IN THE COURT OF APPEAL FOR THE SECOND DISTRICT,
STATE OF FLORIDA

BIO LOGIC, INC. a/a/o
Elizabeth Morgan,

Appellant,

v.

ASI PREFERRED INSURANCE CORP.,

Appellee.
_____/

Case No.: 2D16-3798
L.T. Case No.: 2016-CA-458

CONSOLIDATED REPLY BRIEF AND RESPONSE TO AMICUS BRIEF

ON APPEAL FROM
THE HON. GILBERT SMITH
TWELFTH JUDICIAL CIRCUIT COURT
IN AND FOR MANATEE COUNTY, FLORIDA

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ARGUMENT

The answer brief "recall[s] an oft-quoted adage: If the law is against you, argue the facts; if the facts are against you, argue the law; and if they both are against you, pound the table and attack your opponent." United States v. Griffin, 84 F.3d 912, 927 (7th Cir. 1996). ASI's answer brief, although a shining example of the art of lawyering, is nevertheless just so much table-pounding, obfuscatory rather than illuminating.

It would not do to lose sight of three key truths. This Court has jurisdiction because a final order dismissing the complaint issued. The validity of the mortgagee consent clause is squarely before the Court. Finally, against the background of free post-loss assignability of insurance benefits, neither ASI nor *amici* produce a single authority recognizing the exception they propose.

A few other specific points warrant discussion, and are discussed briefly. Bio Logic will also explain why the amicus brief is improper and devoid of merit.

I. Standing, preservation, and assignability: the keys to this case.

A. Bio Logic appeals a final order which the Court has jurisdiction to review.

ASI observes correctly that "an order granting a motion to dismiss without any language of finality is nonfinal and nonappealable in and of itself." (Answer Br. at 34). ASI fails to mention in its brief, however, that the lower court did not merely grant the motion to dismiss. The order also provides that "Plaintiff's complaint is DISMISSED." (R. 440). It is well-settled that an order dismissing a

complaint, with or without prejudice, is an appealable final order. Raza v. Deutsche Bank Nat'l Trust Co., 100 So. 3d 121, 122-23 (Fla. 2d DCA 2012); Hayward & Assocs. v. Hoffman, 793 So. 2d 89, 91 (Fla. 2d DCA 2001); Cicero v. Paradis, 167 So. 2d 247 (Fla. 2d DCA 1964); see also Handel v. Nevel, 147 So. 3d 649, 652 n.2 (Fla. 3d DCA 2014). Indeed, here the order, although final, could not properly dismiss "with prejudice" because it addressed only standing, not the merits of the claims. Smith v. St. Vil, 714 So. 2d 603, 604-05 (Fla. 4th DCA 1998). The Court's jurisdiction to consider this matter arose upon the entry of the lower court's order granting the motion to dismiss and dismissing the complaint.

B. Bio Logic argued below that the mortgagee consent requirement is not enforceable, and ASI does not contend the issue is unpreserved.

ASI objects to authority and argument regarding other restraints on alienation of property. That authority applies to issues presented below and now properly before the court. It is irrelevant that Bio Logic "never cited any of the authorities it relies upon now," (Answer Br. 32), as no new claim for relief is raised. It is enough to observe that inherent in the concept of appellate review is introduction of "new legal authority for the position . . . advanced before the [lower] court." United States v. Rapone, 131 F.3d 188, 196 (D.C. Cir. 1997).

C. The heart of the case: whether insurers can defeat the rule against restrictions on AOBs by making changes to the policy.

Here, where there appears to be no authority directly addressing the validity of the mortgagee consent clause, basic principles of property law can and should inform this application of the rule against restrictions on AOBs. Courts have long recognized that "every consideration, suggested by the wants of commerce, and by the policy which discountenances restraint on alienation, applies with greater force to personal property, than to real property." Jordan v. Roach, 32 Miss. 481, 600 (1856). It against this background that the Court should render its decision.

