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IN THE SUPREME COURT OF FLORIDA

LEANDRO DE LA FUENTE and
ANA DELIA GARCIA,

CASE NO. SC15-519
L.T. CASE NO. 2D13-3543

Petitioners,

v.

FLORIDA INSURANCE
GUARANTY ASSOCIATION,

Respondent/

ON DISCRETIONARY REVIEW FROM THE DISTRICT COURT OF APPEAL OF FLORIDA, SECOND DISTRICT

AMICUS CURIAE BRIEF OF UNITED POLICYHOLDERS IN SUPPORT OF THE PETITIONERS

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STATEMENT OF INTEREST

Insurance policies provide financial security essential to the fabric of our economy and modern society. Adequate protection against the risk of financial loss is so important that our laws require individuals to purchase insurance coverage for many basic functions. From a policyholder's perspective, the integrity of their insurance safety net is paramount.

There is tension between consumer expectations and the business of insurance, which must be fundamentally concerned with profits and solvency. Insurers are able to elevate their interests by controlling the terms of coverage when drafting their policies—typically standardized forms filled with terms of art not readily understood by the consumer—and determining which claims get paid. The law responds to this dynamic by placing heightened obligations on insurers. The obligations placed on the Florida Insurance Guaranty Association when one of its member insurers becomes insolvent should be no less stringent. The interpretation of the insolvent insurer's insurance policy and the concomitant issue of payment for the insured's losses by the guaranty association accordingly involve special judicial handling. United Policyholders ("UP") is in a unique position to assist this Court in fulfilling its important role.

United Policyholders is a nonprofit organization founded in 1991 that serves as an information resource and voice for insurance consumers in all 50 states.

Donations, foundation grants and volunteer labor support the organization's work, which is divided into three program areas: Roadmap to Recovery (helping disaster victims navigate the insurance claim process), Roadmap to Preparedness (promoting disaster preparedness and insurance literacy) and Advocate and Action (advancing the interests of insurance consumers in courts of law, before regulators, legislators, and in the media).

UP has assisted Florida residents with insurance claims since Hurricane Andrew in 1992, and responds to inquiries from Florida policyholders on a regular basis. The organization works with Commissioner Kevin McCarty and the Office of Insurance Regulation, and is involved in projects related to property insurance availability, depopulating Citizens, promoting disaster preparedness and mitigation and educating and assisting consumers in navigating the complicated insurance claims process. As an advocate, UP has filed over 370 amicus briefs in state and federal courts nationwide, including many in Florida.

SUMMARY OF THE ARGUMENT

The issue presented in this case is which version of the term "covered claim" in the Florida Insurance Guaranty Act applies to a claim made by an insured of an insolvent insurance company—the definition of the term in effect at the time the insurance policy was issued and when the insured loss occurred, or the one in effect

on the date of the insurer's insolvency? The First and Second District Courts of Appeal have incorrectly ruled that it is the latter.

The legislature has made it abundantly clear that FIGA's obligations extend to covered claims existing prior to the adjudication of insolvency. §631.57(1)(a)1.a., Fla. Stat. Florida law is unambiguous—when an insurer becomes insolvent, FIGA, like every guarantor, is said to "stand in the shoes of the insolvent insurer." Since the inception of the Act, FIGA has been deemed the "insurer" to the extent of the insurer's obligations on the covered claims, and to such extent, has all the rights, duties and obligations of the insolvent insurer as if the insurer had not become insolvent. §631.57(1)(b), Fla. Stat. Thus, FIGA's liability, as a guarantor, is adjudged from the perspective of the insurer's obligation under the policy giving rise to the claim. It is after all, the performance of this very obligation FIGA "guaranteed" when the policy was issued by one of its member insurers. This Court should resolve this case by reaffirming these bedrock legal principles, quash the decision of Second District Court of Appeal, and disapprove the First District's decision in Florida Insurance Guaranty Association, Inc. v. Bernard, 140 So. 3d 1023 (Fla. 1st DCA 2014).

ARGUMENT

THE AMENDED DEFINITION OF "COVERED CLAIM" CONTAINED IN SECTION 631.54(3)(c), FLA. STAT. (2011), DOES NOT APPLY TO CLAIMS ARISING OUT OF INSURANCE POLICIES ISSUED BEFORE THE EFFECTIVE DATE OF THE STATUTORY AMENDMENT.

