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

Security First Insurance Company,

Appellant,

v.

State of Florida, Office of Insurance Regulation,

Appellee.
_____/

Case No. 1D14-1864
Lower Case No. 149960-14

RESPONSE IN OPPOSITION TO MOTION FOR REHEARING AND MOTION FOR REHEARING EN BANC

Pursuant to Florida Rules of Appellate Procedure 9.330 and 9.331, Appellee, State of Florida, Office of Insurance Regulation ("Office"), respectfully requests that this Court deny Appellant, Security First Insurance Company's ("Security First"), Motion for Rehearing and Motion for Rehearing En Banc. Security First's Motion for Rehearing advances the same arguments raised in its Initial Brief and Reply Brief, which were considered and rejected by this Court. Additionally, En Banc review is improper as Security First failed to establish this case as one of exceptional importance.

I. The Motion for Rehearing is Improper.

In its Initial Brief, Security First framed the issue in this appeal as follows:

> This appeal raises from the disapproval by the Florida Office of Insurance Regulation of Security First's proposed policy language concerning the assignability of its policy, as follows:
>
> > E. Assignment
> >
> > Assignment of this policy or any benefit or post-loss right will not be valid unless we give our written consent.

Initial Brief at 2.

> This Court framed the issue in its opinion as follows:
>
> [W]hether post-loss rights under an insurance policy are freely assignable without the consent of the insurer, and in turn, whether OIR erred in disapproving the new language, which required that Security First give written consent for an assignment of post-loss rights.

Op. at 2.

Despite the virtual identity of the two issue statements, Security First contends that this Court's framing of the issue "suggests the panel either overlooked or misapprehended [Security First's] arguments" and that rehearing is therefore warranted. Motion for Rehearing at 2. This statement in contravention of the obvious underscores the sole improper purpose of the Motion for Rehearing: to reargue an appeal which has already been decided against Security First.

All of the arguments which Security First raises here were previously raised in its Initial Brief or its Reply Brief, some of which this Court directly addressed in its opinion. *See, e.g.*, Initial Brief at 10 (freedom of contract), 10-11, (§ 627.422, Fla. Stat.), 11 (§ 627.414, Fla. Stat.), 14-17 (analysis of Florida case law), and 18-

21 (the Office's statutory authority); Op. at 3-4 (upholding the Office's disapproval on the basis that anti-assignment provision was misleading).

Florida courts have consistently held that a motion for rehearing "is not a vehicle through which 'an unhappy litigant or attorney [may] reargue the same points previously presented.' " *McDonnell v. Sanford Airport Auth.*, 5D13-3850, 2015 WL 2259430, at *1 (Fla. 5th DCA May 15, 2015) (alteration in original); *Unifirst Corp. v. City of Jacksonville*, 42 So. 3d 247, 247-48 (Fla. 1st DCA 2009) (noting that when "arguments were raised in Security First's Initial Brief and extensively addressed during oral argument," "rearguing [those] points was improper"); *Gainesville Coca-Cola v. Young*, 632 So. 2d 83, 84 (Fla. 1st DCA 1993) (denying motion for rehearing as improper reargument where the motion "restate[d] the case law and facts contained in the Office's brief"). In addressing the improper use of a petition for rehearing, this Court has stated as follows:

> Certainly it is not the function of a petition for rehearing to furnish a medium through which counsel may advise the court that they disagree with its conclusion, to reargue matters already discussed in briefs and oral argument and necessarily considered by the court, or to request the court to change its mind as to a matter which has already received the careful attention of the judges, or to further delay the termination of litigation.

State ex rel. Jaytex Realty Co. v. Green, 105 So. 2d 817, 818-19 (Fla. 1st DCA 1958).

Because the arguments made in Security First's Motion for Rehearing have already been heard and rejected by this Court, this Court should deny Security First's Motion for Rehearing.[1]

II. The Motion for Rehearing En Banc is Deficient.

The rules of appellate procedure make clear that rehearing en banc "is an extraordinary proceeding." Fla. R. App. 9.331(d)(2). Rehearing en banc "shall not be ordered unless the case is of exceptional importance or unless necessary to maintain uniformity in the court's decisions." Fla. R. App. 9.331(a). Here, Security First has argued but failed to establish that this case is of exceptional importance.

