IN THE SUPREME COURT OF FLORIDA

Case No. **SC10-2097**

DIANE PETTY AND KEVIN FARMER

PETITIONERS,

vs.

FLORIDA INSURANCE GUARANTY ASSOCIATION, INCORPORATED

RESPONDENT

BRIEF OF AMICUS CURIAE
FLORIDA JUSTICE ASSOCIATION

ON CONFLICT JURISDICTION FROM THE
SECOND DISTRICT COURT OF APPEAL
CASE NO.: 2D09-3749
TRIAL COURT CASE NO.: 04-2449CA

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Statement of Identity of Amicus Curiae and Interest in the Case

A. Statement of Interest of Amicus:

The Amicus Curiae, Florida Justice Association ("FJA"), is a statewide not-for-profit voluntary association of more than 4,000 trial and appellate lawyers concentrating on litigation in all areas of the law. The members of FJA are pledged to the preservation of the American legal system, the protection of individual rights and liberties, the evolution of the common law, and the right of access to courts. FJA has been involved as amicus curiae in hundreds of cases in the Florida appellate courts.

FJA frequently appears in cases involving issues important to the rights of individuals and to the administration of justice. The Objectives and Goals of FJA are, as set forth in its Charter:

> Section I. The objectives of this corporation are to: (a) Uphold and defend the principles of the Constitutions of the United States and the State of Florida. (b) Advance the science of jurisprudence. © Train in all fields and phases of advocacy. (d) Promote the administration of justice for the public good. (e) Uphold the honor and dignity of the profession of law. (f) Encourage mutual support and cooperation among members of the Bar. (g) Diligently work to promote public safety and welfare while protecting individual liberties. (h) Encourage the public awareness and understanding of the adversary system and to uphold and improve the adversary system, assuring that the courts shall be kept open and accessible to every person for redress of any injury and that the right to trial by jury shall be secure to all and remain inviolate.

Article II, FJA Charter, approved October 26, 1973.

Consistent with the foregoing, FJA sustains one of the State's most active[1] Amicus Curiae efforts, and its members work on a pro bono basis to address important issues of substantive and procedural law of widespread importance to its members, the clients who they represent in the Florida courts, and as well as to all of the citizens of the State.

The lawyer members of FJA care deeply about the integrity of the legal system. FJA has a substantial interest in the application of legal standards relating to the rights of individuals who have suffered losses due to accident.

This case is important to FJA because it involves the ability of insureds who have suffered insured losses to obtain legal counsel and to pursue their claims against insurance companies on the brink of insolvency. A corollary concern is a teetering insurer's ability to fend off a determination of insolvency by denying covered claims, if legal counsel is unavailable to insureds to pursue coverage benefits because FIGA will, after all, not reimburse attorney's fees expended by the insured pre-insolvency in litigation against such an insurer. FJA believes that its input may be of

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1 A LEXIS search reflects more than 400 opinions in cases in which FJA (formerly, the Academy of Florida Trial Lawyers) has participated as an *amicus curiae*, dating back forty years.

assistance to the Court in resolving the issues raised in this case, and that this Court's decision will have a tremendous impact on its members and their clients. *See*, *e.g.*, *Ciba-Geigy Ltd. v. Fish Peddler, Inc.*, 683 So.2d 522 (Fla. 4th DCA 1999) (briefs from *amicus curiae* are generally for the purpose of assisting the court in cases which are of general public interest, or aiding in the presentation of difficult issues); accord *Rathkamp v. Dep't. of Cmty. Affairs*, 730 So.2d 866 (Fla. 3d DCA 1999) (endorsing and adopting the opinion in *Ryan v. Commodity Futures Trading Comm'n*, 125 F.3d 1062 (7th Cir. 1997), regarding the role of *amicus curiae*).

B. Issues To Be Addressed:

This is a case of statewide importance, in which FJA writes to assist the Court in addressing issues which affect substantial public policy regarding whether attorneys fees incurred in litigation against an insurer which becomes insolvent during the litigation, are a "covered claim" under Florida Statute §631.54(3), that FIGA is obligated to pay?

