<<COURT\_NAME>>

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| <<PROVIDER\_SUITNAME>>,  a/a/o <<INJUREDPARTY\_NAME>>    Plaintiff,  vs.  <<INSURANCECOMPANY\_SUITNAME>>  Defendant. | Case No. <<INDEXORAAA\_NUMBER>> |

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**PLAINTIFF’S RESPONSE TO DEFENDANT’S MOTION TO DISMISS**

**COMES NOW**, Plaintiff, <<PROVIDER\_SUITNAME>>, by and through its undersigned counsel, pursuant to Rule 1.140, Fla. R. Civ. P., responds to Defendant’s Motion to Dismiss, and in support thereof states:

**FACTS AND PROCEDURAL POSTURE**

1. On <<DOS\_START>>, Plaintiff, <<PROVIDER\_SUITNAME>> (hereinafter “Plaintiff”) was retained by the Insured, <<INJUREDPARTY\_NAME>>, to provide engineering mold, bacteria or asbestos testing services. *A true and correct copy of the Invoice is attached hereto as “Exhibit A”.*
2. <<INJUREDPARTY\_NAME>> purchased a homeowner’s policy of insurance from Defendant, which insured the property located at <<INJUREDPARTY\_FULL\_ADDRESS>> (the “Property”), under Policy No. <<POLICY\_NUMBER>> (hereinafter “Policy”).
3. In exchange for the services provided by Plaintiff, <<INJUREDPARTY\_NAME>> executed a Non-Emergency Contract for Services and Assignment of Benefits (hereinafter “AOB”). *A true and correct copy of the Non-Emergency Contract for Services and Assignment of Benefits is attached hereto as “Exhibit B”.*
4. The AOB states by its own terms the following:

“The nonemergency indoor environmental assessment shall include a visual inspection of the subject property which may include destructive and non-destructive testing to determine repair-ability, scope and/or categorization of water damage, testing for contamination including bacteria and/or mold in order to prepare a forensic engineering report and/or remediation protocol report that may be used to prescribe or confirm proper remediation procedures for the damaged property.

I understand that this non-emergency indoor environmental assessment **in no way is meant to protect, repair, restore, or replace damaged property or to mitigate against further damage to the property.**”

1. Subsequently, Defendant served their Motion to Dismiss claiming that Plaintiff lacks standing for the AOB for allegedly not complying with Florida Statute §627.7152 which went into effect on July 1, 2019.

