IN THE SUPREME COURT OF FLORIDA
CASE NO. 90,323

LEXINGTON INSURANCE COMPANY,

Petitioner,

vs.

SIMKINS INDUSTRIES, INC.,

Respondent.

PETITIONER'S INITIAL BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

In 1988, the entity now known as SIMKINS INDUSTRIES, INC. ("SIMKINS") loaned WAK Limited, Inc. ("WAK") approximately $2.5 million to finance WAK'S ownership of the Monte Carlo hotel on Miami Beach. (R.140, 168-172) In exchange for the funds, WAK gave SIMKINS a promissory note and executed a Mortgage and Security Agreement. (R.143-72) Edgar Galvin (GALVIN) had a pre-existing interest in the property, and as part of the transaction, GALVIN agreed to subordinate his interest to that of SIMKINS. (R.7)

SIMKINS' Mortgage gave to it more than just an interest in the Monte Carlo premises: the documents purported to secure SIMKINS' investment by providing SIMKINS with a stake in the personal property on the premises, as well as a stake in the insurance covering that property through an assignment of any and all insurance policies. (R.143-144) The Mortgage provided that WAK agreed to keep the property insured and that WAK, in the event of a loss, assigned its interest in the policies to SIMKINS. (R.146-147) SIMKINS filed two UCC-1 financing statements with the Secretary of State in Tallahassee, Florida, and recorded them in Miami, Florida. (R.212-215) Both had expired by the time SIMKINS filed suit. (R.212-215)

In 1989, SIMKINS loaned to WAK an additional $1 million and the parties to the mortgage entered into a Loan Modification Agreement, making this additional loan subject to the terms of the original note and Mortgage. (R.173-176) A third loan agreement, memorializing SIMKINS' loan to WAK of still an additional $2 million, was executed in

November, 1989, and likewise incorporated the provisions of the initial loan agreement. (R.180-211) SIMKINS again filed the documents with the Secretary of State and recorded the UCC-1 statement in the public records of Dade County. (R.216-219)

In the meantime, as agreed, WAK obtained insurance coverage for the Monte Carlo and the personal property therein. From August 16, 1993 to August 16, 1994, WAK had in force an insurance policy with LEXINGTON for the principal sum of $2 million. (R.6-53) The policy insured WAK's Monte Carlo Hotel and covered the insured for the contents thereof and for loss of business income in the event of a covered loss. (R.6) As required by the mortgage documents, the endorsements provided that SIMKINS was insured as the First Mortgagee and Galvin was insured as the Second Mortgagee. (R.7) The named insured was specified as "WAK LTD DBA MONTE CARLO HOTEL". (R.6, 8, 9) The policy provided that "[a]ssignment of this policy shall not be valid except with the written consent of [Lexington]." (R.12) In addition, the policy stated that "[WAK'S] rights and duties under this policy may not be transferred without our written consent except in the case of death of an individual named insured." (R.12)

The policy covered the named insured WAK for "direct physical loss of or damage to Covered Property at the premises described in the Declarations caused by or resulting from any Covered Cause of Loss." (R.31) Covered causes of loss were separately defined as "all risk excluding flood and earthquake" and included loss by fire. (R.8) The term "Building" included completed additions, fixtures, machinery and equipment permanently installed on the premises, outdoor fixtures and

personal property used to maintain and service the building. (R.31) "Personal Property" was defined to include furniture and fixtures, machinery and equipment, stock, and all other property owned by the named insured and used in its business. (R.31)

The policy also covered the named insured WAK for loss of business income as follows:

> A. COVERAGE
>
> We will pay for the actual loss of Business Income you sustain due to the necessary suspension of your 'operations' during the 'period of restoration.' The suspension must be caused by direct physical loss of or damage to property at the premises described in the Declarations, including personal property in the open (or in a vehicle) within one hundred (100) feet, caused by or resulting from any Covered Cause of Loss.
>
> 1. Business Income
>
> Business Income means the:
>
> a. Net Income (Net Profit or Loss before income taxes) that would have been earned or incurred; and
>
> b. Continuing normal operating expenses incurred, including payroll.

