IN THE
Supreme Court of Florida
Case No. SC10-2097
Lower Tribunal Nos.: 2D09-3749
04-2449CA

DIANE PETTY and KEVIN FARMER,

Petitioners,

v.

FLORIDA INSURANCE GUARANTY ASSOCIATION

Respondent.

BRIEF *AMICUS CURIAE* OF THE FLORIDA DEPARTMENT OF FINANCIAL SERVICES IN SUPPORT OF RESPONDENT

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STATEMENT OF INTEREST

The Florida Department of Financial Services (FLDFS) hereby files this brief in support of the Respondent, the Florida Insurance Guaranty Association (FIGA). Pursuant to Chapter 631, Florida Statutes, the FLDFS is appointed by the Circuit Court of the Second Judicial Circuit Court in and for Leon County, Florida as receiver of insurance companies that are placed into receivership in Florida. The Department's Division of Rehabilitation and Liquidation handles the operations of Florida insurance company receivership estates. The receivership process is similar to bankruptcy proceedings and is governed by Chapter 631, Florida Statutes. In a typical receivership, the receiver marshals the assets of the company, adjudicates the claims, and makes distributions to claimants pursuant to a statutory distribution scheme. Because FIGA has a class 2 claim in the estate of an insolvent insurer, the Court's decision in the instant case will affect the FLDFS in its role as a receiver of insolvent insurance companies. Accordingly, the FLDFS has a vested interest in the outcome of this matter.

SUMMARY OF ARGUMENT

Petitioner seeks to have her section 627.428 claim for attorney's fees against a now-insolvent insurer paid by the guaranty association, FIGA, as a "covered claim" under section 631.54(3). In addition to the arguments made by FIGA, this court should affirm the decision of the Second District Court of Appeal because the inclusion of a section 627.428 claim for attorney's fees as a "covered claim" under section 631.54(3) would alter the statutory distribution scheme for insurance company receiverships, thus leading to a dilution of the funds available in the insolvent insurer's estate to distribute to the other claimants. Also, the inclusion of a section 627.428 claim for attorney's fees as a "covered claim" under section 631.54(3) could lead to a violation of the Federal Priority in Claims Act and additional expenses or even personal liability for the receiver. Furthermore, section 627.428 is a penalty statute meant to ensure that insurance companies do not wrongfully resort to litigation to resolve disputes with policyholders. A penalty statute has no meaning in relation to a defunct company. Allowing section 627.428 claims for attorney's fees as "covered claims" under section 631.54(3) will not have any effect on the operations of a troubled insurance company. It will, however, alter the statutory distribution scheme for insurance company receiverships.

ARGUMENT

I. THE INCLUSION OF A SECTION 627.428 CLAIM FOR ATTORNEY'S FEES AS A "COVERED CLAIM" UNDER SECTION 631.54(3) WOULD ALTER THE STATUTORY DISTRIBUTION SCHEME FOR INSURANCE COMPANY RECEIVERSHIPS, THUS LEADING TO A DILUTION OF THE FUNDS AVAILABLE IN THE INSOLVENT INSURER'S ESTATE AVAILABLE TO DISTRUBUTE TO THE OTHER CLAIMANTS IN THE ESTATE.

Insurance company receiverships in Florida are governed by Chapter 631, Florida Statutes. When a company is placed into liquidation, the Second Judicial Circuit Court in and for Leon County, Florida appoints the FLDFS as receiver. The receiver is responsible for the day to day operations of the insurance company estate including marshalling assets, collecting and adjudicating claims and making distributions. FIGA is an entirely separate entity from FLDFS and the receiver. FIGA is also governed by Chapter 631. When a property and casualty company in Florida is declared insolvent, FIGA generally steps in to pay "covered claims" pursuant to their statutes. FIGA then has a claim in the estate of the insolvent insurer for the amount of the claims and the claims handling expenses.

The receiver pays claims pursuant to a strict priority of claims schedule contained in section 631.271, Florida Statutes. The priority schedule is comprised of ten classes of claims. The receiver starts paying claims at class 1 and moves through the classes in numerical order. The receiver has to pay (or retain adequate funds to pay) every claim in each class before moving to the next class. FIGA's

expenses in handling claims are a class 1 claim. The remainder of FIGA's claim against the estate of an insolvent insurer is a class 2 claim. The claims of policyholders under their policy for losses incurred are also class 2 claims. Claims like the Petitioners' for attorney's fees are considered a class 6 claim unless the claim is based upon explicit language in the insurance policy. However, if the court rules that a section 627.428 claim for attorney's fees is a "covered claim" under section 631.54(3) and FIGA pays the claim, FIGA will appropriately include that amount in its class 2 claim against the estate of the insolvent insurer. The 627.428 claim for attorney's fees will have been effectively elevated from a class 6 claim to a class 2 claim.

The distinction between a class 6 claim and a class 2 claim is important because in almost all insurance company receivership estates, the assets in the estate are not sufficient to pay all of the claims. Obviously, if the receiver commits more money to pay the increased FIGA claim at class 2, that money is not available to pay the other class 2 claims, the legitimate claims for unearned premium or claims of the Federal government, employees or general creditors. Because insurance companies that are nearing insolvency often deny legitimate claims and become involved in litigation, this change has the potential to fundamentally shift the balance of claims payments in property and casualty insurance company receivership estates in Florida.

II. THE INCLUSION OF A SECTION 627.428 CLAIM FOR ATTORNEY'S FEES AS A "COVERED CLAIM" UNDER SECTION 631.54(3) COULD LEAD TO A VIOLATION OF THE FEDERAL PRIORITY IN CLAIMS ACT (31 U.S.C. SECTION 3713) AND ADDITIONAL EXPENSES FOR THE RECEIVER.

