

**IN THE SUPREME COURT OF FLORIDA
CASE NO. 95,889**

First District Court of Appeal Case no. 98-334

BONNIE ROSEN,
Petitioner,

vs.

THE FLORIDA INSURANCE GUARANTY ASSN., INC.,
Respondent

RESPONDENT'S BRIEF ON THE MERITS

Respectfully submitted,

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INTRODUCTION

The First District opinion from which appeal is taken, case no. 98-334, reported at *Rosen v. Florida Insurance Guaranty Assn.*, 734 So. 2d 491 (Fla. 1st DCA 1999), affirms a final summary judgment in favor of the Florida Insurance Guaranty Association (herein called “FIGA”), entered by Judge Frederick Buttner of the Duval County Circuit Court. The appellate opinion holds that third-party claimant Bonnie Rosen [hereafter “Rosen”] is not entitled to pursue a claim against the guaranty association after she has released the insured party from any legal obligation to pay her claim. The First District did not pass upon a second basis for the trial court’s decision, namely, that the policy limits had been exhausted where the underlying insurance policy had a “declining balance” clause, and the total expended for defense and settlement had reached the guaranty association’s statutory limit. The original record consists of the pleadings, court orders, and four depositions which are separately bound. References to those depositions will include the name of the deponent and the page numbers. Transcripts of two hearings, filed by Rosen as supplements to the record, will be cited by date and page number. References to the other portions of the record will be in the form [R- 1]. The parties will be referred to by name.

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STATEMENT OF THE CASE AND FACTS

In a declaratory action below, appellant Rosen sought further payment from

FIGA in addition to a \$39,000.00 monetary settlement which had previously been paid to her in her underlying claim against FIGA's insured. The declaratory action was brought in Duval County. Both parties promptly moved for summary judgment on the same issues, and FIGA prevailed. The trial judge issued a detailed final order explaining the bases for his rulings [R 231-242]. As the final order recited, based upon the uncontested facts presented in the pleadings, depositions, and hearings, Rosen had originally sued AB Law Firm,¹ its principal and one employee in Dade County, alleging causes of action for breach of contract, criminal fraud, breach of fiduciary duty, negligent supervision, conversion, and intentional infliction of emotional distress. She sought compensatory and punitive damages [R 82-98]. The Dade County lawsuit and related litigation were originally defended by Rumger Insurance Co., which had issued a professional liability policy to AB Law Firm [R 2,12]. The Rumger policy, in a face amount of \$1 million, specifically excludes coverage for injuries maliciously inflicted, and for dishonest, intentional, fraudulent, malicious or deliberate wrongful acts [R 29-49]. It likewise restricts the duty to indemnify to "all sums which the INSURED must legally pay as DAMAGES because of a WRONGFUL ACT" within the coverage [R-34]. From the outset, Rumger defended under a reservation of rights, as nearly all of

¹Pursuant to the settlement, as will be explained below, the identity of the original insured is protected, and the pseudonym "AB Law Firm" has been used in the subsequent litigation between Rosen and FIGA.

the claims were outside the policy coverage. FIGA, when it had to assume the defense after Rumger's insolvency, also defended under a reservation of rights [Allen depo, p. 41].

The most crucial fact in this case is that the Rumger policy was of the "declining-balance" type, specifically providing that claims expenses including attorney fees and costs are subtracted from the amount available for indemnity [R 37; Allen depo, pp. 41-44]. The policy defines "claims expenses" to include attorney fees, as well as "all other fees, costs and expenses resulting from the investigation, adjustment, defense or appeal of a CLAIM incurred by us" [R-33]; it states that "CLAIMS EXPENSES are included within the limits shown in the Declarations and not in addition to them," and also explains, "We will subtract all CLAIMS EXPENSES from the limit applicable to each CLAIM, the remainder being the amount available to pay damages" [R -37]. Further, "If the limit is exhausted before the conclusion of any CLAIM, we have the right to withdraw from further defense of the CLAIM. We will do this by tendering control of the defense to YOU. OUR payment of, or OUR offer to pay, the limits available to any CLAIM ends OUR duty to defend or settle" [R-34].

Rosen contended that the "declining balance" provisions should be wholly disregarded after Rumger's insolvency, and that the defense of AB Law Firm would have to consume in excess of \$700,000 before FIGA's \$300,000 "per claim" statutory limit

could begin to decline [R 3-4]. FIGA contended that it was obligated only for a total of \$300,000 under this particular policy, all of which had been expended in defense and indemnity prior to the initiation of the Duval County action.

The judge found, based upon the stipulations of both counsel, that Rumger itself had expended close to \$200,000 in defense costs, before it was declared insolvent and liquidated by order of the Leon County Circuit Court on May 26, 1994 [R 3, 13, 232]. When the insolvency order was entered against Rumger, which triggered FIGA's statutory obligation to assume the defense of "covered claims," FIGA retained the law firm of Walton, Lantaff, Schroeder & Carson to defend AB Law Firm and the two individuals in the litigation with Rosen [Tharp depo, p.4; Cole depo. p. 13]. Unfortunately, the litigation was extremely contentious. By the time Rosen's Dade County case was on the eve of trial, FIGA itself had spent another \$261,000 for defense [R 3, 12]. The trial, if it went to the bitter end, could have lasted two to four weeks. However, AB Law firm's attorneys at the Walton, Lantaff firm thought there was a good chance for directed verdict on the covered claims, which would have made the trial perhaps one week long [Tharp depo, pp. 8-10; Kissane depo, p. 10].

FIGA's adjuster, Sam Allen, testified that for this declining-balance policy, "we do have a duty to advise the insured where he is in the point as to coverage under the policy" [Allen Depo., p. 28]. Advice regarding the balance was given to AB Law Firm

approximately four times during the course of the litigation [Id., p. 39]. When the remaining funds dropped below \$100,000, "the insured took it upon himself to attempt to settle this case" [Allen Depo., p. 28]. FIGA did not interfere with these efforts, because they were beneficial to the insured, Id. Rosen has not alleged that the insured party disputed FIGA's interpretation of the policy. The letters to the insured reporting the balance informed AB Law Firm that if the entire \$300,000 were used up, AB would be "obligated to take on the responsibility of providing its own defense" [Deposition of Sam Allen, pp. 39-40], which was strictly in accordance with the policy provision allowing the insurer to tender control of the defense to the insured when the limit was exhausted.

However, Allen did not know exactly what he would have done if the funds ran out before the matter was fully concluded. "At some point, we would have had to have abided by the terms of the policy and FIGA statutes and terminated defense, if that, somehow. Now, how that would have happened, I cannot tell you that. I have not had a situation like that" [Allen depo. p. 16]. The three members of the Walton, Lantaff defense firm who were deposed all testified that they had never been told to terminate their defense of AB Law Firm. So far as they knew, a final decision had not been made as to what would happen if the money ran out before resolution [Tharp depo, p. 17; Cole depo. pp. 17-21; Kissane depo, p. 12]. Richard Cole, the managing partner,

explained that FIGA could have made a business decision to finish out an ongoing trial, or otherwise expend somewhat more than \$300,000 total in order to avoid possible problems in the future [Cole depo, pp. 17-21]. Insurers sometimes continue a defense where they believe coverage may not exist, and may later seek reimbursement of defense costs.

Shortly before the trial, Rosen and the principal of AB Law Firm finally managed to hammer out a settlement agreement [Kissane depo, pp. 5-6]. Members of the Walton, Lantaff firm formalized the agreement, though their insured and his personal counsel were the ones who negotiated it [Kissane depo, pp. 14, 22]. FIGA consistently refused to comment on any of the terms of the agreement [Allen depo., pp. 32,42; Cole depo, pp. 27-30; Kissane depo, p. 18]. "FIGA had no input into the document at all, none" [Cole depo, p. 27]. "FIGA was not going to take a position relative to the contents of the agreement...FIGA did, however, agree to pay \$39,000" [Kissane depo, p. 18]. The essential terms of the agreement were that AB Law Firm would consent to the entry of a net judgment of \$300,000 against it. However, Rosen would accept the remaining \$39,000 from FIGA and would agree that the judgment against AB Law Firm could not be recorded, could not create any liens, could not even be mentioned or discussed, and could never be executed upon. Further, after she completed any litigation against FIGA, Rosen would be absolutely and unconditionally

required to satisfy the judgment and release AB Law Firm even if she had failed to recover another penny. Any lawsuit against FIGA had to avoid using the real name of AB Law Firm and had to be brought in Duval County. There was a statement that nothing in the agreement was intended to prejudice any "potential claim, whether valid or invalid, that Bonnie Rosen may decide to pursue as against FIGA" [R 174]. There was no assignment by AB Law Firm of any of its own rights against FIGA [R 161-76, 233-36].

