IN THE SUPREME COURT
STATE OF FLORIDA

CASE ***No. 90,323***

LEXINGTON INSURANCE COMPANY,

Petitioner,

V.

SIMKINS INDUSTRIES, INC.,

Respondent.

BRIEF OF RESPONDENT

ON **DISCRETIONARY REVIEW FROM THE THIRD DISTRICT COURT OF** APPEAL

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INTRODUCTION

Respondent Simkins Industries, Inc. (Simkins) made several loans to WAK Limited, Inc. (WAR), an entity that owned a hotel on Miami Beach. The mortgage and security agreement between Simkins and WAK, as collateral for the loans, granted Simkins, among other things, (a) the right to receive insurance proceeds, and (b) an assignment of WAK's insurance policies, including a policy written by petitioner Lexington Insurance Company (Lexington). Applying established principles of insurance law that the Florida courts have not heretofore had the opportunity comprehensively to address, the Third District ruled that this pre-existing assignment of an insurance policy as collateral security for the payment of a debt is "outside the scope and purpose of general policy provisions against assignment without the insurer's consent." The court's sound ruling on this point should find approval before this Court.

STATEMENT OF THE CASE AND FACTS

1. The Agreements Between Simkins and WAK.

Simkins loaned WAK $2.5 million in April of 1988. (R: 140, 168-72). WAK provided Simkins with a promissory note and executed both a mortgage on its property, the Monte Carlo Hotel in Miami Beach, and a security agreement. (R: 143-72). Under the security agreement, Simkins was granted a security interest in the hotel building, WAK's personal property, and the proceeds of all insurance policies on the hotel premises, including fire insurance. (R: 143-44). The security agreement specifically provides that WAK granted Simkins a security interest in the "proceeds of any fire or hazard insurance policy covering the Mortgaged Property." Id.

WAK further agreed to maintain insurance on the mortgaged property, including fire insurance "with extended coverage and business interruption coverage." (R: 146-47). The proceeds of such insurance policies were assigned by WAK to Simkins, which was appointed as WAK's attorney-in-fact for this purpose:

> In the event of loss, . . . [e]ach insurance company concerned is hereby authorized and directed to make payment under such insurance . . . directly to [Simkins] instead of to [WAK] and [Simkins] jointly, and [WAK] appoints [Sir&ins], irrevocably, as [its] attorney-in-fact to endorse any draft therefor . . . . Such policies of insurance and all renewals thereof are hereby assigned to [Simkins] as additional security for payment of the indebtedness hereby secured.

(R: 146-47).[1]

Simkins loaned WAK approximately $5.5 million. (A:2). WAK executed a promissory note, mortgage, and security agreement in Simkins' favor. ***Id.*** The mortgage and security agreement granted Simkins a security interest in WAK's property, the Monte Carlo Hotel (and the land underneath the hotel) in Miami Beach, as well as a security interest in personal property used in connection with the hotel and "the proceeds of all insurance policies that covered the hotel. " ***Id.*** WAK also agreed to assign all insurance policies to Simkins as additional security for the loan. ***Id.***

Long after securing the loans and granting the security interests to Simkins, WAK procured a $2 million insurance policy from Lexington, which policy included coverage for fire damage. (A:2). The Lexington policy covered damage to the hotel building and personal property, as well as coverage for business income loss. ***Id.*** Simkins was named as the first mortgagee in the Lexington policy's loss-payable clause. ***Id.*** After the hotel was damaged by fire in October of 1993, Simkins filed an action seeking proceeds due under the policy. (A:2-3). On Lexington's motion for summary judgment, the trial court ruled that "Simkins may not recover under the policy for any loss of business income or damage to business personalty." (A:3).

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[1] Simkins and WAK executed a loan modification agreement in February of 1989, pursuant to which agreement Simkins loaned WAK an additional $1 million; the agreement expressly incorporated all terms, conditions, and stipulations set forth in the original loan documents and the security agreement. (R: 173-76). A subsequent agreement in November 1989 for an additional loan of $2 million was also made subject to the original loan conditions and the security agreement. (R: 180-211). Simkins recorded each of the mortgages and security agreements in the public records and filed the appropriate financing statements with the Florida Secretary of State. (R:212-19).

2. **The Lexington Insurance Policy.**

WAK purchased an "all-risk" insurance policy from Lexington, in compliance with the Simkins loan agreement. (R:6-53). The "Building and Personal Property Coverage" section of the policy provides that Lexington "will pay for direct physical loss or damage" to the hotel property caused by fire (or other covered event) and will also cover damage to "business personal property." (R:31-32). In a section of the business and personal property coverage titled "Mortgage Holders," the policy provides: "We will pay for covered loss or damage to buildings or structures to each mortgage holder shown in the Declarations in their order of precedence, as interests may appear." (R:40).[2] The policy further provides coverage for "actual loss of [b]usiness [i]ncome" due to a suspension of operations at the hotel as a result of a covered loss. (R:43).

