IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC10-2097

Lower Tribunal Nos.: 2D09-3749
04-2449CA

DIANE PETTY and KEVIN FARMER,

Petitioners,

vs.

FLORIDA INSURANCE GUARANTY ASSOCIATION,

Respondent.

ON APPEAL FROM THE DISTRICT COURT OF APPEAL, SECOND DISTRICT, STATE OF FLORIDA

RESPONDENT'S ANSWER BRIEF

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INTRODUCTION

This matter is before the Court based upon the Second District Court of Appeal's certification of a conflict between its decision in *Florida Ins. Guar. Ass'n v. Petty*, 44 So. 3d 1191 (Fla. 2d DCA 2010), and the Third District Court of Appeal's decision in *Florida Ins. Guar. Ass'n v. Soto,* 979 So. 2d 964 (Fla. 3d DCA 2003). Both decisions dealt with the issue of whether an insured, who incurs attorney's fees in suing an insurer who becomes insolvent before the insured can recover the fees, is nevertheless entitled to collect those fees from the Respondent, Florida Insurance Guaranty Association, Inc. [hereinafter "FIGA"], even though the attorney's fees do not fall within the coverage of the insolvent insurer's policy.

In *Petty*, the Second District ruled that FIGA did not have to pay attorney's fees incurred by the insured pre-insolvency in a first-party suit because such fees were not "within the coverage" of the insurance policy at issue and therefore were not a "covered claim" as defined in section 631.54(3), Florida Statutes (2007). 44 So. 3d at 1195. In contrast, the Third District in *Soto* ruled that FIGA had to pay the insured's attorney's fees because "FIGA is not relieved of the [insurer's] obligation to pay the insured's attorney's fees and costs incurred pre-insolvency for prevailing on a 'covered claim.'" 979 So. 2d at 966. As will be demonstrated below, the Second District's analysis and holding in *Petty* is correct and should be upheld by this Court.

STATEMENT OF THE CASE AND OF THE FACTS

The *Petty* case had its genesis in August 2004, when the home owned by Diane Petty and Kevin Farmer [hereinafter "the insureds" or "Petitioners"] sustained damage when Hurricane Charley swept through Charlotte County. (R.1: 2).[1] At the time of the damage, the home was insured with Florida Preferred Property Insurance Company [hereinafter "Florida Preferred"]. (R.1: 7–46). The insureds submitted claims for the damage, and within a month, the insurer began making payments to the insureds. (R.2: 327–28). In October 2004, the insureds requested an appraisal because the estimate prepared by their adjuster indicated that the damages were substantially higher than the amounts paid. (R.2: 337–38).

In response to their request, Florida Preferred performed a second review and assessment of the property in December 2004. (R.2: 327, 332). As a result of this second evaluation, Florida Preferred paid additional amounts under coverage A, but did not pay any amounts under the Law and Ordinance coverage of the policy. (R.2: 327, 332).

The insureds continued to insist that the damage to their home exceeded the amount they had been paid and continued to demand an appraisal pursuant to the policy. (R.2: 337-38). Florida Preferred refused to submit to the appraisal process,

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[1]Citations to the Record on Appeal appear in the following format (R.1: 100), with "1" representing the volume number and "100" the page number.

arguing that the insureds were required to mediate the case pursuant to an emergency rule put in place as a result of the overwhelming number of claims that had resulted from the four hurricanes that struck central Florida in the summer of 2004. (R.1: 3). Accordingly, the insureds filed suit to compel appraisal. (R.1: 1–46). For several months, Florida Preferred resisted the appraisal process and continued to insist that the insureds were required to submit to mediation. (R.1: 55–58).

Once litigation ensued, Florida Preferred recognized that it had been in error, and apparently ignoring the fact that the insureds' own petition was filed for the sole purpose of compelling appraisal, itself filed a motion to compel appraisal. (R.1: 55–58). The appraisal was held in late 2005, and in early 2006, the umpire handed down his decision that additional coverage was owed by Florida Preferred on the claim. (R.2: 356). In keeping with the award and terms of the policy, on February 28, 2006, Florida Preferred forwarded payment to counsel for the insureds in the additional amount owed under the policy. (R.3: 358–59).

Following full payment of the benefits due under the Florida Preferred policy, the insureds filed a motion to confirm the appraisal and a motion for entry of a final judgment. (R.1: 117–61). The insureds also filed a motion for an award of attorney's fees pursuant to section 627.428, Florida Statutes. (R.1: 167–180). Florida Preferred opposed the entry of a final judgment and disputed the appraiser's award for the Law and Ordinance coverage. (R.1: 117–61).

Before these matters were scheduled for hearing, however, Florida Preferred became insolvent. (R.1: 184–201). On May 31, 2006, Florida Preferred was ordered into receivership with the Department of Financial Services and an automatic stay was entered in the matter. (R.2: 202–21). A final judgment and an order confirming the appraisal were thus never entered.

Just over two years later, the insureds filed a Motion to Lift the Stay, Reopen the Case and Substitute FIGA as the defendant. (R.2: 222–25). FIGA was served with the complaint several months later. (R.2: 229–334). As all of the policy benefits had been paid to the insureds by Florida Preferred prior to its insolvency, the parties eventually stipulated that the only issue that remained unresolved was whether FIGA could be required to pay the insureds' fees and costs incurred in the litigation with Florida Preferred. (R.2: 252–54).

Based on this stipulation, FIGA then responded to the complaint. (R.2: 255–58). With no factual disputes on this narrow issue in existence, and the parties promptly filed cross motions for summary judgment. (R.2: 259-62, 265-388). Following a hearing on the cross motions, the trial court entered its Order Granting Summary Judgment to the insureds, finding that FIGA was obligated to pay the fees and costs incurred by the insureds in their litigation with Florida Preferred. (R.3: 456–61). Thereafter, the parties reached an agreement on the amount of fees to which the insureds were entitled and a Final Judgment for $29,300 was entered on July 20,

2009. (R.3: 472–73). From this Final Judgment, FIGA timely appealed to the Second District. (R.3: 474–75).

The Second District reversed the trial court's decision, holding that an insured's statutory claim for attorney's fees was *not* a "covered claim" within the meaning of the FIGA Act, as there was no language in the insolvent insurer's policy providing coverage for fees awarded under section 627.428. *Petty*, 44 So. 3d at 1194-95. The Second District also certified that its decision in *Petty* was in conflict with the Third District's decision in *Soto*. *Id.* at 1195. The insureds filed a Notice to Invoke Discretionary Jurisdiction, and this Court accepted jurisdiction to review the two district court of appeal decisions.

SUMMARY OF ARGUMENT

On de novo review, this Court should affirm the Second District's decision in *Petty*. Attorney's fees, which are assessed as a penalty pursuant to section 627.428 in litigation against an insurer, who becomes insolvent before those fees can be paid, are not "covered claims" under the FIGA Act for which FIGA may be held liable. As the Second District correctly concluded, "section 631.54(3) does not impose coverage for fees claimed under section 627.428 when such fees are not within the insurance policy's coverage provisions." *Petty*, 44 So. 3d at 1195. Based on a plain reading of the statutory limitations included in the FIGA Act, supported by legislative history, case authority, fundamental rules of statutory construction, and public policy, it is

clear that the Florida Legislature never intended for FIGA to be held liable for attorney's fees, awarded pursuant to 627.428, for the actions of a now-insolvent insurer over which FIGA had no control.

FIGA's payment obligations are strictly limited by statute to "covered claims." Such limitation reflects an intention that FIGA, although responsible for the payment of "covered claims" to help protect insureds, not be required to take on all of the liabilities of insolvent insurers. As defined in plain and unambiguous language in section 631.54(3), Florida Statutes (2007), "covered claims" are only those that "arise[ ] out of, and [are] within the coverage, and not in excess of, the applicable limits of an insurance policy." Based on the plain language of the statute, and specifically the plain and ordinary meaning of "within the coverage" as construed by Florida courts, FIGA's obligations are restricted solely to the insurance coverage provisions in the insolvent insurer's policy. That "covered claims" are those created by the "coverage" provisions of an insurance policy is the very point of the definition.

Such a reading of "covered claims," supported by case authority from Florida and foreign jurisdictions, is not undermined by the fact that section 627.428 has been deemed to be an implied part of every insurance policy. As the Second District held in *Petty*, "the fact that section 627.428 is an implicit part of an insurance policy does not mean that the insured's claim against the insurer for fees and costs is part of the policy's coverage." *Petty*, 44 So. 3d at 1194. What Petitioners fail to grasp in arguing

to the contrary is the distinction, which must be made in determining what constitutes a "covered claim," between those statutes that regulate the substantive contents or terms of an insurance policy and those that regulate or control interpretation of, and disputes over, the coverage provided by the policy itself. The former statutes require or mandate provisions that must be included in a given policy of insurance, and if the insurer fails to so include them, then the courts will in essence reform the policy so as to include such provisions. The latter statutes govern the disputes or questions that arise regarding the actual coverage provisions. The former are properly applied to determine whether a claim is a "covered claim"; the latter are properly applied to govern the dispute related to the covered claim. FIGA is subject to the statutes that govern disputes over the coverage terms. Thus, while FIGA agrees that a claim for attorney's fees would be a "covered claim" if the policy in question stated that it provided coverage for the particular attorney's fees at issue, that simply is not the case herein.