(R.43)

The "Additional Conditions" section of the policy provided that Mortgage Holders were entitled to received payment for "covered loss of or damage to buildings or structures, in order of their precedence and as their interests may appear." (R.40) That section also said that if the insured was denied coverage because of its own wrongful act(s) or because of its failure to comply with the policy, the mortgage holder would still have the right to receive loss payment if the mortgagee

submitted an executed proof of loss within 60 days after being requested to do so and if the mortgagee has notified the insurer of any change in ownership, occupancy or substantial change in risk known to the mortgagee. (R.40) Assuming that the mortgagee fully complied with these requirements, the policy provided that "[a]ll of the terms of this Coverage Part will then apply directly to the mortgage holder." (R.40) In the event the mortgage holder was paid the principal and interest due, the insurer was entitled to an assignment of the mortgage and the insured remained obligated to make its mortgage payments to the insurer. (R.41)

In 1991, WAK filed for reorganization in bankruptcy in the Southern District of Florida. (R.99-107, 141) Those proceedings which came to be known as WAK I were concluded shortly before the subject loss occurred.

In October of 1993, while the hotel was closed and while it was insured by LEXINGTON, the Monte Carlo suffered a fire loss. (R.3, 6, 82-83, 141) Shortly after that loss, WAK once again declared bankruptcy and the Bankruptcy Court began liquidating the company pursuant to Chapter 7.[1] (R.318-320) SIMKINS was a party to those proceedings. (R.318-320) In late summer of 1994, the bankruptcy trustee abandoned all interest in the hotel and the Bankruptcy Court entered an Agreed Order Granting Relief from the Automatic Stay. (R.318-320) That Order permitted SIMKINS to prosecute a foreclosure action against WAK. (R.318) LEXINGTON was not a party to that

[1] This case came to be known as WAK II.

foreclosure action, which concluded with SIMKINS obtaining title to the Monte Carlo by way of Final Judgment of Foreclosure. (R.321) See, WAK Limited, Inc. v. Simkins Indus., Inc., 658 So. 2d 571 (Fla. 3d DCA 1995). At no time did SIMKINS assign LEXINGTON its mortgage, as was required by the express terms of the policy.[2]

LEXINGTON acknowledged from the inception in Bankruptcy Court in WAK II and in the present case, that it owed SIMKINS and/or GALVIN proceeds representing building damage as defined by the policy and agreed upon a figure with SIMKINS' adjuster. (R.79) LEXINGTON denied coverage to SIMKINS only for the contents of the building and business interruption claims. (R.59)

In April 1995, the Bankruptcy Court entered an order on WAK'S liquidation. (R.106-107) Although LEXINGTON had attempted to tender $339,900.50, the agreed upon amount of the proceeds due SIMKINS as mortgagee, SIMKINS refused to accept LEXINGTON'S tender. (R.107) SIMKINS then moved to deposit the funds in the registry of the Court which ordered that the funds be tendered to SIMKINS' attorney.[3] (R.107)

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[2] SIMKINS' position is that it had no obligation to assign LEXINGTON its mortgage, since the mortgage was extinguished by foreclosure prior to the time the company actually obtained the insurance proceeds, which remain in trust. (R.358-366)

[3] Subsequently, those funds were placed in the Trial Court Registry as Edgar Galvin contested the disposition of those funds and SIMKINS' counsel filed an interpleader action in this cause. (R.118-130, 248-249) That action is currently on appeal before the Third District Court of Appeal.

In 1995, SIMKINS filed suit against LEXINGTON seeking payment for the hotel personal property and business interruption. (R.1-53) SIMKINS alleged that the Monte Carlo and its contents were damaged by fire, causing WAK to lose income as a result and that SIMKINS was entitled to recover **all** insurance proceeds that would have been payable to WAK, in light of its Note and Mortgage. (R.1-4)

LEXINGTON filed its Answer asserting that SIMKINS, as a mortgagee under the policy, was limited to recovering payment for its building damages. (R.54-60) Alternatively, since LEXINGTON alleged that WAK was responsible for the fire loss, if SIMKINS purported to be anything other than a mortgage holder, its claim would be denied on the grounds that the insured intentionally caused the loss or otherwise violated material terms of the policy. (R.54-60) LEXINGTON also raised the affirmative defense that SIMKINS' failure to comply with the policy by foreclosing on the property instead of assigning LEXINGTON its mortgage relieved LEXINGTON of any further obligations to SIMKINS under the policy. (R.54-60)

LEXINGTON moved for Summary Judgment. (R.78-98) Its position was that it was not obligated to pay SIMKINS any proceeds other than those due under the mortgage holder clause. (R.79-80, 84-87). In opposition, SIMKINS claimed that it was entitled to all of proceeds of the policy pursuant to its Note and Financing Agreements with WAK which entitled it to the proceeds as a third party beneficiary of the insurance policy. (R.235-237) SIMKINS further sought to recover pursuant to an assignment of those proceeds, although LEXINGTON had

never approved of the assignment as required by the policy. (R.235-237)

