IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

SECURITY FIRST INSURANCE COMPANY,
Appellant,

v.

FLORIDA OFFICE OF INSURANCE REGULATION,
Appellee.
_____/

CASE No.: 1D14-1864
L.T. No.: 2013-CA-3541

BRIEF OF *AMICUS CURIAE* FLORIDA PROPERTY & CASUALTY ASSOCIATION, FLORIDA ASSOCIATION OF INSURANCE AGENTS, INC., AND PROPERTY CASUALTY INSURERS ASSOCIATION OF AMERICA, INC. IN SUPPORT OF APPELLANT SECURITY FIRST INSURANCE COMPANY

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STATEMENT OF IDENTITY AND INTEREST OF *AMICUS CURIAE*

The Florida Property & Casualty Association ("FPCA") is an industry trade group comprised of Florida-based insurance companies that write either automobile or homeowner policies. Established in 1997, the organization's mission is to foster and promote a healthy, competitive insurance market in the State of Florida. Of significance to this case, the FPCA's Homeowners Division consists of 14 domestic insurers that collectively represent approximately 40% of all homeowners insurance written in this state. The FPCA works to educate Florida lawmakers, regulators, and consumers on issues and policies that affect the availability and ongoing affordability of property and casualty insurance. The FPCA takes a proactive approach to creating and maintaining a stable and competitive marketplace for insurers and consumers alike.

The Property Casualty Insurers Association of America ("PCI") is a non-profit, national trade association that speaks for a large portion of the insurance industry in America. PCI is composed of nearly 1,000 member companies, representing the broadest cross section of insurers of any national trade association. PCI members write more than $183 billion in annual premium, 35 percent of the nation's property casualty insurance. PCI promotes and protects the viability of a competitive private insurance market for the benefit of consumers and insurers

alike, and is keenly interested in threats to that market in states like Florida.

The Florida Association of Insurance Agents, Inc. ("FAIA") is a non-profit, statewide trade association of independent insurance agencies that are also affiliated with the Independent Insurance Agents and Brokers of America, Inc. FAIA represents the interests of more than two thousand member insurance agencies and over twenty thousand licensed insurance agents and professionals writing primarily property casualty insurance, and advocates on their behalf before the Florida Legislature, the executive branch, and various regulatory agencies. Threats to the competitive private insurance marketplace constitute threats to insurance agents as well. Accordingly, the FAIA shares the concerns raised by the FPCA and PCI relating to the ramifications of the panel's decision.

The problem sought to be addressed by the Appellant relating to assignments of property casualty benefits is a significant and growing problem affecting insurers that has the potential to adversely affect millions of Florida policyholders by making homeowners insurance less available and putting significant upward pressure on rates. The Appellant attempted to address this problem by proposing the policy language at issue, which was rejected by the Florida Office of Insurance Regulation ("OIR") as "misleading," even though the language is undeniably plain, unambiguous, and consistent with the public policy of this state as established by

the Florida Legislature.

The panel's conclusion that a plain and unambiguous contract term that is authorized by statute could nonetheless be "misleading" should itself be a sufficient reason for the full Court to take interest in this case. The more important point, however, from amici's perspective, is that the decision will likely result in keeping property and casualty premiums in Florida artificially high to the great detriment of policyholders and to the great profit of the throng of unscrupulous contractors and lawyers who promote these assignments to inflate losses and generate litigation fees.

Moreover, and as described in greater detail below, the panel's decision will have a number of other far reaching effects on Florida insurers, and citizens that purchase property insurance. The decision interferes with insurers' ability to accurately underwrite risk. The risk changes when loss benefits are assigned to contractors financially incentivized and positioned to expand the scope and cost of losses in contrast to the policyholders who wish to minimize their loss and be restored to their pre-loss condition quickly and with a minimum of friction. The object of property casualty insurance is indemnification—a contractual promise that the insurer pays the cost of possible future loss. Assignments of benefits transform the burden on insurers because beneficiaries of these assignments are not

interested in indemnification—they are interested in profit.

Further, the decision creates a significant and unnecessary obstacle to the freedom to contract in Florida as the decision deprives insurers and policyholders of the right to enter into insurance contracts that restrict post-loss assignability of benefits in exchange for reduced costs. Indeed, it is difficult to reconcile the conclusion that policyholders lack this freedom with the precedent on which the panel relies. That precedent stands for the proposition that policyholders have an unfettered right to transfer their benefits, yet the panel relies on this precedent to eliminate the policyholders' right to agree not to assign their loss benefits in exchange for premium savings and or other policy consideration.

