IN THE SUPREME COURT OF FLORIDA

Case No.: SC10-347

FLORIDA INSURANCE GUARANTY ASSOCIATION,

Petitioner,

vs.

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

Respondent.

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

JURISDICTIONAL BRIEF OF PETITIONER

Philip E. Ward
Jeffrey T. Kuntz
Roland E. Schwartz
Evan D. Appell
GRAYROBINSON, P.A.
401 E. Las Olas Boulevard, Suite 1850
Fort Lauderdale, FL 33301
Telephone: 954.761.8111/Telecopier: 954.761.8112

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Constitutional Provisions

STATEMENT OF THE CASE AND FACTS

The Devon Neighborhood Association, Inc. ("Devon") submitted a claim to its insurance carrier, Southern Family Insurance Company, for damages resulting from Hurricane Wilma in October, 2005. Opinion at 1. Subsequently, Southern Family was declared insolvent and the Florida Insurance Guaranty Association ("FIGA") assumed certain of its obligations as provided by chapter 631, Florida Statutes. The Fourth District stated that it is undisputed that "Southern Family paid Devon approximately $2.5 million" and "FIGA paid Devon an additional "$1.7 million for a total payment of $4.2 million." *Id.* On January 30, 2008, Devon submitted claims for an additional $5 million in damages to FIGA and filed a two-count complaint against FIGA eleven days later. *Id.* at 2. In response to the complaint, FIGA moved to compel appraisal and the trial court denied the motion. *Id.*

The Fourth District was asked to determine whether the trial court erred as a matter of law when it denied FIGA Motion to Compel Appraisal. *Id.* The entirety of the Fourth District's analysis focused upon legislative changes to section 627.7015, Florida Statutes, changes that were "enacted after the policy went into effect." *Id.* at 2. At the time the insurance policy was issued, the version of the statute in effect did not apply to condominium associations and did not provide a penalty for failing to notify an insured of its right to mediation. *Id.* at 3. After the

policy went into effect, the statute was amended to 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. *Id.* at 6. The amendments to the statute also mandate that the costs of mediations be borne by the insurer, contrary to the contractual agreement. *Id*. Finally, the amendment provides for the waiver of the right to appraisal if the insurer requests mediation and "the mediation results are rejected by either party." Fla. Stat. § 627.7015 (2005).[1] The amendments 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." Opinion at 1.

SUMMARY OF ARGUMENT

Petitioner, FIGA, seeks to invoke the discretionary jurisdiction of this Court pursuant to Article V, Section 3(b) of the Florida Constitution. The December 2, 2009 decision below (the "Opinion"), *see* Appendix at 1-8, misapplies and thereby conflicts with this Court's rulings in, among other cases, *Menendez v. Progressive Express Ins. Co., Inc.*, - So. 3d -, SC08-789, 2010 WL 375080 at *3 (Fla. Feb. 4, 2010); *Old Port Cove Holdings, Inc. v. Old Port Cove Condominium Assoc. One,*

[1] On December 17, 2009, FIGA filed its Motion for Rehearing, Rehearing En Banc, and for Certification to the Florida Supreme Court. On February 2, 2010, the Fourth District entered an order denying the Motion without a written Opinion. See Appendix at 9.

Inc., 986 So. 2d 1279, 1284 (Fla. 2008); and *Metropolitan Dade County v. Chase Fed. Housing Corp.*, 737 So. 2d 494, 499 (Fla. 1999), and those of other district courts in *Weingrad v. Miles*, - So. 3d -, 3D08-1592, 2010 WL 711801 at *2 (Fla. 3d DCA Mar. 3, 2010) and *Coventry First, LLC v. State, Office of Ins. Regulation*, - So. 3d -, 1D09-804, 2010 WL 478289 at *4 (Fla. 1st DCA Feb. 12, 2010). Further, the Fourth District expressly construed provisions of the state and federal constitutions in reaching its decision. Opinion at 1, 3-7.

As this Court explained in *Chase Fed. Housing Corp.*, a two-step analysis must be conducted to determine whether a statute can be retroactively applied. In this case, the Fourth District determined it is permissible to retroactively apply amendments to section 627.7015, Florida Statutes, without regard for either step of the analysis prescribed by this Court. As such, the Fourth District misapplies the analysis for determining whether section 627.7015 may be applied retroactively, and its opinion likewise expressly and directly conflicts with prior opinions of this Court and those of other district courts. Jurisdiction is proper and should be exercised because "clarification by th[is] Court would be helpful." *Weingrad*, 2010 WL 711801 at *10-11 (Cope, J. in dissent) (discussing confusion relating to the standard to be applied to the retroactive application of statutes).

