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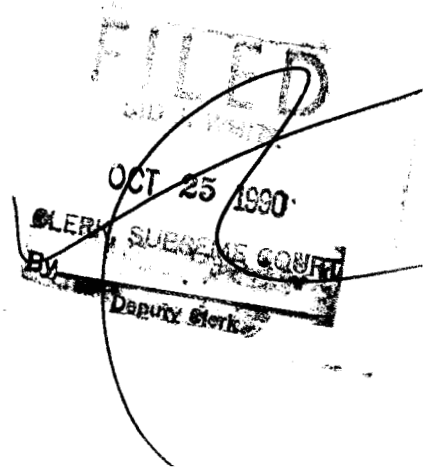
SUPREME COURT
STATE OF FLORIDA

CASE NO.: 75,772
5DCA CASE NO.: 89-00573



DAVID BLIZZARD, ETC., et al,

Petitioners/Appellant(s),

vs.

W.H. ROOF CO., ETC.,

Respondents/Appellees.

DISCRETIONARY REVIEW FROM THE
FIFTH DISTRICT COURT OF APPEAL

RESPONDENTS' ANSWER BRIEF

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STATEMENT OF THE CASE AND FACTS

The respondents accept the petitioners' statement of the case and facts with the following additions:

The petitioners had over three (3) years in which to file their complaint before it would have been barred by the applicable statutes of limitations. The incident giving rise to the cause of action occurred on October 24, 1984. (R. 1-3). The petitioners had until October 10, 1987, in which to file their complaint before the statutes of limitation ran pursuant to the order appointing ancillary receiver and sections 95.11(5) (d) and 631.68. (R. 118-125).

The petitioners' counsel had been participating in settlement discussions with Cyrus H. Davis, the claims examiner for FIGA since at least January 26, 1987. (R. 177-178). The affidavit, additionally, filed by the petitioners' counsel, evidences that negotiations were ongoing prior to the filing of the suit. (R. 163).

POINT ON APPEAL

THE COURT DID NOT ERR IN GRANTING A SUMMARY JUDGMENT FOR W.H. ROOF, COMPANY. ETC., BASED ON SECTIONS 95.11(5)(d) *AND* 631.68, FLORIDA STATUTES, BECAUSE SAID STATUTES ARE CONSTITUTIONAL.

SUMMARY OF THE ARGUMENT

The Florida Insurance Guaranty Association ["FIGA"] is a legislatively declared mechanism to aid and benefit numerous citizens who have suffered loss of insurance protection they obtained because of the insolvency of their insurers. The Florida legislature created FIGA for the avowed purpose of aiding and benefiting numerous citizens, many of whom complied with state requirements in obtaining casualty and other insurance coverage for themselves and have suffered loss of the insurance protection they obtained because of the insolvency of the insurers. Absent the creation of FIGA, there would be no effective remedy to recover on any claims whatsoever against insolvent insurers. Further, insured individuals would be open to personal liability for claims which they intended to be covered by insurance. Since there is an overpowering public necessity for the legislation, sections 95.11(5)(d) and 631.68, Florida Statutes, are not constitutionally infirm under well-established Florida law.

The statutes in question benefit not only the insured for the amount of the insurance policy and for the period of the policy, but it also protects an injured party should the insured as well as the insurer be insolvent. If there were no FIGA and the insured had no assets upon which an injured party could levy, then the injured party would left without a source for payment of his injuries. Consequently, FIGA and the statutes of limitations run to the benefit of the insured and the injured party.

The petitioners! argument that sections 95.11(5)(d) and 631.68, Florida Statutes, deny access to the courts is without merit. Article I, section 21 of the Florida Constitution, which guarantees access to the courts, only prohibits legislative action which abolishes or totally eliminates previously recognized causes of action. The constitutionally mandated access to the courts does not apply to legislative enactments which reduce, but do not destroy, a cause of action. If a statute only shortens the period in which a litigant may sue, as opposed to barring his cause of action entirely, the statute does not invoke the provisions in article, section 21. In the instant case, sections 95.11(5) (d) and 631.68 do not bar access to the courts, but simply curtail the time in which suit must be filed.

