IN THE SUPREME COURT OF FLORIDA

Case No.: SC10-2097

L.T. Case No. 2D09-3749

DIANE PETTY, ET AL.,

Petitioner,

vs.

FLORIDA INSURANCE GUARANTY ASSOCIATION,

Respondent.

AMICI CURIAE BRIEF IN SUPPORT OF RESPONDENT FLORIDA INSURANCE GUARANTY ASSOCIATION'S ANSWER BRIEF

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INTRODUCTION

Amici Curiae, the Florida Property & Casualty Association ("FPCA") and Property Casualty Insurers Association of America ("PCI"), through undersigned counsel, submit this amici brief in support of Respondent, Florida Insurance Guaranty Association, Incorporated's ("FIGA") Answer Brief. Amici contend that the conflict between the opinion issued by the Second District Court of Appeal of Florida on September 29, 2010 in *Florida Insurance Guaranty Association v. Petty*, 44 So. 3d 1191 (Fla. 2d DCA 2010) (the "*Petty* Opinion") and the opinion issued by the Third District Court of Appeal of Florida on May 15, 2008 in *Florida Insurance Guaranty Association, Inc. v. Soto*, 979 So. 2d 964 (Fla. 3d DCA 2008) (the "*Soto* Opinion") has caused confusion over the state of the law relating to the Florida insurance industry and may adversely affect insurers and insureds alike. The *Soto* Opinion is contrary to the plain language of the Florida Insurance Guaranty Association Act, § 631.50, *et seq.*, *Fla. Stat.* (the "Act") and does not comport with the legislative intent of the Act. If the *Soto* Opinion is held to be valid, FIGA will face a substantial and incalculable increase in "covered claims," reducing funds for insureds' losses, and consumers will likely face additional insurance premiums annually. The *Soto* Opinion's effect on Florida's insurance market would be widespread, sharply increasing the frequency and amount of FIGA assessments, weakening our insurance market, and raising insurance costs.

INTEREST OF AMICI

Amici curiae are trade associations representing the interests of property and casualty carriers and insurance agents and agencies in Florida. Amici have an interest in fostering and promoting a healthy, competitive insurance market in the State of Florida, creating and maintaining a stable and competitive marketplace for both insurers and consumers alike, and ensuring that the various elements contributing to the overall efficiency and effectiveness of Florida's property and casualty insurance industry are maintained and protected.

As such, amici have an interest in issues pertaining to the interpretation of the laws, statutes, or provisions affecting property insurance carriers and insureds in Florida. The present case is significant to amici in that it concerns changes to the obligations and duties of the safety net underlying Florida's insurance market, as the *Petty* Opinion and the *Soto* Opinion (collectively the "Opinions") create ambiguity in the state of the law pertaining to FIGA's duties and obligations placing Florida's insurance markets in jeopardy.

SUMMARY OF THE ARGUMENT

At issue in this case is whether or not attorney's fees awarded to an insured under § 627.428 against an insurer that becomes insolvent are "covered claims"

payable by FIGA under the Florida Insurance Guaranty Association Act of 1970. As explained herein, the *Petty* Opinion sets forth the correct result under Florida law, holding that such fees are not "covered claims."

The Legislature created FIGA by statute, and FIGA is an association with a narrow charge and specific bounds within which it must operate. The legislative purpose behind FIGA was to provide Florida's insureds with a safety net if faced with the unfortunate insolvency of their insurer. The Legislature's imposition of restrictions and limits upon sums payable by FIGA make clear that FIGA's purpose is not to make insureds whole, but to aid in the recoupment of losses that may otherwise be uncompensated. This ensures, among other things, that property will be repaired or replaced rather than left in disrepair.

