SUPREME COURT OF FLORIDA

LEANDRO DE LA FUENTE and
ANA DELIA GARCIA,

Petitioners/Plaintiffs,

vs.

FLORIDA INSURANCE
GUARANTY ASSOCIATION,

Respondent/Defendant.
_____/

Case No. SC15-519

2d DCA Case No. 2D13-3543

13th Jud. Cir. Case No.
2010 CA-022488

REPLY BRIEF OF PETITIONERS/PLAINTIFFS LEANDRO DE LA FUENTE AND ANA DELIA GARCIA

Robert E. Biasotti
Florida Bar No. 0104272
Christine R. O'Shea
Florida Bar No. 113047
BIASOTTI AND ASSOCIATES
5999 Central Avenue, Suite 303
St. Petersburg, FL 33710
Tel: 727-823-8811;
Fax: 727-823-8801
Email:bob@biasottilaw.com
Email:christine@biasottilaw.com
Email:eservice@biasottilaw.com

TABLE OF CONTENTS

TABLE OF CITATIONS

CASES

FLORIDA STATUTES AND RULES

OTHER AUTHORITIES

ARGUMENT

I. THE DEFINITION OF "COVERED CLAIM" IN SECTION 631.54(3), FLORIDA STATUTES (2011) DOES NOT RETROACTIVELY APPLY TO A SINKHOLE LOSS INCURRED UNDER A 2009 HOMEOWNERS' POLICY

FIGA asserts that the definition of "covered claim" arises from a statute, and that FIGA's obligations in this lawsuit were not "triggered" until HomeWise was declared insolvent. Both assertions are wrong.

A. FIGA Failed To Explain Why The 2011 Changes To Florida's Sinkhole Statutes Apply In This Lawsuit

Under FIGA laws, all of the references to a "covered claim" necessarily refer to a claim defined in an existing insurance policy. Section 631.54 does not--and cannot--define a "sinkhole loss." That loss is defined in De La Fuente's 2009 HomeWise insurance policy and the Florida insurance statutes in effect when the contract was signed. FIGA presented no statutory arguments, no legislative history, no substantive legal defense for the numerous issues raised by the Second District in its certified questions, or refuting any of the substantive arguments made in De La Fuente's Initial Brief specifically on this issue.

FIGA refers to the "legislative intent" for the 2011 changes to Florida's sinkhole statutes in its Answer Brief, relying on statements made in *Florida Insurance Guaranty Ass'n, Inc. v. Bernard*, 140 So. 3d 1023 (Fla. 1st DCA 2014). *See* AB at 22, 28, 42, 43. There are two problems with that analysis.

First, the Legislature's plain language made clear that the changes it made to sinkhole statutes in Chapter 2011-39, Laws of Florida, **did not apply to the 2011 FIGA changes**. *See* Ch. 2011-39, Laws of Fla, §21. All of these changes, made in sections 22 to 27, were intended to "maintain[] a viable and orderly **private-sector market** for property insurance," and to "generally to reduce the number of sinkhole claims and related disputes arising under prior law." *Id.* There is no legislative finding or intent **at all** presented on Ch. 2011-39, Laws of Fla, §30. That statute includes dramatic, additional, and substantive changes to controlling FIGA law regarding sinkholes, including refusing to pay the policyholder, refusing to pay attorney's fees (even when FIGA's actions intentionally violate section 631.70), and requiring that all payments (both cosmetic and "below the ground" sinkhole remedies) be made to a contractor--even when the contractor's estimate dramatically exceeds the policy limits. None of those additional changes were made to Florida's private-sector market substantive sinkhole laws (Chapter 627).

Second, **all** of these substantive sinkhole changes (*i.e.*, changes modifying existing substantive rights under sections 627.706-627.7074) were **prospective**, not **retroactive**. Hence, on May 21, 2011--when these sinkhole statute changes were enacted, and **before** HomeWise was deemed insolvent--**none** of these changes applied to HomeWise or to De La Fuente's 2009 insurance policy that covered his existing, pending sinkhole claim. *See Menendez v. Progressive*

Express Ins. Co., 35 So. 3d 873, 876 (Fla. 2010) ("[T]he statute in effect at the time an insurance contract is executed governs substantive issues arising in connection with that contract." (quoting *Hassen v. State Farm Mut. Auto. Ins. Co.*, 674 So. 2d 106, 108 (Fla. 1996))).