Rosen's own counsel recognized that this arrangement might fail to create any rights for Rosen against FIGA, and asked attorney Tharp to inquire of FIGA whether it would agree to waive the defects in the settlement. A letter to FIGA dated December 30, 1996, which Rosen's counsel (who had received a courtesy copy) showed to Tharp at his deposition, and which Tharp then read into the record, stated:

There is a snag in the settlement agreement. The plaintiff's attorney is of the opinion, based upon the language in the settlement agreement, that preventing the recordation of the judgment against AB and the execution on such a judgment would render the plaintiff's claim against FIGA meaningless. Therefore he would like to have a letter from FIGA that says, quote, FIGA agrees that recordation of a judgment or execution of a judgment will not be asserted as defenses to any suit brought by Bonnie and Arnold Rosen and are waived, end quote. Is there a problem with issuing a letter waiving these defenses? Please call me in order to discuss this.

[Tharp depo, p. 13]

The settlement agreement was signed less than a week after this letter, on January 4, 1997 [R 175].

The three Walton, Lantaff attorneys clearly explained that their relationship with FIGA was the typical insurance-defense situation--they were obliged to defend the insured and report the progress of the case to the insurer, but their primary duty was to the insured. They had no part in any coverage issues which could have arisen between AB Law Firm and FIGA, and did not have authority to represent FIGA as to coverage matters [Tharp depo pp. 17-19; Cole depo pp. 33-41; Kissane depo pp. 23-25]. Attorney Cole reviewed various drafts of the settlement agreement before it was signed:

Q: In reviewing, if not drafting, these preliminary settlement agreements, whom were you representing?

A: The defendants.

Q: Were you representing FIGA as well?

A: No. FIGA was told by me specifically that we were not going to become involved in any manner at all relating to issues that FIGA might have with the defendants and/or the plaintiffs, and FIGA readily agreed and understood that that was the way it was going to be.

[Cole depo, p. 10]

AB Law Firm, which had its own personal counsel, dealt directly with FIGA on coverage issues [Cole depo pp. 29-30, 37-38]. Tharp indicated that both FIGA and AB Law Firm were his clients [Tharp depo, p. 12], but he signed the settlement agreement

"in my capacity as the attorney for AB" [Tharp depo. p. 6]. FIGA simply did not prohibit him from signing [Id.] Cole explained that he took no interest in whether Rosen would be able to state a cause of action against FIGA, because he was representing the interests of AB and its employees. "We were not representing the interests of FIGA" [Cole depo, p. 42]. Kissane was asked, "Did the signature of the law firm at the end of this signify that the Guaranty Association has agreed to the contents of that document?" He responded, "Absolutely no. As I said earlier...the Guaranty Association did not agree to the contents of this settlement agreement. What they agreed to do was pay a certain sum in an effort to resolve the matter" [Kissane depo, p. 25]. "We had absolutely no authority to bind FIGA...relative to this agreement" Id., p. 27].

However, Walton, Lantaff did facilitate direct communications on coverage matters when asked [Cole depo, p. 27; Tharp depo. p. 14]. FIGA's consistent response to the above-quoted "snag in the settlement" letter, and to every other inquiry about the settlement language, was a firm "no comment." "We did not object to the agreement, and we did not waive any rights under the policy or the FIGA laws, or the laws as to insolvent insurance companies" [Allen depo. p. 32; also p. 42].

Rosen then sued FIGA in its home venue of Duval County, filing a declaratory action requesting a determination that the "declining-balance" provision of AB Law

Firm's policy could not be enforced after Rumger's insolvency, so that there was a full \$300,000 available for indemnity regardless of how much FIGA had been required to spend in defense of AB Law Firm. She sought the amount remaining unpaid on her consent "judgment," \$261,000 plus attorneys' fees, interest and costs [R 1-5]. FIGA responded that because its insured, AB Law Firm, was not and never could be "legally obligated to pay" any sums to Rosen, there could be no obligation of indemnity under the policy, even if the limits had not already been exhausted. FIGA further pointed out that the "declining balance" provisions of AB's policy meant that the \$300,000 statutory limit had been fully exhausted and nothing more could be collected from FIGA. Further, FIGA explained that most (if not all) of Rosen's settlement should be apportioned to non-covered claims; that the settlement was not reasonable based upon the true value of Rosen's case; and that Rosen as a stranger to the insurance contract, and not an assignee, had no claim for fees or costs [R 11-15].

Rosen moved for summary judgment [R 60-74] as to the entirety of the claims and affirmative defenses, supported by her own affidavit asserting that the settlement was reasonably related to the value of the case [R 81]. A hearing was held on Rosen's motion on September 2, 1997. Because FIGA's own motion for summary judgment was also pending, the trial judge determined to delay ruling, set a second hearing, and then rule on both motions [Transcript of 11/18/97,p. 3; R 194]. In the interim, Rosen's

counsel completed and filed the depositions of the three Walton, Lantaff attorneys and the FIGA adjuster, Sam Allen, which appear in the record. The court held a second hearing on November 18, 1997. FIGA explained that, as the policy limits were indeed close to exhaustion, it had acted quite properly in warning its insured of that fact, but had nevertheless continued to fulfil its policy obligations, including the provision of a vigorous defense until a settlement was obtained. Since the settlement called for a complete release of the insured party, the insured had no remaining "legal liability" which could possibly be covered under the policy. Therefore, Rosen could not pursue any claim against FIGA in its capacity as successor insurer. Rosen contended that she did not have to preserve any rights to recover against the insured party in settling, because FIGA had committed an "abandonment."

The trial court found [R 231-42], that FIGA had not "abandoned" AB Law firm by simply warning it of the remaining balances. The defense was not prematurely withdrawn. In the absence of such "abandonment," Rosen had no rights against FIGA, because AB Law Firm had no obligation to pay anything to her. Without any damages to AB Law Firm, there was no third-party claim against FIGA. Alternatively, assuming that the warning could have been deemed an "abandonment" if the duty to defend had extended beyond the exhaustion of FIGA's statutory limits, the trial court held that FIGA's actions were not wrongful, as it had *correctly* asserted that the "declining

balance" provisions of this particular Rumger policy continued in effect after the insolvency of the carrier. Since Rumger would have been able to cease defending and tender the defense back to its insured upon exhaustion of the policy limits, FIGA could do likewise. The Court specifically found that the signature of attorney Tharp at the end of the settlement agreement did not represent a consent "as to FIGA" [R 233]. FIGA was not estopped from arguing the foregoing legal defenses merely because a member of the Walton, Lantaff firm was a signatory of the settlement agreement. The "snag in the settlement" letter was quoted in the Order as evidence that Rosen was not misled by FIGA's conduct [R 237-38]. The court noted that there were factual issues as to the reasonableness of the settlement and how it should be allocated between covered and non-covered claims, but there was no need to reach those issues.

The First District, in a *per curiam* opinion, recited the background of the dispute, and then explained:

The trial court granted FIGA's motion, reasoning that because appellant had agreed to release the AB Law Firm at the conclusion of the litigation with FIGA, it had extinguished any liability that FIGA had as an insurer. Thus, the trial court ruled, by agreeing to release the law firm, appellant thereby released the insurer.

We believe this reasoning to be correct in light of two cases that present similar factual scenarios. In *Kelly v. Williams*, 411 So. 2d 902 (Fla. 5th DCA 1982), the insurer offered policy limits to the plaintiff, who thereupon released the tortfeasor with the intention of pursuing a bad-faith claim

against the insurer. The release of the tortfeasor, however, relieved the insurer of any legal obligations to pay damages, as the trial court ruled and the appellate court affirmed.

Kelly was cited in support of the holding in *Fidelity & Cas. Co. v. Cope*, 462 So. 2d 459 (Fla. 1985), which held that a release to the insured eliminates the obligation of the insurer to pay damages, absent an assignment of claim.

The order below is affirmed.

Rosen v. Florida Insurance Guaranty Assn., 734 So. 2d. 491, 492 (Fla. 1st DCA 1999).

The First District also denied Rosen's claim for attorney fees and costs on appeal.

In seeking review by this Court, Rosen now argues that the general principles of insurance law which govern the obligations of insurers, as explained in the opinions of the First District and the trial court, are inapplicable to FIGA.

SUMMARY OF THE ARGUMENT:

Appellant Rosen cannot evade the clear legal consequences of her failure to preserve a claim against FIGA's insured before she unconditionally agreed to release the insured party. Under *Fidelity & Casualty Co. v. Cope*, 462 So. 2d 459 (Fla. 1985), she has no further claim against FIGA. "Covered claims" are interpreted like claims against solvent insurers, except that the limit is "capped." A guaranty association has fewer liabilities than its predecessor, not more, as Rosen contends. This particular

policy unambiguously provided that defense costs are deducted from the liability limits. FIGA thus acted quite properly in warning its insured that the \$300,000 FIGA “cap” for this unusual “declining balance” policy would include the costs of defense. Even if FIGA’s position were not eminently correct, such a warning does not constitute an “abandonment” of the insured where FIGA continued to pay for a vigorous defense until the insured was fully protected. FIGA never agreed to waive its rights to assert any and all defenses to payment, and Rosen knew that there had been no waiver, yet she now takes a contrary position. As a stranger to the contract, Rosen cannot seek attorney fees even if successful, nor can she re-write this “declining balance” policy to suit her own views of what she would like a guaranty association to cover.