FIGA is, in part, funded by assessments levied upon Florida insurance carriers who, in turn, pass that cost along to Florida insureds in the form of an additional premium charge. Because of this fact, the *Soto* Opinion will ultimately result in additional premiums for insureds in Florida. Worse, however, is the fact that construing § 627.428 attorney's fees as "covered claims" will drastically increase FIGA's expenditures, diminishing funds available to pay losses. The Legislature's decision to preclude the application of § 627.428 to claims made

pursuant to the Act is commensurate with the legislative intent that the Act benefit Florida's insureds. By limiting attorney's fees payable by FIGA, the Legislature intended to keep FIGA's costs in check and ensure FIGA's continuing ability to assist unfortunate insureds. Should § 627.428 attorney's fees be construed as "covered claims," FIGA's funds would be wrongfully diverted to compensate attorneys to the ultimate detriment of Florida's insureds.

Section 631.70, *Fla. Stat.*, by its plain language, precludes application of § 627.428, *Fla. Stat.* to any claim presented to FIGA under the Act. The Legislature implemented this provision knowing that § 627.428, *Fla. Stat.* has long been accepted as an implicit part of the contract of insurance between carriers and insureds in Florida. Our lawmakers chose to preclude § 627.428's application to the Act because § 627.428 fees are punitive in nature. FIGA's purpose is to assist insureds with insured losses, not to pay penalties potentially owed by insolvent insurance companies due to their prior wrongful acts.

Risk is inherent in our legal system and commerce in general. FIGA's purpose is to benefit Florida insureds who have unfortunately succumbed to that risk by alleviating some of the burden imposed upon Floridians by insolvent insurers. FIGA accomplishes its purpose to the best of its ability within the

confines set forth by our lawmakers by providing citizens with something where they would otherwise have nothing. Amici contend that the *Petty* Opinion came to the proper conclusion and that the *Soto* Opinion did not, and respectfully request that this Court affirm *Petty* and reverse *Soto*.

ARGUMENT

I. FIGA'S PURPOSE IS LIMITED AND IT IS PAID FOR BY INSUREDS.

A. FIGA's Formation and Purpose.

FIGA was created by the Florida Insurance Guaranty Association Act of 1970,[1] effective October 1, 1970, as a non-profit, public corporation "of statewide authority created for public purposes relevantly connected with the administration of government." *O'Malley v. Florida Insurance Guaranty Association, Inc.*, 257 So. 2d 9, 11 (Fla. 1971); § 631.55, *Fla. Stat*. As a public corporation, FIGA's "function is to promote the public welfare," and it is "organized for the benefit of the public." *Id.*

The Legislature created FIGA to:

> (1) Provide a mechanism for the payment of covered claims under certain insurance policies to avoid excessive delay in

[1] § 631.50, *et seq.*, *Fla. Stat.*

> payment and to avoid financial loss to claimants or policyholders because of the insolvency of an insurer;
> (2) Assist in the detection and prevention of insurer insolvencies;
> (3) Create a nonprofit corporation to administer and supervise the operation of such association; and
> (4) Assess the cost of such protection among insurers.

Section 631.51, *Fla. Stat.* FIGA is essentially a safety-net "to aid and benefit numerous citizens many of whom comply 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 their insurers." *O'Malley*, 257 So. 2d at 11.

FIGA's obligations are clearly delineated in § 631.57, *Fla. Stat.*, titled: "[p]owers and duties of the association," and it is strictly bound by its legislative charter. As stated by the Second District Court of Appeal, "FIGA is strictly a creature of statute[,]" and "statutory language defines the extent of FIGA's obligations." *Florida Insurance Guaranty Ass'n. v. All the Way with Bill Vernay, Inc.*, 864 So. 2d 1126, 1129 (Fla. 2d DCA 2003).

B. FIGA Was Never Intended to Make Insured's "Whole."

FIGA ensures consumer confidence in Florida's insurance markets and provides some recourse for Florida insureds whose insurance carriers have failed.

FIGA is obligated to pay "covered claims" arising from the insolvency of FIGA's insurance carrier members. § 631.57, *Fla. Stat.* The Legislature specifically defined "covered claim" to mean:

> [A]n 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.

Section 631.54(3), *Fla. Stat*. Regardless of the policy limits applicable to an insured's pre-insolvency claim, in most cases, FIGA is only obligated to pay up to $300,000.[2] § 631.57, *Fla. Stat*. The imposition of strict limits on FIGA's covered claim obligations illustrates the Legislature's view that FIGA's purpose is not to make insureds whole. Rather FIGA serves to provide ***some*** compensation where, without FIGA, there would otherwise be none.

