SUPREME COURT OF FLORIDA

CASE NO.: SC15-519

2D DCA CASE NO.: 2D13-3543

13th JUDICIAL CIRCUIT CASE NO.: 2010-CA-022488

LEANDRO DE LA FUENTE and ANA DELIA GARCIA,

Petitioners/Plaintiffs,

vs.

FLORIDA INSURANCE GUARANTY ASSOCIATION,

Respondent/Defendant.

ANSWER BRIEF OF RESPONDENT/DEFENDANT, FLORIDA INSURANCE GUARANTY ASSOCIATION

On Discretionary Review From A Certified Question Of Great Public Importance Issued By The District Court Of Appeal For The Second District, State of Florida The Honorable Judges Wallace, Khouzam, and Dakan Presiding

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INTRODUCTION

Before this Court is the decision of the Second District Court of Appeal in Florida Ins. Guar. Ass'n v. De La Fuente, 158 So. 3d 675 (Fla. 2d DCA 2015), which certified two questions of great public importance relating to the statutory obligations of the Florida Insurance Guaranty Association ("FIGA") under the FIGA Act [§§ 631.50, Florida Statutes et seq.] in statutory claims filed against FIGA after May 17, 2011, and arising out of a sinkhole loss. Six other appellate decisions from the Second and Fifth Districts potentially involving the same two questions are waiting in the queue before this Court.[1]

Although Petitioner De La Fuente nowhere mentions these other appellate cases, the fact remains every appellate court to address the issues raised by the first certified question, including the First, Second and Fifth, and the sixteen appellate court judges who have heard these cases before this Court, have unanimously ruled in FIGA's favor on the issue. That issue is of whether the 2011 definition of "covered claims" found in Section 631.54(3)(c), Florida Statutes (hereinafter "§ 631.54(3)(c)") is to be applied to claims addressed by FIGA as a result of an insolvency order issued after the 2011 statutes effective date.

Here, FIGA's obligation to handle Petitioner's claim followed the entry of a

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[1]These are Case No. SC15-264; Case No. SC15-357; Case No. SC15-609; Case No. SC15-692; Case No. SC15-960; and Case No. SC15-1313.

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November 4, 2011 Leon County Circuit Court's order declaring the insolvency of Petitioner's insurance carrier, HomeWise Preferred Insurance Company (hereinafter "HomeWise"). The challenged statutory amendment, effective May 17, 2011, six months prior to HomeWises insolvency, provided that FIGA could only pay for the amounts needed for necessary testing and then for payments to be made directly to contractors (not insureds) "for the *actual repair* of loss." Those like Petitioner, who object to the Legislature's amendment of the statute, focus primarily upon the language of the amendment that specifically states FIGA will not pay for attorney or public adjuster fees, and will only pay the contractor directly for actual repairs made. The amendment thus prevents direct payment to the policyholder, who can simply pocket the money and walk away without repairing the sinkhole activity affecting their home.

Three appellate courts have now unanimously ruled that the version of Section 631.54(3)(c) in effect at the time of insolvency controls. Section 631.54 (3)(c) specifically defines the scope and contours of the statutory "covered claim" an insured may bring against FIGA due to a sinkhole loss. Accordingly, this statute applies to those statutory covered claims that first accrued after the May 17, 2011 effective date of the amended "covered claim" statute.. In the face of these rulings, Petitioner, nevertheless, implicitly tells this Court that all of these appellate courts

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and their learned appellate judges got it wrong.

FIGA will demonstrate in this brief that : (a) the multiple appellate decisions from the First, Second and Fifth Districts correctly answered the primary certified question (Question 1); (b) it is Petitioner who is wrong on the merits; and (c) direct payment to Petitioner (as opposed to direct payment for the performance of the "actual" sinkhole repairs) AND the recovery of attorney's fees by Petitioner's counsel are *the* driving forces behind this case, as well as the other cases which this Court has stayed pending resolution of the questions certified by the Second District. FIGA submits that both of the certified questions should be answered in the affirmative. However, if the second certified question is answered in the negative, thus permitting appraisal, then it should be made clear that § 631.54(3)(c) still applies so as to require payment of the award directly to a contractor to perform actual repairs.

STATEMENT OF THE CASE AND FACTS

Petitioner's Sinkhole Claim and FIGA's Continued Willingness To Pay For the "Actual" Repairs

A. Preface: Throughout Petitioner's Initial Brief, he goes to extremes attempting to engender sympathy in this Court by making unfounded accusations that FIGA has delayed or refused to fund the performance of the "actual repairs" needed to remediate the sinkhole condition on his property and the resulting cosmetic damages to the home. Nothing could be further from the truth, as the official Record

on Appeal demonstrates. As an initial matter, it should be noted that nowhere in Petitioner's Initial Brief does he represent to this Court that he truly intends to repair the subsurface and cosmetic damage to the home he insured with HomeWise. Instead, it is quite clear throughout his Initial Brief that Petitioner's chief complaints focus solely upon his allegedly being deprived of various "constitutionally protected rights," including some alleged rights vis-a-vis FIGA: (a) to "be personally paid the insurance claim proceeds;" (b) to choose the "manner in which to repair the home" (if at all); and (c) in any event, "to recover attorney's fees" from FIGA. (IB at 14, 39-49).

Since May 16, 2012, FIGA has continuously advised Petitioner to proceed to hire a contractor to perform the subsurface repairs, with FIGA advancing the initial cost to begin repairs, and to thereafter make the necessary payments to pay for the performance of the actual repairs. (R6 at 809-810). To place the facts of this case into the proper context for the Court, FIGA is compelled to its present own Statement of the Case and Facts.

B. Petitioner's Sinkhole Claim and His Insurer HomeWise's Response:

Petitioner owns a home in Tampa, Florida, which he insured with HomeWise between May 7, 2009 and May 7, 2010. (R5 at 605). On March 1, 2010, Petitioner notified HomeWise that he had suffered a sinkhole loss that he allegedly first noticed

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on June 1, 2009, the year before and shortly after the policy's effective date. (R4 at 494-95).

Following Petitioner's notification of the claim, HomeWise investigated the claim and hired HSA Engineers and Scientists ("HSA") to inspect the property to determine the nature and cause of the damage. (R4 at 576). Following its initial inspection, HSA concluded that the sinkhole activity did not damage the property and even if it did, the damage to the home did not constitute "structural damage" as defined in the policy. (R4 at 576). Based upon HSA's investigation, HomeWise wrote Petitioner on May14, 2010, and advised the cause and nature of the claimed damages to the home did not constitute a covered sinkhole loss. (R4 at 576-79). However, this letter did advise Petitioner he could demand additional geotechnical subsurface testing pursuant to § 627.707, Fla. Stat., and could participate in the State's Neutral Evaluation Program. (R4 at 578-79). As a result, Petitioner requested additional testing, which was performed. Following this additional testing, HSA concluded that sinkhole activity was, in fact, present at Petitioner's property. (R4 at 580). Even though sinkhole activity appeared to be present, HSA again concluded that the home had not sustained any "structural damage" as the policy's terms required. (R4 at 580). HomeWise notified Petitioner in a November 17, 2010, letter that the claim was still denied. (R4 at 580-84).

Seven days before the denial letter was sent, Petitioner had already filed suit against HomeWise on November 10, 2010, alleging breach of contract. (R1 at 10-14). At the front end of the lawsuit, the parties fought over the issue of what constituted "structural damage" as required for sinkhole coverage. (R2-3 at 157-417, R3 at 427-449). The trial court ruled on this issue in May, 2011, determining that "structural damage" under the policy meant "damage to the structure, specifically including cracking of walls, floors, or ceilings, including settling, shrinking, bulging, expansion and resulting cracking." (R3 at 449-50).

C. FIGA Begins the Handling of Petitioner's Statutory Claim Under the FIGA Act:

Six months after the trial court's decision on the meaning of "structural damage," a Leon County Circuit Court entered an Order of Liquidation of HomeWise on November 4, 2011. (R3 at 473-89). By this Liquidation Order, HomeWise was declared insolvent, and FIGA was activated to handle the "covered claims" (as defined in the statutes) of the insolvent insurer falling within the scope of FIGA's enabling statutes, §§ 631.50-631.70, Fla. Stat. (2011) (the "FIGA Act"). (R3 at 477; R4 at 490-91).

