IN THE SUPREME COURT OF FLORIDA

FLORIDA INSURANCE GUARANTY ASSOCIATION, INC.,

Petitioner,

vs.

DEVON NEIGHBORHOOD ASSOCIATION INC. D/B/A DEVON NEIGHBORHOOD & CONDOMINIUMS A-J ASSOCIATION, INC.

Respondent.

CASE NO.: SC10-347

L.T. NO.: 4D09-377

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ON DISCRETIONARY REVIEW FROM THE FOURTH DISTRICT COURT OF APPEAL

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RESPONDENT'S ANSWER BRIEF

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PRELIMINARY STATEMENT

Respondent, Devon Neighborhood Association Inc. d/b/a Devon Neighborhood & Condominiums A-J Association, Inc., who was the Appellee before the Fourth District Court of Appeal and the Plaintiff before the trial court, will be referred to as "Devon." Petitioner, the Florida Insurance Guaranty Association, Inc., who was the Appellant before the Fourth District Court of Appeal and the Defendant before the trial court, will be referred to as "FIGA." Non-party Southern Family Insurance Company will be referred to as "Southern."

Petitioner's Initial Brief before this Court will be referenced by "IB." References to Petitioner's Initial Brief before the Fourth District Court of Appeal will be "IBDA." Petitioner's Jurisdictional Brief before this Court will be referenced by "JB."

STATEMENT OF THE CASE AND FACTS

Devon timely filed a claim with its insurer, Southern, after Devon's property sustained extensive damage when Hurricane Wilma struck in October of 2005. Florida Ins. Guar. Ass'n, Inc. v. Devon Neighborhood Ass'n Inc., 33 So. 3d 48, 50 (Fla. 4th DCA 2009). Devon submitted a sworn proof of loss for its claim in February of 2006. Id. Southern became insolvent and was placed into receivership in April of 2006. Id. By operation of law, FIGA assumed responsibility for

Devon's claim. Id. Before becoming insolvent, Southern paid Devon approximately $2.5 million. Id.

Devon subsequently submitted a second sworn proof of loss statement, increasing the claimed amount of the loss. Id. FIGA paid Devon an additional $1.7 million. Id. In December of 2007, a contracting company hired by Devon estimated additional damage in the amount of $4.8 or $5 million. Id. The additional damages include three roofs and the replacement of all the sliding glass doors and windows. Id. Devon submitted the report with the $4.8 million in additional claims to FIGA on January 30, 2008, but FIGA refused to make any payment. Id.

On February 11, 2008, Devon filed a lawsuit against FIGA. Id. Count I alleged breach of contractual and statutory duties in failing to fully compensate Devon for all losses covered under the policy. Id. Count II sought a declaration of the validity of the insurance contract, a determination of Devon's rights and obligations under the policy, a determination of whether the damages and losses were covered claims, and a declaration that the deductible provisions were void. Id. FIGA's answer alleged numerous affirmative defenses and demanded an appraisal of the damages pursuant to the terms of the Southern insurance policy. Id.

FIGA moved to compel an appraisal. Devon opposed the appraisal process and alleged that FIGA waived its right to appraisal by (1) participating in the lawsuit, and (2) failing to notify Devon of the statutory mediation process set forth in section 627.7015(2) of the Florida Statutes. Id. Under the plain language of section 627.7015(2), the failure to notify Devon of the statutory mediation process prevented FIGA from insisting on the appraisal process as a precondition to legal action. Id. Ultimately, the trial court denied the motion to compel the appraisal, and FIGA appealed the trial court's ruling to the Fourth District Court of Appeal.

On appeal, FIGA argued that applying section 627.7015(2) in this case would amount to an unconstitutional impairment of the insurance contract, which was entered into before the pertinent portion of the statute became effective. Id. The Fourth District analyzed FIGA's argument on appeal by applying the test established in Pomponio v. Claridge of Pompano Condo., Inc., 378 So. 2d 774 (Fla. 1979). Devon Neighborhood Ass'n Inc., 33 So. 3d at 51. After it conducted a thorough analysis, the Fourth District held that "the statutory amendment subjecting commercial residential insurance policies to the mediation provisions of section 627.7015 was not an unconstitutional impairment of the existing insurance policy." Id. at 53.

After the Fourth District entered its opinion, FIGA filed a motion for rehearing, rehearing en banc, and to certify a question of great public importance to

this Court ("Motion for Rehearing"). FIGA's Motion for Rehearing argued, for the first time, that the Fourth District should apply the test utilized in Old Port Cove Holdings, Inc. v. Old Port Cove Condo. Ass'n One, Inc., 986 So. 2d 1279 (Fla. 2008), and Metropolitan Dade County v. Chase Fed. Hous. Corp., 737 So. 2d 494 (Fla. 1999) to determine whether section 627.7015 can be applied retroactively. (FIGA Reh'g Mot. 4-13). The Fourth District denied FIGA's Motion for Rehearing, and FIGA sought review in this Court. On September 22, 2009, the Court accepted jurisdiction over this case.

SUMMARY OF THE ARGUMENT

FIGA claims the Fourth District erred by failing to apply the two-part test utilized in Menendez v. Progressive Express Ins. Co., Inc., 35 So. 3d 873 (Fla. 2010), Old Port Cove Holdings, Inc. v. Old Port Cove Condo. Ass'n One, Inc., 986 So. 2d 1279 (Fla. 2008), and Metropolitan Dade County v. Chase Fed. Hous. Corp., 737 So. 2d 494 (Fla. 1999). FIGA's argument should be rejected because it did not contend in its briefs below that Old Port Cove and Chase Fed. Hous. were controlling in this case. Instead, FIGA waited until after the Fourth District issued an opinion before it raised such an argument in a Motion for Rehearing. The law is clear that authorities not cited and issues not raised in the briefs cannot be raised for the first time on a motion for rehearing. Therefore, the Fourth District's ruling in this case should be affirmed.