Consideration of the core issue in this case, whether or not pre-insolvency attorney's fees are a "covered claim" for which FIGA is obligated, brings to light another example of the Legislature's intent that FIGA's obligations to unfortunate

[2] An additional $200,000 is provided for portions of a covered claim relating only to damage to a structure and its contents under homeowner's insurance policies. § 631.57(1)(a)2, *Fla. Stat.*

insureds be limited. Section 631.70, *Fla. Stat.*, expressly precludes the application of § 627.428, *Fla. Stat.*, from claims presented to FIGA. While generally, § 627.428, fees are available to insureds against their insurers,[3] once a claim goes into FIGA, the general statutory language of § 627.428 no longer applies and the more specific reference to fees, under § 631.70, *Fla. Stat*. is the applicable law. § 631.70, *Fla. Stat*. ("The ***provisions of s. 627.428*** providing for an attorney's fee ***shall not be applicable to any claim*** presented to the association under the provisions of this part, except when the association denies by affirmative action, other than delay, a covered claim or a portion thereof.") (***emphasis added***); *Mendenhall v. State*, 48 So. 3d 740, 749 (Fla. 2010) (a specific statute controls over a general statute); *Florida Ins. Guarantee Ass'n v. Ehrlich*, 2011 WL 1661386, *1 (Fla. 4th DCA 2011) ("Section 631.70 excludes FIGA from the provisions of section 627.428," except as expressly set forth in the statute). By limiting attorney's fees only to claims denied by FIGA, the Legislature ensured that FIGA's purpose was limited to assisting insureds with actual losses only.

The limitations set forth in the Act demonstrate the Legislature's acknowledgment that FIGA cannot, and should not, realistically be responsible for

[3] *See State Farm Fire & Casualty Co. v. Palma*, 629 So. 2d 830, 832 (Fla. 1993).

every dollar collectable by insureds against their insolvent insurance carriers. *See Williams v. Fla. Ins. Guar. Ass'n, Inc.*, 549 So. 2d 253, 254 (Fla. 5th DCA 1989) ("the full gamut of a defunct insurance company's liabilities was not intended to be shifted into FIGA"). The purpose of § 627.428, *Fla. Stat*. is to "discourage the contesting of valid claims against insurance companies and to reimburse successful insureds for their attorney's fees when they are compelled to defend or sue to enforce their insurance contracts." *Ins. Co. of North America v. Lexow*, 602 So. 2d 528, 531 (Fla. 1992). Our lawmakers chose to preclude § 627.428's application to the Act, at least in part, because § 627.428 fees are punitive in nature. *Liberty Nat'l Life Ins. Co. v. Bailey ex rel. Bailey*, 944 So. 2d 1028, 1030 (Fla. 2d DCA 2006) (Section 627.428 attorney's fees are a "penalty to discourage wrongful refusals to pay policy benefits"); *see also United States Fire Ins. Co. v. Dickerson*, 90 So. 613, 616 (Fla. 1921) (stating that the "attorney's fees provided for in our statute are in the nature of a penalty," referring to § 625.08, *Fla. Stat.*, *repealed*, the spiritual predecessor to § 627.428, *Fla. Stat.*).

The Legislature did not intend to transfer onto FIGA the responsibility to pay punitive attorney's fees for the potentially delinquent conduct of insolvent

insurers. Claims for those fees should be properly handled in the receivership of the defunct insurance company. *See* § 631.153, *Fla. Stat.*

C. FIGA is Paid For by Insureds, Not Insurers

The Florida Justice Association ("FJA") erroneously asserts in its amicus brief in support of Petitioners, Diane Petty and Kevin Farmer ("Petty") that "it is the insurance industry that benefits from a judicial construction of 'covered claim' that excludes claims for pre-insolvency attorney's fees under section 627.428[,]" and that "FIGA is fully funded" by the insurance industry. Brief of Amicus Curiae, Florida Justice Association, pages 6 and 8, respectively. Though, FJA is technically correct that FIGA obtains some direct funding from its member insurance companies through assessments, *see* §§ 631.55(1) and 631.57, *Fla. Stat.*, in reality those assessments are passed on to insureds and paid as a separate charge on consumers' property and casualty policies. *See* Florida Insurance Guaranty Association, "*How Florida's Insurance Safety Net Protects Consumers*," August 2009, attached hereto as Appendix "A." Thus, insurance carriers face no financial penalty as a result of FIGA assessments.