Unfortunately, insurer insolvencies are not uncommon, and generally, as an insurer descends towards insolvency, in order to fend off the insolvency, it tends to reject and deny covered claims with greater frequency, forcing its insureds to resort to litigation. Respectfully, this Court's adoption of the reasoning of the Second District in *Florida*

Insurance Guaranty Association v Petty, 44 So.3d 1191 (Fla. 2nd DCA 2010, would mean that insureds -- whose covered claims have been wrongfully denied and who were already forced to litigate against a financially failing and unreasonable insurer -- would shoulder the burden of paying for an attorney with no possibility of redress, in addition to the already denied claim being litigated when FIGA steps in. The FJA suggests that the Second District's reasoning is not supported by the plain language of sections 627.428, 631.54(3), and 631.70, Florida Statutes, ignores rules of statutory construction, and longstanding Florida case law. The issue potentially affects every Florida-resident insured who would seek insurance Benefits.

SUMMARY OF ARGUMENT

The most significant purpose of the Florida Insurance Guaranty Association Act, § 631.50, *et seq.*, Fla.Stat. ("FIGA Act") is to avoid financial loss to policyholders due to an insurer's insolvency, and indeed the Act is construed to protect Florida's citizens as opposed to the insurance industry. Another purpose of the Act is to detect and prevent insurer insolvencies. It can be expected that an insurer in financial difficulty will attempt to avoid paying legitimate claims for the sole purpose of keeping a financial pulse. When an insurance company refuses to pay a claim, the insured's recourse is a lawsuit. It is well-established that the purpose of section 627.428, Florida Statutes (2007), is to discourage insurers from contesting valid claims and to reimburse successful policy holders forced to sue to enforce their policies. Similarly, the mandate of the statute is an implicit provision of the insurance coverage even if not expressly stated within the insurance policy itself.

No provision anywhere in the Florida Insurance Code, and no provision in the FIGA Act., indicates that the legislature intended for the coverage of section 627.428 to inure any less in favor of an insured who has been forced to litigate against an insurer in financial peril prior to FIGA stepping in under its statutory authority, than to an insured who is forced to

litigate against a financially stable insurer. Indeed, the FIGA Act's purpose of detecting insolvent insurers would be hindered if insureds are unable to afford or obtain counsel to sue a nearly-insolvent insurer because they can no longer depend upon § 627.428 to fulfill their obligation for legal fees. Hence, the near-insolvent carrier may be emboldened, rather than discouraged, to deny valid claims.

The intent of the FIGA Act is to benefit citizens of Florida, not the insurance industry. The obligations imposed on FIGA under section 631.57(1)(b), Florida Stat. (2007) must be construed liberally to effect the purposes of the FIGA Act. Insurance companies are required by law to be members of FIGA, and FIGA is solely composed of these "member insurers." FIGA's governance – its board of directors is drawn exclusively from persons recommended by its member insurers – is decidedly dedicated to favoring the industry. In other words, the insurance industry both funds FIGA and guards its funds. By virtue of paying lowered assessments whenever FIGA can avoid a claim, 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.

ARGUMENT

I. FIGA, AN ENTITY FUNDED AND CONTROLLED BY THE INSURANCE INDUSTRY, HAS BEEN DIRECTED BY THE LEGISLATURE TO PROTECT FLORIDA'S CITIZENS FROM BEING HARMED WHEN INSURERS BECOME INSOLVENT.

The Florida Insurance Guaranty Association, Incorporated, Respondent ("FIGA"), is "a public corporation of statewide authority created for public purposes relevantly connected with the administration of government." *O'Malley v. Florida Ins. Guaranty Asso.*, 257 So.2d 9, 11 (Fla. 1971). Unlike private corporations, which have no official duties or concern with the affairs of government and whose primary object is the personal emolument of their stockholders, FIGA is a nonprofit corporation created by the Florida Insurance Guaranty Association Act, § 631.50, *et seq.* ("FIGA Act"). *Id.* It is a legislatively declared "mechanism" to aid and benefit numerous citizens who 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. *Id.* FIGA was created to provide insurance coverage to private individuals who had obtained insurance coverage from insurers who subsequently became insolvent. *In re Advisory Opinion to the Governor-State Revenue Cap*, 658 So.2d 77, 81 (Fla. 1995).

