IN THE SUPREME COURT OF FLORIDA

CASE NO. SC10-2097

DIANE PETTY and
KEVIN FARMER,

Petitioners,

v.

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

FLORIDA INSURANCE
GUARANTY ASSOCIATION,

Respondent.

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

PETITIONERS' INITIAL BRIEF

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STATEMENT OF THE CASE AND FACTS

Is an insured's claim under section 627.428, Florida Statutes (2007) for attorney's fees – incurred in a pre-insolvency suit against a now-insolvent insurer that confessed judgment – a "covered claim" under section 631.54(3), Florida Statutes (2007) that the Florida Insurance Guaranty Association ("FIGA") must pay? Petitioners, Diane Petty and Kevin Farmer (collectively, "Petty") and the Third District say "yes." *See Fla. Ins. Guar. Ass'n, Inc. v. Soto*, 979 So. 2d 964 (Fla. 3d DCA 2008). Respondent FIGA and the Second District say "no." *See Fla. Ins. Guar. Ass'n v. Petty*, 44 So. 3d 1191 (Fla. 2d DCA 2010).

Facts and Procedural Background[1]

The trial court decided this case on cross-motions for summary judgment, as the material facts were undisputed. (R3.462-67.) The Second District's recitation of the material facts and procedural history in the trial court are quoted below:

> [FIGA] appeals a final judgment awarding attorney's fees of $29,300 in favor of [Petty] in Petty's action seeking to enforce an appraisal award concerning damages resulting from [a] [h]urricane.
> . . . .
> At the time of the hurricane damage to Petty's home in August 2004, Florida Preferred Property Insurance Company (Florida Preferred) insured the home. After Petty received partial payment for some of the damages sustained, she demanded an appraisal to resolve the dispute

[1] Citations to the record from the trial court are in the format (R1.100), with the 1 being the volume number and 100 being the page number. We also have prepared an appendix, consisting of selected legal authorities not easily located on online databases. Citations to the appendix are in the format (App. 1, at 10), with 1 being the appendix tab and 10 being the page number (if necessary).

> concerning the value of the covered loss. Florida Preferred refused to submit to the appraisal process, and Petty filed suit to compel an appraisal. An appraisal was eventually completed, and the award filed with the court indicated that Florida Preferred owed Petty more money under the policy terms. Petty filed a motion to confirm the award, a motion for entry of a final judgment, and a motion for an award of attorney's fees under section 627.428. Florida Preferred paid more insurance benefits but shortly thereafter became insolvent, and an automatic stay was entered in the lawsuit.
>
> [In May] 2008, Petty filed a motion to lift the stay, reopen the case, and substitute FIGA as the defendant. FIGA was served with the complaint and, ultimately, the parties stipulated that the only issue that remained unresolved was whether FIGA could be required to pay Petty's attorney's fees and costs incurred in the litigation with Florida Preferred. Based on this stipulation, FIGA responded to the complaint. There were no factual disputes on this narrow issue, and the parties filed competing motions for summary judgment.
>
> The trial court determined that Florida Preferred's payment of the appraisal award to Petty constituted a confession of judgment by the insurer and thus invoked the mandatory attorney's fee provisions of section 627.428. The court recognized that under section 631.57(1), FIGA was "obligated to the extent of the covered claims" that existed before the adjudication of insolvency. Relying in part upon *Soto*, the trial court determined that the right to fees under section 627.428 was a covered claim in this case. Therefore, the trial court granted Petty's motion for partial summary judgment and denied FIGA's cross motion for summary judgment. The trial court later entered a final judgment in Petty's favor. The judgment reflects that the parties stipulated to the amount of $29,300 "for all costs and fees awarded pursuant to § 627.428." FIGA timely appealed the final judgment and argues that it was not obligated to pay the fee award imposed pursuant to section 627.428.

Petty, 44 So. 3d at 1192-93. Not noted in the Second District's opinion were the undisputed facts that: (1) the $29,300 for the fees and costs awarded were incurred solely in the pre-insolvency suit against Florida Preferred (not in the post-

insolvency suit against FIGA), and (2) Petty actually paid her counsel these fees and costs. (R3:424 ¶5, 435 ¶7, 472.)

Conflicting Decisions of the Second and Third Districts

In reviewing the trial court's judgment, the Second District began its analysis with a review of section 627.428, Florida Statutes (2007), the statutory provision entitling Petty to attorney's fees from her insurer. *Id.* at 1193. That section states in pertinent part:

> (1) Upon the rendition of a judgment or decree by any of the courts of this state against an insurer and in favor of any named or omnibus insured or the named beneficiary under a policy or contract executed by the insurer, the trial court or, in the event of an appeal in which the insured or beneficiary prevails, the appellate court shall adjudge or decree against the insurer and in favor of the insured or beneficiary a reasonable sum as fees or compensation for the insured's or beneficiary's attorney prosecuting the suit in which the recovery is had.
> . . . .
> (3) When so awarded, compensation or fees of the attorney shall be included in the judgment or decree rendered in the case.

§ 627.428, Fla. Stat. (2007). The Second District construed this statute as a penalty, finding that it must be strictly construed. *Petty*, 44 So. 3d at 1193.

The Second District next examined section 631.70, Florida Statutes (2007), which is part of the Florida Insurance Guaranty Act (the "Act" or the "Florida Act"). *Id.* It provides:

> The provisions of s. 627.428 providing for an attorney's fee shall not be applicable to any claim presented to [FIGA] under the provisions

> of this part, except when [FIGA] denies by affirmative action, other than delay, a covered claim or a portion thereof.

§ 631.70, Fla. Stat. (2007). The Second District noted that "FIGA did not wrongfully refuse to pay any policy benefits." *Petty*, 44 So. 3d at 1193.

Then, the Second District noted that, under the Act, FIGA is obligated to pay covered claims existing either before an insurer's insolvency or within 30 days after the insurer is determined to be insolvent *Id.* (citing § 631.57(1)(a)1.a, Fla. Stat. (2007)). The Second District concluded that a section 627.428 claim for attorney's fees did not satisfy the definition of a "covered claim" under section 631.54(3), another statute that is part of the Act. *Petty*, 44 So. 3d at 1193-94. That statute states in pertinent part:

> "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.[2]

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

Though acknowledging that section 627.428 was a part of every insurance policy, the Second District reasoned that fact did not mean an insured's claim for

[2] Some of the commas contained in section 631.54(3) were not contained in the original bill passed by the Legislature and appear to have been erroneously placed in the statute by the Division of Statutory Revision. *See infra* 19 n.10; Ch. 70-20, § 5(4), at 92, Laws of Fla.

fees under section 627.428 was "within the coverage" of the policy because, in the Second District's view, there was a "distinction between liabilities arising by operation of law and liabilities arising by express contractual terms." *Id.* at 1194-95 (internal quotations omitted). And, according to the Second District, the Legislature had linked "covered claims to coverage provisions, rather than legal liabilities" and had "limited FIGA's obligation to the express terms of the policy." *Id.* at 1195 (emphasis added) (internal quotations omitted). Because Petty's insurance policy did not expressly provide coverage for fees claimed under section 627.428, the Second District concluded that the Act and section 631.54(3) did not obligate FIGA to pay fees claimed under section 627.428. *Id.*

The Second District's decision in the instant case was founded in large part on its prior decision in *Florida Insurance Guaranty Ass'n v. All the Way with Bill Vernay, Inc.*, 864 So. 2d 1126 (Fla. 2d DCA 2003). *See Petty*, 44 So. 3d at 1194. In that case, the insurer breached its duty to defend under a liability insurance policy, causing the insured to incur legal expenses to defend a lawsuit. *All the Way*, 864 So. 2d at 1127-29. The Second District agreed that the insured's losses were of the type that "arise out of" an insurance policy. *Id.* at 1130. But, the Second District reasoned, the insured's losses were not "within the [policy's] coverage" because the policy, by its express terms, merely obligated the insurer itself to incur the legal expenses or "to pay all reasonable [legal] expenses incurred

by the insured *at [the insurer's] request*." *Id.* The Second District suggested that, for the insured's losses to be "within the [policy's] coverage," the policy had to have a provision expressly requiring payment of legal expenses that were both incurred by the insured and not requested by the insurer. *Id.* Thus, the Second District concluded in *All the Way* that the insured's claim for its incurred legal expenses was not a "covered claim" under section 631.54(3). *Id.* at 1130-31.

