STATE OF MICHIGAN
IN THE SUPREME COURT

JAWAD A. SHAH, M.D., PC, INTEGRATED HOSPITAL SPECIALISTS, PC, INSIGHT ANESTHESIA, PLLC, and STERLING ANESTHESIA, PLLC,

Plaintiffs/Appellees,

v

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Defendant/Appellant.

Supreme Court Case No. 157951

Court of Appeals Case No. 340370

Genesee County Circuit Court
Case No. 17-108637-NF

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STATE FARM'S SUPPLEMENTAL REPLY BRIEF

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

I. OVERVIEW

If a no-fault policy does not conflict with the No-Fault Act and has been approved by the Commissioner of Insurance, then it does not violate Michigan public policy. State Farm's policy does not conflict with the No-Fault Act. The Act does not prohibit insurers from including anti-assignment provisions in their policies, and many insurers therefore have standard anti-assignment language in their policies much like State Farm's. (See, *e.g.*, IAM Amicus Br at ix.) The Commissioner approved State Farm's policy containing the Assignment Clause over eight years ago without incident, and then State Farm issued over a million policies containing the Assignment Clause in reliance on the Commissioner's approval. The Assignment Clause therefore does not conflict with the No-Fault Act and has been approved by the Commissioner. Under controlling law, this means the Assignment Clause does not violate public policy.

The *Roger Williams* case that Plaintiffs and the Court of Appeals relied on so heavily does not change this analysis. *Roger Williams* was not a no-fault case. *Roger Williams* was based on one of two things: (1) a nineteenth-century statute guaranteeing an "absolute right" to assign; or (2) a judicial policy judgment that post-loss assignment should not "concern" the contracting parties. See *Roger Williams Ins Co v Carrington*, 43 Mich 252; 5 NW 303 (1880). But there is no statute on the books today guaranteeing an absolute right to assign (the No-Fault Act and the real-party-in-interest statute Plaintiffs rely on plainly do not). And policy judgments about what should "concern" no-fault insurers and claimants are now the domain of the Legislature and the Commissioner of Insurance, not the courts. *Roger Williams* therefore does not control in this no-fault case.

State Farm does not "believe[] that its policies are above the law," and does not ask the Court to "invade the province of the legislature" or "legislate from the bench." (Pls' Suppl Br at 1.) Just the opposite. State Farm asks the Court to leave no-fault policy to the Legislature and

the Commissioner, and simply to apply straightforward contract language as written. The Assignment Clause, as written, bars the assignments at issue. The trial court got this right and the Court of Appeals got it wrong, so State Farm asks this Court to reverse.

II. THE ASSIGNMENT CLAUSE DOES NOT CONFLICT WITH THE NO-FAULT ACT AND WAS APPROVED BY THE COMMISSIONER OF INSURANCE, SO IT DOES NOT VIOLATE PUBLIC POLICY

A. No-fault policies may add provisions that do not conflict with the No-Fault Act.

Plaintiffs' central argument is that "[a] no fault insurance policy cannot be more restrictive than the No Fault Act[.]" (Pls' Suppl Br at 16.) Plaintiffs argue that since the Assignment Clause "is more restrictive on the issue of assignments than the No Fault Act, it is void." (*Id.*) But Plaintiffs have this fundamentally wrong. This Court has repeatedly held that no-fault insurance policies *may* be "more restrictive" than the No-Fault Act. They simply may not *conflict* with the No-Fault Act. The No-Fault Act itself "is the most recent expression of this state's public policy concerning motor vehicle liability insurance." *Citizens Ins Co of Am v Federated Mut Ins Co*, 448 Mich 225, 232; 531 NW2d 138 (1995). So only a policy provision that "conflicts with the mandatory coverage requirements of the no-fault act is void as contrary to public policy." *Husted v Dobbs*, 459 Mich 500, 512; 591 NW2d 642 (1999).

