IN THE SUPREME COURT OF FLORIDA

Case No.: SC10-347

THE FLORIDA INSURANCE GUARANTY ASSOCIATION, INC.,

Petitioner,

vs.

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

Respondent.

On Discretionary Review from the
District Court of Appeal of the State of Florida, Fourth District
Case No.: 4D09-377

PETITIONER'S INITIAL BRIEF ON THE MERITS

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I. STATEMENT OF THE CASE AND FACTS[1]

A. Devon's Insurance Claim

Respondent, Devon Neighborhood Association, Inc. ("Devon"), purchased an insurance policy from Southern Family Insurance Company ("Southern Family") for the twelve (12) month period commencing December 31, 2004. [App. 14:86-146]. The Southern Family Policy was in full force and effect when Hurricane Wilma caused damage to Devon on October 24, 2005.

Devon submitted a claim for damage resulting from Hurricane Wilma by filing two sworn proofs of loss with Southern Family. [App. 8:64, 9:65]. On February 24, 2006, Devon executed the First Sworn Proof of Loss and alleged partial hurricane damage in the amount of $1,478,873.53. [App. 8:]. On April 28, 2006, Devon executed its Second Sworn Proof of Loss, which amended the First Sworn Proof of Loss, removed the word partial, and alleged total hurricane damage in the total amount of $2,711,099.83. [App. Tab 9].

On June 1, 2006, less than one month after the submission of the Second Proof of Loss, the Leon County Circuit Court entered an order declaring Southern Family insolvent. As of the date of the insolvency order, Southern Family had paid

[1] The facts contained within this brief are similar to and based upon the corresponding portions of the initial brief FIGA filed with the Fourth District Court of Appeal on March 3, 2009. Pursuant to the Court's September 22, 2010 order accepting jurisdiction, the Clerk of Court for the Fourth District Court of Appeal has been ordered to provide this Court with paginated and indexed copies of the briefs filed in that court. Counsel for FIGA has contacted the Fourth District's clerk who indicated the record would be timely transmitted to this Court.

Devon $2,548,425.27, inclusive of the $511,173.87 applicable hurricane deductible. [App. 29:281].

Southern Family's insolvency triggered FIGA's obligations under section 631.57, Florida Statutes, to provide a mechanism for the payment of "covered claims." Following its assumption of certain of Southern Family's obligations, FIGA paid an additional $1,731,941.69 to Devon. [App. 29:281]. Between Southern Family and FIGA, Devon had been paid $4,280,467.56, inclusive of the hurricane deductible. [App. 29:230, 21:243, 29:281]. Of course, that is $1,569,367.73 higher than the amount Devon provided as its total damage in its Second Sworn Proof of Loss.

B. Devon's Supplemental Claim

On February 4, 2008, FIGA received a letter of representation from Devon's counsel, and a letter presenting a supplemental claim consisting of previously unclaimed damages in the amount of $4,800,286.84. [App. 10:66-67, 11:68-69]. This amount of new damages exceeded the $4,280,467.56 previously paid to Devon, and was 514% higher than the amount Devon claimed in its First Sworn Proof of Loss. The February 4, 2008 letter attached an estimate from an entity called Hunter R Contracting and stated that "all windows and sliding doors need to be replaced with impact type per code…The Roof estimates clearly show that all three roofs on Buildings (C, G and H) need to be replaced." [App. 11:68].

C. Devon's Lawsuit and FIGA's Appraisal Demand

On February 11, 2008, only seven days after FIGA received the letter submitting the supplemental claim, Devon filed its two count complaint against FIGA for breach of statutory duties and duties under the insurance contract and for declaratory relief. [App. 14:74-146]. On March 4, 2008, exactly one month after FIGA's receipt of the supplemental claim letter, Devon served FIGA with the Complaint.

i. FIGA's Appraisal Demand

On March 31, 2008, only twenty-seven days after it was served with the Complaint, and prior to taking any other action, FIGA demanded appraisal pursuant to the Policy which, in relevant part, states:

> 2. Appraisal
>
> If we and you disagree on the value of the property or the amount of loss, either may make written demand for an appraisal of the loss. In this event, each party will select a competent and impartial appraiser. The two appraisers will select an umpire. If they cannot agree, either may request that selection be made by a judge of a court having jurisdiction. The appraisers will state separately the value of the property and amount of loss. If they fail to agree, they will submit their differences to the umpire. A decision agreed to by any two will be binding. Each party will:
>
> a. Pay its chosen appraiser; and
>
> b. Bear the other expenses of the appraisal and umpire equally.
>
> If there is an appraisal, we will still retain our right to deny the claim.

[App. 13:72]. FIGA made its appraisal demand clear by simultaneously doing three different things. On March 31, 2008, FIGA sent an appraisal demand letter to Devon via certified mail and United States mail. [App. 12:70-71]. In its appraisal demand letter, FIGA stated it "demands that the valuation of the damage and loss be determined in accordance with the terms of the Policy." [App. 12:70-71]. Also on March 31, 2008, FIGA served its Motion to Compel Appraisal and Stay Action. [App. 4:11-26]. In its Motion to Compel Appraisal and Stay Action, FIGA asked the trial court to stay the action and compel an appraisal to determine the amount of loss. [App. 4:22]. FIGA also served its Answer, Defenses and Affirmative Defenses, which included both an affirmative defense demanding appraisal and a demand for appraisal in the "Prayer for Relief." [App. 15:147-167]. The affirmative defense stated "[p]ursuant to the Policy, FIGA has demanded Appraisal and this action should be stayed until the Appraisal process is completed." [App. 15:164]. Further, the "Prayer for Relief" demanded that "the Court order appraisal pursuant to FIGA's Motion to Compel Appraisal." [App. 15:165].

On April 29, 2010, Devon filed its "Response and Memorandum of Law in Opposition to FIGA's Motion to Compel Appraisal." [App. 5:27-35]. Devon stated that "all parties agree that there is a valid contract of insurance, but disagree as to the amount…and who should determine the amount of loss: the Court or an appraisal." [App. 5:27]. Devon raised two arguments in opposition to FIGA's

motion. First, Devon argued that "FIGA waived and is barred from electing the Appraisal process by 'taking action inconsistent' with the claimed right to Appraisal, including…making payment of disputed amounts at issue during litigation." [App. 5:28]. As the record shows, there was no such payment "during litigation." Devon stated that "the undersigned counsel…specifically requested that FIGA reevaluate the claim [and] FIGA took an unreasonable amount of time to re-evaluate the claim." [App. 5:28].[2] As was stated above, Devon filed its lawsuit only seven days after FIGA received the referenced letter. Devon's second argument was that FIGA waived its claim of entitlement by failing to provide statutory notices of Plaintiff's right to mediation." [App. 5:28]. Subsequently, FIGA filed its reply brief in support of its motion to compel appraisal. [App. 6:36-42].

The trial court held a hearing on FIGA's Motion to Compel Appraisal on September 4, 2008. [App. 7:43-63]. At the hearing, counsel for FIGA stated "[t]he first thing that FIGA did in response to the lawsuit was file, was send a letter demanding appraisal. We answered it, and concurrently filed a Motion to Compel Appraisal and stay the case pending that appraisal." [App. 7:44]. Importantly, both at the hearing on the Motion to Compel Appraisal and Stay Action and in the motion itself, FIGA informed the trial court that FIGA was "not wholesale denying coverage at all." [App. 4:20; 7:44, 45, 46]. As it did in its written response, Devon argued: (1)

[2] Counsel for the Respondent was not representing Devon in the trial court at that time.