In the instant case, the Second District recognized that its decision conflicted with the Third District's decision in *Soto* and thus it certified a conflict. *Petty*, 44 So. 3d at 1195 (citing *Soto*, 979 So. 2d at 964). In *Soto*, the insured settled her suit with her insurer in exchange for a lump sum payment and an amount for attorney's fees to be determined by the court. 979 So. 2d at 965. Before the court could determine that amount, the insurer became insolvent. *Id.* When the insured sued FIGA to collect under the settlement agreement, FIGA denied that the insured's claim for fees was a "covered claim" that it had to pay. *Id.*

The Third District disagreed, holding that the claim for fees was a "covered claim" that FIGA had to pay:

> [T]here is no doubt that [the insured's] original claim against the insolvent insurer arose from a policy and that it was covered. In Florida, automobile insurance policies are subject as a matter of law to the obligation to reimburse an insured for attorney's fees and costs if the insured prevails in a lawsuit for payment of a claim under the policy. [§ 627.428, Fla. Stat. (2001).] The Florida Supreme Court has held that section 627.428 is an implicit part of all insurance policies of the kind involved here. *See State Farm Fire & Cas. Co. v. Palma*, 629

> So.2d 830, 832 (Fla. 1993). It follows that [the insured's] stipulated but unpaid attorney's fee judgment is a "covered claim" within the meaning of subsection 631.54(3).
>
> The original insurer . . . acknowledged its obligations by settling for two payments: (1) a fixed amount immediately; and (2) an unliquidated amount of attorney's fees and costs when calculated by the court. The contractual obligations of the original insurer merged into the judgments approving that settlement and liquidating the claim amount. While FIGA is not responsible for further attorney's fees and costs incurred by the insured under section 627.428 after the insolvency–section 631.70 allows an exception as to post-insolvency fees and costs incurred by the insured when FIGA wrongly denies a claim–it is not relieved of the obligation to pay the insured's attorney's fees and costs incurred pre-insolvency for prevailing on a "covered claim." To so hold would be to disregard the remedial purposes of the FIGA statute and to place the insured in a worse position, not the same position, than the insured occupied pre-insolvency with regard to the operative insurance policy.

Soto, 979 So. 2d at 966. The Third District also distinguished the Second District's decision in *All the Way* on the ground that *Soto* involved a settlement agreement while *All the Way* did not, and it would be unfair and contrary to the Act's purpose to allow FIGA to accept the lump-sum payment from the settlement and reject the unliquidated attorney's fee portion of the settlement. *Id*. at 967.

In light of the certified conflict with *Soto*, Petty timely invoked this Court's discretionary jurisdiction, and this Court decided to exercise jurisdiction.

SUMMARY OF THE ARGUMENT

Petty's section 627.428 claim for attorney's fees – incurred in a pre-insolvency suit against her insurer that confessed judgment – is a "covered claim" under section 631.54(3) and the Act that FIGA must pay. This is the only reasonable conclusion based on the Act's text, purpose, history, and case law. The Second District's construction – that a claim is "covered" only if it arises out of an express coverage provision – is unsupported by tools of statutory construction.

Beginning with the statute's text, the Second District's construction was based on the phrase "within the coverage." But, under dictionary and statutory definitions, this phrase means that, for a claim to be "covered," it must arise out of a contractual obligation, rather than an out of an extra-contractual obligation. It does not mean that a claim must arise out of an express contractual obligation, rather than an implied contractual obligation. Insurance contracts are heavily regulated. Obligations under the insurance code – including an insurer's obligation to pay fees – are part of the insurance contract, even if not expressly mentioned therein. The statute's text does not support any decision to treat statutory and implied contractual obligations differently from express contractual obligations.

This disparate treatment also undermines the Act's purpose of protecting Florida's insureds. The Second District's construction leaves insureds unpaid anytime an insolvent insurer fails to expressly include in its policy a statutory

obligation. For example, if an insolvent insurer's policy does not expressly provide the statutorily required minimum coverage, the Second District's decision authorizes FIGA to ignore the insurance code and pay the insured only the lesser amount stated in the policy. The Second District's decision deprives insureds of many statutorily-required insurance benefits, not just attorney's fees benefits.

The Second District's decision to exclude fee claims from the definition of "covered claim" is particularly unsupported given the Act's history. Shortly after the Act was enacted in 1970 from the NAIC Model Bill, a question arose whether pre-insolvency fees could be a "covered claim." But Florida courts, from 1980 to 2008, held that statutory claims for pre-insolvency fees could be a "covered claim." During this same time, eighteen state legislatures amended their similar, NAIC definition of "covered claim" to exclude fees. The Florida Legislature did not do this, though it did amend the definition in other ways after the Florida court decisions. The Second District's decision unravels forty years of history, and it improperly contravenes legislative intent.

Finally, section 631.70's prohibition on fees does not apply to Petty's property loss claim because that claim was never presented to FIGA. Nor does that statute's prohibition apply to Petty's distinct pre-insolvency fee claim because FIGA affirmatively denied that claim. Accordingly, Section 631.70 does not excuse FIGA from paying Petty's pre-insolvency fee claim.

ARGUMENT

ISSUE PRESENTED: IS AN INSURED'S CLAIM UNDER SECTION 627.428 FOR ATTORNEY'S FEES – INCURRED IN A PRE-INSOLVENCY SUIT AGAINST A NOW-INSOLVENT INSURER THAT CONFESSED JUDGMENT – A "COVERED CLAIM" UNDER SECTION 631.54(3) THAT FIGA MUST PAY?

Standard of Review. Because this is an appeal of a summary judgment order that involves solely the interpretation of statutes, the standard of review is *de novo*. *E.g., Allstate Ins. Co. v. Holy Cross Hosp., Inc.*, 961 So. 2d 328, 331 (Fla. 2007); *Volusia County v. Aberdeen at Ormond Beach, L.P.*, 760 So. 2d 126, 130-31 (Fla. 2000). In interpreting the pertinent statutes, this Court must give effect to legislative intent, which is the polestar of any statutory analysis. *E.g., Bautista v. State*, 863 So. 2d 1180, 1185-86 (Fla. 2003). This Court should "first look to the actual language used in the statute." *E.g., id.* When the statutory language is unclear, this Court next applies rules of statutory construction and explores legislative history to determine legislative intent. *E.g., id.* In discerning legislative intent, this Court considers "the statute as a whole, including the evil to be corrected, the language, title, and history of its enactment, and the state of law already in existence on the statute." *E.g., id.*

Merits. The resolution of this appeal turns primarily on the interpretation of

three statutes: sections 627.428, 631.54(3), and 631.70, Florida Statutes (2007).[3] Because the meaning of section 631.54(3)'s definition of "covered claim" is unclear, *see infra* at 28, it is appropriate to apply rules of statutory construction, explore legislative history, and consider the statute as a whole to determine its legislative intent. *E.g.*, *Bautista*, 863 So. 2d at 1185-86. In Part I, we explain the history and background of these statutes. In Part II, we argue that an insured's claim under section 627.428 for attorney's fees – incurred in a pre-insolvency suit against a now-insolvent insurer that confessed judgment – is a "covered claim" under section 631.54(3) that FIGA must pay. In Part III, we contend that section 631.70 does not apply in this case because it merely limits claims against FIGA for section 627.428 fees incurred in a post-insolvency suit against FIGA.

I. History and background of the statutes

A. Section 627.428

Section 627.428 and its predecessor statutes have been a part of Florida law for almost 120 years. *See Tillis v. Liverpool & London & Globe Ins. Co.*, 35 So.

[3] Like the Second District, we cite herein to the 2007 version of the Florida statutes. *See Petty*, 44 So. 3d at 1192. Arguably, the 2004 version of section 627.428 should apply because the original complaint was filed in December 2004. (R1:1); *cf. Bionetics Corp. v. Kenniasty*, __So. 3d __, No. SC09-1243 (Fla. Feb. 10, 2011) (holding that the applicable version of an attorney's fee statute was the version in effect when the complaint was filed, rather than when the motion for fees was filed). For all the statutes cited herein, however, there have been no material amendments since 2004; therefore, the Court's decision will be the same whether it applies the 2004, 2007, or 2010 version of the Florida statutes.

171, 174 (Fla. 1903) (citing Ch. 4173, Laws of Florida (1893) and § 625.08, Fla. Stat. (repealed by Ch. 59-205, § 816, Laws of Fla.)); § 627.0127, Fla. Stat. (renumbered in 1971 to § 627.428, Fla. Stat.). Currently, the statute is codified under the "Insurance Contract" part of Chapter 627. The statute entitles an insured to an award of a reasonable attorney's fees in the event of a judgment against an insurer in favor of its insured in a suit arising "under a policy or contract executed by the insurer." § 627.428(1), Fla. Stat. (2007). The statute states the award "shall be included" in the underlying judgment rendered in favor of the insured. *Id.* § 627.428(3).

For almost seventy-five years, this Court and the district courts of appeal consistently have held that section 627.428 or its predecessors is a part of every insurance contract in Florida.[4] The purpose of section 627.428 and its predecessors has been to discourage insurers from contesting valid claims by insureds and to pay insureds for the losses they suffer when compelled to sue their insurers to enforce their insurance policies.[5] Though section 627.428(1)'s plain

[4] *Pendas v. Equitable Life Assur. Soc. of U.S.*, 176 So. 104, 112 (Fla. 1937); *accord State Farm Fire & Cas. Co v. Palma*, 629 So. 2d 830, 832 (Fla. 1993); *Cincinnati Ins. Co. v. Palmer*, 297 So. 2d 96, 99 (Fla. 4th DCA 1974); *Old Republic Ins. Co. v. Monsees*, 188 So. 2d 893, 895 (Fla. 4th DCA 1966).