The trial court entered final Summary Judgment in favor of LEXINGTON. (R.551-553) The order was based upon the Court's findings that:

1. A Mortgagee is only a third party beneficiary of an insurance policy to the extent of its mortgage and therefore, SIMKINS was only entitled to recover for property damage to the hotel and fixtures as provided in the policy;

2. Assuming that SIMKINS was otherwise entitled to recover for damage to personal property, its own Complaint alleged that the property was damaged as a result of asbestos contamination relating to the fire and, as such, recovery for the personal property was specifically excluded from coverage.

3. SIMKINS had already received payments for its interest in the proceeds and that payment has been in its attorneys' possession thereby constituting sufficient tender.

(R.552-553)

SIMKINS' motion for rehearing was denied and it appealed to the District Court. (R.532-535, 536-539, 545-546, 554) The Third District Court of Appeal issued its opinion in this case on January 8, 1997. (R.555-560) In its opinion, the court agreed with SIMKINS that it was entitled to recover insurance proceeds for damage to personal property and business interruption by virtue of WAK'S purported assignment of its policies, and in spite of LEXINGTON'S "no assignment" clauses. (R.555-560) The Court reasoned:

> 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. [citations omitted]
>
> '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.' [citation omitted] 'Such a transfer does not affect legal title to or possession of the property involved.' [citation omitted] 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.' [citation omitted] 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.

(R.558-559)

LEXINGTON filed Motions for Rehearing, Rehearing En Banc, Clarification and Certification, all of which were denied by the District Court. (R.561-561)

LEXINGTON then filed a Notice to Invoke this Court's jurisdiction on the grounds that this Third District's decision in this case conflicts with the Fourth District Court of Appeal's decision in Classic Concepts Inc. v. Poland, 570 So. 2d 311 (Fla. 4th DCA 1990), in which that Court held that where an unambiguous "no assignment" clause was included in an insurance policy, the policy could not be assigned without the insurer's consent. LEXINGTON also argued that the decision in this case conflicts with numerous cases from this Court and other District Courts of Appeal holding that courts have no authority to construe a contract in contravention of its plain language in the absence of waiver, estoppel or some overriding public policy, none of which are present in this case. See, e.g., Camden Fire Ins. Assn v. Daylight Grocery Co., 12 so. 2d 768 (Fla. 1943)(where there is no real

ambiguity in policy language, construction of the policy is governed by its plain language and undisclosed object or purpose of parties cannot be read into policy so as to extend coverage thereof to something not covered by language of policy).

This Court accepted jurisdiction to consider this case on July 25, 1997.

POINT ON APPEAL

THE TRIAL COURT CORRECTLY DETERMINED THAT SIMKINS, AS MORTGAGEE UNDER THE LEXINGTON POLICY, WAS NOT ENTITLED TO RECEIVE PROCEEDS OTHER THAN THOSE NECESSARY TO SATISFY WAK'S MORTGAGE

A. SIMKINS has only those riuhts expressly set out in the subject policy in which it is named a "mortgagee" and is entitled to only those benefits due a nortsasee under the policy.

B. SIMKINS has no risht to recover additional proceeds under the policy in its capacity as assignee in lisht of WAK'S violation of LEXINGTON'S "no assignment" clause.

SUMMARY OF ARGUMENT

The trial court correctly determined that SIMKINS, as designated mortgagee under the LEXINGTON policy, was not entitled to be paid proceeds other than those necessary to satisfy WAK'S mortgage. Pursuant to the express terms of the policy, SIMKINS was only entitled to be paid the proceeds representing damage to the real property. Since it is undisputed that LEXINGTON paid SIMKINS those proceeds before suit was filed, the trial court was eminently correct in finding that SIMKINS had already received all the benefits it was entitled to under that policy.

The trial court was also correct in finding that SIMKINS' assignment of the policy was unenforceable as against LEXINGTON under the "no assignment" clause of the policy, which required that LEXINGTON reserved the right to require its express written consent to any proposed assignment of the contract. The "no assignment" clause of the policy is clear and unambiguous and Florida Statute 627.422 permits insurers to include such clauses in their policies. The district court's refusal to apply the statute and enforce the "no assignment" clause as written impermissibly impinged on legislative intent and the authority granted to insurers by the lawmakers to provide for assignments of their policies as they see fit.