ARGUMENT:

I. THE TRIAL COURT AND THE FIRST DISTRICT CORRECTLY DETERMINED THAT UNDER COPE AND OTHER ESTABLISHED LEGAL PRECEDENT, ROSEN’S CLAIM IS BARRED

A. LEGAL PRECEDENTS GOVERNING THE LIABILITY OF SOLVENT INSURANCE COMPANIES ARE GENERALLY APPLICABLE TO A GUARANTY ASSOCIATION, AS WELL; IN PARTICULAR, A GUARANTY ASSOCIATION CAN NEVER BE LIABLE FOR A CLAIM WHICH ITS PREDECESSOR INSURER COULD NOT HAVE BEEN COMPELLED TO PAY

Rosen argues inconsistently that a guaranty association must be treated exactly like an insurance company in determining its duty to defend, but unlike the insurance company, it cannot enforce the unambiguous "declining-balance" clause in the policy, nor can it assert the defense of "release." Her argument is based upon a misunderstanding of the statutory rights and liabilities of a guaranty association, and of the difference between a guaranty association and an insurance-company receiver.

1. AN INSURANCE GUARANTY ASSOCIATION HAS FEWER OBLIGATIONS THAN THE INSOLVENT CARRIER WOULD HAVE HAD, BECAUSE IT IS MERELY A "SAFETY NET" TO CUSHION THE IMPACT UPON THE PUBLIC WHEN AN INSURER FAILS, AND BECAUSE IT ULTIMATELY DERIVES ITS FUNDING FROM THE POLICYHOLDERS OF SOLVENT COMPANIES

An insurance guaranty association is a creature of statute, intended to alleviate, but not eliminate, the public harm caused by insurance-company insolvencies. Its coverage is restricted, because its funding is restricted. Rosen correctly states that guaranty association statutes are derived from proposed uniform statutes originally drafted by the National Association of Insurance Commissioners. However, they are considerably newer than insurance-liquidation statutes, which began with uniform acts drafted in the 1930's. The Florida Insurance Guaranty Association Act was adopted in 1970. Thus, the number of legal precedents involving guaranty associations are relatively few. FIGA, the first guaranty association created in Florida, covers only property and casualty insurance. Subsequent guaranty associations have been created for health

insurance, and for workers' compensation insurance. Guaranty associations have no receivership functions. Pursuant to Part I of Chapter 631, Florida's version of the Uniform Insurers Rehabilitation and Liquidation Act, the Receiver of AB Law Firm's insolvent malpractice insurer, Rumger (also called Manatee Insurance Co.), is the Florida Department of Insurance (see Order of Liquidation, R 16-28; Fla. Stat. sec. 631.141 (1999), *not* FIGA or one of the other guaranty associations.²

A guaranty association derives its operating funds from assessments levied upon its member insurers, but it may assess only for "covered claims" and reasonable administrative expenses, sec. 631.57, Fla. Stat. (1999). The members, in turn, pass on these assessments to their policyholders as a cost of doing business. Accordingly, the insurance-buying public ultimately bears the cost of paying an insolvent insurer's claims. If guaranty associations were responsible for claims which the underlying insurers

²An insurance-company receiver must cooperate with a guaranty association because the receiver initially takes possession of the company records which the guaranty association needs to process claims, Fla. Stat. secs. 631.141, 631.395 (1999). The guaranty association becomes a claimant in the receivership as to amounts that it is obliged to pay out, Fla. Stat. secs. 631.181, 631.271; therefore, the receivership cannot be fully resolved until the guaranty association completes its work, so that the total amount of the losses from the insolvency can be finalized. A guaranty association may receive an early distribution if the estate has assets, subject to re-evaluation when all claims are known, Fla. Stat. sec. 631.397. Despite these many areas of cooperation, a guaranty association is a wholly separate entity whose rights and liabilities are distinct from those of the receiver. In structure, FIGA and its sister guaranty associations are corporations, governed by their own Boards of Directors, Fla. Stat. sec. 631.56 (1999).

could have avoided, as Rosen advocates here, there would be a windfall to certain claimants, at the expense of the public. In order not to impose too great a burden on the remaining insurers and their policyholders, every guaranty association has a dollar limit upon its claims and excludes many types of claims.

FIGA, like most guaranty associations, benefits from a shortened statute of limitations which precludes some meritorious claims, as explained in *Queen v. Clearwater Electric Co.*, 555 So. 2d 1262 (Fla. 2d DCA 1990), wherein the court remarked that shortening the time which a claimant would otherwise have to file his action, in order to accomplish the timely and orderly liquidation of a defendant's insurer, was a "reasonable restriction" upon the right of access to the courts.³

Like other guaranty associations, FIGA cannot pay "bad faith" claims which would be valid against solvent insurers--not even claims for the bad faith conduct of the predecessor company before the insolvency--pursuant to Fla. Stat. secs. 631.57(1)(b) and 631.66 (1999), *Fernandez v. Florida Insurance Guaranty Assn.*, 383 So. 2d 974 (Fla. 3d DCA 1980); *Rivera v. Southern American Fire Ins. Co.*, 361 So. 2d 193 (Fla.

³Accord, *Blizzard v. W.H. Roof Co., Inc.*, 573 So. 2d 334 (Fla. 1991); *Montano v. Florida Insurance Guaranty Association*, 535 So. 2d 658 (Fla. 3d DCA 1988); *Florida Insurance Guaranty Association, Inc. v. Garcia*, 614 So. 2d 684 (Fla. 2d DCA 1993); *Miller v. Pagodin*, 591 So. 2d 677 (Fla. 4th DCA 1992).

3d DCA 1978).⁴ Also, FIGA is specifically exempted from paying fees assessed against its predecessor insurer where the insured has prevailed and is entitled to fees pursuant to section 627.428, see Fla. Stat. sec. 631.70 (1999).

These examples demonstrate that the guaranty association statutes are not intended to be interpreted so as to always give the maximum coverage to a claimant. Rather, a balance must be struck between the interests of claimants and those of the public who must bear the costs of financing the guaranty association. As explained in the case of *Schreffler v. Pennsylvania Insurance Guaranty Association*, 402 Pa. Super. 309, 312, 586 A. 2d 983, 985 (Pa. Super. Ct. 1991), "the Act does not intend to place a claimant in all cases in the same position she would have been had the insurance company remained solvent. The Act creates a means by which limited recovery may be had in instances where none would have been possible due to insolvency." Florida's Fifth District likewise stated that the guaranty association "was intended to provide a mechanism to pay 'covered claims' under certain insurance policies issued in this state to Florida residents in the event an insurance company becomes insolvent before paying a covered claim to an insured. However, the full gamut of a defunct insurer's liabilities was not intended to be shifted onto FIGA," *Williams v. Florida Insurance Guaranty*

⁴ *Accord*, *Veillon v. Louisiana Insurance Guaranty Assn.*, 608 So. 2d 670 (La. App., 3d Cir. 1992); *Isaacson v. California Insurance Guarantee Assn.*, 44 Cal. 3d 775, 750 P. 2d 297, 244 Cal. Rptr. 655 (Cal. 1988).

Assn., Inc., 549 So. 2d 253, 254 (Fla. 5th DCA 1989).

2. A GUARANTY ASSOCIATION IS ENTIRELY DISTINCT FROM THE RECEIVER OF AN INSOLVENT INSURER; THUS, SECTION 631.193 HAS NO APPLICATION TO THIS CASE

Because the Receiver and FIGA are not the same legal entity, Rosen is entirely incorrect in asserting, as she has done consistently throughout this litigation, that the provisions of section 631.193, concerning the Receivership, have anything to do with the issues in this case. At p. 27 of her brief, Rosen states that under that statute, “the filing of a **FIGA claim** constitutes a release of the insured from liability to the claimant to the extent of the coverage or policy limits provided by the insolvent insurer” (emphasis added).

Section 631.193, which is located in Part I of Chapter 631 dealing with Receiverships, and not within the Florida Insurance Guaranty Association Act that begins with section 631.50, provides:

631.193. Releases

The filing of a claim constitutes a release of the insured from liability to the claimant to the extent of the coverage or policy limits provided by the insolvent insurer. The release is conditioned upon the cooperation of the insured with the receiver and the Florida Insurance Guaranty Association and any other guaranty association in defense of the claim. This release does not operate to discharge the Florida Insurance Guaranty Association or any other guaranty association from any of its responsibilities and duties set out in this chapter.

Every case decided under this section clearly indicates that the filing constituting the

release is a filing **with the Receiver** –i.e., the Florida Department of Insurance.⁵ FIGA does not assert, and has never asserted, that its obligations are affected by the filing of a claim with the Receiver, nor that an insured would be released from any obligation whatsoever merely because a claimant seeks payment from FIGA.