Likewise, sections 95.11(5) (d) and 631.68, Florida Statutues, do not constitute an improper delegation of authority from the legislature to an executive agency. These statutes do not delegate unrestricted discretion to an agency or officials in applying the law or declaring what the law should be. The statutes contain sufficient standards and guidelines to enable the appointed receiver for the insolvent insurance company and the courts to determine whether this legislative intent is being carried out. Although the statutes do allow the appointed receiver to set a date for the filing of claims against an insolvent insurance company, the discretion is limited in that the statute requires that the period of time be **"reasonable."** The law in Florida is clear that the legislature may delegate to

authorized officials and agencies the authority to promulgate subordinate rules with proscribed limits so long as the agency is not delegated the complete authority to determine what the law shall be.

Finally, the respondents submit that the statutes at issue do not violate equal protection. The proper analysis to be used by this court in analyzing the petitioners' challenge based on equal protection is the "rational basis" test. The Florida legislature in enacting sections 95.11(5)(d) and **631.68** as part of the statutory scheme of Chapter **631** creating FIGA utilized a reasonable means of achieving a legitimate state purpose. The statutes in question provide a special statute of limitations in which individuals having claims against insured whose insurance company has gone into receivership with FIGA can be filed. The creation of FIGA protects the Florida citizenry by providing means of recovery against individuals whose insurance companies have become insolvent as well as protecting the citizens of Florida who have purchased insurance expecting to be covered for any claims arising during the period of insurance and suffer the misfortune of having their insurance company become insolvent.

ARGUMENT

THE COURT DID NOT ERR IN GRANTING A SUMMARY JUDGMENT FOR W.H. ROOF, COMPANY, ETC., BASED ON SECTIONS 95.11(5)(d) AND 631.68, FLORIDA STATUTES, BECAUSE SAID STATUTES ARE CONSTITUTIONAL.

Before discussing the constitutionality of sections 95.11(5)(d) and 631.68, Florida Statutes, the respondents respectfully submit that it is important to note that section 95.11(5)**(d)** operates as a statute of repose rather than a statute of limitations. Section 95.11(5)(d) provides:

> Actions other than for recovery of real property shall be commenced as follows:
>
> . . .
>
> (5) Within one year
>
> . . .
>
> (d) An action against any guaranty association and its insured with a period running from the date of the deadline for filing claims in the order of liquidation.

Section 631.68 provides:

> A covered claim.. .to which settlement is not effected and suit is not instituted against the insured of an insolvent insurer or the association within one year after the deadline for filing claims or any extension thereof, with the receiver of the insolvent insurer shall henceforth be barred as a claim against the association and the insured.

The order appointing ancillary receiver for purposes of liquidation was dated October 11, 1985 and the order declared that the deadline for filing claims was October 10, 1986 (R.

111). Consequently, the last date on which the petitioners could have filed a claim in this action was October 10, 1987.

The one-year provisions operate as statutes of repose. Both are to be measured from a date other than from the date the cause of action arises. Both section 95.11(5)(d) and section 631.68 commence to run from the date of the deadline for filing claims in the order of liquidation.

A statute of limitations bars enforcement of an accrued cause of action whereas a statute of repose not only bars an accrued cause of action but will also prevent the accrual of a cause of action where the final element necessary for its creation occurs beyond the time period established by the statute. *Carr v. Broward County,* 505 So.2d 568, 570 (Fla. 4th DCA 1987), *aff'd,* 541 So.2d 92 (Fla. 1989). Additionally, a statute of limitation runs from the date the cause of action arises; that is, the date on which the final element essential to the existence of a cause of action occurs; ordinarily, that date is when the damages occur. A statute of repose, on the other hand, commences to run from the date of an event specified in the statute. At the end of the time period, the cause of action ceases to exist. *Id.*

Similar constitutional attacks upon statutes of repose have been rejected by this court on several occasions. *E.g., Carr* v. *Broward County,* 541 So.2d 92 (Fla. 1989) (the legislature found an overriding public necessity in its enactment of the seven-year state of repose applicable to medical malpractice actions);

Pullum v. Cincinnati, Inc., 476 So.2d 657 (Fla. 1985), appeal dismissed, 475 U.S. 1114 (1986) (statute, which provides, *inter alia*, that an action for products liability must be begun within twelve-years after date of delivery of completed product to its original purchaser does not deny equal protection under the state constitution). The respondents submit that this court should likewise reject the constitutional attacks upon the instant statute of repose regarding FIGA.