In *Cruz v State Farm Mut Auto Ins*, 466 Mich 588; 648 NW2d 591 (2002), for example, the insurance policy had a provision requiring a claimant to submit to an examination under oath (EUO). The No-Fault Act did not require this, so the policy was more restrictive than the Act. The Court of Appeals invalidated the provision on these grounds: "the no-fault act sets forth the insured's duties of cooperation, and because it does not provide for an EUO provision, the provision is contrary to the no-fault act." See 241 Mich App 159, 164; 614 NW2d 689 (2000). But this Court reversed in part, holding that although insurers could not make participation in an

EUO a condition precedent to the payment of benefits, they were still allowed to include and enforce EUO provisions in their policies. 466 Mich at 598. This was because insurers are allowed to *add* contractual requirements not specifically provided for in the No-Fault Act. These additional contractual requirements "are only precluded when they *clash* with the rules the Legislature has established for such mandatory insurance policies." *Id.* (emphasis added). Only "[t]o the degree that the contract is in *conflict* with the statute, [is it] contrary to public policy and, therefore, invalid." *Id.* at 601 (emphasis added).

Similarly, in *Rory v Continental Ins Co*, 473 Mich 457; 703 NW2d 23 (2005), the Court upheld a policy limitations period that was more restrictive (that is, more insurer-friendly) than the general statutory limitations period applicable to breach-of-contract claims. *Id.* at 472. So even though the Legislature had specifically addressed limitations periods by statute, the insurer was still allowed to include a more restrictive limitations provision in its policy. See *id.* The Court held that since the Legislature did not "explicitly prohibit[]" contractual limitations periods on top of the statutory one, insurers were free to include limitations provisions in their policies—even ones more restrictive than the limitations period in the statute. *Id.*

In short, Plaintiffs are wrong that no-fault policies "cannot be more restrictive than the No Fault Act[.]" (Pls' Suppl Br at 16.) This Court has expressly rejected this argument, and has repeatedly upheld no-fault policy terms that were more restrictive than the No-Fault Act. The same analysis applies to State Farm's Assignment Clause. Since the No-Fault Act does not prohibit anti-assignment provisions, the Assignment Clause does not conflict with the Act. And since only a policy term that "conflicts with the mandatory coverage requirements of the no-fault act is void as contrary to public policy," *Husted*, 459 Mich at 512, the Assignment Clause does

not violate Michigan public policy. State Farm was therefore free to include the Assignment Clause in its policy.

B. Plaintiffs misapply the *expressio unius* canon: The No-Fault Act does not prohibit—and thereby permits—anti-assignment provisions.

Plaintiffs argue that, despite the lack of an explicit prohibition of anti-assignment clauses in the No-Fault Act, Section 3143 of the Act *implicitly* bars anti-assignment provisions under the canon of *expressio unius est exclusio alterius*. (See Pls' Suppl Br at 14-17.) But Plaintiffs misapply that canon of construction. Section 3143 simply provides that an "agreement for assignment of a right to benefits payable in the future is void." MCL 500.3143. Properly applying the *expressio unius* canon, it may safely be inferred that the Legislature did not intend to automatically void other types of assignments, like assignments of past benefits. See *Profl Rehab Assoc v State Farm Mut Auto Ins Co*, 228 Mich App 167, 172; 577 NW2d 909 (1998) ("[I]f the Legislature had intended to prohibit the assignment of all rights, it would not have included the word 'future' in the language of the statute.").

But that's as far as the inference goes under the *expressio unius* canon. Section 3143 has nothing to say about anti-assignment clauses. It does not require them, nor does it prohibit them. One cannot, under the *expressio unius* canon, read a prohibition into that silence. In fact, under *Cruz* and this Court's other controlling precedent, the Legislature's silence on the topic of anti-assignment clauses means insurers are free to include them in their policies. As set forth above, the rule is that unless the policy provision "conflicts" with or "clash[es]" with the No-Fault Act, the provision is permissible. *Cruz*, 466 Mich at 598, 601. In *Cruz*, for example, the Court held that "the Legislature's silence regarding what the parties could agree to with regard to claim discovery" meant "the inclusion of examination under oath provisions in no-fault automobile insurance policies is allowed." *Id.* at 593-94. The Legislature's silence regarding anti-

assignment provisions likewise means inclusion of anti-assignment provisions in no-fault policies is allowed.