Furthermore, FIGA does not necessarily rely upon assessments each year, and often obtains a significant amount of its funding from liquidated estates of

insolvent insurers. *See* FIGA 2010 Annual Report, page 5, attached as Appendix "B."[4] FIGA uses assessments only as needed to maintain its ability to pay covered claims when liquidation revenues are insufficient. Construing pre-insolvency attorney's fees as "covered claims" will drastically increase FIGA's costs, requiring increased reliance on assessments[5] and resulting in consistently higher insurance premiums to the majority of Florida insureds.

II. THE SOTO OPINION CONFLICTS WITH THE LEGISLATIVE INTENT BEHIND THE ACT

A. The Legislature has the Power to Limit Attorney's Fees.

The Florida Legislature is tasked with enacting substantive law, *TGI Friday's Inc. v. Dvorak*, 663 So. 2d 606, 611 (Fla. 1995), and is empowered to impose or restrict attorney's fees for the public good. *See Menendez v. Progressive Express Insurance Co., Inc.*, 35 So. 3d 873, 878 (Fla. 2010) ("the statutory right to attorneys' fees is not a procedural right, but rather a substantive right") (citation omitted).[6] The Legislature's enactment of § 631.70, *Fla. Stat*. was permissible and

[4] In 2010, FIGA obtained only three percent of its funding from assessments paid by member companies. *See* Appendix "B."

[5] FIGA has levied no assessments in six of the last ten years. See printout from FIGA website, attached hereto as Appendix "C."

[6] S*ee also De Soto County v. Highsmith*, 60 So. 2d 915, 917 (Fla. 1952) (recognizing that the Legislature's right to provide for attorney's fees is akin to its

that statute should be enforced as written, as it is not ambiguous. *C.f. Murray v. Mariner Health*, 994 So. 2d 1051, 1060-61 (Fla. 2008) (stating that legislative intent is the "polestar that guides a court's inquiry in statutory construction[,]" but noting that traditional rules of statutory construction are necessary to determine legislative intent when a statute is unclear or ambiguous).

B. § 631.70, *Fla. Stat.*, Serves the Legislative Purpose of the Act by Controlling FIGA's Costs, Ensuring its Continuing Protection of Florida Insureds, and Allocating FIGA's Funds to Pay for Losses.

Section 631.70, *Fla. Stat.* supports the Act's legislative purpose to "[p]rovide a mechanism for the payment of covered claims under certain insurance policies to avoid excessive delay in payment and to avoid financial loss to claimants or policyholders because of the insolvency of an insurer[.]" § 631.51, *Fla. Stat.* Without § 631.70, *Fla. Stat.* FIGA's costs would skyrocket, subjecting the association to increased volatility in its income and expenses. By maintaining costs commensurate with actual losses and excluding pre-insolvency § 627.428

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right to provide for the taxing of costs); *Watts v. Newport*, 9 So. 2d 417, 420 (Fla. 1942) (recognizing the intention of the Legislature to provide probate courts with the power to award or disallow costs and attorney's fees); (*Noel v. Sheldon J. Schlesinger, P.A.*, 984 So. 2d 1265, 1286 (Fla. 4th DCA 2008) (recognizing that the "[L]egislature has the power to limit attorney's fees in a claims bill, no matter what the underlying fee contract provides").

fees as covered claims, FIGA can compensate insureds' losses while imposing a minimal burden on Florida's insurance market.

