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November 10, 2023

Trinidad Navarro
Delaware Insurance Commissioner
1351 West North Street
Suite 101
Dover, DE 19904

Re: Adjuster Licensing Working Group (Producer Licensing Task Force, Market Regulation D Committee), Public Adjuster Licensing Model Act Work Stream

Dear Commissioner Navarro:

I would like to thank the NAIC for the opportunity to address proposed changes to the Public Adjusters Licensing Model Act. The Automotive Education & Policy Institute ("AEPI") believes in appropriate licensing, within the correct framework, for all adjusters. However, some of the proposed revisions to the Public Adjusters Licensing Model Act could have starkly negative consequences for consumers, and AEPI believes consumers are better served by not adopting some of the proposed changes.

SUMMARY OF POINTS

Section 15

- Paragraph L harms consumers by:
  - removing one of the only remaining methods available to consumers to obtain fair payment of property loss by assigning the accrued loss value to a repair contractor;
  - creating a limitation allowing assignment only to a person "legally permitted to represent the insured", *i.e.* a public adjuster, then creating an irreconcilable conflict by prohibiting a public adjuster from having an interest in the claim other than the contract fee per Section 19;
- Paragraphs I, J, and K harm consumers by:

- Creating a system that, of the three classes of adjusters, requires only public adjusters to comply with both insurance regulations and the consumer protection laws, raising McCarren-Ferguson Act implications.

Section 16

- Section 16 harms consumers by failing to expressly establish that it is a fraudulent insurance act for insurers to engage in any act of "negotiating" with repair contractors regarding a consumer's property loss.

Section 19

- Proposed paragraph G likely conflicts with Section 15, paragraph L, and Section 14, paragraph D;
- Proposed changes to paragraph I would preclude consumers from benefiting from the knowledge and experience of the public adjuster in the pursuit of quality repair service providers.

DETAILED COMMENTS

SECTION 15

Section 15, Paragraph L proposes to allow insurers to change policy language to prohibit assignment of benefits or proceeds from an accrued claim. As an initial matter, the Public Adjuster Licensing Model Act is not the appropriate location for a legal provision that governs specifics of an insurer's property/casualty policy language.

Furthermore, this language hurts consumers by removing from them a viable avenue from which to obtain their full loss payment.

The proposed language states:

L. Subject to its terms relating to assignability, a property insurance policy, whether heretofore or hereafter issued, under the terms of which the policy and its rights and benefits are assignable, may provide that the rights and benefits under the insurance may only be assigned to a person who has the legal authority to represent the named insured and may explicitly prohibit assignment of rights and benefits to any other person, including a property repair contractor. For purposes of this subsection, having "legal authority to represent the named insured" includes the person named by the named insured as having the named insured's power of attorney, the person who is the name insured's licensed public adjuster, or any other comparable person. Property repair contractors operating in this State may not subvert the public adjuster licensing

requirements of [insert appropriate reference to state law] through the acquisition of a power of attorney from the named insured.

First, this proposed language is essentially about permitting insurers, particularly property/casualty insurers, from prohibiting post-loss assignments of proceeds. This language is directly contrary to the long-held legal position of the majority of jurisdictions in the U.S. that post-loss assignments of insurance benefits from one party to another are freely assignable, and attempts to prohibit them violate public policy. A non-exclusive list of jurisdictions adhering to the post-loss assignment of insurance benefits is included in the attached Amicus Brief.[1] These insurance contract proceeds are effectively an account receivable that has accrued to the insured, and the insured should be entitled to utilize those proceeds in the insured's preferred manner.

Preventing post-loss assignment will substantially harm consumers. In auto claims involving partial losses, if the insurer values the claim at a lower amount than the repair professional, the insured currently has few options to obtain full payment of what the insured believes to be owed.

First, the insured might be able to utilize the Appraisal Clause to obtain recourse via an umpire's opinion; yet, as the AEPI has noted for the NAIC, many auto insurers have, or are seeking to, remove the Appraisal Clause entirely from their policies, or to limit its application exclusively to total losses.[2] This appears to be due to insureds discovering the existence of the Appraisal Clause in partial losses and using it to great effect – underscoring that loss claims are not being properly compensated and insureds are not receiving the true benefit of their insurance contract.

Second, the insured can file a complaint with the Insurance Department. However, this typically results in the Department determining that the matter constitutes a factual issue that it has no ability to decide, and refers the insured to the legal system.

Third, the insured can file a lawsuit against the insurer. This requires insureds to be able to represent themselves, which typically they are not able to do, or be capable of finding an attorney who will undertake the property-loss claim – which the vast majority of attorneys currently refuse to take. This leaves the insured powerless against the resources and economic wherewithal of an insurer.

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[1] Attached Amicus Brief of Automotive Education & Policy Institute in *Nick's Garage, Inc. v. Adirondack Ins. Exchange, Onondaga Cty. Ct., N.Y., Appeal Index No: 08-9681, (Sept. 28, 2009).* The appeal was successful, and the matter returned to the lower court for further proceedings.