The district court's opinion is devoid of any public policy in favor of such drastic measures. To the contrary, there are valid public policy considerations that clearly militate against the court's interference in the limited contractual relationship between SIMKINS and LEXINGTON. If courts are permitted to ignore valid "no assignment"

clauses, insurers will be foreclosed from meaningfully assessing their risk. In addition, such clauses permit insurers to determine as of the date of loss, to whom any proceeds are payable. If insurers are forced to search the public records or pay the funds into the court registry in order to protect themselves from having to pay the same loss twice, insurers would not be able to process their claims in the expeditious manner required by the insurance laws. Thus, in the complete absence of any overriding public policy considerations in favor of vitiating "no assignment" clauses, the district court clearly exceeded its limited review by ignoring valid and binding contract provisions and failing to apply the Florida statute which provides that the courts are not free to "second guess" an insurer's decision as to whether and under what circumstances to permit an assignment of its policy.

ARGUMENT

THE TRIAL COTJRT CORRECTLY DETERMINED THAT SIKKINS, AS MORTGAGEE UNDER THE LEXINGTON POLICY, WAS NOT ENTITLED TO RECEIVE PROCEEDS OTHER THAN THOSE NECESSARY TO SATISFY WAK'S MORTGAGE

A. SIKKINS has only those rights expressly set out in the subject policy in which it is named a mortgagee and only those benefits due a mortgagee under the policy.

It is undisputed that SIMKINS was endorsed on the policy solely in its capacity as First Mortgagee of the Monte Carlo property. (R.7) It was therefore entitled only to those rights granted in the policy to one in that capacity. Those rights are described in the mortgage clause of the policy:

> a. The term 'mortgage holder' includes trustee.
>
> b. We will pay for covered loss of or damaue to buildings or structures to each Mortgage Holder shown in the declarations in the order of precedence, as interest may appear.
>
> c. The Mortgage Holder has the right to receive loss payment even if the Mortgage Holder has started foreclosure or similar action on the building or structure.
>
> d. If we deny [the insured's] claim because of [the insured's) acts or because [the insured has] failed to comply with the terms of this Coverage Part, the mortgage holder will still have the right to receive loss payment if the mortgage holder:
>
> 1) Pays any premium due under this Coverage Part at our request if [the insured has] failed to do so:
>
> 2) Submits a signed, sworn statement of loss within sixty (60) days after receiving notice from us of [the insured's] failure to do so:
>
> 3) Has notified us of any change in ownership, occupancy or substantial change in risk known to the mortgage holder.

All of the terms of this coverage part will then apply directly to the mortgage holder.

(R.40-41)(emphasis added).

This mortgage clause (also known as a "standard" or "union" mortgage clause) constitutes a separate contract between the insurer and the mortgage holder such that the mortgage holder may still recover insurance proceeds "for covered loss of or damage to buildings or structures" even where the insured has breached the policy or, as in this case, intentionally caused the loss. Independent Fire Ins. v. NCNB Nat. Bank, 517 So. 2d 59 (Fla. 1st DCA 1987); State Farm Fire and Casualty C0. v. Aetna Fire Underwriters Ins. Co., 413 So. 2d 144 (Fla. 5th DCA 1982); National Casualty Co. v. General Motors Acceptance Corp., 161 So. 2d 848 (Fla. 1st DCA 1964). In exchange, the insurer receives (a) the mortgagee's pledge that it will be paid its premiums by the mortgage holder in the event of default by the insured, (b) the right to receive a proof of loss by the mortgage holder, (c) the right to be notified by the mortgagee of any increase in the risk and (d) the right to receive an assignment of the mortgage to the extent of the payment made after loss. In addition, the clause clearly limits the mortgage holder's potential recovery to loss of or damage to buildings and structures. When, as in the present case, the insurance contract is clear and unambiguous, the mortgage clause must be given its effect as written. Universal Underwriters Insurance Co. v. Fallaro, 597 So. 2d 818 (Fla. 3d DCA 1992); Weldon v. All American Life Insurance Co., 605 So. 2d 911 (Fla. 2d DCA 1992); MorrisonAssurance Company, Inc. v. City of Osa Locka, 389 So. 2d 1079 (Fla. 3d DCA 1980).

