

IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. CS03-59

Lower Tribunal Case No.: 3D01-2081

In re: Assignment for the Benefit of Creditors of MEDICAL RESEARCH
INDUSTRIES, INC., Assignor TO: DONALD KAPLAN, Assignee,

COWAN LIEBOWITZ & LATMAN, P.C., STEPHEN M. ROSENBERG,
FRANZINO & ROSENBERG, P.C., JAMES J. D'ESPOSITO,
MARSHALL DOUGLASS PLATT, P.A., JACK B. PARR, P.A. and
PACKAR and PLATT,

Petitioners,

v.

DONALD KAPLAN, as Assignee for the Benefit of Creditors of Medical
Research, Inc.,

Respondent.

**CONSENTED AMICUS CURIAE BRIEF OF THE BUSINESS LAW
SECTION OF THE FLORIDA BAR (Supporting Respondent Donald
Kaplan)**

**On Discretionary Review From a Decision of the
Third District Court of Appeal**

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TABLE OF CONTENTS

TABLE OF CONTENTS.....i

TABLE OF AUTHORITIES.....ii

STATEMENT OF INTEREST.....1

SUMMARY OF THE ARGUMENT.....2

ARGUMENT.....4

I. There is no functional difference between an assignee in an assignment for the benefit of creditors case brought pursuant to Florida law and a trustee in a chapter 7 bankruptcy case brought pursuant to the Bankruptcy Code. An assignee should be deemed to have the same statutory and fiduciary duty to prosecute legal malpractice claims as does a chapter 7 trustee.....4

II. Chapter 727, Florida Statutes, authorizes an assignee for the benefit of creditors to prosecute legal malpractice claims in the name of an assignor.....14

CONCLUSION.....17

CERTIFICATE OF SERVICE.....18

CERTIFICATE OF COMPLIANCE.....19

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<i>Alipour v. Thomas (In re Alipour)</i> , 252 B.R. 230 (Bankr. M.D. Fla. 2000).....	12
<i>Armstrong, Cator & Co. v. Holland</i> , 35 Fla. 160, 17 So. 366 (Fla. 1895).....	2, 6
<i>Cerberus Partners, L.P. v. Gadsby & Hannah</i> , 728 A.2d 1057 (S. Ct. R.I. 1999).....	13
<i>Continental Cas. Co. v. Quigley</i> , 264 So. 2d 87 (Fla. 1 st DCA 1972).....	12
<i>Deason v. Florida Dept. of Corrections</i> , 705 So. 2d 1374 (Fla. 1998).....	14
<i>Federal Deposit Ins. Corp. v. Brodie</i> , 602 So. 2d 1358 (Fla. 3d DCA 1992).....	12
<i>Holly v. Auld</i> , 450 So. 2d 217 (Fla. 1984).....	15
<i>In re Vernon</i> , 609 So. 2d 128 (Fla. 4th DCA 1992).....	12
<i>Johnson, Blakely, Pope, Bokor, Ruppel & Burns, P.A. v. Alvarez (In re Alvarez)</i> , 224 F.3d 1273 (11th Cir. 2000).....	2, 7
<i>Kaplan v. Antoine</i> , 845 So. 2d 904 (Fla 1 st DCA 2003).....	2, 5
<i>Palm Beach Cty. Canvassing Bd. v. Harris</i> , 772 So. 2d 1273 (Fla. 2000).....	14
<i>T.R. v. State</i> , 677 So. 2d 270 (Fla. 1996).....	14
 <u>Other Authorities</u>	
11 U.S.C. § 362.....	11

