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SUPREME COURT OF KENTUCKY
CASE NOS. 2008-SC-000037-DG and 2008-SC-000044-DG

ASSOCIATED INSURANCE SERVICE, INC. APPELLANTS
AND
AON RISK SERVICES, INC. OF OHIO

v.

APPEAL FROM COURT OF APPEALS
CASE NO. 2006 CA-001737-MR AND
JEFFERSON CIRCUIT COURT
CASE NO. 02-CI-009027

DANIEL GARCIA, M.D. APPELLEES
AND
RITA GARCIA

BRIEF OF APPELLANT, AON RISK SERVICES, INC. OF OHIO

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CERTIFICATE OF SERVICE

It is hereby certified that true and correct copies of this Brief of Appellant, Aon Risk Services, Inc. of Ohio, were served, by first class mail, postage prepaid, this 10th day of November, 2008, upon the following: Lee E. Sitlinger, Sitlinger, McGlincy, Theiler & Karem, 370 Starks Building, 455 S. Fourth St., Louisville, Kentucky 40202;.Larry B. Franklin, Franklin Law Group, 505 W. Ormsby, Louisville, Kentucky 40203; Frank P. Doheny, Jr. and Michael C. Merrick, 1400 PNC Plaza, 500 W. Jefferson St., Louisville, Kentucky 40202; Hon. Geoffrey P. Morris, Jefferson Circuit Court, Division 11, 700 W. Jefferson, Louisville, Kentucky 40202; and Clerk of the Kentucky Court of Appeals, 360 Democrat Dr., Frankfort, Kentucky 40601.

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INTRODUCTION

This appeal involves an issue of first impression for this Court regarding the validity and enforceability of a purported assignment by an insured of a stipulated "claim" as the basis for a professional negligence claim against a third party insurance broker, and the public policy concerns of collusion and unfairness inherent in this type of arrangement. Appellant Aon Risk Services, Inc. of Ohio appeals from an opinion by the Court of Appeals upholding such an assignment – in conflict with the Court of Appeals' prior decision in Coffey v. Jefferson County Bd. of Educ., 756 S.W.2d 155 (Ky. App. 1988) – and the compelling public policy disfavoring such agreements.

STATEMENT CONCERNING ORAL ARGUMENT

Pursuant to CR 76.12(4)(c)(ii), Appellant Aon Risk Services, Inc. of Ohio requests that the Court grant oral argument because it will assist the Court in considering the issues of first impression presented in this case, specifically including the important legal and public policy considerations regarding potentially collusive assignments of claims, and the separate and distinct roles of an insurance company, an insurance agent, and an insurance brokerage firm and the attendant risk of potential liability to which each should be fairly and lawfully subjected.

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STATEMENT OF THE CASE

Aon Risk Services, Inc. of Ohio ("ARS Ohio") submits the following statement of facts and procedural background underlying the issues presented by this appeal:

1. Whether the collusive and illusory assignment agreement between Daniel and Rita Garcia ("the Garcias") and the Star of Louisville, Inc. (the "Star") is unenforceable and void as against public policy?

2. Whether the Court of Appeals improperly sought to redress the collusive assignment through rewriting the agreement between the Garcias and the Star of Louisville?

3. Whether the undisputed facts in the record establish that the Circuit Court correctly entered summary judgment in favor of ARS Ohio?

A. Factual Background.

1. The Star Of Louisville Purchases Liability Insurance.

The Star is a commercial passenger ship that offers public dinner cruises on the Ohio River. [T.R. at 786-788, and Jennifer M. Bell Deposition ("Bell Depo."), App. 2 at 184-185]. In 1997, the Star sought to locate less expensive marine insurance coverage to reduce the cost of its insurance premiums.

> A. I – I can't recall the exact specifics. However, I know they weren't necessarily happy with their price, and the market back then was very competitive. And they wanted – you know, I did see some reference in – in, I think, Kevin O'Bryan's deposition that they – if I recall correctly, that they – they wanted to see – that Mr. Svanczyk thought the price was too high they were paying, and they wanted to look at other options –
>
> Q. Uh-huh.

A. – to see if they could lower the insurance cost.

[T.R. at 786-788, and James D. Wetterer Deposition ("Wetterer Depo."), App. 3[1] at 32-33]. The Star sought liability insurance through Associated Insurance Service, Inc. ("Associated"), an insurance agency located in Louisville. [T.R. at 786-788, and Wetterer Depo. at 125-127, 132, 152-153]. Given the specialized nature of the marine insurance sought by the Star, and Associated's limited industry contacts in that area, Associated contacted an insurance brokerage firm, ARS Ohio, to assist in identifying possible marine insurance carriers for the Star. [T.R. at 786-788, Wetterer Depo. at 8 and 171, and Bell Depo. at 98 and 186-187]. In addition to ARS Ohio, and in order to provide the Star with insurance carrier options, Associated also solicited quotes from another insurance brokerage firm. [T.R. at 786-788, Wetterer Depo. at 62-63 and 166-167, and Bell Depo. at 124-127].

During that time, an "agent of record" letter was signed by the Star notifying ARS Ohio that the Star had appointed Associated as its insurance agent of record regarding the marine insurance quotations to be provided by ARS Ohio, and that ARS Ohio was to take any instructions directly from Associated regarding placing the coverage.

A. Because he is the insurance agent of record. He pretty much took that role over from us. That's why he is shared – we share in the commission.

Q. Okay. What – I guess –

[1] The applicable deposition pages from the Bell and Wetterer depositions are attached at App. 2 and 3, respectively. These depositions were designated to be included in the record on appeal [T.R. at 786-788]. Bell acted as the corporate representative for the insurance brokerage firm ARS Ohio, and Wetterer, one of the owners of Associated, was the individual insurance agent of record in the applicable transaction.

A. So our job became place – just taking instructions from him to place the coverage.

[T.R. at 786-788, and Bell Depo. at 93; see also Bell Depo. at 186-187, 197, and Wetterer Depo. at 132, 152-154.] As a result of Associated's formal "agent of record" status, ARS Ohio dealt directly with Associated, and had no direct contact with the Star.

Q. So, correct me if I'm wrong, but after AON would have received this agent of record letter –

A. Uh-huh.

Q. – indicating that you're acting as the insurance agent for The Star of Louisville, AON would have no further direct contact with The Star of Louisville; is that fair?

A. Other than claims. Yes, sir.

[T.R. at 786-788, and Wetterer Depo. at 126-127; see also Wetterer Depo. at 129, 132, 152-154, and Bell Depo. at 76-77, 93, 151, 168]. Associated, as agent of record, became the Star's direct communicator with ARS Ohio, and assumed responsibility for advising the Star regarding any insurance related issues involving the marine insurance policy at issue.