JURISDICTIONAL ARGUMENT

This Court should exercise its jurisdiction because the Fourth District did not apply the two-part analysis mandated by this Court to determine whether a statute may be applied retroactively. *Menendez v. Progressive Express Ins. Co., Inc.*, - So. 3d -, SC08-789, 2010 WL 375080 at *3 (Fla. Feb. 4, 2010); *Old Port Cove Holdings, Inc. v. Old Port Cove Condominium Assoc. One, Inc.*, 986 So. 2d 1279, 1284 (Fla. 2008); *Metropolitan Dade County v. Chase Fed. Housing Corp.*, 737 So. 2d 494, 499 (Fla. 1999); *Weingrad v. Miles*, - So. 3d -, 3D08-1592, 2010 WL 711801 at *2 (Fla. 3d DCA Mar. 3, 2010); *Coventry First, LLC v. State, Office of Ins. Regulation*, - So. 3d -, 1D09-804, 2010 WL 478289 at *4 (Fla. 1st DCA Feb. 12, 2010). Had the proper analysis been applied in this action, retroactive application would have failed both prongs.

The Fourth District applied the test provided in *Pomponio v. Clairidge of Pompano Condo, Inc.*, 278 So. 2d 774 (Fla. 1979), rather than the two-part analysis adopted more recently by this Court to determine whether a statutory amendment is applied retroactively. *Pomponio* only addresses whether a statutory enactment violates the federal and state constitutional ban on the impairment of contract. *Pomponio* does not address whether the statute was intended or permitted to be applied retroactively. By applying the *Pomponio* analysis, as opposed to the more recent pronouncements regarding the retroactive application of statutes, the Fourth

District's decision conflicts with those of this Court and of other District Courts of Appeal.

"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. Quite simply in applying the test in *Pomponio*, the Fourth District completely ignored the required two-step analysis.

Applying the proper analysis set forth by this Court, it is clear that neither part of the analysis favors retroactive application. "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. 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.").[2]

Specifically rejecting the Fourth District's conclusion in *Raphael v. Shecter*, 18 So. 3d 1152, 1156 (Fla. 4th DCA 2009),[3] the Third District recently stated that "without clear legislative intent for retroactive application of the statute, retroactive application would be prohibited and no constitutional analysis would be required." *Weingrad*, 2010 WL 711801 at *4. However, even if the legislature had expressed an intent to apply the statute retroactively, the amendments to section 627.7015 cannot sustain the second part of the retroactive test as "[a]ny conduct on the part

[2] Only after the contract of insurance was entered into was section 627.7015 amended and "it 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*, 2010 WL 375080 at *2, *citing Hassen v. State Farm Mut. Auto. Ins. Co.*, 674 So. 2d 106, 108 (Fla. 1996) and *Hausler v. State Farm Mut. Auto. Ins. Co.*, 374 So. 2d 1037, 1038 (Fla. 2d DCA 1979). Without any qualifier, the Second District has 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).

[3] 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.

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) (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).[4]

Further, this Court has 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.[5]

[4] 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)).

[5] 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

The amendments to section 627.7015 were enacted for that exact purpose. Similarly, in *Yamaha*, the Florida Supreme 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.[6]

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 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. Clearly, "there is a seeming inconsistency between more recent appellate pronouncements regarding retroactive legislation" and earlier decisions from the Florida Supreme Court and "clarification by th[is] Court would be helpful." *Weingrad*, 2010 WL 711801 at *10-11 (Cope, J. in dissent). The Fourth District highlighted the inconsistent analysis applied to the retroactive application of statutes by failing to

---

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.").

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

use the analysis required by this Court's more recent pronouncements.

CONCLUSION

The Fourth District's decision expressly and directly conflicts with *Chase Federal* and its progeny in its failure to apply the two-part analysis required to determine the permissibility of the retroactive application of a statute. In so doing, the Fourth District construed both the state and federal constitution in a manner inconsistent with the rule of law as pronounced by this Court. This Court should exercise its jurisdiction to resolve the express and direct conflict caused by the Fourth District's erroneous extension of precedent.

CERTIFICATE OF TYPEFACE COMPLIANCE

Counsel for Petitioner, the American Maritime Officers Union certifies that this *Jurisdictional Brief* is typed in 14 point (proportionately spaced) Times New Roman, in compliance with Rule 9.210 of the Florida Rules of Appellate Procedure.

GRAYROBINSON, P.A.
Attorneys for Florida Insurance Guaranty Association
401 E. Las Olas Boulevard, Suite 1850
Fort Lauderdale, FL 33301
954.761.8111/954.761.8112 – fax

By:_____
Philip E. Ward, Florida Bar No. 869600
Jeffrey T. Kuntz, Florida Bar No. 26345
Roland E. Schwartz, Florida Bar No. 712078
Evan D. Appell, Florida Bar No. 58146

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that on Thursday, March 11, 2010, a true and correct copy of the foregoing was furnished via facsimile and e-mail to Mark Keegan, Esquire, **Attorneys for Respondent**, Katzman, Garfinkel, Rosenbaum LLP, 250 Australian Avenue South, Suite 500, West Palm Beach, FL 33401.

GRAYROBINSON, P.A.
Attorneys for Florida Insurance Guaranty Association
401 E. Las Olas Boulevard, Suite 1850
Fort Lauderdale, FL 33301
954.761.8111/954.761.8112 – fax

By:_____
Philip E. Ward, Florida Bar No. 869600
Jeffrey T. Kuntz, Florida Bar No. 26345
Roland E. Schwartz, Florida Bar No. 712078
Evan D. Appell, Florida Bar No. 58146