11 U.S.C. § 521.....8

11 U.S.C. § 521(4).....8, 9

11 U.S.C. § 541(a)(1).....7, 8

11 U.S.C. § 542.....9

11 U.S.C. § 704(1).....7, 8, 9

Fla. Stat. § 671.201(12).....6

Fla. Stat. § 727.101.....6, 8

Fla. Stat. § 727.103(1).....3, 7, 13, 14, 16, 17

Fla. Stat. § 727.103(7).....8

Fla. Stat. § 727.104(1)(b).....3, 15, 16, 17

Fla. Stat. § 727.104(1)(d).....3, 4, 15

Fla. Stat. § 727.107(4).....8

Fla. Stat. § 727.108(1).....4, 8, 9, 15, 16

STATEMENT OF INTEREST

Amicus Curiae, the Business Law Section of The Florida Bar (“BLSFB”), submits this brief supporting Respondent Donald Kaplan (“Kaplan” or the “Respondent”), assignee for the benefit of creditors of Medical Research, Inc. (“MRI”). BLSFB respectfully submits this brief in its capacity as a recognized Section of The Florida Bar which includes many attorneys who have a direct interest in this litigation with respect to the interpretation and application of Chapter 727, Florida Statutes. This brief is not filed on behalf of The Florida Bar itself.

This case raises important issues concerning the interpretation and application of statutory and fiduciary duties imposed upon persons serving as assignees in assignment cases brought pursuant to Chapter 727, Florida Statutes. This Court has the opportunity to clarify these duties and to address whether legal malpractice claims, which are not otherwise assignable, are claims that can be prosecuted by an assignee who, as correctly noted by the Third District, “is no different from a trustee in bankruptcy who has full standing to bring a debtor’s legal malpractice claim.” Because an assignee is charged with the statutory and fiduciary duty to “collect and reduce to money the assets of the estate,” and because there is

no functional difference between an assignee and a bankruptcy trustee, the BLSFB supports and joins the Respondent.

SUMMARY OF THE ARGUMENT

In support of its ruling that the Respondent, as assignee of MRI, possessed standing to prosecute the legal malpractice claims against the Petitioners, the Third District analogized the Respondent to a trustee in bankruptcy. The analogy drawn by the Court was sound and squarely supported by a review of the relevant provisions of the assignment statute and chapter 7 of the Bankruptcy Code, generally, and the duties of assignees and chapter 7 trustees, specifically.

An assignee in an assignment case, and a trustee in a chapter 7 bankruptcy case, are charged with the same statutory duties and the underlying goal in both proceedings is the same: liquidation of the assets of the estates for subsequent distribution to creditors thereof *Armstrong, Cator & Co. v. Holland*, 35 Fla. 160, 165, 17 So. 366, 367 (Fla. 1895); *Johnson, Blakely, Pope, Bokor, Ruppel & Burns, P.A. v. Alvarez (In re Alvarez)*, 224 F.3d 1273, 1278 (11th Cir. 2000).

In construing the assignment statute and issues raised thereunder, State case law recognizes that it is appropriate to look to federal bankruptcy decisions. *Kaplan v. Antoine*, 845 So. 2d 945, ___ n.10, 2003 Fla. App.

LEXIS 3254, *19 n.10 (Fla. 1st DCA Mar. 13, 2003). There is no question that Eleventh Circuit case law contemplates that chapter 7 trustees succeed to and have the power to prosecute legal malpractice claims that have accrued as of the filing of a bankruptcy case. *See, e.g., Alvarez, supra.* Based upon the striking similarities in the purposes and goals of the assignment statute, and chapter 7 of the Bankruptcy Code, there is no principled basis to preclude an assignee from prosecuting such a claim on behalf of an estate in an assignment case.

A review of the relevant statutory provisions in the assignment statute, viewed in the context of well-accepted tenets of statutory construction, support the Third District's holding. The Petitioners' argument is premised upon that part of section 727.103(1) exempting from the estate "property exempt by law from forced sale." Fla. Stat. § 727.103(1). This statute, however, cannot be read in isolation.

Section 727.104(1)(b) includes among the assets of the estate "claims and demands belonging to the assignor," Fla. Stat. § 727.104(1)(b), which would certainly include pending litigation claims, including those based upon legal malpractice. Section 727.104(1)(d) requires an assignor to list all "claims and choses in action" in the papers supporting its assignment filing,

Fla. Stat. § 727.104(1)(d), and a legal malpractice claim or suit would certainly be included within that description.