Q. But in terms of questions relating to procuring insurance and insurance-related questions, The Star of Louisville would address that with you as opposed to AON correct?

A. That's correct. Yes, sir.

[T.R. at 786-788, and Wetterer Depo. at 126-127; see also Wetterer Depo. at 64-65, 134-135, 161-167, and Bell Depo. at 74, 155-156]. ARS Ohio in turn provided a quotation to Associated from an insurance company known as HIH Casualty and General Insurance, Ltd. ("HIH"), a large property/casualty insurer based in Australia that wrote insurance

policies around the world. [T.R. at 786-788, Wetterer Depo. at 7-8, 166-168, and Bell Depo. at 109-110].

Associated then presented the marine insurance options to the Star's decision makers, and specifically discussed, among other things, the lower cost premiums proposed by HIH (approximately a $50,000 annual premium savings compared to the Star's existing insurance carrier), and the fact that HIH was a highly rated insurance carrier according to Standard & Poor's Rating Services. [T.R. at 786-788, Wetterer Depo. at 50, 65-66, 141-143, 157, 168, and Bell Depo. at 179-180]. Although the Star could have (i) continued coverage with its existing insurance carrier, (ii) asked Associated to locate other options for marine insurance, or (iii) looked to other resources besides Associated to find other marine insurance carriers, the Star decided to approve and select HIH as its marine insurance carrier and subsequently purchased a policy from HIH in October, 1997. [T.R. at 786-788, Wetterer Depo. at 141-143, 161-168, and Bell Depo. at 102-103, 115-116, 124-127, 130-132, 143-144, 155-156, 197-198]. The Star thereafter purchased renewal policies from HIH in 1998 and 1999.

2. The Garcias Are Injured On The Star; While Their Personal Injury Suit Was Pending, The Star's Insurer Defaulted.

In April 1998, during the Star's *first* policy period with HIH, the Garcias were injured while attending a dinner cruise on the Star. [T.R. at 1-16]. In 1999, the Garcias filed a personal injury lawsuit against the Star in Jefferson Circuit Court. [T.R. at 1-16]. As the Star's insurer, HIH provided it a defense in that action. [T.R. at 458]. The applicable policy, which had a $1,000,000 limit of liability, provides that HIH agreed to reimburse such sums the Star "shall have become legally liable to pay and shall have paid" to the Garcias. [T.R. at 387, Ex. 1 and App. 4 at 25]. However, in 2001 –

approximately four years *after* the initial policy was purchased, and three years after the Garcias were injured – HIH became insolvent, and was thus unable to satisfy any potential judgment against the Star. [T.R. at 458, 786-788, Bell Depo. at 160, 165, 168-169, 177-178, and Wetterer Depo. at 6-7].

No evidence was presented by the Garcias that ARS Ohio, or the insurance industry at large for that matter, was aware that HIH was in financial distress prior to the public disclosure of HIH's insolvency in 2001. More pertinently, no evidence has indicated that ARS Ohio, or the insurance industry, had any knowledge that HIH was having financial difficulties prior to the initial insurance policy being issued to the Star in 1997 – the policy that applied to the Garcias' claim.[2] To the contrary, representatives from both ARS Ohio and Associated have testified at length that HIH was not only a solvent and financially stable insurance company, but highly rated by a reputable rating firm, and that there were absolutely no signs of financial instability or solvency problems in 1997 or in any subsequent renewal policy period. [T.R. at 786-788, Bell Depo. at 131-132, 135-138, 160, 164-165, 177-180, 189-192, and Wetterer Depo. at 7-8, 65-66, 167-169, 172-173, 186-187.] It only became clear *after the fact* that key HIH insiders, who have since been criminally prosecuted, had misrepresented the financial condition of HIH to the insurance industry and public. [T.R. at 786-788, Bell Depo. at 160, 165, 168-169, 177-178, and Wetterer Depo. at 6-7]. Industry publications of which this Court may take

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[2] The Garcias, in an attempt to suggest that it was known that HIH was having financial difficulties as early as 1996, have previously relied upon a report that has not been made a part of the record. In any event, that report, which is solely based upon hindsight, was not even prepared until May 16, 2001 – two months *after* HIH went into liquidation. It, therefore, in no way notified ARS Ohio, as suggested by the Garcias, that HIH was having any financial difficulties at the time the 1997 policy or any subsequent HIH policies were issued.

judicial notice pursuant to CR 76.12(4)(c)(vii) further support this conclusion.[3] See also Doe v. Golden & Walters, PLLC, 173 S.W.3d 260, 264 (Ky. App. 2005) (taking judicial notice of court documents on the Internet).

3. The Star Admits Liability And Purports To Assign Claims To The Garcias.

On February 28, 2002, while the personal injury case was pending in Jefferson Circuit Court, but after HIH had gone into receivership, the Garcias and the Star struck an arrangement whereby the Star confessed judgment as to liability and agreed to arbitrate the amount of damages within a stipulated range, pursuant to a high/low agreement fixing damages between $200,000 and $800,000 (an amount within the $1,000,000 policy limit of liability). [T.R. at 458-460, 471-472 and App. 7]. At the same time, the Garcias agreed to "forebear any and all attempts to collect from the Star . . . ." [T.R. at 459, 472 ¶ 5 and App. 7 at 2]. As a result, despite conceding liability for the Garcias' personal injury claims, the Star was not actually responsible for, nor did it actually pay, any damages, and the Garcias agreed to not pursue collection from the Star, as consideration for the assignment of the Star's "claims". [T.R. at 460 ¶ 5 and App. 7 at 2].

This agreement was reduced to writing in an Arbitration Agreement [T.R. at 471-473 and App. 7]. In pertinent part, the Arbitration Agreement provides:

> The defendant [the Star] shall admit that the plaintiffs' compensatory damages for Dr. and Mrs. Garcia's personal injuries were caused by its negligence but it will continue to deny the extent of those damages.

[T.R. at 471 ¶ 1 and App. 7 at 1].

[3] See Business Insurance and BestWire Services articles at App. 5 and 6.

The Arbitration Agreement next provided that the Star would assign to the Garcias certain unspecified "claims" against ARS Ohio and Associated. [T.R. at 472 ¶ 6 and App. 7 at 2]. Also under the Agreement, the Star agreed to participate in an arbitration with the Garcias. [T.R. at 473 ¶ 11 and App. 7 at 3]. Specifically, in order to induce the Star to admit responsibility prior to the arbitration, the Arbitration Agreement provides:

> In consideration of the assignment of claims contained herein, Dr. and Mrs. Garcia hereby agree to **forebear any and all attempts to collect from the Star the judgment on the negligence claim**, as will be reduced to a liquidated amount at the arbitration, and to **forebear any and all attempts to collect from or proceed against the Star in relation to the punitive damages claims**. It is agreed this forbearance shall not effect [sic] the ability of Dr. and Mrs. Garcia to collect from any other party any amount reduced in judgment or for which forbearance is hereby granted. (Emphasis added.)

