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IN THE SUPREME COURT OF FLORIDA

LEANDRO DE LA FUENTE and
ANA DELIA GARCIA,

Petitioners,

v.

FLORIDA INSURANCE
GUARANTY ASSOCIATION,

Respondent
________________________________/

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

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

AMICUS CURIAE BRIEF OF NATIONAL CONFERENCE OF INSURANCE GUARANTY FUNDS IN SUPPORT OF RESPONDENT FLORIDA INSURANCE GUARANTY ASSOCIATION

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IDENTITY OF AMICUS CURIAE AND ITS INTEREST IN THE CASE

The National Conference of Insurance Guaranty Funds (the "NCIGF") is a non-profit, member-funded association that provides national assistance and support to the property and casualty guaranty funds located in each of the 50 states and the District of Columbia. See National Conference of Insurance Guaranty Funds, About Us, (Aug. 10, 2015), available at http://ncigf.org/about. The Florida Insurance Guaranty Fund Association ("FIGA") is one of NCIGF's members.

NCIGF was incorporated in December 1989, and its purpose is to monitor national insurance activities, coordinate information for multi-state insolvencies and provide legal, informational, administrative, communications and public policy and administrative support to its members. Id. The NCIGF works closely with the property and casualty insurance trade associations to monitor and respond to issues that might impact state guaranty funds. Id. Although the NCIGF does not pay claims, it does coordinate "the multi-state claims-paying activities of its member guaranty funds, monitors litigation that may affect guaranty funds, coordinates with the property and casualty insurance trade associations on state legislative matters, conducts education and training seminars for guaranty funds, provides financial information concerning the guaranty system, serves as a clearinghouse of relevant information, provides a national forum for discussion, and serves as a liaison with the National Association of Insurance Commissioners (NAIC) and insurance

receivers." NCIGF brochure, Protecting Policyholders: An Overview of the Property and Casualty Insurance Guaranty Fund System, at 11 (Aug. 10, 2015), available http://ncigf.org/media/files/2015_GF_brochure.pdf. In furtherance of its responsibilities of monitoring litigation that may affect guaranty funds, NCIGF's Bylaws provide it may "fil[e] amicus curiae briefs when appropriate." NCIGF By-Laws, Art. I, s. 3. Pursuant to rule 9.370, Florida Rules of Appellate Procedure, NCIGF obtained the consent of the parties for appearing as an amicus curiae. See NCIGF's Motion to Appear as Amicus Curiae in support of Respondent.

The issue in this case is whether the district court correctly held that the statutory definition of "covered claims" in effect on the date the insurer is declared an insolvent insurer[1], directs FIGA's obligations. NCIGF has an interest in this Court's resolution of the issue presented, because it will determine when a guaranty fund's obligations begin under the statutory scheme, and the ability of a legislature to craft specific remedies protecting claimants when an insurer is declared an insolvent insurer. It is important that Florida's rule of law continue to follow the other state jurisdictions that have consistently held that a guaranty fund's obligations are controlled by the statutes in effect at the time the insurer is declared an insolvent

[1] The term "insolvent insurer," as defined by section 631.54(6), Florida Statutes, means an insurer against whom a finding of insolvency and an order of liquidation by a court of competent jurisdiction has been entered. See also NAIC Property and Casualty Insurance Guaranty Association Model Act, section 5.

insurer. By consistently following this established rule of law, that it is the date an insurer becomes an insolvent insurer which triggers an obligation by a guaranty association, and therefore triggers the statutory definition of "covered claim," Florida will ensure that the purposes of promptly and efficiently paying claimants of insolvent insurers are upheld.

SUMMARY OF ARGUMENT

The district court below properly held that FIGA's statutory obligations are triggered by the date an insurer becomes an insolvent insurer. Thus, the district court correctly held that the statutory definition of a "covered claim," in effect at the time an insurer is declared an insolvent insurer directs FIGA's obligations. Two sound reasons support this rule of law. First, this rule provides for certainty in that a guaranty fund's statutory obligations are determined at a fixed point in time, the date an insurer is declared an insolvent insurer. Thus, the rule of law promotes efficient evaluation of "covered claims" and prompt payments. To hold otherwise requires a guaranty fund to examine when each policy of an insolvent insurer was issued, and determine which statutory definition was in effect at the time the policy was issued. When one considers that an insolvent insurer may have tens-of-thousands of unpaid claims from policies sold in multiple years, the quagmire becomes apparent. Thus, the De La Fuente's position results in claims not being efficiently evaluated or promptly paid.