[2] The AEPI has given two recent presentations on insurers' removals of the Appraisal Clause: *Uses And Recommendations for P&C Appraisal Clauses*, Summer Meeting, Seattle, WA, August 2023, and *The Appraisal Clause: Auto Insurer Abandonment Hurts Consumers*, Spring Meeting, Kansas City, MO, April 2022

Fourth, an insured in the majority of states, has the legal ability to assign the right to receive payment of the loss to a person or entity providing the repair services. This is a significant right, as auto repairers automatically acquire a lien securing the cost of repairs on the consumer's vehicle by state statute or common law. This lien ensures the repairer is compensated in full prior to the release of the vehicle. As a result, a repair contractor is permitted to hold the consumer's vehicle as security for full payment, and an insurer's refusal to address the issue only harms the consumer.

When an insurer disagrees with a repair contractor's professional determination of the procedures, parts, and activities necessary to safely and properly repair a consumer's vehicle, that amount may differ by a few hundred to many thousands of dollars. Forcing the consumer to pay out-of-pocket for the difference and then seek full indemnification from the insurer is often an undue hardship for the consumer. If the insurer has failed to pay the actual loss due, this leaves the consumer and the repair contractor with several equally poor choices:

A. the consumer can pay out-of-pocket for the repair portion the insurer claims is unnecessary and seek to obtain full payment from the carrier;
B. the repairer can ignore its professional duty to safely and properly repair the vehicle, and negligently provide a repair for the amount of money the insurer offers the insured;
C. the repairer can safely and properly repair the vehicle per its repair blueprint and simply accept the amount of money the insurer offers the insured and write off the remainder;
D. the repairer can refuse to perform repairs for the consumer; or
E. the repairer can accept an assignment of the right to receive full payment of the insurance proceeds from the insured in exchange for releasing the vehicle, and pursue full recovery directly from the insurer.

Not all repair contractors are willing to accept assignments and proceed against the insurer directly. However, those that do are providing insureds with a valuable option that ensures quality repairs are being performed on consumers' vehicles while removing the financial burden from consumers unable to pay the difference in the invoice and pursue their own insurers for full payment.

It is option E that the proposed revisions to the Public Adjuster Model Act seek to remove from the consumer. Removing this option would substantially harm consumers, would limit their repair choices, and is contrary to public policy.

GARAGE KEEPERS INSURANCE V. AUTO INSURANCE

Although auto insurers often write cost estimates anticipating vehicle repairs, those cost estimates are for insurer internal purposes, verifying claim investigation and creating reserve

values. Insurer cost estimates are not blueprints for determining how the vehicle will be safely and properly repaired, like the damage analyses created by professional repair contractors are. The professional repair contractors have the liability for performing safe, proper repairs that ensure every vehicle that is returned to the nation's highways will function appropriately and prevent the motoring public from being exposed to harm.

As insurers are not held liable for unsafe or improper repairs that may result from repairs performed per the amount of money offered by an insurer to an insured, insurers have the luxury of offering settlement payments based on antiquated repair techniques, improper parts, and labor rates that are artificially low and fail to keep pace with technological innovation. They also often deny compensation for repair procedures the auto makers deem necessary to safely and properly restore the vehicle. Yet again, insurers accept no liability for these determinations or actions in the event an unsafe repair promoted by an insurer is utilized and someone is harmed as a result.

In contrast, professional repairers have a legal duty to consumers to repair vehicles safely and properly. This means they must stay abreast of techniques to deal with new materials used in vehicles and complex electronics, utilize increasingly expensive equipment (frame alignment machines and EPA-compliant paint booths), provide significant time and money to train technicians to repair increasingly complex vehicles, and continue to maintain necessary overhead, like workers compensation and garage keepers insurance.

The terms and requirements of repairers' garage keepers coverage also often conflicts with the demands of an auto insurer regarding the consumer's repair. For example, some garage keepers policies refuse to provide coverage for repairs using non-original equipment parts and many are demanding that repairers provide services in compliance with auto makers' repair procedures. These mutually exclusive demands have created considerable friction between repairers dedicated to providing consumers with safe, proper repairs, and auto insurers seeking to minimize claims payments. Auto insurers in most states, however, have an option to directly control repairs and repair costs by selecting the "election to repair" remedy.

ELECTION TO REPAIR

Insurers typically have a remedy contained within their property/casualty policies that allows the carrier to "elect to repair". Yet, insurers do not typically utilize this remedy for a significant reason: Historical case law holds that an insurer that elects to repair converts the insurance contract into a repair contract and makes the carrier liable for the propriety and efficacy of the repair. Under the repair contract, the insurer becomes the general contractor on the repair, and the repair professional becomes its sub-contractor. *See, e.g., State Farm Mut. Auto. Ins. Co. v. Dodd*, 276 Ala. 410, 1964 Ala. LEXIS 363 (Ala., March 26, 1964); *Venable v. Import Volkswagen, Inc.*, 214 Kan. 43, 1974 Kan. LEXIS 339 (Kan., March 2, 1974, Opinion Filed *); Mockmore v. Stone*, 143 Ill. App. 3d 916, 1986 Ill. App. LEXIS 2273 (Ill. App. Ct., June 2, 1986, Filed);

Williams v. Gulf Ins. Co., 39 Mass. App. Ct. 432, 1995 Mass. App. LEXIS 823 (Mass. App. Ct., November 22, 1995, Decided); *Drew v. Mobile USA Ins. Co*., 920 So. 2d 832, 2006 Fla. App. LEXIS 2267 (Fla. 4th DCA, February 22, 2006, Decided)

Therefore, the insurer in these circumstances can entirely control the repair cost – but it does so only with the full assumption of liability for the repair. Accordingly, if insurers are certain that appropriate repairs can be made to consumers' vehicles for the amount they offer in settlement, they have the ability in most states to validate that assertion by accepting full liability and undertaking repairs themselves.