I. THE ENACTMENT OF CHATPER 631 DOES NOT CONSTITUTE *AN* IMPROPER DELEGATION OF AUTHORITY TO THE RECEIVER APPOINTED BY THE COURT PURSUANT TO SECTION 631.68.

The Petitioners have contended that sections 95.11(5)(d) and 631.68, Florida Statutes (1985) grant authority to the executive branch to create law. The petitioners erroneously submit that the sections grant authority to the executive branch to create a statute of limitations. A superficial perusal of these statutes clearly proves that the petitioners' allegation is erroneous. The law is set forth in section 631.181(3), which declares that the court fixes the time for filing claims and the time shall not be less than six months after entry of the order of insolvency; section 631.68 which provides that suit for a covered claim must be instituted against FIGA within one year of the deadline for filing claims; and section 95.11(5)(d) which provides that actions against FIGA and the insured shall be commenced within one year from the deadline for filing claims. The only discretion left to "the court" is to fix the time for filing

claims some time after six months of the order of insolvency. Such is, therefore, a subordinate rule which is constitutionally allowable. Not only is the rule constitutionally allowable, but necessary because there has to be some discretion and leeway given due to the complexity of each specific case.

The respondents initially submit that in analyzing the constitutional challenges against the instant legislative enactment, this court should apply the presumption that all legislative enactments are presumed valid. *Sandlin* v. *Criminal Justice Standards and Training Commission,* **531** So.2d **1344 (Fla. 1988);** *Gulf Stream Park Racing Association* ***v.*** *Department* ***of*** *Business Regulations,* **441 So.2d 627** (Fla. **1983);** *Golden* v. *McCarty,* **337** So.2d **388** (Fla. **1976).** Since it is presumed that the instant legislative enactments are valid, the petitioners have the burden to prove that Chapter **631** and section **95.11(5)(d)** constitute an improper delegation of authority from the legislature to the appointed receiver and FIGA. The petitioners have failed to meet their burden on three different occasions, *i.e.,* at the trial level, in the Fifth District Court of Appeal, and before this Court.

The constitutional prohibition against the unlawful delegation of legislative authority to an agency or an individual is designed to prevent the exercise of unrestricted discretion in the application of the law by an administrative agency charged with enforcement. *Florida Teaching Professional* v. *Turlington,* **490** So.2d **142** (Fla. 1st DCA **1986).** The legislature may, however,

delegate to authorized officials and agencies the authority to determine facts to which the established policies of the legislature are to apply. Id. at 820.

The crucial test in determining whether a statute amounts to an unlawful delegation of legislative power is whether the statute contains sufficient standards or guidelines to enable the agency and the courts to determine whether the agency is carrying out the legislature's intent. *Department of Insurance v. Southeast Volusia Hospital District*, 438 So.2d 815, 818 (Fla. 1983), *citing to*, *Askew v. Cross Key Waterways*, 372 So.2d 913 (Fla. 1978); *Lewis v. Bank of Pasco County*, 346 So.2d 53 (Fla. 1976). As correctly held by the Fifth District, the statutes in question do not constitute an unlawful delegation because they contain sufficient guidelines regarding the time frame in which claims must be filed and, therefore, there is no unrestricted discretion in applying the law.

In support of their position that the statutes are an unconstitutional delegation of legislative authority, the petitioners argue that the deadline for filing claims is totally within the discretion of the receiver or the governing body of the "liquidation" [sic]. As correctly held by the Fifth District, however, section 631.181(3), Florida Statutes (1985), mandates that "the court" fixes the time for filing of claims and that, in any event, the time cannot be fixed less than six months after the entry of the order of insolvency. Section 631.181(3) declares:

> After the entry of the order of liquidation, regardless of any prior notice that may have been given to creditors, the receiver shall notify all persons who may have claims against the insurer that they must file such claims with it at a place and within the time specified in the notice or else such claims will be forever barred. The time specified in the notice shall be affixed by the court for filing of claims and shall be not less than six months after the entry of the order of insolvency. The notice shall be given in such manner and for such reasonable period of time as may be ordered by the court.