**MEMORANDUM OF LAW**

1. **Motion to Dismiss Standard**
2. To rule on a motion to dismiss, a court's gaze is limited to the four comers of the complaint, including the attachments incorporated in it, and all well pleaded allegations are taken as true. *U.S. Project Mgmt., Inc. v. Pare Royale E. Dev., Inc.,* 861 So.2d 74, 76 (Fla. 4th DCA 2003).
3. At the motion to dismiss stage, the court is limited to determining whether the complaint on its face contains allegations that legally sufficient to state a cause of action. *Gallon v. Geico Gen. Ins. Co.*, 150 So. 3d 252 (Fla. 2nd DCA 2014); *citing to Maynard v. Taco Bell of Am. Inc.,* 117 So. 3d 1159 (Fla. 2nd DCA 2013)(*quoting Reyes ex rel. Barcenas v. Roush*, 99 So. 3d 586 (Fla. 2nd DCA 2012); *Davidson v. Iona-McGregor Fire Protection and Rescue Dist.*, 674 So. 2d 858 (Fla. 2nd DCA 1966).
4. The facts alleged in the Complaint must be accepted as true and all reasonable inferences are drawn in favor of the pleaders. *Mitleider v. Brier Grieves Agency, Inc.*, 53 So. 3d 410 (Fla. 4th DCA 2011).
5. It is not for the court to speculate whether the allegations are true or whether the pleader has the ability to prove them.... “The question for the trial court to decide is simply whether, assuming all the allegations in the complaint to be true, the plaintiff would be entitled to the relief requested.” *Fox v. Prof'l Wrecker Operators of Fla., Inc.,* 801 So.2d 175, 178 (Fla. 5th DCA 2001) (*quoting Cintron v. Osmose Wood Preserving, Inc*., 681 So.2d 859, 861 (Fla. 5th DCA 1996)); *Chaires v. North Florida National Bank*, 432 So. 2d 183 (Fla. 1st DCA 1983).
6. “[A] motion to dismiss for failure to state a cause of action is not a substitute for a motion for summary judgment, and in ruling on such a motion, the trial court is confined to a consideration of the allegations found within the four corners of the complaint.” *Consuegra v. Lloyd's Underwriters at London*, 801 So.2d 111, 112 (Fla. 2d DCA 2001).
7. A complaint should not be dismissed unless the movant can demonstrate there is no set of facts that would support a claim for relief. *Meadows Cmty. Ass’n Inc. v. Russell-Tutty*, 928 So. 2d 1276 (Fla. 2nd DCA 2006).
8. A trial court violates a plaintiff’s due process when going outside the four corners of the complaint when ruling on a motion to dismiss. *Nevitt v. Bonomo*, 53 So. 3d 1078, 1081 (Fla. 1st DCA 2010) (“First, due process was not afforded because the county court granted the motion to dismiss by going beyond the four corners of the complaint”).
9. **FLORIDA LAW ON STANDING**
10. Florida law is clear that challenging a Plaintiff’s standing is an affirmative defense and not an issue of subject matter jurisdiction, thus standing can only be argued in a motion for summary judgment. *Wells Fargo Bank, N.A., v. Reeves*, 92 So. 3d 249 (Fla. 1st DCA 2012); *Broward Ins. Recovery Center v. Geico Cas. Co.*, 23 Fla. L. Weekly Supp. 642a (17th Cit. 2015); *Professional Diagnostic Reading v. State Farm Mutual Auto. Ins. Co.*, 20 Fla. L. Weekly Supp. 700a (17th Cir. Appellate 2013).
11. In this matter, like in *Reeves*, Defendant is improperly trying to argue standing issues that are only proper in a motion for summary judgment.
12. **FLORIDA LAW ON POLICY EXCLUSIONS**
13. “An affirmative defense based on a policy exclusion usually raises issues of fact that should not be decided pursuant to a motion to dismiss for failure to state a cause of action.” *Fla. Farm Bureau Gen. Ins. Co. v. Ins. Co. of N. Am.*, 763 So. 2d 429 (Fla. 5th DCA 2000); (*citing Cintron v. Osmose Wood Preserving, Inc*., 681 So.2d 859, 861 (Fla. 5th DCA 1996)) (“In reviewing a motion to dismiss a complaint, the trial court must make its decision solely upon questions of law”); *Peninsular Life Ins. Co. v. Hanratty*, 281 So. 2d 609 (Fla. 3rd DCA 1973).
14. “The most common and appropriate pre-trial motion to raise the issue of whether a particular exclusion clause in an insurance policy applies to prohibit recover is a motion for summary judgment.” *Fla. Farm Bureau Gen. Ins. Co. v. Ins. Co. of N. Am.*, 763 So. 2d 429 (Fla. 5th DCA 2000). A motion to dismiss should not be used “to determine issues of ultimate fact” and “may not act as a substitute for summary judgment.” *Id.*
15. Alleging that services provided are not covered pursuant to a policy of insurance does not test the legal sufficiency of the pleadings, it is an affirmative defense which this court cannot consider on a motion to dismiss. *Lonestar Alt. Sol, Inc. v. Leview-Boymelgreen Solell Developers, LLC*, 10 So. 3d 1169 (Fla. 3rd DCA 2009) (When deciding a motion to dismiss, a trial court may not consider affirmative defenses.) *See also, Vienneau v. Metro Life Ins. Co.*, 548 So. 2d 856 (Fla. 4th DCA 1989).
16. In the instant matter, Defendant is improperly arguing that Plaintiff’s services are not covered under the policy in a motion to dismiss instead of a motion for summary judgment.
17. **LAW OF ASSIGNMENT**
18. In  *State Farm Fire and Casualty Co. v. Ray*, 556 So. 2d 811 (Fla. 5th DCA 1990), the 5th DCA held:

An assignee may enforce payments or the performance of an obligation due under an assigned contract. *Boulevard Nat’l Bank, supra.* Because an unqualified assignment transfers to the assignee all the interest of the assignor under the assigned contract, the assignor has no right to make any claim on the contract once, the assignment is complete, unless authorized to do so by the assignee. 4 Fla. Jur. 2d, *Assignments* § 23 (1978);  *See also, Howard v. Pensacola & A.R. Company,* 24 Fla. 560, 5 So. 356 (1886).