In *O'Malley*, *supra,* this court also found that "[t]he dominant purpose

of [the Act] is to avoid delay and to settle as soon as possible claims of insolvent insurers which are ripe for payment." *O'Malley*, *supra*, 257 So.2d at 12. The purpose of the Act is to "provide 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(1), Fla. Stat.; see also *Jones v. Fla. Ins. Guar. Ass'n, Inc.*, 908 So.2d 435, 442 (Fla. 2005). FIGA is the entity that pays those claims, and "is deemed the 'insurer' to the extent of covered claims and has the same obligations as the insolvent insurer as if the insurer had not been declared insolvent." *Jones,* 908 So.2d at 442.

Pursuant to statute, all insurers defined as member insurers under the Act are members of FIGA as a condition of their authority to transact insurance in this state. § 631.55(1), Fla.Stat. (2007). There are no other members of FIGA. In turn, FIGA's activities are wholly administered by a board of directors, and no person who is not recommended by the member insurers is permitted to serve on the board. § 631.56(1), Fla.Stat. (2007).

Therefore, while technically speaking FIGA may not be "owned" by the insurance industry, it is obvious that FIGA is fully funded and f controlled by the insurance industry. Therefore, it would not fulfill the legislative intent that FIGA benefit Florida's citizens, not the insurance

industry, if the Act were construed such that ambiguity as to whether a given claim must be paid by FIGA, is determined in favor of FIGA. If that were the case, then FIGA would be granted the benefit of any doubt as to legislative intent, and construction of the Act would favor the insurance industry over Florida insureds. Rather, a policy of liberal construction to benefit insureds over the industry dictates that, to the extent of any ambiguity, construction of the Act must favor the insured who has submitted a claim to FIGA for payment pursuant to the Act, and that FIGA must pay the claim as covered under the Act.

II. WELL ACCEPTED RULES OF STATUTORY CONSTRUCTION DEMONSTRATE THAT FIGA WAS NOT INTENDED TO ELIMINATE ATTORNEYS FEES INCURRED IN LITIGATION AGAINST AN INSOLVENT CARRIER PRIOR TO THE INSOLVENCY

This Court has long held that section 627.428 is an implicit part of every insurance policy issued in Florida. *State Farm Fire & Cas. Co. v. Palma*, 629 So.2d 830, 832 (Fla.1993). Indeed, the rule of statutory incorporation applies whenever a statute may be incorporated into an insurance contract for purposes of determining the parties' contractual rights. *Foundation Health v. Westside EKG Assocs.*, 944 So.2d 188, 195 (Fla.2006).

This Court has previously discussed the purpose of section 627.428

and the public policy behind it, emphasizing the importance of the provision for fees to the insured under section 627.428 by explaining:

> [T]he legislative objective of section 627.428(1), Florida Statutes, which provides for an award of attorney fees against insurers who wrongfully deny benefits, was to discourage insurance companies from contesting valid claims and to reimburse successful insureds for their attorney fees when they are compelled to sue to enforce their insurance contracts. See State Farm Fire & Cas. Co. v. Palma, 629 So.2d 830, 833 (Fla. 1993).

Nationwide Mut. Fire Ins. Co. v. Pinnacle Med., Inc., 753 So.2d 55, 59 (Fla. 2000). Further as to the purpose of the statute, it has been held:

> The purpose behind section 627.428 is plainly to place the insured or beneficiary in the place she would have been if the carrier had seasonably paid the claim or benefits without causing the payee to
> engage counsel and incur obligations for attorney's fees.

Clay v. Prudential Ins. Co., 617 So.2d 433, 436 (Fla. 4th DCA 1993). *See also Travelers of Fla. v. Stormont*, 43 So.3d 941 (Fla. 3d DCA 2010); *Lewis v. Universal Prop. & Cas. Ins. Co.*, 13 So.3d 1079, 1081 (Fla. 4th DCA 2009); *Federated Nat'l Ins. Co. v. Esposito*, 937 So.2d 199 (Fla. 4th DCA 2006) (holding insureds not entitled to fees where insurer had already initiated appraisal process when insured filed suit); *Travelers Indem. Ins. Co.*

v. Meadows MRI, LLP, 900 So.2d 676, 679 (Fla. 4th DCA 2005); *Underwood Anderson & Assocs. v. Lillo's Italian Rest., Inc.*, 36 So.3d 885(Fla. 1st DCA 2010); *Grider-Garcia v. State Farm Mut. Auto.*, 14 So.3d 1120, 1121 (Fla. 5th DCA 2009).

