IN THE SUPREME COURT OF FLORIDA

CASE NO. SC03-1259

BETTY JONES, as Personal Representative of the Estate of Althea Jones, and as Personal Representative of the Estate of Althea Jones, as Assignee of MICHAEL PRATT, d/b/a/ SPRUILL AUTO SALES,

Petitioner,

v.

FLORIDA INSURANCE GUARANTY ASSOCIATION, INC., individually and on behalf of DEALERS INSURANCE COMPANY,

Respondent.

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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STANDARD OF REVIEW

A trial court's ruling on a motion for summary judgment posing a pure question of law is subject to *de novo* review. *Clay Electric Cooperative, Inc. v. Johnson, et al*, 2003 Fla. LEXIS 2150, *6 (Fla. December 18, 2003).

STATEMENT OF THE CASE

On May 18, 1994, an automobile driven by Heath Gilliam collided with a vehicle driven by Althea Jones[1]. Althea Jones died from injuries sustained in that accident. The vehicle driven by Gilliam was loaned to him by Anthony Dixon, who, in turn, worked for Michael Pratt d/b/a Spruill Auto Sales. Pratt had previously applied for and was issued a garage liability policy by Dealers Insurance Company, effective from March 11, 1994 until March 11, 1995. In December 1994, Dealers Insurance Company went bankrupt. On December 19, 1994, an order was entered by Judge Ted Steinmeyer, in Leon County, finding Dealers insolvent, appointing the Florida Department of Insurance ("DOI") as receiver for purposes of liquidation, and directing the DOI to "[c]oordinate the operation of the receivership with the Florida Insurance Guaranty Association pursuant to Part II of Chapter 631, Florida Statutes (1993)."[2]

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[1]Appellee, in the jurisdictional brief, incorrectly stated that the vehicle was owned by an employee of Michael Pratt. That statement was a scrivener's error. FIGA has always maintained that the vehicle was not owned by Pratt, and the Petitioner here, agrees. See Petitioner's Amended Initial Brief on Merits, p. 42.

[2] *In Re: The Receivership of Dealers Insurance Company*, Leon County Circuit Court Case No.: 94-4009.

Ms. Jones' estate initially brought a wrongful death action against Heath Gilliam, the driver of the car. On or about March 15, 1996, however, Betty Jones amended her wrongful death suit to add Michael Pratt d/b/a Spruill Auto Sales, alleging that the vehicle was available for sale at Spruill Auto Sales. Pratt was served with the amended complaint on April 19, 1996. FIGA was advised of the filing and service of the amended complaint by counsel for Betty Jones. Pratt did not report service of the lawsuit to FIGA as required by the Dealers insurance policy.

Pursuant to its duties under the statute, the Association conducted an investigation to determine whether the accident was a "covered claim." The Association's investigation and review of the Dealers insurance policy's conditions led it to conclude that the claims against Pratt were not a "covered claim" owed by Dealers. *FIGA v. Jones*, 847 So. 2d 1020, 1022 (Fla. 1st DCA 2003). On May 1, 1996, Pratt was notified by FIGA that it had determined the claim was not a covered claim within the meaning of the FIGA statute, and that no action would be taken to defend the suit. Pratt did not file a claim with FIGA regarding the denial of coverage. He did not file an action against FIGA to challenge the denial of the claim within one year as required by F.S. §631.68.

A default was entered against Pratt, and a jury returned a verdict on damages against him in the amount of $75,000,000 in August 1996. Jones did not seek to join FIGA in that suit after judgment was rendered in 1996 to determine her entitlement to the $25,000 policy. Rather, Jones brought this action sixteen (16) months later, solely in her capacity as the assignee of Michael Pratt d/b/a Spruill Auto Sales, in an attempt to collect on the $75,000,000 verdict. Jones sued the Association, asserting that it had breached its statutory, contractual and fiduciary obligations to Pratt by refusing to defend him in the lawsuit.

On August 14, 2001, the Honorable Terry Lewis denied FIGA's motion for summary judgment and granted Jones' motion for summary judgment, finding that FIGA must pay $299,000.00, plus interest on that amount from May 16, 1997 through the date of entry of the Order.[3] On October 4, 2001, Final Summary Judgment was entered by Judge Lewis. FIGA appealed Judge Lewis' denial of its motion for summary judgment on October 23, 2001. Jones filed a cross-appeal on October 29, 2001.

On appeal, however, the First District Court of Appeal reversed. *Florida Insurance Guaranty Association, Inc., v. Jones*, 847 So. 2d 1020, 1022 (Fla. 1st

[3] The trial court apparently awarded less than the full $75,000,000 because the FIGA statute limits the payment of all covered claims to $300,000, less a $100 statutory deductible.

DCA 2003) *citing Fernandez v. Florida Insurance Guaranty Association*, 383 So. 2d 974 (Fla. 3d DCA 1980) (bad faith claims against the Association itself are not cognizable under FIGA act due to immunity). The First District explained that the Association was not an insurance company and was not subject to suit for bad faith since it had been granted complete immunity by the Florida Legislature. Thus, it concluded, Jones' claims were not cognizable under the FIGA act. Jones is now seeking review in this Court.

STATEMENT OF THE FACTS

In the first amended complaint in *Jones v. Gilliam*, (the underlying auto tort suit) Ms. Jones alleged that Gilliam was operating the automobile with the permission of Anthony Dixon, an employee of Spruill Auto Sales, and that Michael Pratt, the owner of Spruill Auto Sales, had given permission to Anthony Dixon to operate the automobile. (See Amended Complaint, Exhibit 3 to Appendix, Petitioner's Amended Initial Brief.)