Section 727.108(1) requires an assignee to “collect and reduce to money the assets of the estate . . . by suit....,” Fla. Stat. § 727.108(1), which, again, would include legal malpractice suit. A review of these statutory provisions as a whole, which form the basis for an assignee’s administration of an estate, supports the Third District’s holding that the Respondent possessed standing to prosecute the underlying malpractice claims against the Petitioners.

ARGUMENT

- I. There is no functional difference between an assignee in an assignment for the benefit of creditors case brought pursuant to Florida law and a trustee in a chapter 7 bankruptcy case brought pursuant to the Bankruptcy Code. An assignee should be deemed to have the same statutory and fiduciary duty to prosecute legal malpractice claims as does a chapter 7 trustee.**

In support of its holding, the Third District stated that

Kaplan, as assignee for [sic] benefit of creditors, has the legal charge of gathering and liquidating assets of the corporation. In that regard Kaplan is no different from a trustee in bankruptcy who has full standing to bring a debtor’s legal malpractice claim.

Kaplan, 832 So. 2d at 140. The Third District was correct. There is no functional difference between an assignee in an assignment for the benefit of

creditors case brought pursuant to Florida law, Chapter 727, Florida Statutes, and a trustee in a chapter 7 bankruptcy case brought pursuant to title 11 of the United States Code, 11 U.S.C. §§ 101 *et seq.* (“Bankruptcy Code”).

As discussed below, a review of the relevant provisions of Chapter 727, Florida statutes, and Chapter 7 of the Bankruptcy Code, and the statutory duties imposed on an assignee and a chapter 7 trustee confirm that these persons occupy virtually identical positions and are duty-bound to engage in the same administration of insolvent estates subject of their respective statutory charges. Both assignees and chapter 7 trustees serve as representatives of their estates and work for the same goal--to maximize the distribution to their respective estates’ creditors.

Moreover, the fact that “State courts often look to federal bankruptcy law for guidance as to legal issues arising in proceeding [sic] involving assignments for the benefit of creditors,” *Kaplan v. Antoine*, 845 So. 2d 904, ___ n. 10, 2003 Fla. App. LEXIS 3254, *19 n.10 (Fla. 1st DCA Mar. 13, 2003)(citations omitted), further supports the proposition asserted by the Third District and, consequently, its decision.

Of note, the statutory duties of assignees and trustees in bankruptcy are virtually identical and their respective titles are used interchangeably by the Florida courts and legislature. *See, e.g., Kaplan, supra*, 2003 Fla. App.

LEXIS 3254, *14 (“In an assignment for the benefit of creditors, the debtor voluntarily assigns its assets to a third party *as trustee* for the purposes of liquidating the assets to satisfy, in full or in part, creditors’ claims against the debtor.”)(citations omitted)(italics added); Fla. Stat. § 671.201(12) (“‘Creditor’ includes a general creditor, a secured creditor, a lien creditor and *any representative of creditors, including an assignee for the benefit of creditors, a trustee in bankruptcy, a receiver in equity and an executor or administrator of an insolvent debtor’s or assignor’s estate.*”)(italics added).

A. A comparison of relevant statutory provisions under the assignment statute and Bankruptcy Code confirms that assignees are the functional equivalent of chapter 7 trustees in bankruptcy.

Section 727.101 of the assignment statute contemplates the administration, that is, liquidation of the assets of an assignor’s estate and a distribution thereof consistent with the provisions of the assignment statute. See Fla. Stat. § 727.101 (“The intent of this chapter is to provide a uniform procedure for the administration of insolvent estates, and to ensure full reporting to creditors and equal distribution of assets according to priorities as established under this chapter.”); *Armstrong, Cator & Co. v. Holland*, 35 Fla. 160, 165, 17 So. 366, 367 (Fla. 1895)(manifest purpose of assignment statute to enforce rule of securing equal distribution of insolvent debtor’s property among debtor’s creditors); *Kaplan, supra*, 2003 Fla. App. LEXIS