This Court has held in ***In re Advisory Opinion to the Governor***, 509 So.2d 292, 311 (Fla. 1987) and in Askew ***v. Cross*** Key Waterways, ***supra***, 372 So.2d 913, 915:

> Under this doctrine fundamental and private policy decisions shall be made by members of the legislature who are elected to perform those tasks, and administration of legislative programs must be pursuant to some minimal standards and guidelines ascertainable by reference to the enactment establishing the program.

(emphasis supplied). The instant statutes meet the "minimal standards" test established by this Court with the minimal standards precluding any "whim, favoritism, or unbridled discretion."

The fact that the time specified by the receiver for filing claims shall be fixed by the court does not render the statute unconstitutional. The time specified for filing claims against an insolvent company which has been taken over by FIGA is a subordinate rule. The law is clear that the legislature may delegate to authorized officials and agencies the authority to promulgate subordinate rules with proscribed limits so long as

the agency is not delegated the complete authority to determine what the law shall be. ***In re Advisory Opinion*** to the ***Governor, supra,*** 509 So.2d at **311**. The statute also contains limitations in that the period shall not be less than six months after entry of the order of insolvency. Such is a necessity by the fact that FIGA may be presented two (2) tractor trailers of files of an insolvent insurance company and it would be impossible to go through each file and notify all necessary parties in a short period of time.

Further, section **631.181(3)** provides that notice by the receiver shall be given in such manner and for such reasonable period of time as may be ordered by the court. The term "reasonable period of time" is a limitation on the discretion accorded the court. Facially, therefore, it is readily apparent that Chapter **631** does not allow an agency or individual to exercise unrestricted discretion in applying the law, or to declare what the law should be. The section simply facilitates the procedures for filing claims against insolvent insurance companies by allowing the receiver to determine, given the complexity of each specific case, what the time period for filing claims shall be. This Court has recognized "[t]he specificity with which the legislature must set out statutory standards and guidelines may depend upon the subject matter dealt with and the degree of difficulty involved in articulating finite **standards."** In re ***Advisory Opinion*** of the ***Governor, supra,*** 509 So.2d at **311.**

The legislature has determined that actions against any

guaranty association and its insured must be begun within one year from the date of the deadline for filing claims in the order of liquidation. The legislature has also declared that the date of the deadline for filing claims shall not be less than six months after the entry of the order of insolvency. What the legislature has delegated to the agency is that the agency officials have the authority to promulgate subordinate rules within those prescribed limits and to determine the facts which the established policies of legislation are to apply. The legislature has not delegated to FIGA the authority to determine what the law shall be, only the reasonable period of time in which claims must be filed.

Given the complexity and difficulties of liquidating the assets of insolvent insurance companies and providing for the recovery of claims against insureds of said companies, the receiver must be given some latitude in determining when a claim must be filed against an individual insured by an insolvent insurance company. The fact that the periods may vary depending upon the insolvent entity does not constitute allowing the receiver to determine what the law shall be. The law is set forth in sections 95.11(5)(d) and **631.68,** which provides that all claims against insolvent insurance companies shall be filed in a court no later than one year after the period set by the receiver in which claims can be filed with the insolvent insurance company. The statute of limitations is a one-year statute of repose applying to persons seeking to file lawsuits against an

insured whose insurance company has become insolvent and taken over by FIGA. The statutes clearly set out adequate standards to guide FIGA in the execution of the powers delegated and define those powers with sufficient clarity to preclude FIGA from acting through whim, favoritism, or unbridled discretion. *See In re Advisory Opinion to the Governor, supra,* 509 So.2d at 311; *Lewis v. Bank of Pasco County,* 346 So.2d 53 (Fla. 1977); *Flesch v. Metropolitan Dade County,* 240 So.2d 504 (Fla. 3d DCA 1970), *cert. denied,* 244 So.2d 432 (Fla. 1971).