The Plaintiff's attorney notified FIGA that he was seeking recovery against Pratt for his client. FIGA then undertook an investigation to determine if the auto accident was a covered claim. When Michael Pratt did not respond to FIGA's

attempts to contact him, an investigative firm in Leon County was hired to assist in that effort.

FIGA representatives testified the facts available to it did not present a basis for determining this was a covered claim. The FIGA claims supervisor testified that the failure of the insured, Pratt, to come forward to assist in the investigation prejudiced the investigation. The police report of the accident at issue indicated Brian K. Ritchotte owned the automobile involved in the accident, that the vehicle had been used to leave the scene of a felony, and that the accident occurred after the vehicle failed to stop in response to a marked police vehicle. While the first amended complaint filed in *Jones v. Gilliam* alleges that an employee, Anthony Dixon, had permission to drive one of the "for sale" vehicles and that he allowed Gilliam to drive the vehicle, these allegations could not be verified due to the complete failure of the insured to cooperate. The facts that were available to FIGA raised many questions relevant to determining if this was a covered claim. The questions included: Who owned the vehicle? Was Dixon an employee of the insured? Did Dixon have permission to use a vehicle owned by the insured? Did Dixon give permission to Gilliam to use the vehicle? Had the vehicle been sold to Dixon or another customer?

The Dealers policy provided insurance coverage for "any auto" used in "garage operations." The policy defines garage operations as

> the ownership, maintenance or use of locations for garage business and that portion of the roads or other accesses that adjoin these locations. 'Garage operations' includes the ownership, maintenance or use of the autos indicated in Part II as covered autos. Garage operations also include all operations necessary or incidental to a garage business. *(emphasis supplied)* (See Exhibit 1 to Petitioner's Appendix.)

The facts available to FIGA did not demonstrate the accident was within the coverage afforded by the policy. The application for the insurance policy, signed by Michael Pratt on March 21, 1994, provided additional factual issues concerning coverage under the policy for this accident. On the second page of the application Pratt answered "no" to the question, "Are vehicles loaned to others?" Immediately below that question, the form required the applicant to "list all employees and anyone (including family members) who has occasion to drive dealer owned vehicles." The application listed Michael Pratt and Michael McLendon as such drivers.

The Dealers policy, at page 5, provides that the "insurance provided by the policy is subject to the following conditions: a. Cooperate with us in the investigation, settlement or defense of any claim or suit . . . b. Immediately send

us copies of any notices or legal papers received in connection with the accident or loss." FIGA asserted that Pratt did not comply with these provisions of the policy. He neither came forward to cooperate with the investigation nor did he provide any copies of notices or legal papers relevant to the accident.

SUMMARY OF ARGUMENT

FIGA is a statutory creation designed to serve solely as "the mechanism for the payment of covered claims...." *O'Malley v. Florida Ins. Guar. Ass'n, Inc.*, 257 So.2d 9, 10 (Fla. 1971), §631.51, Fla. Stat. (1979). The "legislature was careful to restrict [FIGA's] potential liability...as to its own allegedly wrongful activities." *Fernandez v. Fla. Ins. Guar. Ass'n, Inc.*, 383 So.2d 974, 975 (3rd DCA 1980), §631.66, Fla. Stat. (1979).

Here, the Plaintiff sues solely in her capacity as the assignee of Michael Pratt d/b/a Spruill Auto Parts. Plaintiff seeks to recover $75,000,000.00 against FIGA for its failure to defend Michael Pratt. *Fla. Ins. Guar Ass'n v. Jones*, 847 So.2d 1020, 1022 (1st DCA 2003). All of Plaintiff's claims arise out of duties Plaintiff contends FIGA owed Pratt, whether statutory, contractual or fiduciary. *Id.* at 1022. Though couched in breach of duties, Plaintiff's claims against FIGA sound in bad faith, for which alleged conduct the legislature expressly granted FIGA immunity. *Id.* at 1022, *Fernandez, supra.*

FIGA preformed its duties in good faith and determined Plaintiff's claim was not a covered claim under its Act. §631.54, Fla. Stat. (1996). Pratt had one (1) year to sue FIGA to enforce his rights. §631.68. Pratt never sued FIGA.

Rather, long after Pratt's right to sue ran, Pratt assigned his rights to the Plaintiff, Petitioner here. The trial court below never addressed the issue of whether the underlying auto accident was a covered claim. It awarded Plaintiff the statutory maximum of $299,900.00, plus interest. On appeal, the First District held that Plaintiff's "claims for damages as alleged, are not covered obligations under the FIGA Act and are barred by FIGA's immunity protection." *Florida Ins. Guar. Ass'n v. Jones*, at 1022. The First DCA relied on *Fernandez v. Florida Ins. Guar. Ass'n*, 393 So.2d 974 (3rd DCA 1980). Petitioner claims jurisdiction here, based on apparent conflict with *Florida Ins. Guar Ass'n v. Giordano*, 485 So.2d 453 (3rd DCA 1986). *Fernandez, Giordano* and this case, are in complete harmony and jurisdiction should be revisited.

Plaintiff seeks to do an end run around FIGA's immunity by suggesting that failure to defend is inaction. Plaintiff argues that FIGA took no action, and, therefore, it's immunity fails. Further, Plaintiff argues that FIGA should be responsible for the entire excess verdict, in violation of the FIGA Act, and every case interpreting the FIGA Act. Plaintiff also argues that it is entitled to interest on the $75,000,000.00 in violation of the FIGA Act and cases interpreting the Act. Plaintiff presents no cognizable claim.