Amici, William and Annette Sturdivant ("Sturdivant"), in support of Petty,[7] assert that insureds of insolvent insurers will face greatly diminished compensation for covered claims if the *Petty* decision is upheld. Their argument is based upon the general, industry-wide, use of the "classic contingent fee agreement for the greater of 40% or a court-ordered fee[,]" which would allegedly detract from any recovery obtained by insureds from FIGA. *See* Amici Curiae Brief of Sturdivant, page 7. However, the Sturdivant's argument fails to consider that the "classic" fee agreement utilized by insureds and their counsel is no different than any other contingent fee arrangement whereby a judgment award may be diminished after attorney's fees are paid. The American Rule, adopted in Florida, provides that parties to litigation are responsible for their own attorney's fees and costs unless otherwise directed by statute or agreement. *Menendez*, 35 So. 3d at 878-79 (citation omitted). The § 627.428 fees at issue in this case are by no means

[7] The Sturdivant's standing to appear as amici on the issues before the Court is questionable at best. The Sturdivant's counsel waived its fees, and the Sturdivants have not paid, and are not obligated to pay, attorney's fee on their claim. Amici Brief of Sturdivant, page 12. Therefore, the Sturdivant's entire argument appears to be an appeal to the sympathies of the Court, rather than to substantive legal issues.

awarded to litigants as a matter of right, and litigants and attorneys must make decisions and compromises on the payment of fees and costs in any lawsuit.[8]

Furthermore, if FIGA is required to pay an additional 40% over and above covered losses already payable, the additional cost to the association would be astronomical. FIGA has paid approximately $1.67 billion in claims from 2004 through November 30, 2010. See Appendix "D," attached. Adding 40% to FIGA's claims expenses for this period would add $668,000,000 in additional FIGA payouts.[9] Considering that FIGA's income from the liquidated estates of insolvent insurers is volatile and unpredictable,[10] it is easy to see how FIGA's resources would be taxed should it be required to pay pre-insolvency attorney's fees as covered claims, especially after a major catastrophe. Given the limited sources of funding available to FIGA within the confines of the Act, *See Vernay, Inc.*, 864 So. 2d at 1129, FIGA must take care to ensure that every dollar it pays out goes towards an actual loss suffered by an insured.

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[8] This contravenes the Sturdivant's implied argument that *Petty* may restrict access to courts for poorer Floridians. Amici Brief of Sturdivant, page 14. The reality is that access to courts is no more restricted under *Petty* than it is in any case in our system of justice.

[9] Though the stated figure represents the high end of a potential cost increase because it assumes attorney's fees would be payable by FIGA on all claims, even a small percentage of the figure would significantly effect FIGA's operating budget.

[10] *See* Appendix "B" and FIGA's 2009 Annual Report, attached as Appendix "E."

It is unlikely that FIGA would be able to sustain the additional costs resulting from the obligation to pay pre-insolvency attorney's fees as "covered claims" without sharply increasing the frequency of assessments. This would result in higher insurance premiums to consumers. A homeowner with a $5,000.00 annual premium could owe an additional $200[11] in premium to pay for additional FIGA assessments.[12] Furthermore, the frequent use of FIGA assessments could impair the stability of FIGA and Florida's insurance market. If FIGA is constantly seeking additional revenue from insurance carriers and in-turn their insureds, the Florida insurance market is weakened. Our State would become even less desirable to carriers, diminishing competition and further raising the cost of insurance.

III. THE ARGUMENTS OF PETITIONER AND THE AMICI SUPPORTING PETITIONER ARE ERRONEOUS

A. The Act is Clear Regarding Attorney's Fees under § 631.70, *Fla. Stat.*

The circuitous and illogical arguments asserted by petitioners and their supporting amici ignore the clear language and structure of the Act. In essence Petty and their amici argue that the mere implicit inclusion of § 627.428 in Florida

[11] This figure represents 4% of $5,000.00.

[12] Each year, FIGA may charge an assessment of up to 2%, and may also charge an emergency assessment of up to 2%. § 631.57, *Fla. Stat.*

insurance policies renders the statute part of the "coverage" afforded by insurers. However, despite the fact that § 627.428, *Fla. Stat.* is implicit in Florida insurance policies, attorney's fees awarded thereunder are not part of the "coverage" provided by insurance policies in Florida. Rather, the inclusion of § 627.428, *Fla. Stat.* in insurance policies serves both as a deterrent to unscrupulous claims practices by the insurer[13] and as a reassurance to insureds that they will have recourse should their claim be handled improperly. Section 627.428, *Fla. Stat*. is unrelated to the obligation of an insurer to compensate an insured for an insurance claim. The Legislature was obviously aware of the implicit application of § 627.428, *Fla. Stat*. to insurance policies, which is precisely why it enacted § 631.70, *Fla. Stat.* to preclude application of § 627.428, *Fla. Stat.* to FIGA.