Even if FIGA had timely raised its argument below, it would be without merit under the binding authority set forth by this Court more than thirty years ago in Pomponio v. Claridge of Pompano Condo., Inc., 378 So. 2d 774 (Fla. 1979). The Fourth District used the Pomponio test because FIGA argued below that applying section 627.7015 to this case would constitute an unconstitutional impairment of the insurance contract. Devon Neighborhood Ass'n Inc., 33 So. 3d at 50. This decision in Pomponio has not been overruled, and the Court does not intentionally overrule itself *sub silentio*. Accordingly, the Fourth District properly applied the Pomponio test, which remains viable today.

The Fourth District's opinion should also be affirmed because the amendments to section 627.7015 were procedural or remedial in nature. Under Florida law, procedural or remedial statutes can be applied retroactively. Section 627.7015 is entitled "Alternative ***procedure*** for resolution of disputed property insurance claims," and the "Purpose and Scope" section of the statute states that it "sets forth a nonadversarial alternative dispute resolution ***procedure*** for a mediated claim resolution conference prompted by the need for effective, fair, and timely handling of property insurance claims." § 627.7015, Fla. Stat. (emphasis added). Furthermore, the retroactive application of section 627.7015 is a permissible exercise of the state's police powers. Accordingly, the Court should uphold the Fourth District's ruling.

Devon contends that the Court should decline jurisdiction over this case because nothing within the four corners of the Fourth District's opinion expressly and directly conflicts with any decision made by this Court or any other District Court of Appeal. All of the "conflict" cases cited by FIGA are factually distinguishable from this case. When two cases are factually distinguishable, there is no conflict jurisdiction. Therefore, this Court should decline to exercise its jurisdiction over this case.

Finally, the Fourth District's decision should be affirmed even if the test utilized in Menendez, Old Port Cove, and Chase Fed. Hous. is applied. The retroactivity analysis set forth in Menendez requires the Court to first "ascertain whether the Legislature intended for the statute to apply retroactively. Second, if such an intent is clearly expressed, the Court must determine whether retroactive application would violate any constitutional principles." Menendez, 35 So. 3d at 877. Chapter 2005-111, Laws of Florida, the legislation that amended section 627.7015, reflects an intent that the amendments to the statute apply retroactively. In addition, the retroactive application of section 627.7015 would not violate any constitutional principles because the statute (1) is procedural/remedial in nature, and (2) constitutes a legitimate exercise of the state's police powers. Accordingly, the Court should affirm the Fourth District's opinion in this case.

ARGUMENT

THE FOURTH DISTRICT FOLLOWED THE BINDING PRECEDENT SET FORTH IN POMPONIO V. CLARIDGE OF POMPANO CONDO., INC., 378 SO. 2D 774 (FLA. 1979) AND PROPERLY CONCLUDED THAT SECTION 627.7015 WAS APPLICABLE IN THIS CASE

Standard of Review

"This Court reviews de novo a lower court's ruling on the constitutionality of a statute," and legislative acts are afforded a presumption of constitutionality. Lawnwood Med. Ctr. v. Seeger, 990 So. 2d 503, 508 (Fla. 2008). The conflict issue raised by FIGA involves constitutional and statutory interpretation, so the proper standard of review in this case is de novo. Florida Hosp. Waterman, Inc. v. Buster, 984 So. 2d 478, 485 (Fla. 2008).

The Fourth District Properly Applied the Pomponio Test

FIGA argues that the Fourth District misapplied this Court's controlling authority when it held that section 627.7015 of the Florida Statutes could be applied retroactively. (IB. 12). FIGA does not, however, acknowledge the fact that the Fourth District's "retroactivity analysis" was based upon the binding authority set forth by this Court in Pomponio. This Court "does not intentionally overrule itself sub silentio," State v. Ruiz, 863 So. 2d 1205, 1210 (Fla. 2003), and the Fourth District was bound to follow the case law set forth by this Court, i.e., Pomponio. Hoffman v. Jones, 280 So. 2d 431, 434 (Fla. 1973). Therefore,

FIGA's claim that the Fourth District somehow misapplied this Court's controlling authority is without merit.

FIGA claims the Fourth District erred by failing to apply the two-part test utilized in Menendez, 35 So. 3d 873, Old Port Cove Holdings, 986 So. 2d 1279, and Chase Fed. Hous., 737 So. 2d 494, yet it did not raise such an argument below until it filed a Motion for Rehearing. (IB. 11-12; FIGA Reh'g Mot. 4-13). The law is clear that authorities not cited and issues not raised in the briefs cannot be raised for the first time on a motion for rehearing. Begyn v. State Bus. & Prof'l Regulations, 849 So. 2d 336, 340 (Fla. 1st DCA 2003). Thus, the Fourth District properly applied the Pomponio test because FIGA never argued in its briefs below that Old Port Cove and Chase Fed. Hous. were controlling.[1]