FIGA denied coverage, which, according to Devon, waives the right to appraisal; (2) FIGA acknowledged coverage by paying funds to Devon, which, according to Devon, waives the right to appraisal; (3) FIGA failed to comply with Section 627.7015, Florida Statutes, which, according to Devon, both applies to FIGA and is a waiver of appraisal; and (4) FIGA waived appraisal by answering the Complaint without demanding appraisal and by responding to discovery. In rebuttal, FIGA argued that (1) FIGA did not deny coverage, and even if FIGA had partially denied coverage, such a partial denial does not constitute a waiver of the right to appraisal; (2) FIGA's payments of funds to Devon prior to the receipt of the letter on February 4, 2008, whereby Devon increased its claim 514% over its First Sworn Proof of Loss, does not constitute a waiver of the right to appraisal; (3) Section 627.7015, Florida Statutes, was not enacted until after the Southern Family Policy was issued, the statute at the time the Southern Family Policy was issued did not apply to policies covering condominium associations and did not include a penalty, and regardless, the statute does not apply to FIGA; and (4) FIGA did not answer the Complaint without demanding appraisal, at all times indicated its intent to enter appraisal, and never acted inconsistent with its appraisal demand.

ii. Discovery And Related Issues In The Trial Court

FIGA did not initiate any discovery in the trial court. However, on May 8, 2008, FIGA complied with its obligations pursuant to the Florida Rules of Civil

Procedure and responded to discovery that Devon had served with its Complaint. Failing to respond to the discovery could have subjected FIGA to penalties, a "catch-22" situation recognized by the trial court. Contained within FIGA's Interrogatory Responses and incorporated into each individual interrogatory response was an objection stating "FIGA objects to responding to the First Set of Interrogatories as FIGA has properly demanded appraisal and therefore, the above-captioned action should be stayed." [App. 16:172]. In response to Interrogatory Number 5, which generally requested that FIGA provide Devon with the amount of loss, FIGA stated it "disputes the amount of covered losses. Therefore, FIGA has demanded appraisal." [App. 16:174]. Further, FIGA specifically referenced its demand for appraisal in response to interrogatories numbered 6, 10, 12, 13, 14, 16, and 17. [App. 16:175, 177-181]. Similarly, contained within FIGA's Response to Devon's Request for Production was an objection incorporated into each individual response stating "FIGA objects to responding to these Requests as there is a pending Motion to Compel Appraisal." [App. 17:193]. Clearly, FIGA did not voluntarily participate in discovery and FIGA did not initiate any discovery. Rather, FIGA responded to discovery pursuant to the Florida Rules of Civil Procedure and at all times indicated its intent to enter an appraisal to determine the amount of loss.

On June 13, 2008, the trial court entered its Pretrial Order and Order Setting Trial. Included within the Pretrial Order were certain deadlines, including a deadline

to exchange the names of expert witnesses. While awaiting a hearing and determination on FIGA's Motion to Compel Appraisal and Stay Action and in order to comply with the Pretrial Order, FIGA filed its Motion to Enlarge FIGA's Expert Witness Disclosure Deadline on August 11, 2008. [App. 19:215-228]. The Motion boiled down to one issue, "[b]ased upon FIGA's Motion to Compel Appraisal, FIGA believes this matter should be and will be stayed. Therefore, FIGA moves to enlarge FIGA's expert disclosure response deadline until after the Court hears FIGA's Motion to Compel Appraisal." [App. 19:226-227]. Similarly, on September 19, 2008, FIGA filed its Motion to Remove From Trial Docket, requesting the trial court remove the action from the trial docket pending an appraisal to determine the amount of the loss. [App. 20:229-233]. A hearing was held on the motion to remove from trial docket on October 7, 2008. [App. 21:234-240]. On December 3, 2008, FIGA served a second Motion to Remove From Trial Docket.[3] [App. 23:242-247]. The second Motion to Remove From Trial Docket, again reinforced FIGA's demand to participate in an appraisal pursuant to the Southern Family Policy. At the December 17, 2008 hearing on FIGA's second Motion to Remove From Trial Docket, counsel for FIGA stated:

> This is a dispute of over the amount of the covered loss, which is exactly process intended to be handled by the appraisal process [sic]. FIGA has filed a motion to compel appraisal in this case which Your

[3] Due to a flood in the Broward County Circuit Courthouse, the second Motion to Remove From Trial Docket was date stamped by the clerk on December 10, 2008.

> Honor has not yet ruled upon. If this case is then compelled to appraisal, which is FIGA's position, the exact process it ought to be in, so that the umpire and appraisers can sort through the amount of covered loss, including this additional $3.8 million thrown at us last week. Then if through that process some coverage issues were to arise, we can always come back to Your Honor to sort those out.

[App. 24:251]. As noted at the hearing, approximately one week prior to the December 17, 2008 hearing, Devon's claim fluctuated once again, with Devon adding $3,800,000.00 to the $4,800,286.84 in damages it claimed in its February 4, 2008 letter. [App. 24:251]. The additional sums Devon claimed in December 2008 brought the total amount of new money claimed by Devon since the lawsuit was filed to $8,600,286.84. This new money raised the total for the claim as a whole to $12,880,754.40, *which represents a 771% increase in the amount of the claim since Devon signed its First Sworn Proof of Loss*. At a January 15, 2009 hearing on a motion to clarify the order granting in part FIGA's second Motion to Remove From Trial Docket, [App. 26:261-264], counsel for FIGA again stated FIGA's position that the action should be stayed pending an appraisal of the loss. [App. 27:265-275].

D. The Fourth District's Opinion

On January 15, 2009, the trial court entered its order denying FIGA's Motion to Compel Appraisal and Stay Action. [App. 3:10]. The trial court's order does not state the basis for its ruling. On February 3, 2009, FIGA timely appealed the Appraisal Order to the Fourth District Court of Appeal. The jurisdiction of the Fourth District was invoked pursuant to Rule 9.130(a)(3)(C)(iv), Florida Rules of

Appellate Procedure, as amended January 1, 2009, which permits the appeal of a non-final order determining a party's entitlement to appraisal pursuant to an insurance policy. Subsequent to the filing of its notice of appeal, FIGA filed its Motion to Stay Pending Appeal, [App. 29: 278-289], which was granted by the trial court after a hearing. [App. 30:290-298; 31:299]. Therefore, this action has been stayed by the trial court pending resolution on appeal.

The Fourth District issued its opinion on December 2, 2009, and affirmed the trial court's ruling. [App. 1:1-8]; *see also Fla. Ins. Guar. Ass'n, Inc. v. Devon Neighborhood Ass'n., Inc.*, 33 So. 3d 48 (Fla. 4th DCA 2009) . The Fourth District concluded that "FIGA is precluded from asserting its right to compel the appraisal process by failing to provide the notice required by the statute, the application of which does not violate the impairment of contracts clause of the constitution." *Id*. at 50 [App. 1:1].

At issue in the Fourth District's opinion was whether section 627.7015, Florida Statutes, could be applied to the instant controversy because "the prior version of the statute, which was in effect at the time the parties entered into the contract, did not apply to condominium associations nor did it provide a penalty for failing to notify the claimant of its right to mediation." *Id*. at 51 [App. 1:2]. Due to the legislative changes, the Fourth District summarized FIGA's arguments against application as follows:

> FIGA, however, contends that the provisions of the amended statute cannot be applied retroactively because the insurance contract was executed prior to the date of the statutory amendment, even though the loss occurred and the claim was submitted after the enactment of the amendment.