The 2009 version of sections 627.706-627.7074 apply to **both** HomeWise and FIGA when interpreting this contract. *See Menendez*, 35 So. 3d at 876. De La Fuente has no "breach of contract" claim against FIGA. Indeed, De La Fuente has no relationship with FIGA **at all**, except FIGA's obligation to pay De La Fuente's insurance claims under his HomeWise contract. De La Fuente's "breach of contract" claim was filed against HomeWise Preferred Insurance Company on November 12, 2010, for a breach that occurred in 2009 contract. FIGA is bound by the insurance statutes that were in place in 2009.

Section 631.57 provides that FIGA shall be obligated to the extent of covered claims "[p]rior to the adjudication of insolvency." §631.57(1)(a)1.a., Fla. Stat. (2009). Section 631.57(1)(b) also provides that FIGA "shall have all rights, duties, defenses, and obligations of the insolvent insurer as if the insurer had not become insolvent." If that is so, why would the 2011 definition of "covered claim" in section 631.54 apply to this case, when the "covered claim" is defined in a 2009 contract? Under section 631.54, Florida Statutes (2009), FIGA made a promise to De La Fuente that, if HomeWise **becomes** insolvent, FIGA will

guaranty the "covered claim" payments to De La Fuente, based on the definitions and terms of his 2009 insurance policy, and the terms and conditions of controlling 2009 Florida insurance law. *See Menendez*, 35 So. 3d at 876.

One judge on the Second District recently expressed his concerns about the court's decision in *Florida Insurance Guaranty Ass'n v. De La Fuente*, 158 So. 3d 675 (Fla. 2d DCA 2015). In *Florida Insurance Guaranty Ass'n v. Lustre,* 163 So. 3d 624 (Fla. 2d DCA 2015), Judge Altenbernd explained the issues he had with the definition of a "covered claim" under section 631.54(3) in the Court's *De La Fuente* decision:

> [T]o establish the "covered claim" that is used to determine the guaranteed payment by FIGA under section 631.57, one starts with an "unpaid claim" that arises out of and is within the coverage of the relevant insurance policy. § 631.54(3). The unpaid claim is normally determined using roughly the same adjusting procedures that would have been used by the insurance company if it had not become insolvent. In this adjusting process, FIGA has all of the "rights, duties, defenses, and obligations" that the insurance company had under the relevant insurance policy. *See* § 631.57(1)(b).

Lustre, 163 So. 3d at 631 (Altenbernd, J., concurring). Judge Altenbernd's concerns are resolved if this Court simply follows its own prior decisions. FIGA's definition of "covered claim" that applies to the 2009 insurance policy at issue in this case arises for the 2009 contract and the 2009 definition for "covered claim." *See* §631.54(3), Fla. Stat. (2009). FIGA is a representative party, similar to a trustee or guardian, "standing in the shoes" of the insolvent insurer, HomeWise.

The most ironic part about FIGA's argument to this Court (and FIGA's argument in *Bernard* and *De La Fuente*), is its interpretation of *Florida Insurance Guaranty Association, Inc. v. Devon Neighborhood Association, Inc.*, 67 So. 3d 187 (Fla. 2011), a case where FIGA prevailed in advancing **the exact opposite argument** in this Court. In *Devon*, FIGA demanded appraisal, under a clause in the insolvent insurer's policy. That clause was unenforceable at the time of the insurer's insolvency. **FIGA prevailed**, arguing a 2005 amendment did not apply to the insured's 2004 claim, even though the insurer's insolvency occurred in 2006.