For many years sinkhole claims were excluded from insurance coverage by the earth movement exclusion. Section 627.706, Fla. Stat., was ultimately enacted by the Florida legislature to require property insurers to make such coverage available. Currently, insurers authorized to transact property insurance in Florida must make available, for an appropriate additional premium, insurance coverage for sinkhole losses on any structure, to the extent provided in the form to which the coverage attaches. §627.706(1)(b), Fla. Stat. (2013). Insurance coverage for sinkholes was mandated by the legislature for the benefit of Florida's property owners; not for the benefit of insurance companies. See, e.g., Diaz-Hernandez v. State Farm Fire & Casualty Co., 19 So. 3d 996, 999 (Fla. 3rd DCA 2009).

The Florida Insurance Guaranty Association ("FIGA") is a non-profit corporation created by the Florida Legislature in 1970. §631.55, Fla. Stat. (2009). In essence, it is a consortium comprised of all insurers authorized to conduct the business of insurance in this state whose membership in the Association is mandatory. §631.55(1), Fla. Stat. The express statutory purpose of the legislature in creating FIGA was to provide a mechanism for the payment of covered claims under certain insurance policies, to avoid excessive delay in payment and to avoid financial

loss to claimants or policyholders because of the insolvency of an insurer. §631.51(1), Fla. Stat. FIGA also is charged with preventing insurer insolvency. §631.51(2), Fla. Stat. The legislature directed the courts to liberally construe the FIGA Act to effect its purposes. §631.53, Fla. Stat. It too is designed to protect Florida's citizens, not insurance companies. Jones v. Florida Ins. Guaranty Assn., Inc., 908 So. 2d 435, 442 (Fla. 2005). Therefore, the Act must be liberally construed to avoid financial loss to claimants and/or policyholders, a legislative directive the First and Second Districts seem to have ignored.

Two sets of promises were made to Mr. De la Fuente and others when they purchased homeowners' policies from Homewise: (1) the insurance policy's promise of coverage for their insured losses; and (2) the statutory promise by FIGA that it would timely provide the mechanism for payment of covered claims should Homewise become insolvent. The second set of promises arises from the premiums insureds such as Mr. De la Fuente pay to secure insurance coverage for their homes through an admitted insurance carrier (as opposed to a surplus lines non-admitted carrier) and statutory member of the Association. Those premiums included an assessment for FIGA obligations which pre-existed the policy period for the insurance they actually purchased. By purchasing coverage through such an admitted insurer they also purchased the protection provided to the customers of a Florida admitted insurer—a guaranteed payment for insured losses should their

insurance company become insolvent. Thus, insureds have a well-founded expectation there will be "insurance coverage" even if their insurance company fails. In this regard, FIGA's sole function, as a guarantor, is to guaranty payment for those insured losses.

A guaranty is a contract insuring that "some particular thing shall be done exactly as it is agreed to be done, whether it is by one person or another, and whether there be a prior or principal contractor or not." Black's Law Dictionary 634-35 (5th ed. 1979) (emphasis added) It is an undertaking by one person (the guarantor) that another person "shall perform his contract or fulfill his obligation, or that, if he does not, the guarantor will do it for him." Id. A guaranty is in the nature of a warranty by the guarantor that "the thing guaranteed by the principal" will be done. Id. The extent of the guarantor's liability is equal to that of the principal debtor because it "stands in the shoes" of the debtor with respect to liability. See Commercial Credit Corp. v. Lane, 466 So. 1326, 1332 (M.D. Fla. 1979); Barnett v. Barnett Bank of Jacksonville, N.A., 345 So. 2d 804, 805 (Fla. 1st DCA 1977); Hepworth v. Orlando Bank & Trust Co., 323 So. 2d 41, 42 (Fla. 4th DCA 1975).