Id. at 51 [App. 1:3]. Applying a *de novo* standard of review, the Fourth District analyzed this Court's opinion in *Pomponio v. Clairidge of Pompano Condo, Inc.*, 278 So. 2d 774 (Fla. 1979), and rejected FIGA's argument. The amendments to section 627.7015 could only be applied to FIGA and this policy of insurance if they are applied retroactively and the Fourth District concluded the retroactive application of the statute "does not violate the impairment of contracts clause of the constitution." *Id*. at 54 [App. 1:7]. The Fourth District also rejected FIGA's arguments that (1) even if applicable, the statute cannot be applied against FIGA; and (2) even the amended version of section 627.7015 did not provide the penalty of an outright waiver of the right to appraisal. *Id*. at 54 [App. 1:7].

On December 17, 2009, FIGA timely filed a motion for rehearing of the Fourth District's opinion. On February 2, 2010, the Fourth District denied FIGA's motion. [App. 2:9].

II. SUMMARY OF ARGUMENT

This Court has established a two-part test to be applied to determine whether a statute can be retroactively applied. *See, e.g., Menendez v. Progressive Express Ins. Co., Inc.*, 35 So. 3d 873 (Fla. 2010); *Old Port Cove Holdings, Inc. v. Old Port*

Cove Condominium Assoc. One, Inc., 986 So. 2d 1279, 1284 (Fla. 2008); and *Metropolitan Dade County v. Chase Fed. Housing Corp.*, 737 So. 2d 494, 499 (Fla. 1999). First, the Court will look to statutory construction and determine "whether there is clear evidence of legislative intent to apply the statute retrospectively." *Chase Fed. Housing Corp.*, 737 So. 2d at 499. If the legislature clearly stated its intent for a statute to be applied retroactively, the Court will then determine whether retroactive application is constitutionally permissible. *Id*. Retroactive application of a statute is not constitutional "if the statute impairs a vested right, creates a new obligation, or imposes a new penalty" or "where a statute impairs the obligation of contracts." *Menendez*, 35 So. 3d at 877. The amendments to section 627.7015 do each of those things.

The Fourth District determined section 627.7015, Florida Statutes could be retroactively applied against FIGA without regard to the analysis required by this Court. As such, the Fourth District misapplied the controlling authority of this Court and that of the United States Supreme Court. Had the proper analysis been applied, retroactive application would have failed both prongs.

The legislature did not evince an intent that the amendments to section 627.7015 be retroactively applied. In fact, the legislature specifically stated that the legislation would be effective July 1, 2005. Therefore, the Court need not address the second prong. However, if the legislature had intended the statute to

apply retroactively, such a retroactive application would not be permitted by either the federal or state constitution. By requiring the insurer to act, providing for a waiver of the right to appraisal, and requiring the insurer to pay for the mediation, the legislature weakened the contractual agreement and the rights of the insurer. Such an impairment of the insurance contract is not permissible.

III. ARGUMENT

A. STANDARD OF REVIEW

The Court's consideration as to whether the change in section 627.7015, Florida Statutes, should receive retroactive application is subject to *de novo* review. *Buckley v. State*, 966 So. 2d 330, 334 (Fla. 2007)(*citing Bunkley v. State*, 833 So. 2d 739, 741 (Fla. 2002) (*vacated on other grounds and remanded for further consideration*, *Bunkley v. Florida*, 538 U.S. 835 (2003))); *see also Weingrad v. Miles*, 29 So. 3d 406, 409 (Fla. 3d DCA 2010)[4]("We review de novo whether the retroactive application of section 766.118, the 'caps statute,' is constitutionally permissible")(*citing Fla. Hosp. Waterman, Inc. v. Buster*, 984 So. 2d 478, 485 (Fla. 2008)).

[4] On March 3, 2010, this Court stayed *Raphael v. Shecter* (SC09-2153), pending the Court's disposition of *American Optical Corporation, et al. v. Spiewak, et al*., Case Nos. SC08-1616 & SC08-1640, and *American Optical Corporation, et al. v. Williams, et al*., Case Nos. SC08-1617 & SC08-1639. As does this case, *Shecter*, *Spiewak* and *Williams* all relate to the retroactive application of a statute.

B. THE AMENDMENTS TO SECTION 627.7015 CANNOT BE RETROACTIVELY APPLIED.

The insurance policy in this action was issued on December 31, 2004. [App. 14:86-146]. The rights and obligations of both Southern Family and Devon were contained within that policy, including a clause allowing either party to invoke an appraisal for the determination of the amount of loss. FIGA invoked that right and the focus of the briefing in this district court was whether FIGA's actions waived that right. However, the focus of the district court's opinion was whether retroactive application of amendments to section 627.7015, Florida Statutes, violates the contracts clause of the constitution.

Section 627.7015, Florida Statutes, was enacted during the Special Legislative Session in November 1993 to assist *homeowners* who sustained damage by Hurricane Andrew. Fla. S. Comm. Banking and Insurance Committee, CS/SB 2428 (2003) Staff Analysis (April 22, 2003). The statute "allowed the policyholder to demand mediation of a property claim under certain conditions." *Id*. Until 2005, however, the statute only applied to *homeowners*, specifically excluded "commercial coverages," and did not apply to condominium associations. The Florida Legislature distinguishes between "homeowners" and "condominium association" policies in Section 627.4025, Florida Statutes, titled "Residential

Coverage and Hurricane Coverage Defined" which states[5]:

> Residential coverage includes both personal lines residential coverage, which consists of the type of coverage provided by homeowner's…and commercial lines residential coverage, which consists of the type of coverage provided by condominium association…and similar policies, including policies covering the common elements of a homeowners' association.

In 2005, the Florida legislature amended Section 627.7015, Florida Statutes, "to allow commercial residential property insurance policies to be eligible for the property mediation program established in 627.7015, F.S." *See* Fla. H.R. Comm. on Insurance, HB 1937 (2005) Staff Analysis (April 24, 2005, page 11). The 2005 amendment "expand[ed] current law to allow a first-party claimant/policyholder to file litigation on the property insurance claim before an appraisal of the damage," *Id*, however, even the 2005 amendment did not provide an outright waiver of the right to appraisal. As such, prior to the 2005 amendments, Section 627.7015, Florida Statutes, did not apply to condominium associations and did not provide

[5] Further guidance is found in the FIGA Act, Section 631.54, Florida Statutes, which specifically defines homeowners insurance as follows:

> "Homeowner's insurance" means personal lines residential property insurance coverage that consists of the type of coverage provided under homeowner's, dwelling, and similar policies for repair or replacement of the insured structure and contents, which policies are written directly to the individual homeowner…The term "homeowner's insurance" excludes commercial residential policies covering condominium associations or homeowners' associations, which associations have a responsibility to provide insurance coverage on residential units within the association, and also excludes coverage for the common elements of a homeowners' association.

for a waiver of the right to appraisal. The Florida Department of Financial Services prepared a summary of the enacting legislation which stated that the legislation "Expands the mediation program for resolving property insurance disputes, administered by the Department of Financial Services (DFS), to commercial residential policies, and provides a penalty for insurers failing to notify claimants of their right to mediation."[6]

The statutory amendment at issue is Chapter 2005-111, section 15, Laws of Florida[7], which began: "Effective July 1, 2005, subsections (1) and (7) of section 627.7015, Florida Statutes, are amended, and subsection (2) of that section is reenacted." Subsection 1 was amended by inserting the Section 1 was amended by twice inserting the words "and commercial residential." The amended section is below with the new portions emphasized:

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[6] The summary is maintained on the website of the Florida Department of Financial Services, maintained by a government agency and can be viewed at the following link: http://www.myfloridacfo.com/PressOffice/Documents/RetrieveDocument.asp?DocumentID={91E730E9-79C4-4844-BF6C-B37F64319294} (last visited Nov. 16, 2010). "Many Florida appellate courts have taken judicial notice of internet materials." *Oken v. Williams*, 23 So. 3d 140, fn. 2 (Fla. 1st DCA 2009). Similarly, the federal appellate courts have taken judicial notice of items maintained on the FDIC's web site. *Laborers' Pension Fund v. Blackmore Sewer Constr., Inc.*, 298 F. 3d 600, 607 (7th Cir. 2002) (taking judicial notice of information contained on the FDIC official web site); s*ee also, U.S. v. Behmanshah*, 49 Fed. Appx. 372 (3d Cir. 2002) (taking judicial notice of SEC filings readily available on Westlaw).