Construing § 627.428 fees as "covered claims" as defined by § 631.54(3), *Fla. Stat.* renders § 631.70, *Fla. Stat.* moot. Such an interpretation is not permissible according to the doctrine of *in pari materia*. See *Larimore v. State*, 2 So. 3d 101, 106 (Fla. 2008). The provisions of § 631.70, *Fla. Stat*. clearly preclude FIGA from paying pre-insolvency attorney's fees, and Petitioners' attempts to construe pre-insolvency attorney's fees claims as "covered claims" and to

[13] *Lexow*, 602 So.2d at 531; *Bailey*, 944 So. 2d at 1030; *Dickerson*, 90 So. at 616.

distinguish the Act from other states' insurance guaranty laws[14] fail to give credence to the plain language of § 631.70, *Fla. Stat*.

Petty and their amici cite only cases involving workers' compensation attorney's fees and cases involving attorney's fees incurred while providing a defense for an insured under an insurance policy. Those types of cases are distinguishable. Neither the worker's compensation cases nor the defense cost cases involve attorney's fees awards pursuant to § 627.428, *Fla. Stat*. Moreover, the cases involving payment of defense costs are about the definition of "covered claims" as defense costs in a particular policy. Likewise the attempted distinction between claims presented to FIGA and claims against FIGA is without merit. § 631.70, *Fla. Stat.* is broadly drafted to preclude the application of § 627.428, *Fla. Stat*. to FIGA to "***any*** claim presented to the association" under the Act, except when denied by FIGA's affirmative action. § 631.70, *Fla. Stat.* (***emphasis added***). FIGA only handles claims brought pursuant to the Act, and the Legislature clearly meant to preclude the application of § 627.428, *Fla. Stat.* to ***any*** claim presented to FIGA for payment, whether it is a "covered claim" or otherwise.

[14] No other state has identical provisions to Florida's Act, and thus direct comparisons are impossible.

B. Petitioners' and Amicis' Arguments Benefit Plaintiffs' Lawyers to the Detriment of Insureds.

Affirmation of the *Soto* opinion and reversal of *Petty* would essentially take money out of the pockets of Florida insureds—who may never file a FIGA claim—to cover plaintiffs' legal fees. Should a catastrophic natural disaster befall our State, FIGA will need every cent in its coffers and every revenue generating tool in its repertoire to ensure that it meets its charge to compensate consumers for losses. Every dollar that FIGA pays to lawyers is money that could, and should, go to pay losses for Florida's insureds. If 40% of FIGA's loss payments end up in the hands of lawyers, than a significant amount of property damage in Florida would go unrepaired, resulting in blight and diminished property values.[15] Payment of pre-insolvency attorney's fees detracts from FIGA's ability to pay for losses and is contrary to FIGA's purpose of benefitting consumers.

The only people who truly stand to benefit from construing § 627.428 attorney's fees as "covered claims" are plaintiff's lawyers. The Soto Opinion could turn FIGA into a slush fund from which some unscrupulous plaintiff's

[15] Amici recognize that some of an insured's recovery from FIGA may inevitably be paid to attorneys. However, FIGA is charged with benefitting the public welfare by compensating losses to insureds, not with compensating attorneys. The terms of an attorney's compensation is up to the individual insureds and their counsel, and should not be imposed upon FIGA.

lawyers could be enriched for marginal claims. Affirming the *Soto* Opinion would encourage attorneys to pursue claims with FIGA, even on nominal claims denied by now insolvent insurers. Certainly, the Legislature did not intend for FIGA to be liable for $50,000.00 or $100,000.00 in attorney's fees on a $200 claim wrongfully denied by a defunct carrier.[16] Such a policy could have a long-term detrimental effect on FIGA and Florida's insurance industry, resulting in losses to insureds.