II. THE STATUTES DO NOT UNCONSTITUTIONALLY DENY ACCESS TO THE COURTS.

The petitioners have erroneously declared that the statutes in question unconstitutionally deny access to the courts because the legislature has not provided a reasonable alternative to protect the rights of the people of the state to redress for injury. The petitioners are incorrect for several reasons. First, the statutes only apply if the tortfeasor's insurer is insolvent and then only if the claim against the insured tortfeasor is $300,000.00 or less. *See Queen v. Clearwater Electric, Inc.,* 555 So.2d 1262, 1265 (Fla. 2d DCA 1989). The statutes only bar claims beyond the one-year period against both FIGA (or the insolvent insurer) and the insured to the extent of the insolvent insurer's coverage. If the injured party's claims are for more than the amount of the policy limits, the injured party could still sue the insured for the excess. However, that is not what is presented in the instant case as the petitioners conceded that their injuries were less than $300,000.00.

The statutes in question do not operate as an absolute bar to bringing a previously existing cause of action but merely shortens the time period during which an action may be brought. The Fifth District so correctly held relying on Universal Engineering Corp. v. Perez, 451 So.2d 463 (Fla. 1984); Queen v. *Clearwater* Electric, Inc., supra, 555 So.2d 1262; *Jetton* v. Jacksonville Electric Authority, 399 So.2d 396, 398 (Fla. 1st DCA), rev. denied, 411 So.2d 383 (Fla. 1984); and Fernandez *v.* Florida Insurance Guaranty Association, Inc., 383 So.2d 974, 976 (Fla. 3d DCA), rev. denied, 389 So.2d 1109 (Fla. 1980). Statutes that have merely shortened the time period in which an action may be brought have universally been upheld by this Court. See, *e.g., Pullum* v. Cincinnati, Inc,, supra, 476 So.2d 657; *Carr v. Broward* County, supra, 541 So.2d 92; Bauld *v. J.* A. Jones Construction Co., 357 So.2d 401 (Fla. 1978).

Of extreme importance to the instant case is the fact that the petitioners had almost three years in which to file a claim against the respondents in this case. The incident giving rise to the cause of action occurred on October 24, 1984. The petitioners had until October 10, 1987, in which to file their complaint but did not file the complaint until March 11, 1988, five months after the statute of repose had run. This is so, notwithstanding the fact that the petitioners' counsel had been participating in settlement discussions with Cyrus H. Davis, claims examiner for FIGA, since at least January 26, 1987. (R. 177-178). In fact, the affidavit filed by the petitioners'

counsel evidences that negotiations were ongoing prior to the filing of the suit. (R. 163). Consequently, if the petitioners are attempting to allege that they were denied access to the courts as applied (by the term "equal access to the courts"), then their argument is totally without merit.

In *Pullum* v. *Cincinnati, Inc.*, *supra*, 476 So.2d at 659, this Court held that Florida's products liability statute of repose, section 95.031(2), Florida Statutes, was not unconstitutionally violative of article I, section 21 of the Florida Constitution. In so doing, this court receded from its prior decision in *Battilla* v. *Allis Chalmers Manufacturing Co.*, 392 So.2d 874 (Fla. 1980). This Court declared that the legislature, in enacting the statute of repose, reasonably decided that perpetual liability placed an undue burden on manufacturers and the legislature decided that twelve years from the date of sale was reasonable time for exposure to liability from manufacturing of a product.

Just as the legislature's reasonable decision for enacting the products liability statute of repose saved the statute from being unconstitutionally violative of the equal access to courts constitutional provision, the legislature's reasonable decision to enact FIGA's statute of repose saves the instant statutes from being unconstitutionally violative of article I, section 21 of the Florida Constitution. The Florida legislature in enacting sections 95.11(5)(d) and 631.68, Florida Statutes, as part of the statutory scheme of section 631.001 *et* seq, creating the Florida Insurance Guaranty Association, utilized a reasonable means of

achieving a legitimate state purpose. The creation of the Florida Insurance Guaranty Association protects the Florida citizenry by providing means of recovery against individuals whose insurance companies have become insolvent.

Absent Chapter 631, FIGA would not exist and there would be no effective remedy to recover on any claims whatever against insolvent insurers. *Fernandez* v. *Florida Insurance Guaranty Association, Inc., supra,* 383 So.2d at 976. The statutes further protect the citizens of Florida who have purchased insurance expecting to be covered for any claims arising during the period of insurance and suffer the misfortune of having their insurance company become insolvent. The Florida legislature used a reasonable means in achieving that purpose by creating sections 95.11(5)(d) and 631.68, which provide a special statute of limitations in which individuals having claims against insureds whose insurance company has gone into receivership with FIGA can be filed, contrary to the petitioners' allegation that said sections are unconstitutional.