Under the FIGA Act, a "covered claim" means an unpaid claim arising out of and covered by a policy issued by the insolvent insurer. §631.54(3). The Second DCA overlooked that the limited exemption granted in section 631.70, from attorneys' fees judgments *against FIGA* itself, does not expressly modify the FIGA Act's definition of "covered claim."[2] As such, section 631.70 has nothing to do with whether a claim submitted to FIGA is, or is not, covered under the FIGA Act. That question is resolved by the statutory definition of "covered claim," § 631.54(3), *supra*. Section 631.70 merely exempts FIGA from responsibility for attorney's fees incurred in suit prosecuting a claim presented to ***FIGA itself***, unless FIGA denies the

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2 Section 631.54 of the FIGA act provides, in relevant part:

> (3) "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, Fla.Stat. (2007).

presented claim by its own affirmative action.

The case of Dilme v SBP Service, Inc., 649 So.2d 934 (Fla. 1st DCA 1995), is worthy of note. In *Dilme*, while a workers compensation claim was pending, the workers compensation insurer was placed in receivership. FIGA was substituted for the insolvent insurer, and its only involvement was to appear at the final argument on the injured worker's entitlement for attorneys fees, which was granted. FIGA appealed the attorney’s fees award to the First District, arguing that the exemption granted to it under §631.70 precluded the award of attorneys fees. The First District disagreed with FIGA, although the *Dilme* opinion is not clear whether the §631.70 exemption did not apply because §631.70 only specifically mentions §627.428, and does not mention §440.34, or whether the exemption simply doesn't apply to pre-insolvency attorneys fees. FJA suggests that the latter rationale is the more likely basis for the opinion, because the First District went on to write:

> The fact that FIGA took no affirmative action in the handling of the claim is irrelevant. Section 631.57(1)(a) provides that FIGA shall be obligated to the extent of the covered claims and shall pay the full amount of any covered claim arising out of a workers’ compensation policy. Section 631.57(1)(b) provides that FIGA shall be “deemed the insurer to the extent of its obligation on the covered claims, and, to such extent, shall have all 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." An award of attorney's fees to a workers' compensation claimant is part of a covered claim for which FIGA may be responsible. *Gustinger*. An award of attorney's fees is neither a penalty nor outside the scope of the policy. *Florida Ins. Guar. Assoc. v. Renfroe*, 568 So.2d 962 (Fla. 1st DCA 1990).

Sub judice, as noted above, an award of attorney's fees pursuant to §627.428, is neither a penalty, nor outside of the scope of a policy of insurance issued Florida. *Palma*, supra.

It is apodictic, and this Court has written time and time again, that the statutes are to read and construed "in pari materia", so as to harmonize the statutes to give effect and meaning to the legislative intent. *Maggio v Florida Department of Labor and Employment Security*, 899 So.2d 1074, (Fla. 2005); *McGhee v Volusia County*, 679 So.2d 729 (Fla. 1996).

When the legislature added the FIGA Act, Part II to Chapter 631, to the Florida Insurance Code in 1970, the legislature was presumed to know existing statutes when adding others so that they conform. *Crescent Miami Center, LLC v Florida Department of Revenue*, 903 So.2d 913 (Fla. 2005); *Tamiami Trail Tours v. Lee*, 194 So. 305 (Fla. 1940); *Schwartz v. Geico General Insurance Company*, 712 So.2d 773 (Fla. 4th DCA 1998).

Certainly, section 627.428, and its immediate predecessor, section 627.0127 had been enacted long before the legislature added FIGA in 1970. Indeed, Florida has had such an attorney's fee statute at least as early as 1893. *Old Republic Ins. Co. v. Monsees*, 188 So.2d 893, 894, (Fla. 4th DCA 1966); *Tillis v. Liverpool & London & Globe Insurance Company*, 35 So. 171 (Fla. 1903).