Florida's rule against restrictions on AOBs takes precedence over absolute freedom of contract, along with other legal rules that would functionally defeat AOBs. E.g., Start to Finish Restoration, LLC v. Homeowners Choice Prop., 192 So. 3d 1275, 1276 n.1 (Fla. 2d DCA June 10, 2016) (opining that rule against partial assignment "would likely be subsumed in this context by Florida's longstanding precedent that insurance policy benefits are freely assignable, even without the insurer's consent").

ASI's mortgagee consent requirement is a restriction on assignment, both directly (if consent is not obtained) and indirectly (because the possibility of any restriction renders all AOBs risky to the assignee). Allowing an insurer to enforce the mortgagee consent clause creates a *de facto* insurer consent requirement, albeit one that might be avoided occasionally in the unlikely event the parties recognize

the need for mortgagee consent and are able to obtain it promptly. The objections raised in the answer brief do not justify creating an exception to the rule against restrictions on AOBs.

The insurance contract is written to recognize the transferability of the insured's interest. The loss payment clause provides "we will pay you unless some other person is . . . legally entitled to receive payment." (R. 308). After an AOB, the assignee becomes the "you." The payments in which the mortgagee retains an interest are then "paid to the mortgagee and you, as interests appear." (R. 308). Any moneys due to the mortgagee, solely or jointly, need not be paid to the assignee alone.

There is reason to question whether Ms. Morgan's mortgagee has any interest in the proceeds of this AOB. A mortgagee's interest does not extend to coverages not specified. Cont'l Mortg. & Equity Trust v. Meridian Mut. Ins. Co., 969 F. Supp. 460, 464 (E.D. Mich. 1997) (lost rent and debris removal). The policy here requires payment jointly to the insured and the mortgagee only for benefits under coverage A (Dwelling) and coverage B (Additional Structures). (R. 308). Bio Logic's services are at least arguably covered under Additional

Coverages for law and ordinance (R. 323; see Manatee Cty. Ordinance 2-6-19)[1]; bacteria (R. 318); or reasonable repairs or debris removal. (R. 266).

II. Contested issues not crucial to the disposition of this case.

A. ASI's standing to raise the mortgagee's purported lack of consent as a defense to suit.

ASI claims to find it "absurd" that Bio Logic can stand in the shoes of Ms. Morgan to sue for breach of contract, but that ASI lacks standing to raise the mortgagee's lack of consent to the AOB. (Answer Br. 22). This is merely the natural consequence of well-settled law. After a loss, the right to insurance benefits becomes a species of freely assignable personal property known as a *chose in action*, a right to a thing not currently possessed. Kohl v. Blue Cross & Blue Shield of Fla., Inc., 955 So. 2d 1140, 1143 (Fla. 4th DCA 2007) (benefits under an insurance policy may be assigned as any other chose in action). An AOB is the assignment of a claim for damages on a contract. Motion, Inc. v. Goldblatt, 193 So. 3d 39, 43 (Fla. 3d DCA 2016).

There is no comparable right of the insurer to challenge the transfer of a *chose in action* based on a third party's failure to consent. This is not a case where the plaintiff has clearly failed to establish standing, by relying on an assignment

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[1] Paragraph 6 defines "unsafe building" to include any structure "manifestly unsafe or unsanitary for the purpose for which it is being occupied."

dated after an action was filed. (Answer Br., at 23 (citing Progressive Express Ins. Co. v. McGrath Cmty. Chiropractic, 913 So. 2d 1281, 1283 (Fla. 2d DCA 2005)). Here, ASI asserts a third party's failure to consent as a defense to its own liability. This officious intermeddling benefits no one except ASI, who will reap a windfall if its obligation to pay Bio Logic under the policy becomes unenforceable.

B. The assignment in equity that would exist if an assignment at law did not.

ASI observes, presumably for this Court's benefit, that "the words 'equitable assignment' cannot be found in the complaint." (Answer Br. 27). ASI does not mention that the complaint alleges "an assignment in equity." (R. 27). Indeed, the word "equity" cannot be found in the answer brief at all.