FIGA's Initial Brief does not address the applicability of the test established by this Court more than thirty years ago in Pomponio. Instead, FIGA simply claims that the Fourth District erred by failing to apply the two-part test utilized in Menendez, Old Port Cove, and Chase Fed. Hous. The opinions in these cases, however, did not supplant the Pomponio test because this Court "does not intentionally overrule itself sub silentio." Ruiz, 863 So. 2d at 1210; State ex rel. Garland v. City of West Palm Beach, 193 So. 297, 298 (Fla. 1940)("For one case to have the effect of overruling another, the same questions must be involved; they

[1] The Court's decision in Menendez was issued after the Fourth District issued its opinion in this case.

must be affected by a like state of facts and a conclusion must be reached in hopeless conflict with that in the former case."). The Court did not even mention the Pomponio test in its opinions in the Menendez, Old Port Cove, and Chase Fed. Hous. cases. Therefore, the Fourth District properly applied the Pomponio test, which is still binding authority. Ingalsbe v. Stewart Agency, Inc., 869 So. 2d 30, 34 (Fla. 4th DCA 2004)(earlier decision of Florida Supreme Court is still authoritative when subsequent decisions of the Court are utterly silent on any purported change in the law).

In Pomponio, the Court set forth a general test to be utilized when analyzing whether a statute violates Article I, Section 10 of the Florida Constitution. Pomponio, 378 So. 2d at 780-782. The Fourth District applied the Pomponio test in this case because FIGA claimed the pertinent provisions of section 627.7015 were inapplicable because they were not effective until after the insurance policy was issued. (IBDA. 28). The fact that Florida courts have applied the Pomponio test in a variety of different cases for more than three decades demonstrates that the Pomponio test remains viable today. See Coral Lakes Cmty. Ass'n, Inc. v. Busey Bank, N.A., 30 So. 3d 579 (Fla. 2d DCA 2010); Cohn v. Grand Condo. Ass'n Inc., 26 So. 3d 8 (Fla. 3d DCA 2009);[2] Columbia Hosp. Corp. of S. Broward v. Fain, 16 So. 3d 236 (Fla. 4th DCA 2009); Yellow Cab Co. v. Dade County, 412 So. 2d 395

[2] The Third District's decision in Cohn is currently pending before this Court in Case No. SC10-430.

(Fla. 3d DCA 1982). Thus, the Fourth District properly applied the Pomponio test in this case.

The Fourth District concluded that application of section 627.7015 in this case passed constitutional muster under Pomponio. The first inquiry of the constitutional analysis under Pomponio must be "whether the state law has, in fact, operated a substantial impairment of a contractual relationship." Cohn, 26 So. 3d at 10. "'The severity of the impairment measures the height of the hurdle the state legislation must clear. Minimal alteration of contractual obligations may end the inquiry at its first stage. Severe impairment, on the other hand, will push the inquiry to a careful examination of the nature and purpose of the state legislation.'" Pomponio, 378 So. 2d at 779.

The Fourth District properly concluded that "[t]he statute in question affects in a minimal way the process of settling a claim. It does not permanently and substantially change the contractual arrangement between the parties." Devon Neighborhood Ass'n Inc., 33 So. 3d at 51. The provisions of section 627.7015 simply required the insurance company in this case, Southern, to provide Devon with notice of the opportunity to participate in non-binding mediation. Requiring Southern to provide such notice constituted, at best, a minimal impairment of its contractual relationship with Devon. Since the application of section 627.7015 in this case altered the contractual relationship between Southern and Devon in a

minimal way, the Fourth District's decision should be affirmed. Pomponio, 378 So. 2d at 243-244 ("[T]he first inquiry must be whether the state law has, in fact, operated as a substantial impairment of a contractual relationship. The severity of the impairment measures the height of the hurdle the state legislation must clear. ***Minimal alteration of contractual obligations may end the inquiry at its first stage***.")(internal citation omitted)(emphasis added).

Even if the retroactive application of section 627.7015 would cause a substantial impairment of the existing contractual relationship between Southern and Devon, the Fourth District properly applied the balancing test set forth in Pomponio. Under the Pomponio balancing test, the Court must analyze the following factors:

> (a) Was the law enacted to deal with a broad, generalized economic or social problem?
>
> (b) Does the law operate in an area which was already subject to state regulation at the time the parties' contractual obligations were originally undertaken, or does it invade an area never before subject to regulation by the state?
>
> (c) Does the law effect a temporary alteration of the contractual relationships of those within its coverage, or does it work a severe, permanent, and immediate change in those relationships irrevocably and retroactively?

Pomponio, 378 So. 2d at 779 (footnotes omitted). The Fourth District addressed the first question in the Pomponio balancing test and noted that the law was enacted to address a broad, generalized economic problem, i.e., the time-

consuming and expensive appraisal process. Devon Neighborhood Ass'n Inc., 33 So. 3d at 53; § 627.7015(1), Fla. Stat. (setting forth purpose and scope of the legislation). Thus, the first prong of the Pomponio balancing test was satisfied in this case.

The second factor under the Pomponio balancing test is whether section 627.7015 operates "in an area which was already subject to state regulation at the time the parties' contractual obligations were originally undertaken, or does it invade an area never before subject to regulation by the state?" Pomponio, 378 So. 2d at 779. Section 627.7015 affects insurance, probably the most heavily regulated industry in Florida. Since "[t]he contents of insurance policies and the procedures for handling claims are regulated by statutes as well as Department of Insurance regulations," the second prong of the Pomponio balancing test was satisfied in this case. Devon Neighborhood Ass'n Inc., 33 So. 3d at 53.