Guaranties have been utilized in commercial transactions for centuries. A typical scenario involves loans to new businesses. The business obtains the loan and is primarily responsible for repayment. However, the lender will often require the principal of the business, most frequently the owner, to personally guaranty

repayment of the loan. What is being guaranteed is payment of the amount owed (performance of another party to the contract)—the guarantor's obligation is equal to that of the business. If the company borrows $100,000, and fails to repay the debt, the guarantor (assuming performance of the obligee's responsibility) must repay $100,000. The guarantor cannot unilaterally later alter the terms of the guaranty and decide at the time of the company's default that he will repay only $50,000. He owes $100,000, the amount he guaranteed.

FIGA's obligations parallel those of a commercial guarantor. It is required to "answer for payment of some debt, or performance of some contract, of [the defunct insurance company] in the event of a default." 39 Am. Jur. 2d, Guaranty §1 (Second Ed.). As a guarantor, it too stands "in the shoes of the insolvent insurer." Jones v. Florida Ins. Guar. Assn, Inc., 908 So. 2d at 454. FIGA's statutory "promise" is to pay covered claims existing prior to the insurer's insolvency. §631.57(1)(a)1.a, Fla. Stat. (2009). Thus, its liability must be adjudged from the perspective of the insurer's obligation under the policy giving rise to the claim. §631.57(1)(b), Fla. Stat. (2009). The scope of FIGA's guaranty and ultimately the amount FIGA owes to the insured is **not** determined at the time of the insurance company's insolvency. The insolvency date simply triggers FIGA's obligation to honor its statutory guaranty. FIGA's obligation, by virtue of the statutory guaranty, is to pay insureds what their insolvent insurance company promised to pay. It was that promise FIGA guaranteed, not some

later occurring contingency that may not occur until years later. Jones v. Florida Ins. Guar. Assn, Inc., 908 So. 2d at 454 (FIGA's responsibility and liability directly linked to insolvent insurer's contractual obligations). The First District's decision in Florida Ins. Guaranty Association v. Bernard, 140 So. 3d 1023 (Fla. 1st DCA 2014), and Second District's decision in this case turn these established principles on their head and, most respectfully, are simply wrong.

The rights of an insured to insurance proceeds are fixed as of the date of loss. Sea Isle Operating Corp. v. Hochberg, 198 So. 2d 336, 337 (Fla. 3rd DCA 1967). See also Norfolk & Dedham Mutual Fire Ins. Co. v. Schlehuber, 327 So. 2d 891, 892 (Fla. 3rd DCA 1976) (rights of loss-payee mortgagee determined as of time of loss). In the context of property claims, an insured's claim for damages under a homeowner's policy accrues at the time of loss. See Independent Fire Ins. Co. v. Lugassy, 593 So. 2d 570, 572 (Fla. 3rd DCA 1992). The FIGA statutory scheme specifically recognizes that concept in §631.54(3), Fla. Stat., which defines an "unpaid claim" as one which "arises out of, and is within the coverage, and not in excess of, the applicable limits of an insurance policy to which this part applies, issued by an insurer, if such insurer becomes an insolvent insurer and the claimant or insured is a resident of this state at the time of the insured event or the property from which the claim arises is permanently located in this state." (emphasis added) The same statute defines the term "insolvent insurer" to mean "a member insurer

authorized to transact insurance in this state, either at the time the policy was issued or when the insured event occurred, and against which an order of liquidation with a finding of insolvency has been entered by a court of competent jurisdiction if such order has become final by the exhaustion of appellate review." §631.54(6), Fla. Stat. (emphasis added). These statutes plainly indicate that the legislature quite logically intended the operative date to be the time the insurance policy was issued or the date of the loss—**not** the later date of the insolvency.[1]

The insurance policies in the multiple cases pending before this Court were all issued prior to 2011. The insureds' claims for benefits arose and their right to proceeds accrued prior to 2011, when they discovered sinkhole damage to their home. It was then they suffered "loss" and incurred damages, not months or even years later when the insurance company was declared insolvent in November 2011. Insureds may not have standing to sue FIGA prior to the insolvency, but that does not mean their rights under the insurance policy did not accrue until then or that the scope of FIGA's "guaranty" is determined at that time. An insured's inability to sue FIGA prior to the insolvency is irrelevant because insolvency triggers FIGA's

[1] Any claim by FIGA that the legislature is free to alter FIGA's obligations or eliminate it altogether prior to the date of insolvency is absurd. Florida has had procedures in place for addressing insurer insolvency for one hundred years. (Initial Brief p. 31-35) While perhaps coverage could be constitutionally abolished for future claims, the legislature cannot retroactively abolish rights that vested upon the purchase of an insurance policy from an admitted Florida insurance carrier.

obligation to perform the antecedent obligation, performance of which it guaranteed, upon issuance of the policy.