SECTION 16

New Section 16 establishes that it is a fraudulent insurance act for an unlicensed person to engage in activities reserved to licensed public adjusters. However, there is no corresponding provision making it a fraudulent insurance act for an insurer to engage in any aspect of "negotiating" a claim with anyone not licensed as a public adjuster or as an attorney.

This is an issue of particular import as, in recent years, auto insurers have routinely attempted to engage in negotiating consumers' repair claims with repair contractors. This is not only inappropriate under the Public Adjusters Licensing Model Act, but it also exposes the repair contractors to charges of violating the state's unauthorized practice of law provisions. Insurers have historically taken the position when challenged on this issue that their "negotiations" with repairers over a consumer's repair matter does not constitute the repairer "negotiating the consumer's claim", and that neither the state's existing public adjuster provisions nor the prospect that insurers are forcing repairers into violating the state's prohibition against engaging in the unauthorized practice of law are offended. This has been the industry's position even when the sole aspect of the insured's claim is one for vehicle damage.

The proposed revisions to Section 15, Paragraph L, and new Section 16 appear to take the opposite approach and make clear that repairers would engage in unlawful conduct if they discuss the consumer's repair with the insurer. Because of proposed new prohibitions against permitting a public adjuster from having a financial interest in an insured's claim

other than a stated fee, the repairer cannot remedy this problem by becoming a licensed public adjuster. Thus, to protect themselves from engaging in illegal behavior, repair professionals would likely refuse to discuss a consumer's claim with an insurer at all.

SECTION 19

Revisions to proposed paragraph G conflict with other provisions of this Act. Proposed paragraph G prohibits a public adjuster from having a direct or indirect financial interest in any aspect of the insured's claim and states:

> ~~D~~G. A public adjuster shall not have a direct or indirect financial interest in any aspect of the claim, other than the salary, fee, commission or other consideration established in the written contract with the insured~~, unless full written disclosure has been made to the insured as set forth in section 15g~~ .

However, new proposed paragraph L in Section 15 makes the public adjuster one of the few people permitted to receive an assignment of the insured's contract benefits. To the extent the assignment is unrelated to, or in excess of the public adjuster's fee, that provision places the public adjuster in conflict with the restrictions on having a financial interest in the insured's claim.

Further, Section 14, proposed paragraph D limits the amount a public adjuster may receive from an insurance claims settlement to 15% of a non-catastrophic loss. The language states:

> ~~E~~D. ~~[Optional] In the event of a catastrophic disaster, t~~There shall be limits on ~~catastrophic~~ fees~~,~~. ~~n~~No public adjuster shall charge, agree to or accept as compensation or reimbursement any payment, commission, fee, or other thing of value equal ~~to~~of more than ten percent (10%) ~~of any insurance settlement or proceeds~~for any catastrophic insurance claim settlement, and no more than fifteen percent (15%) for any insurance claim settlement. No public adjuster shall require, demand or accept any fee, retainer, compensation, deposit, or other thing of value, prior to settlement of a claim

Allowing a consumer to assign proceeds of an insurance claim to a public adjuster, but placing a potential competing limitation on that amount could easily cause a public adjuster to inadvertently violate the cap on compensation. Also, it could easily create a non-enforceable scenario in which a consumer is attempting to assign various portions of the same claim to different persons, like a public adjuster and an attorney.

Moreover, placing an absolute fee cap on a non-catastrophic loss to only 15%, will virtually ensure that public adjusters will not be willing to assist auto damage loss consumers. In partial auto losses, an insured may be attempting to recover $500 to $1,000 that have been denied from the overall claim. It would not be economically feasible for a public adjuster to undertake the consumer's matter for only $75. Just as attorneys will not undertake consumer's auto loss-only claims because it is not economically feasible for them, this change would now create the identical problem with public adjusters. This proposed change would actually harm consumers.

Section 19, proposed paragraph I would now prohibit public adjusters from referring or suggesting repair service providers to consumers. The specific language would read:

~~F~~I. The public adjuster shall abstain from referring or directing the insured to get needed repairs or services in connection with a loss from any person~~, unless disclosed to the insured:~~.

~~(1) With whom the public adjuster has a financial interest; or~~

~~(2) From whom the public adjuster may receive direct or indirect compensation for the referral.~~

This proposed language would again place public adjusters at severe disadvantage to their company and independent adjuster counterparts. Company and independent adjusters routinely recommend and tout the repair services of the contractors that participate in insurers' preferred networks. In contrast, the public adjuster – one of the only people a consumer could consult who would likely have appropriate knowledge of the skills and quality of various service providers – would now be foreclosed from sharing that knowledge with the consumer. Such a provision does not help, but, rather, actively harms consumers.

