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' REPLY BRIEF

FREEMON & MILLER, P.A.

Bob G. Freemon
Florida Bar No. 0328294
Ron A. Hobgood
Florida Bar No. 197161
8381 Gunn Hwy
Tampa, FL 33626
(813) 926-0777
(813) 926-1777 (facsimile)
BFreemon@FreemonLaw.com

Attorneys for Petitioners

CREED & GOWDY, P.A.

Bryan S. Gowdy
Florida Bar No. 0176631
Jessie L. Harrell
Florida Bar No. 0502812
865 May Street
Jacksonville, FL 32204
(904) 350-0075
(904) 350-0086 (facsimile)
bgowdy@appellate-firm.com

Attorneys for Petitioners

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF CITATIONS ii

ARGUMENT 1

I. Our construction of "covered claim" is superior to FIGA's construction 2

A. Recent legislation demonstrates the soundness of our argument 2

B. Our construction gives meaning and effect to every phrase in section 631.54(3), including the phrase "within the coverage" 2

C. FIGA's inconsistent constructions are flawed 4

D. FIGA's constructions exclude claims for unearned premiums, the only type of claim identified in the statute as a "covered claim" and which are similar to claims for section 627.428 fees 7

E. FIGA and its amici have misstated case law 10

II. The anti-penalty statute does not shield FIGA from claims for fees 12

III. Section 631.70 does not apply because no claim was both: (i) presented to FIGA and (ii) not affirmatively denied by FIGA 15

IV. The arguments on federal law and state receiverships are irrelevant 15

CONCLUSION 15

CERTIFICATE OF SERVICE 16

CERTIFICATE OF COMPLIANCE 17

TABLE OF CITATIONS

CASES

Adams v. Culver,
111 So. 2d 665 (Fla. 1959) 13

Bankers Ins. Co. v. Gen. No-Fault Ins., Inc.,
814 So. 2d 1119 (Fla. 4th DCA 2002).....7

Beazer Homes Corp. v. Bailey,
940 So. 2d 453 (Fla. 5th DCA 2006).....3

Breaux v. Klein,
572 So. 2d 656 (La. Ct. App. 1990) 11-12

Dadeland v. St. Paul Fire and Marine Ins. Co.,
945 So. 2d 1216 (Fla. 2006) 2

Feller v. Equitable Life Assur. Soc. of the U.S.,
57 So. 2d 581 (Fla. 1952) 14

Fid. and Deposit Co. of Md. v. First State Ins. Co.,
677 So. 2d 266 (Fla. 1996) 8

Gonzalez v. Eagle Ins. Co.,
948 So. 2d 1 (Fla. 3d DCA 2006).....7

Hart v. Bankers Fire and Cas. Ins. Co.,
320 So. 2d 485 (Fla. 4th DCA 1975).....7

Hawkins v. Ford Motor Co.,
748 So. 2d 993 (Fla. 1999) 13

Jones v. Fla. Ins. Guar. Assoc., Inc.,
908 So. 2d 435 (Fla. 2005) 4

Main v. Benjamin Foster Co.,
192 So. 602 (Fla. 1939) 14

Mgmt. Computer Controls, Inc. v. Charles Perry Constr., Inc.,
743 So. 2d 627 (Fla. 1st DCA 1999) 3