In addition to the limitation that FIGA only be held liable for payment of "covered claims," FIGA may not be held liable for "penalties," pursuant to section 631.57(1)(b). Attorney's fees awarded pursuant to section 627.428 have consistently been held by Florida courts to constitute a "penalty," and thus a plain reading of 631.57(1)(b) makes clear that FIGA may not be held liable for those fees. This reading is confirmed by fundamental rules of statutory construction and legislative

history. In order to give full effect to section 631.57(1)(b), the penalty clause must be read to modify the types of claims and obligations for which FIGA may be held liable. As the Legislature made clear, the purpose behind enactment of 631.57(1)(b) is to protect FIGA from having to make payments for penalties caused by wrongful action and delay *on the part of the insolvent insurer*. The Legislature did not intend to subject FIGA to penalties for the actions of an insolvent insurer over which FIGA had no control.

Similarly, section 631.70, when read in conjunction with existing Florida case authority addressing FIGA's liability for fees, demonstrates that the only instances in which the Legislature intended FIGA to be held liable for section 627.428 fees, are those in which FIGA, by its own affirmative action other than delay, denies a "covered claim." The plain language of section 631.70 reflects an express limitation on the applicability of 627.428 to *all* claims presented to FIGA for payment. Despite Petitioners' misreading of the statute and confusion of the issue, insureds and claimants are always obligated to bring their "unpaid" pre-insolvency claims to FIGA for payment once an insurer becomes insolvent. Without 631.70, every unpaid claim, pending against an insurer at the time of an insolvency, could result in a judgment (whether actual or by "confession") against FIGA, deemed to be the "insurer," thus triggering an award of attorney's fees under section 627.428. To avoid this, the Legislature clearly limited FIGA's obligation to pay section 627.428 fees in any claim

presented to it to those instances in which FIGA's own affirmative actions prompted legal activity. This reading of the statute is supported by legislative history. Additionally, a critical review of Florida case authority to which Petitioners cite, suggests that worker's compensation cases, in which attorney's fees are mandated by statute to be "within the coverage" of the compensation policy, and must be paid pursuant to section 440.34, are inapposite. Such cases thus buttress the conclusion FIGA advocates — only when a statute requires that an insurance policy "provide coverage" for the attorney's fees being demanded, must FIGA treat such as a "covered claim." Such is not the case here.

While the statutory provisions outlined above limit the payment obligations for which FIGA may be held liable, the acceptance of such statutory limitations is not a ruling in favor of the insurance industry. Rather, such limitations are in accord with the purpose of the FIGA Act and are consistent with the financial reality that FIGA's ***assessments are ultimately the burden of every insurance policyholder in Florida.*** By advocating that FIGA be held responsible for the payment of section 627.428 attorney's fees, Petitioners seek to increase the costs of insurance for all Florida policyholders and impose entirely unwarranted penalties on FIGA for actions over which it has no control. This Court should therefore affirm the Second District's decision in *Petty*.

STANDARD OF REVIEW

On appeal, this Court must determine if the Second District Court of Appeal correctly interpreted and applied the FIGA Act, codified as sections 631.50 through 631.70, Florida Statutes (2007). As the issue in this case requires statutory interpretation, the standard of review is de novo. *Allstate Ins. Co. v. Holy Cross Hosp., Inc.*, 961 So. 2d 328, 331 (Fla. 2007); see *Found. Health v. Westside EKG Assoc.*, 944 So. 2d 188, 193–94 (Fla. 2006) (noting that the standard of review for questions of statutory interpretation is de novo).

ARGUMENT

STATUTORY ATTORNEY'S FEES ASSESSED AGAINST AN INSURER UNDER SECTION 627.428, PRIOR TO THE INSURER'S INSOLVENCY, DO NOT CONSTITUTE A "COVERED CLAIM" WITHIN THE MEANING OF SECTION 631.54(3) OF THE FIGA ACT, WHEN SUCH FEES ARE CLEARLY NOT WITHIN THE COVERAGE OF, AND LIKELY ARE IN EXCESS OF THE APPLICABLE LIMITS OF THE INSURANCE POLICY ISSUED BY THE INSOLVENT INSURER, AND SUCH FEES HAVE CONSTITUTED A "PENALTY," WHICH IS NOT A COMPENSABLE "COVERED CLAIM" UNDER SECTION 631.57(1)(b)

A. FIGA Was Created to Provide a *Limited* Level of Relief to Florida Citizens Following the Insolvency of Their Insurers, and Was Not Created to Avoid All Financial Loss to Claimants and Policyholders by Paying All of the Liabilities of the Insolvent Insurer

The Florida Insurance Guaranty Association Act [hereinafter "FIGA Act"] was enacted in 1970. Ch. 70-20, §§ 1–19, Laws of Fla. The FIGA Act is currently codified

as sections 631.50 through 631.70, Florida Statutes (2007). The dominant purposes of the FIGA Act are stated to be: (a) 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; (b) to "[c]reate a *nonprofit corporation* to administer and supervise the operation of such association;" and (c) to "*[a]ssess the cost of such protection* among insurers." § 631.51(a), (c), and (d), Fla. Stat. (2007) (emphasis added).[2]

While FIGA was clearly intended to pay certain "covered claims" to protect insureds and certain third-party claimants, FIGA was never intended to take on all of the liabilities of insolvent insurers. FIGA is purely a creature of statute, whose obligations are strictly limited.[3] The extent of FIGA's payment obligations is detailed in the terms of the statute creating the association. Those limitations on the

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[2]While 631.51(c) states that one of FIGA's purposes is to assess "among the insurers" the cost of the statutorily designated protection provided by the FIGA Act, the undeniable reality of the statutory scheme is that the member insurers are only "fronting" the money to pay the required claims. Ultimately, the amounts paid out to insureds and claimants under the FIGA Act are *directly and legally* passed along via increased premiums to all Florida citizens purchasing insurance. *Infra* 42-47.

[3]Amendments to the FIGA Act since its enactment have operated to reduce FIGA's liabilities in a number of ways. For example, amendments to the Act have removed categories of insurance from the scope of the Act, prohibited subrogation actions against insolvent members, relieved FIGA from any penalty or interest liability, and established a one-year statute of limitations period for claims brought against the association. *See* Ch. 71-970, § 19, at 12, Laws of Fla.; Ch. 77-227, §§ 1–3, at 1152–53, Laws of Fla.

obligations for which FIGA may be held responsible, many of which are discussed in more detail below, include the following: (1) FIGA is only "obligated to the extent of the *covered claims* existing (a) prior to adjudication of insolvency and arising within 30 days after the determination of insolvency; (b) before the policy expiration date if less than 30 days after the determination; or (c) before the insured replaces the policy or causes its cancellation, if she or he does so within 30 days of the determination," § 631.57(1)(a)1, Fla. Stat. (2007) (emphasis added); (2) the maximum amount payable on a "covered claim" (not involving condominiums) is limited by a statutory cap of $300,000, with an automatic $100 deductible,[4] § 631.57(1)(a)2, Fla. Stat. (2007); (3) "[i]n no event shall the association be obligated to a policyholder or claimant in an amount in excess of the *obligation* of the insolvent insurer *under the policy* from which the claims arises," § 631.57(1)(a)3, Fla. Stat. (2007) (emphasis added); (4) "*[i]n no event shall the association be liable for penalties or interest,"* § 631.57(1)(b), Fla. Stat. (2007); (5) FIGA cannot be held liable for an excess judgment caused by the bad faith of an insolvent insurer, *see Rivera v. S. Am. Fire Ins. Co.*, 361 So. 2d 193 (Fla. 3d DCA 1978); (6) FIGA cannot be held liable for the alleged bad-faith failure to settle a claim presented to it, *see Fernandez v. Florida Ins. Guar.*

[4]Thus, for example, multiple survivors under the Wrongful Death Act, suing for the death of one person caused by the act of a single insured, were entitled to only a single $300,000 claim against FIGA, even though the policy provided far more generous "per occurrence" coverage of $1,000,000. *Florida Ins. Guar. Ass'n, Inc. v.*

Ass'n, 383 So. 2d 974 (Fla. 3d DCA 1980). In discussing the limitations on FIGA's obligations, the Third District Court of Appeal aptly observed, "[s]ince, *absent* Chapter 631, *FIGA* would not exist and there would be *no effective remedy to recover* on *any* claims whatever *against insolvent insurers*, there can be no constitutional infirmity in the Legislature's decision to limit those newly-created rights." *Id.* at 976 (emphasis added).