Lastly, the panel's decision expands OIR authority to reject proposed contract provisions, under the auspices of Section 671.411, Florida Statutes, in a manner that is inconsistent with the statutory text.

For these reasons, set forth in greater detail below, the undersigned amici seek leave to participate in this matter in support of the Appellant.

SUMMARY OF THE ARGUMENT

The undersigned amici support the Appellant's petition for rehearing en banc and/or for a certified question because this case is of exceptional importance within the meaning of Rule 9.331 of the Florida Rules of Appellate Procedure and

this case raises a question of great public importance within the meaning of Rule 9.030(a)(2)(A)(v) and Article 5, Section 3(b)(4) of the Florida Constitution. The panel's decision precludes insurers and policyholders alike from agreeing to terms affecting assignments of policy benefits and each enjoying the benefits thereof. If policyholders are free to assign benefits, they should be free to agree to refrain from assigning benefits. The decision to the contrary will have a series of significant, resoundingly adverse consequences for insurers, policyholders, and Florida's fragile property insurance market that has only recently become more stable following the catastrophic 2004 and 2005 hurricane seasons. Indeed, the decision will be universally harmful to all but the unscrupulous contractors and their privies who have turned into big business the process of acquiring an insured's ability to sue and collect legal fees via the assignment and using these acquired rights to force insurers to either pay grossly inflated remediation costs or face even higher litigation costs.

The panel's decision prevents insurers from accurately underwriting the risk of individual policies. Statistics from FPCA members demonstrate that (1) claims that have been assigned cost insurers significantly more and (2) the number of claims assigned every year is rapidly increasing. Insurers underwrite individual policyholders, not actors unknown at the time of contracting that may one day

obtain an assignment of benefits from the insured. The transfer of benefits dramatically increases the risk to insurers for the simple reason that assignees have different and less savory motivations than policyholders—while policyholders intuitively wish to be made whole for losses, with as little aggravation as possible (i.e., to be indemnified, consistent with the purpose of property casualty insurance), assignees and their attorneys promoting assignments are interested in maximizing profit, scope of work, and litigation fees all of which create a long and protracted claims process to the detriment of policy holders.

The panel's decision is an unjustified burden on the freedom of contract that affects insurers and policyholders alike. The panel's decision precludes insurers from offering, and precludes policyholders from accepting, policies with anti-assignability provisions. This burdens policyholders even more than insurers. The panel's decision precludes policyholders from "opting out" of the negative experience caused by assignments. Insurers must ultimately factor the negative loss cost experience into their rates, leading to upward pressure on those rates. Ultimately premiums reflect loss experience. Thus a principal effect of the panel's decision will be to deprive policyholders of the right to make informed decisions and pay less for their insurance. It is no exaggeration to say that the statutes at issue, which prescribe the OIR's duty to police insurance policy terms for the

intuitive purpose of protecting consumers, have been construed by the OIR here in a manner that causes consumers active and measurable harm and deprives them of the very freedoms the OIR sought to preserve by disallowing the anti-assignment provision.

Last, the panel's decision creates an additional, judge-made category of authority for the OIR to use in rejecting proposed contract provisions that is irreconcilable with the OIR's enabling statutes and departs from their plain language. The new category allows the OIR to reject policy provisions as "misleading" if they violate Florida law, including case law, which allows the OIR to find as "misleading" a policy provision that is undeniably plain and unambiguous based upon its interpretation of Florida case law. Moreover, the interpretation is irreconcilable with the statutory text because it renders entirely nugatory and superfluous a subsection within the same statute that allows the OIR to disapprove proposed language that violates state statute. If the term "misleading" is broad enough to include provisions that violate the OIR's construction of case law, the term must also be broad enough to include provisions that violate statutes. If the Legislature intended such a broad meaning of "misleading," it would not have narrowly and independently given OIR authority to disapprove proposed language that violates only state statute.

ARGUMENT

The panel's decision raises a series of issues of exceptional importance, any one of which should be sufficient to justify rehearing en banc and/or certification. As provided below, the decision will have sweeping, harmful effects on the insurance industry from the perspective of both insurers doing business in Florida and their policyholders. The panel's decision frustrates the ability of insurers to evaluate and underwrite risk because it deprives them of the ability to control who will ultimately seek to collect policy benefits; a change of risk results from the assignees' profit-based motivations that differ from those of policyholders, which can be expected to lead directly to substantial increases in costs per claim and upward pressure on rates. Additionally, the panel's decision constitutes an unjustified burden on both parties' freedom to contract, precluding insurers from offering and policyholders from accepting, anti-assignability provisions carrying reduced premiums and or increased coverage. Lastly, the panel's decision expands the OIR's authority in a way that is irreconcilable with the relevant statute, by sanctioning the OIR's conclusion that the OIR can disapprove of a proposed provision as "misleading" even if the provision is plain, unambiguous, and consistent with Florida statutes.