The policy provides that an "[a]ssignment of this policy shall not be valid except with the written consent" of Lexington. (R:50). Further, WAK's rights under the policy "may not be transferred without [Lexington's] written consent expect in the case of death of an individual named insured." *Id.* An endorsement to the policy names Simkins as a loss-payee/mortgagee under the policy, (R:6-8). The endorsement specifically provides that a loss "shall be payable" to Simkins as first mortgagee. *Id.*

The Monte Carlo suffered damage as a result of a fire on October 3, 1993. (R:3,82-83,141). Simkins filed this action against Lexington in March of 1995, seeking recovery of insurance proceeds. (R:l-53). Lexington's answer sets forth its position that Simkins is entitled to recover only for damage to the hotel building under the terms of the policy. (R:54-60).[3] The trial court granted Lexington's motion for summary judgment, ruling that "Simkins is entitled to recover property damage only." (R:551-53).

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[2] The mortgage holder's right to insurance proceeds is unaffected by a denial of coverage to WAK. *Id.*

[3] WAK was in Chapter 11 bankruptcy proceedings in the Southern District of Florida at the time of the fire. (R:99-107,141). In April of 1995, the bankruptcy judge ordered (continued . . .)

3. **The Third District's Decision.**

On Simkins' appeal to the Third District, Lexington asserted that "any assignment was in violation of the policy provisions that prohibit assignment without the consent of the insurer. " (A:3) (footnote omitted). The Third District noted the provision in the policy that "[a]ssignment of this policy shall not be valid except with the written consent" of Lexington, and the clause in the agreement between WAK and Simkins that all "policies of insurance . . . are hereby assigned to [Simkins] as additional security for payment of the indebtedness hereby secured," (A:3). The court determined that "the assignment here involved does not come under the policy provisions prohibiting assignment without Lexington's consent. " (A: 3-4).

Citing to authoritative treaties on insurance law, the court explained:

> The plain language of the assignment, not to mention the surrounding circumstances, clearly indicate that WAK assigned the policy as collateral security for the payment of its debt to Simkins. Such "assignments" (also referred to as "transfers" or "pledges") are regarded, correctly in our view, as being outside the scope and purpose of general policy provisions against assignment without the insurer's consent.
>
> "The reason generally given for this rule is that the assignee in such a case acquires a mere equity under the policy and the insured is not divested of his or her legal interest in the policy. " "Such a transfer does not affect legal title to or possession of the property involved. " Moreover, the purpose of such nonassignability clauses is "to prevent an increase of risk and hazard of loss by a change of ownership without the knowledge of the insurer. " Clearly, that purpose is not implicated by the assignment in this case. Thus, the trial court incorrectly concluded that Simkins was not entitled to recover for the loss of business income and the loss and/or damage to personalty.

(continued . . .)

Lexington to tender a check in the amount of $338,900.50, representing the agreed insurance proceeds for building and property damage, to Simkins' counsel. (R: 107). These proceeds thereafter were interpled by Simkins' counsel in the circuit court; a dispute over the proceeds between Simkins and the second mortgagee is currently pending before the Third District in *Edgar H. Galvin v. Simkins Industries, Inc.*, Case No, 97-12640,

(A:4-5) (citations omitted).[4]

SUMMARY OF ARGUMENT

A pre-existing assignment of insurance proceeds as collateral security does not offend an insurer's anti-assignment clause, particularly where, as here, the lender is endorsed on the insurance policy as a mortgagee payee. The purpose of "anti-assignment" clauses is to protect an insurer against unbargained-for risks, most notably in fire insurance polices, which generally are treated as personal contracts. But an assignment of proceeds as collateral security for a mortgage loan — in what should actually be treated as a pledge — does nothing to increase the insurer's risk and, indeed, leaves all ownership interests exactly as they were before the assignment.

The Florida courts have not heretofore addressed the issue decided by the Third District in this case. Under well established Florida precedent, however, a mortgagee's right to insurance proceeds where, as here, the mortgagee is endorsed as a mortgagee-payee under the insurance policy, is firmly established. The law in other jurisdictions is that an "assignment" of insurance proceeds as collateral security transfers a mere equitable interest in the proceeds and effectuates a lien on behalf of a mortgagee. Such an arrangement does not impinge upon, or imply any disrespect for, an insurer's right to withhold its consent to an assignment,

In the end, Lexington is obligated to pay under the terms of its policy. Indeed, Lexington has agreed that Simkins is entitled to payments for fire damage to the building, and the only question is whether the payments under the personalty and business-interruption provisions of the policy are to be made to the insured or to Simkins. Under these circumstances, the Third District held that Simkins has a right to insist upon enforcement of its

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[4] The decision is reported at ***Simkins Industries, Inc. v. Lexington Insurance Company,*** 688 So. 2d 348 (Fla. 3d DCA 1997).

security interest in the insurance proceeds. This eminently reasonable holding should find favor with this Court.