[7] Chapter 2005-111 can also be accessed at http://laws.flrules.org/files/Ch_2005-111.pdf (last visited Nov. 16, 2010). The Florida Senate maintains a webpage relating to the amendment which can be accessed at http://www.flsenate.gov/session/index.cfm?BI_Mode=ViewBillInfo&Mode=Bills&ElementID=JumpToBox&SubMenu=1&Year=2005&billnum=1486 (last visited Nov. 16, 2010). The Florida House of Representative maintains a webpage relating to the amendment which can be accessed at http://www.myfloridahouse.gov/Sections/Bills/billsdetail.aspx?BillId=17737&SessionId=38 (last visited Nov. 16, 2010).

> (1) PURPOSE AND SCOPE.—This section 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. There is a particular need for an informal, nonthreatening forum for helping parties who elect this procedure to resolve their claims disputes because most homeowner's **and commercial residential** insurance policies obligate insureds to participate in a potentially expensive and time-consuming adversarial appraisal process prior to litigation. The procedure set forth in this section is designed to bring the parties together for a mediated claims settlement conference without any of the trappings or drawbacks of an adversarial process. Before resorting to these procedures, insureds and insurers are encouraged to resolve claims as quickly and fairly as possible. This section is available with respect to claims under personal lines **and commercial residential** policies for all claimants and insurers prior to commencing the appraisal process, or commencing litigation. If requested by the insured, participation by legal counsel shall be permitted. Mediation under this section is also available to litigants referred to the department by a county court or circuit court. This section does not apply to commercial coverages, to private passenger motor vehicle insurance coverages, or to disputes relating to liability coverages in policies of property insurance.

Similarly, the amendments to Subsection 7 of the statute are emphasized below:

> (7) **If the insurer fails to comply with subsection (2) by failing to notify a first-party claimant of its right to participate in the mediation program under this section or** if the insurer requests the mediation, and the mediation results are rejected by either party, the insured shall not be required to submit to or participate in any contractual loss appraisal process of the property loss damage as a precondition to legal action for breach of contract against the insurer for its failure to pay the policyholder's claims covered by the policy.

The final change, the reenactment of subsection 2, is copied below:

> (2) At the time a first-party claim within the scope of this section is filed, the insurer shall notify all first-party claimants of their right to participate in the mediation program under this section. The

> department shall prepare a consumer information pamphlet for distribution to persons participating in mediation under this section.

"[I]t is well settled in Florida that the statute in effect *at the time the insurance contract is executed* governs any issues arising under that contract." *Lumbermens Mut. Cas. Co. v. Ceballos*, 440 So. 2d 612, 613 (Fla. 3d DCA 1983)(emphasis supplied); *see also*, *Menendez v. Progressive Express Ins. Co., Inc.*, 35 So. 3d 873, 876 (Fla. 2010)(*citing Hassen v. State Farm Mut. Auto. Ins. Co.*, 674 So. 2d 106, 108 (Fla. 1996)). Therefore, the application of any statute that post-dates the effective date of the policy is a retroactive application. In that regard, this Court has recognized that "the retroactive operation of statutes can be harsh and implicate due process concerns." *Chase Fed. Housing Corp.*, 737 So. 2d at 499. For that reason, there is strong a presumption against retroactive legislation [that] is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 265, 114 S.Ct. 1483, 128 L.Ed.2d 229 (1994). In *Landgraf* the Supreme Court stated that "the antiretroactivity principle finds expression in several provisions of our Constitution" including "the Ex Post Facto Clause," the prohibition on laws "impairing the Obligation of Contracts," the "Fifth Amendment's Takings Clause," "the prohibitions on Bills of Attainder, and "the Due Process Clause." *Landgraf*, 511 U.S. at 266 (*citing Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 17

(1976)). Therefore, it is not surprising that this Court is required to continuously address challenges to the retroactive application of statutes.

"To determine whether a statutory amendment applies retroactively, courts **must** engage in a two step analysis." *Pondella Hall For Hire, Inc. v. Lamar*, 866 So. 2d 719, 722 (Fla. 5th DCA 2004)(emphasis supplied). The Court must first determine "[w]hether there is clear evidence of legislative intent to apply the statute retroactively." *Chase Fed. Housing Corp.*, 737 So. 2d at 499. "Florida legislation is presumed to operate prospectively unless there exists a showing on the face of the law that retroactive application is intended." *Yamaha Parts Distrib., Inc. v. Ehrman*, 316 So. 2d 557, 559 (Fla. 1975). Accordingly, only where the legislation "itself" clearly expresses an intent of retroactive application will the Court address the second inquiry. *Old Port Cove Holdings, Inc.*, 986 So. 2d at 1284. The second inquiry, which need not even be reached in this case, is whether it would be constitutional to apply the statute retroactively. *Chase Fed. Housing Corp*., 737 So. 2d at 499.

As will be shown below, the amendments at issue were not intended to operate retroactively and, further, the constitutional does not allow the substantial changes and burdens to be retroactively imposed on an insurer.

i. The Legislature Did Not Indicate That The Statute Should Be Applied Retroactively

"The first inquiry is one of statutory construction: whether there is clear evidence of legislative intent to apply the statute retroactively." *Chase Fed. Housing Corp*., 737 So. 2d at 499; *see also, Old Port Cove Holdings, Inc.*, 986 So. 2d at 1284; *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208, 109 S.Ct. 468, 102 L.Ed.2d 493 (1988)("congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result."); *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 841, 110 S.Ct. 1570, 1579, 108 L.Ed.2d 842 (1990)("absent specific indication to the contrary, the operation of nonpenal legislation is prospective only." (Scalia, J. concurring)). This analysis must be done regardless of constitutional implications and, but for the federal and state constitution, this would be the only analysis. *Metropolitan Prop. and Life Ins. Co. v. Gray*, 446 So. 2d 216 (Fla. 5th DCA 1984). As is discussed below, the legislature did not indicate an intent that the statute be retroactively applied, and therefore, the analysis can end.

The legislation that amended section 627.7015, was chapter 2005-111, section 15, Laws of Florida. With regard to the effective date, Chapter 2005-111, section 30, Laws of Florida, provided that "[e]xcept as otherwise expressly provided in this act, this act shall take effect upon becoming a law." Therefore, absent the legislature providing a different effective date, each section of the

legislation would have become effective on June 1, 2005. The legislature, however, did "otherwise expressly provide" with regard to section 15. Section 15 began by stating that the section would be "[e]ffective July 1, 2005," one month after the general effective date for the legislation.