Whether or not to seek payment from the Receiver is purely up to the claimant. Filing a claim with the Receiver is an “election of remedies” *see Ramos v. Jackson*, 510 So. 2d 1241 (Fla. 3d DCA 1987). Had she elected not to file a Receivership claim, Rosen could have executed against AB Law Firm for the portion of any judgment on this claim that was not payable by FIGA, *Queen v. Clearwater Electric*, 555 So. 2d 1262 (Fla. 2d DCA 1990). But where a claimant files with the Receivership, the excess portion of the claim unpaid by FIGA (up to the limits of the original coverage) becomes an obligation of the Receivership, and not of the insured. In this case, if Rosen could have obtained a judgment in excess of FIGA’s coverage—an outcome which FIGA believes highly unlikely-- she would have been able to seek payment of the excess from AB Law Firm, **but for** her own decision to file a claim with the Receiver.⁶ That filing,

⁵These cases include *Payroll Transfers Interstate, Inc. v. Forshey*, 694 So. 2d 80 (Fla. 1st DCA 1997) and *In re International Forum of Florida Health Benefit Trust*, 607 So. 2d 432 (Fla. 1st DCA 1982).

⁶ She filed a claim with the Florida Department of Insurance as Receiver, upon a form provided by the Department, in 1994 [R 77-78], three years before her settlement with AB Law Firm in 1997 [R -134]. Notably, the claim papers bear the

if accepted by the Receiver, released AB for all amounts up to its original \$1 million coverage. However, FIGA never relied upon that statutory release in its legal argument, nor did either of the courts below rely upon it. Rather, FIGA has always relied upon the settlement agreement executed by Rosen herself, which requires her to give an unconditional release to AB Law Firm and the covered individuals even if she never receives another penny from FIGA. Since Rosen's agreement establishes that she can never collect anything further from FIGA's insureds, there is no "legal liability" which requires indemnification, regardless of whether she had ever dealt with the Receivership.

3. IN DETERMINING WHAT CONSTITUTES A "COVERED CLAIM" FOR WHICH THE FLORIDA INSURANCE GUARANTY ASSOCIATION CAN BE RESPONSIBLE, THE TERMS OF THE UNDERLYING INSURANCE POLICY ARE CONTROLLING EXCEPT THAT THE LIMIT OF LIABILITY, IF HIGHER THAN ALLOWED BY THE GUARANTY ASSOCIATION STATUTE, IS REDUCED

Pursuant to Fla. Stat. sec. 631.57(1)(b)(1999), FIGA "shall be deemed the insurer to the extent of its obligation on the covered claims, and, to such extent, shall have all rights, duties, and obligations of the insolvent insurer as if the insurer had not become insolvent. In no event shall the association be liable for any penalties or interest." This obligation, however, **"shall include only that amount of each covered claim which**

Department's address and make no mention of a guaranty association; also, the transmittal letter from Rosen's attorney is directed to the Department, not to FIGA [R-76].

is in excess of \$100 and is less than \$300,000..." Fla. Stat. sec. 631.57(1)(a)(2)(1997)(emphasis added). The definition of "covered claim," in sec. 631.54 (3)(1997), is "an unpaid claim...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..." (emphasis added).

FIGA thus inherits the existing insurance policy, except that FIGA's coverage is limited to liabilities up to \$300,000.00 and otherwise payable under the controlling statutes. It acquires any policy defenses, as well as any defenses available under common law, *Florida Insurance Guaranty Assn. v. Giordano*, 485 So. 2d 453 (Fla. 3d DCA 1980); *Carrousel Concessions, Inc. v. Florida Insurance Guaranty Assn.*, 483 So. 2d 513 (Fla. 3d DCA 1986). In regard to coverage defenses, FIGA "stands in the same shoes" as its predecessor insurer, *Peoples v. Florida Insurance Guaranty Assn.*, 313 So. 2d 40 (Fla. 2d DCA 1975). If a claim falls under one of the exclusions of the insurance policy, as where coverage is barred for malpractice claims not timely reported to the carrier, then despite the carrier's insolvency, the exclusion still stands, *Lawyers Professional Liability Insurance Co. v. Dolan, Fertig & Curtis*, 524 So. 2d 677 (Fla. 4th DCA 1988).

The Second District has explained that when interpreting the coverage of the Florida Insurance Guaranty Association Act, which was drafted by "the state insurance

commissioners of this country,...it is reasonable to assume that it was intended to be interpreted under common insurance concepts," *Florida Insurance Guaranty Assn., Inc., v. Cole*, 573 So. 2d 868, 870 (Fla. 2d DCA 1990). In that case, multiple survivors claiming for the wrongful death of a single individual argued that each of them had a separate "covered claim" with a separate \$300,000.00 limit. The appellate court noted, "There is little case law or prior precedent to help this Court understand or interpret the statutory definition of 'covered claim.'" The claimants argued, just as Rosen does, that the statute must always be liberally construed to generate the maximum recovery to injured parties. However, the court rejected that approach in favor of standard insurance principles:

Insurance typically handles personal injury claims on a per person basis--subject to a per accident or per occurrence limitation of liability. It appears appropriate to continue that approach during insolvency. Thus, the \$300,000 statutory limitation for a covered claim in this case applies to the claim of any one person who is injured or killed. Here, there are multiple survivors under the wrongful death act suing for the death of one person caused by the act(s) of a single insured. These survivors are only entitled to a single claim to the maximum of the statutory amount of \$300,000.00 even if the limitation of liability for any one occurrence in the relevant insurance policy provides for more generous coverage.

FIGA v. Cole, supra, 573 So. 2d at 870-71.

Thus, in determining when a claim may be maintained under a policy, we use the same principles for a guaranty association as we would use for a solvent insurer.

4. WHERE THE INSURED IS NOT LEGALLY LIABLE TO PAY A CLAIMANT,

NEITHER THE ORIGINAL INSURER NOR THE GUARANTY ASSOCIATION
CAN BE REQUIRED TO RESPOND UNDER A LIABILITY POLICY

Liability insurance policies require the insurer to pay only damages which the insured is “legally liable to pay,” or similar language. In this case, AB Law Firm’s policy indisputably contained such a clause; it stated, “We will pay on behalf of an INSURED all sums an insured must legally pay as DAMAGES” within the policy coverage [R -34]. The existence of a legal obligation is a condition precedent to invoking the duty of indemnity under an insurance contract which contains any such language, see, e.g., Bentley v. Grange Mutual Casualty Insurance Co., 694 N.E. 2d 526 (Ct. App. Ohio 1997).

Rosen contends, without any authority other than her own interpretation of “statutory intent,” that this ironclad rule of insurance may be disregarded where the original insurer has become insolvent. However, Florida precedent exactly on point establishes that the existence of a legally enforceable obligation against the insured is equally essential where a guaranty association is involved. In *Peoples v. Florida Insurance Guaranty Assn.*, 313 So. 2d 40 (Fla. 2d DCA 1975), a third-party claimant attempted to sue FIGA directly upon a liability insurance policy, and FIGA pointed out that no suit had been commenced against the insured within the statute of limitations. Because the insolvent insurer “would have had to respond under its liability coverage only upon the

establishment of a legal obligation on the part of its insured...to pay damages,” there was no coverage. It was too late to sue the insured. Thus, “it follows that no action may be maintained against Florida Insurance Guaranty Association, Inc.” Citing *Peoples*, the Fourth District reached a similar result in *Troso v. Florida Insurance Guaranty Assn.*, 538 So. 2d 103 (Fla. 4th DCA 1989), holding, “Since appellants are legally barred from pursuing the insured, no action may now be maintained against FIGA.”

The settlement agreement negotiated by Rosen and AB Law Firm’s personal counsel, which was appended to FIGA's cross-motion for summary judgment and was considered by the Court, includes the following specific language:

2. ...a final judgment should be entered in favor of Bonnie Rosen in the amount of two hundred and sixty one thousand (\$261,000) dollars against only [AB LAW FIRM] with the judgment containing language that the judgment does not create or establish any encumbrance or lien and no one will execute against anyone, including, but not limited to, any of the Defendants in this case...Also the final judgment shall contain language that it does not create or establish any encumbrance or lien and this final judgment is non-assignable by Bonnie Rosen and shall not be recorded by Bonnie Rosen or anyone else unless legally required as a condition precedent to a lawsuit by Bonnie Rosen against FIGA and if legally required will be recorded only in the Clerk of the Court's Minute Book and will not be recorded in the Official Public (real estate) Records unless legally required as a condition precedent to the filing of said lawsuit. Recording, if ultimately required, shall not alter the terms and conditions of the confidentiality agreement contained herein which shall remain in full force and effect. The foregoing is not intended, nor should it be construed, to prejudice the potential claim, whether valid or invalid, that Bonnie Rosen may decide to pursue as against FIGA.

3. With respect to the amount of the final judgment referenced in paragraph no. 2, the only person or entity against whom Bonnie Rosen may attempt to proceed is FIGA...If Bonnie Rosen is unsuccessful in her lawsuit as against FIGA she shall have no recourse against any of the Defendants named in this lawsuit. Her sole and exclusive recourse will be limited to available appellate relief, if any, as to FIGA.

