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 AMENDED REPLY BRIEF

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I. ARGUMENT

In 2005, the Florida Legislature amended section 627.7015, Florida Statutes, and instructed insurance companies that, effective July 1, 2005, if they did not take certain actions they would not be permitted to demand an insurance appraisal as otherwise permitted by an insurance policy. Further, the insurance companies became financially responsible for those required actions as the amendment required the insurance company to pay for any mediation that occurred as a result of the statute. The legislature neither stated that the amendments were to be applied retroactively nor could it have done so. In fact, the legislature specifically provided that the subsection of the legislation at issue would become effective at a date after the effective date of the remainder of the legislation.

This Court has developed a two part test for determining whether a statute can be applied retroactively. *See, e.g.*, *Bionetics Corp. v. Kenniasty*, SC09-1243, 2011 WL 446205 (Fla. Feb. 10, 2011); *Menendez v. Progressive Express Ins. Co., Inc.*, 35 So. 3d 873 (Fla. 2010); *Old Port Cove Holdings, Inc. v. Old Port Cove Condo. Assoc. One, Inc.*, 986 So. 2d 1279, 1284 (Fla. 2008); and *Metro. Dade County v. Chase Fed. Housing Corp.*, 737 So. 2d 494, 499 (Fla. 1999). First, the legislature must specifically indicate an intention that the statute be applied retroactively. Second, if the legislature expresses such an intention, retroactive application can only be applied if it doing so would withstand constitutional

scrutiny. This statutory amendment at in this case satisfies neither the first nor second part of the test. Because the legislature did not indicate an intention that the statute be applied retroactively, the Court can end its analysis with the first part of the test. However, if the Court were to analyze the constitutionality of retroactive application, the legislation would fail that test as well.

A. The Legislature Did Not Indicate An Intention That The Statute Would Be Applied Retroactively

The first part of the two-part test requires the court to determine whether the legislature intended for the legislative enactment is to operate retroactively. *Geico Indem. Co. v. Physicians Group, LLC*, 47 So. 3d 354, 357 (Fla. 2d DCA 2010)("A statute will not be determined to be retroactive unless its terms clearly show that the legislature intended such." (*citing Arrow Air, Inc. v. Walsh*, 645 So. 2d 422, 424 (Fla. 1994))). The first prong is not only applied in this state but, consistent with the United States Constitution, it is uniform throughout the country that legislation is presumed to operate prospectively only. *See, e.g.*, *Bennett v. New Jersey*, 470 U.S. 632, 639, 105 S.Ct. 1555, 1560, 84 L.Ed.2d 572 (1985)(citations omitted)("This limitation comports with another venerable rule of statutory interpretation, *i.e.*, that statutes affecting substantive rights and liabilities are presumed to have only prospective effect."); *Specialty Rest. Corp. v. Nelson*, 231 P.3d 393, 402 (Colo. 2010)("Absent legislative intent to the contrary, a statute is presumed to be prospective in its operation"); *Pratte v. Stewart*, 929 N.E.2d 415,

421 (Ohio 2010)(same); *Martin v. Richards*, 192 Wis. 2d 156, 200-201, 531 N.W.2d 70, 88-89 (Wis. 1995).

As an additional basis for looking to the intent of the legislature, it has been stated that:

> Requiring clear intent assures that [the legislature] itself has ***affirmatively considered the potential unfairness*** of retroactive application and determined that it is an acceptable price to pay for the countervailing benefits. **Such a requirement *allocates to [the legislature] responsibility* for fundamental policy judgments concerning the proper temporal reach of statutes....**