The *Devon* case involved a Hurricane Wilma claim and a 2004 insurance policy issued by Devon's original insurer, Southern Family Insurance ("Southern Family"). *Devon*, 67 So. 3d at 189. Southern Family became insolvent and was placed in receivership in April 2006. *Id.* at 190. FIGA assumed responsibility for Devon's claims on that date. *Id.*

In January 2008, Devon submitted supplemental claims to FIGA totaling $4.8 million dollars. *Id.* Shortly thereafter, Devon filed suit against FIGA. *Id.* FIGA answered the complaint and demanded an appraisal of the claimed loss under the appraisal provision contained in the 2004 policy between Devon and Southern Family. *Id.* Devon objected to the appraisal process because it had not been provided with a notice of the availability of mediation--a notice requirement that was imposed by a 2005 amendment to section 627.7015, Florida Statutes

(more than a year before Southern Family's insolvency). *Id.* FIGA argued that section 627.7015 did not apply because the portion of the statute that precluded an insurer from demanding appraisal, if it failed to provide notice, did not go into effect until 2005--one year after the policy was issued. *Id.* at 193.

In *Devon,* FIGA argued to this Court **the exact opposite** argument it presented in the district courts in *Bernard* and *De La Fuente*. Based on FIGA's arguments in *Devon,* this Court held that "the 2005 amendments may not be applied retroactively to the 2004 policy of insurance in this case to bar FIGA's right to enforce the appraisal provision in that contract." *Id.* at 197.

In *Bernard,* the First District justified FIGA's conflicting position in *Devon,* citing three reasons: (1) "the citation to the general rule reaffirmed in *Menendez* was included in a footnote in the part of the Court's opinion . . . [and] was effectively dicta . . ."; (2) "[t]here is nothing in the courts' [*Devon*] opinions suggesting that either court was asked to consider whether the 2005 statute was being applied prospectively, and not retroactively, because FIGA's responsibilities were not triggered until 2006 when the insurer was adjudicated insolvent.;" and (3) the Court did not need to determine in [*Devon*] if the claim at issue was a "covered claim" under the FIGA Act because FIGA had already accepted responsibility for the claim." *Bernard*, 140 So. 3d at 1032-33.

First, both *Bernard* and *Devon* thoroughly analyzed the *Mendendez* test for the retroactive application of a statute; this Court did **not** discuss the *Mendendez* test in a footnote in *Devon*. Second, the question of whether this Court considered the insolvency issue in *Devon* is simple: FIGA, as the appellant and petitioner, failed to raise that issue in that appeal, and now raises the opposite argument in this appeal. Third, FIGA accepted responsibility for De La Fuente's 2009 sinkhole claim in this case; but did so based on its new argument--that its obligations to De La Fuente arise only **after** HomeWise's insolvency (opposite from its *Devon* position). None of those reasons explain or justify why FIGA has taken conflicting legal positions in this case, to the detriment of De La Fuente.[1]

B. FIGA's Guaranty of De La Fuente's 2009 "Covered Claim," Arising Under HomeWise Insurance's Contract, Did Not Arise On The Date of HomeWise's Insolvency

In 1970, the Florida Legislature created FIGA, the "Florida Insurance Guaranty Association." Before the creation of FIGA, the State Treasurer or a court-appointed receiver would address the rehabilitation and liquidation of licensed insureds. *See Vanderhost v. Knott*, 159 Fla. 394 (Fla. 1947); *Springer v. Colburn*, 162 So. 2d 513, 514 (Fla. 1964). In 1970, the Legislature streamlined an

[1] In *Blumberg v. USAA Cas. Ins. Co.*, 790 So. 2d 1061 (Fla. 2001), this Court explained that a position taken in a former judicial proceeding should estop the party from asserting a conflicting position in a subsequent judicial proceeding, to the prejudice of the adverse party. *See id*. at 1064. FIGA is consistently taking this conflicting position, to the prejudice of De La Fuente and other insureds.

existing rehabilitation and liquidation system, by creating a symbiotic relationship between Florida's Department of Financial Services and FIGA, a non-profit organization assist in the rehabilitation and liquidation of licensed insureds. FIGA has four statutory purposes: (1) pay covered claims under certain insurance policies to avoid excessive delay and avoid financial loss to insureds; (2) assist in the detection and prevention of insurer insolvencies; (3) create a nonprofit corporation to administer and supervise the operation; and (4) assess the cost of such protection among insurers. § 631.51, Fla. Stat. (2009).