Pursuant to its statutory obligations, FIGA then reviewed and investigated the pending claim, and on May 16, 2012, sent a letter to Petitioner c/o his attorneys, the Merlin Group, advising that, based upon the HSA's engineering determination that

sinkhole activity was a cause of damage to the structure of their home, the HomeWise policy provided coverage for the loss. (R6 at 809-11). However, FIGA further advised Petitioner that pursuant to the statute, it would only issue payment directly to a contractor he hired to perform actual repairs of the sinkhole related damage. (R6 at 810).

D. Petitioner Declined to Proceed With the Sinkhole Repairs that FIGA Was Required to Directly Pay Petitioner's Chosen Contractor to Perform, and Instead Filed an Amended Complaint Pursuing a Statutory Claim Against FIGA:

Petitioner decided he did not want to proceed with FIGA paying his chosen contractor to perform the stabilization repairs recommended by HSA, followed by the cosmetic repairs. A mere two days after receiving FIGA's letter via e-mail, Petitioner's counsel responded by serving a motion for leave to file an amended complaint to name FIGA as a defendant and sought to obtain a judgment directing FIGA to directly pay Petitioner for policy benefits and attorney's fees. (R4 at 490-91). The proposed amended complaint was attached to the motion (R4 at 494-98).The amended complaint was accepted and filed July 9, 2012. (R5 at 605-715).

The amended complaint making FIGA a defendant specifically recognized that, "[p]ursuant to the Florida Insurance Guaranty Association Act ('FIGA Act'), Section 631.50, et. Seq., Florida Statutes, the Liquidation order *triggered* the involvement of FIGA."(R5 at 606, ¶ 9) (emphasis added). However, the amended complaint then

proceeded to incorrectly allege that FIGA was the "the Statutory Receiver for HomeWise" and, based upon this incorrect characterization, further erroneously alleged that FIGA "has breached the policy of insurance by failing to pay the [Petitioner] the benefits due and owing under the policy for a covered cause of loss during the policy period." (R5 at 607, ¶ 14). Petitioner demanded a judgment be entered against FIGA requiring it to pay the full policy benefits and attorney's fees directly to him. (R5 at 608).

FIGA filed its answer the following month. (R5 at 717-22). The answer correctly and repeatedly pointed out that: (a) "FIGA is not the statutory receiver for HomeWise, nor the successor in interest to all of HomeWise's liabilities;"[2] (b) "FIGA is merely a mechanism to pay 'covered claims';" and (c) "the definition of what constitutes a 'covered claim' is specifically set forth in § 631.54 Florida Statutes." (R5 at 718-21, ¶¶ 12, 14, 15, 19). The answer additionally stated, consistent with its pre-suit letter to Petitioner, that FIGA was not denying the claim (R5 at 718, ¶ 13), but that in "accordance with Fla. Stat. § 631.54(3)(c), [FIGA] is only obligated to pay for the actual repair of the loss and [FIGA] may not pay for attorney's fees or public adjuster fees in connection with a sinkhole loss, or pay the policyholder." (R5

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[2]This statement is accurate and in accordance with Section 631.54(3)(c). Further, FIGA is not the "receiver" for the insolvent insurer, nor is it "the statutory insurer for HomeWise," as Petitioner repeatedly and incorrectly asserts without any support. See §§ 631.001-631.401, Fla. Stat. (2011).

at 721, sixth through tenth affirmative defenses).

E. Petitioner Demands, and the Trial Court Compels Appraisal:

Six months after FIGA advised Petitioner it would pay a contractor to repair his property in accordance with the recommendations of HSA, his response came in the form of a November 21, 2012 letter demanding appraisal. (R6 at 884-85). The demand letter asserted there was a dispute as to the "amount of loss," although the documents attached to that letter demonstrated the real dispute was over the "method" of the "subsurface remediation." (R6 at 842-47, 885). As to the subsurface repairs, Petitioner's letter attached a December 29, 2010 "Foundation Evaluation and Recommendation" report from C. E. Odell & Associates ("Odell"). (R6 at 842-47). Odell's report reflects it was simply a peer review of HSA's investigation. Indeed, Odell's report even notes that HSA had "performed a methodical investigation of the subject property" and that a "comprehensive amount of geotechnical investigation tests ha[d] been performed." (R6 at 844-45).

Although Odell agreed with HSA that subsurface grouting at a cost he estimated at $40,200 ($35,200 for grouting and $5,000 for mobilization) was needed, Odell went further and "recommend[ed] the footings to be underpinned with a mini-pile support system that extends to a grouted stable limerock layer" at (R6 at 845-46, 885) an additional $53,050 ($48,050 for the underpinning and $5,000 for

monitoring). (R6 at 846, 885). The method of subsurface repair was thus central to the dispute between the parties, and the "amount of loss" could not be addressed until that dispute was resolved.

FIGA sent a letter responding to Petitioner's appraisal demand. (R6 at 886-87). That letter quoted § 631.54(3)(c), which provided that in a claim involving a sinkhole loss, FIGA could not pay the policyholder directly, could not pay attorney's fees or public adjuster's fees, and could only pay the contractor for performing the actual repairs to the property. (R6 at 887). FIGA further advised it would "be seeking guidance from the Court in an effort to resolve the uncertainties regarding FIGA's duties and responsibilities under these circumstances." (R6 at 887).

A week later, Petitioner filed his motion to compel appraisal and stay the action pending appraisal. (R6 at 726-887). At the time the motion to compel appraisal was filed, the record before the trial court demonstrated that the parties disagreed on whether the home needed underpinning in addition to grouting, as Odell posited, but more importantly, the parties further disagreed on a purely legal issue: whether, under section 631.54(3)(c), FIGA could only properly directly pay a contractor for the actual repairs performed, not the policyholder, and relatedly, could not pay attorney's fees or public adjuster fees. (R6 at 884-87).

On February 8, 2013, FIGA filed a response and objected to Petitioner's motion

to compel appraisal. (R6 at 888-94). In its response, FIGA explained that it was a creature of statute and that Petitioner's rights to present a statutory claim to FIGA and FIGA's obligations with respect to such claims is governed solely by its enabling legislation. (R6 at 889-94). The response noted that appraisal was inappropriate in this sinkhole claim since FIGA had accepted the claim as a sinkhole loss and advised it was ready and willing to make payments directly to whichever contractor Petitioner chose to perform the actual subsurface repairs in accordance with the recommendations of HSA. (R6 at 889). Importantly, FIGA additionally pointed out that to the extent Petitioner sought appraisal so that any appraisal award would be paid directly to him (under the policy's loss payment provision), as opposed to FIGA making payment to the contractor for the actual repairs performed, such a payment would violate section 631.54(3)(c). (R6 at 891-94).

Petitioner's motion to compel appraisal was heard on February 12, 2013. (R7 at 1008-54). The thrust of Petitioner's argument was that "FIGA steps into" or "stands in the shoes of the insolvent insurer," a statement repeated throughout the hearing. (R7 at 1014-018, 1028, 1041). On the basis of these overly broad assertions, Petitioner then argued FIGA had to go to appraisal due to the appraisal clause in the HomeWise policy. (R7 at 1014-15, 1018-19, 1041-42).

On the other hand, FIGA argued first and foremost it is wholly a creature of

statute, whose payment obligations are specifically limited to "covered claims," as defined in section 631.54(3) of the FIGA Act. (R7 at 1030-36, 1043). Further, it was argued that the inevitable result of forcing FIGA into appraisal would be Petitioner seeking a judgment, pursuant to the Loss Payment provision of the policy, commanding FIGA to pay the amount of the appraisal award directly to him, in direct contravention of section 631.54(3)(c), which was already in effect when Petitioner's statutory cause of action against FIGA first arose. (R7 at 1033-37). As FIGA's counsel noted, any appraisal award amount would not be synonymous with the cost of the "actual repairs," which is what section 631.54(3)(c) specifically obligated FIGA to pay as the statutory defined "covered claim." (R7 at 1038-39). It was also pointed out that it was the intent of the 2011 changes in the insurance laws to have policy benefits paid to a contractor to perform the repairs on the house, and not to just be paid directly to the policyholder to pocket and never perform any repairs. (R7 at 1032-34).

Petitioner's rebuttal to FIGA's argument that the 2011 definition of "covered claim" governed FIGA's payment obligations in this case was two-fold. First, Petitioner declined to inform the trial judge whether he intended, pursuant to the Loss Payment provision in the policy, to have the appraisal award reduced to a judgment, thus requiring FIGA to make payment directly to him in contravention of section

631.54(3)(c). Petitioner claimed this question was "irrelevant" and could be dealt with "down the road." (R7 at 1018-19, 1029, 1040-41). Second, Petitioner argued that in any event, section 631.54(3)(c) simply could not be applied in this case because to do so would constitute an improper "retroactive" application of a statute to an insurance policy that was issued prior to the statute's effective date. (R7 at 1019-1023, 1029, 1039).