I. THE ASSIGNMENT OF BENEFITS SANCTIONED BY THE PANEL'S DECISION RESULTS IN A CHANGE OF RISK THAT INHIBITS THE ABILITY OF INSURERS TO ACCURATELY UNDERWRITE RISKS, ACCURATELY AND TIMELY ADJUST CLAIMS, NEEDLESSLY INFLATES LOSSES, AND PUTS UPWARD PRESSURE ON RATES.

The panel's decision prohibits insurers from accurately underwriting risks by prohibiting insurers from requiring that they assent to assignments of benefits. The assignment mechanism, as utilized by the cadre of contractors and lawyers who exploit it, amplifies losses thereby changing the risk. It should be intuitive that the type and scope of risk posed to insurers is dramatically altered by an assignment of benefits. While policyholders are interested in being made whole, i.e., having their home restored to the pre-loss state, with minimal aggravation, assignees of insurance benefits are interested in their own profit.

At the heart of the problem are the "one-way" attorney's fees awarded to the trial lawyers representing vendors—not consumers—that, via the assignment, "stand in the shoes of the insured" and as such acquire the right to attorney fees pursuant to Section 627.428, Florida Statutes. This acquisition of the right to sue and collect attorney fees via an assignment provides the incentive for attorneys to file assignment of benefits lawsuits. Under threat of litigation and substantial legal fees, vendors inflate their invoices leaving insurers to either pay the inflated

charges or incur legal fees well in excess of the inflated charges. Additionally, the attorney collects a substantial fee to conclude the collection effort.

Hence, the assignment mechanism is not a mere convenient tool to enable payment directly to a vendor as its proponents would argue. To the contrary, it has become a litigation-for-profit and extortion scheme, at the expense of insurers, policyholders, and the Florida courts. Indeed, insurers now face multiple lawsuits involving the same claim from different contractors and service providers all claiming to hold an assignment of the benefits. Insurers have no ability to verify all parties who might assert rights to loss benefits through assignment. In fact, even after claims are paid, other vendors emerge claiming rights to those payments via an assignment of the benefits, and insurers face the prospect of further litigation. Section 627.428, Florida Statutes, which provides an insured prevailing party attorney's fees, could not have contemplated or intended to extend attorney's fees recoveries to multiple litigants. Insurers nonetheless are faced with this prospect, and in every such case, the attorneys' fees awarded can be exponentially greater than any value attributable to the actual loss that gave rise to the litigation.

This "assignment to litigate" scheme has become so profitable that vendors routinely pay $1000 to $1500 to anyone who refers a claim and conferences are hosted by trial lawyers among vendors, contractors, and attorneys for the specific

purpose of educating, marketing and expanding the assignment to litigate industry.[1]The potential growth of this market seems limitless, facing no legal restraint.

The active marketing of this network is yielding results that may be good for this union of contractors and lawyers but that are decidedly bad for the rest of Florida. Prior to the intense hurricane season in 2004, lawsuits involving an assignment were almost nonexistent. Assignment lawsuits filed against Florida property insurers have skyrocketed to more than 92,500 in 2013-2014. The top ten domestic insurers report being sued at a rate of 70 to 80 lawsuits per month

[1] Trial lawyers hold workshops to teach contractors how to use assignments to boost profits. As an example, one seminar in Orlando in 2013 advertised: "We'll show you the insider secrets the insurance companies don't want you to know!" Personal Insurance Federation of Florida, *Assignment of Benefits Insurance Reform – 2015 Legislative Proposals – Fact Sheet*, *available at* http://fixfloridainsurance.com/wp-content/uploads/2015/03/FixFLinsurance-AOB-FactSheet.pdf (last visited Aug. 6, 2015); *see also, e.g.*, Harvey Cohen, *Insider Secrets: Legal Assignment of Insurance Benefits*, *available at* http://johnsonstrategiesllc.com/wp-content/uploads/downloads/2015/03/Cohen-Battistia-AOB-presentation.pdf (last visited Aug. 6, 2015); Insurance Claim Dispute Attorney, *available at* http://www.cohenbattisti.com/Services/insurance-claim-dispute-attorney (last visited Aug. 6, 2015); Assignment of Benefits, Contract for Services, *available at* http://ericksonsdrying.com/contact-us/contract-for-services-assignment-of-benefits/ (last visited Aug. 6, 2015); Florida Association of Restoration Specialists, *Why are HB 669 & SB 1064 so Bad? What Would They Do?*, *available at* http://www.flars.org/(last visited Aug. 6, 2015); Michael Carlson, *Consumers Need Legislative Fix to Home Repair Scam*, Miami Herald, July 19, 2015, *available at* http://www.miamiherald.com/opinion/op-ed/article27519238.html.