I. WHETHER THE FIRST DISTRICT'S DECISION IN THIS CASE EXPRESSLY AND DIRECTLY CONFLICTS WITH *FERNANDEZ V. FLORIDA INSURANCE GUARANTY ASSOCIATION*, 383 SO. 2D 974 (FLA. 3D DCA 1980) AND/OR *FLORIDA INSURANCE GUARANTY ASSOCIATION V. GIORDANO*, 485 SO. 2D 453 (FLA. 3D DCA 1986)

While this court accepted jurisdiction to hear this appeal, FIGA still believes there is no express or direct conflict with other decisions in the state and suggests that jurisdiction is still lacking. The First District's decision in this case does not expressly and directly conflict with either of the Third District's decisions in *Fernandez v. Florida Insurance Guaranty Association*, 383 So.2d 974 (Fla. 3d DCA 1980) or *Florida Insurance Guaranty Association v. Giordano*, 485 So.2d 453 (Fla. 3d DCA 1986). The decision in this case is in complete harmony with *Fernandez* because, like the situation in this case, in *Fernandez*, the Third District held that under the FIGA Act immunity provisions, no bad faith claims against the Association are cognizable.

Petitioner sought this Court's conflict jurisdiction under Article V, section 3(b)(3) of the Florida Constitution, which provides for discretionary jurisdiction to review the District Court's decision only if the decision "expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law." Art. V, §3(b)(3), Fla. Const. (emphasis

added). To determine whether there is conflict, the Court may only examine "the four corners of the [district court's] majority decision," *see Reaves v. State*, 485 So.2d 829, 830 (Fla. 1986), not the underlying record. Further, the conflict must concern the very same point of law. *Wainwright v. Taylor*, 476 So.2d 669, 670 (Fla. 1985). This is because the true purpose of conflict review is to eliminate inconsistent views about the same question of law. *Id.*

In *Fernandez*, the plaintiff was injured in an automobile accident negligently caused by the insured. When the insured's carrier went bankrupt, the Association took over defense of the lawsuit. After the Association rejected an offer to settle the claim for the policy limits, the plaintiff recovered a jury verdict larger than the policy limits and brought a separate action against the Association to recover the difference between the policy limits and the jury verdict. Plaintiff alleged that the Association itself had been guilty of a bad faith refusal to settle the claim within the policy limits. The trial judge dismissed the complaint with prejudice on the sole ground that, as a matter of law, no such action could be maintained against the Association based on the FIGA Act immunity provisions. The Third District affirmed explaining that the Association's responsibility was a type of vicarious liability in that it took over the duties of the insolvent insurance

companies and even then, only to a limited extent. *Fernandez*, 383 So. 2d at 975. Moreover, the Third District noted, the Associations' own liability was further limited by the immunity provisions set forth in the FIGA act. Id. The Third District explained:

> FIGA is a statutory creature which is designed to serve solely as "the mechanism for the payment of covered claims under certain classes of insurance policies of insurers which have become insolvent." In establishing the institution, however, the legislature was careful to restrict its potential liability not only concerning its vicarious responsibility for the acts of the companies it succeeds . . . but also as to its own allegedly wrongful activities . . . . which is the [issue] before us.

Fernandez, 383 So. 2d at 975 (internal citations and footnotes omitted; emphasis added). After examining the text of the immunity statute,[4] the Third District concluded that the statutes' provision that "no cause of action of any nature" could arise against the Association itself included the bad-faith failure to settle

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[4] The FIGA immunity statutes, section 631.66, Florida Statutes (2002) (emphasis supplied), provides, in pertinent part, as follows:

> There shall be no liability on the part of, and no cause of action of any nature shall arise against, any member insurer, the association or its agents or employees, the board of directors, or the department or its representatives for any action taken by them in the performance of their powers and duties under this part.

claim set forth by the Plaintiff in *Fernandez* and thus, the claim was not cognizable.

The Petitioner in this case attempts to invoke this Court's conflict jurisdiction by asserting that the First District's decision in this case "misapplied" the Third District's decision in *Fernandez*. While the First District's decision in this case concerned a failure to defend claim and the Third District's *Fernandez* decision concerned a failure to settle claim,[5] both decisions were based on the same principle that the Association is statutorily protected against suit for its own allegedly "bad faith" actions based on the broad immunity provisions set forth in the FIGA statute.

Petitioner also attempts to back-up her "misapplication" theory by asserting that the First District in this case should have reversed only a portion of the verdict (the excess judgment) because only the excess judgment portion of the verdict in *Fernandez* was reversed. The reason, however, for this difference in the two decisions is based on a difference in the facts of each case. In

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[5] In insurance law, an improper refusal to defend allegation has been determined to be a "bad faith" claim. See, e.g. *Kelly v. Williams*, 411 So. 2d 902, 904 (Fla. 5th DCA 1982) ("The essence of a 'bad faith' insurance suit . . . is that the insurer breached its duty to its insured by failing to properly or promptly defend the claim, which may encompass its failure to make a good faith offer of settlement within the policy limits, all of which results in the insured being exposed to an excess judgment.") (internal parentheses omitted).

Fernandez, the Association did not contest that the claim was a "covered claim." As specifically set forth in the *Fernandez* decision, the Association accepted the case; assumed responsibility for the defense of it, and paid the limits of the insolvent carrier's policy. Plaintiff *Fernandez*, however, sought more than the limits of the insolvent carrier's policy; she sought an excess judgment against the Association above and beyond the limits of the insolvent carrier's policy for an alleged bad faith refusal to settle before trial. The *Fernandez* court did not preclude the plaintiff from recovery of the limits of the policy because the Association had never contested that amount and recovery of those amounts were not based on the bad-faith theory. In the First District's decision in this case, however, the Association contested the entire award as it had concluded that none of it was covered by the FIGA Act. Further, all of the money awarded by the trial court in this case was based on the alleged bad-faith failure to defend claim. In a nutshell, therefore, the *Fernandez* court allowed the plaintiff to retain the policy limits of $10,000 because coverage was never contested by the Association and that amount was not the basis of the bad faith claim.