3254, *14 (in assignment case debtor voluntarily assigns his assets to third party as trustee for purposes of liquidating assets to satisfy, to the extent available, creditors' claims against debtor). Chapter 7 of the Bankruptcy Code is entitled "Liquidation," and its provisions clearly contemplate and provide for the liquidation and distribution of a debtor's non-exempt assets. See 11 U.S.C. §§ 704(1)(discussed below) and 726 (providing mechanism for distribution of assets of estate after same are reduced to money); *Johnson, Blakely, Pope, Bokor, Ruppel & Burns, P.A. v. Alvarez (In re Alvarez)*, 224 F.3d 1273, 1278 (11th Cir. 2000)("... in a Chapter 7 case, a trustee is appointed who is charged with the duty of liquidating the assets in the debtor's bankruptcy estate with the goal of satisfying as many of the creditors' claims as possible.")(citation omitted).

The assignment statute defines "[a]sset" as "a legal or equitable interest of the assignor in property, which shall include *anything that may be subject of ownership, whether real or personal, tangible or intangible, wherever located and by whomever held at the date of the assignment, except property exempt by law from forced sale.*" Fla. Stat. § 727.103(1) (italics added).¹ Section 541(a)(1) of the Bankruptcy Code, entitled "The

¹ The second issue addressed by the BLSFB, *infra*, is the last portion of the quoted language that provides for a limitation upon the statutory definition of an "[a]sset" of the estate.

Estate,” provides in relevant part and with exceptions inapplicable here, that upon the commencement of a voluntary chapter 7 case the debtor’s estate “is compromised of all the following property, wherever located and by whomever held: (1) . . . all legal or equitable interests of the debtor in property . . .” 11 U.S.C. § 541(a)(1). Of note, the term “[e]state,” which has critical application in bankruptcy cases,² is used in the assignment statute. Fla. Stat. § 727.103(7)(“‘Estate’ means all of the assets of the assignor.”).

The core statutory duty of both assignees and trustees is virtually identical. Section 727.108(1) of the assignment statute provides that an assignee “shall” “[c]ollect and reduce to money the assets of the estate . . .,” Fla. Stat. § 727.108(1), while section 704(1) of the Bankruptcy Code provides that a chapter 7 trustee “shall” “collect and reduce to money the property of the estate for which such trustee serves . . .” 11 U.S.C. § 704(1).³

² The United States Supreme Court has given the phrase “property of the estate” a broad construction. *United States v. Whiting Pools, Inc.*, 462 U.S. 198, 204-05 (1983).

³ Likewise, the core statutory duty of assignors and debtors is likewise virtually identical. *Compare Fla. Stat.* § 727.101 (duties of assignees) with 11 U.S.C. § 521 (duties of debtors). Specifically, section 727.107(4) provides that an assignee “shall,” “[u]pon delivery of the assignment to the assignee, deliver to the assignee all of the assets of the estate in the assignor’s possession, custody, or control, including, but not limited to, all accounts, books, papers, records, and other documents.” Fla. Stat. § 727.107(4). Section 521(4) of the Bankruptcy Code provides that a debtor

A review of section 727.108 of the assignment statute and section 704 of the Bankruptcy Code confirms that assignees and trustees in chapter 7 liquidations are charged with the same basic functions: liquidating assets and reducing same to money and, after administrative functions such as claim objections, distributing the assets of the estate to administrative claimants and creditors pursuant to a statutory scheme promulgated by the Florida legislature and Congress, respectively.

