IN THE SUPREME COURT OF FLORIDA

DIANE PETTY and KEVIN FARMER,

Petitioners, Case No. SC10-2097

v.

FLORIDA INSURANCE GUARANTY ASSOCIATION,

Respondent.

AMICUS CURIAE BRIEF OF THE NATIONAL CONFERENCE OF INSURANCE GUARANTY FUNDS (IN SUPPORT OF RESPONDENT FLORIDA INSURANCE GUARANTY ASSOCIATION)

ON APPEAL FROM THE
SECOND DISTRICT COURT OF APPEAL OF FLORIDA

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IDENTITY OF *AMICUS CURIAE* AND ITS INTEREST IN THE CASE

The National Conference of Insurance Guaranty Funds (the "NCIGF"), by its undersigned attorneys, offers the following as its *amicus curiae* brief, pursuant to Rule 9.370 of the Florida Rules of Appellate Procedure and the Court's April 19, 2011 Order.

The NCIGF is a non profit, member-funded association that provides national assistance and support to the property and casualty insurance guaranty associations located in each of the 50 states and the District of Columbia, including Respondent Florida Insurance Guaranty Association ("FIGA"). Incorporated in December 1989, the NCIGF monitors national insurance activities, coordinates information from multi state insolvencies, and provides legal, informational, administrative, communications, and public policy support to its members. Pursuant to its By Laws, one of the purposes for which the NCIGF was organized is to "fil[e] amicus curiae briefs when appropriate." NCIGF By-Laws, Art. I, § 3.

The principal issue presented in this appeal is whether an insured's claim for attorney fees, pursuant to section 627.428, Florida Statutes, based on an insurer's pre-insolvency conduct, constitutes a "covered claim" for which FIGA is responsible. The statutory obligations of the property and casualty insurance guaranty associations arise from a definition of "covered claim" similar to the definition in section 631.54, Florida Statutes. Hence, whether attorney fees fit

within those definitions is an issue of fundamental importance for all NCIGF members.

The NCIGF is interested in providing to this Court a national perspective on the role of guaranty associations, in general, and how guaranty associations and courts have dealt with this fundamental issue, in particular.

SUMMARY OF THE ARGUMENT

State property and casualty insurance guaranty associations provide a limited safety net, defined by state statutes, for certain claims against insolvent insurance companies. In particular, the state guaranty association statutes obligate guaranty associations to pay "covered claims." A covered claim "arises out of and is within the coverage" of the underlying insurance policy. Courts throughout the country have held that pre-insolvency attorney fees are not covered claims. Furthermore, guaranty association statutes also exempt from coverage penalties, including awards of attorney fees.

The statutes defining FIGA's obligations are no different. Pursuant to section§ 631.54(3), Florida Statutes, FIGA pays covered claims. The Second District Court of Appeal correctly has held in this case that the Petitioners' claim for attorney fees under section 627.428 is not within the coverage of the underlying insurance policy and, hence, it is not a covered claim. Furthermore, the Petitioners' claim is exempted from coverage, pursuant to section 631.70, because

FIGA's conduct did not lead to the attorney fee award and, pursuant to section 631.57(1)(b), because the attorney fee award at issue is a penalty. Finally, exempting FIGA from paying pre-insolvency attorney fees is consistent with good public policy.

Hence, the Court should affirm the decision of the Second District Court of Appeal and hold that FIGA is not responsible for paying the Petitioners' claim for pre-insolvency attorney fees.

ARGUMENT

I. STATE GUARANTY ASSOCIATIONS GENERALLY DO NOT PAY CLAIMS FOR PRE-INSOLVENCY ATTORNEY FEES.

A. The History And Purpose Of State Guaranty Associations.

The state guaranty associations were created by state statutes in the early 1970s to protect policyholders and claimants from financial loss as a result of insurance company insolvencies. Most NCIGF member state guaranty associations are non-profit, unincorporated associations comprised of property and casualty insurance companies licensed to transact insurance in that state. *See* Alan M. Gamse, *Understanding the Safety Net Provided by Property and Casualty Insurance Guaranty Associations*, The Brief, Fall 2010 at 34, 36. A few guaranty associations are governmental entities. The guaranty associations serve as limited, but vital, safety nets by paying certain claims of policyholders and claimants that

qualify as "covered claims" under the state guaranty association statutes. *See, e.g.*, §§ 631.50 – 631.70, Fla. Stat.