ARGUMENT

1. Simkins' Right to Recover as a Mortgagee Under the Lexington Policy.

Lexington acknowledges that the mortgage clause in its policy, under which Simkins is named as the first mortgagee, "constitutes a separate contract between the insurer and the mortgage holder." Brief of Petitioner at 14. Because the mortgage clause appears in the section of the policy titled "Building and Personal Property Coverage" (R:31-32,40,43), Lexington asserts that Simkins "is entitled to recover only the proceeds for 'covered loss of or damage to buildings or structures,' as provided in the insurance policy," and that Simkins cannot recover for damage to personalty or under the business-interruption provisions of the policy. Brief of Petitioner at 14-15.[5]

The crippling flaw in this argument is that Simkins' status as a mortgagee-payee is ***separately established*** by an endorsement to the policy that names Simkins as the mortgagee and which states that a "[l]oss, if any, shall be payable to [Simkins]" as first mortgagee. (R:6-8). That endorsement does not limit Simkins' right to receive proceeds to losses under the Building and Personal Property Coverage section of the policy, nor does it suggest in any manner that proceeds from ***any*** particular coverages are excluded.

The mortgagee clause thus "reflects as its dominant purpose an intention to extend coverage . . . the clause must be liberally construed in favor of the insured." *Valdes* ***v. Smalley,*** 303 So, 2d 342, 344 (Fla. 3d DCA 1974), ***cert. discharged,*** 341 So. 2d 975 (Fla. 1976). "[I]f an insurer intends to limit mortgage coverage to real property and to define 'mortgage holder'

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[5] The Third District did not reach this question, presumably because its holding that the assignment by WAK was valid entitled Simkins to full recovery under the policy. (A:4-5). That holding is addressed separately by Lexington, Brief of Petitioner at 17-26, and Simkins will discuss the assignment issue in Point 2, *supra*. If, however, Simkins prevails on the present issue, there is no need to reach the question whether the assignment was valid.

to exclude holders of secured interest in personal property, it must *use unambiguous language* to do so." 5A J. **APPLEMAN, INSURANCE LAW & PRACTICE,** § 3405 (1970) (emphasis supplied; footnote omitted). Particularly because the endorsement issued *without limitations as to coverage,* it is impossible to read the limited mortgagee clause in the property-damage section of the policy as extending beyond that section.

The mortgage clause in the endorsement plainly states that Simkins is payable *as the first mortgagee* :

LEXINGTON INSURANCE COMPANY
(A DELAWARE CORPORATION)
(A STOCK INSURANCE COMPANY)
Administrative Office 200 State Street, Boston. Massachusetts 02109
COMMERCIAL PROPERTY POLICY
DECLARATIONS

POLICY NUMBER: 8691107 RENEWAL OF:

ITEM 1. Named Insured: WAK LTD DBA MONTE CARLO HOTEL
Address: 6551 COLLINS AVE
MIAMI BEACH FL 33141-

ITEM 2. Policy Period:
From 08/16/93 To 08/16/94
at 12:01 A.M. Standard Time at the address of the named insured shown above

ITEM 3. Limit of Insurance:
2,000,000 PRIMARY

Total Premium $27,059 Plus tax Minimum Earned Premium $6,765 Plus tax

Perils:
ALL RISK EXCLUDING FLOOD AND EARTHQUAKE

ITEM 5. Description of Property Covered: Coinsurance
BUILDING
CONTENTS
BUSINESS INCOME

THE FOLLOWING ENTITIES ARE HEREBY ADDED TO ITEM 6 OF THE POLICY DECLARATIONS:
1ST MORTGAGEE: SIMKINS WESTFIELD FINANCIAL CORP.
6101 BLUE LAGOON DRIVE #270
MIAMI, FLORIDA 33126
2ND MORTGAGEE: EDGAR H. GALVIN
3650 N. 36TH AVENUE
VILLA #30
HOLLYWOOD, FLORIDA 33021

ITEM 6. Mortgagee Clause: Loss, if any shall be payable to:

ITEM 7. Forms Attached: 8
See attached forms schedule

Countersigned on 08/20/93
Authorized Representative

(R:6-8).

A "standard" mortgage clause (also variously known as a "union" or "New York" clause) frees that mortgagee from any policy defenses that the insurer might have against the mortgagor. ***E.g., Secured Realty Investment Fund, Ltd., III v. Highlands Insurance Company,*** 678 So. 2d 852, 854 (Fla. 3d DCA), ***review denied,*** 686 So. 2d 578 (Fla. 1996); ***Progressive American Insurance Company v. Florida Bank at Daytona Beach, 452 So.*** 2d 42, 44 (Fla. 5th DCA 1984); ***State Farm Fire and Casualty Company v. Aetna Fire Underwriters Insurance Company,*** 413 So. 2d 144, 145-46 (Fla. 5th DCA 1982). Such a clause thus creates "a separate agreement between the insurance company and the mortgagee in which policy provisions of the insurance contract not in conflict with the mortgage clause become part of this separate contract. " ***Independent Fire Insurance Co. v. NCNB National Bank of Florida,*** 517 So. 2d 59, 63 (Fla. 1st DCA 1987).