The decision in this case is not in express and direct conflict with *Florida Insurance Guaranty Association v. Giordano*, 485 So.2d 453 (Fla. 3d DCA

1986), because both the holding and the facts in *Giordano* are completely distinguishable. The facts in this case showed that the Association had determined that the claim was not a "covered claim" for which the insolvent insurance company was or would have been responsible. In *Giordano*, on the other hand, the Third District specifically stated that neither the insolvent insurance company nor the Association had ever denied that the claim was a "covered claim." *Giordano*, 485 So.2d at 456 ("The statute clearly states that FIGA shall be deemed the insurer to the extent of its obligations of the insolvent insurer. . . [and]. . FIGA did not dispute that the wrongful death action was "covered claim."). The distinction is paramount because the entire basis for the relief granted in *Giordano* was that the Association was vicariously liable for the "covered claim" because it "stood in the shoes" of the insolvent insurance company. *Giordano*, 485 So.2d at 455. In the First District's decision in this case, there was no "covered claim," and thus, no vicarious liability.

In absence of any express and direct conflict, this court should reconsider its decision to accept jurisdiction.

II. THE PLAINTIFF'S CAUSES OF ACTION, WHILE COUCHED IN BREACH OF DUTIES, SOUND IN BAD FAITH AND ARE NOT COGNIZABLE.

"FIGA is a statutory creature which is designed to serve solely as the 'mechanism for the payment of covered claims under certain classes of insurance policies of insurers which have become insolvent.' § 631.51, Fla. Stat." *Fernandez v. Florida Ins. Guaranty Ass'n*, 383 So. 2d 974, 975 (Fla. 3d DCA 1980) A "covered claim" is defined at Section 631.54(4) as "an unpaid claim…which arises out of, and is within the coverage, and not in excess of, the applicable limits" of the Dealers insurance policy which provided coverage for garage operations in the amount of $25,000.00.

Section 631.57(1)(a)2 provides that the obligation for covered claims "shall include that amount for each covered claim which is in excess of $100 and is less than $300,000.00…." This provision, which requires reference to the definition of "covered claim" at Section 631.54(4), is clear and unambiguous. FIGA is charged with paying properly presented "covered claims" up to the applicable limits of the underlying insurance policy. However, Section 631.57(1)(a)2 limits the liability to $300.000.00, should the insurance policy limits in question exceed that amount.

Jones, as assignee of Michael Pratt, contends that the statutory limits on the amounts for which FIGA may be liable do not apply in this case because it alleges FIGA did not perform its statutory duties, and instead, refused to perform its duties. Section 631.66 provides the unequivocal and unambiguous response to that contention:

> There shall be no liability on the part of, and no cause of action of any nature shall arise against, any member insurer, the association or its agents or employees, the board of directors, or the department or its representative for any action taken by them in the performance of their powers and duties under this part.

In *Fernandez v. Florida Insurance Guaranty Assoc., Inc.,* 383 So. 2d 974 (Fla. 3d DCA 1980), *pet. denied,* 389 So. 2d 1109 (Fla. 1980), FIGA rejected an offer to settle the claim for $10,000.00. The plaintiff obtained a verdict in the amount of $54,000.00. The insured then brought an action against FIGA, alleging that FIGA had been guilty of bad faith in its refusal to settle the claim within the policy limits. The trial judge dismissed the action with prejudice on the sole ground that no such action may be maintained against FIGA. Citing section 631.66, the court held:

> This provision clearly, unambiguously, and directly applies to the present situation. It is obvious that the present claim arises from FIGA's refusal to accept the $10,000 settlement offer which was an

> 'action' it took 'in the performance of (its) powers and duties' under the statute to dispose of the covered claim in question. An application of the plain terms of § 631.66, which neither require nor permit judicial construction, therefore compels the conclusion that no bad faith action lies against FIGA.

Both the statute and the opinion in *Fernandez* "clearly, unambiguously, and directly" apply to this case as well. *See also Florida Ins. Guaranty Assoc. v. Giordano,* 485 So. 2d 453, 457 (Fla. 3d DCA 1986); *Rivera v. Southern Am. Fire Ins. Co.,* 361 So. 2d 193 (Fla. 3d DCA 1978).

The only authority offered by Petitioner in support of her theory that FIGA should be liable for its alleged failure to perform its statutory duties is the opinion in *Washington Ins. Guar. Ass=n. v. Ramsey*, 922 P. 2d 237 (Alaska 1996). The Alaska Supreme Court is at odds with all other jurisdictions that have rendered an opinion on the issue of the direct liability of an insurance guarantee association. In fact, that court considered, among other opinions, *Fernandez, supra*. The *Ramsey* court, in analyzing the *Fernandez* case, felt it was Aunclear from the opinion whether the suit was brought in contract, in tort, or as a statutory action.@ *Ramsey* at 246. AAnd if the suit was brought to enforce FIGA=s statutory obligations, we think that the Florida court misinterpreted the immunity provision by ruling that FIGA was immune from the suit.@ *Id.*

The *Fernandez* court did not engage in a discussion of whether the action was Abrought in contract, in tort, or as a statutory action@ because there is no viable claim under any of these theories. The *Ramsey* court used a large broom to sweep aside the opinions in all other jurisdictions that had considered this issue.