[T.R. at 472 ¶ 5 and App. 7 at 2].

Finally, the Garcias agreed to dismiss their underlying personal injury lawsuit against the Star "without prejudice but subject to this agreement" and also agreed "that any appropriate statute of limitation shall be tolled from the date of the injuries." [T.R. at 472-473 ¶ 10 and App. 7 at 2-3]. Notably, no evidence was introduced to establish that the Star, which continues to do business, was judgment proof or unable to satisfy any judgment prior to or since the time it struck a deal with the Garcias. [T.R. at 757-776].[4]

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[4] See also www.staroflouisville.com, attached at App. 8, which this Court may take judicial notice. CR 76.12(4)(e)(vii); Doe, 173 S.W.3d at 264.

4. At An Arbitration In Which The Star Failed To Even Present A Defense, And Of Which ARS Ohio Was Not Given Notice, The Garcia's Personal Injury Damages Are Set At $742,193.10.

On June 11, 2002, an arbitrator issued a Finding and Award ("Award") [T.R. at 475-478 and App. 9]. The Award is silent with respect to the Star's participation in the arbitration hearing and does not reflect that the Star actually presented any evidence or defense.[5] [T.R. at 460, 757-776, 475-478 and App. 9]. The Garcias were awarded $742,193.10 "as a result of the Star's negligence." [T.R. at 460, 475-478 and App. 9 at 4]. Notably, ARS Ohio was never notified of the arbitration, in violation of Paragraph 11 of the Arbitration Agreement, which expressly required the Star to provide notice to "any and all additional parties against whom claims may be made", and an opportunity to participate in the arbitration. [T.R. at 473 ¶ 11and App. 7 at 3]. Moreover, the Star's alleged claims against ARS Ohio were not addressed in any way in the arbitration, nor did the Award state that the Star was entitled to any damages against ARS Ohio. [T.R. at 460, 475-478 and App. 9].

5. The Garcias File Suit Against ARS Ohio And Associated To Enforce The Arbitration Award.

On November 27, 2002, the Star and the Garcias, in accordance with their prior assignment agreement, executed an "Assignment of Rights and Claims" in which the Star purported to formally assign to the Garcias all the "claims" it may have against Associated and ARS Ohio. [T.R. at 387, Ex. 9 and App. 10]. That same day, the Garcias, having agreed not to pursue the Star to collect the arbitration Award, filed a Complaint in Jefferson Circuit Court seeking to enforce that Award against Associated,

[5] Likewise, during the Circuit Court summary judgment briefing, and subsequent Court of Appeals briefing, the Garcias set forth nothing in the record which established that the Star presented any evidence or defense during the arbitration.

the Star's insurance agent, but not ARS Ohio. [T.R. at 1-16]. On December 17, 2003, the Garcias filed a First Amended Complaint seeking to also enforce the Award against ARS Ohio, the insurance broker that simply provided Associated with possible options for marine insurance coverage. [T.R. at 70-79]. In the First Amended Complaint, the Garcias sought to assert the Star's assigned claim, contending that Associated and ARS Ohio were negligent in proposing HIH as an insurance carrier for the Star, despite the fact that HIH was not placed into receivership until four years after the 1997 policy in question was issued. [T.R. at 70-79, 461].

Although the Garcias' claims against ARS Ohio and Associated were purportedly based upon the Star's assigned claims for negligent procurement of insurance from HIH, the Amended Complaint seeks to combine the assigned claims with the Garcias' personal injury claims, and even includes a claim for loss of consortium. [T.R. at 75-76]. Significantly, the Amended Complaint seeks damages against Associated and ARS Ohio for the exact amount of personal injury damages awarded in the arbitration, despite the fact that the arbitration Award does not address or mention ARS Ohio or Associated. [T.R. at 78].

B. Procedural History.

1. The Circuit Court Dismissed The Garcias' Claims.

After discovery, ARS Ohio filed a motion for summary judgment, contending that the purported assignment of the Star's insurance claims to the Garcias was void as a matter of law, and that the arbitration Award was not binding on ARS Ohio as a non-party to the arbitration. [T.R. at 457-532]. Associated also filed a similar motion for summary judgment. [T.R. at 387-449]. On June 21, 2006, following briefing and oral argument, the Circuit Court granted summary judgment in favor of ARS Ohio and

Associated, ruling that the attempted assignment was illusory, unenforceable and void *ab initio* against ARS Ohio and Associated, and that applicable legal authority precluded the type of assignment scheme contrived by the Garcias and the Star. [T.R. at 730-736 and App. 11]. The Garcias filed a motion to alter, amend or vacate the judgment, which was denied by the Circuit Court on August 16, 2006. [T.R. at 777-779 and App. 12]. The Garcias then appealed to the Kentucky Court of Appeals. [T.R. at 780-781].

2. The Court Of Appeals' Opinion And Grant Of Discretionary Review By this Court.

On December 14, 2007, the Court of Appeals entered an Opinion Reversing and Remanding the trial court's decision. [App. 1]. Motions for Discretionary Review were filed by ARS Ohio and Associated in January, 2008, and this Court granted discretionary review on September 10, 2008.

ARGUMENT

A. Standard Of Review.

On appeal of a summary judgment, the standard of review is "whether the trial judge correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to a judgment as a matter of law." First Fed. Sav. Bank v. McCubbins, 217 S.W.3d 201, 203 (Ky. 2007). Because they involve legal questions, appellate courts review summary judgment decisions *de novo*. 3D Enters. Contracting Corp. v. Louisville and Jefferson County Metro. Sewer Dist., 174 S.W.3d 440, 445, 448 (Ky. 2005).

For the reasons explained below, there is no genuine dispute as to the facts material to a determination of ARS Ohio's entitlement to summary judgment. The trial record and legal precedent establish that the purported assignment is void and

unenforceable as a matter of law, and that the trial court correctly granted summary judgment in favor of ARS Ohio.

B. The Issues Before This Court Were Properly Preserved For Review.

In accordance with CR 76.12(3)(c)(v), the foregoing issues set forth in the Argument section were properly preserved for review on appeal by ARS Ohio's and Associated's Motions for Summary Judgment, and their appellate briefs before the Court of Appeals. [T.R. at 457-532 and 387-449].