FIGA claims its obligation regarding HomeWise began on November 4, 2011, the date that a Leon County trial court granted a petition, filed by the Florida Department of Financial Services, finding HomeWise Preferred Insurance Company insolvent. *See* R3 473-89. However, according to this record, there was a prior order, arising from the same petition, granting an automatic stay for all HomeWise lawsuit or judgments, dated September 2, 2011.

Both of those two orders arise from a petition, filed by the Department of Financial Services on August 11, 2011, seeking to find HomeWise insolvent. *See* www.myfloridacfo.com/Division/Receiver/company_pdf/536/536Petition.pdf.[2] Attached to that petition is a unanimous Resolution of the Board of Directors of HomeWise Preferred Insurance Company **dated September 2, 2010** --one year

[2] A courtesy copy of this petition, as found on the internet, is filed as an appendix to this Reply Brief.

before the petition was filed--requesting the State to immediately appoint a Receiver for HomeWise, for the purposes of Rehabilitation or Liquidation, without further notice or hearing, and waiving any and all rights to notice and hearing. *See id.* at Exhibit "A."

Under controlling Florida law, the department may petition for an order of rehabilitation or liquidation when "the insurer: (1) [i]s impaired or insolvent; . . . or (11) has consented to such order through a majority of its directors, stockholders, members, or subscribers." § 631.051, Florida Statutes (2009). FIGA "shall be given reasonable written notice by the department of all hearings which pertain to the adjudication of insolvency of a member insured." §631.021, Fla. Stat. (2009).

Given those undisputed facts, when did FIGA's statutory obligation to the 750 Florida citizens who incurred over $140 million in sinkhole damages, arise based on HomeWise's insolvency? Since 1970, FIGA is required to avoid financial loss to policyholders because of a member's insolvency, and detect and prevent insurer insolvencies. All Florida citizens (including De La Fuente), who purchased insurance coverage from a licensed Florida insurers, expect FIGA to carry out its statutory obligations. These obligations were in place: a) in 2009, when De La Fuente paid HomeWise for sinkhole insurance; b) on September 2, 2010, when the HomeWise Board of Directors unanimously declared the company was unable to pay its insureds, and notified the State of Florida; d) on November

12, 2010, when De La Fuente sued HomeWise, e) in December 2010, when HomeWise answered the complaint, and refused to pay De La Fuente's valid, confirmed sinkhole claim. To assert FIGA's statutory obligations regarding HomeWise's insolvency did not arise until November 4, 2011, ignores these staggering facts, the plain language of the policy, and controlling Florida law.

De La Fuente agrees that, under Florida's statute of limitations, De La Fuente had one year from November 4, 2011, to bring his existing claim to FIGA's attention. However, De La Fuente asserts that his "covered claim," as defined in section 631.54(3), began in 2009 when he purchased sinkhole insurance. In 2009, FIGA guaranteed De La Fuente's policy if and when HomeWise later "becomes" insolvent. § 631.54(3), Fla. Stat. (2009). De La Fuente's claim became an "unpaid claim" in 2010, arising out of and within the coverage of the relevant insurance policy. Under section 631.57, FIGA is obligated to pay that "covered claim" that exists "prior to the date of the [insurer's] insolvency." Nowhere in the statute or the legislative history did the Legislature determine that a "covered claim," defined by an insurance contract, should be guaranteed by FIGA at some arbitrary future date--the date of the judicially-recognized "insolvency." In this case, that arbitrary date, November 4, 2011, was a year **after** the State received written notice from HomeWise, a licensed Florida insurer--one that cannot pay its insureds' obligations. HomeWise was $140 million short, but no one told De La Fuente.

II. SECTION 631.54(3)(c) IS UNCONSTITUTIONAL AS APPLIED TO DE LA FUENTE'S LAWSUIT AGAINST FIGA, AS THE GUARANTOR OF HOMEWISE'S 2009 INSURANCE POLICY

A. De La Fuente's Constitutional Arguments Are All Fully Preserved For Appellate Review By This Court

FIGA claims that De La Fuente's constitutional arguments are not preserved for appellate review. FIGA is flat wrong. De La Fuente stands on all constitutional arguments timely raised in the Second District and in this Court.