An analogous dispute was addressed in this Court's decision of *Holmes County School Board v. Duffell*, 651 So.2d 1176 (Fla. 1995). *Duffell*, also involved the simultaneous operation of two Florida Statutes. The dispute was whether the legislature's amendment of the sovereign immunity statute, section 768.28(9), in 1980, was intended to eliminate a public employee's statutory right pursuant to section 440.11(1), amended two years prior, in 1978, which provided that workers' compensation is not a claimant's exclusive remedy as to liability of a fellow employee when each is operating in the furtherance of the employer's business but they are assigned primarily to unrelated works. This Court, applying long accepted rules of statutory construction wrote, at pp. 1179:

> The legislature is presumed to know existing law when it enacts a statute. *Williams v. Jones*, 326 So.2d 425 (Fla.1975),. As such, it is illogical to assume the legislature's 1980 amendment to section 768.28(9) was intended to eviscerate the public employee's statutory right to redress injury

> under section 440.11(1), while the private employee's statutory right to redress injury under the same section remains intact.
>
> A contrary interpretation facilitates unequal treatment among public and private employees.

Sub judice, without a clear intention expressed in the FIGA Act, it is illogical to assume that §627.428, which is an implicit part of every insurance policy issued in Florida when an insured is forced to litigate a claim against an insurer prior to the insolvency, was eviscerated by the language in §631.70 which contains a limited exemption from attorneys fees claims for litigation against FIGA ***itself*** after an insolvency.

The premise of what constitutes a claim that FIGA must pay is that FIGA stands in the shoes of an insolvent insurer to protect Florida citizens by paying– subject to caps as to amount-- all claims that were covered by the subject policy of insurance. *Jones*, supra. Since this is the touchstone of the Act, then in order to take away from it (*i.e.*, for any claim that would have been paid by the insolvent carrier to be avoided by FIGA), the Act must contain clear language expressing a contrary intent. It does not.

Respectfully, it is a quantum leap to say that, if FIGA is exempt from an award of section 627.428 attorneys' fees ***directly against FIGA***, then FIGA is necessarily exempt from a claim that consists of a section 627.428

attorney's fee award for fees incurred in litigating a lawsuit against a now insolvent insurer, prior to the insolvency. On the contrary, since the §627.428 unidirectional attorneys' fee provision is an implicit part of every insurance policy issued in Florida, FIGA must pay claims for section 627.428 awards against insolvent insurers whose claims obligations it assumes.

Prior precedent supports this view. In *Martino v FIGA*, 383 So.2d 942, 944 (Fla.3rd DCA 1980); the insured had obtained a default judgment against the insurer prior to the insolvency. FIGA contended that it was not responsible for a final default judgment entered against the insolvent insurer. The Third District rejected FIGA'S argument out of hand:

> Clearly, the claim in the instant case is more than "ripe for payment." Notwithstanding the fact that the Florida Insurance Guaranty Association, Inc. was not a named party in the prior suit, it is bound by the former judgment as it participated in that proceeding after Southern American Fire Insurance Company had been declared an "insolvent insurer." See *Kline v. Heyman*, 309 So.2d 242 (Fla. 2d DCA 1975), cert. denied, 317 So.2d 767 (Fla.1975), cert. denied, 423 U.S. 1034, 96 S.Ct. 567, 46 L.Ed.2d 408 (1975). Furthermore a judgment by default is as conclusive on rights of parties as a judgment on the merits. *Perez v. Rodriguez*, 349 So.2d 826 (Fla. 3d DCA 1977); *Sottile v. Gaines Construction Company*, 281 So.2d 558 (Fla. 3d DCA 1973); *Baum v. Pines Realty, Inc.*, 164 So.2d 517 (Fla. 2d DCA 1964); and generally 47 Am.Jur.2d, Judgments ss 1152 et

seq.

> The relevant provision of Section 631.57 states un-equivocally that:
>
> "(1) The association shall:
>
> "(a) Be obligated to the extent of the covered claims existing:
>
> "1. Prior to the adjudication of insolvency and aris-ing within thirty days after the determination of in-solvency;"
>
> "(b) (The association shall) (b)e deemed the insurer to the extent of its obligation on the covered claims, and to such extent shall have all rights, du-ties, and obligations of the insolvent insurer as if the insurer had not become insolvent."
>
> Accordingly, we reverse and remand the cause to the trial court. Appellee, the Florida Insurance Guaranty Association, Inc., as the party having the same rights, duties and obligations as had the now-insolvent insurer, is bound by the judgment against the insolvent insurer due to the obvious "mutual" or "successive" relationship formally created by our Legislature. See *Hann v. Carson*, 462 F.Supp. 854 (M.D.Fla.1978); *Osburn v. Stickel*, 187 So.2d 89 (Fla. 3d DCA 1966); *Allstate Insurance Company v. Warren*, 125 So.2d 886 (Fla. 3d DCA 1961).

