*
[5] *Id.* at 5.

Bill Analysis at 1 (May 28, 2019).

More specifically, the reforms enacted through section 627.7152 included, among other things:

- requiring an AOB to be in writing and signed by both assignee and assignor, § 627.7152(2)(a)1., Fla. Stat. (2019);
- mandating that assignors have the option to rescind the AOB within a period of time, *id.* § 627.7152(2)(a)2., Fla. Stat. (2019);
- requiring assignees to provide a written, itemized, per-unit cost estimate of services, *id.* § 627.7152(2)(a)4., Fla. Stat. (2019);
- requiring an AOB include notice to the assignor of the right to rescind the agreement and that, by executing the AOB, the assignor is giving up certain rights that could result in litigation by the assignee against the insurer, *id.* § 627.7152(2)(a)6., Fla. Stat. (2019);
- requiring an AOB include a provision mandating the assignee indemnify and hold harmless the assignor from all liabilities, damages, losses, and costs, should the insurance policy subject to the assignment agreement prohibit such assignment, in whole or in part, *id.* § 627.7152(2)(a)7., Fla. Stat. (2019);

- prohibiting an AOB from containing any fee related to administering or rescinding the agreement, *id.* § 627.7152(2)(b), Fla. Stat. (2019); and
- prohibiting an assignee from collecting or attempting to collect money from an insured, maintaining an action against an insured, claiming a lien on the real property of an insured, or reporting an insured to a credit agency for payments arising from the assignment agreement, *id.* § 627.7152(7)(a), Fla. Stat. (2019).

An AOB that fails to comply with the statute is invalid and unenforceable. *Id.* § 627.7152(2)(d). There can be no dispute here that HICA's AOB contained none of these statutory protections.

II. ADOPTING HICA'S POSITION IS CONTRARY TO THE STATUTE AND LEAVES POLICYHOLDERS UNPROTECTED.

Enterprising plaintiffs' attorneys have pivoted to trying to avoid section 627.7152 by craftily drafting their assignment agreements to avoid the strictures of the statute. That is exactly what happened here. The Court should reject these attempts to circumvent the law.

HICA boldly asserts that, because it is "not a service provider and its assignment contract for post-loss benefits was not based

upon the performance of any services contemplated by" section 627.7152(1)(b)'s definition of an "[a]ssignment agreement," its AOB is simply beyond the reach of the statute, and thus the homeowner granting the AOB to HICA is left without the protections afforded by section 627.7152. *See* Initial Br. at 1. But HICA's entire existence, and the reason it accepted the AOB at all, was in order to provide "services" related to the repair of the policyholder's wind-damaged property—i.e., to file suit on the policyholder's behalf to recover benefits that would repair that damage. *See* § 627.7152(1)(b), Fla. Stat.; *see also* Initial Br. at 3-4. The Court should not countenance sly agreement drafting by service providers in a transparent effort to thwart application of the statute. *See, e.g.*, *Elmore v. Palmer First Nat'l Bank & Tr. Co. of Sarasota*, 221 So. 2d 164, 166 (Fla. 2d DCA 1969) (rejecting a plaintiff's creative pleading as "a thinly veiled attempt to thwart the intended effect of this statute"); *see also, e.g.*, *Ingersoll v. Hoffman*, 589 So. 2d 223, 224 (Fla. 1991) ("To suggest that the requirements of [a] statute may be easily circumvented would be to thwart the legislative will.").

Indeed, this Court should reject HICA's attempt just as the

Second District rejected the service provider's similar effort in *Kidwell Group, LLC v. American Integrity Insurance Co. of Florida*, 347 So. 3d 501 (Fla. 2d DCA 2022). Much like here, the AOB at issue in *Kidwell* "disclaimed that the assessment services were 'meant to protect, repair, restore, or replace damaged property or to mitigate against further damage to the property'" and was expressly intended to avoid application of section 627.7152. *Id.* at 506. But as the Second District astutely noted, "if it looks like a duck, and quacks like a duck, then it is a duck." *Id.* (internal alterations and quotation marks omitted). Thus, the Second District rejected the provider's creative arguments to avoid the application of the statute, finding that the AOB at issue was "an 'assignment agreement' under section 627.7152, regardless of [the provider's] attempts to disguise it as something else." *Id.* The provider had "agreed to provide services as part of the homeowners' efforts to remediate property damage," and that brought the AOB within the ambit of the statute. *Id.*

Likewise here, HICA's AOB falls within the statute. Although HICA strenuously argues that its "service"—filing this lawsuit—is not encompassed within section 627.7152's assignment agreement

definition, there can be little argument that it is an agreement wherein HCA has "agreed to provide services as part of the homeowners' efforts to remediate property damage"—i.e., by recovering insurance benefits. *See Kidwell*, 347 So. 3d at 506; *see also* Initial Br. at 2 (acknowledging that HICA's AOB was for "the sole purpose of filing suit against American Integrity for unpaid insurance benefits" purportedly due as a result of wind damage); R. 306 (acknowledging that purpose of the assignment is to enforce the contractual terms of the insurance policy—terms which require the payment of claims falling within the policy); *see also* R. 286, 291.[6]

Accepting HICA's argument would defeat the legislative intent behind section 627.7152 and have disastrous consequences. It would mean that the Court would be removing the protections afforded to assignors/homeowners in section 627.7152 from agreements that, for all intents and purposes, are "assignment

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[6] *Cf. Sigma Funding Grp., LLC v. Sec. First Ins. Co.*, 345 So. 3d 960, 961 (Fla. 5th DCA 2022) (reversing trial court order granting motion to dismiss and holding that assignment agreement did not fall within section 627.7152 where, based on four corners of the complaint and attachments, it was not possible to tell the purpose behind the use of the funds gained through the assignment).

agreements" under the statute. But the Court may avoid that result by simply enforcing section 627.7152 as written—which HICA's agreement falls under—and ensuring the legislative will is carried out.

CONCLUSION

After careful study of the problems plaguing Florida's insurance industry, the Legislature adopted section 627.7152 to provide parameters on the use of property insurance AOBs and to ensure policyholders had basic protections in AOBs. What HICA asks this Court to do is to approve its attempted end-run around the statute, which would thwart the will of the Legislature and leave policyholders without the basic protections the Legislature gave them in section 627.7152. For all these reasons, the Institute asks the Court to affirm the trial court's order granting summary judgment to American Integrity.

Respectfully submitted on April 24, 2024.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on April 24, 2024, a copy of the foregoing has been filed with the Florida Courts E-Filing Portal, which will provide notices of electronic filing to the following:

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CERTIFICATE OF COMPLIANCE

I certify this document complies with the applicable font and word count limit requirements, as it has been prepared in Bookman Old Style 14-point font and contains 2,914 words. *See* Fla. R. App. P. 9.045, 9.210, & 9.370.

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