While SIMKINS has utilized the terms "mortgagee" and "loss-payee" interchangeably throughout this case in an effort to confuse the issues, Florida law is clear that there is a distinct difference between a loss-payable clause and a mortgagee clause in insurance policies. See, Progressive American Insurance Co, v. Florida Bank at Daytona Beach, 452 So. 2d 42 (Fla. 5th DCA 1984)(comparing open loss payable clause with standard mortgagee clause). A loss-payable clause generally gives the lienholder a broader interest in the proceeds, while the mortgagee clause guarantees the lienholder protection of its interest in the mortgaged building in the event of a default or breach on the part of the insured.[4] Id. Only a standard mortgagee clause constitutes an independent contract between the insurer and the mortgagee. Id.

Under the mortgagee clause, SIMKINS is entitled to recover only the proceeds for "covered loss of or damage to buildings or structures", as provided in the insurance policy. See, Paskow v. Calvert Fire Ins. Co,, 579 F. 2d 949 (5th Cir. 1978)(under Florida law, where mortgage clause was limited to coverage for buildings only and the definition of "building" excluded most personal property, mortgagee

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[4] SIMKINS could have negotiated with WAK to be named as an additional insured or as a loss payee under the policy, but neither of these designations of insurable interests would have provided SIMKINS the extra security found in the "standard" or "union" mortgage clause. Had SIMKINS been designated on the policy as something other than a mortgagee, it would have been paid nothing on the policy, since the named insured had no claim in light of its arson. DeMay v. Dependable Ins. Co. 638 So. 2d 96 (Fla. 2d DCA 1994)(loss payable clause does not create a'contract between insurer and loss payee and loss payees have no greater rights to insurance proceeds that do named insureds).

did not have contractual right to portion of insurance proceeds relating to excluded property). See also, Employers' Liability Assur. Corn. v. Rovals Farm Sup,, 186 So. 2d 317 (Fla. 2d DCA 1966)(mortgage clause limiting mortgagee's coverage to building and not to contents that were also included in mortgage, was not ambiguous in excluding coverage for contents).[5] Thus, the only benefits ever due SIMKINS under the terms of the policy were those representing damage to the building, which the trial court correctly found were paid before suit was filed.[6]

While SIMKINS may argue that its mortgage purports to secure for the mortgagee greater rights to insurance proceeds than it actually has under the policy, what its mortgage provides is irrelevant to LEXINGTON because the sole contract between SIMKINS and LEXINGTON -- the mortgagee clause of the insurance policy -- is explicit in its limitations.[7] For that reason, LEXINGTON'S policy precludes assignment of the insured's interest in the absence of its express consent. (R.12) See, infra, pp. 17-21.

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[5] The phrase "as interest may appear" in the mortgage clause does not operate to broaden coverage in the mortgagee's favor as the phrase "is simply language of limitation, which recognizes that the mortgagee can have no greater interest in the insurance fund than in the insurance collateral." Paskow, 579 F. 2d at 951 (citing 5A J. Appelman, Insurance Law and Practice, §3404, at 305-306).

[6] The proceeds remain in the court registry and are the subject of continuing litigation between First Mortgagee SIMKINS and Second Mortgagee Edgar Galvin.

[7] In reality, SIMKINS' mortgage explicitly provides that it shall be designated as "mortgagee" on WAK'S insurance policy and specifies that the policy must contain a "standard" mortgagee clause. (R.143) Thus, what SIMKINS wanted, SIMKINS got.

The mortgagee clause in WAK'S policy provides coverage to mortgagee SIMKINS only to the extent of its interest in buildings and structures. Since the clause is not ambiguous and since SIMKINS has already been paid the agreed upon value of its loss to the building as a result of the fire, it has no further claim under the policy in its capacity as mortgagee.

B. **SIMKINS has no right to recover additional proceeds under the rwlicv in its casacitv as assicmee in light of WAK'S violation of LEXINGTON'S "no assignment" clause.**

SIMKINS' mortgage with WAK provided not only that it be endorsed on the policy as mortgagee, but also that WAK assign any and all insurance policies on the property to SIMKINS as additional collateral for the loan. Florida law provides that "[a] policy may be assignable, or not assignable, as provided by its terms." Fla. Stat. ch. 627.422 (1997). LEXINGTON'S policy contains a standard "no assignment" clause providing that the policy could not be assigned without the insurer's express written consent. In construing this clause, the district court held:

> 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. [citations omitted]
>
> '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.' [citation omitted] 'Such a transfer does not affect **legal** title to or possession of the property involved.' [citation omitted] 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.' [citation omitted] 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.

(R.558-559) Thus, the district court read into the statute and the policy an exception in cases where a policy is assigned as collateral for a loan. In doing so, it exceeded the scope of its authority, which, in this case, would be confined to enforcing unambiguous statutes and policy provisions as written. The district court was also wrong to rely on Virginia case law and insurance treatises in that none of these authorities addresses Florida Statute Section 627.422, which makes insurers the final arbiters as to whether they will permit assignments of their policies.