In *Ramsey,* the Alaska Supreme Court was interpreting the State of Washington=s insurance guaranty fund statute. The *Ramsey* court rejected the decisions of the Washington Supreme Court and intermediate appellate court interpreting the immunity provisions of the Washington statute. *Id.* at 245. *Vaughn v. Vaughn*, 23 Wash. App. 527, 597 P. 2d 932 (Wash. App. 1979), *Evans v. Continental Casualty Co.*, 40 Wash. 2d 614, 245 P. 2d 470 (Wash. 1952), *Murray v. Mossman*, 56 Wash. 2d 909, 355 P. 2d 985 (Wash. 1060), and *Hamilton v. State Farm Ins.*, 83 Wash. 2d 787, 523 P. 2d 193 (Wash. 1974). Disregarding the *Vaughn* decision, the *Ramsey* court noted, AInterestingly, the court did not consider the immunity provision of the act, but instead reasoned that such a tort would not be a >covered claim= with the meaning@ of the Washington statute. Because the *Vaughn* decision did not consider contract or statutory claims against the guaranty fund, the Alaska court reasoned that the door

had been left open for them to find liability under the statutory theory. The only case cited by the *Ramsey* court to support this theory was *Isaacson v. Calif. Ins. Guar. Ass=n*, 44 Cal. 3d 775, 750 P. 2d 297 (Calf. Sup. Ct. 1988), which held there may be liability where there is no denial that a covered claim exists, a judgment in excess of the statutory limit is likely and the association refuses to settle within the statutory limits. The association Amay thereby become liable to the insured for reimbursement if the insured expends his own funds to settle, within the statutory limit.@ *Id.* at 792.

Isaacson held that where the association breached its duty to settle a Acovered claim@ within the statutory limits and the insolvent=s insured seeks reimbursement for settling the case with his own funds, the recovery is limited to the statutory limits. Significantly, the California Supreme Court denied recovery. A[R]eimbursement required proof that CIGA failed to accept a reasonable settlement offer on a >covered claim,= a fact the plaintiffs failed to establish.@ *Id.* at 793.

Respectfully, in staking out its lonely territory on the statutory theory, the *Ramsey* court missed the critical point in all the cases that have considered the various theories urging direct liability of guaranty associations. Guaranty

associations, created by the Uniform Statute, are statutory creatures Adesigned to serve solely as >the mechanism for the payment of covered claims under certain classes of insurance policies of insurers, which have become insolvent.=@ *Fernandez* at 245, quoting *O=Malley v. Florida Ins. Guar. Ass=n*, 257 So. 2d 9, 10 (Fla. 1971). What is lacking in the *Ramsey* analysis, but present either expressly or implicitly in all of the other cases rejected by that court, is the function and purpose of the Uniform Act, as enacted in most states. In addition to its rejection of the opinions from the State of Washington and *Fernandez* case, the *Ramsey* court expressly found unpersuasive the opinions in *Veillon v. Louisiana Ins. Guar. Ass=n*, 608 So. 2d 670 (La. App. 3 Cir. 1992); *Schreffler v. Pa. Ins. Guar. Ass=n*, 586 A. 2d 983 (Pa. Super. 1991); and *T & N PLC v. Pennsylvania Ins. Guar. Ass=n*, 800 F. Supp. 1259 (E.D. Penn. 1992).

Some important aspects of the *Ramsey* decision must be considered. First, *Ramsey* does not provide authority for the theory espoused by Pratt. There was no claim for an amount in excess of the statutory limits. The underlying case was a negligence action. The Washington Insurance Guaranty Association undertook the defense of the claim, assigned an independent contractor to serve as the claims manager on the claim, and assigned a law firm to represent the defendants

in the action. When the association failed to settle the claim within the statutory limits, the parties agreed to a consent judgment for an amount equal to the maximum claim permitted under the statute. The defendants assigned their action for reimbursement to the plaintiff. *Id.* at239.

As have all other courts that have examined aspects of the duties and liabilities insurance guaranty associations, the *Ramsey* court disposed of the threshold issue. AWIGA does not assert that the claim in the case at bar is uncovered.@ *Id.* at 243, footnote 22.

Petitioner contends that FIGA should be liable for $75,000,000.00, plus interest, from the date of the entry of judgment against Pratt because FIGA breached or failed in its statutory duty to settle a claim. Petitioner claims the statute only affords immunity for the performance of its duties and powers. The language of the statute cannot be read to have such a narrow intent. Further, in *Fernandez* such a theory was rejected. An essential aspect of handling claims is to determine which claims should or should not be paid. See *Fernandez* at 975. The same contention was made in *T&N PLC v. Pennsylvania Ins. Guar. Ass=n*, 800 F. Supp. 1259,1264 (E.D. PA 1992):

> T&N alleges that PIGA has failed to investigate, pay, or settle, an alleged covered claim, and has failed to advise T&N of purported

> claims procedures. Taken together, however, these allegations are undeniably part of PIGA=s statutory powers and duties to adjust, handle, and pay covered claims while denying all others. Moreover, to date, PIGA has taken the position that it is statutorily barred from paying T&N=s claims because T&N=s claims are not covered claims. Although, we have previously held that the settlement agreement >arises= under the terms of an insurance policy, pending further discovery, we were unable to make a dispositive finding of whether or not T&N has satisfied the remaining requirements of a covered claim, including the residency requirement. Until such time as we can make such a finding, PIGA=s refusal to pay out on these claims clearly amounts to actions not only taken but also required by PIGA in the performance of its duties under the Insurance Guaranty Act.

The issue of direct liability was carefully analyzed in *Bills v. Arizona Prop. & Cas. Ins. Guar. Fund*, 194 Arz. 488, 494, 984 P. 2d 574 (App. 1999). The Arizona court considered the intent and purpose of the statute, including the method of funding the association to pay covered claims through assessments. The reasoning in *Ramsey* was expressly rejected. In *Bills* the plaintiff sought damages against the fund for an amount in excess of the statutory limits. The Arizona court found that the damages sought by the plaintiff was contrary to the provisions of the statute. AStatutorily limiting the Fund=s liability to the payment of >covered claims,= . . . is neither arbitrary nor irrational. That limitation rationally furthers the state=s legitimate interest in preserving the Fund=s financial integrity.@ *Id*. at 499.