[5] *Feller v. Equitable Life Assur. Soc. of U.S.*, 57 So. 2d 581, 586 (Fla. 1952); *accord Palma*, 629 So. 2d at 833; *Ins. Co. of N. Am. v. Lexow*, 602 So. 2d 528, 531 (Fla. 1992); *Travelers Indem. Ins. Co. of Ill. v. Meadows MRI, LLP*, 900 So. 2d 676, 679 (Fla. 4th DCA 2005).

language permits a fee award only when a judgment has been rendered against an insurer, Florida courts have held, since before 1970, that an actual judgment is not required to establish entitlement to attorney's fees when an insurer offers to pay, or pays, a disputed amount after a suit is filed.[6] Such a post-litigation offer or payment is the functional equivalent of a confession of judgment. *Supra* at 13 & n.6. (A confession of judgment occurred in this case when post-litigation, but pre-insolvency, Florida Preferred paid in full the amount sought by Petty for the property damage to her home. *Petty*, 44 So. 3d at 1192-93; (R2:260, 266-67).) In addition, Florida courts have held, since before 1970, that an insurer's delay in payment, even in the absence of any bad faith by the insurer, entitles an insured to fees under section 627.428.[7]

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[6] *Wollard v. Lloyd's & Cos. of Lloyd's*, 439 So. 2d 217, 217-18 (Fla. 1983) (adopting, among others, *Employers' Liability Assurance Corp. v. Royals Farm Supply, Inc.*, 186 So. 2d 317 (Fla. 2d DCA 1966)); *accord Ivey v. Allstate Ins. Co.*, 774 So. 2d 679, 684-85 (Fla. 2000).

[7] *See Employers' Liability*, 186 So. 2d at 320-22 (holding under section 627.428's predecessor that, even in the absence of bad faith by the insurer, "[a]n undue delay in offering to pay the amount due under an insurance contract amounts to a wrongful withholding and justifies an award of attorney's fees"); *see also Pac. Mut. Life Ins. Co. of Cal. v. McCaskill*, 170 So. 579, 582 (Fla. 1936) (citing *N.Y. Life Ins. Co. v. Lecks*, 165 So. 50, 52 (Fla. 1935) and holding under section 627.428's predecessor that bad faith by the insurer was not required for fee award under the statute); *Clifton v. United Cas. Ins. Co. of Am.*, 31 So. 3d 826, 831 (Fla. 2d DCA 2010), *review denied*, 49 So. 3d 746 (Fla. 2010) (holding that an insurer confesses judgment and must pay the insured's fees if it is aware of a dispute with its insured, ignores it, and waits to pay until after the insured files suit).

In 1970, the Legislature enacted the Florida Insurance Guaranty Act, which we discuss next. *See* Ch. 70-20, §§ 1-19, at 91-102, Laws of Fla.; §§ 631.50 – 631.70, Fla. Stat. (2007). When the Legislature enacted this act, it presumably knew the prior judicial constructions of section 627.428, discussed immediately above. *See, e.g., Williams v. Jones*, 326 So. 2d 425, 435 (Fla. 1975).

B. Florida Insurance Guaranty Act

1. Overview

The other two primary statutes at issue in this case, sections 631.54(3) and 631.70, are part of the Florida Insurance Guaranty Act (the "Florida Act" or the "Act"), as enacted in 1970 and amended thereafter. *See* Ch. 70-20, §§ 1-19, at 91-102, Laws of Fla. (App. 6); *see also, e.g.*, Ch. 77-227, § 7, at 1154. Laws of Fla. (App. 7); *see generally* §§ 631.50 – 631.70, Fla. Stat. (2007). The Act is designed "to protect Florida citizens, not the insurance industry." *Jones v. Fla. Ins. Guar. Ass'n, Inc.*, 908 So. 2d 435, 442 (Fla. 2005). The Act's purposes, among others, were to provide "payment of covered claims under certain insurance policies" and "to avoid financial loss to [insureds] because of the insolvency of an insurer." § 631.51(1), Fla. Stat. (2007); *accord* Ch. 70-20, § 2, at 91-92, Laws of Fla. The Legislature directed that the Act be "liberally construed" to effect this purpose. § 631.53, Fla. Stat. (2007); *accord* Ch. 70-20, § 4, at 92, Laws of Fla.

The Act created FIGA as a nonprofit corporation, not as a state agency. *See* Ch. 70-20, § 6, at 93, Laws of Fla.; § 631.55(1), Fla. Stat. (2007); *Kuvin, Klingensmith & Lewis, P.A. v. Fla. Ins. Guar. Ass'n, Inc.*, 371 So. 2d 214, 215-16 (Fla. 3d DCA 1979). Once an insurer becomes insolvent, FIGA is deemed to be "the insurer to the extent of its obligation on the covered claims," and "to such extent," FIGA is deemed to "have all rights, duties, and obligations of the insolvent insurer as if the insurer had not become insolvent." § 631.57(1)(b), Fla. Stat. (2007); *accord* Ch. 70-20, § 8(1)(b), at 94, Laws of Fla. The Act obligates FIGA to pay all "covered claims" that existed either before the insurer's insolvency or within thirty days after the insurer is determined to be insolvent.[8] § 631.57(1)(a)1.a, Fla. Stat. (2007); *accord* Ch. 70-20, § 8(1)(a), at 94, Laws of Fla. However, FIGA's liability for a covered claim generally may not exceed specified caps or the amount of the insurer's obligation under the policy, whichever is lower. *See* § 631.57(1)(a)2-4, Fla. Stat. (2007); *see also* Ch. 70-20, § 8(1)(a), at 94, Laws of Fla.

The Act empowers FIGA to levy assessments on insurers to collect sufficient funds to pay any covered claims. § 631.57(3)(a), Fla. Stat. (2007); Ch. 70-20, § 8(3), at 95, Laws of Fla. Government funds are not allocated to FIGA. § 631.57(3)(e), Fla. Stat. (2007); Ch. 70-20, § 8(3), at 95, Laws of Fla. All insurers

[8] There are also several exceptions to the general rule stated in the text, none of which apply in this case. *See* § 631.57(1)(a), Fla. Stat. (2007).

must be members of FIGA as a condition for their authority to transact business in the state. § 631.55(1), Fla. Stat. (2007); *accord* Ch. 70-20, § 6, at 93, Laws of Fla. FIGA's board of directors consists of persons who are first recommended by insurers and then appointed and approved by the Department of Financial Services (formerly the Department of Insurance). § 631.56(1), Fla. Stat. (2007); Ch. 70-20, § 7, at 93, Laws of Fla.

The Act, when enacted in 1970, largely comported with a model bill proposed that same year by the National Association of Insurance Commissioners ("NAIC"). *Compare* Ch. 70-20, §§ 1-19, at 91-102, Laws of Fla. *with* State Post-Assessment Insurance Guaranty Association Model Bill (1970) ("NAIC Model Bill (1970)" or "1970 NAIC Model Bill"), 1970-4 NAIC Proc. 251 (App. 3); *see also Fla. Ins. Guar. Ass'n v. Cole*, 573 So. 2d 868, 870 (Fla. 2d DCA 1990) (noting that the Act was "derived from a proposed uniform act prepared by the state insurance commissioners of this country"); (R2:279 n.12). By our count, forty-four states and the District of Columbia have enacted insurance guaranty acts based on the 1970 NAIC Model Bill. (App. 1); *see also Firemen's Fund Ins. Co.v. Ariz. Ins. Guar. Ass'n*, 528 P. 2d 839, 847 & n.5 (Ariz. Ct. App. 1975) (noting that, as of 1975, forty states had enacted the "essential elements of the N.A.I.C. Model Bill"). As we discuss next, the critical definition to be construed in this appeal – "covered claim" – originates from the 1970 NAIC Model Bill..

2. Definition of "covered claim" in section 631.54(3)

The central issue in this appeal is whether an insured's claim under section 627.428 for attorney's fees – incurred in a pre-insolvency suit against a now-insolvent insurer that confessed judgment – is a "covered claim" under the Act and section 631.54(3). *Infra* Argument II, at 27-40. Shortly after the Act's 1970 enactment, a commentator noted that there were "two schools of thought" on whether various categories of pre-insolvency attorney's fees were "covered" under the Act. Charles Friend, *Insolvent Insurance Companies*, 45 Fla. B.J. 183, 185 (April 1971) (App. 10). Forty years of legislative and judicial history, both inside and outside of Florida, demonstrate that the claim for attorney's fees at issue in this case – a section 627.428 claim for fees incurred by an insured in a pre-insolvency suit against its now-insolvent insurer that confessed judgment – is a "covered claim." *See infra* at 18-25.

As originally enacted, the Act's definition of "covered claim" was virtually identical to the definition proposed in the 1970 NAIC Model Bill:

> **"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 act applies issued by an insurer, if such insurer becomes an insolvent insurer after the effective date of this act 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.** *"Covered claim" shall not include any amount due any reinsurer, insurer, insurance pool, or underwriting association, as subrogation recoveries or otherwise.*

Ch. 70-20, § 5(4), at 92, Laws of Fla. (emphasis added).[9] In proposing this language, the NAIC drafters commented that "the claims covered by the Association should include all claims, including unearned premiums, arising from the policies of the insolvent insurer." NAIC Model Bill § 5(3), Comment (1970) (App. 3, at 3.) There is nothing in the NAIC drafting history or the legislative history of the Florida Act indicating that the drafters intended for the phrases "arises out of" and "within the coverage" to have distinct meanings or to impose separate requirements. *See id.*; 1970 Committee Activity Report, Senate Committee on Insurance (App. 8).