The second type of mortgagee clause is an "open loss payable" clause, under which the mortgagee "is usually subject to the same defenses" as would be available against the mortgagor. ***Progressive American,*** 452 So. 2d at 44. "[S]uch a clause . . . does not create a contract between the insurer and the loss payee and does not give the loss payee any rights greater than those to which the insured is entitled." *DeMay* ***v. Dependable Insurance Company,*** 638 So. 2d 96, 97 (Fla. 2d DCA 1994) (citation omitted). Thus, in the parlance used by insurance companies, there is a clear differentiation between a "mere loss payee" and a "mortgagee payee," ***i.e.,*** "[i]n contradistinction with a basic loss payee whose rights are totally derivative, a mortgagee payee has an independent agreement with the insurer." ***Granite State Insurance Company v. Employers Mutual Insurance Company,*** 125 Ariz. 275, 609 P.2d ***90, 92*** (1980); ***accord, Valley National Bank of Arizona v. Insurance Company of North America,*** 172 Ariz. 212, 836 P.2d 425, 428 (1992) ("[a] mortgagee payee is different than what is normally called a loss payee" because of independent agreement created by standard clause, as opposed to loss payee's wholly-derivative rights); ***First State Bank of*** *Idabel,* ***Oklahoma v. State Farm Fire and Casualty Company,*** 840 P.2d 1267, 1268-69 (Okla. Ct.

App. 1992) (mortgagee payee has "a superior right to policy proceeds" under standard mortgage clause).

A true "loss payee" has ***very limited rights*** under an insurance policy:

> From the point of view of legal interpretation, it has been held that a mortgagee under an open clause is an appointee only to receive the funds payable in the event of loss; it is not an assignment of the contract, but an appointment only. It does not create a new contract with the payee nor abrogate any condition of the policy. The rights of such appointee are, therefore, no greater than those of the insured, nor is an undertaking thereby imported to pay the mortgagee, independent of that to pay the insured or mortgagor. And, in any event, such a policy is insurance on the property of the mortgagor as owner, rather than on the interest of the mortgagee.. . .

5A J. **APPLEMAN, INSURANCE LAW & PRACTICE,** § 3401 (1970) (footnotes omitted); ***accord, e.g., Chrysler First Commercial Corporation v. State Farm Insurance Company,*** 269 Ill. App. 3d 318, 646 N.E.2d ***647, 649 (1995); Midwest Federal Savings and Loan Association of Minneapolis v. West Bend Mutual Insurance Company,*** 407 N.W.2d 690, 695-96 (Minn. Ct. App. 1987).

Simkins' status as a mortgagee-payee, as established by the endorsement, must accordingly be given its due weight and significance. Where an endorsement does not specifically provide otherwise, it "operate[s] to extend to the mortgagee ***whatever coverage was afforded by the main policy." Aero International, Inc. v. United States Fire Insurance Company,*** 713 F.2d 1106, 1109 (5th Cir. 1983) (emphasis supplied)." Moreover, "to the extent an endorsement is inconsistent with the body of the policy, ***the endorsement controls."***

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[6] ***Paskow v. Calvert Fire Insurance Company, 579*** F.2d 949, 952-53 (5th Cir. 1978), upon which Lexington primarily relies to bolster its interpretation of the mortgagee clause, Brief of Petitioner at 15-16, applied a "loss payable clause" that was "expressly limited 'to buildings only.' " 579 F.2d at 951. Here, by contrast, the mortgage clause appears ***only*** in a discrete section of the policy ***and*** Simkins is endorsed on ***the entire*** policy as mortgagee. To like effect is the decision in ***Employers' Liability Assurance Corporation v. Royals Farm Supply, Inc.,*** 186 So. 2d 317, 319 (Fla. 2d DCA 1966) (language of mortgagee clause provided that the clause ***does not apply*** to personal property) (emphasis supplied), also cited by Lexington. Brief of Petitioner at 16.

Steuart Petroleum Company, Inc. v. Certain Underwriters at Lloyd's London, 696 So. 2d 376, 379 (Fla. 1st DCA 1997) (citation omitted; emphasis supplied). Thus, regardless of how Lexington would have the Court read the "mortgage holder" clause in the business and property section of the policy, the parties' clearly-stated intent to constitute Simkins as a mortgagee-payee, as set forth in the endorsement, governs Simkins' rights under the policy.