When the legislature amended section 627.7015, they did not indicate an intent that the legislation be retroactively applied. Instead, they specifically indicated that it would become effective on July 1, 2005. The law is clear that amendments to an insurance policy only impacts policies issued or renewed after the effective date of the statute. *Menendez v. Progressive Express Ins. Co., Inc.*, 35 So. 3d 873, 876 (Fla. 2010)(citing *Hassen v. State Farm Mut. Auto. Ins. Co.*, 674 So. 2d 106, 108 (Fla. 1996)). The date of the loss and the date of the claim are not relevant. *Id*. The legislature is presumed to know this rule of construction when it enacted the legislation. *See*, *e.g*., *Crescent Miami Ctr., LLC v. Fla. Dep't of Rev.*, 903 So. 2d 913, 918 (Fla. 2005), *Williams v. Jones*, 326 So. 2d 425, 435 (Fla. 1975)("Our conclusion is further buttressed by the principle of statutory construction which provides that the Legislature is presumed to know the existing law when it enacts a statute and is also presumed to be acquainted with the judicial construction of former laws on the subject concerning which a later statute is enacted.). Therefore, it must be presumed the legislature did not intend for the legislation to be retroactively applied.

Further, the inclusion of an effective date by the legislature "effectively rebuts any argument that retroactive application of the law was intended." *State, Dep't. of Revenue v. Zuckerman-Vernon Corp*., 354 So. 2d 353, 358 (Fla. 1977). More recently, the Third District cited to *Zuckerman-Vernon Corp*. and reached the same conclusion. *Ramcharitar v. Derosins*, 35 So. 3d 94, 98-99 (Fla. 3d DCA 2010). In *Ramcharitar*, "the enacting legislation expressly provided that the revisions to [the statute] were to become effective on January 1, 2004…which was some three months later than the effective date provided for most all other revisions that were addressed in this legislation." *Id*. at 98. "The inclusion of this effective date rebuts the suggestion that [the amendment] was intended to apply retroactively." *Id*. (internal citations omitted). The analysis used in *Zuckerman-Vernon* and *Ramcharitar*, applied in this case and rebuts the suggestion that the amendments be retroactively applied.

The Florida Legislature did not expressly indicate an intent to apply the amendments to section 627.7015, Florida Statutes, retroactively, and therefore, the statutory amendments are "presumed to operate prospectively." *Old Port Cove Holdings, Inc.*, 986 So. 2d at 1284; *Fleeman v. Case*, 342 So. 2d 815, 817 (Fla. 1976)("Statutes are presumed to be prospective in application unless the Legislature manifests an intention to the contrary."). Further, the inclusion of a specific effective date for this section of the bill, a date that is different than the

remainder of the issues addressed in the bill, "rebuts the suggestion that [the amendment] was intended to apply retroactively." The amendments to section 627.7015 can only be applied to insurance policies issued on or after July 1, 2005. As the policy at issue in this case was issued on December 30, 2004, retroactive application of the amendments to section 627.7015 is neither intended nor is it permissible.

ii. Retroactive Application Of The Statutory Amendments Cannot Withstand Constitutional Scrutiny

The amendments to section 627.7015 did not express an intent that they be applied retroactively, and therefore, "the issue of impairment of contracts is mooted" and the analysis need not proceed further. *Hassen v. State Farm Mut. Automobile Ins. Co*., 674 So. 2d 106, fn. 3 (Fla. 1996); *see also Weingrad v. Miles*, 29 So. 3d 406, 411 (Fla. 3d DCA 2010)("without clear legislative intent for retroactive application of the statute, retroactive application would be prohibited and no constitutional analysis would be required."). Notwithstanding the foregoing, the statutory amendments also fail the second part of the test. The second part of the *Chase Fed. Housing Corp*. inquiry is whether it would be constitutional to apply the statute retroactively. *Id*. Even if the legislature had expressed an intent to apply the statute retroactively, "it cannot be applied where it impairs 'the obligation of contract under Article I, Section 10 of both the United States and Florida Constitutions.'" *Jupiter Ocean and Racquet Club Condominium*

Ass'n, Inc. v. Courtside Properties of Palm Beach, LLC, 17 So. 3d 854, 856 (Fla. 4th DCA 2009)(*quoting Fleeman*, 342 So. 2d at 818). Without any qualifier, the courts in this state have concluded that "changes in statutes that occur between policy renewals cannot be incorporated into an insurance policy without unconstitutionally impairing the obligation of the parties to the insurance contract." *Esancy v. Hodges*, 727 So. 2d 308, 309-10 (Fla. 2d DCA 1999)(*citing Hassen v. State Farm Mut. Auto. Ins. Co.*, 674 So. 2d 106 (Fla. 1996); *Yamaha Parts Distrib., Inc. v. Ehrman*, 316 So. 2d 557 (Fla. 1975)); *see also Metropolitan Prop. and Life Ins. Co. v. Gray*, 446 So. 2d 216, 218 (Fla. 5th DCA 1984)("[S]tatutory changes occurring between renewals cannot be incorporated into the policy without unconstitutionally impairing the obligations of the parties to the insurance contract.").

In *Fla. Ins. Guar. Ass'n. v. Johnson*, the court reviewed a statutory amendment that the legislature specifically stated was "to apply to all claims arising out of accidents occurring on or after its effective date on October 1, 1976." 39 So. 2d 1348, 1350 (Fla. 5th DCA 1980). The claim at issue in *Johnson* related to an accident that occurred after that date, however, the insurance policy at issue had renewed prior to that date. *Id*. In the *Johnson* case, the amended statute could not be applied to the claim because the policy was issued "***before the effective date of the statute***, ***and to apply the statute would unconstitutionally impair this***

insurance contract." *Id*. (*citing Dewberry v. Auto-Owners Ins. Co.*, 363 So. 2d 1077 (Fla.1978)); *Hausler v. State Farm Mutual Auto. Ins. Co.*, 374 So.2d 1037 (Fla. 2nd DCA 1979); *Bunch v. Hartford Accident and Indemnity Co.*, 370 So.2d 455 (Fla. 4th DCA 1979)). The same result was reached in *Metropolitan Prop. and Life Ins. Co. v. Gray*, where the court stated that "regardless of the intent of the legislature, a statute may not, constitutionally, alter, amend or impair the rights of the parties to an existing contract." 446 So. 2d 216, 219 (Fla. 5th DCA 1984). The court concluded that the statutory amendment would not apply to the claim unless a policy renewal occurred before the accident but after the date of the amendment. *Id*.

Further, the amendments to section 627.7015 cannot sustain the second part of the retroactive test because "[a]ny conduct on the part of the legislature **that detracts in any way** from the value of the contract is inhibited by the Constitution." *Dewberry v. Auto-Owners Ins. Co.*, 363 So. 2d 1077, 1080 (Fla. 1978) (quoting *Pinellas County v. Banks*, 19 So. 2d 1, 3 (Fla. 1944)(emphasis supplied). Additionally, "if a statute accomplishes a remedial [or procedural] purpose by creating new substantive rights **or imposing new legal burdens**, the presumption against retroactivity would still apply." *R.A.M. of South Florida, Inc.*

v. WCI Communities, Inc., 869 So. 2d 1210, 1217 (Fla. 2d DCA 2004)(emphasis supplied).[8]

Here, the version of the statute in effect at the time the contract of insurance was entered into did not apply to condominium associations and did not provide a penalty for failing to notify an insured of its right to mediation. The amendments to section 627.7015 provide for a waiver of the insurer's contractual right to appraisal if the insurer failed to provide notice of the right to mediation within five days of receipt of the claim. Fla. Stat. § 627.7015 (2005); *see also Fla. Ins. Guar. Assoc., Inc. v. Devon*, 33 So. 3d at 50. The amendments also mandate that the costs of the mediations are to be borne by the insurer, contrary to the contractual agreement. *Id*. The legislative amendment also provides for the waiver of the right to appraisal if the insurer requests mediation and "the mediation results are rejected by either party."