The third prong of the Pomponio balancing test is whether the law creates "a temporary alteration of the contractual relationships of those within its coverage, or does it work a severe, permanent, and immediate change in those relationships irrevocably and retroactively?" Pomponio, 378 So. 2d at 779. Here, section 627.7015 simply affects the process of settling an insurance claim in a minimal way. The contractual relationship between Southern and Devon is not permanently or severely changed. Thus, the third factor of the Pomponio balancing test strongly

weighs in favor of affirming the Fourth District's decision in this case.

The Court Should Follow Pomponio

FIGA's argument tacitly seeks to have this Court overrule its prior decision in Pomponio. In N. Fla. Women's Health & Counseling Servs., Inc. v. State, 866 So. 2d 612, 637 (Fla. 2003), this Court previously stated:

> Before overruling a prior decision of this Court, we traditionally have asked several questions, including the following. (1) Has the prior decision proved unworkable due to reliance on an impractical legal "fiction"? (2) Can the rule of law announced in the decision be reversed without serious injustice to those who have relied on it and without serious disruption in the stability of the law? And (3) have the factual premises underlying the decision changed so drastically as to leave the decision's central holding utterly without legal justification?

FIGA's briefs before this Court and the Fourth District do not suggest that the test established in Pomponio has become unworkable due to reliance on an impractical legal fiction. In fact, the recent decisions in Cohn, 26 So. 3d 8 and Fain, 16 So. 3d 236, demonstrate that the Pomponio test remains viable and workable today. Accordingly, the first question set forth in N. Fla. Women's Health & Counseling Servs. clearly favors upholding the Pomponio test.

A review of the second question posited in N. Fla. Women's Health & Counseling Servs. reveals that the rule of law announced in Pomponio cannot be reversed without causing a serious injustice to those who have relied on it and without producing a serious disruption in the stability of the law. For more than thirty years the Pomponio test has provided the framework for Florida courts

analyzing whether the retroactive application of a statute impermissibly impairs the obligation of contracts in violation of Article I, Section 10 of the Florida Constitution. Adopting a different test for conducting such an analysis would create a serious injustice to a multitude of parties, like those in Cohn and Fain, who have relied upon the Pomponio test. The stability of the law would also be seriously disrupted if the Court recedes from Pomponio.

The third question set forth in N. Fla. Women's Health & Counseling Servs. asks whether the factual premises underlying Pomponio have changed so drastically as to leave the decision's central holding utterly without legal justification. Nothing in the factual premises underlying Pomponio has changed drastically over the past thirty years, and the legal justification for its central holding remains intact today. Because the factual premises underlying the Pomponio decision have not changed, the Court should uphold the test set forth in Pomponio.

Retroactive Application of Section 627.7015 is Permissible Because it is a Procedural Statute

FIGA's argument in this case fails to acknowledge that section 627.7015 is procedural, or remedial, in nature. Substantive statutes set forth duties and rights, while procedural statutes address the means and methods to apply and enforce the duties and rights. Alamo-Rent-A-Car, Inc. v. Mancusi, 632 So. 2d 1352, 1358 (Fla. 1994). "A remedial statute is one which confers a remedy and the means

employed in enforcing a right or in redressing an injury." Snellgrove v. Fogazzi, 616 So. 2d 527, 529 (Fla. 4th DCA 1993). The law is clear that "[r]emedial or procedural statutes do not fall within the constitutional prohibition against retroactive legislation and they may be held immediately applicable to pending cases." Village of El Portal v. City of Miami Shores, 362 So. 2d 275, 278 (Fla. 1978); City of Lakeland v. Catinella, 129 So. 2d 133, 137 (Fla. 1961)(statutes relating to remedies or modes of procedure which "do not create new or take away vested rights, but only operate in furtherance of the remedy or confirmation of rights already existing, do not come within the legal conception of a retrospective law").

The plain language in section 627.7015(1) demonstrates the statute is procedural, or remedial, in nature. In fact, section 627.7015 is entitled "Alternative ***procedure*** for resolution of disputed property insurance claims." § 627.7015, Fla. Stat. (emphasis added). In addition, the "Purpose and Scope" section of 627.7015 specifically states that the statute "sets forth a nonadversarial alternative dispute resolution ***procedure*** for a mediated claim resolution conference prompted by the need for effective, fair, and timely handling of property insurance claims." Id. (emphasis added). The purpose of the ***procedure*** set forth in section 627.7015 is to "bring the parties together for a mediated claims settlement conference without any of the trappings or drawbacks of an adversarial process." Id. The statute also

encourages the insureds and insurers to resolve claims as quickly as possible "[b]efore resorting to these ***procedures***." Id. (emphasis added). Even the preamble to the law enacting the applicable version of section 627.7015 specifically states the statute is being amended to revise the "purpose and scope provisions relating to an alternative ***procedure*** for resolution of disputed property insurance claims; providing that failure of an insurer to notify a claimant of the availability of mediation excuses an insured from being required to submit to certain loss appraisal processes." Ch. 2005-111, Laws of Fla. The language establishing that section 627.7015 is procedural in nature existed before, as well as after, the statutory amendments became effective on July 1, 2005.

The First District Court of Appeal's decision in M.D. Transp. v. Paschen, 996 So. 2d 902 (Fla. 1st DCA 2008) is instructive on this issue. In M.D. Transp., a worker was injured and sought benefits. After the worker was injured and filed his claim, section 440.25(4)(d) of the Florida Statutes was amended to state that "[a]ny benefit due but not raised at the final hearing which was ripe, due, or owing at the time of the final hearing is waived." The Judge of Compensation Claims (JCC) concluded that the amendment to section 440.25(4)(d) was inapplicable because it substantively affected the worker's entitlement to benefits. The First District reversed the JCC's ruling because the statute did not:

> alter Claimaint's substantive right to receive medical treatment or the type of treatments to which Claimant is entitled. The language only

> prescribes the means and methods with which he must comply to establish his entitlement to medical treatment. The statutory change is procedural and applies regardless of the date of the accident. The JCC erred in holding the section to be substantive.