No violence is done to the contract of insurance by doing so. The courts are bound to apply the "general rule that contracts prepared by an insurance company are to be construed against the insurer, and where two interpretations of policy language can fairly be made, the only allowing the greatest coverage to the insured will prevail." ***Secured Realty Investment Fund, Ltd., III v. Highlands Insurance Company,*** 678 So. 2d at 854 n.3 (citation omitted). When an exclusionary provision is at issue, "ambiguity is construed against the company." ***Ceron v. Paxton National Insurance Company,*** 537 So. 2d 1090, 1091 (Fla. 3d DCA), ***review denied,*** 545 So. 2d 1368 (Fla. 1989). At worst for Simkins, the presence of the mortgagee clause in the property-damage provision and the unrestricted endorsement of Simkins as mortgagee create an ambiguity, e.g., ***State Farm Fire and Casualty Company v. Metropolitan Dade County,*** 639 So, 2d 63, 65 (Fla. 3d DCA) ("[a]n ambiguity arises when more than one interpretation 'may fairly be given' to a policy provision") (citation omitted), ***review denied,*** 649 So. 2d 234 (Fla. 1994), and that ambiguity must be resolved against Lexington. E.g., ***National Automobile Insurance Association v. Brumit,*** 98 So. 2d 330, 332 (Fla. 1957) ("provisions of a policy of insurance which tend to limit or avoid liability are to be construed most liberally in favor of the insured and strictly against the insurer"); ***Mitchel v. Cigna Property and Casualty Insurance Company,*** 625 So. 2d 862, 864 (Fla. 3d DCA 1993) ("insurance policies in general, and exclusions in particular, are interpreted strictly against the carrier").

2. **The Third District Correctly Ruled That WAK's Pre-Existing Assignment of the Insurance Proceeds Entitled Simkins to Recover Under the Policy.**

a. The right of a secured creditor to insurance proceeds under the Uniform Commercial Code.

Florida's Uniform Commercial Code provides that insurance payments are "proceeds" to which the holder of a security interest is absolutely entitled upon disposition of the secured property:

> "Proceeds" includes whatever is received upon the sale, exchange, collection, or other disposition of collateral or proceeds. ***Insurance payable by reason of loss or damage to the collateral is proceeds,*** except to the extent that it is payable to a person other than a party to the security agreement.. . .

§ 679.306(1) Fla. Stat. (1995) (emphasis supplied).

In ***Kahn v. Capital Bank,*** 384 So. 2d 976 (Fla. 3d DCA 1980), the holder of a promissory note, Kahn, had a security agreement with his debtor, a restaurant, under which insurance proceeds were assigned to Kahn. ***Id.*** at 976. Kahn thereafter assigned the note to Capital Bank, but "did not separately and specifically assign the insurance proceeds to the bank, nor was the bank made a loss-payee under the insurance policy." ***Id.*** at 976-77. After the restaurant was destroyed by fire, a dispute arose between Kahn and the bank over the disposition of the insurance proceeds, with Kahn insisting that "moneys paid on an insurance policy covering collateral are not 'proceeds"' under the UCC. ***Id.*** at 977.

Section 679.306(1), as it existed at the time of the dispute in ***Kahn, see*** § 679.306(1), Fla. Stat. (1977), did ***not*** include the express provision, now written into the statute, that insurance payments are, by definition, "proceeds." 384 So. 2d at 977 & n.2. Relying on prior federal and Florida interpretations of the statute,[7] the court held that "moneys paid on an insurance policy as a result of the destruction of mortgaged collateral are 'proceeds' within the

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[1] ***Paskow v. Calvert Fire Insurance Company, 579*** F.2d at ***952-53; PPG Industries, Inc. v. Hartford Fire Insurance Company,*** 531 F.2d ***58,*** 61 (2d Cir. 1976); ***Insurance Management Corporation v. Cable Services of Florida, Inc., 359 So.*** 2d 572, 575-77 (Fla. 2d DCA 1978).

meaning of Section 679.306(1). " ***384 So.*** 2d at 977; ***accord, Beaver Crane Service, Inc. v. National Surety Corporation,*** 391 So. 2d 224, 227-28 (Fla. 3d DCA 1980) ("insurance proceeds due and payable under an insurance policy for loss or damage . . . is payable to the secured party to the extent of its secured interest under the security agreement") (citing ***Kahn).***

The present statute, which includes the insurance proceeds provision, only reinforces the rectitude of the ***Kahn*** ruling. The Uniform Commercial Code was amended in 1972 to provide for payment of insurance proceeds, so as "to overrule various cases to the effect that proceeds of insurance on collateral are not proceeds of the collateral. " U. C.C. Rep. Serv., Code § 9-306. The Florida Legislature adopted this amendment in 1979, see Ch. 79-398, § 19, Laws of Fla., to codify the common-law interpretation of the prior statute. ***Beaver Crane Service,*** 391 ***So.*** 2d at 228; ***Kahn, 384 So.*** 2d at 977 n.2.