whereas ten years ago fewer than 10 lawsuits were filed per month. The number of lawsuits is anticipated to continue to increase: one FPCA member has reported 1,465 lawsuits in the first two months of 2015 alone—roughly 35 lawsuits per day. Tellingly, virtually none of these lawsuits are brought on behalf of insureds but rather contractors.[2]

For claims related to water loss from 2013-2015, another FPCA member reports an average increase over $10,000 in the amount paid for a claim with an assignment as opposed to a claim without an assignment. This difference represents an increase in the loss amount paid of 108% for claims with an assignment. At the beginning of this same two year period, claims with assignments represented only 3% of all reported claims and currently represent

[2]A prime example of the cost to consumers of the assignment of benefits industry comes from Citizens Property Insurance Corporation ("Citizens"), the state's property insurer. Citizens was hit with 1,397 assignment lawsuits in 2013 and 1,526 assignment lawsuits in 2014. In its June 23, 2014 annual rate filing, Citizens indicated the need to increase rates 17.2% statewide due largely in part to assignment lawsuits. *See* Citizens 2016 Rate Kit, *Actuarial & Underwriting Committee Recommended Rate Filing Executive Summary*, June 23, 2015, *available at* https://www.citizensfla.com/shared/press/documents/2016RateKit.pdf (last visited Aug. 6, 2015). The Florida Chamber of Commerce has recognized the dramatic increase in premiums due to the impact of assignments of benefits. Florida Chamber Exclusive Property Insurance Update, *available at* http://floridaflcoc.weblinkconnect.com/cwt/external/wcpages/wcnews/propertyinsurance_07302015.aspx?ProfileID=7L295A2N987B (last visited Aug. 6, 2015).

37% of claims reported.

Initially, assignment claims were made on behalf of water remediation companies, but members report an expansion of assignment claims related to wind and hail damage costs as well, with one insurer reporting claims related to claims for hail for the five years from 2007-2012 amounted to $1.8 million dollars, then escalating to $8.3 million dollars for the two year period from 2013-2014.[3]

The panel decision that allows this problem to proliferate is not a necessary consequence of Florida law; to the contrary, it constitutes a change in Florida law. Section 627.422, Florida Statutes, unambiguously permits insurance contracts to be (or not be) assignable in accordance with their terms. Moreover, prior appellate decisions were consistent with Section 627.422. *E.g.*, *Kohl v. Blue Cross & Blue Shield of Fla., Inc.*, 988 So. 2d 654, 658 (Fla. 4th DCA 2008) (holding that contractual rights are assignable unless the contract prohibits assignment). Indeed, a Fourth District panel recently acknowledged that a post-loss insurance claim may

[3] Scott Johnson, *AOB & Roofers?!*, Johnson Strategies, (Feb. 17, 2015), *available at* http://johnsonstrategiesllc.com/aob-roofers (last visited Aug. 6, 2015); Contractors and lawyers work together to actively promote assignment claims related to hail damage and promise to appeal and overturn denied claims. *See* Attention Homeowners It's Not Too Late to File a Claim, http://johnsonstrategiesllc.com/wp-content/uploads/downloads/2015/03/roof-flier.pdf (last visited Aug. 6, 2015).

be assigned unless the contract prohibits the assignment. *See One Call Prop. Servs., Inc. v. Security First Ins. Co.*, 165 So. 3d 749, 752 (Fla. 4th DCA 2015).

The undersigned amici will not repeat arguments made by the Appellant and other parties, apart from reiterating that there is simply no way to square the panel decision with a Florida Statute, Section 627.422, and the Fourth District's holding cited above. The troubling facts detailed above should be sufficient to demonstrate that the underlying legal issues are a question of great public importance worthy of certification.

II. PRECLUDING INSURERS AND POLICYHOLDERS FROM CONTRACTING FOR ANTI-ASSIGNABILITY PROVISIONS INFRINGES UPON THE FREEDOM TO CONTRACT OF INSURER AND INSURED.