This Court has repeatedly ruled that the law in effect when the insurance policy is issued applies to the insured's claim against the insurance company. Menendez v. Progressive Express Ins. Co., Inc., 35 So. 3d 873, 876 (Fla. 2010); Hassen v. State Farm Mut. Auto. Ins. Co., 674 So. 2d 106, 108 (Fla. 1996). Logically, it likewise controls the disposition of the insured's claim against FIGA. Florida Ins. Guaranty Assn., Inc. v. Devon Neighborhood Assn., Inc., 67 So. 3d 187 (Fla. 2011) (agreeing with FIGA that the 2005 statute requiring insurers to give policyholders notice of the availability of mediation did not apply to a policy issued in 2004, even though the insolvency occurred in 2006). Although the legislative has the power to alter FIGA's statutory obligations and responsibility for "covered claims" prospectively; it cannot constitutionally diminish or eliminate the insured's vested interest and rights to require FIGA to perform the statutory obligation it assumed when one of its member insurers issued a policy that carried with it FIGA's statutory promise to perform the obligations of the member insurer if it was financially unable to do so. See Miles v. Weingrad, 2015 WL 240126 *5 (Fla. May 21, 2015) (litigant's substantive and vested rights may not be infringed upon by retroactive application of substantive statute). The First and Second Districts' decisions do not remotely advance any rational explanation for overriding this long-

standing rule, and retroactively applying an admittedly substantive amendment. Florida Ins. Guaranty Association v. De la Fuente, 158 So. 3d 675, 679 (Fla. 2nd DCA 2015).

As applied by the First and Second Districts, §631.54(3), Fla. Stat. (2011), also violates the Florida Constitution. Under the insurance policies issued by Homewise, and the law in effect at the time of issuance (including Chap. 631, Fla. Stat.), payment of a claim is to be made 20 days after an agreement is reached by the parties, or 60 days after entry of a final judgment or a mediation settlement. When insureds such as Mr. De la Fuente purchased the policies, Homewise promised to timely pay their claims pursuant to policies' Loss Payment provision. FIGA, in turn, statutorily promised to perform that obligation should Homewise be declared insolvent. The decisions of the First and Second District materially changed the terms and conditions of the policy by effectively eliminating the Loss Payment provision and FIGA's concomitant guaranty of swift payment of covered claims. See Art. I, §10, Fla. Const. Such a result is an "immediate diminution" in the value of the policy to the insureds, and particularly the statutory guaranty that FIGA would perform the contractual obligations referenced in the Loss Payment provisions, which this Court has repeatedly recognized as being repugnant to the Florida Constitution. Cohn v. Grand Condominium Assn., 62 So. 3d 1120, 1121-22 (Fla. 2011); Dewberry v. Auto-Owners Ins. Co., 363 So. 2d 1077, 1080 (Fla. 1978).

The rulings of the Second and First Districts likewise place many Florida insureds in an untenable Catch-22 position. In order to obtain **any** payment from FIGA, FIGA maintained (and the District Courts have ruled) the insureds must enter into a repair contract with FIGA making direct payment to the respective contractors. However, what happens when the record shows that every repair estimate greatly exceeds the insurance policy's limits?[2] In other words, what happens to the people who have suffered the most devastating damage to their homes? Pursuant to §631.57(1)(a)2., 4., Fla. Stat., FIGA will cease payment once policy limits are reached, thus stopping the work before the "repair" is complete. If the insureds lack the financial wherewithal to pay the excess repair costs, they are incapable of entering into a binding and legally enforceable contract to repair their home. In essence, the insureds in such situations are legally compelled to commit insurance fraud by entering into a repair contract they cannot possibly perform (payment) or are obligated to commit waste (literally pouring money down a hole). Under the rulings of the Second and First Districts, in such situations, FIGA is not obligated to pay anything to the insureds or anyone else for that matter. Instead, FIGA can insist that it may only pay for a repair that will be incomplete and not actually fix the residence. It is impossible to reconcile such a bizarre result with FIGA's legislatively

[2] That is precisely the factual situation in Simmons v. Florida Ins. Guaranty Association, Case No. SC15-264.

stated purpose of avoiding financial loss to claimants or policyholders because of the insolvency of an insurer. §631.51(1), Fla. Stat.