"'It is the established rule in the United States that an assignment for a valuable consideration, with notice to the debtor, imposes on him an equitable and moral obligation to pay the assignee.'" Santiago v. Safeway Ins. Co., 396 S.E.2d 506, 509 (Ga. App. 1990) (citations omitted)). An assignment contract – even one unenforceable at law – clearly shows the requisite intent to assign and to receive, and Bio Logic's services are the necessary consideration. These are the only elements of an equitable assignment. Giles v. Sun Bank, N.A., 450 So. 2d 258, 261 (Fla. 5th DCA 1984). ASI's consent is not required; it was only the right to benefits, not the entire policy, that was assigned. (Answer Br., at 26).

ASI mentions in passing that no cause of action for equitable assignment was pleaded. (Answer Br., at 11). To the extent the issue is properly raised, ASI offers no authority showing that equitable assignment is a distinct cause of action. It appears much more logical to proceed on a breach of contract suit, as the policy governs ASI's obligations, while an assignment in equity is an issue of standing only. E.g., Morales v. Zenith Ins. Co., 714 F.3d 1220, 1234 (11th Cir. 2013) (discussing suit for breach, where assignment was equitable in nature). The need to treat the claim itself as equitable would only arise in the few jurisdictions that divide chancery courts from courts at law. See Joseph Gianola, *Changing Jurisdiction in Chancery Court*, 25 MISS. C. L. REV. 109, 114 (Fall 2005) (explaining that in such cases, any ambiguity should be resolved in favor of jurisdiction at law).

C. The relevance of OIR materials as additional authority.

ASI's discussion of the OIR materials appended to the initial brief does not address whether the materials are "authority" subject to judicial notice, despite Bio Logic having taken this position in this appeal. (See Opp. to Motion to Strike). These materials are "other authority" specified in Rule 9.220(b) of the Florida Rules of Appellate Procedure.

ASI's oracular pronouncement that the OIR's decision "will likely be overturned" (Answer Br., at 30) is merely unreasoned optimism that ought not

sway the Court. As for the disparate treatment of different insurers seeking to incorporate the same clause, an amicus brief in the pending Security First case explains why the OIRs acts violate Florida's constitution in addition to its obligation to retroactively disapprove illegal filings. No. 5D14-3425, *Amicus* Brief of Universal Insurance Company of North America (Feb. 16, 2017). Finally, the distinctions between ASI's policy and Security First's rejected amendment (Answer Br. 29) are irrelevant, as OIR relied only on language common to both in disapproving the filings. (See App. at 130, 136). There is no barrier to the Court considering OIR's opinion on whether the mortgagee clause is legal.

III. The amicus brief is unhelpful and devoid of merit.

Bio Logic does not object to the Court's consideration of any relevant material. Nevertheless, their brief shows that *amici* here are not true friends to the Court. Although their arguments are ultimately without merit, the Court would be justified in ignoring them.

An *amicus* brief is appropriate "when the interest of the amici is differentiated from that of the litigants, or where *amici* want to introduce subtle variations . . . or even novel arguments that might result in a successful outcome but are too risky for the principal litigant to embrace." Walbolt, Sylvia and Lang, Joseph, *Amicus Briefs: Friend or Foe of Florida Courts?*, 32 STETSON L.

REV. 269, 274 (Winter 2003). In the article, Judge Chris Alternbernd was quoted as stating that *amici* should strive to assist the court, not the litigant:

> The amicus should try to write a brief that is similar to the memorandum that a good staff attorney or law clerk might write for his or her judge. It should give thought to the arguments on both sides, but ultimately advocate a position that is perceived to be the best outcome for the fabric of the law, as compared to the interests of the parties on one side or the other of the dispute.