Contrary to Petitioners assertions, the Legislature did not draft the FIGA Act so as to place Florida insureds in the same position they would have been in if their insurer had not become insolvent. (Pet'rs' Br. 37). While FIGA may be obligated to pay certain covered claims, just as the insolvent insurer would have been, it does not automatically assume *all* of the insolvent insurers liabilities. As the Fifth District Court of Appeal has simply stated, "the full gamut of a defunct insurance company's liabilities was not intended to be shifted onto FIGA." *Florida Ins. Guar. Ass'n, Inc. v. Olympus Ass'n, Inc.,* 34 So. 3d 791, 794 (Fla. 4th DCA 2010) (quoting *Williams v. Florida Ins. Guar. Ass'n, Inc.,* 549 So. 2d 253, 254 (Fla. 5th DCA 1989)).[5] Rather, the FIGA Act evidences a clear legislative intent to limit the obligations for which FIGA

Cole, 573 So. 2d 868 (Fla. 2d DCA 1990), *rev. denied,* 584 So. 2d 997 (Fla. 1991).

[5]As explained in *Schreffler v. Pennsylvania Ins. Guar. Ass'n,* 586 A. 2d 983, 985 (Pa. Super. Ct. 1991), "the Act does ***not*** intend to place a claimant in all cases in the ***same*** position she would have been had the insurance company remained solvent. The Act creates a means by which limited recovery may be had in instances where none would have been possible due to insolvency" (emphasis added).

may be held responsible. This only makes sense given that it is not the member insurers, but the entire insurance-purchasing public in Florida that ultimately bears the burden of the costs incurred by FIGA in paying claims under the FIGA Act. As the court aptly observed in *Williams*:

> If FIGA had been intended to be a successor in all regards to an insolvent insurer's obligations and liabilities to a policyholder, such limiting language would not be necessary. The legislature could simply have made FIGA a statutory successor to defunct insurance companies. ***No doubt because it was intended that the claims preserved for payment by Chapter 631 would be manageable and not bankrupt the statute's funding and payment mechanism, it was necessary to limit them not only as to total amount, but also as to substance-covered claims under existing policies.***

549 So. 2d at 254 (emphasis added).

In determining whether FIGA will be held responsible for the payment of attorney's fees as a "substance-covered claim under an existing policy," this Court must determine the meaning of "covered claim" under section 631.54(3). In general, "a two-part test is applied to determine whether a state guaranty fund is obligated to assume the payment obligations of the insolvent insurer. First, the claim must be one that would have been covered by the insolvent carrier. Second, the claim must fit within the statutory definition of a covered claim. . . ." Jeff Hawkins, *Which Faultless Party Will Be Forced to Pay for Another's Failure? A Proposal for Legislatively Extending the Use of State Guaranty Funds to Absorb the Orphan Shares of Long-Tail Claim*, 37

TEX. TECH L. REV. 215, 227 (Winter 2004). Thus, to determine whether or not the payment of attorney's fees, pursuant to section 627.428, Florida Statutes, is a "covered claim" for which FIGA should be held liable, this Court must look to the plain language of section 631.54(3).

B. The Plain Meaning of Section 631.54(3), Florida Statutes, Makes Clear that FIGA May Not be Held Liable for the Payment of Attorney's Fees, Pursuant to Section 627.428, as They Are Not "Covered Claims" that Are Within the Coverage of, and Not in Excess of the Applicable Limits of the Policy Issued by the Insolvent Insurer

In limiting the extent of relief provided to claimants and policyholders, the Florida Legislature restricted FIGA's obligations solely to "covered claims," which it defined in plain and unambiguous language. § 631.54(3), Fla. Stat. (2007). Section 631.54(3) defines "covered claim," in pertinent part, as:

> [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.

§631.54(3), Fla. Stat. (2007) (emphasis added).

Fundamental rules of statutory construction dictate that the statute must be given its plain meaning. As recently stated by this Court in *Florida Birth-Related Neurological Injury Compensation Ass'n v. Dept. of Admin. Hearings*, 29 So. 3d 992 (Fla. 2010):

> As a general rule, statutory interpretation begins with the

> plain meaning of the statute. . . . As this Court has
>
> > explained, "[w]hen the language of the statute is clear and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation and construction; the statute must be given its plain and obvious meaning. . . . "If the language of a statute is clear and unambiguous, the legislative intent must be derived from the words used without involving rules of construction or speculating as to what the legislature intended." . . . "[E]ven where a court is convinced that the legislature really meant and intended something not expressed in the phraseology of the [statute], it will not deem itself authorized to depart from the plain meaning of the language which is free from ambiguity."

29 So. 3d at 997–98 (internal quotations and citations omitted). Based on the plain language of the statute, FIGA's obligations are restricted solely to the insurance coverage provided in the insolvent insurer's policy. That "covered claims" are those created by the 'coverage' provisions of an insurance policy is the very point of the definition. To determine whether the claim is covered, a court looks to the coverage provisions (those portions of the policy that are, in fact, subject to limits of liability and set forth the payment obligations of the insurer).

Petitioners argue, however, that there is ambiguity in the statute. Specifically, Petitioners argue that the phrase, "within the coverage of" is unclear because "covered claims" and "coverage" are "derived from the same etymological root." (Pet'rs' Br. 28–29). They claim that such an ambiguity permits the Court to resort to

statutory rules of construction in order to resolve the issue raised in this appeal.[6] Whether or not this Court looks to the plain meaning of the phrase, or resorts to rules of statutory construction, the outcome is the same—attorney's fees are not "within the coverage" of the insurance policy at issue in this case.

In analyzing "within the coverage," which is not specifically defined by the statute, "[o]ne of the most fundamental tenets of statutory construction requires that we give [it] its plain and ordinary meaning." *Green v. State*, 604 So. 2d 471, 473 (Fla. 1992). When necessary, "the plain and ordinary meaning of the word can be ascertained by reference to a dictionary." *Id.* In the instant case, the plain meaning of the term "within" is "in" or "in the scope of." The term "coverage" may be defined as "[i]nclusion of a risk under an insurance policy." BLACK'S LAW DICTIONARY (9th ed. 2009). Based on this definition, while Petitioners may be correct in arguing that section 627.428, Florida Statutes, is a part of every Florida-issued insurance policy, and as a result, an insurer is subject to the assessment of attorney's fees against it as

[6]The phrase "arises out of" is not at issue in the present case, and Petitioner does not discuss the phrase "***not in excess of, the applicable limits of an insurance policy***." FIGA would call this Court's attention to the fact that Petitioners and Amici have both conspicuously and repeatedly omitted the emphasized phrase, because it clearly shows that covered claims must be within the coverage provisions of the policy. The "applicable limits" of an insurance policy do not apply to any payment obligation, except those expressly created by the coverage provisions of the policy. Attorney's fees awarded pursuant to section 627.428 are clearly and unquestionably *not* restricted to the maximum policy limits. This omitted phrase is further evidence that Petitioners' argument regarding other statutory insurance provisions (Pet'rs' Br. 32–34) is unavailing.

a penalty, it can hardly be argued that these attorney's fees are properly considered to be a "risk," like personal injury, property damage, or other loss, which typically is considered to be "within the coverage of" an insurance policy.

Additionally, "in the absence of a statutory definition, courts can resort to definitions of the same term found in case law." *Rollins v. Pizzarelli,* 761 So. 2d 294, 298 (Fla. 2000). Daily, the courts throughout this state utilize the phrase "within the coverage of an insurance policy" in discussing whether an insurance company owes a duty to defend or indemnify an insured; the phrase has a readily understood meaning—a particular claim is "within the coverage" where defined and outlined in the provisions contained in the insurance policy. *See, e.g., Nat'l Union Fire Ins. Co. v. Lenox Liquors, Inc.,* 358 So. 2d 533, 535 (Fla. 1978) (applying the "well-established rule of this state that the insurer is under a duty to defend a suit against an insured only where the complaint alleges a state of facts ***within the coverage of*** the insurance policy"); *Citizens Prop. Ins. Corp. v. Manning*, 966 So. 2d 486, 488 (Fla. 1st DCA 2007) ("In a suit to recover under an insurance policy, the insured must prove that the loss did occur and that it was ***within the coverage of*** the policy") (quoting *Exhibitor, Inc. v. Nationwide Mut. Fire Ins. Co.*, 494 So. 2d 288, 289 (Fla. 1st DCA 1986). In fact, a simple Westlaw search retrieves hundreds of Florida cases using the phrase "within the coverage of" without a hint that the phrase is ambiguous or unclear to the courts involved in those decisions.