CONCLUSION

The AEPI asks the NAIC to seriously consider and weigh the proposed revisions to evaluate whether they will actually benefit consumers. AEPI believes that, if accepted, these provisions will cause substantial harm to consumers and will have the opposite result of the goals this work stream is attempting to achieve.

Thank you for your consideration of these comments and for your leadership on this matter.

Sincerely,

Erica L. Eversman, J.D.
President
Automotive Education & Policy Institute

Consumer Liaison Representatives Supporting:

Karol Kitt, University of Texas
Richard Webber, Life Insurance Consumer Advocacy Center
Birny Birnbaum, Center for Economic Justice
Silvia Yee, Disability Rights Education & Defense Fund

CC: Tim Mullen, Director, Market Regulation, National Association of Insurance Commissioners

Attachment: Automotive Education & Policy Institute Amicus Brief in *Nick's Garage, Inc. v. Adirondack Ins. Exchange, Onondaga Cty. Ct., N.Y., Appeal Index No: 08-9681, (Sept. 28, 2009)*

STATE OF NEW YORK
COUNTY COURT COUNTY OF ONONDAGA

Nick's Garage Inc., D/B/A Nick Orso's,
Body Shop & Service Center Plaintiff/Appellant

Index No.: 2008-2808CV

Appeal Index No: 08-9681

-vs-

Adirondack Insurance Exchange.

Defendant/Respondent

BRIEF OF AMICI CURIAE, THE AUTOMOTIVE EDUCATION AND POLICY INSTITUTE AND VEHICLE INFORMATION SERVICES, INC.

STATEMENT OF AMICUS CURIAE INTEREST

The Automotive Education and Policy Institute ("AEPI") is a non-profit organization providing education, information, and assistance to consumers and automotive repair businesses concerning motor vehicle safety, insurance responsibilities, and consumer rights. Legal determinations that affect consumers' rights to receive the benefits of their state-mandated insurance contracts, automotive repair businesses' duties to perform safe and proper repairs, and the rights of automotive repair businesses to be paid for the work they perform substantially impacts consumers, motor vehicle safety, and automobile repair businesses. Accordingly, the AEPI has significant interests in the outcome of this matter.

Vehicle Information Services, Inc. is an Ohio corporation providing information, expert analyses, and consulting services for consumers, insurers, financial institutions, government entities, and the automotive industry. The

company provides information to government entities and is a consultant regarding automotive consumer protection issues. Issues that impact consumers, motor vehicle safety, and collision repair practices are of substantial import to the clients of the company, and Vehicle Information Services, Inc. has a significant interest in the outcome of the case.

STATEMENT OF FACTS AND STATEMENT OF THE CASE

Appellant, Nick's Garage, Inc., dba Nick Orso's Body Shop and Service Center ("Nick's") filed suit against Appellee, Adirondack Insurance Exchange ("Adirondack") to recover full payment for collision repair services rendered to two separate insureds of Adirondack. Both insureds, Michael Albino and David Hess, had purchased automobile insurance policies from Adirondack contracting to indemnify each for property loss occurring to the insured's vehicle. While each policy was in effect, each of the insureds was involved in an accident.

Both of the insureds selected Nick's to perform the collision repair work. Both insureds signed documents authorizing Nick's to repair the vehicle, function as the insured's designated representative for dealing with the insurer, and both eventually signed documents assigning their right to receive the full amount of payment from Adirondack under the insurance contracts to Nick's.

Adirondack self-determined the cost of repairs to be lower than the dollar amount identified by Nick's to be necessary and reasonable to return each vehicle to its "pre-loss condition". Adirondack paid Nick's directly on each claim the lower amount if deemed appropriate and refused additional payments for the amounts Nick's claimed was due and owing.

Rather than requiring each insured to pay the difference between the amount of Nick's repair invoice and the amount Adirondack elected to pay to obtain release of their vehicles, Nick's accepted an assignment of proceeds owed under the policy from each insured. Nick's then filed suit in the Syracuse City Court against Adirondack to recover the difference owed between the repair invoice and the amount paid by Adirondack on each claim.

Adirondack moved for summary judgment on the basis that each insurance contract contained an "anti-assignment" clause prohibiting assignment of any rights or duties under the insurance policy by the insured without consent of Adirondack. The Syracuse City Court found that neither insured had sought approval of the assignment, Adirondack had not approved either assignment, and, therefore, Nick's did not have standing to file suit against the insurer. The lower grant granted Adirondack's Motion for Summary Judgment.

Nick's appealed, asserting the assignment was valid and the Syracuse City Court erred by granting Adirondack's Motion for Summary Judgment.

QUESTION PRESENTED

Did the Syracuse City Court err in granting Appellee's Motion for Summary Judgment by determining that the insurance policy anti-assignment clause prohibited an insured's transfer of the right to receive payment to Appellant without Adirondack's approval?