Petitioner argues that she does not present a bad faith claim. She contends that her cause of action is for the damages to Pratt resulting from the breach of its statutory duties. Pratt's assignee here, attempts to assign a new label to a well-recognized cause of action. In *Florida Ins. Guar. Ass'n v. Giordano,* 485 So. 2d 453, 457 (Fla. 3rd DCA 1986), a similar effort was rejected. "The allegations of this count, though couched in the language of tort and constitutional law, still make out an action for bad faith against FIGA." The language of section 631.66 is clear. "There shall be no liability on the part of, and no cause of action of any nature shall arise against [FIGA] for any action taken by them in the performance of their powers and duties under this part."

A. FIGA INVESTIGATED THE CLAIM AND MADE A GOOD FAITH DETERMINATION THAT IT WAS NOT A COVERED CLAIM UNDER THE ACT.

FIGA was created by Ch. 70-20, Laws of Florida 1970, which appears as sections 631.51 through 631.70, Fla.Stat. ("FIGA statute") The Florida Supreme Court, in ruling the act to be constitutional, found that FIGA is "a public corporation of statewide authority created for public purposes relevantly connected with the administration of government." *O'Malley v. Florida Insurance Guaranty Assoc.*, 257 So. 2d 9, 11 (Fla. 1971). To achieve its legislatively declared function as a 'mechanism' to aid and benefit numerous citizens who have suffered loss of insurance protection because of the insolvency of their insurers, the legislature established strict rules regarding what constitutes a covered claim, how a claim may be brought, the amount that may be paid on any claim, and the types of claims that may be paid. §§ 631.54. 631.57, 631.66 and 631.68, Fla.Stat. In its rejection of constitutional attacks on these limitations, the Third District Court of Appeal held:

> [A]bsent Chapter 631, FIGA would not exist and there would be no effective remedy to recover on any claims whatever against insolvent

> insurers, there can be no constitutional infirmity in the legislature's decision to limit those newly-created rights and, in effect, not to establish a new one.

Fernandez v. Florida Insurance Guaranty Ass'n, Inc., 383 So. 2d 974, 976 (Fla. 3d DCA 1980), *rev. denied,* 389 So. 2d 1109 (Fla. 1980); *Queen v. Clearwater Electric, Inc.,* 555 So. 2d 1262, 1265 (Fla. 2d DCA 1989); and *Blizzard v. W.H. Roof Co., Inc*., 573 So. 2d 334 (Fla. 1991).

To achieve this purpose, the legislature provided very specific limitations on what may be considered a claim under this plan. Section 631.54(3) does not define a "covered claim" as any claim defined by the underlying insurance contract, rather it includes a detailed definition of what a "covered claim" is for purposes of the act. Section 631.57 provides:

> (1) The association shall:
> (a) 1. Be obligated to the extent of the covered claims existing:
> 1. Prior to the adjudication of insolvency and arising within 30 days after the determination of insolvency;
> 2. Before the policy expiration date if less than 30 days after the determination; or
> 3. Before the insured replaces the policy or causes its cancellation, if she or he does so within 30 days of the determination.

Two issues concerning whether the auto accident was a covered claim under the policy shall be considered in detail in this subsection. First, the issue of whether material misrepresentations or omissions on the application for the insurance policy voided the policy, *ab initio*, was before the trial court. Second, it was also contended that Pratt breached the insurance contract by failing to cooperate in the defense of the claim. The failure to cooperate compounded obvious issues raised by the circumstances of the accident, including (1) the ownership of the vehicle: (2) whether the vehicle was being used in garage operations, as it was being used in the commission of a felony at the time of the accident; and, (3) whether the driver was authorized to operate the vehicle. These factual disputes placed at issue whether the incident was "within the coverage" of the underlying policy. Each of these general categories contained numerous factual issues that required resolution.

1. Material Misrepresentations or Omissions

The issue of the validity of the underlying policy was raised below on the basis that the insured made material misrepresentations on the application for the underlying insurance coverage. A covered claim must arise out of an underlying policy. § 631.54(3), Fla.Stat. If recovery under an insurance policy would have

been precluded either because the misrepresentation materially affects the acceptance of risk or the insurer would not have issued the policy under the same terms had it known the true facts, the claim cannot be a covered claim. *Continental Assurance Co. v. Carroll*, 485 So. 2d 406, 407 (Fla. 1986); *Life Insurance Co. v.Shifflet*, 201 So. 2d 715 (Fla. 1967). Both the FIGA adjuster assigned to this case, and his supervisor, testified that the misrepresentations on the application of Pratt in obtaining the underlying policy could have materially affected the acceptance of the risk and could have altered the terms of the policy, or could have prevented the issuance of the policy.

Jones, as assignee of Pratt, contends that because FIGA has not returned the premium, FIGA is estopped to deny the contract. That argument misstates the relationship of FIGA to Pratt. FIGA never received a premium from Pratt. FIGA had no privity with Pratt. Section 631.50, *et seq.*, designates FIGA as the entity to carry out the public policy defined in that statute. *Zinke-Smith, Inc. v. Florida Ins. Guar Ass'n*, 304 So.2d 507 (4th DCA 1974). Equitable principles are not applicable. The entity that received the premium is insolvent. It has ceased to exist by operation of law. What is left is a factual determination by FIGA mandated by the statute, which created the Association. Unless it is determined that this was a

covered claim, as defined by Section 631.54(3), the powers and duties created by Section 631.57 cannot be exercised. The trial court below did not make that determination; therefore, there is no basis for the award of benefits under the statute.