13. When Bonnie Rosen's case against FIGA is concluded and all appeals, if any, are exhausted or the time limitations for same expired, the following shall be done:

.....

b. Bonnie Rosen will immediately give a satisfaction of judgment, if she was successful in collecting the two hundred and sixty one thousand (\$261,000) dollars mentioned in the Judgment in Paragraph no. 2 hereof and/or in the event of a settlement, and if unsuccessful in obtaining monies from FIGA, Bonnie Rosen will give a release from the Judgment mentioned in Paragraph 2 hereof, to [AB LAW FIRM].

27. Notwithstanding anything contained herein to the contrary, that under no circumstances, including but not limited to whether Bonnie Rosen wins, loses or settles her potential lawsuit against FIGA (referenced in paragraph 3 of this Stipulation and Settlement Agreement) will [AB LAW FIRM] ... be responsible to pay any monies whatsoever to, including but not limited to, Bonnie Rosen or any other individual and/or entity nor does the final judgment or anything in this Stipulation or by operation of law create or establish any lien or encumbrance, nor will any lien or encumbrance be on or be created on or against [AB LAW FIRM] including but not limited to on any stock or any asset of whatsoever kind.

[R 121-133]

AB Law Firm is not out of pocket nor is it exposed to any possible liability in the future, or any detriment whatsoever—not even reputation injury. Rosen's "judgment" cannot be assigned. It is not recorded. Even if it were to be recorded, it can create no

lien or encumbrance. It can **never** be executed upon. Nobody is allowed even to mention it. And even if Rosen receives nothing at all from FIGA, she **must** give a release to AB Law Firm. In short, this "judgment" is nothing but an illusion.

FIGA does not disagree with the proposition that if there were a true judgment against AB Law Firm, rather than the sham described above, Rosen could bring a direct action against AB's insurer, or against FIGA as the insurer's successor in interest, to enforce payment up to the limits of the coverage (assuming, of course, that the coverage had not already been exhausted as it was in this case). *Thompson v. Commercial Union Insurance Co.*, 250 So. 2d. 259 (Fla. 1971) established that principle long ago. But if there has been a full release of the insured, and no attempt to preserve a cause of action against the insurer by prior assignment of the action, there is nothing to enforce. The insured has no damages. Damages are an essential element of any third-party claim upon an insurance policy, even where a statute specifically gives the third party a right of action, *Conquest v. Auto-Owners Insurance Co.*, 23 FLW D928 (Fla. 2d DCA 1998) [case no. 96-015141, opinion filed April 6, 1998], rev. den., 728 So. 2d 201 (Fla. 1998)[statutory bad-faith claim pursuant to Fla. Stat. sec. 624.155]. In the leading Florida cases where a third-party claimant has been able to pursue a claim against a carrier despite the insured's having no personal liability--on the basis that the insurer had breached the insurance contract and acted in bad faith,

excusing the requirement for an enforceable obligation against the insured--there was an assignment of the “bad faith” claim prior to the release of the insured, *Steil v. Florida Physicians Insurance Reciprocal*, 448 So. 2d 589 (Fla. 2d DCA 1984); *Shook v. Allstate Insurance Co.*, 498 So. 2d 498 (Fla. 4th DCA 1986). This crucial element was omitted from Rosen’s settlement.

Rosen tries to distinguish the two cases relied upon by the trial and appellate court because they arise in the “bad faith” context, whereas FIGA is not liable for bad faith.⁷ However, regardless of the theory of claim, those cases stand for the unobjectionable proposition that an enforceable legal obligation is a condition precedent to a third party’s direct claim against an insurer for breach of the policy obligations. Obviously, the controlling case is *Fidelity and Casualty Company of New York v. Cope*, 462 So. 2d 459 (Fla. 1985), which holds that no third-party claim can be maintained if the insured has obtained an agreement which fully releases it from liability, and did not assign its rights before such agreement became effective. In *Cope*, this Court explained that in a third-party action against an insurer, a cause of action can exist only where there is an enforceable judgment against the insured party, because the third-party action is a derivative claim. If the insured party could not prove damages, then the

⁷Of course, *Steil* and *Shook*, upon which Rosen relies, are likewise bad-faith cases.

judgment creditor cannot have any cause of action. "An essential ingredient to any action is damages," *Cope*, 462 So. 2d at 461. Where the injured claimant has released the tortfeasor without previously obtaining an assignment of his rights against the insurer, there are obviously no damages. "[O]nce an injured party has released the tortfeasor from all liability, or has satisfied the underlying judgment, no such action may be maintained," *Id.* at 459. Even though the claimant in *Cope* did not intend to release one of the insurance companies in its settlement with the other parties, it had done so by extinguishing the liability of the insured. *Cope* was adopted by the Federal Eleventh Circuit in the Florida case of *Clement v. Prudential Property & Casualty Co.*, 790 F. 2d 1545 (11th Cir. 1986).

In *Kelly v. Williams*, 411 So. 2d 902 (Fla. 5th DCA 1982), cited with approval in *Cope*, the defendant's insurer agreed to pay the plaintiff its limit of coverage. In return, the plaintiff covenanted to execute a satisfaction of judgment in favor of the defendant at the conclusion of the litigation, unless a bad-faith claim were commenced against the insurer. If such a claim were pursued, the satisfaction would be executed after conclusion of that matter (regardless of outcome). The defendant could never be responsible for any further sums beyond the \$50,000 already paid. As in the instant case, the contracting parties did not intend to wipe out an excess claim against the insurer, but that was the effect of their agreement. "Under the arrangement stipulated

to by the parties in this case, the insured could not be exposed to an excess judgment under any circumstances. If one was obtained, the insured was entitled to a complete satisfaction of it, as soon as the judgment became final or enforceable," *Kelly*, supra, 411 So. 2d at 904. The insured party suffered no detriment, and the third-party case could not be maintained. The trial court explicitly relied upon *Kelly* in its final order:

Kelly v. Williams, 411 So. 2d 902 (Fla. 5th DCA 1982), cited with approval in *Cope*, supra, is indistinguishable from the case at bar. In *Kelly*, pursuant to a written settlement agreement, the insurer agreed to pay its policy limits to plaintiff Kelly. Kelly promised to satisfy his judgment against Williams (the insured party) within ten days after the conclusion of a bad-faith case against the insurer, regardless of outcome, and he agreed not to execute on any judgment until twenty days thereafter. Thus, Williams could never be required to pay anything. Upon the insurer's motion to dismiss, the appellate court prohibited Kelly from pursuing a bad-faith action, even though the agreement specifically stated that it "will not operate to prevent or hinder Grace B. Williams and/or Plaintiff from filing a legal action against Allstate for alleged bad-faith," and the insurer had been a party thereto. The court explained, "The stipulation completely safeguarded the insured, and therefore it completely discharged the insurer's duty to its insured...Kelly's attempted reservation of his rights against the insurer were not effective, since in the body of the stipulation, the baby was thrown out with the bath water," *Kelly*, supra, 411 So. 2d at 904, 905.... If the insured has no liability, there can be no third-party claim. [R 236-38]

Rosen vainly seeks to preclude the application of *Cope*, *Kelly*, and their progeny, by seizing upon a single sentence of dictum in *Florida Insurance Guaranty Assn. v. Giordano*, 485 So. 2d 453 (Fla. 3d DCA 1986), a case concerning a breach by FIGA

of its contractual duty to defend the insured. On its facts, *Giordano* presents a "textbook" example of how to accomplish this type of settlement in a proper situation. It highlights all of the areas wherein Rosen's own claim is deficient. In *Giordano*, there was an assignment from the insured to the claimant of all rights against the insurer, before any such claims were extinguished by the other terms of the settlement. In addition, the settlement between the insured party and the claimant provided that no satisfaction would be given for a recorded, public judgment, until the judgment was paid in full. In our case, there was no assignment, the judgment is not recorded, and Rosen is bound to give a satisfaction regardless of whether she ever collects anything. In holding that *Cope* did not bar an action by the assignee, Mrs. Giordano, the Third District explained:

In the case at bar, the insured first assigned all of its rights against FIGA to the injured party. That alone takes this case out of *Cope*'s purview. Secondly, there has been no satisfaction of the underlying judgment against the insured, and there won't be any such satisfaction until the entire judgment has been paid in full. As a result, until this cause is resolved, the insured has an unsatisfied judgment and an unsatisfied cost judgment recorded against it. Thirdly, this is not a bad faith action against the insurer and there is no excess judgment involved here. We find that *Cope* does not apply to the instant cause and therefore, Mrs. Giordano, as assignee of the insured, has a cause of action against FIGA.

FIGA v. Giordano, 485 So. 2d at 457

The Third District never explains why it should make any difference whether the action is for bad faith, for failure to defend, or simply to enforce payment under a contract of

insurance, within or in excess of policy limits. The basis for the holding is clearly set forth in the first part of the quoted passage, and the remainder, “this is not a bad faith action against the insurer and there is no excess judgment involved here,” is dictum. Giordano is repeatedly referred to as an “assignee,” which clearly explains the source of her rights.