STANDARD OF REVIEW

The standard of review for the propriety of granting summary judgment in this matter is *de novo* pursuant to the Uniform City Court Act § 1702(d).

LAW AND ARGUMENT

A. NEW YORK LAW INVALIDATES ANTI-ASSIGNMENT INSURANCE CONTRACT PROVISIONS FOR INSUREDS' POST-LOSS PROPERTY DAMAGE PROCEED ASSIGNMENTS.

Insurance policies typically contain "anti-assignment" clauses prohibiting the insured from transferring rights or duties under the insurance contract to another without the prior approval of the insurer. When determining the validity of such clauses, courts routinely make distinctions between a pre-loss transfer and a post-loss transfer. Most jurisdictions uphold the prohibition of the insured's transfer of any rights prior to the loss, but freely allow transfer after a loss as occurred.

To say that New York law has long followed the majority rule that an insured may transfer the right to receive payment under an insurance policy after a loss has occurred is not an exaggeration. In *Mellen v. Hamilton Fire Ins. Co.*, 17 N.Y. 609 (N.Y. 1858)(Syllabus 1), the New York Court of Appeals held that "[t]he assignment of a policy of insurance after a loss is not within the clause prohibiting a transfer without the consent of the insurers. The restriction is upon assignment during the pendency of the risk, and not of a transfer, of the debt arising from a loss."

For over one hundred and fifty years, New York courts and courts applying New York law have recognized that, "[a]lthough assignment of the policy prior to loss was ineffective without the consent of the insurer, no such approval was necessary for an assignment of the right to the proceeds after the loss, see *Courtney v. New York City Ins. Co.*, 28 Barb. 116, 118 (N.Y.Sup. Ct. 1858); *Carroll v. Charter Oak Ins. Co., 38 Barb*. 402, 408-409 (N.Y.Sup.Ct. 1862); 5 *Appleman, Insurance Law and Practice* §§ 3458-3459 (1941)." *Travelers Indem. Co. v. Israel*, 354 F.2d 488, 490 (2d

Cir. N.Y. 1965)(applying New York law)(citations in original.) New York courts have consistently upheld the propriety of post-loss assignment of rights under an insurance policy by the insured without consent of the insurer. In *Beck-Brown Realty Co. v. Liberty Bell Ins. Co.*, 137 Misc. 263, 264, 241 N.Y.S. 727, 728 (N.Y. Sup. Ct. 1930), the court stated:

> Before loss, the insurer is subjected to a risk, and it is this risk which the insurer may exempt from assignability except upon its own consent. Upon loss, however, the risk disappears and nothing remains except the assured's right to payment -- a mere chose in action which may be assigned within the limitations of any other chose in action.

In its decision in *Globecon Group, LLC v. Hartford Fire Ins. Co.*, 434 F.3d 165, 170-71 (2nd Cir. 2006), overturning the lower court's entry of summary judgment in favor the insurer on assignment of proceeds for a presented claim, the Second Circuit Court of Appeals found under New York law that anti-assignment provisions cannot prohibit a transfer once a loss has accrued.[1]

> As a general matter, New York follows the majority rule that such a provision is valid with respect to transfers that were made prior to, but not after, the insured-against loss has occurred. *See Travelers Indemnity Co. v. Israel*, 354 F.2d 488, 490 (2d Cir. 1965) ("Although assignment of the policy prior to loss [is] ineffective without the consent of the insurer, no such approval [is] necessary for an assignment of the right to the proceeds after the loss." (footnote omitted)); *SR Int'l Bus. Ins. Co. v. World Trade Ctr. Props.*, 375 F. Supp. 2d 238, 245-46 (S.D.N.Y. 2005) ("Under [no-transfer] provisions, any unauthorized assignment of a property insurance policy before a loss occurs is invalid [but] after a loss occurs . . . a party to an insurance contract may assign its right to accrued insurance proceeds to another party, even in the face of express policy language prohibiting assignments." (citations

[1] The *Globetron Group LLC* court did recognize that in certain unusual circumstances post-loss accrual assignment might be invalidated under the anti-assignment clause if, in fact, it increased the insurer's risk. Although not directly addressing the applicability of the question to the case, the court mused that it might be proper to limit post-accrual loss of business interruption insurance proceeds to the original business' losses, but prohibit the recovery of an assignee business asset purchaser for ongoing or future losses. *Id* at 172. The Second Circuit, however, did not countenance the upholding of an insurance contract anti-assignment clause for readily ascertainable property loss, such as the vehicle property damage at issue here.

omitted)).

The principle undergirding the enforceability of the anti-assignment clause pre-loss, yet negating it post-loss is simple. Prohibiting pre-loss transfer is about protecting the insurer from being exposed to risk it did not undertake and for which it did not collect a premium by substituting the insured party. Once a loss has occurred, however, the insured's right to receive payment is fixed and effectively becomes an account receivable – which imposes no increased risk on the insurer. "The accrual of an insurance claim extinguishes the insurer's interest in the risk profile of the insured, thereby converting the claim into, in effect, a chose in action." *Globecon*, 434 F.3d at 171; *see, also, R.L. Vallee, Inc. v. Am. Int'l Specialty Lines Ins. Co.*, 431 F. Supp. 2d 428, 435 (D. Vt. 2006)(applying Vermont law).