C. Collusive Agreements Creating Illusory Damage Awards Are Void As A Matter Of Law In Kentucky And Are Unenforceable.

The Court of Appeals noted that Kentucky "law in this area" is not only "sparse," but "no Kentucky appellate court has addressed [the] precise issue" presented on this appeal. [App. 1 at 4, 9]. This case thus presents an important issue of first impression for this Court concerning the validity and enforceability of the purported assignment of a stipulated "claim" as the basis for a professional negligence claim against a third party, and the public policy concerns of collusion and unfairness inherent in that type of arrangement.

1. Existing Kentucky Law Prohibits These Types of Assigned Claims.

Although this case presents an issue of first impression for this Court, the Court of Appeals has previously declared – in a published decision – that these types of agreements are void and unenforceable because they involve the assignment of non-cognizable claims, violate public policy and create an unacceptable risk of collusion to impose liability on a third party. Coffey v. Jefferson County Bd. of Educ., 756 S.W.2d 155 (Ky. App. 1988). The Court of Appeals' Opinion below thus conflicts with prior published authority. In issuing its "To Be Published" Opinion, the Court of Appeals

failed to follow its own precedent – and dramatically changed Kentucky law in the process – without affording the parties the benefit of an oral argument in order to test this departure from established legal principles. See, e.g., Spanish Cove Sanitation, Inc. v. Louisville-Jefferson County Metropolitan Sewer Dist., 72 S.W.3d 918, 920 (Ky. 2002), *cert. denied*, 537 U.S. 885 (2002) (Court of Appeals panel bound by previous published panel decision where "a majority of the Court of Appeals had declined to overrule it.").

Instead, the Court of Appeals adopted a crabbed interpretation of the published decision in Coffey, which held that collusive assignment agreements creating illusory damage awards, like the transaction between the Garcias and the Star, are void as a matter of law, against public policy and, therefore, unenforceable against a third party. 756 S.W.2d at 156.

It is well settled in Kentucky that where an agreement by "its very nature and tendency . . . is forbidden as against public policy, it is then ipso facto void, and neither party can maintain an action upon it." Kentucky Ass'n of Highway Contractors v. Williams, 213 Ky. 167, 280 S.W. 937, 939 (1926); see also Hanks v. McDanell, 307 Ky. 243, 210 S.W.2d 784, 785-88 (1948); Modern Woodmen of Am. v. Hurford, 193 Ky. 50, 235 S.W. 24, 27 (1921). Prohibited contracts, which are void against public policy, are those which have "a tendency to be injurious to the public or against the public good." Kentucky Ass'n of Highway Contractors, 280 S.W. at 940. The validity of such a contract is determined by:

> its *general tendency at the time it is made*, and, if this is *opposed to the interest of the public*, it will be invalid, even though the intent of the parties was good and no injury to the public would result in the particular case. The test is the *evil tendency* of the contract and not its actual injury to the public in a particular instance.

Id. (italics in original) (quotations omitted).

In Coffey, the plaintiffs and the defendant appeared before the trial court on the eve of trial announcing that the defendant had confessed judgment for $1,000,000. 756 S.W.2d at 156. The parties had struck a deal, like here, whereby the defendant agreed to confess judgment prior to the trial in exchange for the plaintiffs' promise not to execute judgment against the defendant and, instead, accept an assignment of the defendant's alleged legal malpractice claim. Id. The plaintiffs then sought to prosecute the assigned claims against the defendant's attorney. Id. In upholding the dismissal of the plaintiffs' attempt to assign a legal malpractice claim, and after recognizing that the settlement amount was "not any indication of the actual damage, if any there was, as a result of legal malpractice," the Coffey court stated:

> it appears to us that this transaction is so collusive that same should be held to be against public policy. This was the type of contrived and elaborate scheme that was denounced by the California Court in the case of *Doser v. Middlesex Mutual Insurance Company*, 101 Cal.App.3d 883, 162 Cal. Rptr. 115 (1980).

Id. at 157. The Coffey court ultimately decided that the assignment itself was "void as against public policy", and upheld the dismissal as a matter of law of the plaintiffs' assigned claims in their entirety. Id. at 157.

Significantly, by principally relying on the California Court of Appeals decision in Doser v. Middlesex Mut. Ins. Co., 101 Cal. App. 3d 883 (1980)[6] – a case involving the assignment of an *insurance* related claim – the Coffey decision clearly suggests that its holding against collusive assignment agreements applies beyond the legal malpractice

[6] Attached hereto at App. 13.

paradigm. Yet, the Court of Appeals here completely overlooked this important contextual issue.[7]

As here, the plaintiffs in Doser offered to settle their claim for $980,000, agreeing to accept an assignment of an alleged insurance bad faith claim against the defendant's insurer in lieu of payment. Id. at 892. The defendant insured accepted the offer and was released of any liability. Id. at 888. The Doser court affirmed the trial court's judgment in favor of the defendant insurance company on the purported assigned claim, noting that "it is fundamental that a valid cause of action must exist in the assignor insured before an assignee can prevail against the insurer." Id. No valid cause of action existed for the assignee plaintiffs because, as here, "no legal liability was ever imposed" against the assignor. Id. at 891.

The court further noted that the "illusory nature of the agreement" at issue raised a serious public policy concern, and found it extremely troubling that the plaintiffs were trying to enforce a settlement agreement against the insurer, which was not a party to the settlement, concluding that to do so would "invite collusion between the claimants and the insured." Id. at 893. Ultimately, after noting that the assignment agreement was "a worthless paper transaction" which cannot support a cause of action against an insurance company, and refusing to condone such an assignment, the Doser court held that the "assigned cause of action was invalid" and directed that judgment be entered in favor of the insurer. Id. at 894. Given the specter of potential collusion and other concerns

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[7] While the Court of Appeals cited Coffey in support of its Opinion, it failed to consider Coffey in the context of collusive assignments involving insurance claims and instead looked to authority outside of Kentucky. [App. 1 at 8-11].

referenced above, the Doser court refused to allow the assignment against the insurance carrier, much less such an assignment against an insurance agent or broker.

The same public policy concerns addressed in Coffey and Doser apply here, and are especially heightened as applied to ARS Ohio's capacity as an insurance broker in the underlying transaction.

2. Because The Star Had No Valid Cause Of Action To Assign To The Garcias, The Garcias' Assigned Claims Against ARS Ohio Fail As A Matter of Law.