Unsuccessful in their argument that "within the coverage of" the insolvent insurer's policy is unclear, Petitioners attempt to confuse the issue by arguing that the Legislature did not intend for the phrases "arises out of" and "within the coverage of" an insurance policy to have distinct meanings or to impose separate requirements." (Pet'rs' Br. 18–19). The language used in section 631.54(3), however, directly contradicts Petitioners' argument—the statute states that a "covered claim" is defined to mean an "unpaid claim, . . . which arises out of, ***and*** is within the coverage, ***and*** not in excess of, the applicable limits of an insurance policy" issued by the insolvent insurer. FIGA submits that this Court would have to ignore or overrule ***clear precedent*** to accept Petitioners' argument that the Legislature did not intend to create three specific and separate statutory requirements in order for an unpaid claim to be considered a "covered claim" (i.e., one arising out of the policy; AND one within the coverage of the policy; AND one not in excess of the applicable limits of the policy). Petitioners' argument would require this Court to ignore the language the Legislature used in the definition and ignore clear precedent that commands that a court give meaning to the use of the conjunctive "and" in statutory provisions. See *Florida Birth-Related Neurological Injury Compensation Ass'n v. Florida Div. Admin. Hearings*, 686 So. 2d 1349,1353-6 (Fla. 1997) (the word "and," as used in the Birth-Related Neurological Injury Compensation Plan (NICA), which provides compensation for those who are "substantially mentally ***and*** physically impaired" as

result of birth-related neurological injury, must be read in conjunctive, and cannot be replaced with word "or" and read in disjunctive; thus, in order to obtain coverage under statutory plan, infant must suffer **both** substantial mental and substantial physical impairments, and it is insufficient that infant suffer only substantial impairment, mental or physical); *Sherman v. Reserve Ins. Co.,* 350 So. 2d 349, 352 (Fla. 4th DCA 1977), *cert. dismissed,* 355 So. 2d 516 (Fla. 1978) ("The choice of the conjunctive 'and' by the legislature in drafting this provision indicates that it was the intent of the framers to require that all three of the requirements set forth [in the statutory definition] be met").

Beyond the significance of the conjunctive "and," it is a general rule of statutory construction that "the Legislature does not intend to enact useless provisions, and courts should avoid readings that would render part of a statute meaningless." *Metro. Cas. Ins. Co. v. Tepper,* 2 So. 3d 209, 215 (Fla. 2009) (citing *State v. Goode,* 830 So. 2d 817, 824 (Fla. 2002); *Martinez v. State,* 981 So. 2d 449, 452 (Fla. 2008)). As such, "words in a statute are not to be construed as superfluous if a reasonable construction exists that gives effect to all words." *Id.* (citing *State v. Bodden,* 877 So. 2d 680, 686 (Fla. 2004)). Here, Petitioner may not ignore the significance of "within the coverage of." The plain meaning of the phrase "within the coverage of" is clear, and given its meaning, attorney's fees cannot be awarded pursuant to section 627.428, Florida Statutes, as "covered claims," because they are

not ***within the coverage of*** an insurance policy.

Having been unsuccessful in arguing that "within the coverage of" is unclear, and that the phrase should simply be merged with, or collapsed into, the separate phrase "arises out of," Petitioners attempt to further confuse the issue by coming up with their own explanation and/or definition of what they postulate the Legislature intended when it used the phrase "within the coverage of" in defining the scope of a "covered claim." Through sleight of hand, Petitioners move from properly focusing upon the phrase "within the coverage" to instead focusing upon a statutory definition of the word "insurance," and then, based thereon, conclude that "[a]n insurer's implied contractual obligation under section 627.428 satisfies this statutory definition of 'insurance' because it obligates an insurer to pay 'a determinable benefit' ('reasonable' attorney's fees) upon a 'determinable contingenc[y]' ('the rendition of a judgment' in favor of an insured 'under a policy or contract executed by the insurer'"), (Pet'rs' Br. 36). (citing section 624.02, Fla. Stat. (2007))

Petitioners say that their "construction of 'covered claim'" is preferable because it "draws a line between, on the one hand, 'covered' contractual liabilities under which an insurer must pay a determinable benefit upon the occurrence of a determinable contingency and, on the other hand, 'non-covered' extra-contractual and other liabilities that lack a determinable benefit or contingency." (Pet'rs' Br. at 37).

Petitioners never explain the basis for their assertion that attorney's fee awards

are a "determinable benefit" under an insolvent insurer's policy that FIGA could reasonably quantify in calculating the level of assessments necessary for FIGA to handle the anticipated claims under the policies issued by an insolvent insurer. No basis exists for Petitioners' assertion. In contrast, as long as FIGA's liability is properly limited to the claims covered under the insolvent insurer's policy and the statutory cap, whichever is less, as held by the Second District in *Petty*, the maximum potential exposure FIGA may face following any given insolvency can certainly be calculated with a reasonable degree of accuracy by reference to the "applicable limits" of the issued policies and the FIGA cap.

The Petitioners have offered no rationale for why this Court should adopt the new "standard", which they simply invented, to determine what constitutes a "covered claim" in order to reach the conclusion they desire — i.e., that their attorneys be paid for the time they devoted to the case before FIGA was even in the picture. Petitioners provide no guidance as to where they suggest this new covered claim "line is drawn" (other than obviously suggesting that the Petitioners' attorney fee claim falls "inside" the new line). Clearly, the Petitioners' proposed amorphous standard and "the line" to which they allude are nowhere supported by the plain and easily understood language of the definition of "covered claim" currently set out in section 631.54(3).

For these reasons, there is no need for this Court to look any further than the plain language of "covered claim" in Florida's FIGA Act. This Court should affirm

the Second District's decision in *Petty*, in which the court correctly determined that "covered claims" are those which are directly provided for by the policy. And, despite Petitioners' invitation to the contrary (Pet'rs' Br. 19–23), there is no need for this Court to focus upon extrinsic matters such as the differences in the language used in the National Association of Insurance Commissioner's 1970 Model Act versus the new version of the Model Act recently issued in 2010, or to ponder the wide variety of amendments of the Insurance Guaranty Association Acts in some other states, including those which have varied the language of their definition of "covered claim." The Petitioners' references to these extrinsic sources only serve to reinforce the notion that it is contrary to the overall plan for, and the important purposes served by, insurance guaranty associations to require them to pay claims based on attorney's fees, whether incurred in a lawsuit against the insolvent insurer or in a lawsuit against the guaranty association.

C. Case Authority Suggests that Although Attorney's Fees, Awarded Pursuant to Section 627.428, May Be an Implicit Part of an Insurance Policy, Section 631.54(3) Does Not Impose Coverage for Such Fees When Such Fees Are Not Within the Insurance Policy's Coverage Provisions

From FIGA's perspective, the phrase "within the coverage of" an insurance policy has a plain, ordinary and commonly understood meaning. An insurer's legal obligation to pay statutorily imposed attorney's fees under section 627.428 does not constitute a "covered claim" under the FIGA Act unless those fees come "within the

coverage of" the insurance policy issued by the insolvent insurer. The Second District found no difficulty in giving the phrase "within the coverage of" its proper meaning as used within the definition of "covered claim" in *Florida Ins. Guar. Ass'n, Inc. v. All the Way with Bill Vernay, Inc.*,:

> Under the plain language of the statute, to be a covered claim, the claim must both 'arise out of' the insurance policy and be 'within the coverage of' the insurance policy.
>
> In this case, there is no dispute that the attorney's fees and costs constituting the damages award for Reliance's breach of its own duty to defend 'arise out of' the insurance policy. However, this damage award is not 'within the coverage of' the policy. The only possible source of coverage is the 'supplemental payments' provisions of Vernay's policies with Reliance.

864 So. 2d 1126, 1130 (Fla. 2d DCA 2003). After determining that the facts of the case did not qualify the insured's attorney's fees for coverage under the policy's "supplementary payments" provision, the Second District continued:

> Therefore, under the plain language of Vernay's policies and the holding of *Steele*, the attorney's fees and costs incurred by Vernay in defending the underlying action are not 'within the coverage of' the insurance policies. Because a claim must both 'arise out of' and be 'within the coverage of' the policy before it constitutes a covered claim for which FIGA is responsible, the fact that Vernay's damages are not 'within the coverage of' the policy means that FIGA cannot be held responsible for those damages.

Id.

Several courts in other states have agreed, construing the same "covered claim"

language found in their own state's guaranty acts, to mean that "'covered claims' refers to claims covered by the policy of an insolvent insurer;" they do not encompass attorney's fees and penalties, which are not covered under the policy, but are imposed by statute upon the insurer prior to insolvency due to the insurer's handling of the claim. See *Williams v Champion Ins. Co.*, 590 So. 2d 736 (La. App. 3 Cir. 1991); *Moore v. Louisiana Ins. Guar. Ass'n*, 584 So. 2d 1220 (La. App. 2 Cir. 1991); *Breaux v. Klein*, 572 So. 2d 656 (La. App. 5 Cir. 1991); *Chris Episcopo Constr. Co., Inc. v. Int'l Underwriters Ins. Co.*, 1994 WL 555381, at *3–4 (Del. Super. Ct. 1994).