Id. at 905.

Section 627.7015, like the statute at issue in M.D. Transp., does not alter FIGA's substantive right to participate in the appraisal process. Instead, the language in section 627.7015 only prescribes the means and methods with which FIGA (or its predecessor, Southern) must comply before it can proceed through the appraisal process. Section 627.7015 does not involve any coverage issues at all, and "[o]nly the process of settling the claim is affected by the statute." Devon Neighborhood Ass'n Inc., 33 So. 3d at 54. Accordingly, the Fourth District's decision in this case should be affirmed because procedural statutes, like section 627.7015, can be applied retroactively. Village of El Portal, 362 So. 2d at 278; Warfel v. Universal Ins. Co. of N. Am., 36 So. 3d 136, 137 n.2 (Fla. 2d DCA 2010)(affirming retroactive application of a statute that (1) required creation of report a from a professional engineer or geologist regarding a sinkhole loss, and (2) presumed that the findings of the professional generating the report were correct);[3] Firestone v. Firestone, 263 So. 2d 223, 225 (Fla. 1972)("the findings of the lower court are not necessarily binding and controlling on appeal, and if these findings

[3] The Second District's decision in Warfel is currently pending before this Court in Case No. 10-948.

are grounded on an erroneous theory, the judgment may yet be affirmed where appellate review discloses other theories to support it.").

This Court has previously held that "[i]f a statute is found to be remedial in nature, it can and should be retroactively applied in order to serve its intended purposes." City of Orlando v. Desjardins, 493 So. 2d 1027, 1028 (Fla. 1986). "A remedial statute is one which confers a remedy and the means employed in enforcing a right or in redressing an injury." Snellgrove, 616 So. 2d at 529. Section 627.7015 was enacted because the Florida Legislature found that "[t]here is a particular need for an informal, nonthreatening forum for helping parties who elect this procedure to resolve their claims dispute because most homeowners' and commercial residential insurance policies obligate insureds to participate in a potentially expensive and time-consuming adversarial appraisal process prior to litigation." § 627.7015(1), Fla. Stat. Thus, the Fourth District's decision in this case should also be affirmed because section 627.7015 is remedial in nature.

Section 627.7015 is a Permissible Exercise of the State's Police Powers

FIGA's argument in this case ignores the fact that retroactive application of section 627.7015 is a permissible exercise of the state's police powers. All contracts entered into in Florida are "subject to the valid exercise of the police power of the state." Telophase Soc'y of Fla., Inc. v. State Bd. of Funeral Dirs. & Embalmers, 308 So. 2d 606, 609 (Fla. 1st DCA 1975); McConville v. Ft. Pierce

Bank & Trust Co., 135 So. 392, 395 (Fla. 1931)("It is well established that all contracts are inherently subject to the paramount powers of the sovereign and the exercise of such power is never understood to involve their violation."). It is beyond dispute that "the business of insurance is affected with a public interest and as such is subject to reasonable regulation under the police power." Springer v. Colburn, 162 So. 2d 513, 514 (Fla. 1964). "The legitimate exercise of the police power cannot constitute an impairment of contract," and FIGA's Initial Brief does not address how the state purportedly abused its police power by enacting section 627.7015. Id. Accordingly, FIGA's argument should be rejected.

The law is clear that the Contracts Clause and the Due Process Clause do not override "the power of the state to establish all regulations that are reasonably necessary to secure the health, safety, good order, comfort, or general welfare of the community; that this power can neither be abdicated nor bargained away, and is inalienable even by express grant. . ." Atlantic Coast Line R.R. Co. v. City of Goldsboro, 232 U.S. 548, 558 (1914). All contract rights are held subject to the fair exercise of the state's police powers. Id.; Golden v. McCarty, 337 So. 2d 388, 390 (Fla. 1976). There is no absolute right to contract as one chooses because the guarantee of liberty "does not withdraw from legislative supervision that wide department of activity which consists of the making of contracts, or deny to government the power to provide restrictive safeguards. Liberty implies the

absence of arbitrary restraint, not immunity from reasonable regulations and prohibitions imposed in the interests of the community." Southern Utils. Co. v. City of Palatka, 99 So. 236, 240 (Fla. 1924)(internal quotation omitted). The Florida Legislature's enactment of section 627.7015, and the retroactive application thereof, constitutes a reasonable regulation enacted for the best interests of Florida's residents.

"Reasonable regulation under the police power may include the alteration or modification of remedies in force at the time a contract is entered into." Springer, 162 So. 2d at 515. Section 627.7015 is a permissible exercise of the state's police powers because it simply modifies the remedies in force at the time Devon purchased an insurance policy from Southern. Nothing in section 627.7015 involves the substantive coverage that was provided to Devon by the Southern insurance policy. Instead, "[o]nly the process of settling the claim is affected by the statute." Devon Neighborhood Ass'n Inc., 33 So. 3d at 54. Section 627.7015 was enacted because the Florida Legislature found that "[t]here is a particular need for an informal, nonthreatening forum for helping parties who elect this procedure to resolve their claims dispute because most homeowners' and commercial residential insurance policies obligate insureds to participate in a potentially expensive and time-consuming adversarial appraisal process prior to litigation." § 627.7015(1), Fla. Stat. Since the enactment of section 627.7015 constitutes a

permissible exercise of the state's police powers, this Court should affirm the Fourth District's decision in this case.