N.Y. Life Ins. Co. v. Lecks,
165 So. 50 (Fla. 1935) 14

Nunley v. Fla. Farm Bureau Mut. Ins. Co.,
494 So. 2d 306 (Fla. 1st DCA 1986) 8

Pendas v. Equitable Life Assur. Soc. of U.S.,
176 So. 104 (Fla. 1937) 14

Sifers v. Gen. Marine Catering Co.,
892 F. 2d 386 (5th Cir. 1990) 10-11

Steritech Group, Inc. v. MacKenzie,
970 So. 2d 895 (Fla. 5th DCA 2007).....3

Time Ins. Co. v. Arnold,
319 So. 2d 638, 640 (Fla. 1st DCA 1975) 14

U.S. Fire Ins. Co. v. Dickerson,
90 So. 613 (Fla. 1921) 14

U.S. Sec. Ins. Co. v. Shivbaran,
827 So. 2d 1090 (Fla. 3d DCA 2002).....8

United Auto Ins. Co. v. Rodriguez,
808 So. 2d 82 (1997) 14

Williams v. Champion Ins. Co.,
590 So. 2d 736 (La. Ct. App. 1991) 11

STATUTES AND RULES

§ 627.428, Fla. Stat. (2010).....6-7, 11-15

§ 627.705, Fla. Stat. (2007)..... 8-9

§ 627.706, Fla. Stat. (2010).....6

§ 627.727, Fla. Stat. (2010).....6

§ 627.727(8), Fla. Stat. (2010).....6

§ 627.736, Fla. Stat. (2010).....6

§ 627.736(4), Fla. Stat. (2010).....14

§ 627.736(8), Fla. Stat. (2010).....6

§ 627.6741(4), Fla. Stat. (2007).....8-9

§ 627.7074(15)(b), Fla. Stat. (2010).....6

§ 627.7283, Fla. Stat. (2007).....8-9

§ 631.54(3), Fla. Stat. (2007).....7-8

§ 631.57(1)(a)(2), Fla. Stat. (2007).....4

§ 631.57(1)(b), Fla. Stat. (2007).....1, 12

§ 631.70, Fla. Stat. (2010).....12-15

LAWS AND LEGISLATIVE HISTORY

Ch. 2011-39, § 30, Laws of Fla. (approved May 17, 2011).....2

Ch. 77-227, Laws of Fla. 12

ARGUMENT

What did the Legislature mean by the phrase "within the coverage" when it defined a "covered claim" in section 631.54(3)? The answer to this question will determine this case. We construed this phrase to: (i) include contractual liabilities either expressly stated or implied in the policy by statute and (ii) exclude extra-contractual liabilities. FIGA, supporting the Second District's rule, argues that only a claim based on an express contractual provision is "within the coverage." Inconsistently, FIGA also argues that claims based on "substantive, coverage-related" statutes, not expressly stated in the policy, are "within the coverage."

Our construction of "covered claim" is superior. Recent legislation demonstrates this. *Infra* Argument I.A. And our construction gives meaning and effect to every phrase in the definition, including "within the coverage." *Infra* Argument I.B. In contrast, FIGA's inconsistent constructions are flawed; exclude similar claims for unearned premiums (the only claim identified in the definition); and rely on misstated case law. *Infra* Argument I.C, D, and E.

The other arguments of FIGA and its amici are unavailing. The anti-penalty statute, section 631.57(1)(b), does not shield FIGA from section 627.428 claims. *Infra* Argument II. Section 631.70 does not apply because no claim was both: (i) presented to FIGA and (ii) not affirmatively denied by FIGA. *Infra* Argument III. Finally, the arguments on receivership law are irrelevant. *Infra* Argument IV.

I. Our construction of "covered claim" is superior to FIGA's construction.

A. Recent legislation demonstrates the soundness of our argument.

If the Legislature intended to exclude attorney's fees from the definition of "covered claim," it would have expressly done so like eighteen other legislatures. (Initial Br. 17-25.) In fact, the Legislature recently did exclude some attorney's fees from the definition of "covered claim." *See* Ch. 2011-39, § 30, Laws of Fla. (approved May 17, 2011). But it failed to do so for the fees incurred in this case (those incurred in connection with property damage due to a hurricane). *See id.*

In particular, the Legislature amended the definition of "covered claim" to exclude claims for attorney's fees incurred in connection with a sinkhole loss. *See id.* This limited exclusion of some attorney's fees from the definition of "covered claim" suggests that the Legislature intended to include all other types of fees (or at least section 627.428 fees) in the definition of "covered claim." *See Dadeland v. St. Paul Fire and Marine Ins. Co.*, 945 So. 2d 1216, 1230-31 (Fla. 2006) (holding that a recent legislative exemption of certain bonds suggested that the Legislature intended for other types of surety relationships to be subject to the statute).