Nevertheless, Petitioners cite to what they consider definitive authority to argue that because section 627.428 has been stated to be "an implied part of" every insurance policy, the insurer's statutorily imposed obligation to pay the insured's attorney's fees under this provision, following a wrongful denial of coverage, "arises out of and is within the coverage of the policy," and thus a claim on this obligation is a "covered claim" under section 631.54(3). (Pet'rs' Br. 27–40). While the Florida cases Petitioners cite do state in various ways that section 627.428 "is an implicit part of every insurance policy issued in Florida," none of the cases cited state that the insurance policy itself is thereby "amended" so as to "provide coverage" for statutorily imposed attorney's fees.

Review of Petitioners' cited authority[7] fails to reveal a single case stating that the section 627.428 legal obligation imposed on an insurer following a wrongful denial or delay in paying a claim is "within the coverage of" the policy at issue. Instead, "the ***liability imposed*** by the statute upon the insurer is in effect an ***incident of the insurer's wrongful refusal to pay***." *Pendas v. Equitable Life Assur. Soc. of U.S.*, 176 So. 104, 112 (Fla. 1937) (quoting *Orlando Candy Co. v. New Hampshire Fire Ins. Co.*, 51 F. 2d 392, 393 (S.D. Fla. 1931) (also noting that the fees awarded "constitute a ***statutory liability*** against a delinquent insurer")) (emphasis added).

This point is supported by cases from other jurisdictions cited in footnote 19 of the Petitioners' Brief at page 36. In that footnote, Petitioners state that they have located only three foreign cases "concerning whether a claim for pre-insolvency fees incurred by an insured was a 'covered claim.'"[8]

Petitioners first cite to *Carrier v. Hawaii Ins. Guar. Ass'n*, 721 P. 2d 1236 (Haw. 1986), and then state that this case found that pre-insolvency fees incurred by an insured were a "covered claim." What Petitioners conveniently omit is that the pre-insolvency attorney's fees incurred by the insured in *Carrier* case were specifically

[7]At pages 12 n. 4 and 34 of Petitioners' Brief, Petitioners cite to *Pendas v. Equitable Life Assur. Soc. of U.S.*, 176 So. 104, 112 (Fla. 1937); *State Farm Fire & Cas. Co. v. Palma*, 629 So. 2d 830 (Fla. 1993); *Cincinnati Ins. Co. v. Palmer*, 297 So. 2d 96, 98–99 (Fla. 4th DCA 1974).

[8]Additional cases dealing with the issue presented are cited in this brief.

noted to be "within the coverage of the policy of insurance." See *Carrier*, 721 P. 2d at 1237 (a claim for pre-insolvency fees was a "covered claim" under Hawaii's statute since "the claim is clearly 'within the coverage' because HRS § 294-2(10) (D) (iii) (1985) and ***the policy*** itself ***expressly include*** attorney's ***fees as part of*** a claimant's no fault ***benefits***") (emphasis added).

Petitioners also cite to *Matusz v. Safeguard Mut. Ins. Co.,* 489 A. 2d 868 (Pa. Super. Ct. 1985). It is true that the court ruled that the Pennsylvania Guaranty Association was responsible for payment of pre-insolvency attorney's fees awarded to the insured as a benefit under the No-Fault Act as it was a covered claim. *Matusz*, 489 A. 2d at 870. However, the Pennsylvania Act only required that the claim "**arise under** a property or casualty insurance policy." *Id.* The Pennsylvania Act did not require, as Florida's does, that the claim also had to be "**within the coverage of**" the insolvent insurer's policy. *Matusz* therefore sheds no light on the issue at hand.

Thus, the *Soto* decision is the lone authority the to which Petitioners can really point as supporting their argument that "any claim based on an insurer's obligation under section 627.428 arises out of and is within the coverage of an insurance policy, and thus any such claim is a 'covered claim' under section 631.54(3)." (Pet'rs' Br. at 37). On this point, *Soto* stated, without any analysis, the following:

> The Florida Supreme Court has held that section 627.428 is an implicit part of all insurance policies of the kind involved here. It follows that Soto's stipulated but unpaid

> attorney's fee judgment is a "covered claim" within the meaning of subsection 631.54(3).

979 So. 2d at 966.

The *Petty* court, on the other hand, engaged in a more thorough analysis of the issue presented and rejected the simplistic approach exemplified by the *Soto* court. Specifically, in addressing the insured's argument that the attorney's fees awarded under section 627.428 were part of the policy's coverage and therefore constituted a "covered claim," Judge Silberman stated:

> In our view, the fact that section 627.428 is an implicit part of an insurance policy does not mean that the insured's claim against the insurer for fees and costs is part of the policy's 'coverage.' As FIGA argues in its reply brief, to rely on the fee statute being 'implied in every policy fails to appreciate the distinction between liabilities arising by operation of law and liabilities arising by express contractual terms. . . . ***By linking covered claims to coverage provisions, rather than legal liabilities, the legislature limited FIGA's obligation to express terms of the policy***.' Notably, the parties have not pointed to any language in the applicable insurance policy that provides coverage for fees awarded under section 627.428. ***Thus, we conclude that section 631.54(3) does not impose coverage for fees claimed under section 627.428 when such fees are not within the insurance policy's coverage provisions***.

Petty, 44 So. 3d at 1194–5 (emphasis added).[9]

[9]This Court must keep in mind that (unlike *Petty*), the court's opinion in *Soto* states that the attorney fees involved in the case were actually stipulated to be "within the coverage of" the policy. *See Soto*, 979 So. 2d at 967 ("In the instant case, **Fortune already had agreed** (in the form of the stipulated judgment) that Soto's claims . . . for her **attorney's fees** were **payable under her policy**") (emphasis added). This was

In the instant case, it is undisputed that the Petitioners' homeowner's insurance policy provided no coverage whatsoever for the payment of attorney's fees. Instead, the insurer's obligation to pay the Petitioners' fees was a legal obligation imposed solely by statute as a penalty for contesting a valid claim; it was not a contractual obligation imposed by the coverage provisions of the policy. Thus, this Court should align itself with the reasoning of the Second District's decision in *Petty*, rather than following the Third District's decision in *Soto*.

D. Petitioners Fail to Grasp the Distinction, Which Must Be Made in Determining What Constitutes a "Covered Claim," Between Those Statutes That Regulate the Substantive Contents or Terms of an Insurance Policy and Those That Regulate or Control Interpretation of, and Disputes Over, the Coverage Provided by the Policy Itself

Petitioners argue that the Second District's determination, that "covered claims" are only those that are within the terms of the policy's coverage provisions and limits of liability, is flawed because such a determination does not allow for the incorporation into the terms of a policy those substantive, coverage-related provisions that are implied by other Florida statutes.[10] (Pet'rs' Br. 30–34). However, Petitioners'

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not the case in *Petty*, where the Second District pointed out that "[n]otably, the parties have not pointed to any language in the applicable insurance policy that provides coverage for fees awarded under section 627.428." 44 So. 3d at 1195.

[10]Petitioners attempt to illustrate their point with reference to a claim for unearned premiums. (Pet'rs' Br. 30-31). Yet, unearned premiums are expressly included within the definition of "covered claims." § 631.54 (3), Fla. Stat. Moreover, unearned premiums are one of the obligations both created by a contractual

argument fails to appreciate the distinction between those statutes that regulate the substantive contents or terms of an insurance policy and those that regulate or control interpretation of, and disputes over, the coverage provided by the policy itself.

The former statutes require or mandate provisions that must be included in a given policy of insurance, and if the insurer fails to so include them, they will become provisions implied by law.[11] The latter statutes govern the disputes or questions that arise regarding a policy's coverage provisions.[12] The former are properly applied to determine whether a claim is a "covered claim"; the latter are properly applied to

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relationship and required by statute. However, while the statute requires that an unearned premium be refunded, there is no requirement in Florida law that the policy actually include such "refund" as being included as a benefit which is paid as a part of the coverage extended by the provisions of the policy.

[11]Examples include section 627.4147, Florida Statutes (2010), which dictates provisions that must be included or offered in medical malpractice insurance; section 627.706, Florida Statutes (2010), which mandates coverage for sinkholes; section 627.736, Florida Statutes (2010), which mandates exact provisions for PIP coverage; and section 627.727, Florida Statutes (2010), which specifies the terms of uninsured motorist coverage. These statutes specify what coverage and terms may, may not, and must be included in the pertinent policies of insurance. Where a policy fails to actually comply with these statutes, a court will nonetheless apply and read into the policy the statutory terms as though they were properly incorporated. Nothing stated in the Second District's opinion would alter the appropriate application of such mandatory substantive statutes.