The second reason supporting the district court's rule of law is that a legislature is free to modify and amend the safety-net that it has created in a guaranty fund. To hold otherwise would unduly restrict the legislature, and would harm claimants, by denying them the opportunity to take part in any benefits that a legislature might subsequently add to the guaranty fund's safety-net.

ARGUMENT

Guaranty funds are statutorily created safety-nets that only pay "covered claims," as defined by statute at the time of an insurer's liquidation.

FIGA's web-site contains the following straight-forward answer to the frequently asked question about what is the role of a guaranty fund:

> Guaranty associations ease the burden on policyholders and claimants of the insolvent insurer by immediately stepping in to assume responsibility for most policy claims following liquidation. The coverage guaranty associations provide is fixed by the policy or state law; they do not offer a "replacement policy."
>
> By virtue of the authority given to the guaranty associations by state law, they are able to provide two important benefits: prompt payment of covered claims and payment of the full value of covered claims up to the limits set by the policy or state law. **http://www.figafacts.com/faq#n314.**

This answer contains two elements that show that the district court reached the right decision. The first element is that guaranty funds, including FIGA, are statutorily

created safety-nets that protect policyholders and claimants when their member insurance company becomes an insolvent insurer; and thus, can be modified by the legislature. The second element is that this statutorily created safety-net provided by FIGA provides for prompt payments of "covered claims," as defined by statute, but it is not a "replacement policy."

The crux of NCIGF's argument here focuses on the "how, when, and why" a guaranty fund's statutory obligations are activated, and the recognition that legislatures are free to shape the safety-net provided by a guaranty fund. Further, NCIGF specifically addresses several of the erroneous assumptions built into De La Fuente's arguments, and the pitfalls contained in those arguments.

A. The History and Purpose of the State Guaranty Funds.

State guaranty funds, like FIGA, were created by state statutes in the early 1970s in order to protect policyholders and claimants from financial loss that results from an insurance company's liquidation. The National Association of Insurance Commissioners (NAIC), working together with representatives of the insurance industry, devised the guaranty fund system. See Alan M. Gamse, Understanding the Safety Net Provided by Property and Casualty Insurance Guaranty Associations, The Brief, Fall 2010, at 34, 36. Based on this collaboration, the NAIC promulgated the Post-Assessment Property and Liability Insurance Guaranty Association Model Act (the "Model Act"), which, with some variation, was enacted in all 50 states. See

Alan N. Gamse, supra, at 36. The Model Act called for the creation of state guaranty funds. Generally, these state guaranty funds are non-profit, unincorporated associations comprised of property and casualty insurance companies licensed to transact insurance in their specific state. Id. The guaranty funds are the limited safety nets that pay the statutorily defined "covered claims" of insolvent member insurer's policyholders and claimants. Before the judicial determination that an insurer is an insolvent insurer, a claimant's only cognizable right or expectation to be paid for an insurance claim is from the insurer, under the insurance contract's terms.

After a court determines that an insurance company is an insolvent insurer, the state guaranty association is responsible for paying the "covered claims," as defined by the guaranty fund statutes. Guaranty funds pay the "covered claims," and the administrative expenses of the funds, through assessments to their member insurance companies. See Alan N. Gamse, supra. Generally, under the state statutes, the guaranty funds are allowed to assess their member insurance companies, on an annual basis, up to a statutorily-set percentage of the net direct premiums written by the member companies in the state, during the preceding calendar year. Id. The Model Act and most guaranty fund statutes, including the one in Florida, provide that a guaranty fund's assessment may be recouped in the rates and premiums charged for insurance. See §631.57(3)(c), Fla. Stat. (2014). By allowing the

guaranty fund to enact an assessment, the legislation creates a pool of funds, so that the association may "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. (2014).

B. Guaranty funds pay "covered claims," as defined by the statute.

At the onset, it is important to remember that guaranty funds do not pay *all* claims against an insolvent insurer; rather, the associations provide a limited safety-net, defined by statute.[2] Under both the Model Act and Florida Statutes, a state legislature determines the limitations on the availability of a guaranty fund's resources to pay the unpaid claims against an insolvent insurer. For example, it is not disputed that both the Model Act and Florida Statutes recognize limitations based on residency or property requirements[3], and the amount of coverage to be paid.[4] Consequently, it is clear that a legislature is free to define "covered claims" and

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[2] See Florida Insurance Guaranty Association, Inc. v. Devon Neighborhood Association, Inc., 67 So.3d 187, 190 (Fla. 2011), stating "[t]hus, 'the statutory language defines the extent of FIGA's obligations. FIGA is not responsible for claims against an insurer that do not fall within FIGA's statutory obligations.' " quoting, Fla. Ins. Guar. Ass'n v. Petty, 44 So.3d 1191, 1194 (Fla. 2d DCA 2010) and All the Way with Bill Vernay, Inc., 864 So.2d 1126, 1130 (Fla. 2d DCA 2003).