No Conflict Exists Because the Cases FIGA Relies Upon are Distinguishable

FIGA argues that the Fourth District's opinion should be reversed because it did not employ the two-part test utilized in Menendez, Old Port Cove, and Chase Fed. Hous. Such an argument is misplaced because the cases FIGA relies upon are all distinguishable. FIGA argued to the Fourth District that applying the notice provisions of section 627.7015(2) in this case would amount to an unconstitutional impairment of the insurance contract. Devon Neighborhood Ass'n Inc., 33 So. 3d at 50. The Fourth District analyzed FIGA's argument by applying the general test this Court established to ascertain whether a statute violates Article I, Section 10 of the Florida Constitution. Id. at 50-51; Pomponio, at 378 So. 2d 780-782. For the reasons set forth below, the Fourth District's analysis below was proper and did not conflict with Menendez, Old Port Cove, or Chase Fed. Hous.

The instant case involves Devon's first-party property insurance breach of contract action against FIGA, and the Fourth District applied the binding authority set forth in Pomponio. FIGA does not cite any case from this Court holding that the Pomponio test is inapplicable in first-party property insurance cases. In fact, all of the cases from this Court that FIGA relies upon to support its argument are distinguishable because they are not first-party property insurance cases. For

example, in Old Port Cove the Court analyzed a statute abrogating the common law rule against perpetuities. The Court's decision in Chase Fed. Hous. addressed the Dry Cleaning Contamination Cleanup Act, which has nothing to do with a first-party property insurance case.

The Court's decision in Menendez, which dealt with Florida's Motor Vehicle No-Fault Law, is also distinguishable. Menendez, 35 So. 3d at 875. Florida's No-Fault Law is unique because it abrogated certain common law tort principles in order to provide swift and automatic payment so that the injured insured may get on with his life without undue financial interruption.[4] The statute at issue in Menendez required the insured to provide notice to the insurer before filing an action for overdue PIP benefits and provided an insurer additional time to pay an overdue claim. However, "[b]efore the addition of the statutory presuit notice provision, section 627.736 did not require an insured to provide notice to an insurer before filing an action for overdue benefits." Id. at 878.

In Menendez, this Court dealt with the application of a "presuit notice" requirement of a statute that would harm the insured in a PIP case. The Court was concerned that the statute impaired "the right of the insured to recover in a 'swift and virtually automatic' way," which created "the potential for interfering with the PIP scheme's goal of being a reasonable alternative to common law tort

[4] In contrast, nothing in section 627.7015 abrogated common law tort principles in order to provide swift and automatic payment.

principles." Id. This Court ruled in favor of the insured and held that the statute could not be applied retroactively.

The instant case, unlike Menendez, involves the application of a procedural statute to a common law breach of a property insurance contract claim. FIGA argued below that applying the notice provisions of section 627.7015(2) would amount to an unconstitutional impairment of the insurance contract. The Fourth District applied the Pomponio test and concluded that the application of section 62707015(2) in this case did not constitute an unconstitutional impairment of the insurance policy. The Fourth District's ruling in this case, like this Court's decision in Mendedez, favored the insured and the prompt resolution of insurance claims.

FIGA sought review in this Court based upon a purported conflict between Devon and various other cases.[5] However, "[c]onflict between decisions must be express and direct, i.e., it must appear within the four corners of the majority decision." Reaves v. State, 485 So. 2d 829, 830 (Fla. 1986). Nothing within the four corners of the Fourth District's opinion in this case expressly and directly conflicts with Menendez, Old Port Cove, or Chase Fed. Hous. In addition, a

[5] Neither Weingrad v. Miles, 29 So. 3d 406 (Fla. 3d DCA 2010) nor Coventry First, LLC v. State, Office of Ins. Regulation, 30 So. 3d 552 (Fla. 1st DCA 2010), the other cases cited in FIGA Jurisdictional Brief, dealt with a breach of a property insurance contract. In addition, neither case addressed whether the application of a statute would amount to an unconstitutional impairment of contract.

review of Devon and this Court's decisions in Menendez, Old Port Cove, and Chase Fed. Hous. shows that the cases are factually distinguishable. When cases are factually distinguishable, there is no conflict jurisdiction. Benefield v. State, 160 So. 2d 706 (Fla. 1964); Kyle v. Kyle, 139 So. 2d 885 (Fla. 1962). Thus, the Court should exercise its discretion and decline jurisdiction over this case because there is "no express and direct conflict between these opinions within the four corners of [the Fourth District's] decision." Hill v. Hill, 778 So. 2d 967, 967 (Fla. 2001).

The Fourth District's Opinion in this Case Should be Affirmed even if this Court Utilizes the Two-Pronged Test Espoused by FIGA

Assuming *arguendo* that the test utilized in Menendez, Old Port Cove, and Chase Fed. Hous. is applicable in this case, the Fourth District's decision in Devon should still be affirmed. In Menendez, the Court applied a two-pronged test to determine whether a statute should be applied retroactively. "First, the Court must ascertain whether the Legislature intended for the statute to apply retroactively. Second, if such an intent is clearly expressed, the Court must determine whether retroactive application would violate any constitutional principles." Menendez, 35 So. 3d at 877. For the reasons set forth below, the amendments to section 627.7015 should be applied to the instant case.