To begin with, there was no reason to raise any of these constitutional arguments in the trial court because the trial court (correctly, in our view) held in the Final Judgment on appeal 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 June 1, 2009 and expired on June 1, 2010.

R7 1100-01. When FIGA appealed this ruling to the Second District, FIGA failed to raise any of the constitutional issues that the trial court expressly asserted in the order on appeal, following this Court's *Menendez* and *Hassen* decisions. R7 990.

The *Bernard* case had not been decided when the briefing in this case was completed. Nevertheless, De La Fuente raised several constitutional issues in the Answer Brief. *See* AB at 24-27. When the Second District's written opinion in this case was issued, reversing the trial court's ruling, that was **the first time** any court allowed the application of section 631.54(3)(c), Florida Statutes (2011) to this lawsuit--a 2009 insurance contract dispute. The Second District, sua sponte,

prepared two certified questions. Rather than seeking discretionary review, De La Fuente raised every constitutional argument in a Motion for Rehearing, to provide the Second District an opportunity to rule on those arguments that De La Fuente was never given an opportunity to present. FIGA responded to the Motion for Rehearing (and filed it in this Court with its Answer Brief).

FIGA's claim that these constitutional issues were not timely or properly preserved has no merit. De La Fuente agrees with the trial court's holding--a 2011 substantive sinkhole statute does not apply to a 2009 insurance contract. Any contrary ruling violates De La Fuente's Florida and federal constitutional rights.

B. FIGA's Argument Challenging De La Fuente's Florida "Access to Courts" Constitutional Provision Is Misplaced

FIGA asserts the insureds' cannot argue the 2011 Florida Legislature's statute changes to Chapter 631 violate their "access to courts" rights because FIGA was not created until 1970, which was after adoption of the 1968 Constitution of the State of Florida. *See Kluger v. White*, 281 So. 2d 1, 4 (Fla. 1973); see also AB at 36-37. FIGA cites to a Third District case, which states:

> Since, absent Chapter 631, FIGA would not exist and there would be no effective remedy to recovery 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.

Fernandez v. Fla. Ins. Guar. Ass'n, 383 So. 2d 974, 976 (Fla. 3d DCA 1980).

FIGA is misapprehends the Third District's statement in *Fernandez* for two reasons. First, Chapter 631 was enacted in 1959, entitled "The Insurer's Rehabilitation and Liquidation Act." Indeed, insureds of insolvent insurers have had a statutory right to file their claims post-insolvency since the 1930's. *See* IB at 31. All of those rights preceded Florida's 1968 Constitution.

Second, Fernandez attempted to assert a first-party "bad faith" claim against FIGA. However, the Legislature created a first-party bad faith cause of action by an insured against the insurer in 1982, when it enacted section 624.155 Florida Statute (Supp. 1982). *See State Farm Mut. Auto. Ins. Co. v. Laforet*, 658 So. 2d 55, 59 (Fla. 1995). Hence, *Fernandez* simply demonstrates there cannot be a **bad faith claim** against FIGA because: 1) FIGA is immune from bad faith claims by statute, and 2) bad faith claims **did not exist as a remedy for insureds** before Florida's 1968 Constitution. *See Laforet*, 658 So. 2d at 59.

De La Fuente is not asserting a bad faith claim against FIGA. He is asserting his right as an injured insured to get his sinkhole claim paid under his insurance contract after his insurer refused to pay his claim and was later declared insolvent. This action meets the *Kluger* requirement for "access to courts."

Appraisal is a valid alternative to a jury trial. Eliminating appraisal precludes impartial fact finders deciding the proper remediation for De La Fuente's sinkhole damages. Such preclusion violates De La Fuente's access to courts.