Id. at 276. Ideally, the amicus comes forward with "special" or "unique" perspective, that aids the court in understanding the consequences of its decision. Id. at 278 (quoting interview with Justice Pariente). Amicus briefs can also be useful when they explain to the court "how an issue, for example, a commonly occurring insurance coverage dispute, has been handled in other states or at the federal level, and whether that resolution elsewhere 'has been satisfactory in actual application.'" Id. (quoting Justice Wells).

"[A]ll too often, amicus briefs bring nothing new or of value to the court and instead merely reiterate the arguments advanced by one of the actual parties to the appeal." Id. at 269 (emphasis added). As Judge Richard Posner has explained:

> The bane of lawyers is prolixity and duplication, and for obvious reasons is especially marked in commercial cases with large monetary stakes. In an era of heavy judicial caseloads and public impatience with the delays and expense of litigation, we judges should be assiduous to bar the gates to amicus curiae briefs that fail to present convincing reasons why the parties' briefs do not give us all the help we need for deciding the appeal.

Ryan v. Commodity Futures Trading Commission, 125 F.3d 1062,1064 (7th Cir. 1997) (cited in Rathkamp v. Dep't of Comm'ty Affairs, 730 So. 2d 866, 866 (Fla. 3d DCA 1999)).

Here, amici argue only the specific language in ASI's policy. Ciba-Geigy Ltd. v. Fish Peddler, Inc., 683 So.2d 522, 523 (Fla. 4th DCA 1996) (stating "amicus briefs should not argue the facts in issue"); Philip Burlington, *New Rules on Amicus Curiae Briefs*, 81 Fla. Bar J. 30 (April 2007) ("an amicus should not argue the facts at issue in a case, nor attempt to interject into the proceedings matters outside the record"). They make no argument that ASI could not or should not have made on its own behalf. Although ASI commendably refrained from using its entire page allotment, this amicus brief is the sort that, for less sophisticated advocates, might serve as an "end run" around the page limitations for a party's brief. Now, Inc. v. Scheidler, 223 F.3d 615, 617 (7th Cir. 2000).

Amici also go outside the record, supplying what purports to be a typical mortgage agreement, where ASI has not provided the mortgage agreement at issue here. See Altchiler v. State, Dep't of Prof'l Reg., 442 So.2d 349, 350 (Fla. 1st DCA 1983). If the mortgage instrument were relevant to the disposition of the case, ASI would surely have produced it in the context of a motion for summary judgment below.

The main problem with *amici*'s brief, however, is that the points and authorities therein are meritless and irrelevant.

A. Amici provide unreliable and unhelpful empirical material to disparage AOBs general.

Amici contend that AOBs "are often made to water remediation companies, and these assignments cause unwarranted charges and litigation." (Amicus Br., at 4).[2] Their authority, however, shows no such thing.[3]

OIR's data call cannot be reviewed independently, because OIR has taken the position (at least with the undersigned) that the raw data is not within Florida's open records act. The data was reported by insurers, and the data was not audited for the report. (OIR report, at 3). The OIR's data call report offers no explanation for the supposed increase in water losses. Reporting on the severity of the claims does not appear to control for inflation. (OIR report, at 8). Regarding AOB claims, most companies did not track whether an AOB was used. (OIR report, at 11). The report by Citizens similarly relies on data not publicly available.

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[2] Amici did not use the e-portal for service, and have ignored repeated requests to serve a copy of the PDF filed with the Court. Bio Logic asks the Court's understanding if the pagination in the document provided does not match the one filed with the Court.

[3] Of course, even if the authority did "show that these assignments are inviting fraud and abuse, then the legislature is in the best position to investigate and undertake comprehensive reform." One Call Prop. Servs. v. Sec. First Ins. Co., 165 So. 3d 749, 755 (Fla. 4th DCA 2015)

The reports are not helpful to the court. They do not show that AOBs lead to overpayment. To the extent that any reliable data actually supports ASI's argument,[4] the underlying trends are equally consistent with routine underpayment of non-AOB claims. It should not be surprising that sophisticated market participants, with resources to demand and receive proper payment, are better able to negotiate a realistic deal with large insurance companies than individual insureds.