The guaranty association system was devised by representatives of the insurance industry, working together with the National Association of Insurance Commissioners (the "NAIC"). Based on that collaboration, the NAIC promulgated the Post-Assessment Property and Liability Insurance Guaranty Association Model Act (the "Model Act") which, with some variation, was enacted in all but a few states.[1] *See* Alan N. Gamse, *supra* p. 3, at 36.

When a court of competent jurisdiction declares an insurer insolvent, the state guaranty associations are triggered. *Id*. Each state guaranty association is responsible for paying covered claims of insureds and claimants who are residents of the state in which the guaranty association is organized and claims arising from property permanently located in that state. *Id*. Guaranty associations fund the payment of covered claims and their administrative expenses through assessments on the member insurance companies of each state guaranty association. *Id*. Under their respective statutes, guaranty associations only are allowed to assess their member insurance companies on an annual basis between one percent and two percent of the net direct premiums written by the member companies in the state during the preceding calendar year. *Id*.

[1] The name of the Model Act has changed over the years.

The Model Act and most guaranty association statutes (including the Florida Statutes) provide that guaranty association assessments shall be recouped in the rates and premiums charged for insurance. *Id*. Other states provide for policy surcharges or premium tax offsets as methods of providing funds to insurers to cover guaranty association assessments. *Id*. Whatever the particular funding mechanism, however, the public ultimately foots the bill for the cost of the guaranty association system.

B. Guaranty Associations Pay Covered Claims.

Guaranty Associations do not pay all claims against insolvent insurance companies. Rather, they provide a limited safety net, defined by state statutes. Most property and casualty insurance guaranty associations, including FIGA, are obligated by statute to pay covered claims. *See* § 631.54(3), Fla. Stat.

The Model Act defines "covered claim" as follows:

> 9)(a) "Covered claim" means an unpaid claim, including one for unearned premiums, submitted by a claimant, which arises out of and is within the coverage and is subject to the applicable limits of an insurance policy to which this Act applies issued by an insurer, if the insurer becomes an insolvent insurer after the effective date of this Act and:
>
> > (i) the claimant or insured is a resident of this state at the time of the insured event; provided that for entities other than an individual, the residence of a claimant, insured or policyholder is the state in which its principal place of business is located at the time of the insured event; or

(ii) the claim is a first party claim for damage to property with a permanent location in this state.

Model Act, Section 3. Definitions (2008).

Over the years, the NAIC has added various exclusions to the definition of "covered claim." The Petitioners in this case note that the 2010 version of the Model Act has an exclusion for certain attorney fees. *See* Petitioners' Initial Brief, pp. 20-21. The Petitioners suggest that, if FIGA had hoped to avoid paying claims for attorney fees, it should have asked the Florida Legislature to adopt the new Model Act definition and amend section 631.54(3), Florida Statutes, accordingly. As explained more fully below, no such change was necessary. The NAIC did not change the intent of the Model Act. It merely confirmed what courts around the country already had determined – "covered claim" does not include pre-insolvency attorney fees. Furthermore, given the recency of the NAIC's amendment to the Model Act and the timing of the Petitioners' claim in this case, it would have been impossible for new model legislation to apply here.

C. Guaranty Associations Generally Do Not Pay Pre-Insolvency Attorney Fees Because They Are Not Covered Claims.

The vast majority of courts throughout the country that have addressed the issue have held, like the Second District Court of Appeal in this case, that pre-insolvency attorney fees are not covered claims because they are not within the coverage of the underlying insurance policies. Therefore, state guaranty