B. Our construction gives meaning and effect to every phrase in section 631.54(3), including the phrase "within the coverage."

Our construction does not render superfluous any phrase in the statutory definition of "covered claim." (*Contra* Answer Br. 17 nn.6 & 20.) Turning first to the phrase "within the coverage," the NAIC drafting history provides no

guidance on how the phrase "within the coverage" is to be construed differently from the phrase "arises out of." (Initial Br. 18-19, 35 & n.19.) FIGA does not refute this. Nevertheless, FIGA argues that the word "and" should be read conjunctively and thus "within the coverage" must mean something distinct from "arises out of." (Answer Br. 19.) Fair enough. These two phrases may differ in their meanings in some respects despite the lack of any legislative guidance.

Indeed, our construction acknowledges that "within the coverage" differs in some respects from "arises out of." "Within the coverage" limits the claims that qualify as covered claims in a way that the phrase "arises out of" does not. Specifically, "['within the coverage'] means that, for a claim to be 'covered,' it must arise out of a contractual obligation, rather than out of an extra-contractual obligation." (Initial Br. 8.) "Arises out of," standing by itself, does not accomplish this limitation. Claims that merely "arise out of" a contract may include claims based on extra-contractual duties, such as duties under tort law and generally applicable, non-insurance statutes.[1] Accordingly, our construction does not render superfluous the phrase "within the coverage." Instead, the phrase "within the

[1] *See, e.g., Steritech Group, Inc. v. MacKenzie*, 970 So. 2d 895, 899 (Fla. 5th DCA 2007) (holding a claim for conversion "arose out of" a contract); *Beazer Homes Corp. v. Bailey*, 940 So. 2d 453 (Fla. 5th DCA 2006) (holding fraud and FDUTPA claims "arose out of" a contract); *Mgmt. Computer Controls, Inc. v. Charles Perry Constr., Inc.*, 743 So. 2d 627, 632 (Fla. 1st DCA 1999) (holding claim for negligent misrepresentation "arose out of" a contract).

coverage" ensures that claims that merely "arise out of" an insurance policy, like certain tort and statutory claims, are not "covered claims." (Initial Br. 38.)

Nor does our construction render superfluous the phrase "not in excess of the applicable limits." (*Contra* Answer Br. 17 n.6.) Admittedly, there is no policy limit on the amount of section 627.428 fees.[2] (Answer Br. 17 n.6.) Thus, there is no "applicable limit" to the coverage for fees. This is not unusual. Even a coverage expressly included in a policy may have no limits. For example, this Court has ordered FIGA to pay interest under an express coverage provision that had no limit. *See Jones v. Fla. Ins. Guar. Assoc., Inc.*, 908 So. 2d 435, 454-56 (Fla. 2005). And in this case, the policy expressly provides coverage, without any limit, for "costs taxed against an 'insured.'" (R1:28.) Simply put, some coverages have policy limits that apply while others have no policy limits that apply. This fact does not render superfluous the phrase "applicable limits."[3]

C. FIGA's inconsistent constructions are flawed.

FIGA proposes two distinct, irreconcilable constructions of the definition of "covered claim" and the phrase "within coverage": (i) an "express term"

[2] Even when there is no policy limit, FIGA's liability is generally capped at $300,000 per claim. § 631.57(1)(a)(2), Fla. Stat. (2007). Accordingly, FIGA can reasonably quantify the assessments to cover fees. (*Contra* Answer Br. 21-22.)

