IN THE SUPREME COURT OF FLORIDA

UNIVERSAL PROPERTY & CASUALTY INSURANCE COMPANY Petitioner, v. REBECCA HUGHES Respondent,	CASE NO.: SC2024-0025 LT CASE NO. 6D23-296

UNITED POLICYHOLDERS AND DAVID PEARSON'S UNOPPOSED MOTION FOR LEAVE TO FILE AMENDED AMICUS BRIEF

Amici Curiae, United Policyholders and David Person, by and through the undersigned counsel, respectfully file this Unopposed Motion for Leave to File Amended Amicus Brief, and, in support, state as follows:

1. On September 24, 2024, this Honorable Court entered an order granting United Policyholders and David Person leave to file an Amicus Brief in support of the Respondent deeming the brief filed as of September 23, 2024.

2. After the filing of said brief, the undersigned learned that certain documents referenced in the brief as being part of the records of other courts were also a part of the record in the instant matter.

3. Accordingly, the undersigned respectfully requests leave to file an amended brief in support of Respondent correcting the citations and removing the references to other matters and case law on judicial notice which are not necessary given presence of said documents in the instant record.

4. The changes effectuated in the brief are not substantive in nature but will allow for a cleaner record and easier review of same.

5. The undersigned has contacted counsel for the Petitioner who advised that it does not oppose the relief requested in the instant motion.

WHEREFORE, Amici Curiae, United Policyholders and David Pearson, respectfully requests that this Honorable Court enter an Order granting its Motion for Leave to File Amended Amicus Brief and for any and all other relief this Court deems just and proper.

Dated: September 27, 2024

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IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC24-0025

UNIVERSAL PROPERTY & CASUALTY INSURANCE COMPANY,

Petitioner,

vs.

REBECCA HUGHES

Respondent.

6DCA Court Case No.: 6D23-296

AMENDED BRIEF OF AMICUS CURIAE IN SUPPORT OF REBECCA HUGHES

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STATEMENT IDENTIFYING AMICUS, ITS INTEREST IN CASE, AND SOURCE OF AUTHORITY OF AMICUS CURIAE

United Policyholders ("UP") is a non-profit, tax-exempt, charitable organization founded in 1991 that provides valuable information and assistance to the public concerning insurers' duties and policyholders' rights. UP has been serving Florida residents since 1992 when it helped promote fair claim settlements since Hurricane Andrew. UP's activities in Florida have included long-term disaster recovery assistance; consumer education and advocacy related to homeowners' insurance shopping, disaster preparedness and risk mitigation; and educating and assisting consumers navigating the complicated insurance claims process under multiple policies.

David Pearson is an insurance consumer currently litigating a dispute captioned as Case No. 2022-CA-000304*; David Pearson v GM Appliance of NWFL, LLC, et al., in the Circuit Court of the First Judicial Circuit in and For Walton County, Florida.* Mr. Pearson's insurer has belatedly attempted to invoke the statute at issue in this matter.

The undersigned have authored this brief in whole. No party has contributed money to fund this brief and the undersigned have prepared this brief *pro bono*.

STATEMENT OF ISSUES

For purposes of this brief, Amicus Curiae United Policyholders and Mr. Pearson will address whether retroactive application of Section 627.70152(3), Florida Statutes (2021) is permissible.

SUMMARY OF THE ARGUMENT

Section 627.70152(3) of the Florida Statutes was amended in 2021 to provide, among other things, that prior to filing suit, potential policyholder claimants must provide potential insurance carrier defendants with formal written notice of intent to file suit ten days prior to filing the same. Following the amendment to the statute, some insurance carriers have sought to apply the statute's notice requirements to insurance policies with policy periods prior to the amended statute's effective date of July 1, 2021 – in other words, carriers are seeking to apply the amended statute retroactively.

Simply put, retroactive application of §627.70152(3) is legally impermissible. Florida courts have set forth a two-prong test for examining whether a statute may be applied retroactively. First, courts must determine whether the statute contains language indicating whether the legislature intended for the statute in question to apply retroactively. Second, if the statute contains such explicit

intent, courts must examine whether retroactive application would be constitutionally permissible. Generally, retroactive application is constitutionally impermissible if retroactive application changes vested rights, creates new obligations, or imposes new penalties. Here, §627.70152(3) contains no language whatsoever which would suggest or imply a legislative intent for it to apply retroactively. For this reason alone, §627.70152(3) fails the retroactivity test; however, even if this were not the case, because the statute imposes new obligations – the notice requirement did not exist prior to amending the statute and is thus a substantive change – the statute fails the second prong of the retroactivity test.

ARGUMENT

I. SECTION 627.70152(3) FAILS THE WELL-REASONED TEST FOR ESTABLISHING RETROACTIVE APPLICATION

Because section 627.70152(3), Florida Statutes (2021) fails to meet the test for retroactive application, it cannot be applied to policies with effective dates and claims that occurred prior to its effective date of July 1, 2021.