The contractual appraisal process is designed to allow a swift resolution of the disputed amount of loss through alternative dispute resolution as agreed by the parties in the insurance policy. *Fed. Nat. Ins. Co. v. Esposito*, 937 So. 2d 199 (Fla. 4th DCA 2006). "Appraisals also promote finality, are time and cost-efficient, and…As a form of alternative dispute resolution, the appraisal process is favored

[8] Substantive rights are rights "which give[] to preenactment conduct a different legal effect from that which it would have had without the passage of the statute." *Metropolitan Dade County*, 737 So. 2d at 499 (*quoting* Charles B. Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 Harv. L. Rev. 692, 692 (1960)).

and encouraged." *Farmers Auto. Ins. Ass'n v. Union Pacific Ry. Co.*, 319 Wis. 2d 527, 68 N.W. 2d 596, 607 (Wis. 2009). The statutory amendment impacts the rights in the insurance contract and affects the right to appraisal, which is a substantive contractual right. *See*, e.g., *Scheer v. Nationwide Mut. Fire Ins. Co.*, 175 A.D. 2d 640, 640, 572 N.Y.S. 2d 572, 573 (4th Dept. 1991)("Supreme Court was without power to compel defendant to participate in the appraisal procedure….Plaintiffs' reliance on [the amended statute] is misplaced. That statute became effective…after the dates of the parties' contract and plaintiffs' loss. Because ***that statute purports to create a substantive right*** and because its language indicates a prospective application only, [the amended statute] has no application here" (emphasis added)(internal citations omitted)), *review denied* 78 N.Y.2d 861, 582 N.E.2d 603, 576 N.Y.S.2d 220 (N.Y. 1991). Similarly, the Supreme Court of Vermont held that the general Vermont law favoring retroactive application of procedural and remedial laws did not apply to changes to the arbitration laws because "**the enforceability of arbitration agreements is a question of substantive law**." *Preziose v. Lumbermen's Mut. Cas. Co.*, 568 A.2d 397, fn. 3 (Vt. 1989)(emphasis added)(*citing Southland Corp. v. Keating*, 465 U.S. 1, 12, 104 S.Ct. 852, 859, 79 L.Ed.2d 1 (1984)(recognizing that recognized "the underlying issue of arbitrability to be a question of substantive federal law.").

With regard to the amendments imposition of a notice requirement, this Court has previously concluded that presuit notice requirements are substantive legislative enactments. *Williams v. Campaganulo*, 588 So. 2d 982, 983 (Fla. 1991). The statute in *Williams* was enacted for a nearly identical reason as the amendments to section 627.7015: to promote settlement without the necessity of a full adversarial proceeding. "A major factor in this process is the provision…to afford the parties an opportunity to attempt to settle their dispute." *Id*. The statutory amendments at issue in *Williams* related to a notice provision seeking to reduce the cost of the expensive adversarial process and to encourage settlement, which the court determined to be a substantive legislative enactment.[9] The amendments to section 627.7015 were enacted for that exact purpose. Similarly, in *Yamaha*, this Court held that a statutory amendment requiring **notice** prior to enforcing a contractual right could not be applied retroactively. *Yamaha Parts Distrib., Inc.*, 316 So. 2d at 560.[10]

[9] Of course, had the statute merely set up a procedural mechanism, it would have infringed upon this Court's jurisdiction as the sole body permitted to "adopt rules for the practice and procedures in all courts." *See Citigroup, Inc. v. Holtsberg*, 915 So. 2d 1265, 1269 (Fla. 4th DCA 2005). "In Florida, article V, section 2(a) of the Florida Constitution grants this Court the exclusive authority to adopt rules of procedure." *Allen v. Butterworth*, 756 So. 2d 52 (Fla. 2000); *see also Taylor v. State*, 969 So. 2d 583 (Fla. 4th DCA 2007) ("Indisputably, the supreme court has exclusive authority to enact rules of practice and procedure in the courts. Art. V, § 2(a), Fla. Const.").

[10] *See also Walker v. Cash Register Auto Insurance of Leon County, Inc.*, 946 So. 2d 66 (Fla. 1st DCA 2006) ("Subsection (4) does more than require the giving of notice. It creates an opportunity to avoid the sanction of attorney's fees by creating a safe period for withdrawal or

By requiring the insurer to act, providing for a waiver of the right to appraisal, and requiring the insurer to pay for the mediation, the legislature weakened the contractual agreement and rights of the insurer. These legislative actions certainly detract in some way from the value of the contract and "[a]ny conduct on the part of the legislature **that detracts in any way** from the value of the contract is inhibited by the Constitution." *Dewberry v. Auto-Owners Insurance Co.*, 363 So. 2d 1077, 1080 (Fla. 1978); see also *In re Advisory Opinion to the Governor*, 509 So. 2d 292, 314 (Fla. 1987).

Southern Family, and later FIGA, "had a right to rely on the…statute [as it existed when the contract was issued] in determining its loss exposure" and actions it would need to take, and therefore, the statute cannot be retroactively applied. *State Farm Mut. Auto. Ins. Co. v. Gant*, 478 So. 2d 25, 27 (Fla. 1985). By failing to apply this Court's two-part analysis, the Fourth District conflicted with prior (and subsequent) decisions of this Court and those of each of the other District Courts of Appeal. Had the Fourth District applied the proper test, the district court would have concluded neither part was satisfied and reversed the trial court. The amendments to section 627.7015, impacted the substantive right of appraisal, required the insurer to pay for mediation, imposed a penalty and otherwise

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amendment of meritless allegations and claims. The withdrawal or amendment of a claim, allegation or defense could substantively alter a case.").

impaired the contract. The constitution does not permit the statute to be retroactively applied.

Of course, even if Devon's statutory interpretation were correct, there was no dispute that would have triggered the mediation right until the lawsuit was filed. The rules enacted by the Florida Department of Financial Services provide the notice of mediation need not be provided until the time the insurer accepts a claim for damages and remits an amount less than the highest estimate received. *See* Fla. Admin. Code R. 69J-2.003. Therefore, even if it applied, the right to mediation was not triggered until a mere seven days prior to the filing of the lawsuit when Devon submitted its supplemental claim. At the time the lawsuit was filed, the right to mediation was presumably told to Devon by its own counsel, thereby causing no harm to Devon, and the right was mooted by Devon's filing of its lawsuit. Finally, even if the version of the statute cited by Devon did apply, Section 627.7015, Florida Statutes (2005), only voids appraisal as a *precondition* to legal action. The plain and unambiguous language of the statute does not lead to the result Devon argued to the trial court. FIGA is not arguing appraisal is a precondition to legal action nor does the Southern Family Policy contain a condition that the parties participate in appraisal as a precondition to the filing of a lawsuit. By removing the requirement that an appraisal occur prior to the filing of a lawsuit, the legislature did not alter the right of an insurer or the insured to

demand appraisal before or after the lawsuit.