[3] This fact also does not make fees a non-determinable benefit. (*Contra* Answer Br. 21-22.) A benefit need not be a fixed amount or precisely quantified to be "determinable." Few, if any, benefits under a policy can be precisely quantified before the contingency occurs.

construction based on the Second District's decision, and (ii) a "substantive" construction that FIGA proposes for the first time. Both constructions are flawed.

Under the "express term" construction, FIGA's "obligations are restricted solely to the insurance coverage provided in the insolvent insurer's policy," and "'covered claims' are those created by the 'coverage' provisions of an insurance policy." (Answer Br. 16 (emphasis added).) This "express term" construction is flawed for the reasons fully argued in our initial brief. (*See* Initial Br. 28-34.)

FIGA acknowledges that this "express term" construction is flawed. It does so when it concedes that certain terms are "engrafted" into a policy by statute and are "implied by law." (Answer Br. 30-31.) FIGA contends – inconsistently to the "express term" construction – that claims arising out of "substantive, coverage-related" statutes are "within the coverage" and "covered claims," even if they do not arise out of an express policy term. (*Id.*) But, FIGA contends, "covered claims" are not those claims arising out of statutes "that regulate or control the interpretation of, and disputes over, the coverage provided by the policy." (*Id.*) For example, under FIGA's construction, a "covered claim" could not arise out of an insurer's statutory duty to provide coverage when it fails to give notice to its

insured.[4] On the other hand, it could arise out of such a statute but only if it expressly mandates the inclusion of a "coverage" provision in the policy. (Answer Br. 30-32 & nn.11, 13, 14.)

FIGA's newly-minted "substantive" construction fares no better than its "express term" construction. It too is flawed, as demonstrated by FIGA's own concessions. FIGA concedes that a claim under a fee statute, like section 627.428, would be a "covered claim" if the policy stated that it provided coverage for fees under the statute. (Answer Br. 32.) FIGA further concedes that the statutes governing personal injury protection benefits, uninsured motorist benefits, and sinkholes are "substantive" statutes that would constitute "coverage provisions" implied by law in the policy though not expressly stated in the policy. (Answer Br. 30-31 & nn.11 & 14 (citing §§ 627.706, 627.727, 627.736, Fla. Stat. (2010)).) As FIGA acknowledges, these "substantive" statutes expressly incorporate the fee statute (section 627.428), though they limit its application. *See* §§ 627.7074(15)(b), 627.727(8), 627.736(8), Fla. Stat. (2010); (Answer Br. 32).

Nevertheless, FIGA asserts, the fee statute does not "create" coverage because the fee statute, unlike the "substantive" statutes, does not expressly mandate that a policy include the statute's language. (Answer Br. 32 ("[N]othing

[4] *Compare* Initial Br. 33 & n.18 (identifying cases where insurers were required to provide coverage because they failed to provide statutorily required notice) *with* Answer Br. 30 & n.12 (stating that covered claim would not arise out of statute requiring insurers to make certain disclosures).

in section 627.428 mandates that policies contain such language.").) This "substantive" construction falls squarely into our "cutting and pasting" example (Initial Br. 31) and would mean that a claim is "covered" if the statutory language is unnecessarily cut and pasted into the policy but not covered if it is not. FIGA's "substantive" construction elevates form over substance. It should be rejected.

D. FIGA's constructions exclude claims for unearned premiums, the only type of claim identified in the statute as a "covered claim" and which are similar to claims for section 627.428 fees.

FIGA's constructions of "covered claim" cannot be reconciled with the plain statutory text identifying a claim for unearned premiums as a "covered claim." *See* § 631.54(3), Fla. Stat. (2007). Unearned premiums are the elephant in the room that FIGA conveniently ignores by limiting its discussion of them to a single footnote. (Answer Br. 29 n.10.) Some claims for unearned premiums must qualify as covered claims given that they are expressly mentioned in the statute as a type of covered claim. *See* § 631.54(3), Fla. Stat. (2007).