B. MEDICAL POST-LOSS ANTI-ASSIGNMENT DECISIONS ARE INAPPOSITE.

In its decision to grant summary judgment in favor of the insurer in this matter, the Syracus City Court did not consider the well-established precedent set forth by the New York Court of Appeals in *Mellen v. Hamilton Fire Ins. Co.*, 17 N.Y. 609 expressly authorizing post-loss assignments of proceeds under insurance contracts. Instead, the lower court relied upon two medical insurance decisions, *Spinex Laboratories, Inc. v. Empire Clue Cross and Blue Shield*, 212 A.D.2d 906, 622 N.Y.S.2d 154 (NY App. Div. 1995), and *New Medico Associates, Inc. v. . Empire Clue Cross and Blue Shield*, 267 A.D.2d 757, 701 N.Y.S.2d 142 (NY App. Div. 1996), in which the medical insurance policies contained language expressly prohibiting the assignment of monies from the insurance policy to any other party. Both decisions

are inapposite to the case at bar and the lower court's reliance upon them was flawed.

First, the Syracuse City Court failed to consider binding New York precedent holding that post-loss assignment of proceeds could not be prohibited by an anti-assignment clause contained in an insurance policy.

Second, the two medical decisions relied upon by the lower court also failed to consider New York Court of Appeals precedent pertaining to the post-loss invalidity of an anti-assignment clause in an insurance policy. As previously explained, via an insurance contract, the relationship between insurer and insured post-loss becomes one of debtor and creditor. As such, accrued losses can be readily assigned.

Instead, the court in *Spinex Laboratories, Inc.*, 212 A.D.2d at 906, 622 N.Y.S.2d at 155 relied upon *Allhusen v. Caristo Constr. Corp.* 303 NY 446 (NY 1951) and other construction contracts for the proposition that assignments made in contravention of clear and definite anti-assignment language in the contract were void. The court in *Spinex Laboratories, Inc.* failed to consider that the construction contracts were more in the nature of personal services contracts unlike accrued insurance losses. The *New Medico Associates, Inc.* court simply followed and relied upon the decision in *Spinex.*

Third, the anti-assignment language contained in the medical insurance policy considered by the *Spinex* was substantially different than the property loss policies at issue here. The *Spinex* court focused on the anti-assignment language of the medical policy stating that the insured could not assign his/her "right to collect money from [the insurer] for the services." *Spinex Laboratories, Inc.* at 906, 622

N.Y.S.2d at 155. The insurance policy language at issue does not expressly prohibit an insured from assigning accrued monies due him/her under the property loss policy.

Finally, there is a substantial difference in the nature of property loss and medical loss proceeds, which may reflect that the assignment of medical loss proceeds may actually increase the risk an insurer might face, rendering the medical loss assignments invalid. With medical losses and expenses, an insured may need ongoing and future treatment that is not liquidated or readily definable at the time of assignment. Unlike these losses, property loss proceeds are readily definable and fixed at the time of the assignment and do not impose any increased risk to an insurer.

Accordingly, the Syracuse City Court's reliance upon the medical insurance decisions was not proper, and Amici Curiae respectfully request this Court to reverse the grant of summary judgment in favor of Appellee and remand this matter for further proceedings.

C. OTHER JURISDICTIONS FOLLOW THE MAJORITY RULE NEGATING POST-LOSS PROHIBITIONS ON ASSIGNMENTS

Not only does New York law expressly sanction the post-loss assignment of rights in an insurance policy, it follows the majority rule adhered to by other jurisdictions do as well. States across the country that have addressed the issue of the efficacy of post-loss assignment of insurance proceeds to a third party have resoundingly found in favor of assignability and many have found prohibition of post-loss assignment by insurers void as against public policy.