Independent of the public policy concerns raised here, the Star simply cannot legally assign a valid cause of action to the Garcias because, as adopted by Coffey and as set forth in Doser, "no legal liability was ever imposed" against the Star. Coffey, 756 S.W.2d at 157; Doser, 101 Cal. App. 3d at 891. Under the express provisions of the Agreement, the Garcias agreed to "forebear any and all attempts to collect from the Star . . . ." (¶ 5), and agreed to "forebear execution against the [Star] on any and all claims or awards . . . ." (¶ 7) [T.R. at 459, 472 ¶¶ 5 and 7 and App. 7 at 2]. As a result, the Star has not paid, nor is it required to pay, the Award amount. Because the Star was not liable for the payment of any damages, including those determined at the arbitration, the assigned claim is entirely illusory. In short, there was no valid claim for the Star to assign to the Garcias against the Star's insurance agent and broker regarding the sale of an insurance policy years earlier, because the Star was relieved from risk of actually paying the damages to which it stipulated. By agreeing to forbear collection or execution against the Star, *before* the amount of damages was determined, the claim became entirely illusory and there was no actual, valid "claim" for the Star to assign.

The fact that the Star had no cognizable claim to assign is further reiterated by the provisions of the applicable insurance policy with HIH, which limits the covered amount

the insurance carrier will reimburse to "such sums as the assured, as owner of the FLEET PER SCHEDULE **shall have become legally liable to pay and shall have paid** on account of: Loss of life, or injury to, or illness of, any person . . ." [T.R. at 387, Ex. 1 and App. 4 at 25] (emphasis added). The Star never became "legally liable to pay" or actually paid *anything* to the Garcias. The "claim" the Star assigned to the Garcias simply had no value or legally cognizable existence. Therefore, independent of the public policy concerns raised here, the Garcias' assigned claim against ARS Ohio fails as a matter of law.

3. Given The Illusory Nature Of The Purported Arbitration Damage Award, The Garcias' Assigned Claims Against ARS Ohio Likewise Fail As A Matter of Law.

In nearly identical fashion to the transactions rejected by the courts in Coffey and Doser, the Garcias granted the Star a release from payment of any damages, in exchange for the assignment, *before* the arbitration and resulting Award. As a result, the Star had no incentive to defend or limit damages. Because of the pre-determined manner in which they arose, the assignment and Award are illusory in that they offer no true indication as to the nature and extent of the Star's alleged injuries, if any, resulting from any alleged professional negligence by ARS Ohio or Associated.

The Supreme Court of West Virginia recently struck down an assignment for similar reasons in a case involving an attempted assignment by an insured based upon a claim of unfair settlement practices by an insurance company. Strahin v. Sullivan, 647 S.E.2d 765 (W. Va. 2007). In that case, the assignment, like the one here, included an agreement to not execute against the assignor insured. The court held that "[b]y coupling the assignment in this case with a covenant not to execute prior to trial", the claim "was automatically extinguished." Id. at 773. The Supreme Court of West Virginia further

noted: "Obviously, an insured who is protected by a covenant not to execute loses the incentive to contest his or her liability", and that such an arrangement ". . . only encourages collusion between the insured and the plaintiff to raid the insurance proceeds." Id.

Moreover, the Award in this case did not address any alleged claims of the Star against ARS Ohio, and offers no indication of the actual damage, if any, the Star allegedly suffered in connection with its purported negligence claim against ARS Ohio (an insurance broker with which the Star has no privity of contract). Therefore, the Award cannot be fairly or lawfully enforced against ARS Ohio. Rather, the arbitration focused exclusively on the amount of damages the Garcias allegedly suffered as a result of the Star's confessed negligence for personal injuries. Yet, the Amended Complaint the Garcias (standing in the shoes of the Star) filed against ARS Ohio and Associated in Jefferson Circuit Court seeks recovery of the *exact same* amount of damages set forth in the arbitration Award, although for an entirely different type of claim. [T.R. at 70-79].

The Star's confession of judgment for a personal injury claim, the Garcias' covenant not to execute against the Star, and the assignment "are not any indication of the actual damage, if any there was, as a result of" a purported claim against ARS Ohio and Associated related to the selection of the Star's insurance company. Coffey, 756 S.W.2d at 156. In fact, the Star never actually incurred *any* alleged damages whatsoever because it was relieved of responsibility for damages well before the Garcias and the Star created a damage award. Just as in Doser, ARS Ohio was not even a party to the Arbitration Agreement and did not participate in any way in, nor was it notified of, the arbitration. Doser, 101 Cal. App. 3d at 893. Because the Star was relieved of exposure to damages

prior to the arbitration, it was not motivated to challenge, or even participate in, the arbitration. Indeed, neither the Award, nor the record, identifies any evidence offered, or arguments made, by the Star during the arbitration, underscoring the illusory nature of the transaction at hand. The Award was meaningless because, by agreement, it could not be collected from the Star.[8]

Even if there was no actual intended collusion between the Star and the Garcias, public policy interests dictate that a claim for which the assignor/insured is not legally liable to pay creates a clear and unacceptable risk of collusion in setting a damage amount in which the assignor has no interest or motivation to defend. In addition, under the terms of the Agreement and the applicable insurance policy, there simply was not a valid cause of action for the Star to assign – particularly against ARS Ohio in its capacity as the broker.

4. ARS Ohio, As The Insurance Broker, Had Limited Involvement and Should Not Be Placed At Risk For The Unanticipated Failure Of an Insurance Company Years Later.

In its Opinion, the Court of Appeals referred to this Court's "repeated validation of an insured's assignment of claims against his **insurer**…" (emphasis added) as grounds for upholding an assignment against "insurance **agents**" (emphasis added). [App. 1 at 9]. The Court of Appeals did not, however, specifically consider or analyze the distinct role

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[8] Furthermore, pursuant to paragraph 11 of the Arbitration Agreement, the Star was required to provide at least thirty (30) days notice of the arbitration to ARS Ohio. Despite the Garcias' claims, however, absolutely no evidence has been produced in this case indicating ARS Ohio was ever notified of the arbitration. The Star's failure to notify ARS Ohio, violating numerical paragraph 11 of the Arbitration Agreement, independently voids the entire Arbitration Agreement (and assignment) as set forth in numerical paragraph 12, which expressly provides: "Violation of any portion of this agreement, absent good cause shown, voids this entire agreement." [T.R. at 473 and App. 7 at 3].

of an insurance *broker* like ARS Ohio, or the limited function performed by ARS Ohio in this matter. The Court of Appeals made a leap of logic and lumped together assignment of claims against insurance companies, insurance agents and insurance brokers. A more thorough analysis reveals why an insurance broker, such as ARS Ohio, should not be subjected to the Garcias' assigned claim under the circumstances of this case.

