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 CERTIFICATION

Pursuant to Florida Rule of Appellate Procedure 9.330, 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 Certification for two reasons: first, this Court's opinion is materially distinguishable from or consistent with the Fourth District Court of Appeal decisions Security First cites. Second, the questions Security First raises fall short of the great public importance threshold.

I. No Direct Conflict.

Security First mistakenly claims that this Court's opinion is in direct conflict with several decisions rendered by the Fourth District Court of Appeal. A simple review of the cases cited by Security First—authority Security First relied upon in

its briefs and to which this Court even cited—reveals that they are either materially distinguishable from this Court's opinion or, in fact, consistent with it.

The Office thoroughly distinguished *Classic Concepts, Inc. v. Poland*, 570 So. 2d 311 (Fla. 4th DCA 1990), and *Kohl v. Blue Cross & Blue Shield of Florida, Inc.*, 988 So. 2d 1140 (Fla. 4th DCA 2007) ("Kohl I"), in its Answer Brief at 15-16. In short, the type of insurance policy and the timing of the assignment in *Poland* are materially different than those in the case at bar. The policy in *Poland* was an indemnity for loss policy, unlike Security First's indemnity for liability policy. For that reason, the assignment in *Poland*, which was made prior to any liability accruing, was made pre-loss, not post-loss. *Kohl I* involved a health insurance policy governed by entirely different statutory law and public policy considerations. 988 So. 2d at 1141-45.

Security First also cites *Kohl v. Blue Cross & Blue Shield of Florida, Inc.*, 988 So. 2d 654 (Fla. 4th DCA 2008) ("Kohl II"). *Kohl II* is even more distinguishable from the case at bar because the health insurance policy at issue in that case did "not contain a provision forbidding assignment." *Id.* at 658. Security First apparently cites *Kohl II* solely for that court's restatement of its general holding in *Kohl I*, which has no application to the specific facts of this case.

Finally, Security First's argument that *One Call Prop. Services, Inc. v. Security First Insurance Co.*, 165 So. 3d 749 (Fla. 4th DCA 2015), is in direct

conflict with this Court's opinion is confounding. Security First cited *One Call* for the proposition that assignment of a policy may be restricted in certain circumstances, but apparently overlooked the two pages in that opinion citing the "well-settled case law allowing post-loss assignments of insurance claims," "[e]ven when an insurance policy contains a provision barring assignment of the policy." *Id.* at 753. *One Call* is entirely consistent with this Court's opinion: this Court cited to *One Call* to support its holding. Because this Court's opinion does not directly conflict with the decisions cited by Security First, this Court should deny Security First's motion to certify conflict.

II. The Questions Raised Fall Short of "Great Public Importance."

While there does not exist a clear set of principles for determining what constitutes a question of "great public importance," the questions presented by Security First differ significantly from many that were certified as such. *See Wiesenberg v. Costa Crociere, S.p.A.*, 35 So. 3d 910, 914-15 (Fla. 3d DCA 2010) (Shepherd, J., dissenting) ("What constitutes a question of great public importance is not defined."). For example, this is not a case of first impression. *See Duggan v. Tomlinson*, 174 So. 2d 393, 393-94 (Fla. 1965) (noting that certification of an issue of great public importance "is particularly applicable to decisions of the district courts of appeal of first impression, where no decisional conflict or other fact involving our certiorari jurisdiction is invoked"). The Florida Supreme Court first

articulated that policyholders have the right to assign post-loss rights and claims without insurer consent nearly 100 years ago. *See W. Fla. Grocery Co. v. Teutonia Fire Ins. Co.*, 77 So. 209, 210-11 (Fla. 1917).

The well-established precedent of *West Florida Grocery Co.* has been examined and reaffirmed recently, which further counsels against certification. Raoul G. Cantero, *Certifying Questions to the Florida Supreme Court: What's So Important?*, 76 Fla. Bar J. 40, 42 (2002) ("Another basis for certification is the reexamination of an issues as a consequence of the passage of time."); *Young v. St. Vincent's Med. Ctr., Inc.*, 653 So. 2d 499, 503 (Fla. 1st DCA 1995) (noting that it had been fifteen years since the Florida Supreme Court had reviewed the issue certified); *Taylor v. State*, 401 So. 2d 812, 816 (Fla. 5th DCA 1981) (certifying the question of great public importance because the issue "ha[d] not been directly addressed by the Supreme Court in almost 50 years"). Here, the Florida Supreme Court reconsidered and reaffirmed its long-standing holding on the freely assignable nature of post-loss rights just seven years ago. *Cont'l Cas. Co. v. Ryan Inc. E.*, 974 So. 2d 368, 377 n.7 (Fla. 2008) (holding that "it is a well-settled rule that [anti-assignment provisions do] not apply to an assignment after loss" (alteration in original)).