In short, Plaintiffs have misapplied the *expressio unius* canon. Section 3143 allows assignment of accrued benefits in the *absence* of an anti-assignment provision. But not when there is an anti-assignment provision. The Legislature in the No-Fault Act did not prohibit—and thereby permitted—insurers to include anti-assignment provisions in their policies.[1]

C. The courts may not second-guess the Commissioner of Insurance's policy judgment that the Assignment Clause is reasonable.

Plaintiffs make many policy arguments about why they think enforcing the Assignment Clause would be unfair to them and bad for the no-fault system in general. Plaintiffs argue, for example, that it should not "concern" State Farm who brings the cause of action to recover benefits, that "[p]ost-loss assignments do not harm the insurance company," and that allowing assignments "further[s] the purposes underlying the No Fault Act." (Pls' Suppl Br at 5, 13.)

But Plaintiffs address these policy arguments to the wrong branch of government. The Legislature is responsible for setting no-fault policy, in the No-Fault Act. See *Citizens*, 448 Mich at 232. As set forth above, the Legislature in the No-Fault Act did not prohibit insurers from including anti-assignment clauses in their policies, which means that anti-assignment clauses do not conflict with the public policy expressed in the No-Fault Act. On top of that, the Legislature in the No-Fault Act "explicitly assigned [the] task" of evaluating whether a policy provision is reasonable to the executive branch, through the Commissioner of Insurance. *Rory*,

[1] Plaintiffs also argue because statutory benefits are generally assignable, no-fault benefits must be as well. (See Pls' Suppl Br at 20-21.) But the case they rely on, *Grand Traverse Convention & Visitor's Bureau v Park Place Motor Inn, Inc*, 176 Mich App 445, 448-49; 440 NW2d 28 (1989), holds only that there is no categorical rule of law prohibiting the assignment of statutory benefits, not that assignments of statutory benefits may never be restricted by contract.

473 Mich at 461. Thus "the explicit 'public policy' of Michigan is that the reasonableness of insurance contracts is a matter for the executive, not judicial, branch of government." *Id.* at 476.

Plaintiffs couch their public-policy arguments in terms of what they think should "concern" State Farm, and conspicuously avoid calling the Assignment Clause "unreasonable." (See Pls' Suppl Br at 5.) But a plaintiff cannot avoid the controlling effect of *Rory* and the Commissioner's approval of the policy by changing the labels. When, as here, the Commissioner has approved the policy, the policy is not subject to challenge on the grounds of reasonableness, unfairness, sensibility, prudence, inequity, or what should "concern" one party or the other. Whatever the label, these sorts of policy judgments rest "within the sound discretion of the Commissioner," so the *only* way to challenge them is through an Administrative Procedures Act claim contesting the Commissioner's decision to approve the policy. *Id.* at 475, 491. In such an action, the challenging party would have to show not just that the Commissioner's decision was unreasonable or unwise, but rather "[a]rbitrary, capricious or clearly an abuse or unwarranted exercise of discretion." See *id.* at 475-76; MCL 24.306.[2]

Plaintiffs argue that this regime would require a court to "abandon its responsibilities to determine if [] contractual provisions violate law or public policy." (Pls' Suppl Br at 7.) But this is not true. The courts still play an important, albeit limited, role. The role is the one this Court played in *Cruz* and *Husted*, among other cases. The Court ensures that the policy provision in question does not conflict with the No-Fault Act. If the provision conflicts with the No-Fault

[2] Plaintiffs note that the Commissioner approved the policy pre-*Covenant*, when the lower courts (erroneously) allowed providers to sue insurers directly. But this timeline does not change the analysis. The Commissioner approved the policy with an Assignment Clause that barred any and all assignments without State Farm's approval—whether the specific form of assignment was anticipated at the time or not—and has not changed that decision in the year and a half since *Covenant*.