associations are not responsible for paying those fees. *See, e.g., ARCNET Architects, Inc. v. New Jersey Property-Liability Ins. Guar. Ass'n*, 871 A.2d 728, 731 (N.J. Super. Ct. App. Div. 2005) ("Out-of-state jurisdictions with similar or nearly identical statutes, also patterned on the Model Act, have all held that a claim for pre-insolvency attorney fees is not a covered claim.") (*citing Sifers v. General Marine Catering Co.*, 892 F.2d 386, 399-400 (5th Cir. 1990) (dealing with Louisiana Insurance Guaranty Association); *White v. Alaska Ins. Guar. Ass'n*, 592 P.2d 367, 368-69 (Alaska 1979); *Florida Ins. Guar. Ass'n v. Price*, 450 So. 2d 596, 597 (Fla. 2nd DCA 1984); *Maguire, Ward, Maguire & Eldredge v. Idaho Ins. Guar. Ass'n*, 730 P.2d 1086, 1087-88 (Idaho Ct. App. 1986); *Commissioner of Ins. v. Massachusetts Insurers Insolvency Fund*, 370 N.E.2d 1353, 1354, 1356-57 (Mass. 1977); *Metry, Metry, Sanom & Ashare v. Michigan Prop. & Cas. Guar. Ass'n*, 267 N.W.2d 695, 696-97 (Mich. 1978); *Zuger v. North Dakota Ins. Guar. Ass'n*, 494 N.W.2d 135, 136-38 (N.D. 1992); *Ohio Ins. Guar. Ass'n v. Simpson*, 439 N.E.2d 1257, 1258-59 (Ohio Ct. App. 1981); *Greenfield v. Pennsylvania Ins. Guar. Ass'n*, 389 A.2d 638, 639-40 (Pa. Super. Ct. 1978)). Instead, claims for pre-insolvency attorney fees are class 6 general creditor claims that can be pursued in the liquidation estate. § 631.271(f), Fla. Stat.; *see* Brief Amicus Curiae of the Florida Department of Financial Services, p. 4.

The Petitioners note that they only could locate "three foreign cases concerning whether a claim for pre-insolvency fees incurred by an insured was a 'covered claim.'" Petitioner's Initial Brief, pp. 35-36 n.19. Our research revealed several more cases directly on point – that is, in which an insured sought attorney fees it incurred pre-insolvency from a state guaranty association after its insurer was placed in liquidation. *See Wyoming Medical Center, Inc. v. Wyoming Ins. Guar. Ass'n*, 225 P.3d 1061, 1069-70 (Wyo. 2010) (insured counterclaimed against guaranty association seeking pre-insolvency attorney fees; "[O]ur legislature is also capable of drawing the line between what is covered and what is not. … [W]e conclude the legislature did not intend for WIGA to be obligated for attorney fees."); *Boehme v. Fareway Stores, Inc.*, 762 N.W.2d 142, 149 (Iowa 2009) (workers' compensation claimant/insured sought pre-insolvency attorney fees from guaranty association; "Iowa Code section 515B.2(b)(4) ["covered claims" statute] prevents Boehme from recovering attorneys' fees from the IIGA …."); *ARCNET Architects*, 871 A.2d at 732 ("The pre-insolvency attorney fees and other claim expenses incurred in this case are not and have never been covered claims."); *Harris v. Lewis*, 605 So. 2d 705, 706 (La. Ct. App. 1992) ("This court has specifically held that LIGA is not liable for penalties and attorney fees …."); *Scherer v. Texas Prop. & Cas. Ins. Guar. Ass'n*, 958 S.W.2d 413, 414 (Tex. App. 1997) (finding that statutory language excluded attorney fees from the definition of

"covered claims"; "The Act shows the legislature capable of drawing stark lines with limited exceptions regarding what types of claims are compensable."); *Chris Episcopo Constr. Co. v. Int'l Underwriters Ins. Co.*, No. 86C-04-063, 1994 WL 555381, *4 (Del. Super. Ct. 1994) (finding that pre-insolvency attorney fees sought by the insured against DIGA did not fit within the statutory definition of "covered claim").

In fact, the Petitioners cite only two cases from other jurisdictions in which courts have held that pre-insolvency attorney fees were covered claims. *See* Petitioners' Initial Brief, pp. 35-36 n.19, citing *Carrier v. Hawaii Ins. Guar. Ass'n*, 721 P.2d 1236 (Haw. 1986); *Matusz v. Safeguard Mut. Ins. Co.*, 489 A.2d 868 (Pa. Super. Ct. 1985). Both of those cases, however, involved no fault automobile insurance. And in both cases, claims for attorney fees expressly were covered pursuant to the insurance policy (they were "within the coverage"), the no fault statute, or both. Furthermore, either the Pennsylvania statute at issue in *Matusz* did not require the claim to be "within the coverage" of the underlying policy, unlike section 631.54(3), Florida Statutes, or the Pennsylvania court ignored that statutory requirement. Hence, those two cases offer little, if any, guidance for this Court. Better guidance is found in what another appellate court referred to as "the unanimous position of appellate courts in those sister jurisdictions which have construed nearly identical statutes when confronted with similar circumstances":

guaranty associations are not responsible for pre-insolvency attorney fees. *See Simpson*, 439 N.E.2d at 1259.