Of note here, both assignees and trustees are empowered to bring suit on behalf of assignors and debtors in furtherance of their respective statutory duties. *Compare Fla. Stat.* §§ 727.108(1)(assignee charged with collecting and reducing to money assets of estate by suit or public or private sale) and 727.110(1)(a)-(c)(authorizing assignee to initiate supplemental proceedings to recover money or other assets of estate, determine validity, priority or extent of lien and avoid conveyances or transfers void or voidable under applicable law) with Fed. R. Bankr. P. 7001(2)(action to determine validity, priority and extent of liens), 11 U.S.C. § 542 (turnover action against persons other than custodians in possession or control of estate property), 543 (turnover action against custodians in possession or control of estate

“shall,” “if a trustee is serving in the case, surrender to the trustee all property of the estate and any recorded information, including books, documents, records, and papers, relating to property of the estate....” 11 U.S.C. § 521(4).

property), 544 (enabling trustee to make use of applicable state laws to avoid conveyances or transfers void or voidable including Chapter 726, Florida Statutes, 547 (actions to avoid preferential transfers) and 548 (actions to avoid fraudulent transfers).

Causes of action that have accrued as of the filing of an assignment case and a bankruptcy case become part of the respective estates. *Alvarez, supra*, 224 F.3d at 1278 n.12 (“It is well-settled that causes of action which have accrued prior to bankruptcy become part of the bankruptcy estate.”) (citations omitted); *Kaplan, supra*, 2003 Fla. App. LEXIS 3254, *19 n.10 (state courts often look to federal bankruptcy law for guidance as to issues arising in assignment cases; here, there is no reason to not apply the rule accepted in bankruptcy proceedings that causes of action that have accrued prior to the filing to become part of debtor’s estate).

In short, an assignment for the benefit of creditors case is the state court counterpart, or “alternative,” to a chapter 7 bankruptcy case brought in federal court, *id.*, at *14 (characterizing assignment for benefit of creditors as “alternative” to bankruptcy proceeding), with the primary distinction being that a discharge of debts is not available in an assignment case while same is available in a chapter 7 case with respect to an individual. *See W.L. Courshon, Florida’s New Law on Assignments for the Benefit of Creditors:*

An Alternative to Bankruptcy, Fla. Bar Journal, at 39 (Oct., 1987)(comparing assignment case to chapter 7 bankruptcy case as both being vehicles to liquidate insolvent debtors with main difference being absence of discharge in assignment cases).⁴

It is more than appropriate for this Court, as noted by the Third District in *Kaplan, supra*, 2003 Fla. App. LEXIS 3254, *14, to look to applicable bankruptcy law in determining whether a claim for legal malpractice is included in the assets assigned to an assignee in an assignment case. In light of the striking similarities between the duties of an assignee in an assignment case and a trustee in a case under chapter 7 of the Bankruptcy Code, and the underlying goals of both proceedings, there is no principled basis to preclude assignees from prosecuting legal malpractice claims like those brought by chapter 7 trustees.

B. It is undisputed that chapter 7 trustees in Florida have the statutory and fiduciary duty to prosecute legal malpractice claims of debtors which have accrued as of the filing of chapter 7 cases.

As stated above, it is “well-settled that causes of action which have accrued prior to bankruptcy become part of the bankruptcy estate,” and legal

⁴ Another notable (but for present purposes equally irrelevant) difference between assignment cases and cases under chapter 7 of the Bankruptcy Code is the absence of provisions in the assignment statute similar to the automatic stay provisions of the Bankruptcy Code, 11 U.S.C. § 362.

malpractice claims are included within such causes of action. *See, e.g., Alvarez, supra* (applying Florida law with respect to legal malpractice claims and holding that such action belonging to debtor as of filing belonged to estate and that only trustee could bring such action in absence of abandonment of same by trustee). *See also Alipour v. Thomas (In re Alipour)*, 252 B.R. 230 (Bankr. M.D. Fla. 2000)(court granted chapter 7 trustee's motion to substitute in as party plaintiff in debtor's legal malpractice action).