[3] Model Act definition of "covered claim" (9)(a)(i), limiting a covered claim to claimant who "is a resident of this state at the time of the insured event," Model Act, Section 3. Definitions (2008). See also section 631.54(3), Florida Statutes (2014), providing in definition of "covered claim" that claimant is a resident of the state.

[4] Section 631.57(1)(a)2., Florida Statutes (2014), setting out statutory caps on the amount of claim paid by FIGA.

determine the extent of the safety-net it provides. Thus, the Florida legislature was free to determine whether FIGA is obligated, and to what extent, for sink-hole coverage, and the mechanics for paying a claim, if it meets the definition of a "covered claim."

C. FIGA's responsibility here is governed by the statutory definition of a "covered claim" in effect when the court determined that Homewise was an insolvent insurer.

Before the November 4, 2011, circuit court Order adjudicating Homewise insolvent, De La Fuente did not have *any claim or expectation* that he would be paid for his sink-hole claim by FIGA.[5] FIGA's statutory obligations only became activated or triggered after the court found Homewise to be an insolvent insurer. As the First District Court of Appeal exhaustively analyzed in Florida Insurance Guaranty Association Inc., v. Bernard, 140 So.3d 1023 (Fla. 1st DCA 2014), other state jurisdictions have consistently held that the guaranty fund's statutory obligations are triggered by a finding that an insurance company is an insolvent insurer; thus, applying the statutory definition of a "covered claim," in effect on the

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[5] Clearly, under the facts here, the legislature's 2011 statutory amendment to the definition of "covered claims" in section 631.54(3), Florida Statutes (2011), only applied prospectively to insurers who became insolvent after the statutory change, like Homewise. Contrary to De La Fuente's assertions, this is not an example of the statute being applied retroactively to an insurer that had already been declared insolvent. This Amicus Brief does not address the merits of whether a legislature may enact changes to a guaranty fund's statutes that apply retroactively to an insolvent insurer, which is not at issue here.

date of the liquidation. This outcome follows from the Model Act, which also defines "covered claim," in part, as occurring "if the insurer becomes insolvent."[6]

De La Fuente's claim that the FIGA statute is not based on the Model Act, because none of the states have excluded "substantial perils" from their definition of a "covered claim," is without merit. See De La Fuente's Initial Brief, at 13. De La Fuente ignores that the state courts have uniformly held that a guaranty fund's statutory obligations are triggered when an insurer becomes an insolvent insurer. In fact, De La Fuente fails to cite a single case where a court interpreting a guaranty fund statute has held that the association's statutory duty occurs prior to a judicial finding that an insurer is an insolvent insurer. In contrast, as set out in the Bernard decision, other state court jurisdictions have consistently held that an insurance guaranty fund's statutory obligations are triggered when an insurer becomes an insolvent insurer. See Prejean v. Dixie Lloyds Ins. Co., 660 So. 2d 836, 837 (La. 1995) (holding that statute in effect on the date of insolvency, rather than the one in effect on the date of accident, controlled, and was not retroactively applied); Durish v. Channelview Bank, 809 S.W.2d 273, 276 (Tex. App. 1991) (holding that the date of insurer's impairment, not the date of the claim, is the key date to trigger actions by the association, including initiating assessments against members); Agency

[6] Model Act, Section 3, section (9)(a), Definitions (2008). See also Section 631.54(3), Florida Statutes (2014)(which contains nearly identical language as the Model Act, stating "if such insurer becomes an insolvent insurer . . . .").

Budget Corp. v. Wash. Ins. Guaranty Ass'n, 610 P.2d 361, 364 (Wash. 1980) (holding that the insurer's insolvency was the precipitating event triggering the guaranty fund's liability, and under a prospective application of amendment to the state guaranty act, which permitted recovery of claims for unearned premiums associated with an insurer's insolvency, the guaranty fund was not liable for amount of unearned premiums due to assignee of insured from insurer, whose insolvency was adjudicated prior to effective date of the amendment.).

The fact that the Florida legislature decided to specifically address sink-hole coverage within the definition of a "covered claim" does not take Florida outside of the Model Act's intent that the triggering date for application of the act is the date of a finding that the insurer is an insolvent insurer. Rather, the statutory amendment is no different than other limitations that the legislature has placed on types of claims, and caps on amounts paid by FIGA. In this case, De La Fuente had only an expectation that he would be paid directly by FIGA, if Homewise became an insolvent insurer, which expectancy was cut off when the statute was amended in 2011 to allow only for the payment of actual repairs directly to contractors performing those repairs. See Durish, 809 S.W.2d at 277.