See Straz v. Kansas Bankers Sur. Co., 986 F. Supp. 563, 569 (E.D. Wis. 1997)(applying Wisconsin law)(*citing*, *Max L. Bloom Co. v. U.S. Cas. Co.*, 191 Wis. 524, 535-36, 210 N.W. 689 (Wis. 1927)); *Viola v. Fireman's Fund Ins. Co.*, 965 F. Supp. 654, 658 (E.D. Pa. 1997)(applying Pennsylvania law); *Action Auto Stores, Inc. v. United Capitol Ins. Co.*, 845 F. Supp. 417, 422-23 (W.D. Mich. 1993)(applying Michigan law)(*citing, Roger Williams Insurance Company v. Carrington,* 43 Mich. 252, 5 N.W. 303 (1880); *United States v. Lititz Mut. Ins. Co.*, 694 F. Supp. 159, 162 (M.D.N.C. 1988)(applying North Carolina law); *Int'l Rediscount Corp. v. Hartford Accident & Indem. Co.*, 425 F. Supp. 669, 673 (D.C. Del. 1977)(applying Delaware law); *Southwestern Bell Tel. Co. v. Ocean Accident & Guarantee Corp.*, 22 F. Supp. 686, 687 (D.C. Mo. 1938)(citing, *Archer v. Merchants' & Manufacturers' Ins. Co.*, 43 Mo. 434, 443 (Mo. 1869)); *Star Windshield Repair, Inc. v. Western Nat'l Ins. Co.,* 768 N.W.2d 346 (Minn. 2009);*In re Ambassador Ins. Co.*, 2008 VT 105, 965 A.2d 486, (Ver. 2008); *Pilkington N. Am., Inc. v. Travelers Cas. & Sur. Co.*, 112 Ohio St. 3d 482, 861 N.E.2d 121, (Ohio 2006); *Egger v. Gulf Ins. Co.*, 588 Pa. 287, 903 A.2d 1219 (Penn. 2006); *Conrad Bros. v. John Deere Ins. Co.*, 640 N.W.2d 231, 237-38 (Iowa 2001); *Lexington Ins. Co. v. Simkins Indus., Inc.*, 704 So. 2d 1384, 1386 n.3 (Fla. 1998); *West Fla. Grocery Co. v. Teutonia Fire Ins. Co.*, 74 Fla. 220, 224, 77 So. 209, 211 (1917); *Pub. Util. Dist. No. 1 v. Int'l Ins. Co.*, 124 Wn.2d 789, 881 P.2d 1020, 1027 (Wash. 1994); *Smith v. Buege*, 182 W. Va. 204, 387 S.E.2d 109, 116 (W. Va. 1989); *Utica Mut. Ins. Co. v. St. Paul Fire & Marine Ins. Co.*, 468 A.2d 315, 317 (Me. 1983); *Alabama Farm Bureau Ins. Co. v. McCurry*, 336 So. 2d 1109, 1112-13 (Ala. 1976); *Gimbels Midwest, Inc. v. Northwestern Nat'l Ins. Co.*, 72 Wis. 2d 84, 92-3, 240 N.W.2d 140, 145 (Wis.

1976); *Georgia Co-Operative Fire Association v. Borchardt & Company*, 123 Ga. 181, 51 S.E. 429, 430 (Ga. 1905); *A.J. Maggio Co. v. Willis*, 316 Ill. App. 3d 1043, 738 N.E.2d 592, 597, 250 Ill. Dec. 376 (Ill. App. Ct. 2000); *Antal's Restaurant, Inc. v. Lumbermen's Mutual Casualty Co.*, 680 A.2d 1386, 1388 (D.C. Ct. of App. 1996); *Elat, Inc. v. Aetna Cas. & Sur. Co.*, 280 N.J. Super. 62, 654 A.2d 503, 505 (N.J. Super. Ct. App. Div. 1995); *St. Paul Fire & Marine Ins. Co. v. Allstate Ins. Co.*, 25 Ariz. App. 309, 311, 543 P.2d 147, 149 (Ariz. Ct. App. 1975); *Greco v. Oregon Mut. Fire Ins. Co.*, 191 Cal. App. 2d 674, 12 Cal. Rptr. 802, 806-07 (Cal. Ct. App. 1961).

The position that post-loss assignments cannot be prohibited by a clause in the insurance policy is further supported by the reasoning that what is being assigned by the insured to a third party is not the insurance policy, but merely a debt the insurer owes to the insured.

> [O]nce the loss has triggered the liability provisions of the insurance policy, an assignment is no longer regarded as a transfer of the actual policy. Instead, it is a transfer of a chose in action under the policy. At this point, the insurer-insured relationship is more analogous to that of a debtor and creditor, with the policy serving as evidence of the amount of debt owed.

Conrad Bros., 640 N.W.2d at 237-238 (citations omitted.); *see Antal's Restaurant, Inc.,* 680 at 1389(post-loss relationship of insured and insurer now one of "creditor and debtor" and policy no longer significant except as evidence of existence and amount of debt.) Therefore, because the insured is not attempting to transfer the policy to another as an "insured", the anti-assignment clause is not triggered and has no application to post-loss assignments of proceeds – which is effectively the transfer of an account receivable.

As New York and many other courts have found, an insurer has no interest or protectable right to prevent the post-loss assignment of payment rights by the insured. There is simply no rational basis to prevent an insured's assignment of its "chose in action" or its right to receive payment to the collision repair facility effecting the vehicle's repairs other than an insurer's desire to make it as cumbersome as possible for the insured to obtain what it is owed under the insurance contract -- all to the insurer's economic gain.

D. INSUREDS' ASSIGNMENT OF INSURANCE PROCEEDS TO COLLISION REPAIR FACILITIES PROMOTES EFFICIENCY AND JUDICIAL ECONOMY

In addition to being a valid exercise of an insured's right under New York law, an insured's assignment of the "chose in action" with its right to receive payment from his/her insurer to the collision repair facility is efficient and promotes judicial economy. When a collision repair provider of goods and services is willing to forego the right to receive immediate full payment from the insured and will undertake to pursue the debtor-insurer, it is in the public interest to allow this to take place. In these economically fragile times, allowing an assignment of this nature alleviates hardship to consumer-insureds and ensures they receive the benefit of their state-mandated insurance contracts.