Thus, "[i]n accordance with the 1972 amendment to the Code, the creditor is entitled to the proceeds of insurance paid for the damage to or destruction of the collateral, particularly when the debtor was required to insure the property for the benefit of the creditor. " 68A Am. Jur. 2d, ***Secured Transactions,*** § 92 (footnotes omitted). Moreover, in another 1972 amendment to U.C.C. § 9-306, an apparent inconsistency with another section of the Code was eliminated, for the purpose of clarifying that a secured party has "an automatic right to proceeds" under subsection (1), "unless otherwise agreed" by the parties. U.C. C. Rep. Serv., Code § 9-306. Section 679.306, as amended in 1979, codifies this "automatic right," providing: "[A] security interest continues in collateral notwithstanding sale, exchange, or other disposition thereof . . . ***and also continues in any identifiable proceeds.*** " § 679.306(2), Fla. Stat. (1995) (emphasis supplied). These proceeds necessarily include the business-interruption payments. David B. Young, ***The Rights of Secured Creditors to the Proceeds of Business Interruption Insurance Under UCC Article 9, 26*** U. C.C. L. J. 204, 205 (1994) ("a secured creditor with a properly perfected security interest in the debtor's accounts . . . should be entitled to priority with respect to business interruption payments" because "the insurance

payment represents the proceeds of the collateral and any security interest in the collateral will attach to such proceeds").

b. A pledge of insurance proceeds is not an "assignment" of an insurance policy barred by an anti-assignment clause.

"The transfer or pledge of an insurance policy as collateral security for the payment of a debt is ***generally not regarded as an assignment*** within the meaning of a general policy provision against assignment without the consent of the insurer, " 3 COUCH **ON INSURANCE** § 37:43 (3d ed. 1995) (footnote omitted; emphasis supplied). This is so because "the assignee in such a case acquires a mere equity under the policy and the insured is not divested of his or legal interest in the policy." ***Id.*** (footnote omitted). An assignment "merely as collateral security" thus will not violate "a general provision forbidding assignments" of an insurance policy. 5A J. **APPLEMAN, INSURANCE LAW & PRACTICE,** § 3452.

It is certainly true, as Lexington maintains, see Brief of Petitioner at 23-25, that "fire insurance contracts are personal and that the identity of the insured is a matter of importance to the insuring company . " ***McHugh v. Manhattan Fire & Marine Insurance Company,*** 363 Mich. 324, 109 N.W.2d 842, 844 (1961). The rationale for enforcing anti-assignment clauses is grounded upon the recognition that "the identity of the insured is essential to the insurer's willingness to contract on the terms specified. " *Antal's* ***Restaurant, Inc. v. Lumbermen's Mutual Casualty*** Co., 680 A.2d 1386, 1388 (D.C. App, 1996) (citations omitted). As set forth in ***Parrish Chiropractic Centers, P.C. v. Progressive Casualty Insurance Company, 874*** P.2d 1049 (Colo. 1994), upon which Lexington has relied, Brief of Petitioner at 19, "[n]on-assignment clauses are strictly enforced against attempted pre-loss transfers of the policy itself, because assignments before loss involve a transfer of a contractual relationship and, in most cases, would materially increase the risk to the insurer. " 874 P.2d at 1053 (citations omitted).*

[8] ***Parrish*** involved an archetypal improper assignment. The insurer in the case provided PIP coverage under Colorado's no-fault insurance law. ***Id.*** at 1051. The policies provided that interests thereunder "may not be assigned without our written consent." (continued . . .)

The "object of insurance policies requiring insurer consent is 'to prevent an increase of risk and hazard of loss by change of ownership without the knowledge of the insurer," ***Nelson v. Illinois Farmers Insurance Company,*** 1997 WL 469563 (Minn. Ct. App. Aug. 19, 1997) (citation omitted).

Thus, contrary to Lexington's arguments, the question whether and to what extent "anti-assignment" clauses will be enforced cannot be answered in a vacuum. Even when a technical violation of such a clause is found, "[i]f in fact the breach of the policy provision does not increase the insurer's risk . . . the plaintiff may still recover on the policy for its own loss" because "the purpose of the consent requirement is to protect the insurer against an unbargained for increase of risk." ***Standard Mutual Insurance Company v. Petreikis,*** 183 Ill. App. 3d 272, 538 N.E.2d 1327, 1333 (citation omitted), ***appeal denied,*** 127 Ill. 2d 642, 545 N.E.2d 131 (1989). Where there is "no more risk and hazard of loss" after an assignment than existed before the assignment, enforcement of an anti-assignment clause "would place form over substance." ***National American Insurance Company v. Jamison Agency, Inc.,*** 501 F.2d 1125, 1128 (8th Cir. 1974).[9] Try as it might, see Brief of Petitioner at 23-24, Lexington

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(continued . . .)

Id. The plaintiff, a provider of chiropractic services, required its patients to execute assignments of their rights to receive benefits under their PIP policies; the action was brought because the insurer refused to honor the assignments and insisted on making payments directly to its insureds. ***Id,*** at 1052. The basis for the insurer's decision was that "allowing an assignment diminished the insurer's and insured's ability to control the frequency and costs of treatment." ***Id.*** The court upheld the insurer's position, noting that "non-assignment clauses 'are valuable tools in persuading health care providers to keep their health care costs down.'" ***Id.*** at 1053. Nothing in the ***Parrish*** decision touches upon the propriety of a pledge of proceeds as security for a loan.