[12]Examples include section 627.7015, Florida Statutes (2010), which mandates alternative procedures for resolution of disputed property insurance claims; section 627.4132, Florida Statutes (2010), the nonjoinder statute; and section 627.4137, Florida Statutes (2010), which regulates disclosure requirements for liability insurance. These provisions may be "implied" in every policy, but they do not establish "coverage" under the policy.

govern the dispute related to the covered claim.

Thus, it is not a matter of dispute that the statutes which mandate the coverage terms of the policy would continue to apply even after the insurer has gone insolvent. Since those terms are, essentially, engrafted onto the original policy, FIGA takes the claim pursuant to those terms, and they are "covered claims." See e.g., *Coleman v. Florida Ins. Guar. Ass'n,* 517 So. 2d 686, 688 (Fla. 1988) (applying terms of UM statute to determine how many policies stacked to provide coverage, even though policy language limited coverage to only one policy).[13] When the distinction between the two types of statutes is understood, the entire example given by Petitioners regarding Insurers Alpha and Beta and the policy provisions related to unearned premiums, (Pet'rs' Br. 30-31) is shown to be unsound.[14] Petitioners' argument that

[13]In *Coleman*, the court expressly declared the UM policy language invalid and determined coverage solely on the basis of statutory requirements, without regard to whether dispute was with the insolvent insurer or FIGA. *Coleman*, 517 So.2d at 688, n.1 ("Although the policy provided that the limit of uninsured motorist insurance shown in the declarations ($ 20,000.00) was the most that would be paid for any one accident regardless of the number of covered autos or insureds, such provisions have been held to be invalid").

[14]The statutes that create coverage actually alter the express terms of the policy, if necessary, and create coverage provisions or modify the existing coverage to conform to the statute. Thus, the claims which are governed by such statutes are brought pursuant to express coverage provisions and are "covered claims." The obligation to pay medical expenses under section 627.736, to pay sinkhole claims under section 627.706, or to provide medicare supplement coverage without regard to pre-existing conditions under section 627.6741 is the same for FIGA as it is for any solvent insurer, because the statute alters the actual coverage terms of the policies. This is entirely consistent with the *Taylor* case discussed by Petitioners at pages 33

FIGA would not be obligated to pay in accordance with statutory mandates is directly contrary to *Coleman*, 517 So. 2d at 688 and premised entirely on a failure to appreciate the distinction between the types of statutory regulation of insurance.

While FIGA agrees that a claim for fees would be a "covered claim" if the policy in question stated that it provided coverage for attorney's fees imposed by statute, such as section 627.428, that simply is not the case herein. *Carguillo v. State Farm Mut. Auto. Ins. Co.*, 529 So. 2d 276, 278 (Fla. 1988) ("[w]hile an insurer may provide more ***coverage*** than is statutorily required, there is no requirement that an insured be protected to a greater extent than that statutorily mandated."). More importantly, nothing in section 627.428 mandates that policies contain such language. Unlike the examples listed earlier in note 11, section 627.428 simply does not create coverage under the policy. That this is true is likewise illustrated by the fact that the Legislature has specifically limited the application of section 627.428 in several instances: UM claims, section 627.727(8), Florida Statutes (2010); PIP pre-suit demands, section 627.736(10), Florida Statutes (2008); neutral evaluation of sinkholes; section 627.7074, Florida Statutes (2010); and claims against FIGA section 631.70, Florida Statutes. Accordingly, such statutorily imposed attorney's fee claims are not "covered claims" and are not within the scope of the FIGA Act.

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to 34 of their brief.

E. Attorney's Fees Awarded Pursuant to Section 627.428 Have Been Consistently Determined to be "Penalties" by the Florida Courts, and As Such Are Not Compensable Covered Claims Under Section 631.57(1)(b)

In addition to expressly limiting FIGA's payment obligations to claims that "arise out of," are "within the coverage" of, and are "not in excess of, the applicable limits of" the insolvent insurer's insurance policy, the Legislature has also declared that "***[i]n no event shall the association be liable for any penalties***. . . ." § 631.57(1)(b), Fla. Stat. (2007) (emphasis added). This provision also indicates that the Legislature never intended for an attorney's fee award against an insolvent insurer under section 627.428 to be considered a "covered claim" for which FIGA would be liable. In fact, courts of this state have long declared that "a fee award pursuant to statute [§ 627.428] is recognized as a penalty provision" which must be "strictly construed." *Travelers Indem. Co. v. Chisholm,* 384 So. 2d 1360, 1361 (Fla. 2d DCA 1980); *see also U.S. Fire Ins. Co. v. Dickerson,* 90 So. 613, 616 (Fla. 1921) (holding that attorney's fees provided for in Ch. 4173, Laws of Fla. (1893) (precursor to section 627.428), "are in the nature of a penalty"); *Liberty Nat'l Life Ins. Co. v. Bailey,* 944 So. 2d 1028, 1030 (Fla. 2d DCA 2006) ("we recognize that section 627.428 is a penalty in derogation of the common law"); *Gov't Employees Ins. Co. v. Battaglia,* 503 So. 2d 358, 360 (Fla. 5th DCA 1987) (recognizing that "the purpose of section 627.428 is to penalize"); *Great Sw. Fire Ins. Co. v. DeWitt,* 458 So. 2d 398,

400 (Fla. 1st DCA 1984) ("[s]ection 627.428 is in the nature of a penalty against an insurer who wrongfully refuses to pay a legitimate claim, and the statute must be strictly construed"). It is quite clear that long before the passage of the FIGA Act, Florida's Supreme Court was characterizing statutory attorney's fees imposed against insurance companies as a "penalty." See *Pendas* 176 So. at 112 ("The statutes are sustained under the doctrine that attorney's fees may be *imposed upon the delinquent insurance company* under the police power of the state *as a kind of penalty* incurred in the conduct of a business affected with a public interest") (emphasis added). Thus, when the Legislature enacted the FIGA Act, it presumably was aware of the prior judicial constructions of fee awards pursuant to section 627.428 as "penalties."

In construing section 631.57(1)(b), Florida Statutes (2007), a court must first look to the statute's plain language. As previously discussed, "when the language of the statute is clear and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation and construction; the statute must be given its plain and obvious meaning." *Fla. Birth-Related Neurological Injury Comp. Ass'n*, 29 So. 3d at 997 (citing *Holly v. Auld*, 450 So. 2d 217, 219 (Fla. 1984)). Based on the determination of Florida courts that section 627.428 attorney's fees are imposed as a "penalty," the plain meaning of section 631.57(1)(b), which states that "in no event" may FIGA be held liable for "penalties," makes clear that FIGA cannot be held liable for the section 627.428 attorney's fees

"penalty" imposed against an insolvent insurer.

F. Section 631.70, When Read in Conjunction with Existing Florida Case Authority Addressing FIGA's Liability for Fees, Demonstrates That the Only Instances in Which the Legislature Intended FIGA to Be Held Liable for Section 627.428 Attorney's Fees Are Those Where FIGA, by its Own Affirmative Action Other than Delay, Denies a "Covered Claim"

As previously discussed, shortly after the initial establishment of FIGA, the Florida Legislature amended the FIGA Act to add several provisions that limited the scope of FIGA's obligations. These limitations included adoption of section 631.70:

> 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.

Ch. 77-227, § 7, at 1154, Laws of Fla.; § 631.70, Fla. Stat. (emphasis added). Because the language of the statute is clear and unambiguous, there is no need to resort to the rules of statutory construction and interpretation. *Fla. Birth-Related Neurological Injury Comp. Ass'n,* 29 So. 3d at 997. Rather, the plain language of section 631.70 reflects an express limitation on the applicability of section 627.428 to claims presented to FIGA for payment. Despite this fact, Petitioners have attempted to confuse the issue by oddly parsing the language of the statute and developing a flow chart for reading the statute which is unnecessary at best, and inaccurate at worst. (Pet'rs' Br. 40–44).

Specifically, Petitioners attempt to argue that a court must first determine if a claim is "presented to FIGA" and then determine if the claim is a "covered claim." (Pet'rs' Br. 41). This focus on whether the claim is "presented to FIGA" serves no purpose but to confuse the issue. A plain reading of the statute, giving "present" its plain and ordinary meaning, suggests that ***all*** claims, whether arising from pre- or post-insolvency delays in payment, are "presented" to FIGA. Actions on claims brought against an insolvent insurer are handed over to FIGA during liquidation, and actions against FIGA for any direct, or affirmative, denial of claims, are obviously presented to FIGA as well.