1. The right to assign a contractual benefit is found in the common law. An assignee of that right has a common law right to sue on a breach of contract claim. If the Legislature passes a statute that is in derogation of the common law, it must be strictly construed. *Accident Cleaners, Inc. v. Universal Ins. Co.*, 186 So. 3d 1 (Fla. 5th DCA); *Humana Health Plans v. Lawton*, 675 So. 2d 1382 (Fla. 5th DCA 1996).
2. **ELEMENTS FOR BREACH OF CONTRACT**
3. The Florida Supreme Court lists the following elements for a Plaintiff to plead a cause of action for breach of contract:
4. Claimant and Defendant entered into a contract;
5. Claimant has done all or substantially all of the essential things which the contract requires them to do;
6. All conditions required by the contract for Defendant’s performance have occurred;
7. Defendant failed to do something essential which the contract required the Defendant to;
8. Claimant was harmed by Defendant’s failure to perform under the contract.
9. In the instant matter, Plaintiff has properly plead a cause of action pursuant to the Florida Supreme Court.

**ANALYSIS OF FLORIDA STATUTE 627.7152**

1. It is undisputed that the services rendered by Plaintiff were for [engineering services/indoor environmental services/mold testing/bacteria testing/asbestos testing].
2. Florida Statute 627.7152 went into effect on July 1, 2019, and was designed to create new requirements and obligations regarding the use of certain “assignment agreements” in residential and commercial property insurance claims.
3. It is Plaintiff’s position that Plaintiff is not obligated to comply with §627.7152, as Plaintiff does not provide any of the enumerate statutory services.
4. Defendant’s analysis fails to consider the statutory definition of what is an “Assignment Agreement” under §627.7152.
5. Florida Statute 627.7152 does not apply to companies such as the Plaintiff, who provide indoor environmental assessments, mold testing, asbestos testing, bacteria testing and forensic engineering services. In fact, Plaintiff provides not services to protect, repair, restore, or replace property or to mitigate against further damage to the property.
6. Section 627.7152 describes with specificity the types of services that are governed by the statute and this Court has to comply this definition **strictly**. (Emphasis Added). The class of services governed by this new statute clearly encompasses water remediation and other emergency services by the very terms of the statute, but does not cite to or reference in any Legislative document the use of measurement, testing, or observation services, such as those proved by Plaintiff.
7. The statute specifically defines and “assignment agreement” as follows:

"Assignment agreement" means any instrument by which post-loss benefits under a residential property insurance policy or commercial property insurance policy, as that term is defined in s. 627.0625(1), are assigned or transferred, or acquired in any manner, in whole or in part, to or from a person **providing services to protect, repair, restore, or replace property or to mitigate against further damage to the property.** Fla. Stat. §627.7152(l)(b) (2019) (Emphasis Added).

1. By its clear and unambiguous language, Section 627.7152 only applies to “assignment agreement” which relate to “services to protect, repair, restore, or replace property or to mitigate against further damage to the property.”
2. Plaintiff by virtue of providing [engineering services/indoor environmental services/mold testing/bacteria testing/asbestos testing], did not itself provide any: 1 – services to protect the property; 2 – services to repair the property; 3 – services to restore the property; 4 – services to replace the property; or 5 – services to mitigate against further damage to the property.
3. Plaintiff provides services that might be used by others who provide enumerated services, but this Court must construe Section 627.7152 narrowly.
4. If the Legislature had intended to include the types of services provided by Plaintiff, the it would have included “assessments”, “engineering services”, “testing”, or some synonym of the same as one of the enumerated types of services included in the definition of “assignment agreement”; but clearly, it did not.
5. According to the Florida House of Representatives Staff Analysis identified as Final Bill Analysis 5/28/2019 11:20:57 AM, the Staff Analysis states at page 5:

Assignment of Property Insurance Claims. In recent years, AOBs have become common in property insurance claims, where an insured property owner assigns his or her benefits under a property insurance policy to a contractor, water remediation company, or other vendor who repairs the damaged property and bills the insurer for the work. **In the case of property insurance, an insured’s loss is often an emergency, such as a burst water pipe or a damaged roof through which water enters the property. In Florida’s humid environment, water damage can quickly turn a minor problem to a major problem involving mold and mildew, making remediation and repair a time-sensitive task and requiring an assignee to begin repairs immediately to prevent further damage.** Remediation and mitigation of damages are often terms of a property insurance policy. In claims that do not involve an AOB, the property owner typically notifies the insurer of the loss and the insurer has the opportunity to inspect the property before permanent repairs begin. Insurers report that, in claims involving an AOB, the work has often begun or is substantially completed before the insurer has the opportunity to inspect the property; this makes it difficult for an insurer to verify the cause and extent of the damage and to determine the scope of coverage and the appropriate amount of the claim. (Emphasis Added).

1. As discussed in the Legislative Analysis, the purpose of Section 627.7152 is to give insurers who have insured with an emergency condition, fair notice to inspect the loss before all the remediation in complete.
2. Not a single service provided by Plaintiff could or would impair an insurers ability to inspect the property as Plaintiff’s services are non-physical in nature. Thus, once Plaintiff complete its services, it leaves the property in the same condition as when Plaintiff arrived.

**FLORIDA SUPREME COURT ANALYSIS ON RETROACTIVE APPLICATION**

1. In the alternative, Plaintiff asserts that Fla. Stat. 627.7152 does not apply here, because the subject Policy went into effect prior to the effective date of the Statute.
2. Under Florida Law, and in the context of an insurance policy, courts have held that “the statute in effect at the time the insurance contract is executed governs any issues arising under the contract.” *See Glenn Corkins, D.C. v. GEICO Indemnity Co. v. Ceballos*, 440 So. 2d 612 (Fla. 3d DCA 1983)  *citing to Metropolitan Life Ins. Co. v. Fugate*, 313 F.2d 788 (5th Cir. 1963); *Allison v. Imperial Cas. & Indemnity Co.*, 222 So.2d 254 (Fla. 4th DCA 1969); and *Poole v. Travelers Ins. Co.*, 130 Fla. 806, 179 So. 138 (1937).  *See also Hassen v. State Farm Mutual Auto. Ins. Co.*, 674 So.2d 106, 108 (Fla. 1996); *MR Services LLC v. United Auto. Ins. Co.*, 16 Fla. L. Weekly Supp. 678 (Broward Cty. Ct. 2009). Furthermore, “[a]ny legislative action which diminishes the value of a contract is repugnant to and inhibited by the [Florida] Constitution.” *In re Advisory Opinion*, 509 So.2d 292, 314 (Fla. 1987) (emphasis added). A diminishment occurs “when a contract is made worse or is diminished in quantity, value, excellence or strength.” *Lawnwood Medical Center, Inc. v. Seeger*, 959 So.2d 1222, 1224 (Fla. 1st DCA 2007).
3. In *Menendez v. Progressive Exp. Ins. Co. Inc.*, 35 So. 3d 873 (Fla. 2010), the Florida Supreme Court held that I trial court must look at the law in effect on the date that the policy went into effect; and not look at the law at the time the loss occurred, services were performed, or suit was filed.
4. In *Menendez*, the Insured suffered a loss on June 14, 2011. Between the date of the loss and the date Menendez filed suit, the Florida legislature passed a new law which imposed new obligations and conditions on a Plaintiff’s seeking to file a breach of contract action. The trial court in Miami-Dade County granted the Insured’s Motion for Summary Judgment, ruling that the obligations and conditions of the new law were not applicable to the Insured’s claim and that even if the statute did apply, compliance was not required because Progressive denied the claim. Progressive appealed the trial court’s ruling on Summary Judgment and the Third District Court of Appeal reversed. The issue was then appealed to the Florida Supreme Court.
5. The Florida Supreme Court’s Analysis was the following:

In our analysis, **we look at the date the insurance policy was issued and not the date that the suit was filed, or the accident occurred, because “the statute in effect at the time an insurance contract is executed governs substantive issues arising in connection with that contract**.” Hassen v. State Farm Mut. Auto. Ins. Co., 674 So.2d 106, 108 (Fla.1996); see also *Lumbermens Mut. Cas. Co. v. Ceballos*, 440 So.2d 612, 613 (Fla. 3d DCA 1983) (holding that a liability policy is governed by the law in effect at the time the policy is issued, not the law in effect at the time a claim arises); *Hausler v. State Farm Mut. Auto. Ins. Co.*, 374 So.2d 1037, 1038 (Fla. 2d DCA 1979) (holding that the date of the accident does not determine the law that is applicable to a dispute).