The trial court ultimately decided to grant the motion and compel the appraisal based upon its acceptance of the argument that FIGA simply "stands in the shoes" of the insolvent insurer, and the policy contained the appraisal clause. (R7 at 1046-50, 52). An order granting the motion to compel appraisal was entered on February 15, 2013, and on May 1, 2013, an appraisal award in the amount of $130,600.00 was handed down. (R6 at 895; R7 at 901). The award included line items of $62,780.00 for subsurface grouting (only) and $62,120.00 for cosmetic repairs. (R7 at 901). The subsurface amount was slightly above HSA's $45,700 to $60,700 estimate (which included a range for grouting as well as $5,700 for monitoring by an engineer), and well below Odell's $93,250 estimate (which included grouting and underpinning and mobilization and monitoring). (R6 at 813-19, 842-47). The award for cosmetic repairs was close to the midpoint between FIGA's contractor's estimate of $41,741.44 and Petitioner's contractor's estimate of $79,364.17. (R6 at 816, 820-41, 848-68).

F. Petitioner Secures Entry of a Final Judgment Commanding FIGA to Pay the Appraisal Award Directly to Him in Contravention of Section 631.54(3)(c):

Within two weeks of the appraisal award, Petitioner moved to confirm the appraisal award and for entry of a final judgment commanding FIGA to pay the appraisal award directly to him, in accordance with Petitioner's interpretation of the policy's Loss Payment provision. (R7 at 896-980). FIGA filed a response and memorandum objecting to entry of a judgment requiring it to pay the appraisal award directly to Petitioner, as opposed to payment to a contractor. (R7 at 981-89).

FIGA argued that "the 2011 statutory definition of 'covered claim' is applicable to [Petitioner's] claim because HomeWise was not liquidated until November 4, 2011, after the effective date of Florida Statute § 631.54(3)(c), and as such, FIGA was not involved, and [Petitioner] did not have a claim against FIGA until that time." (R7 at 984). Therefore, FIGA argued, it would violate section 631.54(3)(c)'s mandate if a judgment was entered requiring FIGA to directly pay the Petitioner the appraisal award instead of paying a contractor to perform the actual repairs. (R7 at 984-89).

Petitioner's motion to confirm the appraisal award and enter a judgment against FIGA was heard on June 20, 2013. (R7 at 1055-85). Echoing the earlier hearing on the motion to compel appraisal, Petitioner initiated his argument with the assertion that "FIGA stands in the shoes of the insolvent carrier," and owes all the same

obligations, Petitioner asserted that these obligations included compliance with the policy's appraisal requirement, followed by Petitioner's assertion that the policy's Loss Payment provision required payment of the appraisal award directly to the insureds. (R7 at 1060-62, 1072).

On the issue of whether section 631.54(3)(c), governed FIGA's payment obligations, Petitioner again argued that the version of the FIGA Act, which was in effect on the date the insurance policy was issued to him, controlled. (R7 at 1063-66, 1081-82). Petitioner further argued that applying section 631.54(3)(c) in this case would be a prohibited "retroactive" application of a statute constituting an unconstitutional "impairment of contract." (R7 at 1066-1070, 1072).[3]

FIGA responded by pointing out that section 631.54(3)(c) went into effect on May 17, 2011, and the insolvency and liquidation of HomeWise was not declared until six month later on November 4, 2011, which is the first point in time that Petitioner had a potential statutory claim against FIGA, and therefore, section 631.54(3)(c) was not being "retroactively" applied. (R7 at 1074-75, 1077-79). The court ultimately ruled the policy issuance date controlled FIGA's payment obligations. (R7 at 1083-84).

A Final Judgment was entered directing FIGA to directly pay Petitioner the

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[3]As will be discussed below, this "impairment of contract" argument was the **only** "constitutional" argument raised by Petitioner in the trial court.

sum of $130,600.00 within sixty days of when Petitioner had presented his Proof of Loss. (R7 at 990-91). The trial court rejected FIGA's arguments that commanding payment directly to Petitioner would violate the payment restrictions imposed upon FIGA by §631.54(3)(c), and stated "that the change made to Florida Statute 631.54(3) by the addition of the new subparagraph (c) on May 17, 2011 does not apply to this policy that was issued on [May, 7, 2009]. . . ." (R7 at 990-91). FIGA then timely sought review of the final judgment in the Second District Court of Appeal. (R7 995).

G. The Second District Court of Appeal Agreed With FIGA's Arguments and Certified Two Questions to This Court in Florida Ins. Guar. Ass'n v. De La Fuente, 158 So. 3d 675 (Fla. 2d DCA 2015):

The Second District framed the issues presented in the following fashion:

> In this case, we are called upon to decide whether the statutory definition of "covered claim" in effect at the time a homeowners' insurance policy is issued or a more restrictive definition in effect at the time the insurer is adjudicated insolvent governs the scope of FIGA's liability under the FIGA Act. If the more restrictive definition of "covered claim" was in effect when the insurer is adjudicated insolvent applies, then we must also address the question of the availability of appraisal under the terms of the policy to determine the amount of loss.

158 So. 3d at 678. The arguments presented in the trial court and during briefing and at oral argument in the Second District did not venture into the forest of constitutional challenges Petitioner is now seeking to raise in this Court. Instead, the arguments presented to the Second District were described by Judge Wallace as follows:

> The insureds argue that their rights to recover against FIGA were established and vested in May 2009 when HomeWise issued the subject insurance policy. In accordance with this view, the insureds assert that the definition of "covered claim" in the 2008 version of the FIGA Act controls the scope of their rights to recover for their sinkhole loss. On the other hand, FIGA argues "that [the insureds'] right to pursue a claim against FIGA under the FIGA Act could not arise until FIGA's statutory obligations were triggered. FIGA's statutory obligations were triggered, at the earliest, when HomeWise was declared insolvent and liquidated on November 4, 2011, pursuant to the HomeWise Liquidation Order." Based on this reasoning, FIGA concludes that the definition of "covered claim" in effect on November 4, 2011, the date of the liquidation order, governs the scope of its obligations to the insureds.

Id. at 678.

In the course of the opinion, the Second District noted that the First District had recently addressed one of the legal issues presented to it in the decision in Florida Ins. Guar. Ass'n v. Bernard, 140 So. 3d 1023 (Fla. 1st DCA 2014), review denied No. SC14-1416, 2014 WL 6883868 (Fla. Dec. 5, 2014). The Second District observed that the First District in Bernard had conducted a detailed review of the history and purpose of FIGA, the pertinent provisions of the FIGA Act, and decisions by courts from other states that have adopted the Model Act upon which the FIGA Act was based.

The Second District in De La Fuente determined the First District had properly concluded in Bernard "that the statutory definition of 'covered claim' in effect at the

time the insurer is adjudicated insolvent determines the scope of FIGA's liability under the FIGA Act." 158 So. 3d at 679 (quoting Bernard, 140 So. 3d at 1031). The Second District agreed with the analysis and the holding in Bernard, and stated: (a) "[a]ccordingly, we hold that the definition of 'covered claim' in effect on November 4, 2011, the date that HomeWise was adjudicated to be insolvent, governs the scope of FIGA's liability to the insureds for the sinkhole loss at their property;" and (b) "[i]n accordance with this holding, we reverse the amended final judgment that requires FIGA to pay $130,600 directly to the insureds." Id. at 679. The Second District further held that, for multiple reasons, "requiring FIGA to participate in the appraisal process is at odds with FIGA's statutory mandate to pay only for the actual cost of repair for a covered sinkhole loss." Id. at 680-81.

Feeling it "seem[ed] reasonable to assume that these issues will continue to arise in numerous cases," the Second District certified the following questions as being of great public importance:

> I. DOES THE DEFINITION OF "COVERED CLAIM" IN SECTION 631.54(3), FLORIDA STATUTES, EFFECTIVE MAY 17, 2011, APPLY TO A SINKHOLE LOSS UNDER A HOMEOWNERS' POLICY THAT WAS ISSUED BY AN INSURER BEFORE THE EFFECTIVE DATE OF THE NEW DEFINITION WHEN THE INSURER WAS ADJUDICATED TO BE INSOLVENT AFTER THE EFFECTIVE DATE OF THE NEW DEFINITION?
>
> II. DOES THE STATUTORY PROVISION LIMITING FIGA'S

MONETARY OBLIGATION TO THE AMOUNT OF ACTUAL REPAIRS FOR A SINKHOLE LOSS PRECLUDE AN INSURED FROM OBTAINING AN APPRAISAL AWARD DETERMINING THE "AMOUNT OF LOSS" IN ACCORDANCE WITH THE TERMS OF THE HOMEOWNERS' POLICY OF INSURANCE?