The Third District in Martino, did not note whether or not the default final judgment contained an award of statutory attorney's fees under section 627.428. However, if this Court were to adopt the reasoning of the Second District in the instant case, and reject the better reasoned rule of the Third District in *Soto*, respectfully such decision would create inherent conflict

with *Martino*.

Moreover, if this Court were to affirm *Petty*, and reject _Florida Insurance Guaranty Association v Soto_, 979 So.2d 964 (Fla. 3rd DCA 2008), at worst, an unpaid final judgment that an insured had obtained against an insolvent carrier prior to FIGA'S involvement, would be automatically eliminated in its entirety if it were just for attorney's fees, or at the minimum, the portion of any such final judgment for section 627.428 attorney's fees would be automatically eliminated when FIGA is involved.

There is also no basis in the Act to support the Second District's finding that section 627.428 attorney's fees would be covered only if the statutory provision itself was expressly engrafted into a given policy of insurance. There is simply no requirement, nor is there any Florida precedent to support a suggestion that an insurance policy, issued in Florida, must specifically incorporate section 627.428 in order for it to be apart of the policy, and there is certainly no precedent to require such specific incorporation for section 627.428 to apply after an insolvency when FIGA has stepped in.

It would be a miscarriage of the FIGA Act's objectives for Petitioners to lose the statutory attorney's fees provision of § 627.428 -- long-since deemed an implicit coverage provision of the all insurance policies such as

that of the petitioners – simultaneous with FIGA's stepping into their insolvent insurer's shoes. Such a result would be the antithesis of liberal construction in favor of Florida's citizens vis-a-vis the insurance industry.

III. IMMUNIZING FIGA FROM THE PRE-INSOLVENCY § 627.428 OBLIGATIONS OF AN INSOLVENT INSURER IS COUNTERPRODUCTIVE OF ACHIEVING THE ACT'S STATUTORY PURPOSE OF DETECTING INSOLVENCIES. ENSURING THAT INSUREDS CAN AFFORD AND BE REIMBURSED FOR THEIR ATTORNEY'S FEES AS AN INSURER DESCENDS TOWARD INSOLVENCY ADVANCES THIS POLICY AND SERVES AS A CHECK BY REVEALING THAT AN INSURER IS FAILING TO MEET CLAIMS OBLIGATIONS.

Aside from funding, and ensuring payment of, claims against insurance coverage issued by insolvent insurers, the only other purpose of the FIGA Act is to "[a]ssist in the detection and prevention of insurer insolvencies." § 631.51(2), Fla.Stat. (2007). It takes little imagination to recognize that, as a given company's financial reserves become strained, it will initially be tempted to take measures to conserve cash, including delaying and avoiding payment of undisputed obligations. In the context of an insurance company, this may include the failure to pay the claims of its insureds that are obviously covered by current insurance policies. By enactment of section 627.428, Florida Statutes, the legislature long ago expressed the public policy that insureds should have ready access to legal counsel in the event that an insurer does not pay a claim. This provision

guarantees to insureds that their attorney's fees for commencing an action against an insurance company will be reimbursed by the company pursuant to the very coverage of which enforcement is sought.

Insureds do not invariably hire counsel to sue their insurer on a contingency basis, many, especially Florida businesses pay fees in advance, or on an ongoing basis. Unfortunately, such pre-insolvency litigation can sometimes last for years prior to the insolvency, and expose insureds, forced to litigate against their insurers, to incur very substantial attorney's fees indeed. In some instances, the insured may have actually prevailed in the litigation against the insurer, including recovering an award of attorney's fees reduced to a final judgment that has not been satisfied prior to the insolvency. In some cases it may occur that an insurance company in financial straits will seek to avoid or delay paying legitimate and proper claims with the sole motivation of conserving resources and continuing operations. To the extent this may be an insurance industry practice when insolvency nears, to exonerate FIGA, and in turn the insurance industry, of unpaid pre-insolvency section 627.428 obligations, would have the effect of further encouraging such conduct to the detriment of Florida citizens. Yet, there is simply no statutory language, and nothing in the Act's legislative history, to suggest that the legislature intended section 627.428's guarantee

to insureds would disintegrate as to claims that insureds brought against their (ostensibly) then-solvent insurance company, if FIGA steps in after an insolvency.