An insured's claim for unearned premiums is similar to an insured's claim for fees. Both typically arise when the insurer seeks to cancel a policy.[5] In other words, this single transaction (cancellation of a policy) may give rise to, *inter alia*,

[5] *See, e.g., Bankers Ins. Co. v. Gen. No-Fault Ins., Inc.*, 814 So. 2d 1119, 1120 (Fla. 4th DCA 2002) (claim for unearned premiums due to insurer's cancellation of policy); *Hart v. Bankers Fire and Cas. Ins. Co.*, 320 So. 2d 485, 486-87 (Fla. 4th DCA 1975) (claim for section 627.428 fees due to insurer's cancellation of policy).

two claims: (i) a claim for a refund of unearned premiums[6] and (ii) a claim for attorney's fees incurred in getting the coverage reinstated.[7] And insurers routinely seek to cancel coverage after the insured has reported a loss to the insurer.[8]

FIGA, however, summarily dismisses our analogy to unearned premiums on the premise that "unearned premiums are expressly included within the definition of 'covered claims.'" (Answer Br. 29 n.10.) FIGA misreads the statute. Under section 631.54(3)'s plain language, a claim for an unearned premium – though expressly included as a potential covered claim – must still "arise out of" and be "within the coverage" of the policy in order to qualify as a "covered claim." (Initial Br. 30). The statutory definition of "covered claim" does not *per se* include every claim for unearned premiums. *See* § 631.54(3), Fla. Stat. (2007).

But FIGA's constructions go to the opposite extreme. They *per se* exclude from the definition of "covered claim" virtually every claim for unearned premiums. (*See* Answer Br. 30 n.30.) None of the unearned premium statutes

---

[6] *See generally Gonzalez v. Eagle Ins. Co.*, 948 So. 2d 1 (Fla. 3d DCA 2006) (explaining how, under various statutes and the common law of contracts and restitution, an insurer must refund the unearned premium to the insured when it cancels a policy); *see also* §§ 627.6741(4), 627.705, 627.7283, Fla. Stat. (2007).

[7] *See, e.g., Fid. and Deposit Co. of Md. v. First State Ins. Co.*, 677 So. 2d 266, 269-70 (Fla. 1996) (holding that insured's subrogee was entitled to section 627.428 fees if the insurer's cancellation of coverage was later deemed invalid).

[8] *See, e.g., U.S. Sec. Ins. Co. v. Shivbaran*, 827 So. 2d 1090, 1091 (Fla. 3d DCA 2002) (mentioning that insurer cancelled policy and refunded premium after insured reported loss); *Nunley v. Fla. Farm Bureau Mut. Ins. Co.*, 494 So. 2d 306 (Fla. 1st DCA 1986) (mentioning insured's claim for section 627.428 fees in light of insurer's attempt to cancel policy after loss was reported).

"mandate" that insurers include in their policies the statutory language that requires them to refund unearned premiums when a policy is cancelled. *See* §§ 627.6741(4), 627.705, 627.7283, Fla. Stat. (2007). Therefore, FIGA suggests, a claim for unearned premiums under these statutes would never constitute a "covered claim." (*See* Answer Br. 30 & n.10 ("[W]hile 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 part of the coverage extended by the provisions of the policy.").)

Moreover, a contractual claim for unearned premiums likely does not qualify as a "covered claim" under FIGA's constructions even where, as here, the policy has an express provision requiring the insurer to refund an unearned premium upon cancellation. (R1:41). Because FIGA never offers any guiding principle for discerning what provisions are or are not "coverage" provisions, one is left to speculate whether the express, unearned-premium provision in this case (R1:41) is a "coverage" provision under FIGA's constructions. However, it probably is not because FIGA suggests that "covered claims" are limited to claims based on risks external to the policy (like personal injury, property damage, etc.). (Answer Br. 18-19). Thus, conversely, FIGA presumably construes "covered claim" as excluding claims arising out of risks inhering in the insurer's performance under

the policy – like its decision to cancel a policy or deny coverage, both of which may give rise to statutory claims for unearned premiums and fees.