Without re-plowing the ground discussed in the Bernard case, NCIGF asserts that there are two sound reasons why the state courts have consistently held that the declaration an insurer is an insolvent insurer, is the sole "triggering" event for

determining a guaranty fund's statutory responsibilities. The first reason is that this rule of law promotes the goal of paying claimants of the insolvent insurer without excessive delay, and treats claimants equally. The second reason is that this rule of law allows a legislature to enact changes to the safety-net based on the circumstances that immediately address a problem.

When a guaranty fund's responsibilities are guided by the statute in effect at the time the insurer is declared insolvent and placed into liquidation, the fund can evaluate numerous claims and promptly make payments. Under this rule of law, the guaranty fund receives the claimant's unpaid claim from the insolvent insurer. The guaranty fund determines whether or not the unpaid claim meets the definition of a "covered claim" as of the date of the insolvent insurer's liquidation. If the unpaid claim meets the statutory definition of a "covered claim," then the guaranty fund pays the claimant, as set out by law. This practical outcome contrasts sharply with the outcome that would occur if the Court adopts De La Fuente's argument.

De La Fuente offers three alternative arguments on when FIGA's obligations begin: first, the statutory definition of a "covered claim" in effect when the homeowner's policy was sold; or second, the statutory definition of a "covered claim" in effect when the loss occurred; or third, using the definition of a "claim" under the insurance contract. None of these arguments allow FIGA to fulfill its purpose of avoiding excessive delay, and making prompt payments for unpaid

"covered claims." As a practical matter, if De La Fuente was correct, FIGA would have to examine the date each homeowner policy was sold by an insolvent insurer, in order to apply the correct statute. For example, an insurer that becomes insolvent and liquidated on July 31, 2015, might have thousands of claimants with policies from different years. FIGA would be faced with the herculean task of determining what statutory definition of "covered claim" was in effect when each policy was sold, and what limitations under the FIGA statutes applied at that time. Similarly, if the triggering date was the date of an insured's loss, then FIGA is still left with the task of determining the statutory definition of a "covered claim" in effect at the time of the loss. Clearly, De La Fuente's argument would result in delay and additional expense in settling claims to the claimant's detriment.

Another unintended consequence of De La Fuente's argument is that it could deprive a claimant of the benefits of a legislative change, and could otherwise result in inequity between two claimants, even though both have identical claims against an insolvent insurer. As an example of an amendment which benefited policyholders, the FIGA statutory cap for payments to homeowners was increased by amendment on May 16, 2006, from $300,000 to $500,000. Homeowners who had claims (and policy limits) in excess of the prior $300,000 cap, benefited from the increase in their claims made pursuant to the 2004/2005 hurricanes. On May 31, 2006, the Southern Family Insurance Company, the Atlantic Preferred Insurance

Company, and Florida Preferred Property Insurance Company were declared insolvent insurers, leaving over 40,000 claimants unprotected.[7] Those losses occurred, and the claims were made, before the statutory amendment increasing the statutory cap took effect. Under De La Fuente's argument, FIGA would have only been required to pay for the lower statutory cap on those claims made prior to the legislative change. In plain language, people whose homes had more than $300,000 worth of damage would not have been able to access the additional funds the legislature made available. Likewise, claimants whose losses occurred between the May 15, 2006 enactment of the amendment, and the July 1, 2006 deadline to place insurance in a solvent company, would be entitled to the increase that their pre-liquidation counterparts would not. In contrast to this absurd result, if this Court continues to follow the rule of law that a guaranty fund's statutory obligations are determined based on the date an insurer becomes an insolvent insurer, then both claimants whose policies were issued prior to the amendment, and those whose policies were issued after, would be treated fairly and uniformly in the same liquidation, and FIGA would be able to pay the unpaid "covered claims" quickly and efficiently.

[7] See FIGA's web-site concerning date of these insolvencies available at: http://www.figafacts.com/insolvencies.