Returning to the language used in the Act, the first sentence of the "covered claim" definition (illustrated above in bold) was a general inclusionary definition with a single specific inclusion for "unearned premiums." *See* Ch. 70-20, § 5(4), at 92, Laws of Fla. The second sentence (italicized above) was an exclusion from the general inclusionary definition. *See id.* Over the years, the Florida Act's and the NAIC Model Bill's inclusionary definitions of "covered claim" (the first sentence bolded above) have remained virtually unchanged from their original 1970

[9] The 1970 NAIC Model Act differed from the 1970 Florida Act only in two non-material respects: (i) the capitalization of one word (act) and (ii) the addition of two paragraphs letters (a and b). Otherwise, the two acts' definitions of "covered claim" are identical to one another. *See* NAIC Model Bill § 5(3) (1970), at 1970-4 NAIC Proc. 251, 254 (App. 3, at 3).

versions.[10] Since 1970, approximately forty-four other states and the District of Columbia have enacted an inclusionary definition of "covered claim" that is substantially similar to the inclusionary definitions in the Florida Act and the NAIC Model Bill. (*See* App. 1.)

But the laws of many states and the NAIC Model Bill have seen a growth in the exclusions to the definition of "covered claim." For instance, in the NAIC Model Bill, the single exclusion to the 1970 definition of "covered claim" has expanded to ten exclusions to the 2010 definition. *Compare* Property and Casualty Insurance Guaranty Association Model Act § 5.H (2010) ("2010 NAIC Model Bill" or "NAIC Model Bill (2010)" (App. 4, at 4) *with* NAIC Model Bill § 5(3)

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[10] The only differences between the inclusionary definitions in the original 1970 Florida Act and the 2007 Florida Statutes are as follows:

(i) The 2007 Florida Statutes contains the following emphasized commas that do not appear in the 1970 Florida Act: "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 . . . ." None of the amendments to section 631.54 since 1970 indicate that the Legislature intended to insert these commas into section 631.54(3); thus, the Division of Statutory Revision apparently erroneously added the commas.

(ii) The words "this part" have replaced the words "this act."

(iii) The words "after the effective date of this act" in the original act have been deleted.

Compare § 631.54(3), Fla. Stat.(2007) (emphasis added) *with* Ch. 70-20, § 5(4), at 92, Laws of Fla.

The 2010 NAIC Model Bill's inclusionary definition has a few more changes from the original 1970 version, but nothing that is material for this case. *Compare* Property and Casualty Insurance Guaranty Association Model Act § 5.H (2010) ("2010 NAIC Model Bill" or "NAIC Model Bill (2010)" (App. 4, at 4) *with* NAIC Model Bill § 5(3) (1970) (App. 3, at 3).

(1970) (App. 3, at 3). Similarly, others states have enacted many different types of exclusions to their definitions of "covered claim."[11] By comparison, since 1970, Florida has added only one other exclusion to its definition of "covered claim," and that exclusion has nothing to do with attorney's fees or section 627.428. *See* § 631.54(3)(b), Fla. Stat. (2007) (excluding claims rejected by another state guaranty fund due to the insured's net worth).

Two exclusions added to the NAIC Model Bill since 1970 specifically address whether a claim for attorney's fees is a "covered claim." *See* NAIC Model Bill § 5.H(2)(f)&(g) (2010) (App. 4, at 4); *see also* NAIC Proceedings, at 153-54 (March 15-18, 2009) (App. 5). These two NAIC exclusions expressly exclude certain categories of attorney's fees from the definition of "covered claim":

> (2) Except as provided elsewhere in this section, "covered claim" shall not include:

[11] *See, e.g.*, Alaska Stat. Ann. § 21.80.180(6) (West 2000) ("'[C]overed claim' does not include an amount awarded for punitive or exemplary damages, an amount sought as a return of premium under a retroactive rating plan . . . ."); Haw. Rev. Stat. § 431:16-105 (West 2000) ("'Covered claim'. . . [s]hall not include: (A) Any amount awarded as punitive or exemplary damages; (B) Any amount sought as a return of premium under any retrospective rating plan; (C) Any amount due any reinsurer, insurer, insurance pool, or underwriting association, as subrogation recoveries, reinsurance recoveries, contribution, indemnification, or otherwise; (D) Any first party claims by an insured whose net worth exceeds $25,000,000 on December 31 of the year prior to the year in which the insurer becomes an insolvent insurer . . . ."); Me. Rev. Stat. Ann. tit. 24-A, § 4435(4) (2001) ("'Covered claim' does not include any amount due any insurer, reinsurer, affiliate, insurance pool or underwriting association, as subrogation recoveries or otherwise, except that any payment made to the workers' compensation residual market pool . . . .").

. . . .

> (f) Any fee or other amount relating to goods or services sought by or on behalf of any attorney or other provider of goods or services retained by the insolvent insurer or an insured prior to the date it was determined to be insolvent;
>
> (g) Any fee or other amount sought by or on behalf of any attorney or other provider of goods or services retained by any insured or claimant in connection with the assertion or prosecution of any claim, covered or otherwise, against the association.

NAIC Model Bill § 5.H(2)(f)&(g) (2010) (App. 4, at 4). As illustrated immediately above, these two NAIC exclusions expressly exclude two broad categories of fees from the definition of "covered claim": (i) fees incurred by the insurer or insured before the insurer's insolvency and (ii) fees incurred by the insured in prosecuting a claim against the guaranty association, presumably post-insolvency. *See id.*

These two NAIC fee exclusions are similar to fee exclusions enacted in eighteen other NAIC states (but not in Florida). (*See* App. 1, 2.) The fee exclusions in the other NAIC states' laws, like the fee exclusions in the 2010 NAIC Model Bill, can be categorized into two broad categories. First, some out-of-state statutes expressly exclude from the definition of "covered claim" fees incurred pre-insolvency either by just the insurer,[12] or by both the insurer and

[12] *See* Mich. Comp. Laws Ann. § 500.7925(1) (West 2006) ("Covered claims shall not include . . . attorneys' fees and expenses . . . if the fees [or] expenses . . . were incurred by the insolvent insurer before the receiver was appointed."); Neb. Rev. Stat. Ann. § 44-2403 (LexisNexis 2010) ("Covered claim shall not include . . . any

insured.[13] Second, in addition to this exclusion for pre-insolvency fees, most of the remaining out-of-state state statutes also expressly exclude fees incurred by the insured post-insolvency in prosecuting a claim against a state's guaranty association (i.e., the state's equivalent to FIGA).[14]

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amount due an attorney or adjuster as fees for services rendered to the insolvent insurer . . . ."); Nev. Rev. Stat. Ann. § 687A.033 (LexisNexis 2009 & Supp. 2009) ("The term [covered claim] does not include . . . (e) An obligation to make a supplementary payment for . . . attorney's fees and expenses . . . incurred by the insolvent insurer before the appointment of a liquidator, unless the expenses would also be a valid claim against the insured . . . .").

[13] *See* Ariz. Rev. Stat. Ann. § 20-661(3) (2007) ("Covered claim does not include . . . attorney fees or adjustment expenses incurred prior to the determination of insolvency."); Ark. Code. Ann. § 23-90-103(2)(D)(i) (West 1999) ("A 'covered claim' shall not include supplementary payment obligations, including . . . attorney's fees and expenses . . . incurred prior to the determination that an insurer is an insolvent insurer . . . ."); Ind. Code Ann. § 27-6-8-4(4) ("'Covered claim' . . . shall not include . . . any supplementary obligation including . . . attorney fees and expenses . . . , whether arising as a policy benefit or otherwise, prior to the appointment of a liquidator . . . ."); N.M. Stat. Ann. § 59A-43-4 (2007) ("Covered claim shall not include supplementary payment obligations, including . . . attorneys' fees and expenses . . . incurred prior to the determination that an insurer is an insolvent insurer . . . .").

[14] Iowa Code Ann. § 515B.2(4)(b) (West 2010) ("'Covered claim' does not include any amount as follows . . . (4) That is a fee or other amount relating to goods or services sought by or on behalf of an attorney . . . retained by the insolvent insurer or by an insured prior to the date the insurer was declared insolvent . . . (5A) That is a fee or other amount sought by or on behalf of any attorney . . . retained by the insured or claimant in connection with the assertion of any claim, covered or otherwise, against the association . . . ."); La. Rev. Stat. Ann. § 22:2055 (2009) ("'Covered claim' shall not include: . . . (vi) Any fee or other amount relating to goods or services sought by or on behalf of any attorney . . . retained by the insolvent insurer or an insured prior to the date it was determined to be insolvent. (vii) Any fee or other amount sought by or on behalf of any attorney . . . retained

But Florida never has enacted any of these fee exclusions enacted by its sister NAIC states (other than arguably a limited post-insolvency fee exclusion in section 631.70, which we discuss *infra* at 25-27). In other words, while eighteen other state legislatures over the past forty years have expressly excluded various categories of attorney's fees from their states' NAIC definition of "covered claim," the Florida Legislature has never amended our state's NAIC definition of "covered claim" to exclude any category of claims for attorney's fees.