Petitioners' entire discussion of section 631.70 fails to recognize that insureds and claimants are always obligated to bring their "unpaid" pre-insolvency claims to FIGA for payment once an insurer becomes insolvent. Without 631.70, every unpaid claim, pending against an insurer at the time of an insolvency, could result in a judgment (whether actual or by "confession") against FIGA, deemed to be the "insurer", thus triggering an award of attorney's fees under section 627.428. To avoid this, the Legislature clearly limited FIGA's obligation to pay section 627.428 fees to those instances in which FIGA's own affirmative actions prompted the legal activity.

As the Senate Commerce Committee stated in discussing SB 500, enacted as Ch. 77-227, Laws of Fla., and codifying section 631.70, "[t]he [A]ct [as it stands currently] allows an insured to recover attorney's fees whenever he prevails in court.

The bill would allow an insured to recover attorney's fees only if FIGA denied a covered claim by affirmative action other than delay." Fla. S. Comm. on Com., SB 500 (April 26, 1977) Staff Analysis (available at Fla. Dep't of State, Fla. State Archives, Tallahassee, Fla.) [Pet'rs' App. #9]. Based on this statement, it appears that Petitioners' argument, that "section 631.70 does not eliminate or limit an insured's claim for section 627.428 fees incurred in a pre-insolvency suit against the insurer" but rather "eliminates an insured's claim for section 627.428 fees incurred in a post-insolvency suit against FIGA when FIGA does not affirmatively deny a covered claim" (Pet'rs' Br. 26), is exactly the opposite of what the Legislature intended.

Petitioners argue, however, that Florida case authority supports such a reading and that Florida appellate courts have held that "a statutory claim for pre-insolvency attorney's fees satisfies the Act's definition of 'covered claim.'" (Pet'rs' Br. 24, 24 n. 15, 45–46). The first case discussed by Petitioners is distinguishable because it pre-dates the adoption of section 631.70. The other cited cases, excepting *Soto,* are distinguishable because the fees at issue were awarded pursuant to section 440.34, were not affected by section 631.70, which excludes fees awarded pursuant to 627.428 specifically, or were expressly "within the coverage of" the worker's compensation policies involved.

In *Zinke-Smith v. Florida Ins. Guar. Ass'n,* 304 So. 2d 507 (Fla. 4th DCA 1974), which pre-dated the adoption of section 631.70, an employer brought suit

against FIGA "to recover a loss which appellant sustained when its excess insurer . . . . became insolvent and unable to pay to appellant ***certain claims within the coverage of the policy***." 304 So. 2d 507, 508 (Fla. 4th DCA 1974) (emphasis added). The claim was not a claim for employee compensation arising under the Worker's Compensation Act, but rather a direct action against the employer's compensation carrier for the compensation coverage that had been purchased. *Id.* The Fourth DCA found that "the policy of insurance involved in the case was direct insurance within the scope of the [FIGA] Act, and that Zinke-Smith was not an insurer such as would prevent any amount due it from qualifying as a 'covered claim' under section 631.54(3), F.S." *Id.* at 509. Additionally, on petition for rehearing in the case, the court found "that section 627.428, F.S. is applicable to suits against FIGA." *Id.* at 510. The express language of section 631.70, adopted three years later, would make clear, however, that section 627.428 fees were ***not applicable unless*** FIGA affirmatively denied an insured's covered claim.

The next case cited by Petitioners, *Florida Ins. Guar. Ass'n v. Gustinger,* 390 So. 2d 420 (Fla. 3d DCA 1980)[15] involved a claim by an employee for worker's

[15]In July 1978, the Third District issued an opinion in *Rivera v. S. Am. Fire Ins. Co.*, 361 So. 2d 193 (Fla. 3d DCA 1978), wherein it addressed a claim for bad faith damages in excess of the policy limits. The court denied recovery of anything in excess of the policy and specifically rejected the argument that *Zinke-Smith* supported a contrary conclusion, stating, "appellants rely heavily upon the case of *Zinke-Smith, Inc. v. Florida Ins. Guar. Ass'n, Inc.*, 304 So. 2d 507 (Fla. 4th DCA 1974). We find this not to be persuasive *because the attorney's fee recovery therein was permitted*

compensation benefits and an award of attorney's fees pursuant to section 440.34, Florida Statutes (1977). In upholding the award of attorney's fees, the court expressly noted that the worker's compensation policy involved in *Gustinger* actually insured the employer for the fees required by the Compensation Act. *Id.* In concluding that the fees awarded to the employee by the compensation judge were "covered claims," the court stated:

> Since the workmen's compensation ***policy*** issued by Consolidated to Raystan Theatres ***obviously insured against the employer's responsibility to pay the claimant's attorney's fees under the then-existing provisions of the workmen's compensation law*** the statutory definition [of 'covered claims'] plainly applies.

Id. at 421 (emphasis added). Furthermore, on addressing the fees awarded for pursuing the rule nisi proceeding, the court also noted that those fees were awarded pursuant to section 440.34, Florida Statutes (1977), and thus "FIGA's liability under that statute is unaffected by Sec. 631.70." *Id.* Obviously *Gustinger* does not support any conclusion that fees awarded pursuant to section 627.428 are covered claims in a non-worker's compensation case, nor does it support Petitioners' claim that a pre-insolvency and post-insolvency dichotomy exists in the application of section 631.70.

The principles and holdings in workers' compensation cases are thus inapposite to the issues arising in this case. The fee awards in workers' compensation claims

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by another statute." *Id.* at 194 (emphasis added).

involve an award of attorney's fees, pursuant to section 440.34, which section 631.70 does not address, and such claims are covered claims because they are within the coverage of a workers' compensation policy and are not deemed to be a penalty.

While FIGA is not to be held liable for pre-insolvency fees, awarded pursuant to section 627.428, FIGA *may* be held responsible for section 627.428 attorney's fees when acting as an insurer and affirmatively denying an insured's covered claims, such as a duty to defend. See *Florida Ins. Guar. Ass'n v. Giordano,* 485 So. 2d 453 (Fla. 3d DCA 1986) (awarding fees incurred in an action to recover payment of a judgment against an insured);[16] *Carrousel Concessions, Inc. v. Florida Ins. Guar. Ass'n,* 483 So. 2d 513 (Fla. 3d DCA 1986) (awarding fees where the insured alleged that FIGA provided an inadequate defense and sought to recover the fees it incurred in defending itself);[17] *Florida Ins. Guar. Ass'n v. Price*, 450 So. 2d 596 (Fla. 2d DCA

[16]In *Giordano,* FIGA contested its duty to defend the insured under a liability policy, and then refused to participate in settlement negotiations, leaving the insured potentially uninsured for what the court described as "an immense judgment in a wrongful death action." 485 So. 2d at 454-56. The insured assigned its claims against FIGA to the plaintiff who was forced to file suit to compel FIGA to pay its portion of the judgment. *Id.* at 455. After the court ruled in favor of the insured on FIGA's obligation to pay the judgment, it also concluded that the insured was entitled to attorney's fees pursuant to section 631.70, because ***FIGA took affirmative action to deny a covered claim***. *Id.* at 457.

[17]In *Carrousel Concessions*, the insured rejected FIGA's defense attorneys, alleging that they were not providing an adequate defense. 483 So. 2d at 513. The appellate court reversed the summary judgment in favor of FIGA, finding it was premature, but noting that ***if*** FIGA's defense was inadequate then it would be liable for the fees incurred by the insured in procuring a competent defense. *Id.* at 516-17.

1984) (awarding fees where an insured sought fees incurred in a declaratory action to compel FIGA to provide a defense after the insolvency of the liability insurer). In none of these cases, however, was FIGA called upon to pay pre-insolvency fees awarded pursuant to section 627.428.

The first time an appellate court addressed a claim for pre-insolvency attorney's fees was in *Florida Ins. Guar. Association v. All the Way with Bill Vernay, Inc.*, discussed above, in which the court found that 627.428 attorney's fees were not 'covered claims' for which FIGA was liable, absent an express policy provision for such coverage. 864 So. 2d at 1128-30.[18] As can be seen by the above case law, Petitioners' argument that *All the Way* somehow departed from the legal precedent is clearly unfounded. Excepting *Soto*, those cases cited by Petitioner shed no light on section 631.70 or on the Legislature's intent in adopting it.

Such fees would be payable as damages for the breach of contract, *Id.* at 516, and not pursuant to section 627.428.

[18]In *All the Way*, the liability carrier refused to defend the insured in a lawsuit, thereby prompting the insured to hire his own defense lawyers and to file a declaratory action against the carrier. 864 So. 2d at 1127-28. While the two cases were pending, the carrier became insolvent and FIGA was substituted in the declaratory action. *Id.* at 1128. While the automatic stay was still in effect, the insured prevailed in an arbitration of the underlying suit. *Id.* The insured then obtained a judgment in the declaratory action finding that the insolvent carrier had breached the contract and awarding as damages the fees and costs incurred in defending the underlying litigation, as well as an award of fees for the declaratory action. *Id.* at 1128-29. The trial court's ruling that FIGA was obligated to pay those fees and costs was reversed by the Second District, because FIGA had never affirmatively denied any covered claims. *Id.* at 1130-31.