(1) The Policy

LEXINGTON'S policy, which was entered into after the mortgage, contained a clear and unambiguous "no assignment" clause. These clauses are common in all types of contracts. See, Phillips v. Choate, 456 So. 2d 556 (Fla. 4th DCA 1984)(enforcing "no assignment" clause in written agreement regarding disposal of real property); Rafkind v. Simon, 402 So. 2d 22 (Fla. 3d DCA 1981)(enforcing specific prohibition against assignment of partnership interest in joint venture agreement): Troup v. Meyer, 116 So. 2d 467 (Fla. 3d DCA 1959)(enforcing provision forbidding assignment of commissions). Indeed, SIMKINS' own mortgage with WAK forbade WAK from assigning its interest in the property without SIMKINS' prior written consent. (R.152-153)

There is no dispute that an insured may assign insurance proceeds to a third party after a loss, even without consent of an insurer.

Better Construction, Inc. v. National Union Fire Ins. co. of Pittsburgh, 651 So. 2d 141 (Fla. 3d DCA 1995). That simply entails a direction by the insured to pay all or part of the proceeds to a third party. Such assignments frequently occur in automobile and health insurance cases where there is a direction to pay benefits directly to a medical provider and in property cases where a public adjuster takes an assignment to insure payment of the adjuster's fee.

In the present case, however, as the district court recognized, SIMKINS was not claiming an assignment of the proceeds after loss, but rather an assignment of the policy itself, inclusive of the rights and duties thereunder. This is precisely the type of assignment prohibited by the policy. An assignment of the policy is vastly different from an assignment of the benefits or proceeds due and owing under a policy. See, Garrish hir practic Centers. P.E. v. Pro ressive Casualty Ins, Co., a74 P. 2d 1049 (Colo. 1994)(en banc)(nonassignment clauses in insurance policies are strictly enforced against attempted preloss transfers of policy itself, because assignments before loss involve transfer of contractual relationship and, in most cases, would materially increase risk to insurer).

While the district court may have divined no reason to enforce LEXINGTON'S contractual right to decide for itself when and under what circumstances it would agree to have its policies assigned and its right to withhold its consent, even arbitrarily, to an assignment of the policy, that is not a basis for refusing to enforce a valid and

binding contract clause.' A "no assignment" clause virtually identical to the one in the LEXINGTON policy was found to be clear, unambiguous and enforceable in Classic Concepts, Inc. v. Poland, 570 So. 2d 311 (Fla. 4th DCA 1990), rev. denied, 581 So. 2d 163 (Fla. 1980).

The Third District's finding that there was no apparent reason to enforce the contract as written will simply not suffice as a reason not to enforce the contract. See, Camden Fire Ins. Ass'n v. Daylight Grocery Co., 152 Fla. 669, 12 So. 2d 768 (Fla. 1943)(where there is no real ambiguity in policy language, construction of the policy is governed by its plain language and undisclosed object or purpose of parties cannot be read into policy so as to extend coverage thereof to something not covered by language of policy): Stack v. State Farm Mutual Auto. Ins, Co., 507 So. 2d 617 (Fla. 3d DCA 1987)(it is not role of courts to make otherwise valid contract more reasonable from standpoint of one contracting party). It is well established that:

> 'A court may resort to construction of a contract of insurance only when the language of the policy in its ordinary meaning is indefinite, ambiguous or equivocal. If the language employed in the policy is clear and unambiguous, there is no occasion for construction or the exercise of a choice of interpretations. In the absence of ambiguity, waiver or estoppel, contravention of public policy or

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[8] The district court's conclusion that there was no change in risk to the insurer in this case is not supported by the Record. SIMKINS never made the "assignment as collateral equals no increased risk" argument on which the district court based its decision. There is therefore no testimony or evidence in the record to support the appellate court's conclusion that, in this case, the assignment did not have an impact on LEXINGTON'S underwriting. Given the lack of record evidence supporting the district court's decision that in this case LEXINGTON'S risk did not change in any way by the assignment of the policy to SIMKINS, the district court's decision must be reversed, if only for this reason.

> positive law, it is the function of the court to give effect to and enforce the contract as it is written . . . .