During this same forty-year period, no Florida court, except the Second

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by any insured or claimant in connection with the assertion or prosecution of any claim, covered or otherwise, against the association . . . ."); Mo. Ann. Stat. § 375.772 (West 2002 & Supp. 2011) (excluding from covered claims: "f. Supplementary payment obligations incurred prior to the final order of liquidation, including . . . attorney's fees and expenses . . . i. Any fee or other amount sought by or on behalf of an attorney or other provider of goods or services retained by an insured or claimant in connection with the assertion or prosecuting of any claim, covered or otherwise, against the association . . . ."); N.J. Stat. Ann. § 17:30A-5 (West 2007 & Supp. 2010) ("'Covered claim' shall not include . . . (4) counsel fees for prosecuting suits for claims against the association . . . (6) counsel fees and other claim expenses incurred prior to the date of insolvency . . ."); OKLA. STAT. ANN. tit. 36 § 2004 (West 1999 & Supp. 2011) ("'Covered claim' shall not include . . . (6) any fee or other amount relating to goods or services sought by or on behalf of any attorney . . . retained by the insolvent insurer or an insured prior to the date it was determined to be insolvent, (7) any fee or other amount sought by or on behalf of any attorney . . . retained by any insured or claimant in connection with the assertion or prosecution of any claim, covered or otherwise, against the Association . . . ."); S.C. Code Ann. § 38-31-20 (2002 & Supp. 2010) ("'Covered claim' does not include . . . (f) any fee . . . sought by or on behalf of any attorney . . . retained by the insolvent insurer or an insured prior to the date it was determined to be insolvent; (g) any fee . . . sought by or on behalf of any attorney . . . retained by any insured or claimant in connection with the assertion or prosecution of any claim, covered or otherwise, against the association . . . .").

District in this case, has construed "covered claim" to exclude statutory claims for attorney's fees. Indeed, the Second District's decision in this case (rendered just last year in 2010) is the single decision in the last forty years holding that a statutory claim for fees is not a "covered claim" under the Act. *See Petty*, 44 So. 3d at 1191. In contrast, other Florida appellate courts on at least four separate occasions dating back to 1980 have held that a statutory claim for pre-insolvency attorney's fees satisfies the Act's definition of "covered claim."[15]

The Florida Legislature has never, by way of legislation, repudiated these four court decisions dating back to 1980. *See supra* at 24-25 & nn.15&16. The Florida Legislature, however, has not been completely silent on the definition of "covered claim." It has amended the definition of "covered claim" five times

[15] *See Fla. Ins. Guar. Ass'n v. Soto*, 979 So. 2d 964 (Fla. 3d DCA 2008) (holding a claim under section 627.428 for attorney's fees incurred pre-insolvency was a "covered claim."); *Dilme v.SBP Serv., Inc.*, 649 So. 2d 934, 935 (Fla. 1st DCA 1995) (holding that a claim for attorney's fees under section 440.34 was a covered claim); *What an Idea, Inc. v. Sitko*, 505 So. 2d 497 (Fla. 1st DCA 1988) (affirming an attorney's fees award of 1.75 million dollars and holding that a claim for attorney's fees by a workers' compensation claimant was a "covered claim"); *Fla. Ins. Guar. Ass'n v. Gustinger*, 390 So. 2d 420, 421 (Fla. 3d DCA 1980) (holding that attorney's fees awarded in a pre-insolvency compensation proceeding was a "covered claim" that FIGA had to pay). Admittedly, the three pre-2008 decisions cited above concerned claims made under statutes other than section 627.428. However, that fact is irrelevant because the Second District's decision bars any statutory claim (for fees or otherwise) that does not arise under an express coverage provision in the policy. *See Petty*, 44 So. 3d at 1194-95; *infra* Argument II.B., at 34-37.

during the past forty years,[16] and all but one of these amendments post-date three of the four court decisions holding that a statutory claim for fees was a "covered claim." *Compare supra* at 24 n. 15 *with supra* at 24 n.16. Where, as here, the Legislature amends a statute, this Court presumes that the Legislature knew and adopted prior judicial constructions of the statute unless a contrary intention was expressed in the new legislation. *E.g.*, *Essex Ins. Co. v. Zota*, 985 So. 2d 1036, 1042 (Fla. 2008). In the last forty years, none of the five legislative amendments to the Act's definition of "covered claim" express any legislative intent to reject the prior judicial decisions construing a "covered claim" as including statutory claims for attorney's fees incurred before the insurer's insolvency. *See supra* at 24 n.16.

The only amendment to the Act in the last forty years concerning attorney's fees was in 1977. *See* Ch. 77-227, § 7, at 1154, Laws of Fla. But that 1977 amendment, unlike the laws of Florida's sister NAIC states, did not amend the definition of "covered claim." (*Cf.* App. 1.) Instead, that amendment limited, but did not abolish, an insured's right under section 627.428 to collect fees incurred in a post-insolvency suit against FIGA. We discuss this 1977 amendment next.

[16] *See, e.g.*, Ch. 2006-12, § 32, Laws of Fla.; Ch. 2004-374, § 37, Laws of Fla.; Ch. 2004-89, § 1, Laws of Fla.; Ch. 2002-25, § 15, Laws of Fla.; Ch. 77-227, § 2, at 1153, Laws of Fla.

3. 1977 amendment codified in section 631.70

That 1977 amendment to the Florida Act, codified in section 631.70 and still presently in effect, states:

> The provisions of s. 627.428 providing for an attorney's fee shall not be applicable to any claim presented to [FIGA] under the provisions of this part, except when [FIGA] 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. (2007).

As we argue *infra*, section 631.70 does not eliminate or limit an insured's claim for section 627.428 fees <u>incurred in a pre-insolvency suit against the insurer</u>. Instead, section 631.70 merely eliminates an insured's claim for section 627.428 fees <u>incurred in a post-insolvency suit against FIGA</u> when FIGA does not affirmatively deny a covered claim. *Infra* Argument III, at 40-47. The staff analysis to the bill enacting the 1977 amendment does not negate our construction of section 631.70. It states the following:

> The [A]ct 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.

Senate, Commerce Committee, Staff Analysis and Economic Statement, SB 500, at 2 (April 26 & 27, 1977) (App. 9.) Thus, the staff analysis (like the plain statutory text) is silent on whether a claim for section 627.428 fees – incurred in a pre-

insolvency suit against a now-insolvent insurer that confessed judgment – should be considered a "covered claim" under section 631.54(3).

However, another provision in the same 1977 bill, along with the accompanying staff analysis, indicates that the Legislature enacted the 1977 amendment not to eliminate section 627.428 fees from the definition of "covered claims," but rather to save expenses incurred by FIGA because of its delay in processing claims after the insurer was deemed insolvent. *See* Ch. 77-227, § 3, at 1153, Laws of Fla. That other provision amended the Act to prohibit FIGA from being liable for "any penalties or interest." *Id.*; § 631.57(1)(b), Fla. Stat. (2007). The staff analysis noted that FIGA was being assessed for penalties and interest because of its delay in paying claims. Senate Commerce Committee, Staff Analysis and Economic Statement, SB 500, at 1 (April 26 & 27, 1977) (App. 9).

In summary, nothing in section 631.70's legislative history (or its plain language, *infra* Argument III.A, at 40-41) suggests that it was enacted to preclude an insured's claim for pre-insolvency section 627.428 fees.

II. Petty's section 627.428 claim for attorney's fees – incurred in a pre-insolvency suit against her now-insolvent insurer that confessed judgment – is a "covered claim" under section 631.54(3) that FIGA must pay.

The Second District's reasoning – that a "covered claim" may arise only out of an express policy provision – is untenable. It may also arise of out of implied policy provisions. *See infra* Argument II.A, at 28-34. Section 627.428 is in an

implied provision of every Florida insurance policy. And under this implied policy provision, an insurer is obligated to pay its insured's attorney's fees once a judgment is entered, and thus this obligation arises out of and is within the coverage of the policy. Accordingly, a claim based on this obligation is a "covered claim" under section 631.54(3). *See infra* Argument II.B, at 34-37. Finally, our construction of "covered claim," supported by the Third District's *Soto* decision, is superior to the Second District's construction. *See infra* Argument II.C, at 37-40.

A. The Second District's construction of "covered claim" is unsound because many coverage obligations under an insurance policy – including an insurer's obligation to pay unearned premiums – arise out of statutory provisions that, like section 627.428, are incorporated into an insurance policy even if not expressly mentioned in the policy.

The Second District erred because it mistakenly reasoned, based on its equally erroneous *All the Way* decision, that the phrase "within the coverage" in section 631.54(3) excluded from the definition of "covered claim" any claim not arising from an express coverage provision in the policy. *See Petty*, 44 So. 3d at 1194-95; *All the Way*, 864 So. 2d at 1130-31. Section 631.54(3)'s plain language does not support this construction, as it does not limit "covered claim" to only those claims arising from an express policy provision. *See* § 631.54(3), Fla. Stat. (2007). Moreover, the phrase "within the coverage" is unclear. It provides little, if any, guidance as to the meaning of "covered claim," as the terms "coverage" and "covered" are derived from the same etymological root. Thus, to determine the

legislative intent of section 631.54(3), it is appropriate to resort to other tools of statutory construction. *See, e.g., Bautista*, 863 So. 2d at 1185-86 (discussed *supra* at 10-11).