Physicians Group, LLC, 47 So. 3d at 357 (emphasis supplied)(*quoting Arrow*, 645 So. 2d at 425 (alterations from *Arrow*)(*quoting Landgraf v. USI Film Prods.*, 511 U.S. 244, 272-73, 114 S.Ct. 1483, 128 L.Ed.2d 229 (1994))). When the legislature does not make such a judgment, this Court "will not divine an intent that a new law be applied to disturb existing contractual rights or duties **when there is no express indication** that such is the legislature's intent." *Hassen v. State Farm Mut. Auto. Ins. Co*., 674 So. 2d 106, 108 (Fla. 1996)(emphasis supplied). Therefore, without "clear legislative intent to the contrary, a law is presumed to operate prospectively" and the first part of the two-part test fails. *Old Port Cove Holdings, Inc.*, 986 So. 2d at 1284. When the first prong is not satisfied, "there is no need to consider the second prong." *Ramcharitar v. Derosins*, 35 So. 3d 94, 98 (Fla. 3d DCA

2010)(*citing Mem'l Hosp. W. Volusia Inc. v. News-Journal Corp*., 784 So. 2d 438, 441 (Fla. 2001)).

In the legislative enactment at issue, the Legislature did not indicate an intent to apply the statute retroactively. The statutory amendment at issue 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." *See* chapter 2005-111, section 15, Laws of Florida. That language was specifically inserted into legislation that otherwise stated "[e]except as otherwise expressly provided in this act, this act shall take effect upon becoming a law," which was June 1, 1005. *See* chapter 2005-111, section 30, Laws of Florida. Not only did the legislature not evince an intent that the legislation was to be applied retroactively, but the legislature specifically provided the exact opposite intention. The legislature provided an effective date after the effective date provided for the remainder of the legislation. The legislature's inclusion of an effective date "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).

Therefore, the first part of the test fails and the statute cannot be applied retroactively.

B. Retroactive Application Of The Statutory Amendment Violates The State and Federal Constitution

Assuming for a moment that the first part of the test had not failed, the statute also fails the second part. The statutory amendments at issue did not have a mere minimal impact on the contract of insurance but significantly impaired the contract. The amendments imposed new obligations, requirements and penalties, all of which preclude the retroactive application of the amendments due to the guarantees against the impairment of contract provided in the constitution.

A statute that prevents an insurer from exercising rights the insurer had prior to the statutory enactment cannot be retroactively applied. *Allstate Ins. Co. v. Garrett*, 550 So. 2d 22, 24 (Fla. 2d DCA 1989). In *Pomponio v. Claridge of Pompano, Inc*., 378 So. 2d 774 (Fla. 1979), this Court held that "virtually no degree of contract impairment is tolerable." *Id*. at 780. Subsequent to *Pomponio,* the Court noted that "[t]his Court has generally prohibited all forms of contract impairment." *Department of Transportation v. Edward M. Chadbourne, Inc.*, 382 So. 2d 293, 297 (Fla. 1980). *Pomponio* adopted the contracts clause analysis of the United States Supreme Court and provided a balancing test, the application of which results in the conclusion that retroactive application of the statutory amendments at issue offends the state and federal constitution. Further, the balancing test is not even applied when the contract at issue is immediately impaired as it was in this action. *Coral Lakes Comm. Assoc. Inc. v. Busey Bank,*

N.A., 30 So. 3d 579, 585 (Fla. 2d DCA 2010). In order to apply the *Pomponio* analysis to an insurance contract, "Florida law generally requires that 'the statute in effect at the time the insurance contract is executed governs any issues arising under that contract'." *State Farm Mut. Auto. Ins. Co. v. Hassen*, 650 So. 2d 128 (Fla. 2d DCA 1995), *approved* 674 So. 2d 106 (Fla. 1996)(*citing Lumbermans Mut. Cas. Co. v. Ceballos*, 440 So. 2d 612, 613 (Fla. 3d DCA 1983); *Metro. Prop. & Liab. Ins. Co. v. Gray*, 446 So.2d 216, 218 (Fla. 5th DCA 1984), *approved*, 478 So. 2d 25 (Fla. 1985)). The opinion being reviewed reached the contrary result.