From this single sentence of unsupported dictum, Rosen inexplicably concludes that (a) an enforceable obligation against the insured is not a prerequisite for a third-party claim against FIGA even though it may be a prerequisite to a claim against any insurer, ignoring *Peoples v. FIGA* and *Trioso v. FIGA*, supra; (b) *Cope* applies only to bad-faith cases, and not to any other type of third-party claim against an insurer, contractual or extra-contractual; and (c) a third party does not need an assignment to preserve a subsequently released claim where the claim is against FIGA rather than against a solvent insurer. None of these three conclusions is supported by logic or by legal precedent. FIGA, like any insurer, can only be obligated to pay a claim that its insured is legally obligated to pay. If the insured is going to be released, an assignment of the claim against the insurer has to occur before the agreement to execute a release is entered into; otherwise, no claim against the insurer will be preserved. These principles, embodied in *Cope*, apply to FIGA exactly as they apply to solvent

insurance companies.⁸

B. FIGA NEVER WAIVED ITS DEFENSES TO A THIRD-PARTY SUIT, EITHER BY ACTIONS OR THROUGH OPERATION OF LAW, AND ROSEN NEVER CONTENDED IN THE TRIAL COURT THAT THERE WERE ANY DISPUTED ISSUES OF FACT ON THIS POINT

In another specious attempt to avoid the consequences of her own release as dictated by *Cope*, Rosen essentially suggests that this Court overruled *Cope* sub silentio when it approved of the specialized arrangement invented by the parties to the case of *Cunningham v. Standard Guaranty Insurance Co.*, 630 So. 2d 179 (Fla. 1994). In *Cunningham*, the insurer and claimant specifically agreed to waive any jurisdictional objections so that the question of whether bad faith had occurred could be litigated even though the underlying liability case had not concluded. Because it was an eminently sensible arrangement in the circumstances, this Court agreed to allow it. However, the case never suggested that the insurer could have been made to pay a claim if the insured had been released from liability; rather, it distinguished *Cope* on

⁸Rosen also cites *Martino v. Florida Insurance Guaranty Assn.*, 383 So. 2d 942 (Fla. 3d DCA 1980) out of context. The case certainly does not hold that FIGA can never contest a settlement or judgment against its insured. In that case, where FIGA had unsuccessfully challenged the underlying judgment, a third party then had an enforceable claim against the insured, and could bring a subsequent action against FIGA. Again, it is not disputed that if Rosen had obtained an enforceable judgment against AB Law Firm, she could have brought suit against FIGA, providing the per-claim limits had not been exhausted. Her problem is that she released the insured without preserving her claim, by assignment or otherwise.

the basis that the “underlying claim no longer existed” in that case. Nor did this Court suggest that in the absence of a specific waiver of defenses by the insurer, a third party could ever bring a claim without having a judgment against the insured.

Rosen unsuccessfully argued below that the signature of the defense counsel who were paid by FIGA constituted an agreement by FIGA to waive any and all defenses to suit by Rosen, because FIGA was aware of the terms of the agreement. The trial court properly rejected that argument, as the agreement does not specifically mention terms such as those in *Cunningham*, FIGA was not a signatory, all of the attorneys specifically testified that they did not have authority to waive any rights of FIGA’s, and the FIGA adjuster likewise testified that he never agreed to waive any rights. It is a basic principle of law that “[t]he party alleged to have waived a right must have had both knowledge of the existing right and the intention of foregoing it,” BLACK’S LAW DICTIONARY, “Waiver” (7th ed. 1999). Mere failure to object to the language of a document does not constitute an agreement to be bound thereby, *Drucker v. Riley*, 707 So. 2d 872 (Fla. 4th DCA 1998).

FIGA consistently refused to comment on any of the terms of the agreement that Rosen was negotiating with AB Law Firm [Allen depo., pp. 32,42; Cole depo, pp. 27-30; Kissane depo, p. 18]. "FIGA had no input into the document at all, none" [Cole depo, p. 27]. "FIGA was not going to take a position relative to the contents of the

agreement...FIGA did, however, agree to pay \$39,000" [Kissane depo, p. 18]. AB Law Firm had its own personal counsel who dealt directly with FIGA on coverage issues [Cole depo pp. 29-30, 37-38]. Further, Rosen was never misled by FIGA as to its position. Rosen's own counsel **knew** that that the agreement did not constitute a *Cunningham* arrangement, and tried unsuccessfully to obtain additional concessions. He specifically told Walton, Lantaff attorney David Tharp to ask FIGA whether it would agree to waive the defects in the settlement, and Tharp did so:

There is a snag in the settlement agreement. The plaintiff's attorney is of the opinion, based upon the language in the settlement agreement, that preventing the recordation of the judgment against AB and the execution on such a judgment would render the plaintiff's claim against FIGA meaningless. Therefore he would like to have a letter from FIGA that says, quote, FIGA agrees that recordation of a judgment or execution of a judgment will not be asserted as defenses to any suit brought by Bonnie and Arnold Rosen and are waived, end quote. Is there a problem with issuing a letter waiving these defenses? Please call me in order to discuss this.

[Tharp depo, p. 13]

Although no such assurances were forthcoming, the settlement agreement was signed less than a week after this letter, on January 4, 1997 [R 175].

FIGA's consistent response to the above-quoted letter, and to every other inquiry about the settlement language, was a firm "no comment." "We did not object to the agreement, and we did not waive any rights under the policy or the FIGA laws, or the

laws as to insolvent insurance companies" [Allen depo. p. 32; also p. 42]. Rosen offered no evidence at all to indicate that anything FIGA had done led her to believe FIGA would not assert the necessity for its insured to become "legally obligated" upon a consent judgment. The trial court specifically noted, "Rosen does not contend that there are any grounds for rescission of this agreement, or that she was misled. Indeed, her counsel was fully aware of the problems with the agreement," quoting the "snag in the settlement" letter [R 237-38, n. 3]. Further, the agreement Rosen signed is nearly identical to the agreement in *Kelly, supra*, where the insurer itself had been a signatory to an agreement that specified it was not intended to impede a subsequent bad-faith claim, yet the legal effect of the release included in the agreement nevertheless barred any further action. Thus, even if the attorneys had been "representing FIGA" as Rosen now contends, as a matter of law, it would have made no difference in the outcome.

Rosen belatedly argues to this Court that there may have been some question of fact as to whether the defense attorneys had authority to waive FIGA's defenses to suit, but she entirely failed to preserve that issue below. Instead, both parties submitted the case to the Court on summary judgment, agreeing that there were no issues of fact. Rosen argued both in writing and orally that there was no question of fact as to this issue [R 60-74; Transcript of 11/18/97, pp. 24-29]. Thus, she cannot contend on appeal that the

trial court erred in finding an absence of factual issues, *Wilson v. Milligan*, 147 So. 2d 618, 622 (Fla. 2d DCA 1962), citing *Geiser v. Permacrete, Inc.*, 90 So. 2d 610, 612 (Fla. 1956); accord. *Glens Falls Insurance Co. v. J.A. Fields*, 181 So. 2d 187 (Fla. 1st DCA 1966). Further, Rosen never indicated to the trial judge that any additional discovery would be needed. A party who believes that further discovery is necessary must file a motion for continuance, or at least orally inform the trial judge that there is something missing from the record, *Brandauer v. Publix Super Markets*, 657 So. 2d 932 (Fla. 2d DCA 1995); *Steiner v. Ciba-Geigy Corp.*, 364 So. 2d 47 (Fla. 3d DCA 1978). If a party fails to do so, she cannot complain on appeal that the trial judge has proceeded to adjudicate the summary judgment motion prematurely, *Steiner, supra*, 364 So. 2d at 53.

C. FIGA DEFENDED ITS INSURED VIGOROUSLY UP THROUGH THE EXECUTION OF A FAVORABLE SETTLEMENT, FULLY SATISFYING ITS DEFENSE OBLIGATIONS UNDER THE TERMS OF THE POLICY

1. IN THIS PARTICULAR POLICY, THE DEFENSE COSTS ARE DEDUCTED FROM THE LIMITATION OF LIABILITY, AND THE DUTY TO DEFEND TERMINATES WHEN THE COVERAGE IS EXHAUSTED, EITHER BY SETTLEMENT OR BY DEFENSE COSTS

Both parties agreed below that the policy covering AB Law Firm was a true “declining balance” or “wasting” policy, also sometimes called a “defense-within-limits” policy, a relatively rare entity in today’s insurance market. The cost of defense

is commonly provided in addition to limits of liability, but in a minority of policies, the policy limit is a unitary “cap” upon the total of defense and indemnity payments, COUCH ON INSURANCE, sec. 200:5 (3d. Ed. 1995); *Bankers Trust Co. v. Old Republic Insurance Co.*, 7 F. 3d 93 (7th Cir. 1993). Such policies appear in the areas of professional malpractice or directors’ and officers’ liability, e.g., *McLaughlin v. National Union Fire Insurance Co. of Pittsburgh, Pa.*, 23 Cal. App. 4th 1132, 29 Cal. Rptr. 2d 559 (Cal. App., 1st Dist. 1994). “Under these policies, the insureds’ costs of defense, including attorneys’ fees, expert witness fees, and other litigation expenses are paid by the insurance companies and deducted from the policy limits as they are incurred, thereby reducing the amount of insurance coverage available to pay settlements or satisfy judgments,” *Rhode Island Depositors Economic Protection Corp. v. Brown*, 659 A. 2d 95, 100 (R. I. 1995).