In short, FIGA's constructions of "covered claim" should be rejected because they exclude claims for unearned premiums – a claim that is similar to a claim for fees and that is the only claim expressly identified in section 631.54(3).

E. FIGA and its amici have misstated case law.

FIGA and its amici have misstated case law. The National Conference of Insurance Guaranty Funds (NCIGF) cites ten cases and states that "state guaranty associations are not responsible for [attorney's] fees." (NCIGF Br. 6-7.) Not one of these cases is "instructive because they concern claims for fees incurred by an insurer (not an insured) in defending insureds." (Initial Br. 35-36 n.19.) In all ten cases, the insurer retained counsel and the contractual relationship was between the insurer and counsel, not between the insured and counsel. This relationship is typical under a liability policy where the insurer has a duty to defend. *See, e.g.*, *Sifers v. Gen. Marine Catering Co.*, 892 F. 2d 386, 399-400 (5th Cir. 1990).

The Fifth Circuit's *Sifers* opinion is representative of all ten cases. It states (in *dicta*) that a guaranty association should pay an insured's pre-insolvency fees:

> [The insured] correctly asserts that [the guaranty association's] statutory obligation is coextensive with that of the insolvent insurer. Hence, to the extent that . . . the insured . . . incurred attorneys' fees prior to the insurer's bankruptcy, [the guaranty association] should be liable for those fees. However, it does not necessarily follow that

> the insurer's legal fees are recoverable from [the guaranty association.]

Id. (first emphasis added). The fees in *Sifers* did not give rise to a "covered claim" because the insured did not incur the fees or have any obligation to pay them. *Id*. That is not the situation here in this insurer-insured dispute. The insured here was obligated to pay, and did pay, the fees. (Initial Br. 2-3.)

NCGIF's next misstatement is that it purportedly found "several" cases "directly on point." (NCIGF Br. 8-9.) In four cases (from Wyoming, Iowa, Texas, and Louisiana), the state legislatures, unlike the Florida Legislature, expressly amended the definition of covered claim to exclude an insured's pre-insolvency fees.[9] (*See also* Initial Br. 20-23.) A Delaware case (also cited by FIGA (Answer Br. 25)) is the only case arguably "on point." But it is the unpublished decision of a single trial judge that we have previously addressed. (Initial Br. 35-36 n.19.)

One Louisiana case relied on by FIGA, *Breaux*, demonstrates why in Florida – but not in Louisiana – a claim for fees is a "covered claim." (Answer Br. 26, 44-46 (discussing *Breaux v. Klein*, 572 So. 2d 656 (La. Ct. App. 1990)[10]).) Under well-settled Louisiana law, the fee statute at issue in *Breaux* was "separate and distinct from the insurer's contractual obligation," as it allowed for fees only when

[9] FIGA also mistakenly cites a case that falls into this same category. (Answer Br. 25 (citing *Williams v. Champion Ins. Co.*, 590 So. 2d 736 (La. Ct. App. 1991).)

[10] *Breaux* pre-dated Louisiana's legislative amendment excluding pre-insolvency fees from a "covered claim." (Answer Br. 45 n.20.)

the insurer acted frivolously. *Breaux*, 572 So. 2d at 658 (emphasis added). Florida's non-frivolous fee statute, section 627.428, is very different. It is not "separate and distinct" from an insurer's contractual obligation. It is a part of every Florida insurance contract. (Initial Br. 12 & n.4.)