Alvarez is an example of a case standing for the proposition that notwithstanding the general rule applicable in Florida that legal malpractice claims are non-assignable, a trustee in bankruptcy is authorized and, in fact, is statutorily obligated to prosecute such actions in the name of a debtor. *See also In re Vernon*, 609 So. 2d 128 (Fla. 4th DCA 1992)(court affirmed denial of motion to dismiss administrator ad litem's complaint for legal malpractice on behalf of decedent's Florida estate); *Federal Deposit Ins. Corp. v. Brodie*, 602 So. 2d 1358 (Fla. 3d DCA 1992)(after bank declared insolvent FDIC was substituted in as party plaintiff and able to prosecute legal malpractice claim against bank's attorneys); *Continental Cas. Co. v. Quigley*, 264 So. 2d 87 (Fla. 1st DCA 1972)(affirming trial court's order setting aside jury verdict in favor of malpractice insurer and ordering new trial to administratrix of her

husband's decedent estate in claim for legal malpractice). Likewise, there is also case law recognizing the distinction between voluntary assignments of "bare" legal malpractice claims and the assignment of same "that is part of a general assignment in a commercial setting and transaction that encompasses a panoply of other assigned rights, duties and obligations." *Cerberus Partners, L.P. v. Gadsby & Hannah*, 728 A.2d 1057, 1060 (S. Ct. R.I. 1999)(citation omitted). Assignment cases are made in a "commercial setting" and these types of cases "encompass a panoply of other assigned rights, duties and obligations" as set forth in Chapter 727, Florida Statutes.

The above-cited cases demonstrate that notwithstanding the rule applicable in Florida and the majority of jurisdictions that legal malpractice claims are non-assignable, it is appropriate and, in fact, entirely consistent with a trustee's statutory and fiduciary duties to prosecute legal malpractice claims in a debtor's name. Because assignees and trustees in bankruptcy have the same core duties, that is, to reduce to money assets of the estate, and because liquidating legal malpractice claims is clearly such an act, the rule in assignment cases should be that assignees stand in the shoes of an assignor and can prosecute claims for legal malpractice just as an assignor could do absent the initiation of an assignment case.

II. Chapter 727, Florida Statutes, authorizes an assignee for the benefit of creditors to prosecute a legal malpractice claim in the name of an assignor.

The issue of whether section 727.103(1) excludes legal malpractice claims, as argued by the Petitioners, is one of statutory construction. Application of well-accepted rules of statutory construction to section 727.103(1), which defines the term “asset” and excludes assets exempt from forced sale, should not be read to exclude claims for legal malpractice.

A statute should be applied so as to give effect to the legislature’s intent, even if same differs from the statutory language. *Deason v. Florida Dept. of Corrections*, 705 So. 2d 1374, 1375 (Fla. 1998)(citations omitted). “Where possible, courts must give effect to all statutory provisions and construe related statutory provisions in harmony with each other.” *T.R. v. State*, 677 So. 2d 270, 271 (Fla. 1996)(citation omitted). “It is axiomatic that all parts of a statute must be read together in order to achieve a consistent whole.” *T.R.*, 677 So. 2d at 271 (citation omitted); *Palm Beach Cty. Canvassing Bd. v. Harris*, 772 So. 2d 1273, 1287 (Fla. 2000)(“It is well settled that a statute should be construed in its entirety and as a harmonious whole.”)(citation omitted).

Lastly, while unambiguous statutes should be applied as written, “a literal interpretation of the language of a statute need not be given when to

do so would lead to an unreasonable or ridiculous conclusion.” *Holly v. Auld*, 450 So. 2d 217, 219 (Fla. 1984)(citation omitted). Continuing, the Court stated that “[s]uch a departure from the letter of a statute . . . ‘is sanctioned . . . only when there are cogent reasons for believing that the letter [of the law] does not accurately disclose the [legislative] intent.’” *Holly*, 450 So. 2d at 219. Application of the foregoing precepts of statutory construction compels the conclusion that assignees possess the right to prosecute legal malpractice claims of an assignor that have accrued as of the filing of an assignment case.

Section 727.104(1)(b) of the assignment statute specifically includes among the assets of an assignor’s estate “claims and demands belonging to the assignor.” Fla. Stat. § 727.104(1)(b). It cannot be disputed that the legal malpractice claims at issue here constitute “claims and demands belonging to the assignor.”

The list of assets that an assignor is required to complete and deliver to the assignee includes “claims and choses in action.” Fla. Stat. § 727.104(1)(d). It cannot be disputed that the legal malpractice claims at issue here constitute “claims and choses in action.”