State Farm Fire & Cas, v. Deni Assoc., 678 So. 2d 397 (Fla. 4th DCA 1996)(quoting U.S. Fire Ins. Co. v. Morejon, 338 So. 2d 223 (Fla. 3d DCA 1976), cert. denied, 345 So. 2d 426 (Fla. 1977). Thus, courts may not extend insurance coverage beyond the express terms of the policy absent waiver, estoppel or some overriding public policy against the provision, none of which are evident in this case. American Cas. Co. v. Fernandez, 490 So. 2d 134 (Fla. 3d DCA 1986); Velasquez v. American Manufacturers Mutual Ins. Co,, 387 So. 2d 427 (Fla. 3d DCA 1980); United States Fire Ins. Co, v. Morejon, 338 So. 2d 223 (Fla. 3d DCA 1976).

B) The Statute

In concluding that the assignment was not barred by the express terms of the policy, the district court relied on treatises and an obscure Virginia case, Hartford Fire ns. Co, v. Mutual Sav. & Loan, 68 S. E. 2d 541, 544 (Va. 1952), which equated an assignment of a policy with the acquisition of a "mere equity under the policy". This "authority", itself non-binding, is also beside the point because in Florida the legislature has spoken. By its enactment of Florida Statute Section 627.422, the legislature has given the insurer alone the exclusive right to determine whether or not it will permit undisclosed assignments of its policies without its consent.

The obvious purpose behind the statute is to imbue insurers with the authority to determine for themselves, based on their underwriting guidelines, the nature and extent of the risks they are willing to

assume. The legislature chose to leave the matter up to the insurers, and not the courts. Had the legislature wanted to permit the courts to determine whether an insurers' consent to assignment had been **unreasonably** withheld, it could have so provided in the statute itself. By remaining silent on the issue, the legislature clearly mandated that the courts have no business making the determination of whether an insurer could have, would have, or should have, consented to a given assignment, had it been disclosed.

Notably, the district court did not cite to the statute in its opinion. But ignoring Section 627.422 will nat make it go away. The statute unambiguously allows Florida insurers to give or withhold their consent to assignment. It creates no exceptions for unreasonableness. Had the legislature intended to carve out such an exception or an exception in cases where a policy is assigned **as** collateral security, it could have and would have expressed that intent, as has **at** least one other state. See, W. Va. Code §33-6-20 (1997)("[w]henever the insured in a policy owned by him has reserved to himself the right to change the beneficiary thereunder, the insured shall have the right to and may assign said policy to the extent permitted by the terms thereof as collateral security for **a** loan or loans . . .") In the absence of expressed intent, the Court had no authority to **engraft** exceptions into the statute. See, In re Investigation of Circuit Judge, 93 So. 2d 601 (Fla. 1957)(it is the duty of the courts to interpret the law as set forth by the Constitution or legislature and courts are not permitted to substitute what they think the law should be); City of Jacksonville v. Bowden, 67 Fla. 181, 188, 64 So. 769, 772 (Fla. 1914)("[w]here a

statute does not violate the federal or state Constitution, the legislative will is supreme, and its policy is not subject to judicial review. The courts have no veto power, and do not assume to regulate state policy; but they recognize and enforce the policy of the law as expressed in valid enactments, and decline to enforce statutes only when to do so would violate organic law")

C) Public Policy

To allow a court to grant insurance coverage by judicial fiat would be to deprive an insurer of the right to assess and underwrite the risks it is willing to accept and at what price. See, Continental Cas. Co. v. Diversified Indus., Inc., 884 F. Supp. 937 (E.D. Pa. 1995); Couch on Insurance 3d, §35:3 (1996)(and cases cited therein)(obvious purpose behind "no assignment" clause is to preclude a change of risk to the insurer without its knowledge or consent). The parties to a contract are in the best position to negotiate the terms which are of importance to each. Here, it was presumably of greater importance to SIMKINS to have the additional protection of a standard mortgage clause than it was to have the broader, but less certain, rights of a loss payee. Thus, SIMKINS negotiated with WAK the requirement that WAK endorse SIMKINS on any policy of insurance as a mortgagee under a standard or union mortgage clause. LEXINGTON was willing to extend this superior right to be paid to SIMKINS, but solely to the extent of building damage as defined by the policy.

Contrary to the district court's view, any time a person or entity acquires an interest in a policy, the risk alters with respect to the identity, quantum of interest in the policy and loss history of that

person or entity. This is @specially true with respect to fire insurance contracts, which are deemed personal in recognition that the identity of the insured is a matter of utmost importance to the insurer. See, McHugh v. Manhattan Fire & Marine Ins. Co., 109 N.W. 2d 842 (Mich. 1961)(and cases cited therein). If an insured is permitted to assign a policy without revealing the assignment to the insurer, the insurer is foreclosed from its right to meaningfully assess its risk, including the assessment of who stands to benefit from partial or complete destruction of the property.