C. Judge Altenbernd's Concurring Opinion in *Lustre,* Questioning The Second District's Decision In This Case, Directly Addresses This Issue, And Should Be Followed

In the decision on appeal, the Court held that 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. *See De La Fuente*, 158 So. 3d at 680-81. The Court observed "both the insureds and FIGA can choose to avail themselves of mediation or neutral evaluation to assist in reaching an agreement without additional litigation." *Id. at 681.*

In *Lustre,* Judge Altenbernd stated in a concurring opinion: "I am not entirely convinced that the statutory provisions for the processing and payment of "covered claims" by FIGA, a nonprofit corporation created to provide a quasi-governmental safety net in the event of an insurance company's insolvency, are so inconsistent with the rights of appraisal provided in the insurance contract that FIGA can avoid its duty to appraise the insurance claim under the contract." *Lustre*, 163 So. 3d at 630 (Altenbernd, J., concurring). "Thus, I am inclined to believe that on the second certified question in *de la Fuente,* 158 So. 3d at 676–677, **this court may have arrived at the wrong answer**." *Lustre*, 163 So. 3d at 630 (Altenbernd, J., concurring). "By eliminating the duty to appraise sinkhole claims under the contract, we are apparently shifting the resolution of disputed sinkhole claims to the courts for complex and possibly lengthy jury trials." *Id.*

Given the language of the statute, a complex and lengthy jury trial would **not** resolve these cases. An appraisal is an approved, fact-finding vehicle that replaces a jury trial. If a jury finds the reasonable cost to fix a sinkhole is $200,000, and the insured has a policy for $150,000, FIGA **still** requires the insured to enter into a contract with a licensed contractor, approved by FIGA, for $150,000 to fix a $200,000 sinkhole. Simple logic demonstrates that sinkhole will **never** be repaired, and the insured will never be properly compensated--the exact opposite of the Legislative intent identified in Ch. 2011-39, Laws of Fla., §21.

CONCLUSION

De La Fuente respectfully requests this Court to reverse the decision of the Second District, reinstate the trial court's holding that the 2011 amendments to section 631.54, Florida Statutes, cannot apply to FIGA's statutory obligations to enforce a 2009 insurance policy, and approve the Final Judgment issued by the trial court. If, however, this Court concludes the 2011 amendments to section 631.54, Florida Statutes (2011), **should** apply to De La Fuente's sinkhole claim, then De La Fuente respectfully requests this Court to hold those statutory requirements are unconstitutional, as applied to him, for any and all of the reasons identified in the Initial Brief and above.

Respectfully submitted,

/s/ Robert E. Biasotti

Robert E. Biasotti
Florida Bar No. 0104272
bob@biasottilaw.com
Christine R. O'Shea
Florida Bar No. 113047
christine@biasottilaw.com
BIASOTTI AND ASSOCIATES
5999 Central Avenue, Suite 303
St. Petersburg, FL 33710
Tel: 727-823-8811
Fax: 727-823-8801

ATTORNEYS FOR PLAINTIFFS, LEANDRO DE LA FUENTE AND ANA DELIA GARCIA

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of this Reply Brief was electronically filed and furnished by e-mail to the persons identified below, on September 14, 2015.

/s/ Robert E. Biasotti
By: _____
Robert E. Biasotti
Florida Bar No. 0104272

Lucas B. Austin
GROELLE & SALMON, P.A.
Waterford Plaza
7650 W. Courtney Campbell Causeway
Suite 800
Tampa, Florida 33607
laustin@gspalaw.com
Attorney for Respondent/Defendant, FIGA

G. William Bissett, Jr.
KUBICKI DRAPER
City National Bank Building
25 West Flagler Street, Penthouse
Miami, Florida 33130
WB-KD@kubickidraper.com (E-service only)
wb@kubickidraper.com (Regular)
Attorney for Respondent/Defendant, FIGA

Donna B. DeVaney Stockham
STOCKHAM ACKLEY
707 N. Franklin Street, 2nd Floor
Tampa, FL 33602
dstockham@stockhamackley.com
mcassida@stockhamackley.com
Attorney for Petitioners/Plaintiffs,
Leandro De La Fuente and Ana Delia Garcia

CERTIFICATE OF COMPLIANCE

I HEREBY FURTHER CERTIFY that the type size and style used throughout this brief is 14-point Times New Roman, double-spaced, and that this brief fully complies with the requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

/s/ Robert E. Biasotti
By: _____
Robert E. Biasotti
Florida Bar No. 0104272