In protracted litigation, the costs of defense can be astounding. For example, in this case, the parties stipulated that FIGA and its predecessor, Rumger, paid out a total of approximately \$461,000 in defense costs. Obviously, an insurer can sell a “declining balance” policy at a much lower premium than a typical policy, because its total risk is capped. The relevant provisions of insurance-insolvency law, Chapter 631 of the Florida Statutes, which were in effect at the time of the contract are deemed to be incorporated into every contract with an insurer doing business in Florida, *D.R. Mertens*,

Inc. v. State of Florida ex rel. Department of Insurance, 478 So. 2d 1132 (Fla. 1st DCA 1985); *Springer v. Colburn*, 162 So. 2d 513 (Fla. 1964). Thus, AB Law Firm's contract of insurance always carried with it the possibility that, if Rumger became insolvent, the total available for defense and indemnity would drop from \$1 million to \$300,000. AB Law Firm bargained for and agreed to accept this limited coverage, and Rosen cannot change the policy terms.

Whereas the duty of good faith is variously described as an implied duty or an extra-contractual duty, and its breach is often called a tort, the duty to defend is entirely created and controlled by the language of the policy, COUCH ON INSURANCE, sec. 200:5 (3d. Ed. 1995); *Budget Rent A Car Systems, Inc. v. Taylor*, 626 So. 2d 976 (Fla. 4th DCA 1993). Justified refusal to defend a claim will have no consequences to an insurer, but breach of a legitimate duty to defend may mean that the insurer cannot enforce many of the policy provisions, and may not be able to successfully object to a settlement, COUCH ON INSURANCE, secs. 202:5, 202.10 (3d. Ed. 1995). FIGA does not dispute that it can be liable for breach of a contractual duty to defend where the policy requires a defense in addition to indemnity, e.g., *Carrousel Concessions, Inc. v. Florida Insurance Guaranty Assn.*, 483 So. 2d 513 (Fla. 3d DCA 1986). However, FIGA's duty under the instant policy clearly terminated when the \$300,000 statutory limit was expended.

Even in a policy which is not of the “declining balance” type, an insurer’s duty to defend will terminate when its policy limits are exhausted, *Underwriters Guarantee Insurance Co. v. Nationwide Mutual Fire Insurance Co.*, 578 So. 2d 34 (Fla. 4th DCA 1991). *Aetna Insurance Co. v. Borrell-Bigby Electric Co.*, 541 So. 2d 139 (Fla. 2d DCA 1989), while holding that the duty to defend ends with exhaustion of the policy limits, explains that under an unlimited-defense policy, an insurer cannot simply tender its limits into court and walk away. But where the policy clearly and unambiguously warns the insured that the insurer will cease defending after exhaustion of its limits, and the insured consents, the insurer may tender its limits into court and cease defending, *Johnson v. Continental Insurance Cos.*, 202 Cal. App. 3d 477, 248 Cal. Rptr. 412 (Cal. App., 2d Dist. 1988). In this case, FIGA stuck by its insured to the bitter end, only tendering the remainder of the policy limits when requested to do so by the insured itself. Thus, its duty was entirely fulfilled.

2. FIGA NEVER CEASED DEFENDING ITS INSURED, AND CANNOT BE SADDLED WITH THE CONSEQUENCES OF WRONGFUL “ABANDONMENT” EVEN IF ITS DUTY TO DEFEND WOULD NOT, IN FACT, HAVE TERMINATED UPON EXHAUSTION OF THE POLICY LIMITS

Rosen contends that FIGA “abandoned” its insured simply by warning AB Law Firm that the limits of liability were nearly exhausted and that the defense would eventually have to be tendered back to the insured. However, the trial judge pointed out, “it is

undisputed that FIGA was still providing a defense at the time of settlement" [R 238]. The attorneys provided by FIGA assisted in finalizing the settlement agreement and never withdrew from their representation. In addition, the adjuster and the three attorneys all stated that they did not really know what FIGA would have done if the \$39,000 were used up before the trial concluded [Allen depo. p. 16; Tharp depo p. 17; Kissane depo pp. 11-12; Cole depo pp. 17-19]. The attorneys explained that there was a real possibility of a directed verdict for AB Law Firm on the covered portion of the claim [Tharp depo pp. 7-10, Kissane depo p. 10], in which event the covered portion of the claim would have been resolved within the FIGA policy limits. FIGA, of course, would have no duty to continue defending if the only remaining claims were for the intentional torts, which are not within the policy's coverage. Rosen's theory of "prospective abandonment" would require the trial court to venture into pure speculation as to whether (1) FIGA's remaining \$39,000 would have been exhausted without achieving a final resolution of the covered portion of the claim; (2) FIGA would have ceased defending before the covered claim was resolved; and (3) Rosen would have obtained a judgment against AB Law Firm on the covered portion of the claim in excess of the amount remaining on the policy. There was no need for a court to venture into this twilight zone of speculation, however, because there was one inescapable, undisputed, determinative fact: when the settlement was made, a vigorous defense was being

provided and had not been withdrawn. Rosen has no authority to justify her theory that a "prospective abandonment" conditioned upon the occurrence of events which might never take place would suffice to allow a Court to impose upon an unwilling insurer the terms of a settlement to which it had not agreed, especially not if settlement is reached while the defense obligation is clearly being fulfilled. Indisputably, this claim was vigorously defended all the way through a settlement with counsel **paid for by the insurer**, costing approximately \$461,000 including the fees and costs paid by Rumger prior to its insolvency, and the insured party has been fully released from liability while the defense was still being provided. It defies all logic to conclude that this situation constitutes "abandonment."

FIGA explained that its reports to AB Law Firm were no different from any other insurer's reservations of rights, which in Florida is not a breach of the duty to defend, so long as the defense is not wrongfully withdrawn. Where an insurer offers to provide a defense while contesting coverage, the insurer is not bound by a consent judgment agreed to by its insured. "An insurer does not breach its duty to defend an insured when it provides a defense under a reservation of rights...Thus, while an insured is free to enter into a reasonable settlement when its insurer has wrongfully refused to provide it with a defense to a suit, we find that the insured is not similarly free to independently engage in such settlements where, as here, the insurer had not declined a defense to

suit," *First American Title Insurance Co. v. National Union Fire Ins. Co.*, 695 So. 2d 475,477 (Fla. 3d DCA 1997); accord, *Giffen Roofing Co., Inc. v. DHS Developers, Inc.*, 442 So. 2d 396 (Fla. 5th DCA 1983). Indeed, if FIGA had **failed** to warn its insured of the jeopardy in which AB Law Firm stood, it would not have been acting with due regard for the insured's interests, *Odom v. Canal Insurance Co.*, 582 So. 2d 1203 (Fla. 1st DCA 1991).

The only case which Rosen offers in support of her theory of "prospective abandonment" is *Arizona Property and Casualty Insurance Guaranty Fund v. Helme*, 153 Ariz. 129, 735 P. 2d 451 (Ariz. 1987). In that case, having unequivocally and wrongfully denied coverage, a guaranty fund was precluded from asserting that the insured had breached the "cooperation clause" of the policy by settling with the claimant. The specific holding of the case is only that the Arizona guaranty fund "anticipatorily repudiated its duty to indemnify," thereby freeing the insured from the "cooperation clause." The Court did not specifically address a breach of the duty to defend, nor did it address a defense of "release." In fact, the type of settlement in *Helme*, called a "Damron agreement," involves an assignment and covenant not to execute, rather than a release, *Damron v. Sledge*, 105 Ariz. 151, 460 P. 2d 997 (Ariz. 1969). Notably, Arizona is not the jurisdiction to which Florida courts should turn for guidance on the question of when an insured party may settle and bind the insurer.

Arizona courts hold that where the insurer has not refused to defend but has reserved its right to contest coverage, the insured may freely settle with the claimant; the settlement binds the insurer so long as it is reasonable and in good faith, *United Services Automobile Assn. v. Morris*, 154 Ariz. 113, 741 P. 2d 246 (Ariz. 1987); *Cunningham v. Goettl Air Conditioning, Inc.*, 1997 WL 633728 (Ariz. Ct. App. 1997). But, as explained above, Florida courts hold precisely the opposite. In Florida, defending under a reservation of rights is **not** a breach of contract and does **not** permit the insured party to make a settlement that binds the insurer. Because guaranty associations are generally treated like insurers, and insurance law regarding coverage and settlement differs widely from state to state, there will be some lack of uniformity in decisions involving guaranty associations. However, an insurer or a guaranty association in Florida does not breach a duty to defend where it merely continues the defense while warning of circumstances in which it will cease to do so.