Id. at 681.

Following issuance of the Second District's January 7, 2015 decision and opinion, Petitioner filed a lengthy motion for rehearing presenting multiple constitutional challenges that were never previously raised in the case, and he filed a rather substantial appendix containing pages of documents outside the official record on appeal.[4] FIGA filed a detailed response to Petitioner's motion (Supplemental Appendix accompanying this brief at Tab 1), and on March 3, 2015, the Second District denied the Petitioner's motion without comment. Petitioner then timely invoked this Court's discretionary jurisdiction.

SUMMARY OF THE ARGUMENT

Three Courts have correctly held that FIGA's statutory obligations are first triggered when an insurer is declared insolvent. When considering the scope of FIGA's "covered claims" obligations to an insured of an insolvent insurer, it is thus the date of the liquidation order which gives rise to the insured's statutory cause of

[4] This filing and the order denying rehearing are included in Petitioner's Appendix at Vol. 1, Tabs 2 and 3.

action, and therefore, it is the definition of "covered claim" in effect as of that date which controls.

In this case, section 631.54(3)(c)(2011) is thus not being retroactively applied as Petitioner incorrectly asserts. In this case, section 631.54(3)(c) went into effect on May 17, 2011, and HomeWise was declared insolvent on November 4, 2011. Thus, Petitioner's statutory claim against FIGA was triggered on November 4, 2011, and the definition of "covered claim" in effect at that time as to sinkhole claims was section 631.54(3)(c). The definition is therefore not being retroactively applied.

Second, Petitioner's Florida and federal constitutional challenges to Section 631.54(3)(c) should be rejected because those challenges are not supported by the appellate record, were not timely raised, and lack merit, in any event. Untimely arguments not addressed at the trial and appellate levels cannot be addressed before the Florida Supreme Court, even on certified questions. Absent from the trial court record are Petitioner's "access to courts," "equal protection," "due process," and "just compensation" arguments. It was only after the Second District ruled against him that Petitioner first raised these arguments. Petitioner's "access to courts" argument should be denied. Petitioner has had full access to the Court to litigate his statutory claim. Moreover, absent Chapter 631, FIGA would not exist and there would be no effective remedy for Petitioner to recover on his claim against his insolvent insurer.

The legislature's decision to limit the statutorily created rights does not constitute a denial of access to the Courts. Petitioner's "equal protection" argument should be denied for the same reason, in addition to the fact that the payment limitations placed on sinkhole claims is rationally related to the legitimate state interest that includes making FIGA's limited funds available to the maximum number of covered claimants and to those who would otherwise have no remedy.

Petitioner's "due process" argument should be rejected because FIGA was not legally required to, and did not, deny Petitioner notice and an opportunity to be heard with respect to the legislature's passage of the insurance legislation in 2011, a public process open to all citizens. Petitioner's "just compensation" argument should be rejected because FIGA has been willing since May, 2012 to pay Petitioner's contractor directly to actually perform repairs to his property. FIGA challenged the "appraisal process" under the policy because that process did not result in determining "actual repair" cost and because FIGA knew that Petitioner would seek a court order requiring it to pay the appraisal amount directly to him contrary to section 631.54(3)(c). Therefore, Petitioner's constitutional arguments should not be heard. The only constitutional argument timely raised was an "impairment of contract" argument, and that too is not viable.

As the Bernard judges properly recognized, the "creation of section

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631.54(3)(c) was one of a number of provisions in chapter 2011-39 intended to ensure that sinkhole insurance claim proceeds are actually used to remediate the sinkhole damage and repair the property." Bernard, 140 So. 3d at 1027 n.4. The legislative staff analysis noted "there had been a substantial increase in both the number and cost of sinkhole insurance claims and explaining that representatives of the Florida Office of Insurance Regulation and the insurance industry believed that 'a major driving force' for the increase is the fact that 'many policyholders are incentivized to file such claims because they can keep the cash proceeds from the claim instead of effectuating repairs to their home or remediating the land.'" Id. Clearly, the legislation at issue advances a legitimate governmental objective.

Lastly, as to the second certified question, FIGA primarily challenged the "appraisal process" under the policy because: (a) the process would not result in determining "actual repair" cost; and (b) FIGA knew that Petitioner would seek a court order requiring it to pay the appraisal amount directly to him, contrary to Section 631.54(3)(c). FIGA submits the Second District reached the correct conclusion on this second question. However, if this latter conclusion is overturned, then this Court should declare that following an appraisal award, FIGA's statutory obligation remains limited to making payments directly to a contractor up to the amount of the appraisal award for performance of the actual repairs.

ARGUMENT

BOTH OF THE CERTIFIED QUESTIONS SHOULD BE ANSWERED IN THE AFFIRMATIVE, BUT IF THE SECOND CERTIFIED QUESTION IS ANSWERED IN THE NEGATIVE, THUS PERMITTING APPRAISAL, THEN THE COURT SHOULD MAKE IT CLEAR THAT § 631.54(3)(c) STILL APPLIES SO AS TO REQUIRE PAYMENT OF THE AWARD DIRECTLY TO A CONTRACTOR TO PERFORM THE ACTUAL SINKHOLE REPAIRS.

Preface

Petitioner's Summary of Argument and Argument sections bristle with inaccuracies and hyperbole. Contrary to Petitioner's assertions, this brief and its citations of authority demonstrate that FIGA is **not** "the statutory insurer for HomeWise;" it is **not** "by law . . . a trustee, acting for the Florida Department of Insurance on behalf of an insolvent insurer;" the FIGA Act does **not** direct FIGA to "make HomeWise's insureds whole;" and FIGA did not deprive Petitioner of any recognized state or federal constitutional right (even assuming such arguments were timely and properly asserted below).

Standard of Review

FIGA agrees the standard of review applicable to the Court's resolution of the legal issues presented is *de novo*. However, a *de novo* review standard does not open the flood gates to Petitioner's attempt to raise multiple constitutional arguments in this Court that were not timely and properly presented below.

A. The Second District in De La Fuente, the First District in Bernard, and the Fifth District in Simmons Properly Concluded that the 2011 Amendment to Section 631.54(3)(c), Effective Before Petitioner's Statutory Cause of Action Against FIGA Accrued Upon Entry of the HomeWise Liquidation Order, Is Not Being "Retroactively" Applied.

In the trial court, Petitioner asserted that applying the 2011 statutory definition of what constitutes a "covered claim" arising out of a sinkhole loss could not be applied to his sinkhole claim because that would constitute a "retroactive" application of a statute that unconstitutionally impaired his insurance contract with HomeWise. (R7 at 1020, 1022). This is the specific argument which Petitioner did timely and properly raise below, not the myriad of new factual assertions, new constitutional arguments, and unfounded public policy arguments Petitioner now attempts to raise in this Court at pages 15-49 of his Initial Brief.

This case arrived here because the Second District reversed the circuit court's decision that had rejected FIGA's argument as to the applicability of § 631.54(3)(c) to Petitioner's statutory claim against FIGA. The trial court ruled that "the law in effect when the policy was issued" would determine the scope of FIGA's payment obligations together with the loss payment provisions in the policy. De La Fuente, 158 So. 3d at 678. In reversing this ruling, the Second District agreed with the First District's analysis of the issue in Bernard id. at 679. Later, the Fifth District agreed with De La Fuente in Fla. Ins. Guar. Ass'n v. Simmons, 157 So. 3d 506 (Fla. 5th

DCA 2015). The analysis of the issue and the conclusion that the First, Second, and Fifth Districts reached is correct. This Court should likewise reject Petitioner's flawed arguments.