The panel's decision infringes upon the right of the insurer and the insured to freely contract for coverage and undermines the insurer's responsibility to underwrite risk unique to the individual policyholder not the policy claimant. The panel's conclusion in this regard is difficult to reconcile with precedent establishing that courts may not "interfere with freedom of contract or substitute [their] judgment for that of the parties to the contract," *Green v. Life & Health of America*, 704 So. 2d 1386, 1391 (Fla. 1998), and describing as "axiomatic that parties are free to create the insurance contract they deem appropriate to their

needs," *Green*, 704 So. 2d at 1391; *see also Univ. Prop. And Cas. Ins. Co., v. Johnson*, 114 So. 3d 1031, 1034 (Fla. 1st DCA 2013) (finding party to insurance contract free to adopt terms that control over competing statute).

The purpose of a provision prohibiting assignment is simple—to protect an insurer against unbargained for risk. *Lexington Ins. Co. v. Simkins Indus., Inc.*, 704 So. 2d 1384, 1386 (Fla. 1998). The panel's decision infringes upon an insurer's right to contractually minimize risk by restricting assignment through unambiguous language contained in the terms of the policy. Moreover, and just as significantly, the panel's decision infringes upon the rights of policyholders to contract for the elimination of the added risk and enjoy the reduced costs associated therewith. Because the losses associated with the proliferation of the assignment scheme that gave rise to this case will be passed through to policyholders, the lasting effect of the panel's decision will be to harm policyholders by appropriating their power to opt out of the negative effects and costs of the assignments at issue.

III. THE PANEL'S OPINION CREATES AN EXPANSION OF OIR'S AUTHORITY THAT IS IRRECONCILABLE WITH FLORIDA STATUTES.

Section 627.411, Florida Statutes, authorizes the OIR to disapprove provisions proposed by insurers for inclusion into insurance contracts if those

provisions fall within certain categories enumerated in Section 627.411, two of which are of particular significance. First, the OIR is instructed to disapprove of any such provision if it "[i]s in any respect in violation of, or does not comply with, [the Insurance Code]," § 627.411(1)(a), Fla. Stat., and second, the OIR is instructed to disapprove of "any inconsistent, ambiguous, or misleading clauses, or exceptions and conditions which deceptively affect the risk purported to be assumed in the general coverage of the contract," § 627.411(1)(b), Fla. Stat.

The panel's conclusion that the anti-assignability provision at issue was a "misleading clause," within the meaning of Section 627.411, cannot be squared with Section 627.411. A policy term that is undeniably plain and unambiguous on its face is not "misleading," at least as the term "misleading" is commonly understood. "Words of common usage, when used in a statute, should be construed in the plain and ordinary sense, because it must be assumed that the Legislature knows the plain and ordinary meaning of words used in statutes and that it intended the plain and obvious meaning of the words used." *Dadeland Depot, Inc. v. St. Paul Fire & Marine Ins. Co.*, 945 So. 2d 1216, 1225 (Fla. 2006).

The panel's holding is also irreconcilable with another equally axiomatic principle of statutory construction: "A statute should be interpreted to give effect to every clause in it and to accord meaning and harmony to all of its parts and is not

to be read in isolation, but in the context of the entire section." *Florida Dep't of Envtl. Prot. v. ContractPoint Florida Parks, LLC*, 986 So. 2d 1260, 1265 (Fla. 2008) (internal alterations omitted). Even assuming the Legislature did not intend for "misleading" to have its "plain and obvious meaning," the panel's holding renders Section 627.411(1)(a) superfluous and nugatory: if "misleading" is a broad enough term to encompass "in violation of case law," it must also be broad enough to encompass "in violation of the Insurance Code." In other words, the OIR's construction of "misleading" under Section 627.411(1)(b) cannot be correct because it would not give effect to every clause in Section 627.411 and accord meaning and harmony to all of its parts and as a result would render Section 627.411(1)(a) redundant and unnecessary.

Of course, the important point for present purposes is not whether the OIR's conclusion is wrong, but whether it will have significant effects. While the undersigned amici have no way to anticipate all of the circumstances, should the petition be denied, the OIR could extend the term "misleading" to encompass any construction of law that satisfies the "clearly erroneous" standard of review. The OIR's construction of the term "misleading" constitutes a dramatic expansion of its power that, following axiomatic rules of statutory construction, could never have been intended by the Legislature.

CONCLUSION

For the foregoing reasons and for the reasons stated in the Appellant's motions for rehearing en banc and for certification of a question, the Court should grant the motions.

CERTIFICATE OF TYPE SIZE AND STYLE

This Brief is typed using Times New Roman 14 point, a font which is not proportionately spaced.

CERTIFICATE OF SERVICE

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