Prior to the amendments, the section 627.7015 did not apply to condominium associations and did not provide for a penalty for non-compliance. The amendments required an insurer to provide notice of the right to mediation at the expense of the insurer before invoking the contractual dispute resolution process. If an insurer failed to notify an insured of the right to mediation within five days of disputing the valuation of a claim, the insurer could not later demand an appraisal. Alternatively, if the insurer requested mediation and either side rejected a settlement offer at mediation, the insurer could not later demand an appraisal. However, in both situations the insured could still demand an appraisal. The statutory amendments impose new burdens on an insurer, alter the terms of the contract, and require the insurer to pay for the mediations. Additionally, the

legislature imposed a penalty for failure to comply with the new statutory requirements.

These changes were a substantial impairment on the contract of insurance. *Coral Lakes Comm. Assoc. Inc.*, 30 So. 3d at 585 ("Impairment…has been defined in part, as 'to make worse; to diminish in quantity, value, excellency or strength'."). "Any 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). This Court has held that legislation "with provisions that impose additional penalties for noncompliance…do not apply retroactively." *Menendez*, 35 So. 3d at 878. Similarly, a "court will refuse 'to apply a statute retroactively if the statute impairs vested rights, creates new obligations, or imposes new penalties." *Coventry First, LLC v. Fla., Office of Ins. Reg.*, 30 So. 3d 552, 558 (Fla. 1st DCA 2010)(*quoting State Farm Mut. Auto. Ins. Co. v. Laforet*, 658 So. 2d 55, 61 (Fla. 1995)).[1] That is exactly what the statute at issue in this case required.

[1] Whether a right had vested is not at issue in this case. However, the United States Supreme Court has arguably expanded the protections afforded by the United States Constitution to include all rights whether vested or not. *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 853, 110 S.Ct. 1570, 1585, 108 L.Ed.2d 842 (1990)(Scalia, J., concurring)("I would have thought that the language from *Bradley* referred to *vested rights*, which could not be retroactively eliminated without just compensation. By expanding the meaning of that limitation to include *all* "substantive rights and liabilities" we arguably deprived *Bradley* of its distinctive

Devon goes to great lengths to imply the statutory amendment only impaired procedural rights. However, that is neither correct nor is it possible. As Justice Scalia stated, "I suppose it would be possible to distinguish between statutes that alter 'substantive rights and liabilities' directly, and those that do so only by retroactively adding a procedural requirement, the failure to comply with which alters the 'substantive rights and liabilities'-but I fail to see the sense in such a distinction." *Kaiser Aluminum & Chem. Corp. v. Bonjorno,* 494 U.S. 827, 853, 110 S.Ct. 1570, 1585, 108 L.Ed.2d 842 (1990)(Scalia, J., concurring). Similarly, "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 S. Fla., Inc. v. WCI Cmtys., Inc*., 869 So. 2d 1210, 1217 (Fla. 2d DCA 2004)(emphasis supplied). To the extent the statute impacted procedural requirements, which FIGA disagrees with, the legislature imposed substantive penalties for failure to comply with the procedural burdens. Regardless of which example in Justice Scalia's statement the amendments to section 627.7015 fit into, it is unconstitutional to apply them retroactively.

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content, inasmuch as retroactive application is never sought (or defended against) except as a means of "affecting substantive rights and liabilities" at issue in the litigation.")

i. The Pre-Suit Notice Requirements Cannot Be Applied Retroactively

The statute required a notice to be given by the insurer pre-suit. Such pre-suit notices have been found to be substantive requirements on multiple occasions. *Menendez*, 35 So. 3d at 878 (reversing the Third District's opinion which "rejected the insured's assertions that the presuit notice requirements of the statute impaired the obligation of contract." (citation omitted)); *Williams v. Campagnulo*, 588 So. 2d 982, 983 (Fla. 1991)("We reject the contention that the notice requirement…is procedural"); *Yamaha Parts Distrib., Inc. v. Ehrman*, 316 So. 2d 557, 560 (Fla. 1975).