Also, given that failure to pay claims is a sure sign of financial difficulty, permitting FIGA to dishonor the insurer's pre-insolvency section 627.428 attorneys' fee obligations would ignore that such litigation advances the Act's purpose of helping reveal an insurer's impending insolvency. While certainly FIGA is not authorized to arbitrarily "reward" an insured payment for unwittingly assisting in revealing an insured's approaching insolvency, the recovery of section627.428 attorney's fees has never been a reward, but rather carries out the established Florida public policy, discussed above, of ensuring that an insured is reimbursed for attorneys' fees expended to prevail in litigation against an insurance company -- throughout the duration of that company's authority to transact insurance business in Florida. Indeed, it is the previously-discussed purpose and public policy behind section 627.428, and its implicit incorporation into each insurance policy, and the absence of legislative intent to strip such an insured of an entitlement to a recovery thereunder when FIGA "steps into the shoes," that leads to the conclusion that FIGA must pay section 627.428 claims that had matured against an insolvent insurer prior to a determination of insolvency.

Finally, the availability of competent legal counsel to represent insureds whose legitimate claims have been denied by their insurers is the public policy of this state. If this Court were to affirm the Second District in *Petty*, and reject the Third District *Soto* opinion, the FJA foresees an unfortunate scenario:

An attorney, approached by a prospective client with a meritorious insurance claim, would conduct a financial check of the insurer's financial state, and if the insurer's finances were not rock solid, the attorney would be unwilling to represent the insured client at all, or certainly be unwilling to represent the client on a contingent fee basis. The prospective client, already having been victimized by the insurers denial of the claim, would either be unable to afford, or unwilling to pay the attorney, and would be forced to simply walk away from a meritorious claim under his policy. The insurer would win by default, and its bad conduct would be rewarded as a result.

Nothing in such a circumstance supports Florida public policy at all, but would certainly limit FIGA'S exposure after an insurer is declared insolvent, and by extension, limit the assessments of FIGA'S insurer members.

CONCLUSION

In light of the legislative scheme and public policy surrounding the section 627.428 attorneys' fees statute, the FIGA Act's policy of liberal construction in favor of insureds and not the insurance industry, and the absence of any provision of the FIGA Act that unambiguously deprives the insured of an insolvent insurer of coverage and payment by FIGA of pre-insolvency section 627.428 attorney's fees to which the insured became entitled pre-insolvency, FIGA must pay, as "covered claims" pursuant to the FIGA Act, section 627.428 attorneys' fees which the insured became legally entitled to recover from the insolvent insurance company prior to the determination of insolvency.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I CERTIFY THAT copy hereof was served by MAIL upon **Dorothy V. DiFiore**, Haas, Lewis, et al., 4921 Memorial Hwy., Ste. 200, Tampa, Fla. 33634**;** **Betsy E. Gallagher** and **Michael C. Clarke**, Kubicki Draper, P.A., 201 N. Franklin St., Ste. 2550, Tampa, Fla. 33602; **Bryan S. Gowdy** and **Jessie S. Harrell**, Creed & Gowdy, P.A., 865 May St., Jacksonville, Fla. 32204; **Bob G. Freemon** and **Ron A. Hobgood**, Freemon & Miller, P.A., 8381 Gunn Hwy, Tampa, Fla. 33626; and **Alan S. Wachs**, **Chris T. Harris** and **Michael M. Giel**, Volpe, Bajalia, et al., P.A., 501 Riverside Ave., 7th Fl., Jacksonville, Fla. 32202; on March 29, 2011.

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CERTIFICATE OF COMPLIANCE WITH FONT REQUIREMENTS

The foregoing computer-generated brief complies with the font requirements of Rule 9.210, Fla.R.App.P. Same is printed in Times New Roman 14-point font.

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