C. FIGA IS NOT LIABLE FOR STATUTORY VIOLATIONS, IF ANY, OF AN INSOLVENT INSURER.

Even if section 627.7015, Florida Statutes (2005), were applied, the waiver cannot be imposed against FIGA. FIGA is "strictly a creature of statute," *Fla. Ins. Guar. Ass'n. v. All the Way With Bill Vernay*, 864 So. 2d 1126 (Fla. 2d DCA 2003), and "as the state created insurer, is subject to special rules specifically formulated by the Florida legislature." *FIGA v. R.V.M.P. Corp.*, 874 F. 2d 1528, 1532 (11th Cir. 1989), *approved by Fla. Ins. Guar. Assn. v. Jacques*, 643 So. 2d 101 (Fla. 4th DCA 1994). While FIGA was created as a means to pay certain "covered" claims under certain policies issued by insolvent carriers, "***the full gamut of a defunct insurance company's liabilities was not intended to be shifted onto FIGA***." *Fla. Ins. Guar. Ass'n., Inc. v. Olympus Ass'n., Inc.*, 34 So. 3d 791, 794 (Fla. 4th DCA 2010)(emphasis supplied)(*quoting Williams v. Fla. Ins. Guar. Assoc., Inc.*, 549 So. 2d 253, 254 (Fla. 5th DCA 1989)); *see also Schreffler v. Penn. Ins. Guar. Ass'n.*, 402 Pa. Super. 307, 312, 586 A. 2d 983, 985 (Pa. Super. Ct. 1991)("the Act does not intend to place a claimant in the same position she would have been had the insurance company remained solvent."). FIGA is "not in the 'business' of insurance…[FIGA] issues no policies, collects no premiums, and assumes no contractual obligations to the insureds***…[FIGA] does not 'stand in the shoes' of the insolvent insurer for all purposes.***" *Isaacson v. Calif. Ins. Guar.*

Ass'n., 790 P. 2d 297, 304-305 (Cal. 1988)(emphasis supplied)(commenting on the California Insurance Guaranty Association which operates under a similar statute as FIGA). The FIGA Act provides a limited remedy, and while the claimant may argue such a result seems unfair, the courts "are powerless to rewrite either chapter 631 or the insurance policy provisions." *All the Way With Bill Vernay*, 864 So. 2d 1126, 1131 (Fla. 2d DCA 2003). "FIGA's scope of liability is specified as being '[t]o the extent of [the insurer's] obligation, on the covered claims' exclusive of penalties and interest." *Williams*, 549 So. 2d at 254.

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

Id. (emphasis supplied).

Although it denies the existence of any violation of section 627.7015, regardless, FIGA is not liable for statutory violations by either FIGA or the insolvent insurer. *Carrazana v. Fla. Ins. Guar. Assoc., Inc.*, 374 So. 2d 581 (Fla. 3d DCA 1979)(Judge Pearson, in dissent, stated the majority did not discuss the controlling issue, namely that FIGA is not liable for statutory violations because statutory violations are not "covered claims" as defined by the FIGA Act); *Fernandez v. Fla.*

Ins. Guar. Assoc., Inc., 383 So. 2d 974 (Fla. 3d DCA 1980)("the legislature was careful to restrict [FIGA's] potential liability not only concerning the vicarious liability for the acts of the companies it succeeds, but also as to its own allegedly wrongful activities"); *Rivera v. Southern American Fire Ins. Co.*, 361 So. 2d 193 (Fla. 3d DCA 1978). In *Williams v. Fla. Ins. Guar. Assoc., Inc.*, 549 So. 2d 253, 254-255 (Fla. 5th DCA 1989), the Fifth District analyzed *Carrazana* and concluded FIGA is not liable for wrongful acts of an insurance agent and FIGA is only liable for errors and wrongful actions if the actions are deemed a part of the policy by the legislature. In reviewing *Carrazana*, the Fifth District stated the plaintiff in *Carrazana* made an allegation that the insured did not make a knowing and intentional rejection of the coverage at issue, which created a material issue of fact. *Id*. Pursuant to the statute applicable in *Carrazana*, if the insured did not make a knowing and intentional rejection of the coverage, the coverage was deemed to be a part of the insurance policy. *Id*. Therefore, in *Carrazana*, according to the *Williams* Court, because the coverage was deemed a part of the policy at the time of issuance, the coverage was a part of the coverage assumed by FIGA.[11] *Williams*, 549 So. 2d at 254-255. Ultimately, the *Williams* Court concluded FIGA is only liable for "covered claim" under the Southern Family Policy and the FIGA Act and is not liable for

[11] FIGA does not concede or agree with the conclusion that FIGA is liable for statutory violations when the violations alter the policy. However, that issue is not before this Court.

alleged failures by the insolvent insurer.[12] If Southern Family did in fact commit a statutory violation, the FIGA Act does not permit FIGA to bear any penalty resulting from it.

D. FIGA DID NOT WAIVE THE RIGHT TO APPRAISAL.

In the trial court and the Fourth District, Devon argued that FIGA waived the right to appraisal through its actions. The issue was not addressed by the Fourth District, perhaps because it is clear that no such waiver occurred. FIGA demanded appraisal at the outset of the litigation and it is well established in Florida that an appraisal clause in an insurance contract may be invoked for the first time after litigation has commenced. *Gonzalez v. State Farm Fire & Cas.*, 805 So.2d 814 (Fla. 3d DCA 2000)(holding appraisal not waived when appraisal demanded one month after service of the lawsuit), *adopted in part and affirmed, Johnson v. Nationwide Mutual Ins. Co.*, 828 So. 2d 1021 (Fla. 2002). In *Gonzalez*, the Third District, stated: "Nothing in the insurance policy or the law mandates presuit appraisal...It would make no sense to say that State Farm was required to request a presuit appraisal on a loss." *Gonzalez, supra,* 805 So. 2d at 807. FIGA expressed its intent to participate in an appraisal to determine the amount of loss at every

[12] Similarly, the Florida Department of Financial Services, charged by the Florida legislature with enacting rules to enforce Section 627.7015, Florida Statutes, included a specific rule stating the statute applies to Citizens Property Insurance Corporation, but chose not to include a similar rule as to FIGA. *See* Fla. Admin. Code R. 69J-2.003.

opportunity and the Florida courts have consistently refused to find a waiver of the right to appraisal under nearly identical circumstances. *See, e.g. Tobin v. Sunshine State Ins. Co.*, 777 So.2d 1207 (Fla. 3d DCA 2001)(appraisal not waived when insurer did not actively participate in lawsuit); *Florida Sel. Ins. Co. v. Keenlean*, 727 So.2d 1131 (Fla. 2d DCA 1999)(concluding assertion of coverage defense does not waive appraisal); *Phillips v. Gen. Accident Ins. Co. of Am.*, 685 So. 2d 27 (Fla. 3d DCA 1997)(finding no waiver of appraisal/arbitration rights when all pleadings and submission by party evidence affirmative selection of appraisal); *U.S. Fire Ins. Co. v. Franko*, 443 So.2d 170 (Fla. 1st DCA 1984)(finding insurance carrier's dilatoriness could not be a basis to find waiver of right to arbitration); *Paradise Plaza Condominium Assoc., Inc. v. The Resinsurance Corp. of N.Y.*, 685 So. 2d 937 (Fla. 3d DCA 1996)(*en banc*)(Schwartz, C.J.)(holding reservation of coverage challenges does not waive appraisal right); *State Farm Fire &. Cas. Co. v. Middleton*, 648 So. 2d 1200 (Fla. 3d DCA 1995)(finding "no merit" to the insured's claim that appraisal was waived when the insurer took no actions inconsistent with its demand for appraisal).[13]

In *Bared and Co., Inc. v. Spec. Maint. and Constr. Inc.*, 610 So. 2d 1 (Fla. 2d DCA 1992), the case cited by Devon below as support for its argument that

[13] In the arbitration context as opposed to the appraisal context, the Second District recognized "[t]he case law suggests that a mere delay in filing a motion to compel arbitration is a matter of inaction rather than action and is not necessarily evidence of active litigation that results in waiver." *Strominger v. AmSouth Bank*, 991 So. 2d 1030, 1033 (Fla. 2d DCA 2008).

FIGA waived its right to appraisal, the Second District concluded when an arbitration demand is not made at the initial stages of the litigation, the right to arbitration is waived. The defendant in *Bared*, however, did not initially demand arbitration when it answered the complaint. Arbitration was later demanded and the answer was amended to include an affirmative defense demanding arbitration. According to the Second District, the amendment did not negate the prior waiver of the right to arbitration that occurred when the defendant responded to the complaint without demanding arbitration.