The result from the example offered highlights the second reason why the courts and the Model Act have consistently recognized that a guaranty fund's obligations are triggered or activated when an insurer is declared insolvent and is liquidated. The second reason is that legislatures are free to modify the scope of the safety-net that is created by statute. As shown in the example above, De La Fuente's argument deprives claimants of the ability to take advantage of any beneficial changes the legislature might choose to make now or in the future to the FIGA safety-net. Under De La Fuente's analysis, a legislature's ability to define, eliminate or improve the safety-net is severely limited because the guaranty fund's responsibilities would become fixed in time, on the date the policy was issued, <u>or</u> when a claim was made. FIGA's statute makes no mention of either of these options. The reason is that the legislature did not intend for either option to apply or they would have so provided. The legislature <u>did</u> provide clear language that FIGA's covered claim obligations arise as of the date the insolvent company is placed into liquidation. §631.54(3), Fla. Stat. (2011).

NCIGF is concerned that adoption of De La Fuente's reasoning here will create bad precedent that significantly limits a legislature's ability to address a specific problem. For example, in 2006 the Florida legislature enacted section 631.695, Florida Statutes (2006), which allows a governing body of a municipality or county, in conjunction with FIGA, to issue bonds for the purpose of paying

claimant's covered claims. As the Florida Legislature expressly stated in 631.695(1)(e), the unprecedented destruction caused by recent hurricanes had caused massive damage and a number of insolvent insurers. Consequently, the Florida Legislature amended the FIGA statutory scheme to address this specific problem with a solution unique to Florida. Under De La Fuente's analysis, a claimant's rights under the FIGA statute are fixed on the date the policy was sold or when the loss occurred. Had De La Fuente's reasoning applied in 2006, then the Legislature's ability to provide for raising funds by FIGA, through the use of bonds to pay for "covered claims," would have been thwarted.[8] Under De La Fuente's analysis, FIGA's responsibilities would have been set in the law prior to 2006; thus, the funds raised might not be available, and claims could only have been paid on a pro rata basis until funds were acquired, which could have taken years. Again, De La Fuente's argument fails to recognize that state legislatures are free to determine what is a "covered claim" under the safety-net it has created.

NCIGF would further point out that De La Fuente's argument that insureds would be required to make up the difference of payment for repairs, where their policy limits did not provide for same, is without merit. Specifically, while the

[8] In 2006, bonds did not have to be issued to meet this need. The point, however, is that under De La Fuente's analysis, this legislative tool would have been unduly restricted because the legislature did not specifically state the statutory amendment would be applied retroactively.

amendment in the Florida Statute takes away the ability for an insured to be paid directly for the repairs, it puts in the protection that FIGA will pay for "*actual repairs*" up to the statutory FIGA cap. Historically, FIGA pays the value of the claim up to the policy limits, or up to the FIGA covered claim limits, whichever is less. However, the Receiver sought, and obtained, from the Receivership court, clarification of whether this new definition of "covered claim" for sinkholes meant that FIGA could pay above policy limits to ensure repairs were performed. In an Order issued on February 23, 2015, the Receivership court, in Leon County Circuit Court case number 2011-CA-3221, specifically held that **FIGA could pay above policy limits, for actual repairs, up to the $500,000 statutory cap**. Thus, homeowners were better protected, as they will be able to have their home repaired. This happy ending could not be reached under De La Fuente's arguments, which unnecessarily restricts the legislature's ability to modify its guaranty fund safety-net.

CONCLUSION

NCIGF respectfully requests that this Court uphold the district court of appeal's decision below that an insurance guaranty fund's statutory responsibilities are activated when an insurer is determined to be an insolvent insurer; thus, applying the statutory definition of a "covered claim" in effect at the time of the finding.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served electronically to the following on this 14th day of August, 2015: Robert E. Biasotti, Esquire and Christine R. O'Shea, Esquire, Biasotti and Associate, 5999 Central Avenue, Ste. 303, St. Petersburg, Florida 33710, at bob@biasottilaw.com; christine@biasottilaw.com; G. William Bissett, Esquire, Kubicki Draper, 25 West Flagler Street, Penthouse, Miami, Florida 33130, wb@kubickidraper.com, WB-KD@kubickidraper.com; George A. Vaka, Esquire, gvaka@vakalaw.com; Donna B. DeVaney Stockham, Esquire, Stockham Ackley, 707 N. Franklin Street, 2nd Floor, Tampa, FL 33602, dstockham@stockhamackley.com; mcassida@stockhamackley.com; and Lucas B. Austin, Esquire, Groelle & Salmon, P.A., Waterford Plaza, 7650 W. Courtney Campbell Causeway, Suite 800, Tampa, Florida 33607; laustin@gspalaw.com.

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CERTIFICATE OF COMPLIANCE

Pursuant to rule 9.210(a)(2), Florida Rules of Appellate Procedure, the undersigned hereby certifies that this amicus curiae brief complies with the font requirements of the rule.