The first prong of the test used in Menendez involves ascertaining the Legislature's intent in amending section 627.7015. This Court has previously

stated that "it is generally accepted that the statute in effect at the time an insurance contract is executed governs substantive issues arising in connection with that contract." Hassen v. State Farm Mut. Fire Ins. Co., 674 So. 2d 106, 108 (Fla. 1996). However, in order to determine the Legislature's intent in this case, the Court must review all of the applicable statutory changes contained in Chapter 2005-111. State v. Rodriquez, 365 So. 2d 157, 159 (Fla. 1978)("It is a fundamental rule of statutory construction that the entire statute under consideration must be considered in determining legislative intent.").

The amendments to section 627.7015 were effective on July 1, 2005. Ch. 2005-111, § 15, Laws of Fla. Nothing in the 2005 amendment to section 627.7015 specifically states that the changes are inapplicable to insurance contracts entered into before July 1, 2005. Id. Devon contends that when Chapter 2005-111 is read its entirety, it evidences the Florida Legislature's intent to apply the amendments to section 627.7015 to all property insurance claims filed on or after July 1, 2005.

Section 22 of Chapter 2005-111, which created section 627.711 of the Florida Statutes, specifically states that its provisions are applicable to insurance policies entered into or renewed on or after October 1, 2005. The fact that the Legislature expressly stated that section 627.711 did not apply to insurance policies already in existence, but did not make such a statement regarding the amendments to section 627.7015, reveals the Legislature's intent to apply section

627.7015 retroactively. If the Legislature did not want the amendments to section 627.7015 to apply to all applicable insurance policies in existence on July 1, 2005, it certainly would have said so. In fact, there are numerous instances where the Legislature has specifically limited the applicability of statutory amendments to insurance policies entered into, or renewed, after a statute's effective date. See Ch. 71-88, § 2, Laws of Fla. ("This act shall take effect January 1, 1972, and shall be applicable solely with respect to policies delivered, issued for delivery, or renewed in this state with an inception date on or after that date."); Ch. 88-370, § 28, Laws of Fla. (provides that the law will take effect on October 1, 1989, and be applicable to motor vehicle insurance policies issued or renewed on or after the effective dates of the respective provisions of this act governing motor vehicle insurance policies); Ch. 2008-212, § 9, Laws of Fla. ("This act shall take effect November 1, 2008, and applies to contracts entered into, issued, or renewed on or after that date, and the amendments made by this act to ss. 627.6131 and 641.3155, Florida Statutes, apply to claims payments made on or after November 1, 2008."). The Second District's retroactive application of section 627.7073 in Warfel, which dealt with a statute enacted in Chapter 2005-111, supports Devon's argument.

In Warfel, the insured entered into an insurance contract in March of 2005. On June 1, 2005, the Legislature enacted several new laws in Chapter 2005-111 that dealt with insurance coverage for sinkhole claims. Nothing in sections 18, 20,

or 21 of Chapter 2005-111 expressly states that the Legislature intended the new laws to apply to insurance policies that existed before June 1, 2005. The trial court in Warfel, however, concluded that these newly-created statutes could be applied retroactively because they were procedural. Warfel, 36 So. 3d at 137, n.2. The Second District affirmed the trial court's ruling. This Court should follow the Second District's decision in Warfel and uphold the Fourth District's decision in this case.

FIGA contends that the decision in State Dep't of Revenue v. Zuckerman-Vernon Corp., 354 So. 2d 353 (Fla 1977) rebuts any assertion of retroactive application in this case. FIGA's reliance on Zuckerman-Vernon Corp. is misplaced. In Zuckerman-Vernon Corp., a taxpayer was assessed a penalty by the Department of Revenue in 1973. When the taxpayer attempted to ease its burden by utilizing a Florida law enacted four years after the penalty assessment had become final, this Court rejected such an argument. The instant case, unlike Zuckerman-Vernon Corp., involves an insurance claim that arose after a provision of the Florida Statutes was amended. The Third District's decision in Ramcharitar v. Derosins, 35 So. 3d 94 (Fla. 3d DCA 2010) is also distinguishable because it does not involve a situation where the Legislature expressly stated that one part of a chapter law concerning a newly-enacted statute applied only to insurance policies entered into after a specific date, but failed to do so when it addressed an

amendment to another statute in a different section of the same law. Therefore, the cases cited by FIGA do not rebut "the suggestion that the amendments [to section 627.7015] be retroactively applied." (IB. 22).

FIGA claims, without citing any Florida authority, that its ability to participate in an appraisal process "is a substantive contractual right." (IB. 27). Such an assertion is refuted by the title of section 627.7015, which states "Alternative ***procedure*** for resolution of disputed property insurance claims." § 627.7015, Fla. Stat. (emphasis added). FIGA's reliance on Scheer v. Nationwide Mut. Fire Ins. Co., 175 A.D.2d 640 (N.Y. App. Div. 1991) is misplaced because that case involved a statute enacted after the plaintiff's loss. Devon's loss, in contrast, occurred months after the effective date of the amendments to section 627.7015. The opinion in Preziose v. Lumbermen's Mut. Cas. Co., 568 A.2d 397, 399 n.3 (Vt. 1989) is also distinguishable because it dealt with arbitration agreements in motor vehicle contracts, not appraisal clauses in property insurance contracts. Thus, FIGA's assertion that the appraisal clause contained in the Southern insurance policy constitutes a "substantive right" is without merit.