C. **Risk is Inherent in Law and Commerce.**

No good arises from the insolvency of an insurance company, especially one engaging in unscrupulous business practices. Some of the unfortunate scenarios painted by petitioners and their amici may be symptomatic of problems plaguing Florida's insurance industry, but will not, and cannot be solved by defining § 627.428 attorney's fees as "covered claims" payable by FIGA. The Legislature clearly defined FIGA's duties and obligations. FIGA is not charged with compensating insureds for the poor business practices of wayward insurers. FIGA is charged with compensating those insureds for claims covered by their insurance policies within the restrictions set forth by our Legislature. Inevitably, some insureds may not be made whole and their attorneys may not be fully compensated

[16] However, FIGA is liable for attorney's fees on marginal claims that FIGA itself wrongfully denies.

for their legal labor. However, proper recourse for claims not covered by FIGA lies with the receivership estate of the defunct insurer. Any shortfall is unfortunately the result of happenstance and risk inherent in our system of law and commerce.

FIGA is strictly bound by the statutes governing its operation. The Legislature's intent was to compensate insureds in a reasonable manner, and to promote the repair or replacement of property. It was not to ensure full compensation of all expenses and costs incurred by insureds as a result of their claim, hence the Legislature specifically defined "covered claim" in § 631.54(3), *Fla. Stat.* and enacted the clearly drafted § 631.70, *Fla. Stat.*

CONCLUSION

The *Petty* Opinion correctly held that pre-insolvency attorney's fees awarded pursuant to § 627.428, *Fla. Stat.* are not "covered claims" under the Act and are therefore not payable by FIGA. The *Soto* Opinion is erroneous in that FIGA should not have been obligated to pay pre-insolvency attorney's fees.[17] Amici respectfully request that this Court affirm the result of the Second District's opinion in *Petty* and reject the result of the Second District's opinion in *Soto.*

[17] Technically, since the fees were due pursuant to a contract—the settlement agreement—they should have been pursued by the insured in the receivership estate.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was served via U.S. Mail this day of ___ May, 2011, to: **Bryan S. Gowdy, Esq.** and **Jessie L. Harrell, Esq.**, Creed & Gowdy, P.A., 865 May Street, Jacksonville, FL 32204, and **Bob G. Freemon, Esq.** and **Ron A. Hobgood, Esq.**, Freemon & Miller, P.A., 8381 Gunn Highway, Tampa, FL 33626, Counsel for Petitioners; **Dorothy V. DiFiore, Esq.,** Haas, Lewis, DiFiori & Amos, P.A., P.O. Box 23567, Tampa, FL 33623, **Michael C. Clarke, Esq.** and **Betsy E. Gallagher, Esq.**, Kubicki Draper, P.A., 201 N. Franklin Street, Suite 2550, Tampa, FL 33602, and **G. William Bissett, JR., Esq.**, Kubicki Draper, P.A., City National Bank Building, Penthouse, 25 West Flagler Street, Miami, FL 33130, Counsel for Respondent; **Jeffrey M. Liggio, Esq.**, Liggio Benrubi, 1615 Forum Place, Suite 3B, West Palm Beach, FL 33401 and **Perry Tanksley, Esq.**, P.O. Box 249, Sarasota, FL 34230, Counsel for the Florida Justice Association as Amicus Curiae; **Alan S. Wachs, Esq., Chris T. Harris, Esq.,** and **Michael M. Giel, Esq.**, Volpe, Bajalia, Wickes, Rogerson & Wachs, 501 Riverside Avenue, EverBank Plaza, 7th Floor, Jacksonville, FL 32202, Counsel for William & Annette Sturdivant as Amici Curiae; **James A. Friedman, Esq**., Godfrey & Kahn, One East Main Street,

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CERTIFICATE OF COMPLIANCE

WE HEREBY CERTIFY that this brief complies with the font standards in Rule 9.210, Florida Rules of Appellate Procedure. This Brief utilizes Times New Roman 14 point font.

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