Act, then the Court may (and must) invalidate the provision as contrary to the public policy the Legislature expressly set forth in the Act. That is where a court's role ends. The Legislature delegated the task of determining whether policy terms are *reasonable* to the Commissioner of Insurance. So when the Commissioner has determined that the policy is reasonable by approving issuance of it, the courts may not second-guess this determination. That is true whether the party labels the policy provision "unreasonable" or "unfair"—as in *Rory*—or "inequitable," "unwise," "imprudent," "ill-advised," or any other similar label. All of these sorts of policy judgments are left to the sound discretion of the Commissioner.[3]

Plaintiffs argue that if courts defer to the Commissioner, then "plainly illegal provisions could be 'approved', simply by neglect," since policies are approved if the Commissioner does not act within a certain timeframe. (Pls' Suppl Br at 29.) But courts may—indeed must—strike any "plainly illegal" policy provision that conflicts with the No-Fault Act. A court also, in a properly styled Administrative Procedures Act challenge, could conclude that the Commissioner's decision to approve a policy with a "plainly illegal" provision was "[a]rbitrary, capricious or clearly an abuse or unwarranted exercise of discretion." See *id.* at 475-76; MCL 24.306. What a court may not do is substitute its judgment for the Commissioner's on whether a

[3] Nothing in *Drogula v Fed Life Ins Co*, 248 Mich 645; 227 NW 692 (1929) or *Progressive Mut Ins Co v Taylor*, 35 Mich App 633; 193 NW2d 54 (1971) supports a different approach. (See Pls' Suppl Br at 24-25.) The relevant issue in *Drogula* was whether the typeface of a policy exclusion complied with the statutory requirements, and the relevant issue in *Taylor* was whether a particular exclusionary endorsement violated public policy. See *Drogula*, 248 Mich at 646-48; *Taylor*, 35 Mich App 639-43. The Court in *Drogula* determined that the policy at issue was not inconsistent with the relevant statute, and the Court of Appeals in *Taylor* determined that the endorsement in question did not violate public policy. As this Court later did in *Rory*, each court cited the Commissioner's approval of the policy at issue as support for its decision. See *Rory*, 473 Mich at 472-73; *Drogula*, 248 Mich at 647-48; *Taylor*, 35 Mich App at 643. In short, State Farm's position is consistent with both this Court's recent jurisprudence (i.e., *Rory* and *Cruz*), and the pre-No-Fault Act cases cited by Plaintiffs.

policy provision is reasonable or fair. That is precisely what Plaintiffs ask the Court to do here, and that is what the No-Fault Act does not permit.[4]

III. *ROGER WILLIAMS* DOES NOT CONTROL THIS NO-FAULT CASE

The *Roger Williams* decision does not change this analysis. *Roger Williams* was not a no-fault case, and was not decided under the No-Fault Act. This alone is a critical distinguishing factor. For no-fault cases, the Legislature sets Michigan public policy in the No-Fault Act. *Roger Williams* was decided under an entirely different statute—one that apparently secured an "absolute right" to assign a cause of action. 43 Mich at 252. The No-Fault Act, in contrast, does not provide an absolute right to assign a cause of action. Plaintiffs argue that, "while the statute referenced in the [*Roger Williams*] decision no longer exists, the content of the statute remains" in modern real-party-in-interest statutes and court rules. (Pls' Suppl Br at 39.) But none of those statutes or rules guarantees an "absolute right" to assign a cause of action, and no court has ever held otherwise. Plaintiffs do not cite a single case in which any court has ever held—in a century of decisions—that the general real-party-in-interest rules guarantee an absolute right of assignment. Thus the statutory law applicable today is fundamentally different from the statute that applied in *Roger Williams*. This change in statutory law makes *Roger Williams* inapplicable here.[5]

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[4] State Farm addressed Plaintiffs' unpreserved arguments regarding the UCC, UMVARA, the Workers' Compensation Disability Act, and judicial estoppel on pages 39-45 of its Supplemental Brief. Moreover, contrary to Plaintiffs' contentions, Plaintiffs may not offer unpreserved arguments as alternative bases for affirmance. See *Town & Country Dodge, Inc v Dep't of Treasury*, 420 Mich 226, 228; 362 NW2d 618 (1984).