An example of when a statute would be a denial of access to the courts can be found in the footnote in this Court's decision in *Pullum*. This Court cited to *Diamond* v. E.R. *Squibb and* Sons, *Inc.*, 397 So.2d 671 (Fla. 1982). In *Diamond,* the defective product, a drug known as diethylstilbestrol produced by Squibb, was ingested during plaintiff mother's pregnancy shortly after purchase of the drug between 1955-1956. The drug's effects, however, did not become manifest until after plaintiff daughter

reached puberty. The effects of the drug would not manifest itself in **any** case until after the daughter born from the pregnancy wherein the mother ingested the drug reached puberty. In that situation, if the statute applied, all plaintiffs' claims would be barred even though the injury caused by the product did not become evident until over twelve years after the product had been ingested. The respondents submit that scenario is a true example of when a statute would be constitutionally violative of Florida's constitutional guaranty of access to the courts. It is in a situation wherein all plaintiffs could never bring a cause of action. Such just simply is not what occurs due to sections **95.11(5)** (d) and Chapter **631.**

This Honorable Court explained in *O'Malley* v. *Florida Insurance Guaranty Association,* 257 So.2d 9,10 (Fla. 1971), that **FIGA** is a statutory creature which was designed to serve as the mechanism for the payment of covered claims[1] under certain classes of insurance policies of insurers which had become insolvent. **FIGA** is a public corporation and thus its business ordinarily is stipulated by the legislature to fill a public need without private profit to any organizers or stockholders. *Id.* at 11. The function of a public corporation is to promote the public welfare and the implementation of governmental regulations

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[1]Section **631.54 (4),** Florida Statutes (1985), provides:

> **(4)** 'Covered claim' means an unpaid claim...which arises out of, and is within the coverage, and not in excess of, the applicable limits of an insurance policy to which this part applies....

within the state's police power. "In a word, they are organized for the benefit of the public." *Id.* The purpose of **FIGA** is to aid and benefit numerous citizens, many of whom complied with state requirements in obtaining casualty and other insurance coverage for themselves and had suffered loss of the insurance protection they obtained because of the insolvency of the insurers. Id.

Therefore, the respondents respectfully submit that the public policy consideration expounded in *O'Malley* and the statute itself provide ample basis upon which the legislature could validly impose a statute of repose at the end of one year after the deadline for filing claims with the receiver of an insolvent insurer. As declared by the Fifth District below:

> In the instant case, the legislation has a reasonable (rational) relationship to the stated purpose of avoiding financial loss to claimants **or** policyholders because of the insolvency of the insurer. Without belaboring the point, section 631.67 requires that **FIGA** defend the policyholder where the insolvent insurer had an obligation to defend. In this light, the legislation is reasonably related to the stated purpose of protecting the policyholder from financial loss, *i.e.*, from having to defend the action without help from the insurer. Since **FIGA** may have to defend an action brought against the insured/policyholder, the state has the right to limit the time frame for bringing such an action. See *Montano* v. Florida Insurance Guaranty Association, 535 So.2d 658 (Fla. 3d DCA 1988), appeal dismissed, 542 So.2d 989 (Fla. 1989).

Blizzard v. W. H. Roof, 556 So.2d 1237, 1238 (Fla. 5th DCA 1990). Consequently, the statute is not constitutionally infirm as there

is an overpowering public necessity for the legislation. ***Accord, Carr v. Broward County, supra,*** **541** So.2d at **94; *Feldman* v. *Glucroft,* 488** So.2d **574, 575** (Fla. 3d **DCA 1986).**

III. THE STATUTES IN QUESTION DO NOT ACT AS A DENIAL OF EQUAL PROTECTION.

The statutes in question benefit the insured only for the amount of the insurance policy and for the period of the policy. In other words, if a responsible Florida citizen procures insurance for his protection and, the respondents add, for the protection of an injured party should the insured not have a deep pocket, and the insurance company fortuitously becomes insolvent during the period for which the insured had bought his insurance, then all parties are protected for one year for covered claims up to the amount of the insurance policy. If there were no FIGA and the insured had no assets upon which an insured party could levy, then the injured party would be left out on a limb with no one to look to for payment for his injuries. Consequently, FIGA and the statute of limitations run to the benefit of the insured **and** the injured party.