Section 627.409, Florida Statutes, provides that misrepresentations, omissions, concealment of facts, and incorrect statements on an insurance application shall not prevent recovery under the policy unless they are either: (1) fraudulent; (2) material to the risk being assumed; or (3) the insurer in good faith either would not have issued the policy or would have done so only on different terms had the insurer known the true facts. The persons handling this claim had raised factual issues concerning material misrepresentations or omission that affected the risk assumed. FIGA contends that these misrepresentations or omissions would have affected the decisions made by the underwriters for the insolvent insurer regarding whether to accept the risk at all or to assume the risk under different contractual terms. *See Continental Assurance Co. v. Carroll,* 485 So. 2d 406 (Fla. 1986). Whether the underlying policy was void or voidable is an issue of fact. Substantial issues concerning the whether this was a covered claim

in the underlying policy were before the court. *Elmore v. Vatrano*, 485 So. 2d 888 (Fla. 1st DCA 1986.

2. Failure to Cooperate

Part VII of the Garage Policy of Insurance issued by Dealers Insurance Company set forth the duties of the insured after an accident or loss. Under the contract, the insured must, "Cooperate with us in the investigation, settlement or defense of any claim or suit." *See also* §631.60(1), Florida Statutes. Pratt breached this provision. To constitute a material breach of the insurance contract, "the lack of cooperation must be material and the insurance company must show that it was substantially prejudiced in the particular case by a failure to cooperate. Furthermore . . . the insurer must show that it has exercised diligence and good faith in bringing about the cooperation of its insured…." *Ramos v. Northwestern Mutual Ins. Co.*, 336 So. 2d 71, 75 (Fla. 1976); *see also Bankers Ins. Co. v. Macias,* 475 So. 2d 1216 (Fla. 1985); *Bontempo v. State Farm,* 604 So. 2d 28 (Fla. 4th DCA 1992); and *Rustia v. Prudential Propty. & Cas. Ins. Co.*, 440 So. 2d 1316 (Fla. 3rd DCA 1983). Pratt failed to respond to requests from FIGA to assist in the defense. The supervisor and the adjuster assigned to handle this claim testified that the failure to cooperate in the defense was total. Without the

cooperation of the insured, information regarding the status of the vehicle involved in the accident, the status of the driver of the vehicle at the time of the accident, information about witnesses, and other essential elements in the defense of the claim were difficult or impossible to obtain. The facts that were available to FIGA raised significant questions concerning liability.

B. PRATT FAILED TO PRESENT HIS CLAIM WITHIN THE TIME LIMITS OF SECTIONS 631.68 AND 95.11(5)(d), FLA.STAT., THEREFORE THE CLAIM IS BARRED

The Florida Legislature, as noted above, created FIGA to carry out a specific public purpose. But for the creation of FIGA, there would be no effective remedy where an insurance carrier becomes insolvent. *Fernandez, supra*

A necessary and vital part of the legislative plan to protect the insured and claimants of an insolvent insurer is the strict limitation of the time when a claim may be filed. As defined by Section 631.57(1), quoted above, claims that did not exist during the times designated by the statute are not covered claims. If the claim did exist during the timeframe so defined, then the legislature has prescribed the time such a claim may be tendered to FIGA, Section 631.68:

> A covered claim as defined herein with respect to which settlement is not effected and suit is not instituted against the insured of an insolvent insurer or the association within 1 year after the deadline for filing claims, or any

> extension thereof, with the receiver of the insolvent insurer shall thenceforth be barred as a claim against the association and the insured.

Section 95.11(5)(d), Fla.Stat. was enacted to conform to those limitations, prohibiting the filing of an action against FIGA after the one-year deadline. The order of Judge Steinmeyer, entered December 19, 1994, set October 1, 1995 as the deadline for all claims to be filed with the receiver. Thus the limitation period for filing claims against FIGA arising from the Dealers policies expired on October 1, 1996. The claim in this case was not filed until September 11, 1998. These dates are not in dispute.

"The requirement in the statute that a claim such as [this] be presented to the receiver, FIGA, before the deadline evinces the legislature's intent to provide a cutoff date subsequent to which FIGA is no longer obligated to accept claims." *Florida Ins. Guaranty Assoc. v. Garcia*, 614 So. 2d 684, 686 (Fla. 2d DCA 1993). Recognizing the public purpose of FIGA, the *Garcia* court observed: "In sum, we embrace the view expressed in other jurisdictions that the allowance of delinquent claims unduly prolongs the distribution of an insolvent insurer's assets to the detriment of other claimants and prejudices the right of the guaranty association to seek recovery in any subsequent liquidation." *Id.* One of the

opinions cited with approval in the *Garcia* opinion, *Satellite Bowl, Inc. v. Michigan Prop. & Cas. Guaranty Assoc.*, 165 Mich App. 768, 772; 419 N.W. 2d 460, 462 (1988), expressed the rationale for the limitation:

> There must be reasonable limits to the association's liability and finality to the liquidation proceedings. Under the act, a claimant assigns its rights against the insolvent insurer to the association…. The association is authorized to seek reimbursement from the insolvent insurer's estate. It is important, therefore, to the statutory scheme that the association be able to recover as much of the claim as possible from the insolvent insurer's estate. Thus, the association is obligated under the act to accept only claims timely filed which entitle it to participate in the liquidation proceedings.

As in Michigan, the Florida statute provides that "a person recovering under this part shall be deemed to have assigned her or his rights under the policy to the association to the extent of the person's recovery from the association…." § 631.60(1), Fla.Stat. Florida Statutes 631.68 and 95.11(5)(d) have been reviewed on several occasions and held to be constitutional. *Blizzard v. W.H. Roof Co., Inc., supra*, where the Court adopted as its own the opinion of the District Court, *Blizzard* v. *W.H. Roof Co., Inc.*, 556 So. 2d 1237 (Fla. 5th DCA 1990); *Fernandez v. Fla. Ins. Guaranty Assoc.*, 383 So. 2d 974, 976 (Fla. 3d DCA 1980), *rev. denied*, 389 So. 2d 1109 (Fla. 1980).