ii. The Expense Of Mediation Was Borne By The Insurers

The required notice informed the insured that they had the right to attend mediation at the expense of the insurer. Requiring the insurer to pay for the mediation is clearly an obligation that detracts from the contract and this Court has rejected the retroactive application of statutes that impose a new burden or obligation. *Menendez*, 35 So. 3d at 877; *Hassen*, 674 So. 2d at 108; *McCord v. Smith*, 43 So. 2d 704, 708-709 (Fla. 1949)(retroactive application is invalid "when a new obligation or duty is imposed").

iii. The Amendments Imposed A Substantive Penalty For Non-Compliance

If an insurer failed to give the mediation notice or if an insurer requested a mediation and the parties failed to settle, that insurer could not later demand an insurance appraisal. Removing the alternative dispute resolution, appraisal, found in the policy cannot be described as anything but a penalty. Therefore, retroactive application violates this Court's bar against the retroactive application of penalties. *Laforet*, 658 So. 2d at 61. The insurer was given new obligations and failure to comply or even an unsuccessful compliance imposed a penalty.

iv. Police Powers Do Not Warrant Retroactive Application

Devon relies on this Court's opinion in *Springer v. Colburn*, 162 So.2d 513, 514-15 (Fla. 1964), claiming state police powers warrant retroactive application of section 627.7015 ("Reasonable regulation under the police power may include the alteration or modification of remedies in force at the time a contract is entered into."). However, the *Springer* opinion actually supports FIGA's position in that:

> [i]t is well established that the Legislature may not, under the guise of modifying the remedy, ***impair the obligation of a contract, nor impair substantial rights secured by contract. A law which in operation amounts to a denial or obstruction of the rights accruing under a contract,*** although professing to act only on the remedy, violates the constitutional prohibition against the impairment of the obligation of contract. Legislation which lessens the efficacy of the means provided by which a contract can be enforced impairs its obligation, as does legislation which tends to postpone or retard the enforcement of a contract. Any subsequent law which so affects the remedy

> existing at the time a contract is made as substantially to impair and lessen the value of the contract is ***forbidden*** by the Constitution and void.

Id. at 515 (emphasis supplied).

Here, as discussed above, the legislature intended section 627.7015 to apply prospectively. Hence, consideration of retroactive application pursuant state police powers is not necessary. Even if the legislature intended section 627.7015 to apply retroactively, which it did not, such application would be unconstitutional as resulting in impairment of substantial rights secured by the contract.

C. The Court Has Jurisdiction And The Issues Were Preserved

The Court has jurisdiction over this case based upon two distinct areas of conflict. First, the Fourth District's opinion failed to apply the two part test this Court provided in *Menendez*, 35 So. 3d 873; *Old Port Cove Holdings, Inc.*, 986 So. 2d at 1284; and *Metropolitan Dade County*, 737 So. 2d at 499. Second, the analysis and result reached by the Fourth District with regard to the impairment of contract conflicts with that of the other districts to statutory changes enacted after the issuance of an insurance policy. *Esancy v. Hodges*, 727 So. 2d 308, 309-10 (Fla. 2d DCA 1999)(*citing Hassen*, 674 So. 2d 106; *Ehrman*, 316 So. 2d 557); *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."); *Fla. Ins. Guar. Ass'n. v. Johnson*, 39 So. 2d 1348, 1350 (Fla. 5th DCA 1980).

In the trial court and in the Fourth District, FIGA argued that the statutory amendment at issue cannot be applied because it would apply "a law that became effective [after] the policy was issued." FIGA's Initial Brief, Fourth District, pg. 28. The reason a legislative change such as the statutory amendment at issue cannot be implied and the reason the two-part test must be applied is that it would impair the insurance contract if the legislation were applied. When FIGA argued that section 627.7015 could not be applied as Devon sought because "Devon applies a law that became effective after the Southern Family Policy was issued," it preserved the issue. FIGA's Reply Brief, Fourth District, pg. 9.