D. Guaranty Associations Do Not Pay Penalties.

As noted above, the majority of courts confronted with the issue have held that pre-insolvency attorney fees are not covered claims under the Model Act and similar state statutes. The Model Act also excludes from guaranty association coverage penalties, including attorney fees, imposed on insurance carriers before they become insolvent:

> "Covered claim" shall not include:
>
> > (a) Any amount awarded as punitive or exemplary damages ….

Model Act, Section 3(9)(b) (2008); *see Harris*, 605 So. 2d at 706 ("This court [Louisiana Court of Appeals] has specifically held that LIGA is not liable for penalties and attorney fees … for an insolvent insurer's arbitrary and capricious failure to pay insurance claims.").

II. FIGA DOES NOT PAY CLAIMS FOR PRE-INSOLVENCY ATTORNEY FEES.

Like other insurance guaranty association's, FIGA is a nonprofit corporation created by the legislature for the purpose of providing a mechanism for the payment of covered claims for the benefit of certain insureds who have suffered loss as a result of the insolvency of their insurers. *See Zinke-Smith, Inc. v. Florida Ins. Guar. Ass'n*, 304 So. 2d 507 (Fla. 4th DCA 1974). As a creature of statute, the

extent of FIGA's obligations is limited by the relevant statutory language. FIGA is not intended to be a "panacea for all problems caused by insurance companies." *See ARCNET*, 871 A.2d at 730. Adopting the Petitioners' position advanced here – that under all insurance policies FIGA must pay pre-insolvency attorney fees – would subvert the intended purpose of FIGA.

A. Pre-Insolvency Attorney Fees Are Not Covered Claims.

The Florida Legislature, with some variation, adopted the Model Act when it created FIGA. In particular, the definition of "covered claim" in section 631.54(3), Florida Statutes, mirrors the Model Act.

> "Covered claim" means an unpaid claim, including one of unearned premiums, 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, issued by an insurer, if such insurer becomes an insolvent insurer and the claimant or insured is a resident of this state at the time of the insured event or the property from which the claim arises is permanently located in this state.

§ 631.54(3), Fla. Stat. Thus, the statute expressly requires that a covered claim be "within the coverage" of the underlying insurance policy. The Second District Court of Appeal, both in this case and in *Florida Ins. Guar. Ass'n, Inc. v. All the Way With Bill Vernay, Inc.*, 864 So. 2d 1126 (Fla. 2nd DCA 2003), held that attorney fees were not "within the coverage of" the insured's policy and, therefore, "FIGA cannot be held responsible for those damages." *Vernay*, 864 So. 2d at 1130.

As the Second District Court of Appeal pointed out in this case, there is no language in the Petitioners' insurance policy that provides coverage for an award of attorney fees under section 627.428, Florida Statutes. *Florida Ins. Guar. Ass'n, Inc. v. Petty*, 44 So. 2d 1191, 1193 (Fla. 2nd DCA 2010). The policy provides first party coverage for property damage. The award of attorney fees for the Petitioners, however, was based on Florida Preferred Property Insurance Company's ("Florida Preferred") improper conduct in refusing to pay the full amount of the Petitioners' property damage and related claims. It was not within the coverage of the insurance policy and, hence, the pre-insolvency award of attorney fees is not a covered claim for which FIGA is responsible.

B. Section 631.70 Excludes Pre-Insolvency Attorney Fee Awards From FIGA's Coverage.

Pursuant to section 631.70, Florida Statutes:

> The provisions of s. 627.428 providing for an attorney's fee shall not be applicable to any claim presented to the association [FIGA] under the provisions of this part, except when the association denies by affirmative action, other than delay, a covered claim or a portion thereof.

§ 631.70, Fla. Stat. By its plain language, the statute exempts FIGA from paying section 627.428 fee awards caused by the conduct of parties other than FIGA, including the conduct of insurers before they become insolvent.

The Petitioners argue, to the contrary, that section 631.70 applies only to post-insolvency fee awards. *See* Petitioners' Initial Brief, pp. 40-43. That simply is not what the statute says.