FIGA also cites this Court's decision in Williams v. Campaganulo, 588 So. 2d 982 (Fla. 1991) and argues that all presuit notice requirements are substantive legislative enactments. The Williams case is inapposite because the plaintiff in that case failed to comply with a condition precedent to filing a lawsuit, i.e.,

providing the defendant with notice as required by section 768.57, within the applicable statute of limitations period. The instant case, in contrast, does not deal with a condition precedent to filing a lawsuit. Rather, it involves an insurer's ability to engage in an expensive appraisal process when it refuses to provide the insured with the notice mandated by section 627.7015.

FIGA also misconstrues the Court's holding in Williams, which addressed whether the Legislature infringed upon the Court's exclusive rulemaking authority by creating the notice requirement contained in section 768.57 of the Florida Statutes. The instant case, unlike Williams, does not involve a claim that the Legislature infringed upon the Court's rulemaking authority by amending section 627.7015. Thus, the Court's analysis in Williams is completely different from the substantive/procedural analysis applicable when addressing whether a statute can be applied retroactively. Village of El Portal, 362 So. 2d at 278 ("[r]emedial or procedural statutes do not fall within the constitutional prohibition against retroactive legislation and they may be held immediately applicable to pending cases.").

The second prong of the test used in Menendez involves determining whether retroactive application of section 627.7015 would violate any constitutional principles. Menendez, 35 So. 3d at 877. For the reasons set forth above in the analysis regarding the Pomponio test, retroactive application of

section 627.7015 would not violate any constitutional principles. Furthermore, retroaction application of section 627.7015 is constitutionally permissible because the statute (1) is procedural/remedial in nature, and (2) constitutes a legitimate exercise of the state's police powers. Therefore, the decision in this case should be affirmed even if the Court applies the test utilized in Menendez.

FIGA also argues that "even if Devon's statutory interpretation were correct, there was no dispute that would have triggered the mediation right until the lawsuit was filed." (IB. 30). The only issue raised in FIGA's Brief on Jurisdiction is an alleged conflict between the Fourth District's decision in this case and the retroactivity analysis set forth in this Court's decisions in Menendez and Old Port Cove Holdings, as well as other opinions from this Court and other District Courts of Appeal. (JB. 4-9). FIGA's Brief on Jurisdiction did not contend that there was no dispute in this case that would have triggered the right to mediation. The "no dispute" issue raised by FIGA is beyond the scope of the conflict issue, and the Court should decline to address the issue. Knowles v. State, 848 So. 2d 1055, 1059 (Fla. 2003)(declining to address any additional issues outside the scope of the conflict issue); Asbell v. State, 715 So. 2d 258, 258 (Fla. 1999)(same).

Statutory Violations of Insolvent Insurer Argument

FIGA's Brief on Jurisdiction only raises an alleged conflict between the Fourth District's decision in this case and the retroactivity analysis set forth in this

Court's decisions, as well as opinions from other District Courts of Appeal. (JB. 4-9). FIGA's Brief on Jurisdiction did not even mention FIGA's liability for Southern's statutory violations. The "statutory violation" issue raised by FIGA is beyond the scope of the conflict issue, and the Court should decline to address the issue. Knowles, 848 So. 2d at 1059; Asbell, 715 So. 2d at 258.

In an abundance of caution, Devon will briefly address the merits of FIGA's "statutory violation" argument. Section 631.57(1)(b) of the Florida Statutes states that FIGA shall "[b]e deemed the insurer to the extent of its obligation on the covered claims, and, to such extent, shall have all rights, duties, defenses, and obligations of the insolvent insurer as if the insurer had not become insolvent." One of the duties of Southern, and FIGA, was to comply with the provisions of section 627.7015. However, the record is clear that neither Southern nor FIGA complied with the notice requirements contained in section 627.7015. Thus, FIGA's argument on this point should be rejected based upon the plain language in section 631.57(1)(b).[6]

Waiver of the Right to Appraisal Argument

Again, FIGA's Brief on Jurisdiction only raises an alleged conflict between

[6] FIGA's argument should also be rejected because, as the Fourth District astutely noted, the cases it cites "for the proposition that it should not be liable for an insurer's violation of statute are inapposite as they all deal with coverage of a loss. Here, no coverage issue is involved." Devon Neighborhood Ass'n Inc., 33 So. 3d at 54.

the Fourth District's opinion in this case and the retroactivity analysis set forth in this Court's decisions, as well as opinions from other District Courts of Appeal. (JB. 4-9). FIGA's Brief on Jurisdiction did not claim that this Court has conflict jurisdiction regarding whether FIGA waived its right to seek appraisal in this case. FIGA even admits that the Fourth District's decision in this case did not address the "waiver" issue raised in its Initial Brief below. (IB. 34). Because the "waiver of appraisal" issue raised by FIGA is beyond the scope of the conflict issue in this case, the Court should not address the issue. Knowles, 848 So. 2d at 1059; Asbell, 715 So. 2d at 258.

CONCLUSION

Based upon the foregoing arguments and authorities, Devon respectfully requests that this Honorable Court affirm the Fourth District's decision and hold that section 627.7015 was properly applied in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via U.S. Mail to Philip Ward, Jeffrey Kuntz, and Roland Schwartz, GrayRobinson, P.A., 401 East Las Olas Boulevard, Suite 1850, Fort Lauderdale, Florida 33301, on January 7, 2011.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY pursuant to Florida Rule of Appellate Procedure 9.210 that this Answer Brief has been prepared in Times New Roman 14pt. font.

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