There is no genuine issue of material fact on the issue of when this claim was filed. Michael Pratt did not file a claim with the receiver within the time limitations set by the statutes and the order of Judge Steinmeyer. The Plaintiff, Petitioner here, has brought this action as the assignee of Michael Pratt. In that capacity, the assignment transferred to the assignee all the interests and rights of the assignor in the thing assigned. The assignee steps in to the shoes of the assignor and is subject to all equities and defenses that could have been asserted against the assignor had the assignment not been made. *Dove v. McCormick,* 698 So. 2d 585 (Fla. 5th DCA 1997); *State v. Family Bank of Hallandale,* 667 So. 2d 257 (Fla. 1st DCA 1995).

Michael Pratt did not timely file a claim with FIGA. The assignment of his claim to Jones did not change the fact that the claim is barred by operation of law.

C. THE AWARD OF INTEREST SOUGHT BY PLAINTIFF ON THE JUDGMENT ENTERED IN *JONES V. GILLIAM* IS PROHIBITED BY SECTION 631.57(1), FLA.STAT.

Section 631.57(1) provides "The association shall:

> (b) Be deemed the insurer to the extent of its obligations on the covered claims, and, to such extent, shall have all the rights, duties, and obligations of the insolvent insurer as if the insurer had not become insolvent. **In no event shall the association be liable for any penalties or interest.** (emphasis added).

This statutory language is clear and unequivocal. The plain meaning of this language is not in doubt. No judicial interpretation of this language is necessary or permitted. *Heredia v. Allstate Ins. Co.*, 358 So. 2d 1353, 1355 (Fla. 1978) Where FIGA is a party to the suit, and the judgment is entered against FIGA, then post-judgment interest may be imposed in compliance with Section 55.03, Fla.Stat. *Florida Ins. Guaranty Assoc. v. Gustinger*, 390 So. 2d 420 (Fla. 3d DCA 1980) involved an order by a judge of industrial claims ("JIC") awarding an attorney's fee to a claimant's attorney. The order was affirmed by the Industrial Relations Commission ("IRC") and appellate attorney's fees were awarded. Approximately three weeks after the IRC ruling, the Department of Insurance was appointed ancillary receiver for the insurance carrier. A petition was then filed in the circuit court seeking a rule nisi for the enforcement against the employer/carrier and FIGA, as statutory successor of the carrier, of the orders awarding fees. The trial judge entered final judgment for the plaintiffs against FIGA for the fees, plus interest from the date of the awards. Reversing the award of interest, the court held:

> Sec. 631.57(1)(b), Fla.Stat. (1979), clearly states that "(i)n no event shall the association be liable for any penalties or interest." Applying this unambiguous statutory language, see, *Fernandez v. Florida Insurance Guaranty Association, Inc.*, 383 So. 2d 974 (Fla. 3d DCA 1980), we strike the allowance of interest on compensation

> fee awards from the dates of their entry to the date of the final judgment [by the circuit court].
> *Id.* at 421.

Three other cases have addressed this issue. In *Trivoli Amusement Co. v. Rodreguez, 413 So. 2d 163 (Fla. 1st DCA 1982),* an award of interest by the deputy commissioner was reversed. In *Carballo v. Warren Mfg. Co.*, 407 So. 2d 603, 607 (Fla. 1st DCA 1982) the court held that FIGA could not be held liable for interest on compensation benefits prior to the entry of final judgment against FIGA. The remaining case, dealing with interest, involved an action for unearned premiums. The court denied interest prior to judgment against FIGA. *NCNB Nat. Bank v. Fla. Ins. Guar. Ass'n*, 541 So. 2d 728 (Fla. 1st DCA 1989). These cases offer little analysis. The common denominator, however, is the entry of a judgment against FIGA, as a party to the action. That is not the case here. The action in *Jones v. Gilliam* was brought against Pratt. The clear and unequivocal language of Section 631.57(1)(b), Fla.Stat. prohibits the award of interest. An award of prejudgment interest is contrary to the prohibition of the statute.

CONCLUSION

Petitioner argues that the First District's opinion in *Florida Ins. Guar. Ass'n. v. Jones*, conflicts with *Fernandez* and *Giordano*. It does not, and jurisdiction should be rejected. Jones presents no cognizable claims to this court for the following reasons. All claims sound in bad faith. The underlying auto accident was not a covered claim. FIGA acted in good faith investigating the claim. Pratt failed to timely sue FIGA. The provisions of section 631.66, 631.54(3) and 631.57 are clear and unequivocal. FIGA is only obligated for covered claims and Ano cause of action of any nature shall arise against@ FIGA for actions taken by it in the performance of its powers and duties. Petitioner's request for a judgment of $75,000,000.00 fails in the face of the clear and unambiguous language of the statute. Section 631.57(1)(b) prohibits the award of prejudgment interest against FIGA. There is no other authority to support a claim for prejudgment interest. The issues raised by Petitioner in her appeal are contrary the to the clear and unambiguous language of the statute. FIGA respectfully urges the issues raised on appeal be denied.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the foregoing Respondents' Answer Brief on the Merits has been furnished by U.S. Mail to George A. Vaka, Esquire, at Vaka, Larson & Johnson, P.L., 777 S. Harbour Island Boulevard, Suite 300, Tampa, FL 33602, this _____ day of March 2004.

_____
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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that Respondents' Answer Brief on the Merits is submitted in Times New Roman 14-point font, as set forth in Florida Rule of Appellate Procedure 9.210.

_____
RICHARD BURTON BUSH