II. WHILE DEFENSE COSTS ARE NOT INCLUDED WITHIN THE FIGA “CAP” IN A TYPICAL LIABILITY POLICY, THEY ARE INCLUDED WHERE A “DECLINING BALANCE” POLICY SPECIFICALLY INCLUDES THE COSTS OF DEFENSE AS PART OF THE “PER CLAIM” LIMIT

This issue was not decided by the First District, and is moot if this Court concludes that the release precluded Rosen from pursuing her subsequent action. However, it was correctly decided by the trial court. FIGA has never contended that in a typical liability

policy, where the defense is a policy obligation separate and apart from the duty of indemnity, defense costs would be included within the definition of “covered claim.” In such policies, FIGA always covers the defense obligations, regardless of the policy limits. In the only cases determining whether a guaranty association’s defense costs are included within its “cap,” the policies in question were not “declining balance” policies, *Missouri Property and Casualty Insurance Guaranty Assn. v. Petrolite Corp.*, 918 S.W. 2d 869 (Mo. App., E.D. 1996); *Clark Equipment Co. v. Arizona Property and Casualty Insurance Guaranty Fund*, 189 Ariz. 433, 943 P. 2d 793 (Ariz. App., Div. 1, 1997). The courts in those cases correctly decided that “covered claim” did not include the costs of defense, because the original carrier would not have been able to deduct its defense costs from its liability limit. The defense of the insured was a separate policy obligation not incorporated into the “per-claim” limits, *Petrolite, supra*, 918 S.W. 2d at 873 [“MIGA, like Integrity, had dual obligations under the policy. First, MIGA was required to indemnify the insured for any losses resulting from covered claims...Second, MIGA is required to provide a defense to the insured”]; *Clark Equipment, supra*, 943 P. 2d at 804 [policy provided that the insurer “shall in addition to the amount of ultimate net loss payable...defend any suit against the insured seeking damages on account of personal injury”].

However, no court has decided what happens to a “declining balance” policy when

the carrier becomes insolvent. The best guidance is found in *Florida Insurance Guaranty Assn., Inc., v. Cole*, 573 So. 2d 868, 870 (Fla. 2d DCA 1990). In that case, the Second District explained that when interpreting the Florida Insurance Guaranty Association Act, which was drafted by "the state insurance commissioners of this country,...it is reasonable to assume that it was intended to be interpreted under common insurance concepts." Although the original policy had offered \$3 million of coverage, there was only a single "covered claim" of \$300,000 to be shared by all of the survivors in a wrongful death action. In so deciding, the Second District referred to *Florida Insurance Guaranty Assn. v. Cope*, 405 So. 2d 292 (Fla. 2d DCA 1981), wherein the court interpreted a \$10,000/\$20,000 auto policy to mean that a single wrongful death fell under the \$10,000 "per person" limit, because the policy read, "the limit stated for any one person is for all damages claimed by anyone for bodily injury or loss of services to one person..." *FIGA v. Cope*, 405 So. 2d at 293. In its subsequent case of *FIGA v. Cole*, the court was not dealing with a policy that fell below the FIGA "cap" as *FIGA v. Cope* had, but was dealing with the question of whether a "covered claim" under the FIGA statute would have to be interpreted in the same fashion as a "claim" under the insurance policy. The answer was yes, that a "covered claim" is viewed like a "claim" under an insurance policy, whatever the policy terms may be. The insurance policy in this case contains clear and unambiguous provisions:

CONDITIONS:

(1) EACH CLAIM - The limit shown in the Declarations as "per CLAIM" is the maximum WE will pay for all CLAIMS and CLAIMS EXPENSES arising out of or in connection with the same or related WRONGFUL ACT. This limit applies regardless of the number of you that are insured under this policy and the number of claimants.

(3) CLAIMS EXPENSES are included within the limits shown in the Declarations and not in addition to them...

HOW WE WILL PAY:

WE will subtract all CLAIMS EXPENSES from the limit applicable to each CLAIM, the remainder being the amount available to pay DAMAGES [R 37].

Thus, under *FIGA v. Cole* and *FIGA v. Cope*, this description of "claim" in the insurance policy also defines "covered claim" after the insurer's insolvency. FIGA's \$300,000 limit for this particular policy is a combined "cap" on defense and indemnity. Of course, the result would be otherwise in a "standard" liability policy where the defense costs are not specifically deducted from the liability limit.

III. ROSEN WOULD NOT BE ENTITLED TO ATTORNEYS' FEES EVEN IF HER ACTION WERE SUCCESSFUL

Rosen cites no contractual or statutory basis to justify an award of attorney fees against FIGA. Obviously, she cannot obtain fees pursuant to Fla. Stat. sec. 627.428

because that statute applies only to "any **named or omnibus insured** or the **named beneficiary** under a policy or contract executed by the insurer." Three controlling cases from this Court state that a third-party claimant like Rosen cannot recover her fees pursuant to this statute. The insurance policy [R 29-49] defines "insured" by reference to the "who is covered" portion of the policy, which, according to Endorsement no. 002, means lawyers and employees of the firm only. There is no named beneficiary, and no omnibus clauses which would make Rosen an insured.

In the case of *Wilder v. Wright*, 278 So. 2d 1 (Fla. 1973), this Court explained that the purpose of section 627.428 was not to benefit the party injured by an insured, but simply to discourage the insurer from wrongly denying coverage. Four years later, in *Roberts v. Carter*, 350 So. 2d 78 (Fla. 1977), this Court reiterated, "an award of attorney's fees under section 627.428(1) is available only to the contracting insured, the insured's estate, specifically named beneficiaries, and third parties who claim policy coverage by assignment from the insured." This Court again addressed the issue in *Industrial Fire & Casualty Insurance Co. v. Prygrocki*, 422 So. 2d 314 (Fla. 1982), "Third-party claimants...are not within the class of insureds under a contract."

FIGA has even less responsibility for fees than its predecessor insurer would have had. Fla. Stat. sec. 631.70 states:

The provisions of s. 627.428 providing for an attorney's fee shall not be

applicable to any claim presented to the association under the provisions of this part, except when the association denies by affirmative action, other than delay, a covered claim or a portion thereof.

Sec. 631.70 was enacted in 1977; it is derived from Ch. 77-727, Laws of Florida. Prior to the enactment of section 631.70, there was a case holding, in a matter of first impression, that the provisions of Fla. Stat. sec. 627.428 would apply to FIGA, and fees owed by its predecessor insurer under that statute could be a “covered claim,” *Zinke-Smith, Inc., v Florida Insurance Guaranty Assn., Inc.*, 304 So. 2d 507 (Fla. 4th DCA 1974). The passage of section 631.70 legislatively overrules the holding of that case and indicates that our legislature wanted to **limit** FIGA’s responsibility for 627.428 fees. FIGA cannot be responsible for a fee award unless (a) the denial of coverage is by FIGA itself, and (b) the claimant would otherwise be entitled to recovery under section 627.428. There is no ambiguity in the statute.⁹ As Rosen acknowledges, the case of *Florida Insurance Guaranty Assn. v. Jacques*, 643 So. 2d 101 (Fla. 4th DCA 1994) is

⁹The rule is otherwise in workers’ compensation cases, because in such cases, fees are awarded pursuant to Chapter 440 and not pursuant to section 627.428. Accordingly, a claimant may recover fees against FIGA in a workers’ compensation case, because such claims are not affected by the passage of section 631.70 since they derive from a different statute, *Dilme v. SBP Service, Inc.*, 649 So. 2d 934 (Fla. 1st DCA 1995); *Florida Insurance Guaranty Assn. v. Renfroe*, 568 So. 2d 962 (Fla. 1st DCA 1990). Obviously, there are different policy considerations for workers’ compensation, where fees are statutorily included in the coverage, and where FIGA does not have a “cap” on its coverage.

directly on point. Where a third-party claimant, having obtained a valid judgment against the insured, brought an action against FIGA to enforce the provisions of an umbrella policy, the claimant could not recover fees against FIGA because section 627.428 does not benefit third parties. *FIGA v. Giordano*, supra, is not in conflict with *Jacques*, because Mrs. Giordano “as assignee of the insured” had a cause of action against FIGA, *Giordano*, 485 So. 2d at 457. She would, therefore, step into the insured’s shoes for purposes of sec. 627.428, as well.

STANDARD OF REVIEW

FIGA agrees that the legal questions determined below are reviewed de novo. However, because Rosen herself submitted the case for summary judgment on the same issues, arguing that no there were no factual disputes, she cannot now assert that there were any issues of fact, and this Court need not review factual determinations.

CONCLUSION

The First District opinion and the trial court’s final judgment were correct in all respects, and should be affirmed. Although FIGA has preserved its position that questions of fact remain as to whether the settlement was reasonable and whether the claims included therein are within the coverage of the policy, the court did not need to reach those questions, because Rosen’s action is barred and further, the entire amount payable by FIGA on this claim has already been exhausted.

NOTE ON TYPEFACE

The typeface used herein is Times New Roman, proportionately spaced, fourteen point.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was mailed this __ day of June, 2000 to: Lauri Waldman Ross, Ross & Tilghman, 9130 S. Dadeland Blvd., Ste. 1705, Miami, Fl 33156.

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