An assignee, like the Garcias, "simply stands in the shoes of his assignor [the Star], and any defense which may be made against the assignor may be made against him." Kentucky Mut. Inv. Co.'s Assignee v. Schaefer, 120 Ky. 227, 85 S.W. 1098 (1905). The Garcias accepted a non-cognizable claim from the Star and, in addition, accepted that purported claim subject to any defense ARS Ohio could raise. Because insurance agents and brokers, like ARS Ohio and Associated, are not the guarantors of the financial condition or solvency of the insurance company from which an insured purchases insurance, ARS Ohio and Associated are not liable to the Garcias (standing in the shoes of the Star) for the applicable insurance carrier's subsequent insolvency. See Eastham v. Stumbo, 212 Ky. 685, 279 S.W. 1109, 1110 (1926) ("We have been referred to no authority holding an insurance agent liable to the policy holder, where the [insurance] company subsequently becomes insolvent, and the agent fails to notify the policy holder of the insolvency of the [insurance] company . . . . The [insurance] company afterwards failed, but there is no evidence that it was insolvent at the time the policy was issued, or that Eastman [the insurance agent] knew this."); Cherokee Ins. Co. v. E.W. Blanch Co., 66 F.3d 117, 122-24 (6th Cir. 1995) (reiterating that an insurance broker is not the guarantor of the financial condition or solvency of the company from which the broker obtains the insurance); 43 Am. Jur. 2d *Insurance* § 169 (2008) (same);

Michael F. Skinner, Annotation, *Liability of Insurance Agent or Broker for Placing Insurance with Insolvent Carrier*, 42 A.L.R. 5th 199 (1996) (same).

A traditional insurance broker, like ARS Ohio, is not held to the same standard as an insurance company or an insurance agent because the broker acts on behalf of the insurance agent and does not have the direct relationship with the insured. See Daniel James Ins. Agency, Inc. v. Floyd West of La., Inc., 145 F.3d 1330, No. 96-4361, 1998 WL 199721 (6th Cir. Apr. 16, 1998) (finding that the insurance broker owed no direct duty to the insured and discussing the different roles of an insurance broker and agent, and the higher standard placed upon an insurance agent given its direct relationship with the insured). ARS Ohio simply assisted Associated in locating the specialized type of marine vessel insurance sought by the Star. [T.R. at 786-788, Bell Depo. at 93, 186-187, 197, and Wetterer Depo. at 132, 152-154]. Associated was the Star's designated "agent of record", and was specifically authorized to advise and act on behalf of the Star. [T.R. at 786-788, Wetterer Depo. at 129, 132, 152-154, and Bell Depo. at 76-77, 151, 155-156, 168]. In contrast, ARS Ohio did not advise the Star directly and, as the insurance broker, did not have the responsibility of explaining the insurance product to the Star. [T.R. at 786-788, Wetterer Depo. at 64, 65, 126-127, 134-135, 161-167, and Bell Depo. at 74, 76-79, 155-156, 196-198].

Moreover, it would be inherently unfair to impose the financial burden of a collapsed insurance carrier on an insurance broker, because it is the insurance carrier, rather than the insurance broker, that evaluates the potential risks involved and takes on the obligation of agreeing to indemnify the insured for any loss resulting from such risk in exchange for premiums paid. See Buck Run Baptist Church, Inc. v. Cumberland Sur.

Ins. Co., 983 S.W.2d 501, 504 (Ky. 1998) ("an insurance policy is a contract of indemnity whereby the insurer agrees to indemnify the insured for any loss resulting from a specific event. The insurer undertakes the obligation based on an evaluation of the market's wide risks and losses. An insurer expects losses, and they are actuarially predicted. The cost of such losses are spread through the market by means of a premium.").

Unlike the insurer, the insurance broker does not evaluate risks and losses, does not predict or expect such losses, and does not enter into an agreement in which it is paid to indemnify such losses in the future. ARS Ohio, the upstream insurance broker who did not directly advise the insured, should not be exposed to liability solely via a collusive assignment for the unanticipated financial collapse of an insurance carrier four years after the Star chose HIH as its carrier.

While many courts allow the assignment by an insured of claims against an insurance *company* for unfair settlement practices, bad faith, or refusal to provide a defense,[9] the public policy concerns expressed in Coffey and Doser apply with particular force to an insurance broker like ARS Ohio in situations such as this matter. The Star's stipulated arrangement was particularly prejudicial to ARS Ohio, which had no privity of contract with the Star or the Garcias, and is not the guarantor of the financial stability of an insurance company years into the future. While such a stipulation of liability may be

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[9] In Kentucky, the rationale for permitting even those assignments (in order to advance a bad faith claim against an insurer) is less compelling than in other jurisdictions, given the direct cause of action permitted here for both first-party and third-party bad faith claims against insurance companies. See, e.g., Davidson v. American Freightways, Inc., 25 S.W.3d 94, 99-100 (Ky. 2000) (explaining Kentucky's recognition of common law first-party and third-party bad faith claims, as well as statutory first-party and third-party claims under Kentucky's Unfair Claims Settlement Practices Act).

enforceable in appropriate circumstances against the insured's insurance company – which was paid premiums to insure the risk in question – such an arrangement is unfair to a third party insurance broker that had a distinct and limited involvement in the policy transaction. ARS Ohio performed a limited, ministerial function in the Star's search for a new insurance carrier. ARS Ohio was not compensated to assume the risk of either the failure of HIH or the personal injuries sustained by the Garcias. ARS Ohio should not be subjected to liability for a risk it never assumed. Under this undisputed factual scenario, public policy concerns of fairness and the risk of collusion dictate that this purported assignment not be enforceable against ARS Ohio.

5. These Types Of Assignments Are Undesirable Because They Produce And Prolong Litigation.

In addition to the legal authority against these types of inherently collusive agreements, the agreement between the Star and the Garcias also violates a long standing policy against prolonging and producing litigation. See Hess v. Deppen, 125 Ky. 424, 101 S.W. 362, 363 (1907) ("Such a rule would have a tendency to prolong and produce litigation, and it would make the enforcements of judgments which are not superseded so hazardous as to destroy that respect for them which public policy requires."); Federated Dept. Stores, Inc. v. Moitie, 452 U.S. 394, 402 (1981) ("the interest of the state requires that there be an end to litigation – a maxim which comports with common sense as well as public policy. And the mischief which would follow the establishment of precedent for so disregarding this salutary doctrine against prolonging strife would be greater than the benefit which would result from relieving some case of individual hardship.") (quotation omitted).

By engaging in this unnecessary and circuitous litigation, the Garcias and the Star have violated this very public policy. The Garcias could have resolved their claims against the Star almost a decade ago in their personal injury lawsuit, but instead elected to pursue the invalid assignment at issue here, which has led to a second lawsuit that has dragged on for over six years. As noted above, the Star has continued business operations since the assignment in 2002, and no evidence has been presented that the Star was, or is, unable to satisfy a judgment for its stipulated negligence. While the injuries incurred by the Garcias as a result of the stipulated negligence of the Star are unquestionably regrettable, the Garcias should not be allowed to pursue relief against ARS Ohio via the unfair assignment scheme.