The Federal Priority in Claims Act (31 U.S.C. Section 3713) gives the United States first priority for claims in insolvency cases that are not covered by Title 11 of the Federal Bankruptcy Code. The McCarren-Ferguson Act (15 U.S.C. Section 101 et. Seq.) delegates the principal responsibility for the regulation of the business of insurance to the states. In United States Department of Treasury v. Fabe, 508 U.S. 491 (1993), the Supreme Court examined the interplay between the Federal Priority in Claims Act and the McCarren-Ferguson Act. The Court determined that state laws enacted for the purpose of regulating the business of insurance take precedence over the Federal Priority in Claims Act. The Court ruled that state statutes giving priority to the claims of policyholders and administrative expenses were enacted for the purpose of regulating the business of insurance, but statutes giving priority to the claims of employees and general creditors were not. Therefore, claims of the United States in an insurance company receivership estate have a priority above all other claims except policyholder level claims and administrative expenses.

As explained above, including a section 627.428 claim for attorney's fees as a policyholder claim will effectively elevate the claim in an insurance company

receivership from class 6 to class 2, bypassing the claims of the Federal government at class 4. The Federal government has taken the position that a receiver that makes a distribution of assets to a lower class of claimants is personally liable in the event that the Federal government should later assert a claim and there are no assets available for distribution. The inclusion of a section 627.428 claim for attorney's fees as a "covered claim" under section 631.54(3) could lead to a violation of the Federal Priority in Claims Act and additional expenses or even personal liability for the receiver.

III. SECTION 627.428 IS A PENALTY STATUTE MEANT TO ENSURE INSURANCE COMPANIES DO NOT WRONGFULLY RESORT TO LITIGATION TO RESOLVE DISPUTES WITH POLICYHOLDERS. REQUIRING FIGA TO PAY A PENALTY IMPOSED ON AN INSOLVENT INSURER WILL SUBVERT THE STATUTORY SCHEME FOR CLAIMS PRIORITY IN THE RECEIVERSHIP ESTATE OF THE INSOLVENT INSURER.

In the underlying case, the Second District Court noted that "[t]he award of fees under section 627.428 acts 'as a penalty to discourage wrongful refusals to pay policy benefits.'" *Florida Insurance Guaranty Association v. Petty*, 44 So.3d 1191, 1193 (Fla. 2d DCA 2010) citing *Liberty Nat'l Life Ins. Co. v. Bailey ex rel. Bailey*, 944 So. 2d 1028, 1030 (Fla. 2d DCA 2006). As the Respondent points out, FIGA is not required to pay penalties. 631.57(1)(4)(b), Florida Statutes; see also, *Fla. Ins. Guaranty Ass'n v. Gustinger*, 390 So.2d 420 (Fla. 3rd DCA 1980). As discussed above, insolvent insurance companies often operate in a manner that can

lead to the award of section 627.428 fees in the months prior to being placed into receivership. If that activity is used to inflate the policyholder claims against FIGA through an expansion of the term "covered claim," the net result will be to subvert the statutory scheme for claims priority. A claim that should be a class 6 claim will be elevated to a class 2 claim in the receivership estate. Money spent on the class 2 claim for 627.428 attorney's fees will not be available to pay the other class 2 claims or the class 3-6 claims. The end result is essentially a fundamental rewrite of section 631.271, F.S. and the underlying purpose of 627.428 will not be accomplished because the offending company no longer exists.

CONCLUSION

For the foregoing reasons, FLDFS asks this Court to affirm the Second District Court's decision in this matter.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing brief *amici curiae* was sent via U.S. mail on May 2, 2011 to: **Bob G. Freemon** and **Ron A. Hobgood**, Freemon & Miller, P.A., 8381 Gunn Hwy, Tampa, Florida 33626, Attorney for Petitioners; **Bryan S. Gowdy** and **Jessie L. Harrell,** Creed & Gowdy, P.A., 865 May Street, Jacksonville, FL 32204, Attorneys for Petitioners; **Betsy E. Gallagher,** Kubicki Draper, P.A., One Tampa City Center, 201 N. Franklin St., Suite 2550, Tampa, Florida 33602, Co-Counsel for Respondent; **Dorothy V. DiFiore,** Haas, Lewis, DiFiore & Amos, P.A., Post Office Box 23567, Tampa, Florida 33623, Co-Counsel for Respondent; **Michael C. Clarke**, Kubicki Draper, P.A., 201 North Franklin Street, Suite 2550, Tampa, FL 33602, Counsel for Respondent; **Alan S. Wachs**, **Chris T. Harris** and **Michael M. Giel,** Volpe, Bajalia, Wickes, Rogerson & Wachs, P.A., 501 Riverside Avenue, 7th Floor, Jacksonville, Florida 32207, Attorneys for Amici Curiae William Sturdivant and Annette Sturdivant in Support of Petitioners; **Jeffrey M. Liggio** and **Liggio Benrubi,** 1615 Forum Place, Suite 3B, West Palm Beach, FL 33401, Counsel for the Florida Justice Association as Amicus Curiae; and **Perry Tanksley**, P.O. Box 249, Sarasota, FL 34230, Counsel for the Florida Justice Association as Amicus Curiae.

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the font requirements set forth in Rule 9.210(a)(2), Florida Rules of Appellate Procedure, and that I have complied with AOSC04-84 by submitting an electronic copy as set forth therein.

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ERIC S. SCOTT