[9] The decision in ***National American*** addressed a transfer of ownership that included an assignment of a corporation's fire insurance policy, 501 F.2d at 1127-28, ***i.e.,*** a more profound and far-reaching "assignment" than the pledge in the present case. The court recognized the previously-discussed principle that an "anti-assignment" clause in a fire insurance policy is a reasonable condition that will generally be enforced, but held that this principle should not be applied to "work an unexpected forfeiture of insurance coverage, . . . when the assignment involves no increase in risk to the insurer." ***Id.*** at 1128.

will never be able to show that the assignment of an equitable interest in a fire insurance policy as security for a mortgage loan increases in any way the risk of loss. Indeed, no such argument could possibly be made in this case — because Lexington has ***conceded*** the propriety of Simkins' receipt of at least a portion of the insurance proceeds pursuant to its pre-existing contractual rights.

Indeed, the rationale for enforcing an "anti-assignment" provision is particularly absent in the circumstances of this case. A pledge of insurance proceeds is ***not a transfer of ownership,*** and serves only to create a qualified interest in the assignee. ***E.g., Emmons v. Lake States Insurance Company,*** 193 Mich. App. 460, 484 N.W.2d 712, 714 (1992) ("[a]n assignment made as collateral security for a debt gives the assignee only a qualified interest in the assigned chose, commensurate with the debt or liability secured"); ***Males v. New York Life Insurance Company, 48*** A.D.2d 50, 367 N.Y.S.2d 575, 579 (1975) ("an assignment of an insurance policy as collateral security . . . merely creates a lien in favor of the assignee to the extent of the debt owed"); ***Duty v. First State Bank of Oregon,*** 71 Or. App. 611, 693 P.2d 1308 ***(same), review denied, 298*** Or. 822, 698 P.2d 963 (1985). Citing these principles, the decision in *Hartford* ***Fire Insurance Company v. Mutual Savings and Loan Company,*** 193 Va. 269, 68 S.E.2d 541 (1952), upon which the Third District relied (A:4), held as follows:

> The general rule is that the transfer of a fire insurance policy as collateral security for the payment of a debt is not an assignment within the meaning of the provisions against assignment without the consent of the insurer endorsed thereon. Such a transfer does not affect legal title to or possession of the property involved. It simply gives the assignee or pledgee an equitable lien to the extent of his debt on the proceeds of the policy in the event of loss.
>
> A mere assignment of a policy as collateral security without [the] insurer's consent does not violate a provision of the policy that it will be void if it is assigned without the insurer's consent, since the assignee in such a case acquires a mere equity under the policy, and the legal interest of the insured in the policy is not divested. Nor is the pledge of an insurance policy within a provision requiring an assignment of the policy to be in writing and filed with the insurer.

Id. at 544-45 (citations omitted). [10]

c. **The Third District's analysis.**

The Third District's decision does no violence to the common-law rule or to an insurer's right to impose an "anti-assignment" clause under the Florida's Insurance Code. § 627.422, Fla. Stat. (1995).[11] The court merely applied long-established principles of insurance law to allow a secured creditor to enforce a pledge of insurance proceeds after a loss to the covered property. The insurer's risk is increased not one whit by that holding, and there is no legal basis for finding error in the Third District's resolution of this issue

Lexington nonetheless rails against the Third District's decision, insisting that insurers are "the final arbiters as to whether they will permit assignments of their policies" under Section 627.422, Florida Statutes (1995) ("[a] policy may be assignable, or not assignable, as provided by its terms"), and urging that the Third District has evinced a "cavalier disregard of a valid and enforceable policy condition" in the contract of insurance. Brief of Petitioner at 18, 24. Harsh words, it would seem, for a decision that merely applies well-established principles of insurance law to distinguish between a true ***assignment*** of an insurance policy — as to which an insurer certainly may insist on giving consent — and a ***pledge*** of ***insurance proceeds*** as security for a loan. As the Third District said:

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[10] Although taking the Third District to task for citing to "an obscure Virginia case," Brief of Petitioner at 21, Lexington cites ***no authority*** for a contrary proposition. The holding in ***Hartford Fire*** on this issue has been cited with approval by every authoritative treatise, 43 Am. Jur. 2d, *Insurance* § ***804*** nn.59 & 60; **COUCH ON INSURANCE**, ***supra*** at § 37:43 n.47; **APPLEMAN**, ***supra*** at § 3452 n.18.

[11] Lexington's argument that the Third District overstepped its bounds by construing the "anti-assignment" clause, Brief of Petitioner at 19-20, entirely misses the mark. The construction and interpretation of a written contract is a matter of law, e.g., ***DEC Electric, Inc. v. Raphael Construction Corporation, 558 So.*** 2d 427, 428 (Fla. 1990), and, accordingly, "an appellate court is not restricted in its ability to reassess the meaning and effect of a written instrument to reach a conclusion contrary to that of the trial court." *Angell* ***v. Don Jones Insurance Agency, Inc., 620 So.*** 2d 1012, 1014 (Fla. 2d DCA 1993) (citation omitted).