D. The Authorities Cited By The Court of Appeals Are Distinguishable and Inapposite.

Stating that "no Kentucky appellate court has addressed [the] precise issue" presented in this appeal, the Court of Appeals gave a narrow reading to its prior published opinion in Coffey. [App. 1 at 9]. The Court of Appeals compounded this error by placing reliance on cases purportedly upholding the "sort of agreement at issue here," even in the face of asserted "collusion between the settling parties." [Id.].

Curiously, the only Kentucky authority the Court of Appeals cited for this proposition did not even decide the validity of an assignment. Rather, O'Bannon v. Aetna Cas. & Sur. Co., 678 S.W.2d 390 (Ky. 1984), was a writ action concerning the trial court's order requiring an insurer to defend an alleged tortfeasor's estate, which the insurer had earlier refused to defend. It was simply incorrect for the Court of Appeals to opine that O'Bannon "upheld the assignment of an insured's claims against his insurer." [App. 1 at 9]. Also, the Court of Appeals' failure to acknowledge or analyze Coffey in

this context, when that case *did* invalidate such an assignment, constitutes a critical oversight and error.

The only other Kentucky cases the Court of Appeals cited on the assignment issue[10] merely reflect the proposition that assignment agreements against insurers – as opposed to insurance brokers – are typically upheld "[w]here an insurer denies coverage of a claim against its insured, refuses to defend, or unreasonably refuses to settle [as in Terrell and Grundy]." [App. 1 at 3-4]. ARS Ohio respectfully submits that these Kentucky cases would not allow assignments against insurers (much less a broker) predicated on collusion, and an unenforceable damage calculation. See Ayers v. C&D Gen. Contractors, 269 F. Supp. 2d 911, 915 (W.D. Ky. 2003) (speculating on Kentucky law regarding an assignment against an insurance carrier after a consent judgment and covenant not to execute, and noting that a court must look "carefully" at these types of assignments for "collusion" and a "reasonable calculation of damages").

These cases also do not address the public policy concerns and analysis which should prevail where, as here, the non-insurer party sought to be held financially responsible did not engage in bad faith or any other reprehensible practice which arguably would warrant some type of deterrent or weapon against such misconduct. As explained in Doser and Ayers, in the bad faith insurance context, the question can arise as to whether the insurance carrier, based upon the insurer's misconduct, will be forced to pay any amount over and above the covered policy amount. See Doser, 101 Cal. App. 3d at 891; Ayers, 269 F. Supp. 2d at 914-15. Bad faith claims, and assignments based thereon, are used as vehicles to force an insurance carrier to defend the insured and fairly

[10] Terrell v. The Western Cas. & Sur. Co., 427 S.W.2d 825 (Ky. 1968); Grundy v. Manchester Ins. & Indemn. Co., 425 S.W.2d 735 (Ky. 1968).

provide coverage. Otherwise, if the insurer is only liable for the covered policy amount, it would consistently refuse to defend the insured because the insurer's financial exposure would be the same whether it provided a defense or not. These types of policy considerations are simply not applicable to an insurance broker like ARS Ohio. In this non-insurer context, any possible usefulness to these types of assignments are far outweighed by the concern with the risk of potential collusion and unfairness.

As noted above, in Coffey, an earlier Court of Appeals panel likewise rejected an assignment agreement because of its concerns about collusion, citing to the California Court of Appeals' rejection of a collusive *insurance* assignment in Doser. In its Opinion below, the Court of Appeals overlooked that public policy analysis in favor of three out of state cases: Gray v. Grain Dealers Mut. Ins. Co., 871 F.2d 1128 (D.C. Cir. 1989); Stateline Steel Erectors, Inc. v. Shields, 837 A.2d 285 (N.H. 2003); and Campione v. Wilson, 661 N.E.2d 658 (Mass. 1996).

Gray is easily distinguishable, as it involved an insurer's failure to defend or engage in settlement negotiations, as opposed to the Star/Garcias' factually unsupported allegation against a broker for negligent selection of a carrier that later went out of business. Stateline is likewise distinguishable, as the agreement at issue was between the insured (Stateline) and certain contractors Stateline was contractually obligated to indemnify. Id., 837 A.2d at 289 (court presumed that "the stipulated judgment . . . represents the amount the contractors *actually* spent to defend against and settle the employee's lawsuit.") (emphasis in original). The court observed that the risk of collusion in such an arrangement was "particularly low," unlike the typical case involving a settlement agreement between the insured tortfeasor and the injured party.

The Stateline court concluded that, "[i]n that case, there is a real risk of collusion between the tortfeasor and the injured party when they enter into a prejudgment release and a covenant not to execute in favor of the tortfeasor." Id. Yet, those are the very facts at issue here.

In any event, these decisions hardly reflect a judicial consensus on this issue, as both the Stateline and Campione courts acknowledged the "split of authority" among the courts, with each adding that the "conflicting decisions reflect a balancing of policy considerations." Stateline, 837 A.2d at 288; Campione, 661 N.E.2d at 662.

This Court need not simply defer, as did the Court of Appeals, to public policy determinations made by New Hampshire, Massachusetts and District of Columbia courts. Rather, this Court should look to the policy issues raised above, which clearly tip the balance against these types of collusive and illusory agreements, particularly as they apply to a broker like ARS Ohio and its limited involvement in the undisputed facts of this matter.

Finally, none of the cases cited by the Garcias or relied upon by the Court of Appeals actually support the assignment in this case, which was only offered in return for a release from damages *before* the amount of any alleged damages were determined. Indeed, the Star was the beneficiary of a covenant not to execute *before* the Star even attended the arbitration. Its lack of motivation to participate meaningfully in the arbitration is troubling and reflected by the complete absence of any evidence documenting the Star's participation in the arbitration. As a result of the prior promise of the Garcias to not pursue collection, the Star had absolutely no pecuniary interest in the results of the arbitration. Tellingly, there is no evidence indicating that the Star's

participation, if any, was anything more than acquiescence. As such, the purported assignment and arbitration Award should be rejected as there is no evidence that they represent anything more than the illusory result of a meaningless and collusive exercise – and provide no legitimate basis for the assigned claims asserted against ARS Ohio in this case.