In addition to enabling an insurer to protect itself from unknown risks, the "no-assignment" clause allows an insurer to determine, from the clear terms of its own insurance policy as of the date of a loss, to whom any proceeds or benefits are due. If an insured were permitted to assign the policy without the knowledge and consent of an insurer, the insurer would always be in jeopardy of paying the benefits pursuant to the express terms of the policy only to learn later that some undisclosed assignee was stepping forward claiming an interest in the policy and benefits due. See, Asphalt Paving, Inc. v. Ulery, 149 So. 2d 370 (Fla. 1st DCA 1963)(provisions of life policy concerning assignment are solely for benefit of insurer to protect it from double liability). The district court's cavalier disregard of a valid and enforceable policy condition will, if left to stand as the law of this state, generate additional needless litigation arising from competing claims against insurers who are unaware of other interests in their policies.

While the district court recognized that there may be no public policy **against** assignments as collateral security, it ignored that there is no public policy **in favor of** such assignments that would justify overriding clear and unambiguous policy language prohibiting such an assignment. In fact, public policy militates **against** the district court's interference with this valid insurance policy. Reading an exception into the policy clause as the district court has done, will have the practical effect of delaying claims administration and encouraging litigation of competing claims to insurance proceeds. If the insurer is potentially liable to unknown claimants, the insurer may be forced to conduct time consuming courthouse and public records searches before settling claims in order to avoid litigation with unknown assignees.[9] That, of course, would be directly contrary to the legislature's expressed intent that insurance claims be expeditiously processed and paid.

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[9] Lexington does not admit that it or any other insurer would necessarily have the obligation to conduct such searches and in fact, there is case law to the contrary. See, Chrysler Credit Corp. **v.** Smith, 434 Pa. Super. 429, 643 A. 2d 1098 (1994). Nevertheless, the fact that an insurer does not have an affirmative obligation to take particular action will not insulate it from litigation brought by claimants who contend that the insurer does have such an obligation.

Thus, the only way to actually avoid litigation would be for an insurer to conduct such searches, **at** the expense of expeditious settlement with its insured, which in turn may lead to additional litigation on the part of an insured who may claim that the company did not settle his or her claim promptly. The carrier would literally find itself in a **"Catch-22"** situation, while the named insured and assignee are provided with **a** clear opportunity to collude in an effort to obtain double indemnity. The alternative is for the insurer to file suit in State Court and deposit the monies owed under the policy into the Registry of the Court, thus forcing the competing claimants to litigate to establish their respective interests in the funds.

Insurers are required to pay claims within thirty (30) days of a proof of loss. Fla. Stat. ch. 626.9541(1)(i)(3)(e)(1997). If an insurer were to have to contend with unknown parties potentially claiming an interest in a discrete fund as a result of a covered loss, it could never fully protect itself from the potential of having to make multiple payments for the same loss other than to file the appropriate state or federal court Petition for Declaratory Relief, deposit the funds into the court registry and force potential claimants to prove their entitlement to the funds in court. One need think only of the absolute chaos such a requirement would have created following Hurricane Andrew to appreciate that a party to a contract should be able to rely upon its express terms to determine what its duties are and to whom they are owed.

CONCLUSION

A contracting party has the right to rely on the terms of the contract and a right to expect that its clear and unambiguous terms will be enforced by the court as written. If appellate courts are free to discard such provisions simply because they do not believe that the rationale behind the provisions applies in a given case, or because they find no rationale at all, business dealings and relationships established and defined by contracts of all types will disintegrate into chaos at the well-meaning hands of the courts. For this reason, it is respectfully requested that this Court should reverse the appellate court's decision and reinstate final judgment in favor of LEXINGTON.

Respectfully submitted,

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY, that a true and correct copy of the foregoing was mailed this 19th day of August, 1997, to: DANIEL S. PEARSON, Holland & Knight, 701 Brickell Avenue, Miami, Florida 33131; ALAN T. DIMOND, ESQ., Greenberg, Traurig, Hoffman, Lipoff, Rosen & Quentel, P.A., 1221 Brickell Avenue, Miami, Florida 33131; PATRICIA M. SILVER, ESQ., Silver & Waldman, P.A, 800 Brickell Avenue, Suite 902, Miami, Fla., 33131.

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