In its Initial Brief filed in the Fourth District, FIGA cited *Johnson*, 392 So. 2d 1348, which it cited in this Court, for the proposition referenced above that the law in effect when a policy is issued governs. The reason the *Johnson* Court reached that conclusion was its citation, as included in FIGA's brief, to this Court's decision in *Dewberry*, 363 So. 2d 1077. In *Dewberry*, this Court stated that "it is true that a law is presumed to operate prospectively in the absence of clear legislative expression to the contrary." *Id*. at 1079. In *Dewberry*, however, the legislature indicated the statute at issue was to be applied retroactively. Therefore, the Court applied the second step of the test. In applying the second part of the

test, the Court noted that "[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." *Id*. at 1080 (citations omitted).

The fact that FIGA's analysis was short is perhaps because at no point did Devon address the retroactivity issue. Devon did not respond to the issue or address it in any way whatsoever in the trial court nor in its Answer Brief filed in the Fourth District. In the trial court and in the Fourth District, FIGA raised the retroactive issue which is a part of the constitutional analysis. It is the contracts clause in both the state and federal constitution that requires an analysis and FIGA made that clear throughout. Further, even had the retroactive argument not been made, the Court would still have jurisdiction based upon the conflict created by the Fourth District's opinion with decisions of this Court and of the district courts analyzing the impairment of contract. Additionally, the Fourth District specifically ignored and thereby conflicted with the cases cited to it by FIGA relating to the retroactive application of laws enacted after the issuance of an insurance policy.

D. FIGA Is Not Liable For Statutory Violations Of Insolvent Insurers

Devon states that the Court should not address FIGA's argument that it is not liable for statutory violations of the insolvent insurer because FIGA did not raise the issue in its brief on jurisdiction. However, for better or for worse, when this Court accepts jurisdiction over a case it accepts the entire case and not merely

an issue presented as a conflict. *See, e.g., State v. T.G.,* 800 So. 2d 204, 210 n. 4 (Fla. 2001)("[O]nce the Court grants jurisdiction, it may, in its discretion, address other issues properly raised and argued before the Court."); *Jacobson v. State,* 476 So. 2d 1282, 1285 (Fla. 1985); *Savoie v. State*, 422 So. 2d 308, 310 (Fla. 1982).

The Court can, if it chooses, review the issue raised by FIGA relating to its immunity. Specifically, the Court can address FIGA's argument that even if there were a statutory violation by Southern Family, FIGA cannot be penalized for the violation. Of course, there was not a violation as there was no actual disputed valuation known to either Southern Family or FIGA until seven days before Devon filed the lawsuit. 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]. On February 11, 2008, only seven days after FIGA received the letter submitting the supplemental claim, Devon filed its two count complaint. [App. 14:74-146]. Until the lawsuit was filed, there was not even a dispute that would have triggered Southern Family's obligation to provide notice of mediation.

Had there been a dispute that triggered the obligation, FIGA would not have been responsible for Southern Family's failure as "***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)). FIGA is not responsible for statutory violations of an insolvent insurer. Therefore, even if Southern Family had violated the statute, penalties for the violation cannot be imposed against FIGA.

II. CONCLUSION

The Fourth District failed to apply the two part test this Court and the United States Supreme Court use to determine whether a statute can be retroactively applied. Further, the Fourth District's opinion improperly concluded that a statutory amendment imposing new burdens and new penalties can be retroactively applied against an insurer-or in this case FIGA. For the foregoing reasons, the Fourth District's opinion should be reversed and this case remanded for the entry of an order compelling an appraisal to determine the amount of loss.

CERTIFICATE OF TYPEFACE COMPLIANCE

Counsel for Petitioner, The Florida Insurance Guaranty Association, Inc., certifies that this *Reply Brief* 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, February 18, 2011, a true and correct copy of the foregoing Amended Reply Brief was 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 Reply Brief was sent by e-mail to Mark Keegan, Esquire at MKeegan@rmjslaw.com.

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