Rather, the Florida Legislature clearly intended to protect FIGA in precisely this situation. FIGA did not deny the Petitioners' homeowners claim. Florida Preferred did. Under those circumstances, the Florida Legislature has determined, FIGA is not be responsible for paying attorney fees under section 627.428. The clear and plain meaning of section 631.70 is that FIGA only is responsible for paying such fee awards when FIGA's "affirmative action" results in the award. That makes sense. FIGA and, ultimately, the citizens of the State of Florida, should not be penalized for the conduct of the now-insolvent insurer.

The Florida Legislature's exclusion of pre-insolvency attorney fees is entirely consistent with other states' variations on the Model Act. *See Wyoming Medical Center*, 225 P.3d at 1069-70; *Boehme*, 762 N.W.2d at 149; *ARCNET*, 871 A.2d at 732; *Scherer*, 958 S.W.2d at 414.

C. Attorney Fee Awards Under Section 627.428 Also Are Excluded As Penalties.

Pursuant to section 631.57(1)(b), "[i]n no event shall the association [FIGA] be liable for any penalties or interest." Section 627.428 is, in fact, a penalty.

> Rather, we recognize that section 627.428 is a penalty in derogation of the common law.… Section 627.428 allows an

> award of attorneys' fees as a penalty to discourage wrongful refusals to pay policy benefits.

Liberty Nat'l Life Ins. Co. v. Bailey, 944 So. 2d 1028, 1030 (Fla. 2nd DCA 2006); *Petty*, 44 So. 3d at 1193. The purpose of section 627.428 is to discourage lawsuits and the untimely payment of claims. *State Farm Florida Ins. Co. v. Lorenzo*, 969 So. 2d 393, 396 (Fla. 5th DCA 2007). Penalizing FIGA for an insurer's pre-insolvency conduct simply does not advance that purpose or any other rational public policy.

D. Exempting FIGA From Paying Pre-Insolvency Attorney Fees Is Consistent With The Underlying Public Policy.

In its *amicus curiae* brief in support of the Petitioners, the Florida Justice Association (the "FJA") argues that exempting FIGA from paying attorney fee awards under section 627.428 would protect the insurance industry at the expense of insureds. *See* Brief of *Amicus Curiae* FJA, pp. 6-9. That is not the case.

The FJA is correct that insurers who write business in Florida fund FIGA through assessments. § 631.57(3)(a), Fla. Stat. But those assessments are, by statute, passed on directly to insureds. "An insurer may fully recoup such advances by applying a separate recoupment factor to the premium of policies of the same kind or line as were considered by the office in determining the assessment liability of the insurer or insurer group." § 631.57(3)(c), Fla. Stat. Hence, if FIGA is required to pay additional claims, Florida citizens who purchase

insurance, not the insurance industry, ultimately will be stuck with the bill for the improper conduct of insurers.

The FJA also claims that, if this Court holds that FIGA is not responsible for pre-insolvency attorney fees, then near-insolvent insurers will be emboldened to deny valid claims, and attorneys will be unwilling to represent certain insureds. Not surprisingly, the FJA offers no support for either claim, and there is no evidence in the record that would support such assertions.

In reality, it would make very little sense for an insurer attempting to avoid insolvency to deny paying meritorious claims. Given the clear mandate of section 627.428, the insurer actually would be creating additional expense at a time when it should be trying to avoid expense. Furthermore, it seems highly unlikely that attorneys will use the financial stability of insurance companies as a litmus test when deciding whether to accept a representation.

FIGA provides "a mechanism for the payment of covered claims under certain insurance policies" to avoid delay and financial loss resulting from an insurer's insolvency. § 631.51(1), Fla. Stat. The FIGA Act was never intended to, nor does it, guaranty full recovery of all amounts an insured may be owed by its insurer. Rather, FIGA's responsibility is limited to the payment of covered claims, and the Legislature has drawn the line between what is covered and what is not. FIGA is not "a panacea for all problems caused by insurance company

insolvency." Hence, to hold that FIGA is not responsible for pre-insolvency attorney fees would be consistent with the purpose of FIGA and with the public policy underlying its creation and existence, as well as the plain language of the relevant statutes.

CONCLUSION

For the reasons stated above and based on the entire record in this action, the National Conference of Insurance Guaranty Funds respectfully requests that this Court follow "the [near] unanimous position of appellate courts in … sister jurisdictions" by affirming the decision of the Second District Court of Appeal, holding that FIGA is not responsible for paying the Petitioners' pre-liquidation attorney fee award under section 627.428, Florida Statutes.

Dated: May 11, 2011.

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Dated: May 11, 2011.

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