Insurance contracts are heavily regulated by statutes and administrative rules. *See Fla. Ins. Guar. Ass'n v. Devon Neighborhood Ass'n*, 33 So. 3d 48, 53 (Fla. 4th DCA 2009). Accordingly, "statutory limitations and requirements surrounding traditional insurance contracts may be incorporated into an insurance contract for purposes of determining the parties' contractual rights." *Found. Health v. Westside EKG Associates*, 944 So. 2d 188, 195 (Fla. 2006) (citing *Citizens Ins. Co. v. Barnes*, 124 So. 722, 723 (Fla. 1929)). Stated another way, "where a contract of insurance is entered into on a matter surrounded by statutory limitations and requirements, the parties are presumed to have entered into such agreement with reference to the statute, and the statutory provisions become a part of the contract:" *Standard Acc. Ins. Co. v. Gavin*, 184 So. 2d 229, 232 (Fla. 1st DCA 1966) (citing, among others, *Poole vs. Travelers Ins. Co.* 175 So. 138 (1938)). Florida courts have applied this principle to determine what is "covered under an insurance policy." *Found. Health*, 944 So. 2d at 195 (citing *Weldon v. All Am. Life Ins. Co.*, 605 So. 2d 911, 914 (Fla. 2d DCA 1992)).

The Second District's reading of "covered claim" – that a claim is "covered" only if it arises out of an express coverage provision in the policy, *Petty*, 44 So. 3d

at 1194-95 – is unsound because it ignores the heavily regulated nature of insurance contracts and the fact that many statutory obligations are implicitly incorporated into insurance policies. The fallacy of the Second District's reading is best demonstrated by a hypothetical example involving unearned premiums. A claim for an unearned premium is the only type of claim specifically identified in section 631.54(3) as being a "covered claim," provided that it "arises out of" and is "within the coverage" of the policy. *See* § 631.54(3), Fla. Stat. (2007). Thus, under the doctrine of *noscitur a sociis* (a word is known by the company it keeps),[17] examining a claim for unearned premium is helpful in deriving what other types of claims could qualify as a "covered claim."

Under the Second District's construction, however, a claim for an unearned premium would qualify as a "covered claim" only if an insurance policy had an express provision requiring the insolvent insurer to pay the unearned premium to the insured. *See Petty*, 44 So. 3d at 1194-95; *All the Way*, 864 So. 2d at 1130-31. But for many policies, such an express policy provision would be superfluous and unnecessary because Florida statutory law often obligates an insurer to return an unearned premium to the insured once a policy is cancelled or under other circumstances. *See, e.g.,* § 627.6741, Fla. Stat. (2007) (medicare supplement

[17] *E.g.*, *Nehme v. Smithkline Beecham Clinical Labs., Inc.*, 863 So. 2d 201, 205 (Fla. 2003).

policy); § 627.705, Fla. Stat. (2007) (over-insured personal property); § 627.7283, Fla. Stat. (2007) (motor vehicle policy).

Suppose, however, that insurer Alpha cut and pasted the wording of the statute on unearned premiums directly into its policies, making its statutory obligation on unearned premiums an express coverage provision. Further suppose that insurer Beta decided not do any such cutting and pasting, instead relying on the principle, stated above, that statutory obligations are incorporated into a policy. *See supra* at 29. Finally, suppose both insurers Alpha and Beta become insolvent, and at the time of their insolvencies, both insurers have not paid their insureds' claims for unearned premiums. Under the Second District's construction of "covered claim," FIGA must pay the unpaid claims of Alpha's insureds but not the unpaid claims of Beta's insureds simply because Alpha, unlike Beta, chose to cut and paste its statutory obligation expressly into its policies. Nothing in the text of section 631.54(3) plausibly supports this inconsistent result.

This inconsistent result, which is mandated by the Second District's reasoning, applies equally to unpaid section 627.428 claims for attorney's fees. Under the Second District's reasoning, if Florida Preferred had unnecessarily cut and pasted into Petty's policy a provision that verbatim tracked its statutory obligation under section 627.428, then Petty's unpaid claim for fees would have been a "covered claim" that FIGA had to pay. *See Petty*, 44 So. 3d at 1194-95.

But because Florida Preferred failed to do this, the claim is not covered under the Second District's reasoning. *See id.*

The Second District's reasoning will allow FIGA to escape liability for other types of coverage claims, not just for coverage claims for unearned premiums and section 627.428 fees. For example, when an insurance policy fails to provide the minimum insurance required by statute, *see, e.g.*, § 324.021, Fla. Stat. (2007), a court must judicially modify the express policy provisions to comply with the Florida statutes, *see Allstate Ins. Co. v. Kaklamanos*, 843 So. 2d 885, 896 (Fla. 2000); *see also* §§ 627.412(1), 627.414, 627.418(1), Fla. Stat. (2007). Thus, in *Suazo v. Del Busto*, 587 So. 2d 480 (Fla. 3d DCA 1991), the court ordered that a policy providing only $10,000 of insurance to a seven-year-old injured on a school bus be judicially modified to conform to the statute requiring a minimum of $100,000 of insurance. *See id.* at 480-82. But under the Second District's reasoning, if the insurer in *Suazo* had become insolvent, the "covered claim" of the seven-year-old child would have been limited to the express provision allowing only $10,000 of insurance, rather than the statutorily required amount of $100,000.

As in *Suazo*, there are numerous other examples – outside of the context of attorney's fees – where an insured is entitled to coverage under a statutory obligation that arises under a policy but is not found in an express policy provision.

We set forth some of these examples in the footnote below.[18] In each of these examples, the insureds' unpaid claims – though arising out of and within the coverage of the policy – will not be paid by FIGA under the Second District's reasoning that a claim is "within the coverage" and "covered" only if it arises under an express coverage provision.

This Court should reject the Second District's construction and adopt the reasoning of an Oregon appellate court construing a similar definition of "covered claim." *See Taylor v. Ore. Ins. Guar. Ass'n*, 783 P. 2d 49 (Or. Ct. App. 1991). In *Taylor*, the court overruled arguments made by Oregon's insurance guaranty association and held that a claim for uninsured motorist benefits was a "covered claim," notwithstanding the fact that the policy did not expressly provide for uninsured motorist benefits. *Id.* at 50-51. The court so held because Oregon statutory law required insurers to provide uninsured motorist benefits in motor

[18] *See Young v. Progressive Southeastern Ins. Co.*, 753 So. 2d 80, 81 (Fla. 2000) (declaring based on Florida statutory law that an insurer still must provide uninsured motorist coverage even if its express policy provision excludes coverage when the insured collides with a vehicle owned or operated by a self-insurer); *U.S. Fire Ins. Co. v. S. Sec. Life Ins. Co.*, 710 So. 3d 130, 131-32 (Fla. 5th DCA 1998) (holding that insurer had to provide liability coverage, notwithstanding fact that under the express policy provisions the policy was not renewed, because the insurer had failed to comply with statutory notice requirement to effectuate nonrenewal); *N. Ins. Co. of N.Y. v. Hiers*, 504 So. 2d 1382, 1383-85 (Fla. 5th DCA 1987) (holding that insurer was required to provide uninsured motorist coverage, though it was not provided under the policy's express provisions, because insurer failed to comply with statutory notice requirement).

vehicle policies, and when an insurer failed to do so, the uninsured motorist coverage was judicially read into the policy. *Id.*

The result should be the same in Florida. Florida courts have held that an insurer's obligations under section 627.428 and many other statutes are implied provisions that are read into insurance policies even when not expressly mentioned therein. *See supra* at 12 & n. 4, 29. Claims arising out of express provisions and implied statutory provisions should be on equal footing and not treated differently by FIGA or the courts when interpreting the Act. The argument that such claims should be treated differently has no support in section 631.54(3)'s plain language and is unsound in light of the Act's purpose, its history, and its legislative mandate for a liberal construction to protect insureds. *See supra* Argument I.B.1&2, at 14-25; *infra* Argument II.C., at 37-40; § 631.53. Fla. Stat. (2007). We explain next our sounder construction of section 631.54(3), one that is supported by the statute's plain language, purpose, and history.

B. Because section 627.428 is an implied provision in every insurance policy, an insurer's obligation under this provision 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).

Section 627.428 is an implied provision in every insurance policy. *State Farm Fire & Cas. Co v. Palma*, 629 So. 2d 830, 832 (Fla. 1993); *supra* at 12 & n.4. Once a judgment is rendered against an insurer (including, as in this case, a judgment by confession), this implied policy provision obligates an insurer to pay

an insured's reasonable attorney's fees incurred by the insured in her suit against the insurer. *Wollard v. Lloyd's & Cos. of Lloyd's*, 439 So. 2d 217, 217-18 (Fla. 1983) (citing § 627.428, Fla. Stat. (1979)); *supra* at 13 & n.6.