Initially, it must be pointed out that the petitioners' basic premise and argument is incorrect. The petitioners allege that "what this statute has created is a situation in which a person can sue a tortfeasor in negligence for four **(4)** years if that tortfeasor is insured or uninsured, but he may not do that if the tortfeasor happens to have been insured by an insolvent insurer." (Initial Brief at p. **14).** If the petitioners' injuries had exceeded the policy limits, then the petitioners

could have sued the instant insureds for any excess amount within the four-year statute of limitations for negligence.

The petitioners are also incorrect in alleging that "it is obvious under the equal protection clause of the Florida Constitution that there cannot be creation of a subclass treated differently than members of a class as a whole." (Initial Brief at page 13). The law in Florida is that the mere creation of a subclass does not constitute a violation of equal protection so long as there is a rational relationship between the statutory classification of tort victims and the object of the legislation. *E.g., Lasky v. State Farm Insurance Company,* 296 So.2d 9, 18-20 (Fla. 1974); *Montano v. Florida Insurance Guaranty Association, supra,* 535 So.2d 658. As discussed above, the legislation does indeed have a reasonable or rational relationship to the stated purpose of avoiding financial loss to claimants or policyholders because of the insolvency of the insurer.

The party challenging the classification of a statute has the burden of proving the classification does not rest upon any reasonable basis and is arbitrary. E.J. *Catogas v. Southern Federal Savings and Loan Association of Broward County,* 369 So.2d 922 (Fla. 1979). "The burden is upon the party challenging the statute or regulation to show there is no conceivable factual predicate which would rationally support the classification under attack." *Department of Legal Affairs v. District Court of Appeal, Fifth District,* 434 So.2d 310 (Fla. 1983). Should the party challenging the constitutionality of the classification

fail to meet this difficult burden, the statute must be sustained. ***Id.*** at **308**. ***See also, In re Estate of Gainer,*** **466** So.2d **1055** (Fla. **1985)** (the party challenging the classification has the burden of proving it does not rest upon a reasonable basis); ***Lewis V. Mathis,*** **345** So.2d **1066** (Fla. **1977)** (legislature has wide discretion in choosing a classification and, therefore, the presumption is in favor of the validity of the statute).

The first step a court must take in deciding whether a statutory classification violates equal protection is to determine the appropriate level of judicial scrutiny to be applied to the classification under attack. ***The Florida High School Activities Association v. Thomas,*** **434** So.2d **306** (Fla. **1983).** The proper test for this Court to utilize under the circumstances present in this case is the "rational basis" standard.[2]

Under the "rational basis" standard, **"a** court should inquire only whether it is conceivable the regulatory classification bears some rational relation to a legitimate state **purpose."** ***In re Estate of Gainer, supra,*** **466** So.2d at **434.** ***See also, Purk v. Federal Press Co.,*** **387** So.2d **354** (Fla. **1980)** (a statute of limitation does not deny equal protection if it is based on a

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[2] The "strict scrutiny" standard only applies when there is a suspect classification or a fundamental right involved. Any allegations by the petitioner that a strict scrutiny will apply in this case is incorrect. The access to the court's provision embodied in article I, section 21 of the Florida Constitution is inapplicable to this case since the statutes at issue do not abolish a cause of action but merely curtail the time in which an action can be brought.

rational distinction among classes of persons).

Reviewing the statutory scheme of Chapter 631, it is clear that the classification created by that chapter and section 95.11(5)(d) are reasonably related to a legitimate state purpose. Section 631.001(4) declares the purpose of Chapter 631 is "the protection of the interest of insureds, creditors, and the public generally," through:

> (a) Early detection of any potentially dangerous condition in an insurer and prompt application of appropriate corrective measures which are neither unduly harsh nor subject to unwarranted publicity needlessly damaging to the insurer;
>
> (b) Improved methods for rehabilitating insurers, which methods involve the cooperation and management expertise of the insurance industry;
>
> (c) Enhanced efficiency and economy of liquidation through clarification and specification of the law to minimize legal uncertainty and litigation;
>
> (d) Equitable apportionment of any unavoidable loss;
>
> (e) Lessening the problems of interstate rehabilitation and liquidation by facilitating cooperation between states in the liquidation process and by the extension of the scope of personal jurisdiction over debtors of the insurer outside of this state.