In reaching its conclusion in Bernard, the First District initially noted that appellate courts in other states addressing the issue of what constitutes the triggering date defining the scope of the statutory cause of action against a state's Insurance Guaranty Association have "uniformly held that the definition of 'covered claim' in effect when the insurer is adjudicated insolvent is the applicable definition," citing Prejean v. Dixie Lloyds Insurance Co., 660 So. 2d 836 (La. 1995) (stating "[t]he determinative point in time separating prospective from retroactive application of an enactment is the date the 'cause of action' accrues" and "[a]pplying these principles, [the insured] acquired the right to sue [the insurer], but not LIGA, on the date of the accident," and "[the insured]'s cause of action against LIGA did not exist until [the insurer] was declared insolvent"); Duhon v. United Pac. Ins. Co., 978 So.2d 964, 967 (La. 1st Ct. App. 2007) ("The applicable law governing claims against LIGA is the law in effect on the date of the insurer's insolvency" and the "reason for this is that the claim against LIGA does not accrue until the insurer is declared insolvent"); Agency Budget Corp. v. Washington Insurance Guaranty Ass'n, 93 Wash. 2d 416 (Wash. 1980) (statutory definition of "covered claim" in effect on date of declaration

of insolvency controlled Washington Insurance Guaranty Association's statutory obligations, and amendment of statutory definition after insolvency to include certain claims for unearned premiums as a "covered claim" could not be retroactively applied); Durish v. Channelview Bank, 809 S.W.2d 273 (Tex. Ct. App. 1991) (date of declaration of insolvency controlled whether statutory claim against Texas Guaranty Association constituted a "covered claim," not the date when claimant made demand for payment against insurer); Brennan v. Kansas Insurance Guar. Ass'n, 264 P.3d 102, 114 (2011) (court observed that the claimant's "statutory right [against KIGA] arose at the time [the insurer] was declared insolvent"). Id. a1028.[5]

Petitioner fails to cite this Court to a single case nationwide reaching a conclusion contrary to Bernard, De La Fuente, and the cases those courts relied on for guidance. Instead, Petitioner attempts to construct an argument that his "statutory rights" against FIGA vested either "at the time [his] policy was issued or when the insured event occurred," citing to, and emphasizing, some language from sections 631.54(3), 631.54(6), and 631.57(1)(a)1.a., Florida Statutes, as well as launching into an alleged historical overview of FIGA based upon materials and documents from websites which are not part of the official record and certainly have not been shown

[5]The various distinctions Petitioner relies upon to distinguish these cases have no bearing given that all use insolvency as the trigger for access to the statutory benefit the states IGA's administer.

to have been read or relied upon by Petitioner, or any other Homewise insured for that matter. (IB at 16-30). These arguments and scattergun approach do not demonstrate error in the conclusions reached by the First, Second and Fifth Districts as to the applicability of the May 2011 definition of "covered claim" to Petitioner's statutory claim filed against FIGA. That claim against FIGA first arose upon the entry of the declaration of insolvency of HomeWise on November 4, 2011. Indeed, in the amended complaint Petitioner filed against FIGA, Petitioner admitted as must. His complaint specifically alleged that he could pursue a statutory cause of action against FIGA on the very basis that the "Liquidation order *triggered* the involvement of FIGA." (R5 at 606, ¶ 9).

Petitioner can find no solace in those portions of section 631.54(3) that he underlines and emphasizes in his quote at page 16 of his brief. The language of the statutory provision, when properly highlighted, supports FIGA's position:

> (3) "Covered claim" means an unpaid claim, including one of unearned premiums, 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.* . . . . The term does not include: .... (emphasis supplied).

The bolded portions of the provision at issue make clear that a "covered claim" only arises "if such insurer becomes an insolvent insurer." The italicized portion of

the quote relied upon by Petitioner simply spells out the requirement that FIGA, similar to the guaranty associations in other states, focuses primarily on providing a specific statutory benefit to state residents and to owners/possessors of property permanently located in Florida.

The definition, however, simply cannot be read as establishing that a claimant qualifying under the FIGA Act gains a vested statutory cause of action against FIGA at the moment of the issuance of an insurance policy by a solvent member insurer, or when a claim against that solvent member insurer first arises. To the contrary, Florida law is clear that there is no vested right against FIGA until all the qualifications delineated by the Legislature to vest are met. Only then can Petitioner freeze the statutory benefit in time and avoid further amendment to that benefit. Until, then, the statutory benefit is a matter of legislative grace, and can be freely changed and applied to all those yet to vest.

While Petitioner seems to recognize there must be a triggering event that defines when his rights vest, he quotes and emphasizes the **incorrect** portion of § 631.54(6) to support his argument that the triggering event of his statutory cause of action against FIGA was "the time the policy was issued or when the insured event occurred." (IB at 16). When the proper portion of the definition of "insolvent insurer" in § 631.54(6) is emphasized (as the First District specifically discussed in Bernard,

140 So. 3d at 1030-31) it is again made clear that the order of insolvency is the triggering event:

> (6) **"Insolvent insurer" means 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. (Emphasis supplied).

This is precisely the conclusion reached consistently across the country when this question was posed. See Bernard at 1028-31. Petitioner's repeated reliance in his brief upon section 631.57(1)(a)1.a. (IB at 24-27) should also be rejected. Petitioner selectively quotes language from the FIGA Act that he posits demonstrates the date of the declaration of insolvency is irrelevant. Specifically Petitioner quotes excised language stating that FIGA "shall: ... (a)1. Be obligated to the extent of covered claims existing: a. Prior to the adjudication of insolvency and arising 30 days after the determination of insolvency ...." § 631.57(1)(a)1.a., Fla. Stat. The First District in Bernard easily rejected this argument, explaining:

> [B]ecause [Petitioner's] interpretation would essentially read the insolvency requirement out of the statutory definition of "covered claim," we agree with FIGA that the **better reading of section 631.57(1)(a)1.a. is that it merely provides a temporal limitation on the claims that FIGA is obligated to pay, but such claims still have to meet the statutory definition of "covered claim" in effect when FIGA's obligations are triggered by the insurer's insolvency.** See id. (explaining "covered claims" cannot accrue prior to impairment because "a prerequisite for a claim to be a covered claim is that the

Commissioner [of Insurance] declare the insurer to be impaired").

Bernard, 140 So. 3d at 1034 (emphasis supplied) (citations omitted); see also § 631.57(6), Fla. Stat. ("The association may extend the **time limits specified in paragraph (1)(a)** by up to an additional 60 days []") (emphasis supplied).

Realizing all of his arguments through page 30 in his brief have already been considered and rejected by the First, Second and Fifth Districts, Petitioner then resorts to several factually unsupported arguments, apparently in hopes of eliciting sympathy or engendering prejudice against FIGA. The first such argument begins at page 29 of his brief, where Petitioner asserts that, "[b]y [FIGA] retroactively applying this statute, [his] house was essentially rendered valueless because of a sinkhole." Candidly, Petitioner's underlying explanation for this bold assertion obfuscates, rather than enlightens.

Specifically, Petitioner used a footnote to support this assertion wherein he states, by reference to another website never previously relied upon in this case, that because the "County's estimated market value of [his] property ($125,996) is less than the appraisal value [he] obtained in this litigation to fix the sinkhole damage to the home ($130,600)," then "[o]n that basis, the De La Fuente home is essentially worthless." (IB at 29 n. 4). The argument is without merit. First, the website and alleged information Petitioner presents to this Court is inappropriate, as it was not

argued or made part of the official record in the trial court. Second, the market value of the property is higher than Petitioner states, according to undersigned counsel's July 2015 view of the Hillsborough County Property Appraiser's website.

Third, and most importantly, Petitioner continues to utterly ignore the fact that after entry of the Liquidation Order on November 4, 2011 to the present, FIGA has made it abundantly clear since first communicating with Petitioner on May 16, 2012 (R6 at 809-11) that pursuant to the FIGA Act, FIGA has been ready and willing to pay a contractor of Petitioner's choice to perform the actual subsurface and cosmetic repairs to the property within Petitioner's policy limits and in accordance with HSA's recommendations.[6] In reality, it is Petitioner's actions in refusing to proceed with **any** repairs, not FIGA's actions, that are allegedly adversely affecting the market value of his home. If subsurface and cosmetic repairs were performed, as FIGA continues to offer Petitioner to fund and pay directly to his chosen contractors since May 2012, then Petitioner obviously would not currently be in any position to make such

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[6]It is important to note that the only repair recommendations based upon a statutorily compliant engineering and geotechnical investigation were HSA's. Thus, Petitioner's unqualified assertion to this Court that his expert O'Dell's recommended $93,250 fix "would have unquestionably been much safer and sturdier than FIGA's and HSA's" plan should be summarily rejected, as no record cite is provided. (IB at 30).

arguments to this Court.[7]

Even further, it is only because of Petitioner's continued demand that he is legally entitled to receive direct payment from FIGA, unrestricted by any requirement that he enter into a contract for performance of the actual sinkhole repairs, as well as recovering his attorney's and public adjuster's fees, that he is able to ask this Court to wade into the morass of untimely and improperly presented "constitutional" arguments set out at pages 31-49 of his brief. FIGA will now address and demonstrate the lack of merit in those untimely and unsupported constitutional arguments.