The critical issue in this case is whether this implied contractual obligation can be considered to be "within the coverage" of Petty's policy. *See* § 631.54(3), Fla. Stat. (2007). The Florida insurance code, the Act, and the NAIC Model Bill do not define the phrase "within the coverage" or the term "coverage." But, as mentioned above, the NAIC Model Bill's drafting history does not indicate that the two phrases, "arise out of" the policy and "within the coverage" of the policy, had distinct meanings or were intended to create separate requirements. *See* NAIC Model Bill § 5(3), Comment (1970) (App. 3, at 3) (commenting that "the claims covered by the Association should include all claims, including unearned premiums, arising from the policies of the insolvent insurer"). There is also little, if any, indication in the decisions of other state courts, interpreting the NAIC-based definition of "covered claim," that the phrase "within the coverage" was meant to have a wholly different meaning than the phrase "arise out of."[19]

[19] Many foreign cases on whether a claim for attorney's fees satisfies the NAIC inclusionary definition of a "covered claim" are not instructive because they concern claims for fees incurred by an insurer (not an insured) in defending insureds. *See, e.g., Ohio Ins. Guar. Ass'n v. Simpson*, 439 N.E. 2d 1257 (Ohio Ct. App. 1981). These claims have been rejected because the guaranty association was created to protect insured policyholders, not insurers, and because such claims arise out of the insurer's contract with its attorney, not out of the insurer's contract

Properly read, a claim that is "within the coverage" of a policy is one that ties the claim to the insurance contract. Indeed, a dictionary definition shows that the term "coverage" is inextricably intertwined with the terms "insurance" and "contract." *See Black's Law Dictionary* 365 (6th ed. 1990) (defining coverage as: "In insurance, amount and extent of risk contractually covered by insurer."). The Florida statutes, since 1959, have defined "insurance" as "a contract whereby one undertakes to indemnify another or pay or allow a specified amount or a determinable benefit upon determinable contingencies." Ch. 59-205, § 2, at 381, Laws of Fla. (emphasis added); *accord* § 624.02, Fla. Stat. (2007). An 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"). § 624.02, Fla. Stat. (2007) (quoted in the text);

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with its insured. *See, e.g., id.* at 1259 (rejecting claim brought by attorney retained by insurer). We have located only three foreign cases concerning whether a claim for pre-insolvency fees incurred by an insured was a "covered claim." *See Carrier v. Haw. Ins. Guar. Ass'n*, 721 P.2d 1236 (Haw. 1986); *Matusz v. Safeguard Mut. Ins. Co.*, 489 A.2d 868 (Pa. Super. Ct. 1985); *Episcopo v. Int'l Underwriters Ins. Co.*, Civ. A. No. 86C-04-063, 1994 WL 55381 (Del. Super. Ct. Aug. 31, 1994) (unpublished). The former two cases found such claims were "covered claims." The latter third case, an unpublished decision by a trial judge, found such a claim was not a "covered claim." All three cases can be distinguished for various reasons. But, most importantly, none of the three cases construed the phrase "within the coverage," as the Second District did here, to restrict "covered claims" to only those claims arising out of an express coverage provision.

§ 627.428, Fla. Stat. (2007) (quoted in the parenthesis). Therefore, 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). *See Soto*, 979 So. 2d at 966.

Under these principles, Petty's insurer, Florida Preferred, would have had an obligation under section 627.428 – arising out of and within the coverage of the insurance policy – to pay Petty's "covered claim" for fees incurred during her pre-insolvency suit once Florida Preferred confessed a judgment in that suit. Because Florida Preferred would have been obligated to pay this "covered claim," FIGA also is obligated to pay this claim, just as if Florida Preferred never had been declared insolvent. *See* § 631.57(1)(b), Fla. Stat. (2007); *Jones v. Fla. Ins. Guar. Ass'n*, 908 So. 2d 435, 455 (Fla. 2005).

C. Our construction of "covered claim," supported by the Third District's *Soto* decision, is superior to the Second District's construction.

Our construction of "covered claim," supported by the Third District's *Soto* decision, 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. *See supra* Argument II.B, at 34-37. In contrast, the Second District's construction

erroneously draws a line between express contractual liabilities (which are covered in its view) and implicit contractual liabilities (which are not covered in its view). *See supra* Argument II.A, at 28-34. Our construction is superior for primarily three reasons.

First, our construction is more faithful to the statute's text. Our construction appropriately restricts a "covered claim" to the insurance contract – that is, a claim that "arises out of" and is "within the coverage" of a policy. § 631.54(3), Fla. Stat (2007). Thus, for example, our construction prohibits a plaintiff from recovering against FIGA in tort for an insurer's negligence in issuing a policy. *See Williams v. Fla. Ins. Guar. Assoc.*, 549 So. 2d 253, 253-55 (Fla. 5th DCA 1989). In contrast, the Second District's construction overly restricts the definition of a "covered claim" by adding a word, "expressly," that is not in the statute. Effectively, the Second District re-writes the definition of "covered claim" to include only those claims that "expressly arise out of" and that are "expressly within the coverage" of the policy. *See Petty*, 44 So. 3d at 1194-95.

Second, our construction more fully achieves the Act's purpose of minimizing the financial losses suffered by Florida policyholders as a result of an insurer's insolvency. *See* § 631.51(1), Fla. Stat. (2007). We are mindful that the Act was not intended to shift onto FIGA "the full gamut of a defunct insurance company's liabilities." *E.g., Williams*, 549 So. 2d at 254 (citing §§ 631.51(1),

631.54(3), Fla. Stat.). But an insured should not suffer a loss simply because its insurer did not expressly include in the policy a statutory obligation that Florida law has long recognized was an implied part of the policy. And FIGA should not escape liability merely because its member-insurers fail to include their statutory coverage obligations in their form policies. *See supra* Argument II.A, at 28-34.

Third, our construction is more in accord with the Act's history. Shortly after the Act's enactment, a question arose whether a claim for various pre-insolvency attorney's fees qualified as a "covered claim." *See* Charles Friend, *Insolvent Insurance Companies*, 45 Fla. B.J. 183, 185 (April 1971) (App. 10). Over the next forty years, eighteen other state legislatures amended their NAIC-based laws to expressly exclude claims for fees from the definition of a "covered claim." *See supra* Argument I.B.2, at 21-22 & nn.12-14; (App. 1, 2). The Florida Legislature, however, did not do this. *See supra* Argument I.B.2, at 24-25. And the Florida courts, beginning more than thirty years ago, repeatedly construed a "covered claim" to include a statutory claim for fees. *See supra id.* at 24 & n.15. The Legislature presumably adopted these judicial constructions when it later amended the definition of a "covered claim" in other ways. *See supra id.* at 24-25 & nn.15-16. The Second District's decision in this case unravels these forty years of history. It improperly achieves, by way of a new judicial construction, a change

in the law that should have been achieved only by way of legislative amendment, as occurred in eighteen other states. (*See* App. 2.)

In short, our construction of "covered claim" is superior to the Second District's construction because it is more faithful to the statutory text, better achieves the Act's purpose, and is more in accord with the Act's history.

III. Section 631.70 does not excuse FIGA from paying Petty's covered claim under section 627.428 for attorney's fees incurred in her pre-insolvency suit against her insurer.

A. Analysis under Section 631.70's plain language

Section 631.70, by its plain language, has both a prohibition and an exception. It prohibits the application of section 627.428 to "any claim presented to [FIGA]," but it also makes an exception to this prohibition "when [FIGA] denies by affirmative action, other than delay, a covered claim or a portion thereof." § 631.70, Fla. Stat. (2007).

To analyze section 631.70 correctly, a court must first identify the claim at issue. *See id.* If that claim was not "presented to FIGA," then the analysis ends because section 631.70's prohibition of section 627.428 does not apply, as that prohibition applies only to "any claim presented to [FIGA]." *Id.* However, if the identified claim was "presented" to FIGA, then the court must continue its analysis and inquire whether section 631.70's exception applies and overrides section 631.70's prohibition. The court determines whether the exception applies by

asking whether the "presented" claim was: (i) a "covered claim" (ii) denied by FIGA's "affirmative action." *See id.* If the answer to either question is "no," then section 631.70's exception does not apply and section 631.70's prohibition of section 627.428 does apply.[20] *See id.* But if the answers to both questions are "yes," then section 631.70's exception applies and section 631.70's prohibition of section 627.428 does not apply (meaning, by reverse implication, that section 627.428 does apply). *See id.* On the following page is a flow chart showing pictorially the analysis set forth above in words.

B. Applying section 631.70's plain-language analysis to this case

Applying this analysis to the instant case, the first step is to identify the claim at issue. As FIGA correctly pointed out in its reply brief to the Second District, a single judgment or settlement may be based on multiple claims, distinct from one another. (Appellant's 2d DCA Reply Br. 3-4.) The judgment by confession in this case and the settlement in *Soto* each were based on two such

[20] However, if the answer to the first question is "yes" (the claim is a "covered claim") and the answer to the second question is "no" (FIGA did not deny the claim by affirmative action) and if the claim is one for pre-insolvency fees under section 627.428, the insured may still recover on this pre-insolvency fee claim from FIGA (as FIGA did not affirmatively deny that the fee claim was a covered claim), but the insured may not recover any fees incurred post-insolvency in presenting the claim to FIGA, even if the insured was forced to file suit due to FIGA's delay. *See* § 631.70, Fla. Stat. (2007). This differs from an insured's rights against an insurer. Against an insurer, an insured may recover section 627.428 fees when forced to file suit due merely to the insurer's delay. *See supra* at 13 & n.7.

distinct claims: (i) a claim for the underlying loss (property loss in this case and auto theft in *Soto*), and (ii) a claim under section 627.428 for entitlement to fees incurred pre-insolvency by the insured in her suit against the insurer. *See Petty*, 944 So. 2d at 1192; *Soto*, 979 So. 2d at 966; *see also State Farm Fire and Cas. Co. v. Palma*, 629 So. 2d 830, 832-33 (Fla. 1993) (holding that if an insurer loses on the insured's claim on the underlying loss but contests the insured's entitlement to fees under section 627.428, then the insured has a separate claim for entitlement to fees "under the policy and within the scope of section 627.428.").