In an ordinary property loss vehicle damage claim, the insured notifies the insurer of the existence of the claim. The insurer verifies the existence of a valid claim, typically by viewing the damaged vehicle, and the insured enters into a contract with the collision repair facility to repair the vehicle. The insured is responsible for paying the collision repairer for the repairs effected, and the insurer

is responsible for reimbursing/indemnifying the insured for the repair costs. If a dispute arises between the insured and the insurer as to the amount necessary and reasonable to repair the vehicle, the insured would ultimately have to file suit against his/her insurer to recover the full amount owed.

The insured, however, is infrequently a person with sufficient knowledge of the necessities of collision repair to be able to offer testimony as to the parts and procedures required to safely and properly repair the vehicle. To prevail, therefore, the insured must present the testimony of a witness knowledgeable about the collision repair business – which will likely be the repairer or member of the facility that actually repaired the insured's vehicle. Clearly it is far more efficient to allow the collision repairer to step into the shoes of the insured in this regard.

In addition, to obtain the vehicle from the collision repair facility during the time the suit is pending, the insured will have been required to pay out-of-pocket for the difference between the insurer's payment and the amount of the repair facility's invoice. The repair facility typically will not release the vehicle without payment in full, as *NY CLS Lien § 184* expressly recognizes a lien upon the vehicle arising by operation of law for one who has provided repairs, towing, storage or maintenance for a motor vehicle[2]. If the insured consumer is unable to pay the full amount owed

[2] *NY CLS Lien § 184(1)* states in pertinent part: "A person keeping a garage, hangar or place for the storage, maintenance, keeping or repair of motor vehicles … and who in connection therewith tows, stores, maintains, keeps or repairs any motor vehicle… at the request or with the consent of the owner … has a lien upon such motor vehicle … for the sum due for such towing, storing, maintaining, keeping or repairing of such motor vehicle … and may detain such motor vehicle … at any time it may be lawfully in his possession until such sum is paid, except that if the lienor, subsequent to thirty days from the accrual of such lien, allows the motor vehicle … out of his actual possession the lien provided for in this section shall thereupon become void as against all security interests, whether or not perfected, in such motor vehicles… and executed prior to the accrual of such lien, notwithstanding possession of such motor vehicle … is thereafter acquired by such lienor.

to the collision repair facility to obtain release of the vehicle, by the time the suit comes to trial, substantial storage charges will have accrued or the repair facility will have foreclosed upon the lien to obtain payment pursuant to *NY CLS Lien §§ 200 et seq.* As a result, insured consumers are exposed to substantial financial hardship if they cannot afford to pay the collision repair facility in full for the release of the vehicle and then pursue full indemnification for their insurers. If insureds cannot do so, insurers enjoy the windfall of retaining a portion of the actual losses owed to the insured-consumer.

Insurers are well aware of the difficulty insureds face both economically and logistically to obtain full payment for their property loss claims. by pursuing legal action. Economically, they must be capable of paying for their full vehicle repair costs up-front and capable of paying an attorney for representation – if they can find an attorney willing to undertake a vehicle property loss matter. Logistically, insureds must be capable of finding counsel or representing themselves, filing suit, marshalling documents and witnesses, and addressing court mandates. This is clearly a cumbersome process for insureds, and insured consumers typically do not have the ability to fight for proper payment. Allowing insurers to capitalize on the difficulties by preventing insureds from assigning their right to receive payment to the collision repair provider only provides incentives for insurers to underpay vehicle property loss claims and enjoy windfalls at the expense of consumers.

New York is unique among the state jurisdictions in that it expressly allows an insured to name a collision repairer as his/her "designated representative" to

deal with an insurer and "negotiate" on behalf of the insured for the resolution of a vehicle property loss claim without being penalized for engaging in the unauthorized practice of law. *11 NYCRR § 216.7(a)(2).* By allowing a collision repair shop to function as the agent of the insured in determining the amount necessary and reasonable for the repair of the insured's vehicle, the New York Department of Insurance recognizes that the collision repairer is more knowledgeable than the insured about the necessities of repair and better able to ensure that the insurer pays the proper amount on the property loss claim. Given that New York law already recognizes the insured's right to allow the repair facility to settle the property loss claim, it is no significant leap to see that allowing the insured to assign the right to receive the proper amount of the reasonable and necessary repairs to the repairer is beneficial to the insured consumers, the collision repair facilities, and the courts.

CONCLUSION

Post-loss assignments of rights in insurance contracts is expressly authorized and approved by New York law. If collision repair facilities are willing to accept assignment from their customer-insureds to the proceeds for an accrued loss and are willing to undertake the necessary actions to recover the full cost of repairs owed by the insurer on the claim, it is in the best interests of the insureds and the courts to allow this to occur. It minimizes the economic and logistical hardships for insured-consumers and streamlines the process for the courts, rendering this practice a benefit to consumers, collision repairers, and the courts. Accordingly, the Automotive Education and Policy Institute and Vehicle Information Services, Inc.

respectfully request this Court to reverse the judgment of the lower court granting summary judgment in favor of the insurer, Adirondack Insurance Exchange, and remand the matter to the lower court for further proceedings.

Respectfully submitted,

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