It is also impossible to reconcile such a result with the legislature's stated objective of repairing sinkhole damaged properties. It is the policy of this State to see that homes are quickly repaired after catastrophic events such as hurricanes or sinkholes. Universal Ins. Co. v. Warfel, 82 So. 3d 47 (Fla. 2012). In fact, in sinkhole cases insurers are generally insistent that homeowners promptly enter into repair contracts (usually with their authorized vendors) to prevent further damage. If insureds of insolvent insurance companies are unable to rely upon direct payment in the event of a sinkhole loss, the homeowners may have to wait months or, as in the cases before this Court, years, for FIGA to issue payment (if at all) before they can begin repairs. One can only imagine what would have happened if a similar restrictive definition of "covered claim" applied following Hurricane Andrew or any of the other hurricanes that have hit the State. Undoubtedly, the vast majority of homeowners would not have had available the tens of thousands of dollars needed to make immediate repairs to their property. Damage to their property would have increased dramatically, particularly with regard to mold as a result of the water damage and exposure following the wind damage. Damages for loss of use also would have substantially increased, intensifying the burden on homeowners,

increasing the ultimate amount of the loss and, in many instances, diminishing the tax base of local governments because of decreased values.

Without any legal justification, the First and Second Districts have adopted a rule that treats homeowners differently based on the nature and cause of their loss. As noted in De la Fuente's Initial Brief, if the insureds' home had been rendered a total loss as the result of a fire or a hurricane, the insureds would have been entitled to direct and immediate payment of their loss by virtue of the Valued Policy Law, §627.702(1), Fla. Stat. (2009), which states, in pertinent part, that:

> (1)(a) In the event of the total loss of any building, structure, mobile home as defined in s. 320.01(2), or manufactured building as defined in s. 553.36(13), located in this state and insured by any insurer as to a covered peril, in the absence of any change increasing the risk without the insurer's consent and in the absence of fraudulent or criminal fault on the part of the insured or one acting in her or his behalf, the insurer's liability under the policy for such total loss, if caused by a covered peril, shall be the amount of money for which such property was so insured as specified in the policy and for which a premium has been charged and paid.

(emphasis added) If the insured's home is a total loss because the cost of the repairs of sinkhole loss exceed the policy limits, under the rationale of the First and Second Districts, FIGA can refuse to pay any benefits. There is no cogent reason why insureds should be treated differently simply because their home is rendered a total loss by sinkhole activity rather than another covered peril. There is no expression of legislative intent that remotely explains the incongruent results to homeowners whose homes have been rendered a total loss by virtue of different covered perils.

Nor has either court articulated any reasonable explanation why homeowners whose residences are destroyed by sinkhole activity should be paid nothing because they do not enter into a contract for a repair, the cost of which exceeds FIGA's statutory obligation to pay. Such disparate treatment has no rational basis, certainly not one articulated by the legislature or the First or Second Districts, and violates the constitutional right of equal protection. See Art. I, § 2, Fla. Const. ("All natural persons, female and male, are equal before the law"). See also Estate of McCall, 134 So. 3d 894 (Fla. 2014) (holding that cap on wrongful death noneconomic damages recoverable in medical malpractice actions violates right to equal protection under Florida Constitution).