[5] In fact, as set forth in detail in State Farm's supplemental brief (at pp 24-26), this Court and the Court of Appeals have held in controlling decisions that parties do *not* have an absolute right to assign, and that, consistent with the Restatement view, parties may restrict assignment contractually. See Restatement Contracts, 2d, § 317(2) ("A contractual right can be assigned unless . . . assignment is validly precluded by contract."); *Detroit Greyhound Emps v Aetna Life*

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Plaintiffs also call the fact that the insurer in *Roger Williams* sought to void the entire policy because of the assignment, rather than simply to enforce the anti-assignment provision, a "distinction without a difference." (Pls' Suppl Br at 42.) The distinction makes a difference. This Court has always distinguished between an insurer simply seeking to enforce its policy terms from an insurer seeking to avoid its statutory obligation to pay benefits. In *Cruz*, for example, the Court held that failure to comply with an EUO provision did not forfeit the policy, but the insurer could still insist on compliance with it. That is State Farm's position here, unlike the insurer's position in *Roger Williams*: State Farm simply seeks to enforce compliance with the Assignment Clause; it does not argue that the attempted assignments forfeited the policy. So if the insured were entitled to benefits, he could still pursue them from State Farm, despite the invalid assignments. State Farm is thus not "trying to get out of paying a legitimate bill" or trying to escape its payment obligations, as Plaintiffs argue. (Pls' Suppl Br at 5.) That was the insurer's position in *Roger Williams*, so this case is distinguishable.

Plaintiffs argue that *Roger Williams* was "ahead of its time" and that the "logic underpinning" the decision is the same today as it was in 1880. (Pls Suppl Br at 38.) But this ignores a century of changes in the law, including the adoption of the No-Fault Act and changes to the statutory scheme discussed above. Plaintiffs invite the courts to invalidate the Assignment Clause because they think "it is of no concern to the insurance company to whom the payment is made." (*Id.* at 5.) But again, these sorts of policy judgments are now the domain of the Legislature and the Commissioner, not the courts. Under modern law, Courts are not permitted to rewrite no-fault policies based on what they think should "concern" one party or the other.

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Ins, 381 Mich 683; 167 NW2d 274 (1969). If the real-party-in-interest statutes guaranteed an "absolute right" to assign, there would be no cases upholding assignment clauses. The reason there are such cases is that there is no statute today guaranteeing an absolute right to assign.

Roger Williams is fundamentally inconsistent with this modern law, so the Court should either hold that the decision does not apply in this no-fault case or overrule it once and for all.

Finally, Plaintiffs say the joinder and intervention rules are "the solution" and "salvation" for State Farm's problem of facing runaway litigation from piecemeal assignments. (*Id.* at 48.) But this is no solution. Plaintiffs' "solution" would simply add yet another layer of litigation to an already overburdened system: lengthy procedural and jurisdictional fights in each venue about whether and where to consolidate multiple suits arising from the same underlying accident. Placing the burden and expense on State Farm to combat this sprawling web of litigation might be more convenient for Plaintiffs, but, respectfully, this is not Plaintiffs' call to make. The better solution for State Farm is simply to enforce the Assignment Clause as written and avoid the problem of runaway litigation in the first place. State Farm was free to make this choice under the No-Fault Act, and the Commissioner approved it as reasonable, so it is not up to Plaintiffs to craft what they think is a better policy solution.

IV. CONCLUSION AND RELIEF REQUESTED

State Farm respectfully requests that this Court grant leave to appeal to reverse the Court of Appeals' decision invalidating the Assignment Clause. State Farm submits that the Court can do so without overruling *Roger Williams*, since that decision was decided under a statute that no longer exists—and not under the No-Fault Act—and is distinguishable. But to the extent *Roger Williams* has any relevance in this no-fault case, State Farm asks the Court to overrule it.

Respectfully submitted,

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