Further, case law on whether anti-assignment provisions apply to post-loss assignments has never been unclear, confused, or in conflict. Cantero, *supra*, at 41

("Another major reason for certifying a question as one of great public importance is unclear or confused case law." (citing *Hasting v. Demming*, 682 So. 2d 1107 (Fla. 2d DCA 1996); *In re Estate of Tolin*, 594 So. 2d 309, 310 (Fla. 4th DCA 1992))). This Court correctly identified the "unbroken string of Florida cases over the past century holding that policyholders have the right to assign such claims without insurer consent." Opinion at 3; *see also One Call*, 165 So. 3d at 753 (collecting Florida cases consistently applying the rule of *West Florida Grocery Co.*); *Accident Cleaners, Inc. v. Universal Ins. Co.*, No. 5D14-352, 2015 WL 1609973, at *2 (Fla. 5th DCA Apr. 10, 2015) (same).

The "unbroken string of cases," starting with *West Florida Grocery Co.*, establishing and reaffirming the freely assignable nature of interests in an insurance policy disproves Security First's claim that the Florida Supreme Court has yet to express a "public policy" favoring an insurer's freedom of contract rights or a policyholder's rights to freely assign its post-loss interests therein. *See also Lexington Ins. Co. v. Simkins Indus., Inc.*, 704 So. 2d 1384, 1386 n.3 (Fla. 1998); *Cont'l Cas. Co.*, 974 So. 2d at 377 n.7. Indeed, this Court identified that the relief Security First is seeking from this Court is, in fact, a "policy **change**." Op. at 4 (emphasis added).

This Court, along with the Fourth District Court of Appeal in *One Call*, also observed that Security First's particular policy concerns regarding fraudulent

activity in the area of assignments of benefits are "more properly addressed to the Legislature," which is "in the best position to investigate and undertake comprehensive reform." Op. at 5; *see also One Call*, 165 So. 3d at 755. In that regard, the Florida Legislature has considered proposed legislation regarding assignments of benefits the past three legislative sessions. *See* H.B. 909, § 3 (2013) (proposed amendment to § 627.422, Fla. Stat.); H.B. 743, § 7 (2014) (same); H.B. 759, § 5 (2014) (same); H.B. 1109, § 2 (2014) (same); S.B. 708, § 5 (2014) (same); H.B. 669, § 1 (2015) (same); S.B. 1064, § 1 (2015) (same).

In light of the fact that the Florida Legislature is actively considering revisions to this area of the law, this Court should refrain from certifying the requested questions. *See Young*, 653 So. 2d at 507 (Webster, J., dissenting) (noting because repeated efforts to amend the law were met with no success, certification of the issue would "constitute an impermissible incursion by the judicial branch into the powers of government vested by our constitution in the legislature"; commenting that "while the question may be one 'of great public importance,' by certification, the wrong branch of government is being asked to provide an answer").

Pending legislative reform, Security First and other insurers with similar concerns possess several other tools to combat fraud related to assignments of benefits. For example, the Florida Legislature recently amended section 626.854,

Florida Statutes, to prohibit unlicensed public adjusting by a contractor or subcontractor. § 626.854(16), Fla. Stat.[1] Unlicensed public adjusting by such persons is a felony of the third degree, pursuant to section 626.8738, Florida Statutes, and the Florida Division of Insurance Fraud investigated approximately 150 cases of unlicensed public adjusting related to assignments of benefits in 2013. Tr. 120: 9-15.

Additionally, contractual remedies are still available to insurers notwithstanding a post-loss assignment. *Shaw v. State Farm Fire & Cas. Co.*, 37 So. 3d 329, 332 (Fla. 5th DCA 2010) (stating that "[a]ssignment of a right to payment under a contract does not eliminate the duty of compliance with contract conditions, but a third-party assignee is not liable for performance of any duty under a contract"), *disapproved on other grounds by Nunez v. Geico Gen. Ins. Co.*, 117 So. 3d 388 (Fla. 2013); *Citizens Prop. Ins. Corp. v. Ifergane*, 114 So. 3d 190, 197 (Fla. 3d DCA 2012) (holding that an assignor's failure to fulfill her obligations under the insurance policy precluded recovery by the assignee under the policy).

[1] The Florida Legislature has also recently considered further revisions to the public adjuster statute to address assignments of benefits. *See* S.B. 1064, § 1 (2015) (committee substitute 1) (proposed amendment to section 626.854(16), Florida Statutes, to provide that "[a]n assignment or agreement that transfers the authority to adjust, negotiate, or settle any portion of a claim to such contractor . . . is void"); H.B. 669, § 1 (2015) (committee substitute 1) (same).

Despite the concerns Security First raised, for the reasons set forth above, the questions Security First raises fall short of great public importance and therefore should not be certified by this Court.

WHEREFORE, the Office respectfully requests that this Court deny Security First's Motion for Certification.

Respectfully submitted this 6th day of August, 2015.

/s/ Patrick D. Flemming
PATRICK D. FLEMMING
Fla. Bar No.: 0101085
Office of Insurance Regulation
Legal Services Office
200 East Gaines Street
Tallahassee, FL 32399-4206
Phone: (850) 413-4276
Fax: (850) 922-2543
Attorney for Appellee

CERTIFICATE OF SERVICE

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

Amy Koltnow
Maria Elena Abate
Colodny Fass
One Financial Plaza, 23rd Floor
100 Southeast Third Avenue
Fort Lauderdale, Florida 33394
mabate@colodnyfass.com
akoltnow@colodnyfass.com
Counsel for Security First

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
Patrick D. Flemming
Assistant General Counsel