Breaux supports our construction of "covered claim." It does not support FIGA's two constructions. *Breaux* did not hold that covered claims are only those claims arising out of express "coverage" provisions or "substantive, coverage-related" statutes. Instead, *Breaux* examined whether the alleged "covered claim" arose out of a contractual obligation under the policy. *See* 572 So. 2d at 659. This is precisely the test that we propose. A claim under the Louisiana fee statute – being separate and distinct – did not arise out of an insurer's contractual obligation. In contrast, a claim under section 627.428 – being a part of every insurance contract – arises out of an insurer's contractual obligation. Thus, a claim under section 627.428, unlike the Louisiana fee statute, is a covered claim.

II. The anti-penalty statute does not shield FIGA from claims for fees.

Section 631.57(1)(b) prohibits any liability for FIGA for "penalties." This anti-penalty statute does not shield FIGA from an insured's claims for section 627.428 fees. (*Contra* Answer Br. 33-35.) This is demonstrated by the Act's legislative history and this Court's case law.

The anti-penalty statute was enacted in the same 1977 bill as section 631.70. (Initial Br. 27); Ch. 77-227, Laws of Fla. Section 631.70, unlike the anti-penalty statute, specifically addresses FIGA's liability for section 627.428 fees. The parties agree that section 631.70 permits FIGA to be liable for section 627.428 fees under certain circumstances, though the parties disagree as to what those circumstances are. FIGA concedes that section 631.70 allows it to be liable for section 627.428 fees incurred on claims that it affirmatively denies; however, FIGA contends, section 631.70 eliminates its liability for all other such fees. (Answer Br. 40.) In contrast, we contend that section 631.70 eliminates FIGA's liability only for post-insolvency fees incurred on claims not affirmatively denied by FIGA. (Initial Br. 40-47.)

When one statute specifically covers a particular subject, the specific statute governs over other statutes that cover the same and other subjects in more general terms. *E.g., Adams v. Culver*, 111 So. 2d 665, 667 (Fla. 1959). Even if the term "penalties" includes section 627.428 fees, the anti-penalty statute still would not govern FIGA's liability for such fees. Section 631.70 – the statute specifically covering FIGA's liability for section 627.428 fees – would govern instead.

Moreover, the term "penalties" in the anti-penalty statute cannot be logically construed to include section 627.428 fees. If it were, then FIGA would not be liable for any section 627.428 fees, incurred pre- or post-insolvency. This would

contravene the interpretations of section 631.70 offered by both FIGA and us. And section 631.70 would be rendered superfluous. This should be avoided. *See, e.g., Hawkins v. Ford Motor Co.*, 748 So. 2d 993, 1000 (Fla. 1999).

In addition, FIGA relies too heavily on lower court cases equating section 627.428 fees to a penalty. (Answer Br. 33-34.) All these lower court cases post-date the 1977 amendment adding the anti-penalty statute to the Act. (*Id.*) The first time that this Court linked the word "penalty" with section 627.428 (or one of its predecessors) was *U.S. Fire Ins. Co. v. Dickerson*, 90 So. 613 (Fla. 1921). There, the Court decided that a claim for statutory fees had to be pled in the "declaration" (i.e., complaint). *Id.* at 615-16. In deciding this, the Court analogized the statutory fees to a penalty, but it did not hold that these fees were, in fact, a penalty. *Id.* Specifically, the Court stated that such fees were "in the nature of a penalty, although not such strictly speaking." *Id.* at 616 (emphasis added).

In subsequent opinions, this Court repeated this "in the nature of penalty" language or other similar phrases ("kind of penalty").[11] So did the lower courts before 1977. *See, e.g., Time Ins. Co. v. Arnold*, 319 So. 2d 638, 640 (Fla. 1st DCA 1975). But the lower courts later became loose with their language. They stopped merely analogizing section 627.428 fees to a penalty. They began to say such fees

[11] *See N.Y. Life Ins. Co. v. Lecks*, 165 So. 50, 53-54 (Fla. 1935); *Pendas v. Equitable Life Assur. Soc. of U.S.*, 176 So. 104, 111-12 (Fla. 1937); *Main v. Benjamin Foster Co.*, 192 So. 602, 604 (Fla. 1939); *Feller v. Equitable Life Assur. Soc. of the U.S.*, 57 So. 2d 581, 583 (Fla. 1952).

were, in fact, a penalty. (*See* Answer Br. 33-34 (citing cases).) But this Court has never done so,[12] and it should not do so now.