Of course, insurers would not be at the mercy of extortionate contractors even if they existed. Meritless claims need not be paid. The fee statute applies only to prevailing parties, and insurance companies are able to use proposals for settlement and section 57.105, Florida Statutes to shift their own legal fees onto extortionate contractors filing baseless suits. There would be no AOB problem unless insurers were underpaying covered claims.

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[4] Other sources, including transcripts of quarterly meetings with Florida's largest insurer, indicate that the severity and frequency of AOB claims are declining. Charles Elmore, Palm Beach Post blog, February 22, 2017, available online at: http://protectingyourpocket.blog.mypalmbeachpost.com/2017/02/22/crisis-maybe-but-top-fl-insurer-says-severity-of-aob-claims-falling/

B. Amici's improbable "examples" ignore the simple legal tools available to mortgagors concerned with protecting their interests.

Example 1 concerns the homeowner who assigns benefits to a remediation company without the permission of the joint co-owner or the mortgage company. Amici contends that if "company X" performs substandard work, the insurer is put into an untenable situation. The problems with using this example are many.

First: The interests of the homeowners and the mortgagor are all parallel. There is no reason to believe one would act against the other, and that Homeowner A would be content with substandard work to which the others objected.

Second: Amicus fails to differentiate between different coverages under the policy. Coverage for debris removal or for temporary repairs only exists after expenses are incurred, and then only to the extent the expenses are reasonable and necessary. (R. 286). Coverage A (Dwelling) and Coverage B (Additional Structures), on the other hand, can be paid prospectively.

Third: The insurer is able to monitor the work done to the covered property and adjust payment accordingly. Assuming coverage for reasonable expenses incurred, the insurer would be liable for only part of or none of Company X's invoice if the repairs were substandard. If the benefits were for Coverage A or B, the insurer could withhold full payment until the repairs were complete. (R. 292, sub. 3(a)(4)).

Fourth: The law is no stranger to multiple claims to a single obligation. Insurance companies can and do use declaratory actions, impleader, and joinder to protect themselves from improperly paying the incorrect party.

Amici's example 2 merely adds homestead protection and assumes the homeowners are married. The proceeds at issue, however, are not homestead protected. The Supreme Court has held that the constitutional homestead exemption protects against every claim except those exempted by the provision itself, which includes "obligations contracted for the . . . repair" of the homestead. Osborne v. Dumoulin, 55 So. 3d 577, 582 (Fla. 2011); Havoco of America, Ltd. v. Hill, 790 So. 2d 1018, 1022 (Fla. 2001). This situation is vastly different from a general creditor recovering those same funds. (See Amicus Br. at 17 (citing Quiroga v. Citizens Property Ins. Corp., 34 So. 3d 101 (Fla. 3d DCA 2010)).

CONCLUSION

Rebuffed over the past years by Florida's courts of appeal, insurers cannot continue to pursue direct attacks on the free assignability of insurance benefits after a loss occurs. They have not, however, accepted defeat with grace.

The mortgagee consent requirement is a creative solution in search of a problem to justify it. ASI fails to produce a single case from any jurisdiction enforcing an anti-AOB clause requiring the mortgagee's consent to assignment. Amici likewise produce only hypotheticals, unencumbered by authority or even actual examples of insurers placed in untenable situations by an AOB.

Faced with adverse facts and law, ASI can rely only on the sound of its furious table-pounding. By this reply, Bio Logic hopes to have explained why the opposing briefs signify nothing. As a functional restraint on AOBs with no legitimate societal benefit, ASI's mortgagee consent requirement is illegal. Bio Logic asks the Court to reverse the order dismissing the complaint and remand for further proceedings.

Respectfully Submitted,

/s/ Gray Proctor

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CERTIFICATE OF SERVICE

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CERTIFICATE OF TYPEFACE COMPLIANCE

I further certify that this brief is typed in Times New Roman 14-point font in compliance with Florida Rule of Appellate Procedure 9.210(a)(2).

/sGray R. Proctor
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