As recognized by Petitioners, the Legislature is presumed to know the existing law when it enacts a statute and is also presumed to be acquainted with the judicial construction of former laws on a subject about which a later statute is enacted. *Knowles v. Beverly Enterprises-Florida, Inc.,* 898 So. 2d 1 (Fla. 2005) (citing *Nicoll v. Baker,* 668 So. 2d 989, 991 (Fla. 1996); *Collins Inv. Co. v. Metro. Dade County,* 164 So. 2d 806, 809 (Fla. 1964)). By stating that attorney's fees awarded under section 627.428, would ***not apply*** "to any claim presented to FIGA" unless FIGA itself affirmatively denied the claim, the Legislature eliminated the right to pre-insolvency fees which had been incurred under that statute. That the Legislature did not eliminate all fees in actions involving FIGA, does not alter the fact that they eliminated the right to section 627.428 fees, unless triggered by FIGA's own affirmative actions.

G. Accepting the Statutory Limitations on FIGA's Obligations Is Not a Ruling in Favor of the Insurance Industry, but Is In Accord with the Purpose of the FIGA Act and Consistent with the Financial Reality That FIGA's Assessments Are Ultimately the Burden of Every Florida Policyholder

While the Petitioners' brief seeks to convince this Court that a ruling in favor of FIGA in this proceeding would be a ruling in favor of the "insurance industry," such is simply not the case. It is true that the costs associated with the payment of covered claims and the administration of FIGA are initially funded by the levy of assessments among the member insurers under section 631.57(3)(a), the fact remains

that "[a]n insurer may charge higher rates designed to recoup what it has paid to the association as assessments, less any refunds, and such rates shall not be considered excessive by reason of containing an amount reasonably calculated to recoup any such net payment." Charles Friend, *Insolvent Insurance Companies,* 45 FLA. B. J. 183, 184-85 (April 1971) [Pet'rs' App. #10]. As specifically stated in section 631.64, Florida Statutes (2007), "[t]he rates and premiums charged for insurance policies to which this part applies may include amounts sufficient to recoup a sum equal to the amounts paid to the association by the member insurer less any amounts returned to the member insurer by the association, and such rates shall not be deemed excessive because they contain an amount reasonably calculated to recoup assessments paid by the member insurer."

It is thus quite clear that any increase in the liabilities and obligations of FIGA simply gets passed along to Florida policyholders and those seeking insurance coverage in this state. If FIGA has to increase assessments to cover the exposure to pre-insolvency attorney's fee claims as will likely occur if this Court accepts the position advocated by Petitioners, then the result is that member insurers simply raise the rates of Florida insureds to recoup the much larger amounts paid in assessments. Accordingly, this Court's focus need not only be upon the unfortunate citizen whose insurer becomes insolvent while a claim is pending; this Court must also take into consideration that member insurers' assessments simply get passed along through

increased premiums, and therefore all Florida policyholders will be adversely affected by a decision increasing the scope of the claims for which FIGA is held liable.

If this Court were to follow *Soto* and rule that attorney's fees awarded against insolvent insurers under section 627.428 are a "covered claim" payable by FIGA, then it would be improperly imposing a substantial and unknown liability on FIGA for which it has no ability to budget or plan. Restricting the claims that are FIGA's responsibility to the scope of the insolvent insurer's policy coverage and limits permits budgeting and planning. Furthermore, forcing FIGA to pay section 627.428 fees assessed against the insolvent insurer punishes FIGA (and all Florida policyholders through increased premiums) for the mishandling of claims by an insurer over which FIGA had no control.

Thus, this case presents significant financial and operational concerns for Florida's guaranty association. Such concerns were clearly addressed by the Louisiana appellate court in *Breaux v. Klein*, 572 So. 2d 656 (La. App. 5 Cir. 1991). These concerns and the *Breaux* court's reasoning should be considered here in the resolution calculus as to the legal issue presented.

The *Breaux* case involved a suit by an injured claimant against his own underinsured motorist carrier. 572 So. 2d at 657. The suit proceeded to judgment with the trial judge awarding the full amount of coverage under the UIM policy. *Id.* Because it found that the claim was wrongfully denied, the trial court also awarded

additional amounts representing statutory attorney's fees and a 10% statutory penalty[19]. *Id.* When the insurance carrier was declared insolvent, the Louisiana Insurance Guaranty Association ("LIGA") was named a party and held responsible for the judgment. *Id.* LIGA appealed the trial court's ruling. *Id.*

The Louisiana Guaranty Act defined "covered claim" using the same language as Florida's Act. *See Id.* at 658.[20] Based upon application of this definition of a "covered claim," the appellate court reversed the trial court's decision and held that LIGA was not obligated on the statutory attorney's fee award, explaining:

> As we view it, . . . the obligation arising out of the penalty statute is separate and distinct from the obligation arising out of the insurer's contractual obligation. Thus, the present cause of action for penalties and attorneys' fees imposed on Champion falls outside of the 'covered claims' contemplated by R.S. 22:1382(1)(a). Hence, LIGA is not responsible for the statutory penalties and attorney fees imposed on Champion. To hold otherwise would be contrary to the very purpose underlying the statutes which is 'to provide a mechanism for the ***payment of covered***

[19]The Louisiana statute allowed for an award of fees and a penalty against the insurance company in a suit on the policy where its actions in denying the claim were deemed to be wrongful, arbitrary and capricious. *See Breaux*, 572 So. 2d at 657.

[20]The Louisiana court applied the same "covered claim" definition as used in Florida's Act, even though it noted that the Legislature had since amended the definition to specifically exclude from a "covered claim" any "claim based on or arising from a pre-insolvency obligation of an insurer, including . . . statutory penalties and attorney's fees. . . ." *Breaux*, 572 So. 2d at 659 n. 3. The claim at issue pre-dated the amendment of the statute, yet the court still determined that the basic definition of "covered claim" did not encompass attorney's fees imposed by statute. *Id.* at 659.

> ***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. . . .' R.S. 22: 1376.
>
> We fear that to expose LIGA to the possible thousands of claims for arbitrary and capricious non-payment by insolvent insurers, particularly in the wake of Champion's demise, could potentially threaten the very existence of the insurance guaranty fund which has as its avowed statutory purpose the avoidance of excessive delay in payment and the avoidance of financial loss to claimants or policyholders. . . .
>
> Accordingly, we hold LIGA is only responsible for covered claims arising under the insured's insurance policy and 'covered claims' does not include statutory penalties and attorneys' fees imposed under R.S.22:658.

572 So. 2d at 659 (emphasis in original). *See Crider v. Georgia Life & Heath Ins. Guar. Ass'n*, 373 S.E.2d 30, 31 (Ga. Ct. App. 1988) ("to hold that they can proceed against [the guaranty association] on their claims [for statutory fees and penalties] would be to authorize the dissipation of funds which were intended to benefit only those insureds who, entirely unlike appellants, have never even been initially paid those contractual benefits for which they made premium payments and to which they would be entitled under their policies issued by insolvent insurers").

There is simply no reason to turn thirty-seven years of FIGA administration on its head through a tortured reading and convoluted "construction" of plain and unambiguous statutes. The unsupported position advocated by Petitioners will serve

to increase the costs of insurance for all Florida policyholders, impose entirely unwarranted penalties on FIGA for events over which it had no control, and wreak havoc with the orderly assessment procedures that have been in place for decades. Such results are clearly unjustified by either public policy or the "purpose" of the FIGA Act.

CONCLUSION

Based on a plain reading of the statutory limitations included in the FIGA Act, supported by legislative history, case authority, fundamental rules of statutory construction, and public policy, it is clear that the Florida Legislature never intended FIGA to be held liable for attorney's fees, awarded pursuant to 627.428, for the actions of an insurer, prior to insolvency, over which FIGA had no control. Such fees are not "within the coverage" of the applicable insurance policy, and thus do not constitute "covered claims" for which FIGA may be held liable. Such a reading of the FIGA Act is not undermined by the fact that section 627.428 has been deemed to be an implied part of every insurance policy. Rather, in determining what constitutes a "covered claim," a distinction must be made between those statutes that regulate the substantive contents or terms of an insurance policy and those that regulate or control interpretation of, and disputes over, the coverage provided by the policy itself. Where no coverage for attorney's fees exists, these fees are correctly regarded as penalties, the payment of which is limited to those instances where FIGA's own affirmative

actions prompted legal activity. To suggest that FIGA should be held liable for these fees, incurred by an insured in litigation against an insurer who becomes insolvent before payment is made, would serve only to financially burden every insurance policyholder in Florida. For these reasons, FIGA respectfully requests that this Court affirm the Second District's decision in *Petty*.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to all counsel on the attached Service List; this 9th day of May, 2011.

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