> The plain language of the assignment, not to mention the surrounding circumstances, clearly indicate that WAK assigned the policy as collateral security for the payment of its debt to Simkins. Such "assignments" (also referred to as "transfers" or "pledges") are regarded, correctly in our view, as ***being outside the scope and purpose of general policy provisions against assignment without the insurer's consent.***
>
> "The reason generally given for this rule is that the assignee in such a case acquires a mere equity under the policy and the insured is not divested of his or her legal interest in the policy. " "Such a transfer does not affect legal title to or possession of the property involved. " Moreover, the purpose of such nonassignability clauses is "to prevent an increase of risk and hazard of loss by a change of ownership without the knowledge of the insurer. " Clearly, that purpose is not implicated by the assignment in this case. Thus, the trial court incorrectly concluded that Simkins was not entitled to recover for the loss of business income and the loss and/or damage to personalty.

(A:4-5) (citations omitted; emphasis supplied).

Lexington's argument that "[a] 'no assignment' clause virtually identical" to the clause in WAK's policy "was found to be clear, unambiguous and enforceable" in ***Classic Concepts, Inc. v. Poland, 570 So.*** 2d 311 (Fla. 4th DCA 1990), ***review denied,*** 581 So. 2d 163 (Fla. 1991), Brief of Petitioner at 20, is simply incorrect. In ***Classic Concepts,*** a manufacturer insured a shipment of ceiling fans under a point-to-point transportation inland marine floater policy that insured the cargo while in transit from the factory to a warehouse. ***Id. 3*** 11. Poland (a Lloyds underwriter) insured Casado Transport, which was engaged to transport the cargo to the retailer. The policy issued by Poland was an indemnity policy, pursuant to which Casado Transport would be indemnified "only to the amount which they are obligated to pay and do pay. " ***Id.*** at 3 11-12. This indemnity policy had an anti-assignment clause that prohibited assignment without the insurer's written consent. ***Id.*** at 312. The ceiling fans were stolen while in the keeping of Casado Transport. *Id.*

The manufacturer, Classic Concepts, filed a claim with its insurer, Ohio Casualty, for the loss and was paid for a portion thereof. ***Id.*** at 312. Ohio Casualty thereafter brought a subrogation action against Casado Transport; this action was resolved by an agreement that Casado Transport would assign its claim against Poland and thereby be excused from any

liability to Ohio Casualty or Classic Concepts. ***Id.*** Upon securing this assignment, Classic Concepts and Ohio Casualty sued Poland. ***Id.*** Because the policy issued to Casado Transport was an "indemnity for loss policy," under which "the indemnitee cannot recover until he has made payment or otherwise suffered actual loss or damage" and the second of these conditions had not been met, i.e., Casado Transport had not actually paid the loss, Poland had no duty to pay Casado Transport. ***Id.*** at 3 12-13. To protect against an apparent effort "to circumvent the built-in safeguards of the indemnity for loss policy," the court enforced the anti-assignment clause of the Poland policy because "the policy was clear and unequivocal in its prohibition of assignment without the insurer's permission." ***Id.*** at 3 13.

Lexington thus goes far astray in suggesting that ***Classic Concepts*** involved a "virtually identical" no assignment clause. Brief of Petitioner at 20. ***Classic Concepts*** did ***not*** involve a pre-existing assignment of an equitable interest in the proceeds of an insurance policy as collateral for a loan, and the Third District fully recognized and appreciated the rule — upon which ***Classic Concepts*** squarely rests — that ***general*** anti-assignment clauses prevent an insured from assigning rights under a contract of insurance. (A:3-5).

There is no Florida precedent that contravenes the Third District's analysis of the distinction between a true ***assignment*** of an insurance policy and a ***pledge*** of an equitable interest pursuant to a security agreement, and the court's decision rests upon well established and recognized principles of insurance law. The "assignment" by WAK was nothing more or less than a formal recognition by the parties of Simkins' rights as a secured creditor under the UCC. Lexington's effort to paint the Third District's decision as some sort of radical rewriting of insurance law is simply untenable.

CONCLUSION

Based on the foregoing, Simkins requests the Court to approve the decision of Third District in this case.

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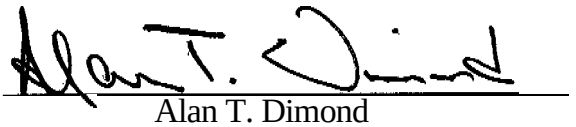
By: 
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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Brief of Respondent was mailed on September 15, 1997 to:

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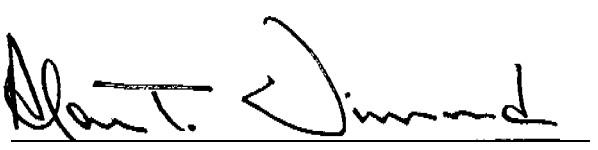

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