E. **In Attempting To Ameliorate The Collusive Effect Of The Agreement At Issue, the Court Of Appeals Impermissibly Rewrote That Agreement.**

It is well established that "[i]t is not the duty of the Court of Appeals to make [a party's] case for it." Grange Mut. Ins. Co. v. Trude, 151 S.W.3d 803, 818 (Ky. 2004). Yet, that is exactly what the Court of Appeals did in this case, effectively rewriting the collusive assignment agreement in an attempt to somehow make it more palatable. First Commonwealth Bank of Prestonsburg v. West, 55 S.W.3d 829, 836 (Ky. App. 2001) (courts not authorized to ignore contract's express terms in order to make for parties a different, "more palatable," contract). Here, the Court of Appeals endorsed the Star's assignment of professional negligence claims to the Garcias, but rejected the damages determined at the arbitration. [App. 1 at 10-11]. However, the damages methodology was an integral component of the overall assignment agreement, and cannot simply be written out of that agreement by judicial fiat. [App. 1 at 2-3]. See, e.g., United States Fidelity & Guar. Co. v. Lairson, 271 S.W.2d 897 (Ky. 1954) (Court will not make contract for the parties, nor rewrite contract for them).

The fact that the Court of Appeals attempted to rewrite the parties' agreement by calling for a "re-do" of the damages calculation is particularly misplaced because the actual agreement reached between the Garcias and the Star expressly provided a remedy to the Garcias in the event the assignment was held void or invalidated. Specifically, the

parties agreed that the Garcias would dismiss their underlying personal injury lawsuit against the Star "without prejudice but subject to this agreement" and also agreed "that any appropriate statute of limitations shall be tolled from the date of the injuries." [T.R. at 472-473 ¶ 10 and App. 7 at 2-3]. By dismissing the underlying tort action without prejudice and tolling the statute of limitations, the Garcias retained their right to seek reimbursement from the Star in the event there was ever any issue concerning the validity of the assignment. The fact that the parties have already envisioned what would happen in the event the assignment is invalidated further reiterates the Court of Appeals' error in taking upon itself to rewrite the arrangement agreed to by the parties. It bears repeating that there is nothing to prevent the Garcias from pursuing the Star for its admitted liability, as no evidence has established that the Star, which continues to do business, is judgment proof or unable to satisfy any judgment in favor of the Garcias. [T.R. at 757-776 and App. 8].

There is simply no permissible basis for the Court of Appeals to rewrite the parties' agreement.

F. <u>ARS Ohio Was Entitled to Summary Judgment Under the Undisputed Facts.</u>

Finally, regardless of the public policy considerations related to the assignment issue, the Garcias simply failed to present any evidence in the record to overcome the Circuit Court's entry of summary judgment in favor of ARS Ohio. Yet, this case was pending in the Circuit Court for almost four years, affording the parties ample opportunity to conduct discovery.

First, it is undisputed that ARS Ohio lacked privity of contract with the Star as a result of the "agent of record" status conferred by the Star upon its agent, Associated. Accordingly, the Star lacked privity and standing to assign a claim against ARS Ohio.

The Star, not ARS Ohio, made the decision to purchase insurance from HIH, largely as a cost savings measure.

Second, it is undisputed that at the time the Star was considering new insurance carriers in 1997, HIH was a large, reputable international insurance company with a strong Standard & Poor's rating. It is likewise undisputed that in 1997, ARS Ohio could not have been aware that HIH would experience financial problems and be placed into receivership four years later. Tellingly, the Garcias have presented no evidence to indicate that ARS Ohio, or the insurance industry for that matter, knew or should have known that HIH was having any financial difficulties prior to HIH's demise. More importantly, the Garcias failed to offer any evidence that, at the time the 1997 policy at issue was written (the policy covering the Garcias' April, 1998 injury), ARS Ohio, or the insurance industry for that matter, had any knowledge that HIH was having any financial difficulties.

In fact, the only applicable testimony in the record, which was elicited from the agent of record in the transaction, establishes that ARS Ohio was *not* negligent because HIH was not only a solvent and financially stable insurance company, but highly rated by a reputable firm at the time the applicable policy was written:

> Q. Well, I'm trying to find out what state – what knowledge or information you have about [ARS Ohio][11] being negligent and even contracting with HIH Casualty.
>
> * * *
>
> A. Okay. You know, [ARS Ohio] contracted with HIH Casualty. I would assume since [ARS Ohio] is

[11] The abbreviated reference to AON in the appended deposition transcripts is a reference to ARS Ohio.

such a large broker that they did their due negligence [sic] in negotiating the contract with HIH. At the time we wrote the coverage through [ARS Ohio], they were rated by Standard & Poor's, double-A rated, which is – is a very good financial rating.

So I'm not sure that [ARS Ohio] is negligent when they contracted with AIH (sic), because at the time it looked to me like [ARS Ohio], like they were financially solvent and a – and a strong company. I think at one point they were the second largest insurer in Australia.

* * *

Q. Do you take any issue with what [ARS Ohio] did or didn't do with respect to the coverage for The Star of Louisville?

A. No, sir.

Q. Okay. Why is that?

A. Because I'm – at the time they put the program together, I'm sure that a broker like [ARS Ohio], one of the most well-respected brokers in the world, did their due diligence in picking out HIH as a primary hull carrier.

Q. To the best of your knowledge [ARS Ohio] acted as a reasonable and prudent broker in this transaction –

A. Yes.

Q. – correct?

A. Yes, sir.

Q. Do you believe that the S&P rating of HIH, do you believe it was a reliable source to determine whether HIH was a solvent company?

A. Yes, sir.

Q. Did the HIH, S&P rate – rating show that HIH was a solvent company in your mind?

A. Yes, sir.

[T.R. at 786-788, and Wetterer Depo., App. 3 at 7-8 and 172-173.][12]

The Garcias introduced no testimony, by deposition or affidavit, in rebuttal. Only afterwards, based upon hindsight unavailable to ARS Ohio in 1997, has it been disclosed that the management of HIH was intentionally and criminally misrepresenting the true financial condition of HIH in order to hide it from the insurance industry and the public, resulting in HIH being placed in receivership four years later in 2001. [T.R. at 786-788, Bell Depo. at 160, 165, 168-169, 177-178, Wetterer Depo. at 6-7 and App. 5 and 6]. Accordingly, based on the evidence in the record, and the lack of any genuine issue of material fact, the Circuit Court was correct in entering summary judgment in favor of ARS Ohio.

CONCLUSION

For the foregoing reasons, ARS Ohio requests that this Court reverse the Court of Appeals, and affirm the summary judgment entered by the Jefferson Circuit Court in favor of ARS Ohio.

Respectfully submitted,

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[12] See Cherokee Ins. Co., 66 F.3d at 122 and 124 (recognizing the propriety of an insurance broker relying upon a similar rating company).