B. Petitioner's Florida and Federal Constitutional Challenges to the Application of Section 631.54(3)(c) to Statutory Claims First Arising Against FIGA As A Result of An Insurer's Insolvency and Liquidation Occurring After the Effective Date of the Statute Should Be Rejected As Untimely and Lacking Merit.

At pages 31-49 of Petitioner's brief, he raises various constitutional challenges to section 631.54(3)(c) based upon the Florida and the United States Constitutions. The constitutional arguments should all be rejected because these arguments were not timely and properly presented in the courts below and because, in any event, the arguments are unsupportable and invalid.

1. Petitioner's Constitutional Arguments Should Be Rejected Because the

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[7]FIGA would further advise the Court that on February 23, 2015 the Leon County Circuit Court entered an order in In Re Receivership of HomeWise Insurance Company, Second Judicial Circuit Case No. 2011-CA-3221, which permits FIGA to make payments for actual repairs above policy limits up to the statutory cap.

Arguments Were Not Timely and Properly Presented in the Courts Below.

In his brief to this Court, Petitioner argues that FIGA's position in this case is unconstitutional because it allegedly: (a) denies him "access to courts" under Florida's Constitution; (b) denies him "equal protection" under the Florida and United States Constitutions; (c) denies him "due process" under the Florida and United States Constitutions; and (d) denies him of his right to "just compensation" under the "takings clauses" in the Florida and United States Constitutions. (IB at 14, 31-49). The question arises as to which, if any, of these arguments were properly presented and supported in the trial court or in the briefs and oral argument in the Second District? The answer is none, although Petitioner did attempt to inject the new arguments into this appeal in an untimely fashion when he filed his motion for rehearing in the Second District.

The record shows the **only** constitutional argument Petitioner raised in the trial court was an "impairment of contract" argument — he did not raise his "access to courts," "equal protection," "due process," or "just compensation" constitutional arguments in the trial court. (R7 at 1008-1084). FIGA anticipates Petitioner will point out that he sufficiently raised these additional constitutional arguments by briefly mentioning access to courts, equal protection, and due process at pages 24-27 of his Answer Brief in the Second District (which FIGA pointed out in its Reply Brief were

not timely and properly raised). Additionally telling is that during the June 18, 2014 oral argument in the Second District, Petitioner mentioned the word "unconstitutionality" only once in passing, and used the phrase "due process" once when discussing the Legislature increasing the level of reserves a domestic insurer must maintain.

It was only following the Second District's decision that was adverse to his position that Petitioner tried to belatedly and improperly inject these wide-ranging constitutional arguments into the appellate proceedings through his motion for rehearing.[8] FIGA responded by arguing these new constitutional arguments were untimely and without merit. (S.A. at Tab 1). The Second District denied Petitioner's motion for rehearing.

This Court should similarly reject Petitioner's attempt to inject these untimely constitutional arguments into these proceedings, especially since they were not directly addressed or even mentioned by the Second District. See Chames v. DeMayo, 972 So. 2d 850, 853 n. 2 (Fla. 2007) (Petitioner "raises several claims . . .

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[8]FIGA would note Rule 1.071, Fla. R. Civ. P., which requires a party challenging the constitutionality of a state statute to notify the Attorney General or the state attorney of the judicial circuit in which the action is pending of the precise challenge to the state statute. This rule evinces a commendable policy of providing notice to the appropriate State officials who can then appear and defend a challenged statute. At no point in these proceedings, however, has Petitioner provided *any* notice to the Attorney General. Such a circumstance further supports this Court refusing to entertain Petitioner's untimely constitutional arguments.

that the district court did not specifically address and that are outside the scope of the certified question" and therefore, "[w]e decline to address them"); McEnderfer v. Keefe, 921 So. 2d 597, 597 n. 1 (Fla. 2006) (declining to reach issues "that were either not directly addressed by the district court ... or were merely implied or cursory, at best"); Major League Baseball v. Morsani, 790 So. 2d 1071, 1080 n. 26 (Fla. 2001) (declining to address a claim outside the scope of the certified question in recognition that "[a]s a rule, we eschew addressing a claim that was not first subjected to the crucible of the jurisdictional process set forth in article V, section 3, Florida Constitution"); Sanford v. Rubin, 237 So. 2d 134, 137 (Fla. 1970) ("Constitutional issues, other than those constituting fundamental error, are waived unless they are timely raised "and an Appellate Court should exercise its discretion under the doctrine of fundamental error very guardedly"). Under these well-established principles, the only constitutional argument timely and properly presented below was Petitioner's "impairment of contract" argument.The remainder of his constitutional arguments should not be addressed in these proceedings.

2. Applying Section 631.54(3)(c) to Preclude Petitioner from Forcing FIGA to Directly Pay Him the Appraisal Award, Regardless of Whether He Performs Any Actual Repairs to His Property, Is Not Unconstitutional Under Florida's "Access to Courts" Provision, the Federal or Florida "Equal Protection" Clauses, the Federal or Florida "Due Process" Clauses, or the Federal or Florida "Takings Without Just Compensation" Clauses

In Argument Section II of his brief, Petitioner states that "[i]f this Court believes section 631.54(3)(c) . . . applies to this lawsuit, that statute would be unconstitutional as applied to De La Fuente's sinkhole claim." (IB at 31). Petitioner begins his constitutional arguments by launching into a nine-page dissertation presenting a flawed view of the "History of Florida Laws Regarding Insolvent Insureds (sic)." (IB at 31-39). It is not clear how this revisionist history presentation bears upon the issues presented in this case. But when Petitioner's constitutional challenges are carefully analyzed, it is clear they are unfounded and without merit.

a. No Unconstitutional Denial of Access to Courts

At pages 39-43 of his brief, Petitioner argues that if section 631.54(3)(c) is "applied to this lawsuit, [it] deprives [him] of his constitutional right of access to courts" in violation of Article I, Section 21 of the Florida Constitution, which provides that "The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay." FIGA submits the courts have been open to Petitioner and have properly dealt with his statutory cause of action against FIGA.

The case Petitioner relies on illustrates why his argument is faulty. In Kluger v. White, 281 So. 2d 1 (Fla. 1973), this Court explained that before an "access to courts" argument can arise, it must first be shown by the claimant that "a right of

access to the courts for redress for a particular injury has been provided by ***statutory law predating the adoption of the Declaration of Rights of the Constitution of the State of Florida, or where such right has become a part of the common law of the State pursuant to Fla. Stat. s 2.01***, F.S.A. []" Id. at 4 (emphasis supplied). Here, Petitioner fails to explain how his alleged 2011 statutory claim for against FIGA meets this language from Kluger. He cannot.

A similar challenge to the FIGA Act based upon an "access to courts" argument was specifically rejected in Fernandez v. Fla. Ins. Guar. Ass'n, 383 So. 2d 974 (Fla. 3d DCA 1980). There, a claimant suing FIGA was determined to be unable to pursue common law bad faith remedies against FIGA which he could have pursue against his insolvent insurer. The claimant argued FIGA stood in the shoes of his insolvent insurer, and therefore his inability to pursue his bad faith claim against FIGA due to the provisions of the FIGA Act violated his access to courts protections. In rejecting the argument, the Third District stated:

> Since, absent Chapter 631, FIGA would not exist and there would be no effective remedy to recover on any claims whatever against insolvent insurers, there can be no constitutional infirmity in the legislature's decision to limit those newly-created rights and, in effect, not to establish an additional one.

Id. at 976.

This "access to courts" argument cannot legitimately be made under the FIGA Act–which did not originate until 1970, and which created new rights that did not

exist at common law. Moreover, since the newly created statutory benefits provided under the FIGA Act are based solely upon the Florida Legislature's prerogative in the first instance, "the Legislature ha[s] the power subsequently to alter, abridge or abrogate (those) contingent or inchoate right(s)." Hyster v. David, 612 So. 2d 678, 682 (Fla. 1st DCA 1993); see also Scott v. Williams, 107 So.3d 379 (Fla. 2013) (holding that an amendment to the Act governing the Florida Retirement System, which changed the plan to a contributory plan and eliminated on a prospective basis the existing cost of living adjustment, could be applied to those state employees whose statutory benefit rights had not yet accrued and vested under the prior Act); L. Ross, Inc. v. R.W. Roberts Const. Co., Inc., 466 So. 2d 1096, 1098 (Fla. 5th DCA 1985) (stating "substantive rights and obligations created by statutes do not vest and accrue as to particular parties until the accrual of a particular cause of action giving rise to the substantive rights and obligations in a particular instance"). Thus, any argument that a constitutionally protected, vested right exists in favor of a policyholder under the FIGA Act prior to the time a claimant's insurer becomes insolvent is illogical, inconsistent with the statutory scheme regulating insurer insolvencies, and has no support under the Law of Florida or any other jurisdiction.