Section 727.108(1) provides, in relevant part, that an assignee “shall” “[c]ollect and reduce to money the assets of the estate [. . .] by suit in any

court of competent jurisdiction. . . .” Fla. Stat. § 727.108(1). It cannot be disputed that prosecution of the legal malpractice claim at issue here would be an act in furtherance of the Respondent’s statutory duty to “[c]ollect and reduce to money the assets of the estate” as contemplated by section 727.108(1).

The BLSFB submits that the recitation of the foregoing sections of the assignment statute demonstrates the Florida legislature’s intent to include all causes of action, including those for legal malpractice, as part of an assignor’s estate. The BLSFB further submits that the only way to read all of the above-cited sections of the assignment statute, *including* section 727.103(1), consistently is to find that an assignee can prosecute legal malpractice claims belonging to the assignor.

The BLSFB further submits that adoption of the Petitioner’s position that the “exempt[ion] from forced sale” language in section 727.103(1) excludes claims for legal malpractice would necessarily lead to an “unreasonable or ridiculous conclusion.” *Holly*, 450 So. 2d at 219. Specifically, if the Court were to adopt the Petitioners’ argument based on section 727.103(1), it would lead to a situation where an assignor would have no ability to carry out the statutory duties imposed upon it to, *inter alia*, prosecute “claims and demands belonging to the assignor.” Fla. Stat. §

727.104(1)(b). Thus, there are “cogent” reasons for believing that statutory language relied upon by the Petitioners does not “accurately disclose” the Florida legislature’s intent in the overall context of the assignment statute. *Holly*, 450 So. 2d at 219.

It should also be noted that the concept of exemptions, as set forth in section 727.103(1), and the differences in how exemptions apply in assignment and bankruptcy cases, upon which Petitioner’s argument is based, are not dispositive to the issue at hand. Specifically, the fact that legal malpractice claims are non-assignable under Florida law does not mean that such claims are exempt from forced sales as contemplated by section 727.103(1). Also, Chapter 222, Florida Statutes, applies to real persons in assignment and bankruptcy cases in Florida. Thus, the distinctions in the application of exemptions in assignment cases and bankruptcy cases set forth in section III(B) of Petitioner’s *Initial Brief* are distinctions without differences. Under Petitioner’s theory of the case, a chapter 7 trustee would be unable to prosecute legal malpractice claims; however, as discussed above, that is not the state of the law. *Alvarez, supra*.

CONCLUSION

Based on the foregoing, the Court should affirm the Third District’s opinion in its entirety and hold that assignees, like the Respondent here,

possess standing to prosecute claims for legal malpractice belonging to assignors that have accrued as of the filing of assignment cases.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served via Regular U.S. Mail, postage prepaid, upon Laura Besvinick, Esq., Hogan & Hartson, LLP, 1111 Brickell Ave., Suite 1900, Miami, FL 33131; Tami L. Harwood, Esq., Senior Claims Attorney, Chicago Ins. Co., One Liberty Plaza, 20th Floor, New York, NY 10006, Deborah Poore Knight, Esq., Walton Lantaff Schroder & Carson, P.A. 707 S.E. 3d Ave., 3d Floor-Blackstone Bldg., Ft. Lauderdale, FL 33316; Marlene Reiss, Esq., Stephens, Lynn Klein et al., Two Datran Center, PH II, 9130 S. Dadeland Blvd., Miami, FL 33156, Caryn Bellus, Esq., Kubicki Draper, 25 West Flagler Street, Penthouse Suite, Miami, FL 33130, Steven E. Stark, Esq., Fowler White Burnett, Bank of America Tower, 17th Floor, 100 S.E. Second Street, Miami, FL 33131 and Patricia Redmond, Esq., Stearns Weaver, 150 West Flagler Street, Suite 2200, Miami, FL 33130 on this ____ day of August, 2003.

CERTIFICATE OF COMPLIANCE

I hereby certify that this Brief complies with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

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