Unlike the defendant in *Bared*, FIGA has not acted inconsistently with its right to appraisal. FIGA did not answer the complaint without demanding the right to appraisal. To the contrary, FIGA's Answer included two demands for appraisal. Moreover, FIGA filed its Motion to Compel Appraisal and Stay Action at the same time it filed its answer, leaving no doubt as to FIGA's intent to demand appraisal. "All doubts regarding right to arbitrate should be construed in favor of arbitration rather than against it." *Marine Environ. Partners, Inc. v. Johnson*, 863 So.2d 423 (Fla. 4th DCA 2003)(concluding if rights to arbitration asserted in responsive pleading, there is no waiver of arbitration).

In 2007, the Second District concluded that a four-month delay in asserting the right to appraisal, **even coupled with the defendant's participation in discovery** did not constitute a waiver of the right to appraisal when the insurer

initially includes appraisal as an affirmative defense. *Wilson v. Fed. Nat. Ins. Co.*, 969 So.2d 1133, 1134 (Fla. 2d DCA 2007)(emphasis supplied). In *Kester v. State Farm Fire & Cas. Co.*, 726 F. Supp. 1015 (E.D. Pa. 1989), finding appraisal had not been waived, the court allowed the insurer to amend its answer eight months after the initiation of the lawsuit to include an appraisal demand. Waiver of the right to arbitration, *not appraisal*, only occurs when a party, unlike FIGA in this action, answers a complaint without including the right to arbitration as an affirmative defense. *Liton Lighting v. Platinum Television Group, Inc.*, 2 So. 3d 366 (Fla. 4th DCA 2008); *Miller & Solomon Gen. Contractors, Inc. v. Brennan's Glass Co., Inc.*, 824 So. 2d 288 (Fla. 4th DCA 2002)("In essence, the answer (without a demand for arbitration in the form of an affirmative defense) is a direct attack on the merits-it is a denial of liability. Under that logic, the Court held that the defendant had waived arbitration." (internal citations omitted)); *Bonati v. Clark*, 975 So. 2d 440 (Fla. 2d DCA 2007)(inconsistent action in answer is not a waiver of right to arbitration). FIGA did include an affirmative defense demanding appraisal, and therefore, FIGA did not waive its right to appraisal.

The case presently before the Court is very different from *Gray Mart, Inc. v. Fireman's Fund Insurance Co.*, 703 So. 2d 1170 (Fla. 3d DCA 1998), in which appraisal was deemed waived when the insurer filed an answer without including a demand for appraisal, propounded discovery, and moved for summary judgment

six months after the commencement of the litigation. *Id*. Only after the motion for summary judgment was denied - and just before the scheduled trial - did the insurer in *Gray Mart* ask for an appraisal. *Id.* The insurer having actively participated in the litigation upon the merits without demanding appraisal for fourteen months, the Third District concluded it was not entitled to an appraisal. *Id*.; *see also, J. Wise Smith & Assoc. v. Nationwide Mut. Ins. Co.*, 925 F. Supp. 528 (W.D. Tenn. 1995)(analyzing waiver of appraisal cases from Tennessee, Texas, Florida, California, Oklahoma, Illinois and Arizona, the Court determined that the party seeking to show waiver has the burden of proof and appraisal is waived where an insurer waits until the close of discovery and five weeks before trial to file a motion to compel appraisal.). In *Gonzalez*, the Third District distinguished its decision in *Gray Mart* concluding *Gray Mart* does not apply and that there is no basis to find waiver when appraisal is demanded at the start of the litigation. *Gonzalez*, 805 So.2d at 817-818, *adopted in part and approved*, *Johnson v. Nationwide Mutual Ins. Co.*, 828 So. 2d 1021 (Fla. 2002).[14]

It is also noteworthy that FIGA could not have demanded appraisal until the lawsuit was filed, or just shortly before it was filed. On February 4, 2008, only

[14] Similarly, analyzing a nearly identical appraisal clause, the Court in *Smith v. Civil Serv. Employees Ins. Co.*, No. 04-0201 PHX MEA, 2005 WL 2620537 (D. Ariz. Oct. 13, 2005), concluded the insured did not waive appraisal when it demanded appraisal eleven months after the initiation of the lawsuit. That court held the filing of the lawsuit was not inconsistent with seeking appraisal, nor was the insurer prejudiced by the delay. *Id*. at * 5.

seven days before this lawsuit was filed, FIGA received the supplemental claim from Devon that added $4,800,286.84 to the claim. Devon added an additional $3,800,000.00 in December 2008. Until the February 4, 2008 supplemental claim, FIGA had no reason to believe there was a dispute as to the amount of loss. Indeed, Devon had previously been paid $4,280,467.56, an amount 514% higher than the amount Devon claimed in the First Sworn Proof of Loss. Without a dispute as to the amount of loss, an appraisal demand by either party would have been improper. In 1999, the Third District sitting *en banc*, held "the existence of a real difference in fact, arising out of an honest effort to agree between the insured and the insurer, is necessary to render operative a provision in the policy for arbitration of difference." *U.S. Fidel. & Guar. Co. v. Romay*, 744 So. 2d 467 (Fla. 3d DCA 1999)(*en banc*). In *Bankers Sec. Ins. Co. v. Brady*, 765 So. 2d 870 (Fla. 5th DCA 2000), the Fifth District reached the same conclusion and held there could be no appraisal without a legitimate dispute as to the amount of loss. *See also, American Capital Assurance Corporation v. Courtney Meadows Apartment, L.L.P.*, 36 So. 3d 704 (Fla. 1st DCA 2010)("Furthermore, granting appraisal of the items of loss in the insured's cross-appeal was premature as those items had yet to be adjusted. Without adjustment, it is impossible to know whether the parties disputed the amount of loss to warrant appraisal."); *Galindo v. ARI Mut. Ins. Co.*, 203 F. 3d 771 (11th Cir. 2000). Based upon these cases, FIGA could not have demanded

appraisal until a legitimate dispute as to the amount of loss existed and such a dispute did not exist until Devon sent FIGA its supplemental claim on February 4, 2008.

At all times, FIGA acted in a manner consistent with its intent to participate in an appraisal to determine the amount of loss. As such, FIGA's actions cannot be deemed a waiver its rights. In light of the foregoing, Devon's arguments below that FIGA waived the right to appraisal could not have been properly accepted.

IV. CONCLUSION

The Fourth District failed to apply the two part test this Court, and the United States Supreme Court, require to determine whether a statute can be retroactively applied. Had the Fourth District applied the proper test, it would have determined the legislature neither intended the statute to be retroactively applied nor does the constitution permit retroactive application. For the reasons stated herein, the Fourth District's opinion should be quashed with instructions to remand this case to the trial court for the entry of an order compelling an appraisal pursuant to the policy.

CERTIFICATE OF TYPEFACE COMPLIANCE

Counsel for Petitioner, The Florida Insurance Guaranty Association, Inc., certifies that this *Initial Brief on the Merits* is typed in 14 point (proportionately spaced) Times New Roman, in compliance with Rule 9.210 of the Florida Rules of Appellate Procedure.

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that on Friday, November 19, 2010, a true and correct copy of the foregoing Initial Brief on the Merits and the Appendix to same were furnished via U.S. Mail to Mark Keegan, Esquire, **Attorneys for Respondent**, Rosenbaum Mollengarden Janssen & Siracusa, PLLC, 250 Australian Avenue South, Fifth Floor, West Palm Beach, Florida 33401-5012. Additionally, the foregoing Initial Brief on the Merits was sent by e-mail to Mark Keegan, Esquire at MKeegan@rmjslaw.com.

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