Relatedly, the "impairment of contract" argument Petitioner presented below now seems to have been abandoned as a separate argument. Nevertheless, in this

Court, Petitioner attempts to weave the basic thrusts of that argument into the fabric of all his arguments here. Petitioner claims the amended statute eliminated his *alleged* right to sue FIGA for breach of contract, demand appraisal under the policy, and secure a judgment against FIGA under his interpretation of the Loss Payment provision of the policy requiring FIGA to directly pay him the appraisal award, irrespective of whether he ever repairs the property.He claims this is what he is "entitled to under his insurance policy," and therefore the FIGA Act cannot validly alter those rights.

Petitioner also asserts that the "statute eliminates his right to sue FIGA for compensation he would otherwise be entitled to obtain under his contract" with the insolvent insurer. Such an argument wholly ignores that the provisions of the FIGA Act have always provided only a limited safety net following an insurer's insolvency. The fact that FIGA's statutory "covered claim" obligation is more limited than the insolvent insurer's contractual obligations under its policy is confirmed by the provisions of the FIGA Act, which clearly make it impossible for FIGA to place insureds in the same position they were in prior to their insurers' insolvency.[9]

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[9]For example: (a) FIGA's obligation is expressly and directly limited to the statutory cap, regardless of policy limits, and regardless of the value of the loss. See § 631.57(2), Fla. Stat.; (b) there is a $100 "deductible" in every case, irrespective of any policy provisions; (c) the statute of limitations is significantly shortened when the insurer becomes insolvent. See § 631.68, Fla. Stat. (2011); (d) the amount payable is reduced by all amounts received in settlement with others, regardless of the claim's

As these statutory provisions make clear, the FIGA Act's statutory remedy is not, and never has been, intended to be identical to prior insurance coverage and will not put the insured in the same position as existed pre-insolvency. Thus, any argument by Petitioner that FIGA's governing statutes should be so construed is meritless, as properly recognized in Bernard and De La Fuente. The Legislature created by statute the limited right to FIGA benefits (which never existed under the common law), and it therefore has the power to alter the contours of the statutory remedy as public policy dictates. This does not constitute an impermissible or unconstitutional action by the Legislature. Instead, what did quite clearly cause the diminution in the value of Petitioner's insurance policy was his carrier becoming insolvent. Additionally, conspicuously absent from Petitioner's constitutional complaints is any recognition that, notwithstanding the Second District's proper reversal of the judgment rendered in this case, Petitioner will **still** be entitled to have his land and residence repaired, and FIGA will pay the contractor performing those

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total value. See § 631.61, Fla. Stat. (2011); (e) there can be no claims for "bad faith" handling or failure to settle claims pursued against FIGA. See Jones v. Fla. Ins. Guar. Ass'n, 908 So. 2d 435, 448 (Fla. 2005); (f) there is no right to interest or penalties against FIGA. See § 631.57(1)-(2), Fla. Stat. (2011); (g) attorney's fees incurred by the insured prior to the insolvency (which would be recoverable by the insured against the insolvent insurer under section 627.428, Fla. Stat.) do not qualify as "covered claims" that FIGA is obligated to pay. See Petty v. Fla. Ins. Guar. Ass'n, 80 So. 3d 313 (Fla. 2012); and (h) what constitutes a "covered claim" and the payment thereof concerning a sinkhole loss is restricted. See § 631.54(3)(c), Fla. Stat. (2011).

actual repairs. Alternatively, Petitioner could choose to pursue his claim against the Received for his policy benefits.

b. No Unconstitutional Denial of Equal Protection

Petitioner's next untimely constitutional argument asserts that the "Legislature's retroactive change to section 631.54(3)(c) [ ] bears no rational relationship to any articulated legitimate statutory objective." (IB at 43-45). This constitutional argument, seemingly an afterthought following Petitioner's receipt of the adverse Second District decision, does not provide a basis to disturb that decision. "Fundamental to the success of an argument that a given statute violates equal protection of the laws within the meaning of the Federal and State constitutions is a showing that the statute under attack sets up an arbitrary or unreasonable classification of persons similarly situated." Manning v. Travelers Ins. Co., 250 So. 2d 872, 874 (Fla. 1971). The burden is on the individual challenging a statute "to demonstrate that 'any classificatory scheme that may be created by the statute could not rationally advance a legitimate governmental objective.'" Lakeland Regional Med. Ctr., Inc. v. State, Agency for Healthcare Admin., 917 So. 2d 1024, 1033 (Fla. 1st DCA 2006).

Petitioner's conclusory assertion that the 2011 amendment to the FIGA Act "bears no rational relationship to any articulated state objective" is utterly

unsupported by any facts in the official record on appeal, ignores the clear intent of the changes contained in chapter 2011-39, Laws of Florida, and is insufficient to meet his legal burden to prove a denial of equal protection on the basis the challenged "statute could not rationally advance a legitimate governmental objective." FIGA's statutory "covered claim" obligation to make payments directly to the contractor for the "actual repairs" to the property involving a sinkhole loss remains the same for all insureds of insolvent insurers falling into the same class. In other words, under the FIGA Act as amended, Petitioner's property will be repaired. He has presented no evidence, either to the trial court, the Second District, or this Court, to demonstrate that he is being denied equal protection simply because FIGA pays the cost of repairs directly to contractors (rather than him).

Moreover, in arguing the 2011 revision to the FIGA Act "bears no rational relationship to any articulated legitimate state objective" (IB at 44), Petitioner simply brushes aside the significant insurance law changes made by the Legislature in Chapter 2011-39, Laws of Florida, which is the same legislation that included the statutory revision challenged here. Petitioner argues the clear legislative intent underlying Chapter 2011-39 is irrelevant because there is no specific mention of sinkhole claims against insurers that might become insolvent and therefore, be handled by FIGA. (IB at 43). This should be summarily rejected. As the Bernard

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judges properly recognized, the "creation of section 631.54(3)(c) was one of a number of provisions in chapter 2011-39 intended to ensure that sinkhole insurance claim proceeds are actually used to remediate the sinkhole damage and repair the property." Bernard, 140 So. 3d at 1027 n.4. As Bernard further noted, in Section 21 of ch. 2011-39, Laws of Fla., the Legislature made findings concerning the adverse impact of sinkhole claims on the public health, safety and welfare, including the finding that "many properties remain unrepaired even after loss payments, which reduces the local property tax base and adversely affects the real estate market." Id.; see also Ch. 2011-39, Laws of Florida at §§ 22-27 (amending various provisions of the Insurance Code pertaining to the investigation and payment of sinkhole claims). There is no basis to claim the concerns underpinning the Chapter 2011-39 amendments are not equally pertinent to the amendments made regarding **all** sinkhole claims, whether handled by a carrier or FIGA after a carrier becomes insolvent.

The Bernard court also referenced legislative staff analysis for "noting that there had been a substantial increase in both the number and cost of sinkhole insurance claims and explaining that representatives of the Florida Office of Insurance Regulation and the insurance industry believed that 'a major driving force' for the increase is the fact that 'many policyholders are incentivized to file such claims because they can keep the cash proceeds from the claim instead of effectuating repairs

to their home or remediating the land." 140 So. 2d at 1027 n. 4. It should thus be abundantly clear that Petitioner has not carried his burden - he has absolutely no basis to claim the legislation at issue "could not rationally advance a legitimate governmental objective." See Lakeland Regional Med. Ctr., 917 So. 2d at 1033.