III. Section 631.70 does not apply because no claim was both: (i) presented to FIGA and (ii) not affirmatively denied by FIGA.

Under its plain language, section 631.70 applies only if, *inter alia*, a claim was both: (i) presented to FIGA and (ii) not affirmatively denied by FIGA. (Initial Br. 40-41.) FIGA's brief never answers the following: What claim asserted by Petty (covered or uncovered) satisfied both these criteria?[13] Was it Petty's claim for property loss? No, that claim was paid pre-insolvency and never was presented to FIGA. (Initial Br. 42.) Was it Petty's claim for entitlement to pre-insolvency fees? No, FIGA affirmatively denied that claim. (Initial Br. 42-43 & n.21). And FIGA does not dispute that the claims for property loss and entitlement to section 627.428 fees are distinct from one another. (Initial Br. 41-42.) Because neither of Petty's distinct claims satisfies both criteria, section 631.70 does not apply.

IV. The arguments on federal law and state receiverships are irrelevant.

[12] This Court did once equate section 627.428 fees to a penalty due to the express language of a statute that applies only in the PIP context. *United Auto Ins. Co. v. Rodriguez*, 808 So. 2d 82, 87 (citing § 627.736(4), Fla. Stat. (1997)).

[13] Rather than answer this critical question, FIGA devotes most of its argument on section 631.70 on the issue of whether Petty's claim for fees is a "covered claim." (Answer Br. 35-42.) We rest on our prior arguments on that issue.

One amicus argues that our position, if adopted, will alter the claims process for state insurance receiverships in a way that "could" violate federal law. (DFS Br. 3-6.) This non-party argument is speculative and not an issue before the Court.

CONCLUSION

This Court should quash the Second District's decision.

CREED & GOWDY, P.A.

_____

Bryan S. Gowdy
Florida Bar No. 0176631
865 May Street
Jacksonville, FL 32204
(904) 350-0075
(904) 350-0086 (facsimile)

Attorney for Petitioners

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; **Bob G. Freemon, Esq.** and **Ron A. Hobgood, Esq.**, Freemon & Miller, P.A., 8381 Gunn Highway, Tampa, FL 33626, Counsel for Petitioners; **G. William Bissett, Jr., Esq.**, Kubicki Draper, P.A.**,** City National Bank Building, Penthouse**,** 25 West Flagler Street**,** Miami, Florida 33130; **Adam S. Rubenfield, Esq.**, Colodny, Fass, Talenfeld, Karlinsky & Abate, P.A., One Financial Plaza, 23rd Floor, 100 Southeast Third Avenue, Ft. Lauderdale, Florida 33394; **James A. Friedman, Esq.**, Godfrey & Kahn**,** One East Main Street, Ste. 500**,** P.O. Box 2719**,** Madison, WI 53701; **Mary Hope Keating, Esq.**, Greenberg Traurig, P.A. , 101 E College Ave, Tallahassee, FL 32301; **Jeffrey M. Liggio, Esq.**, Liggio Benrubi, Barristers

Building, 1615 Forum Place, Suite 3B, West Palm Beach, FL 33401; **Perry Tanksley, Esq.**, P.O. Box 249, Sarasota, FL 34230; **Alan S. Wachs, Esq., Christopher T. Harris, Esq. and Michael M. Giel, Esq.**, Volpe, Bajalia, Wickes, Rogerson & Wachs, EverBank Plaza, 501 Riverside Ave., 7th Floor, Jacksonville, FL 32202, by United States Mail, this 13th day of June, 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.

_____

Attorney