Because in this case the statute was enacted after the issuance of the insurance policy, the operative inquiry is whether the statute should apply retroactively. In this regard, the Court applies a two-pronged test. First, the Court must ascertain whether the Legislature intended for the statute to apply retroactively. Second, if such an intent is clearly expressed, the Court must determine whether retroactive application would violate any constitutional principles. See **Metro. Dade County v. Chase Fed. Hous. Corp**., 737 So.2d 494, 499 (Fla.1999).

1. In the instant matter, like in *Menendez*, the statute was enacted after the issuance of the subject insurance policy, and therefore this Court must apply the two-pronged test set out in *Menendez*.
2. This Court’s analysis of whether or not the statute may be applied retroactively does not end with the legislative intent. The court needs to determine whether retroactive application would violate any constitutional principles, namely Article I, Section 10 of the Florida Constitution.
3. Here, the insured received and paid premiums for an insurance policy that provided certain benefits with no limitations on how they might assign their rights.
4. However, under §627.7152, a policyholder must now sign a written assignment that contains several provisions that were not required under the law at the timepolicy was entered into by the insured. Additionally, policyholders are now limited to those providers who agree to provide a right of rescission of their service contract, as well as those providers who are able and/or willing to provide a “written, itemized, per-unit cost estimate” at the time the assignment is signed. The new law also includes an indemnification provision on behalf of the provider. *See* Fla. Stat. §627.7152(2)(a)7. It even limits the amount of “emergency” work that may be done to protect the premises. *See* Fla. Stat. §627.7152(2)(c).
5. Defendant’s argument is predicated on the idea that post-loss benefits for emergency services are limited $3,0000.00 under the Statute. This is a material limitation that would not have been available as a defense prior to the effective date of the Statute.
6. Furthermore, prior to the enactment of Fla. Stat. 627.7152, Assignees were automatically entitled to attorney’s fees under Florida Statute 627.428 and 626.9373, should they prevail in Court or reach a settlement agreement, and were not subject to any potential liability for a defense counsel’s attorney’s fees should a certain recovery threshold not be met.
7. The Florida Supreme Court in *Menendez* unequivocally stated that it "[would] reject [a retroactive] application if the statute impairs a vested right, creates a new obligation, or imposes a new penalty. *Id. citing* *State Farm Mut. Auto. Ins. Co. v. Laforet*, 658 So. 2d 55 (Fla. 1995).
8. For these reasons and pursuant to the case law cited, this Court is precluded from applying Section 627.7152 to the case at bar, and the assignment of benefits executed between the Insured and Plaintiff is not subject to the requirements and restrictions in Section 627.7152.

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**CONCLUSION**

This Court must deny Defendant’s Motion to Dismiss as Defendant’s motion goes beyond the four-corners of Plaintiff’s Complaint and asserts what is essentially a motion for summary judgment under the disguise of a motion to dismiss. Even a motion for summary judgment on this issue must be denied as the issue of which services were provide by Plaintiff and whether those services are contemplated by Florida Statute 627.7152, is question of fact and not a matter of law. A jury has to decide if Plaintiff’s services were to protect, repair, restore, or replace property or to mitigate against further damage to the property. These are fact questions not suitable for a motion to dismiss or even a motion for summary judgment.

WHEREFORE, Plaintiff, <<PROVIDER\_SUITNAME>>, requests the Court to enter an Order to Denying Defendant’s Motion to Dismiss, requiring an Answer to Plaintiff’s Complaint be filed within ten (10) days, and grant such other further relief that is just and appropriate under the circumstances.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on ­­­­­­­­­­­­­February 20, 2022, a true and correct copy of the foregoing was filed and served on the Defendat through the Florida E-File Portal.

**Florida Insurance Law Group, LLC**

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