Courts in other states, when presented with equal protection challenges to various provisions of their insurance guaranty acts, have invariably deferred to the decisions their legislatures have made to maximize the use of the guaranty association's limited funds to all potentially covered claimants, while at the same time recognizing that any increase in assessments to domestic insurers may ultimately affect the state's insurance market and all insureds. See e.g., Louisiana Ins. Guar. Ass'n v. Johnson Controls, Inc., 905 So. 2d 444, 450 (La. App. 2005) (holding the treatment of insureds having a net worth of $25 million dollars differently under the Louisiana Act did not violate equal protection under state and federal constitutions, because the "classification is rationally related to the legitimate state interest that includes making LIGA's limited funds available to the maximum number of covered claimants and to those who would otherwise have no remedy"); Bills v. Arizona Prop. & Cas. Ins. Guar. Fund, 984 P. 2d 574, 585 (Ariz. App. 1999) (statute immunizing Arizona Guaranty Fund from bad faith claim did not violate equal protection, on basis that "[s]tatutorily limiting the Fund's liability to the payment of 'covered

claims,' as defined in the statutes, is neither arbitrary nor irrational" as that "limitation rationally furthers the state's legitimate interest in preserving the Fund's financial integrity" and "[a]ttaining that goal, in turn, is important in view of the purpose behind the Fund's creation and continued existence: to provide **some** protection to an insured who, without fault, becomes uninsured because of his or her insurer's insolvency") (emphasis supplied).

The instant situation is similar to that presented in Manning v. Travelers Ins. Co., 250 So. 2d 872 (Fla. 1971), where this Court considered an equal protection challenge to the portion of the Florida Uninsured Motorist Statute that required suit be brought within one year if the insurer was insolvent. In rejecting the constitutional challenge, this Court held that "the statute, rather than arbitrarily diminishing the rights of an insured, provides the insured with an additional right; a gratuity furnished by the Legislature" and in "this respect the statute is positive in effect rather than discriminatory." Id. at 874, accord Scott v. Williams. The same can be said of the FIGA Act: but for the guaranty fund, after Petitioner's insurer became insolvent, he would find himself with nothing more than the unattractive right to present a proof of claim to the Receiver. (a right to which Petitioner is still entitled to, as an alternative to seeking compensation under the FIGA Act). See §631.181, Fla. Stat. (2011). The challenged 2011 statutory amendment to the FIGA Act is neither

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arbitrary, capricious nor irrational. To the contrary, it serves a legitimate state purpose relating to how to best utilize FIGA in provide a limited "safety net" by recognizing and addressing the documented problems related to the "substantial increase in both the number and cost of sinkhole insurance claims" and to the insureds' being "incentivized to file such claims because they can keep the cash proceeds from the claim instead of effectuating repairs to their home or remediating the land." Bernard, 140 So. 2d at 1027 n. 4. As recognized in Petitioner's brief it is a system developed over years of careful study and adjustment that led to the 2011 amendments complained of here (IB at 31-39).

c. No Unconstitutional Denial of Due Process

At pages 45-47 of his brief, Petitioner claims the Florida Legislature committed a state and federal "due process" violation in enacting section 631.54(3)(c) because he was "never provided with notice or opportunity to be heard regarding the Legislature's [alleged] efforts to make HomeWise insolvent by changing the insolvency rules, and, at the same time, [allegedly] taking away his [alleged] property right [in] his pending, existing 2010 sinkhole claim []" This "due process" argument exemplifies why all of these "constitutional arguments" raised by Petitioner should not be addressed in determining this case. To do otherwise would ignore established case law concerning this Court's limited discretionary review and principles

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governing what arguments have been properly preserved for review in an appellate court.

More specifically, no "due process" argument was ever raised in the trial court in opposition to FIGA's assertion that since its initial involvement with Petitioner section 631.54(3)(c) governed FIGA's statutory obligations as to his claim. Next, in Petitioner's Second District Answer Brief at page 25, he asserted nothing more than that "FIGA's interpretation of the statute, as it applies to [him], means FIGA's interpretation: . . . (3) violates Plaintiff's due process rights under the Florida and federal constitution (because it terminates [his] existing lawsuit for insured property damage) []" Then, at the oral argument held in the Second District, Petitioner mentioned "due process" once in passing. It was not until his motion for rehearing in the Second District that Petitioner began to claim his due process violation based upon a change being made in the insurer insolvency rules, "without him being provided notice and an opportunity to be heard." Petitioner's chameleon-like due process argument is without merit and should be rejected.

The standard, which Petitioner asserts governs his untimely "due process" argument, appears to mirror the same standard he presents in support of his "equal protection" argument. Therefore, since the legislation at issue satisfies that same standard in an equal protection context, it likewise satisfies the standard in the context

of a due process challenge. The only potential question remaining is whether, as Petitioner claims, he had to be provided some sort of specific notice of the Legislature's intent to pass legislation (i.e., ch. 2011-39, § 6, Laws of Florida) changing section 624.408 general insurance law setting forth the required insurance company "surplus as to policyholders."

Contrary to Petitioner's cavalier assertion, there is no evidence in this record or elsewhere that this legislation was "the Legislature's efforts to make HomeWise insolvent." (IB at 46). In addition, Petitioner fails to cite to any provision of law, statutory or constitutional, providing that a general citizen must be given a specific notice and opportunity to be heard on legislative actions, which at least in Florida are fully transparent due to the Sunshine Law and the Legislature's website. Petitioner's "due process" argument should be rejected.

d. No Unconstitutional Deprivation Under the "Takings Clause"

At pages 47-49 of Petitioner's brief he claims for the first time in this case that FIGA's reliance upon section 631.54(3)(c) constitutes an unconstitutional "taking" of his property under the state and federal constitution. Every argument presented above should demonstrate quite clearly that, even if timely and properly raised, this new constitutional argument is without merit. As best can be deciphered this new argument claims that "FIGA is refusing to pay [him] $130,600 his legally determined

'just compensation' for repairing his sinkhole a property right." (IB at 48). This assertion simply is not true.

FIGA has never said it would not pay a contractor to repair Petitioner's property. It only challenged the "appraisal process" under the policy because : (1) that process did not result in a determination of the cost of the "actual repairs" (only an "estimate," as the Second District recognized); and (2) FIGA knew that after appraisal Petitioner would seek entry of a judgment mandating payment of the appraisal amount directly to him in contravention of section 631.54(3)(c) , Florida Statutes.

Lastly, with respect to Petitioner's argument that he is unconstitutionally deprived of his alleged absolute right to "appraisal" under his insurance policy, if the Court determines that appraisal is still permissible notwithstanding section 631.54(3)(c), then FIGA will pay Petitioner's contractor for the cost of the "actual repairs" performed up to the amount of the appraisal award of $130,600. In this regard, as the Second District noted in De La Fuente, "FIGA-to it's considerable credit" advances a 30% payment to the contractor after a contract is signed and the contractor is ready to start the job. 158 So. 3d at 681 n. 6.

Accordingly, if this Court determines that Petitioner is entitled to appraisal, then Petitioner should be ordered to enter into a contract to perform the subsurface and cosmetic repairs to the home. Then, FIGA would be able to pay the advanced

costs to contractors as previously noted, and to pay for the repairs as they are actually performed up to the $130,600 appraisal award.

CONCLUSION

FIGA can, and has agreed to, fix Petitioner's home. That is precisely what the Legislature intended in its 2011 amendments. Because the 2011 FIGA Act applies in this case, the Second District's resolution of the first certified question is correct and firmly supported. The Second District properly determined that the trial court's entering a judgment against FIGA requiring it to pay money directly to the Petitioner ignored the clear language and intent of the law in effect at the time Petitioner's statutory claim against FIGA accrued. The Second District also correctly concluded that "an appraisal award, as provided for in the homeowner's policy of insurance at issue, is not the functional equivalent of 'the actual repair of the loss,' which is the only amount that FIGA is allowed to pay." If this latter conclusion is overturned, then this Court should declare that following an appraisal award, FIGA's statutory obligation is limited to making payments to a contractor up to the amount of the appraisal award for performance of the actual repairs for the remediation of the subsurface, and then to repair cosmetic damage (subject also, to the other statutory limitations contained in the FIGA Act).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on August 5, 2015, the foregoing document is being served on all counsel of record as identified on the attached Service List via electronic mail.

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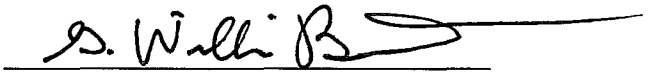
By: 

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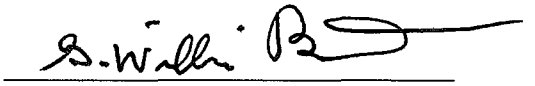
CERTIFICATE OF COMPLIANCE

In compliance with Florida Rule of Appellate Procedure 9.210(2), counsel for Appellant certifies that the size and style of type used in this Brief are 14 point type, Times New Roman.



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