Petty's first claim – the claim based on the property loss – was never "presented" to FIGA. (*See* R3:457,¶9 (trial court's finding in its partial summary order that the "only" claim presented to FIGA was Petty's fee claim).) Because the claim was never "presented" to FIGA, section 631.70's prohibition of section 627.428 does not apply. *See* § 631.70, Fla. Stat. (2007). The analysis ends there with no need to examine whether section 631.70's exception applies. *See supra* at Argument III.A, at 40-41 and enclosed flow chart.

Petty's second claim – the claim under section 627.428 for attorney's fees incurred pre-insolvency in Petty's suit against her insurer – was presented to FIGA. (R3:457,¶¶8,9.) Therefore, section 631.70's prohibition on section 627.428 applies unless section 631.70's exception also applies and overrides the prohibition. The exception does apply because: (i) the fee claim was a "covered claim" for the

reasons fully argued above, *see supra* Argument II, at 27-40; and (ii) FIGA denied this fee claim, a covered claim, by its own "affirmative action."[21] Therefore, section 631.70's exception applies and overrides section 631.70's prohibition of section 627.428, meaning, by reverse implication, that section 627.428 does apply. *See supra* Argument III.A, at 40-41 and enclosed flow chart. Accordingly, in light of the foregoing analysis, FIGA must pay not only the "covered claim" for fees incurred by Petty in her pre-insolvency suit against her now-insolvent insurer, *see supra* Argument II, at 27-40, but FIGA also is liable to Petty for fees she has incurred post-insolvency in prosecuting this suit against FIGA to collect on her covered, pre-insolvency fee claim, *see Jones v. Fla. Ins. Guar. Ass'n*, 908 So. 2d 435, 456 (Fla. 2005) (holding that FIGA was liable for fees incurred in the supreme court litigation because it contested a covered claim). This last point that will be more fully argued in our forthcoming motion for appellate fees.[22]

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[21] FIGA denied this fee claim by affirmative action when it: (i) asserted an affirmative defense denying that Petty had asserted a "covered claim" (R2:257); and (ii) argued in its summary judgment motion and in its appellate brief that this fee claim was not a "covered claim" (R2:268-71; Appellant's 2d DCA Initial Br. 14-23.) *See also Fla. Ins. Guar. Ass'n v. Gustinger*, 390 So. 2d 420, 421 (Fla. 3d DCA 1980) (holding that assertion of an affirmative defense in litigation equated to denial of a claim by "affirmative action" under section 631.70).

[22] Petty did not seek either in the trial court or in the Second District any post-insolvency fees incurred in this litigation against FIGA. (R3:424 ¶5, 472; Second District Docket Sheet.) But Petty will seek such fees in this court by way of a motion under Fla. R. App. P. 9.400.

C. FIGA's case law supports the section 631.70 plain-language analysis advocated in this brief

The foregoing analytical framework – based on section 631.70's plain language – is also supported by the principal cases on which FIGA relied in its brief to the Second District. FIGA asserted to the Second District that section 631.70 was enacted in 1977 in response to *Zinke-Smith, Inc. v. Fla. Ins. Guar. Ass'n, Inc.*, 304 So. 2d 507 (Fla. 4th DCA 1974). (2nd DCA Appellant's Initial Br. 7, 12-13 (citing *Fla. Ins. Guar. Ass'n v. Gustinger*, 390 So. 2d 420, 421 (Fla. 3d DCA 1980).) Assuming this is true,[23] it demonstrates that section 631.70 does not diminish an insured's right to recover section 627.428 fees incurred pre-insolvency as a "covered claim." Instead, it demonstrates that section 631.70 merely limited, but did not eliminate, an insured's right to recover section 627.428 fees post-insolvency as a result of FIGA's mishandling of a covered claim.

The fees at issue in *Zinke-Smith*, unlike this case, were exclusively incurred post-insolvency in the prosecution of the insured's covered claim against FIGA. *See Zinke-Smith*, 304 So. 2d at 508-10. The *Zirke-Smith* court merely addressed whether section 627.428 was "applicable to suits against FIGA." *Id*. at 510. The *Zirke-Smith* court reasoned that, because section 627.428 applies to insurers and because FIGA was deemed an "insurer" under section 631.57(1)(b), it necessarily

[23] However, the 1977 amendment's limited legislative history does not mention *Zinke-Smith*. *See* Senate, Commerce Committee, Staff Analysis and Economic Statement, SB 500 (April 26 & 27, 1977) (App. 9).

followed that section 627.428 applied to suits against FIGA. *Id.* at 510. Suits against FIGA, of course, can happen only after an insurer's insolvency. *See generally* §§ 631.51(1), 631.57, Fla. Stat. (2007). But the issue raised in this brief – seeking to affirm the trial court's judgment – solely concerns fees incurred before an insurer's insolvency.[24] Specifically, it concerns whether the trial court correctly determined that a claim for section 627.428 attorney's fees, incurred pre-insolvency in a suit against the insurer, is a "covered claim." That issue was not before the court in *Zinke-Smith*, 304 So. 2d at 508-10.

The Third District, in a case just three years after section 631.70's enactment in 1977, correctly recognized how section 631.70 modified the *Zinke-Smith* decision of 1974. *See Fla. Ins. Guar. Ass'n v. Gustinger*, 390 So. 2d 420 (Fla. 3d DCA 1980). The Third District was correct because it recognized the analytical distinction between claims for fees incurred pre-insolvency in a suit against the insurer and claims for fees incurred post-insolvency in a suit against FIGA. In *Gustinger*, the Third District first addressed whether a statutory claim for attorney's fees, incurred in a pre-insolvency compensation proceeding against the insurer, was a "covered claim" under section 631.54. *Id.* at 421. It concluded that

[24] But the issue raised in our motion for appellate fees to be filed with this Court will concern post-insolvency attorney's fees incurred in prosecuting this appeal in this Court. *See supra* at 43 n.22.

such a claim was a "covered claim," and in reaching this conclusion, the Third District never mentioned or applied section 631.70. *Id.*

Next, the Third District addressed whether a different claim for fees, incurred by the insured in a post-insolvency *rule nisi* proceeding against FIGA, was recoverable under section 627.428, not whether such a fees claim was a "covered claim." *See id.* For this latter analysis, the Third District acknowledged that section 631.70, amended to the Act in 1977, limited the pre-amendment holding in *Zinke-Smith* that had made section 627.428 applicable to (post-insolvency) suits against FIGA. *See id.* Nevertheless, the Third District concluded, the insured could still recover his fees incurred in the post-insolvency proceeding against FIGA because FIGA had affirmatively denied the covered claim that was the subject of the post-insolvency proceeding, thereby triggering section 631.70's exception. *Id.* The Third District did not hold that a claim for fees incurred in a post-insolvency proceeding against FIGA was as a "covered claim." *See id*.

In summary, the Third District's analysis of section 631.70 in its 1980 decision was correct, *see id.*, and its analysis was correct again in its more recent *Soto* decision, *see* 979 So. 2d at 966. Under that analysis, section 631.70's prohibition of section 627.428 does not apply to Petty's property loss claim because that claim was never presented to FIGA. And section 631.70's prohibition

of section 627.428 does not apply to Petty's pre-insolvency fee claim because FIGA affirmatively denied that claim, thereby triggering section 631.70's exception. Accordingly, Section 631.70 does not excuse FIGA from paying Petty's claim for attorney's fees incurred in her pre-insolvency suit against her insurer. Nor will section 631.70 be a valid defense to Petty's forthcoming motion for appellate fees seeking attorney's fees incurred in the post-insolvency litigation before this Court.

CONCLUSION

For the foregoing reasons, this Court should quash the Second District's decision and direct it to affirm the trial court's decision awarding Petty $29,300 in attorney's fees and costs incurred in her pre-insolvency suit against her now-insolvent insurer, Florida Preferred. In addition, for the reasons argued herein and in Petty's forthcoming motion for appellate fees, this Court should award Petty her post-insolvency attorney's fees incurred in prosecuting this appeal in this Court.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to **Dorothy Venable DiFiore, Esq.**, Haas, Dutton, Lewis, P.L., Counsel for Respondent, 4921 Memorial Highway, Suite 200, Tampa, Florida 33634; **Betsy E. Gallagher, Esq.** and **Michael C. Clarke, Esq.**, Kubicki Draper, P.A., 201 North Franklin Street, Suite 2550, Tampa, FL 33602, Counsel for Respondent; and **Bob G. Freemon, Esq.** and **Ron A. Hobgood, Esq.**, Freemon & Miller, P.A., 8381 Gunn Highway, Tampa, FL 33626, Counsel for Petitioners, by U.S. mail, this 2nd day of March, 2011.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing brief is in Times New Roman 14-point font and complies with the font requirements of Rule 9.210(a)(2), Florida Rules of Appellate Procedure.

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Attorney