It is evident Chapter 631 confers upon Florida courts extensive authority concerningthe rehabilitation and liquidation of domestic insurers. The Florida Insurance Guaranty Association is a "legislatively declared 'mechanism' to aid and benefit numerous citizens many ... [who] have suffered loss of insurance protection they obtained because of the insolvency of their insurers." *O'Malley* v. ***Florida Insurance Guaranty Association, supra,*** 257 So.2d at 9-11. Absent the creation of the Florida

Insurance Guaranty Association, there would be no effective remedy to recover on any claims whatsoever against insolvent insurers. Further, insured individuals would be open to personal liability for claims which they intended to be covered by insurance.

In light of the purpose behind Chapter 631, the legislature created a subclassification of potential tort plaintiffs which has a shorter period of limitation in which to bring suit pursuant to section 95.11(5)(d) than do plaintiffs who sue individuals that are not insured by a company that has become insolvent. However, "[t]he legislature has wide discretion in choosing a classification and therefore the presumption is in favor of the validity of the statute." Lewis v. *Mathis*, supra, 345 So.2d at 1066.

In this case, the classification created in Chapter 631 and section 95.11(5)(d) is reasonably related to the state's objective in seeing that its citizenry is protected from the maladies that may result when an insured has the misfortune of having his insurance company become insolvent after an incident occurs which may give rise to a potential claim and cause of action against the insured. The petitioners have not presented any evidence as to the arbitrariness of such a classification. The petitioners have failed to present any argument to the effect that the classification is arbitrary, capricious and not reasonably related to a legitimate state purpose. The respondents submit that the petitioners' failure to meet their

burden to overcome the presumption of validity of a legislative classification requires this Court to uphold the constitutionality of Chapter 631 and section 95.11(5)(d), Florida Statutes,

The legislature in enacting Chapter 631 and section 95.11(5)(d) acted reasonably to achieve a legitimate state purpose. The police power of the State of Florida may be exercised by the legislature to regulate the insurance industry. *Feller* v. Equitable Life Assur. *Soc.*, 57 So.2d 581 (Fla. 1952). This is so because the business of insurance is clothed with a public interest. Here, the legislature enacted Chapter 631 of the Florida statutes in furtherance of its legitimate role in protecting the public generally.

The issue presented in this case has not been dealt with by Florida courts[3]; however, the courts in California have addressed the issue of equal protection regarding their insurance guaranty association which is substantially similar to that in Florida. *White* V. *City* of Huntington *Beach*, 187 Cal.Rptr. 879 (Cal. 4th Dist. Ct. App. 1983). In that case, the plaintiffs were subrogees barred from pursuing a subrogation claim against the California Insurance Guaranty Association. The court stated:

> To the extent that the CIGA legislation discriminates between subrogation plaintiffs with claims against insureds of insolvent insurers and subrogation plaintiffs with claims against insureds of solvent insurers

[3]The Court in Queen v. Clearwater Electric, Inc., supra, 555 So.2d 1262, only dealt with the issue of the claimant's right to access to the courts.

> or against those who are uninsured, the classification certainly has a fair relationship to the statutory purpose. If such a classification were not made, there would be situations where the person meant to be protected by the CIGA legislation would be left vulnerable just because its insured had become insolvent.

Id. at 884. In this case, the same analysis used by the court in *White* applies. Clearly, the legislature in its wisdom decided to create a classification of potential plaintiffs; however, this classification is not arbitrary or capricious and is reasonably related to a legitimate state purpose, to wit: the protection of its citizenry and the regulation of the insurance industry.

CONCLUSION

Based upon the foregoing facts and authorities cited herein, the appellee respectfully requests this Honorable Court affirm the decision of the court below.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand-delivery this 23rd day of October, 1990 to R. Lee Dorough, Esquire, 45 West Washington Street, Orlando, Florida 32801.

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