The term "exceptional importance" is not defined in Florida Rule of Appellate Procedure 9.331, and "[t]his Court has not expressly articulated standards for determining whether a case is exceptionally important." *In re Doe 13-A*, 136 So. 3d 748, 754 (Fla. 1st DCA 2014) (Rowe, J., dissenting). This Court has, however, relied on federal courts' guidelines for determining whether a case is of "exceptional importance" under Federal Rule of Civil Procedure 35: "(1) cases

[1] The legislative history Security First cited for the first time in its Motion for Rehearing at 5 should not be considered by this Court. *Unifirst Corp.*, 42 So. 3d at 248; *Cartee v. Fla. Dep't of Health & Rehab. Servs.*, 354 So. 2d 81, 83 (Fla. 1st DCA 1977) (holding court will not entertain argument or authorities relied on for the first time in motion for rehearing). Additionally, any legislative intent to be drawn from repealed legislation is ambiguous at best and fails to render the Office's interpretation of the law clearly erroneous.

that may affect large numbers of person, and (2) cases that interpret fundamental legal or constitutional rights." *Id.* (quoting *In re: D.J.S.*, 563 So. 2d 655, 657 (Fla. 1st DCA 1990) (en banc)).

Judges on this Court and other Florida courts have acknowledged that "only the 'truly extraordinary cases merit en banc treatment' " and that "only a select few cases will ever meet this threshold." *Marr v. State*, 470 So. 2d 703, 716 (Fla. 1st DCA 1985) (Ervin, C.J., dissenting); *Ortiz v. State*, 24 So. 3d 596, 618 (Fla. 5th DCA 2009) (Cohen, J., dissenting). Regardless of the exact factors to be applied in the decision-making process, "[t]he need for a careful determination of why a given case merits en banc consideration on the ground of exceptional importance is obvious: a request for en banc consideration of a case engages the attention of every active judge, while burdening the litigants involved with added expense or delay." *State v. Diamond*, 553 So. 2d 1185, 1200 (Fla. 1st DCA 1988).

Security First has failed to establish that this case is one of the "select few" or "truly extraordinary cases" that merit en banc treatment. This case concerns a well-settled area of Florida law that has been reviewed, addressed, and decided uniformly numerous times by Florida and federal courts. *See One Call Prop. Servs. Inc. v. Security First Ins. Co.*, 165 So. 3d 749, 753 (Fla. 4th DCA 2015) (collecting cases). For that reason, this case fails to affect a large number of persons. While a decision in favor of Security First may eventually entice other insurers to adopt

similar assignment provisions—effectually divesting rights Florida policyholders have possessed for well over a century—the opinion of this Court merely reaffirms the status quo and therefore impacts only Security First.

Additionally, the Court's opinion does not deprive Security First or any insurer of any fundamental right. It is well-settled that an insurer's right to contract ends at an insured's right to freely assign its policy or an interest therein after a loss. *W. Fla. Grocery Co. v. Teutonia Fire Ins. Co.*, 77 So. 209, 210-11 (Fla. 1917) ("[I]t 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." (emphasis added)).

Just as this Court, like the Fourth District Court of Appeal in *One Call*, was the incorrect forum in which to address policy concerns to determine whether reversal of long-standing post-loss assignment laws is appropriate, so too would be this Court sitting en banc. The appropriate body to address Security First's concerns is the Florida Legislature.

WHEREFORE, the Office respectfully requests that this Court deny Security First's Motion for Rehearing and Motion for Rehearing En Banc.

Respectfully submitted this 6th day of August, 2015.

/s/ Patrick D. Flemming
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CERTIFICATE OF SERVICE

I certify that a copy of the forgoing was furnished via Electronic Mail on August 6, 2015 to the following:

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that the foregoing was prepared in compliance with Rules 9.210(a) and 9.100(*l*), Florida Rules of Appellate Procedure.

This 6th day of August, 2015.

/s Patrick D. Flemming
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