At a minimum, payment of policy limits is warranted in this type situation. Section 627.707(5), Fla. Stat., states that "if the insurer's professional engineer determines that the repair cannot be completed within policy limits, the insurer **must** pay to complete the repairs recommended by the insurer's professional engineer or tender the policy limits to the policyholder." (emphasis added) The insurer may **not** require the policyholder to advance payment for such repairs. §627.707(5)(c), Fla. Stat. (2011). Since by statute FIGA is not liable for amounts exceeding policy limits (§631.57(1)(a)4, Fla. Stat.), an exception to the rule that FIGA pays only for "actual repairs to the property" must exist in cases where, according to FIGA's own engineer, the property is simply not repairable within policy limits. A contrary ruling

means that some insureds, those with the greatest damages, who specifically pay an additional premium to insure their homes for damage caused by sinkhole activity, will recover no insurance benefits at all. Such an obviously absurd result is neither mandated nor supported by Florida law. To the contrary, FIGA's liability must be adjudged from the perspective of the insurer's obligation under the policy giving rise to the claim. Jones v. Florida Ins. Guar. Assn, Inc., 908 So. 2d at 454. The First and Second Districts completely disregarded that fundamental principle.

This case is obviously of great importance to 750 Florida residents (Initial Brief p. 6) who have been horribly affected by the rulings of the First and Second Districts. When their insurance policies were issued by Homewise, FIGA promised to pay covered claims arising under the policies should Homewise later be declared insolvent. It provided a guaranty, mandated by the state's legislature, to live up to Homewise's promises, even if Homewise could not. The First and Second Districts holdings have effectively abolished that statutory promise of payment. The delay alone, for many of these homeowners, has been an oppressive burden. Unfortunately, the reward for their years of patience has been diminished insurance benefits from what they were promised or worse yet, no benefits at all. This Court should not condone such an indefensible result, especially given the superficial legal analysis upon which it is premised.

The Court should also consider the potential impact the First and Second Districts' rulings may have on future insurer insolvencies. Citizens Property Insurance Corporation ("Citizens") is the largest property insurer in the State. In recent years there has been a great political debate whether the State of Florida should be so heavily involved in the property insurance business. As a result, new insurance companies have been created and have been paid to acquire insured properties previously insured by Citizens. Homewise Insurance Company and Homewise Preferred Insurance Company are examples of such start-up companies who have become insolvent notwithstanding the fact that Florida has not had a major hurricane in nearly ten years. See Miami Herald, June 3, 2013 (miamiherald.com). Despite no hurricanes, many "take-out" insurers fail. Many policyholders were forced to accept property insurance through these insurers because they were no longer eligible for coverage by Citizens because there was now available insurance in the marketplace. The First and Second Districts have issued decisions which potentially invite a great deal of abuse in insurance insolvency cases. For example, a powerful hurricane could strike the state causing millions (or even billions) of dollars in damage, and along with it, the impairment or even insolvency of one or more of the state's largest property insurers. Under the First and Second Districts' rulings, FIGA's obligations to fulfill its promise and to reimburse insured homeowners for their devastating losses could be severely narrowed or even

eliminated by altering the definition of "covered claim" before the insolvency order is entered. Thus, the remaining member insurers of FIGA would be relieved from paying for the otherwise covered losses at the expense of the very policyholders the Legislature has expressly stated the Association is to protect. There is no rational basis for such a result, especially when the purpose of the Act is to protect policyholders from the negative impact of insurer insolvency. Jones v. Florida Ins. Guaranty Assn., Inc., 908 So. 2d at 442.

CONCLUSION

For the reasons stated herein and by the Petitioners this Court should quash the Second District's decision in this case, disapprove the First District's decision in Florida Insurance Guaranty Association, Inc. v. Bernard, and remand with directions to reinstate and enforce the final judgment in favor of the Petitioners.

Respectfully submitted,

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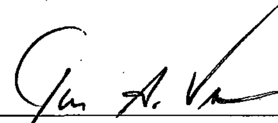

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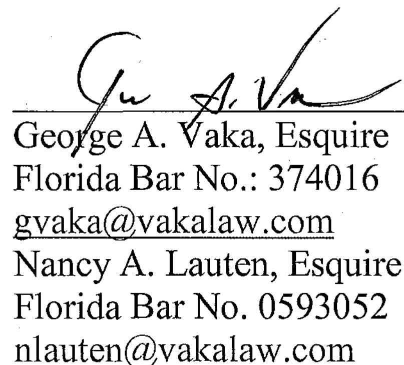

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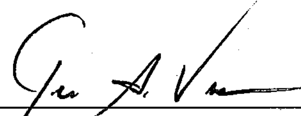

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