All newly enacted statutes are presumed to apply prospectively, and that presumption can only be rebutted by "clear legislative

intent" as "[r]equiring clear intent assures that [the legislature] itself has affirmatively considered the potential unfairness of retroactive application and determined that it is an acceptable price to pay for the countervailing benefits." *Metro. Dade County v. Chase Fed. Hous. Corp.*, 737 So. 2d 494, 499-500 (Fla. 1999). Under clear Florida law, in order to determine whether a statute may be applied retroactively, "[f]irst, the Court must ascertain whether the Legislature intended for the statute to apply retroactively . . . [s]econd, if such an intent is clearly expressed, the Court must determine whether retroactive application would violate any constitutional principles." *Menendez v. Progressive Exp. Ins. Co.*, 35 So. 3d 873, 877 (Fla. 2010); *see also Promontory Enterprises, Inc. v. S. Eng'g & Contracting, Inc.*, 864 So. 2d 479, 483 (Fla. 5th DCA 2004). As indicated, legislative intent for retroactivity must be "clear." *Old Port Cove Holdings, Inc. v. Old Port Cove Condo. Ass'n One, Inc.*, 986 So. 2d 1279, 1284 (Fla. 2008. Thus, whether there is legislative intent is a threshold question; the analysis may stop if no intent is clearly expressed.

Critically, there is a strong presumption against retroactivity. As Justice Scalia and Bryan Garner reasoned:

> As a general, almost invariable rule, a legislature makes law for the future, not for the past. Judicial opinions typically pronounce what the law was at the time of a particular happening. Statutes, by contrast, typically pronounce what the law becomes when the statutes take effect. This point is basic to our rule of law.

A. Scalia & B. Garner, *Reading Law: the Interpretation of Legal Texts* 261 (2012).

Florida courts follow this clear directive; indeed, as noted above, "Florida legislation is **presumed to operate prospectively** unless there exists a showing on the face of the law that retroactive application is intended." *Yamaha Parts Distributors Inc. v. Ehrman*, 316 So. 2d 557, 559 (Fla. 1975) (emphasis added); *see also Arrow Air, Inc. v. Walsh*, 645 So. 2d 422, 425 (Fla. 1994) ("[t]he presumption against retroactive application of a law that affects substantive rights, liabilities, or duties is a well-established rule of statutory construction.").

Even if the Court were to find, despite the absence of any language delineating clear legislative intent, grounds for the retroactive application of the statute, such an application would still be impermissible as it would clearly run afoul of constitutional principles and the logical *stare decisis* established by *Menendez*

holding that a pre-suit notice of intent to initiate litigation is to be considered a substantive change thereby affecting constitutional protections in a manner preventing retroactive application. Presumably, this is why Petitioner never sought to overturn *Menendez*; that issue is not preserved for appellate review. *Miller v. Miller*, 709 So. 2d 644, 645 (Fla. 2nd DCA 1998) (holding that appellate courts "cannot address on appeal an issue not ruled upon by the circuit court.").

Critically, this two-step analysis is mandatory when the question of retroactively. *Pondella Hall For Hire, Inc. v. Lamar*, 866 So. 2d 719, 722 (Fla. 5th DCA 2004) ("To determine whether a statutory amendment applies retroactively, courts **must** engage in a two-step analysis."(emphasis added)).

Here, Petitioner seeks to assert that the pre-suit notice requirement set forth in § 627.70152(3) should be applied retroactively and that its notice requirements should apply to policies with effective dates prior to the statute's effective date (July 1, 2021) – that is, the claim at issue in this action. Section 627.70152(3) reads:

> As a condition precedent to filing a suit under a property insurance policy, a claimant must provide the department with written notice of intent to initiate litigation on a form provided by the department. Such notice must be given at least 10 business days before filing suit under the policy, but may not be given before the insurer has made a determination of coverage under s. 627.70131. Notice to the insurer must be provided by the department to the e-mail address designated by the insurer under s. 624.422. The notice must state with specificity all of the following information:
>
> 1. That the notice is provided pursuant to this section.
> 2. The alleged acts or omissions of the insurer giving rise to the suit, which may include a denial of coverage.
> 3. If provided by an attorney or other representative, that a copy of the notice was provided to the claimant.
> 4. If the notice is provided following a denial of coverage, an estimate of damages, if known.
> 5. If the notice is provided following acts or omissions by the insurer other than denial of coverage, both of the following:
>   a. The pre-suit settlement demand, which must itemize the damages, attorney fees, and costs.
>   b. The disputed amount.

FLA. STAT. §627.70152(3). Thus, this new statute requires a potential claimant to provide an insurance carrier with ten days' written notice of their intent to file suit prior to filing. As this brief will discuss, under no circumstances can this statute be applied retroactively, as

it clearly fails the well-reasoned and well-established test set forth above.

A. The Florida Legislature did not intend for § 627.70152(3) to apply retroactively, as the statute contains no language even suggesting such intent.

Here, the statute at issue - §627.70152(3) - is completely devoid of any language indicating that the legislature intended for it to apply retroactively. Simply put, there is no reference to any date of application, nor is there any language stating that the statute will apply to insurance policies issued before its effective date. On this basis alone, it is clear that the Legislature did not intend for the statute to apply retroactively. Any other reading beyond the crystal-clear text would fabricate, suggest, or imply intent that is simply not there, which is impermissible – simply put, ". . . purpose must be derived from the next, not from extrinsic sources such as a legislative history or an assumption about the legal drafter's desires." Scalia & Garner at 56.

Rather, the only language discussing a date of applicability in the statute is the explicit reference to its effective date of July 1, 2021. Critically, Florida courts have held that the legislature's inclusion of an effective date rebuts any suggestion that the legislature intended

for the statute to apply retroactively. *Fla. Ins. Guar. Ass'n, Inc. v. Devon Neighborhood Ass'n, Inc.*, 67 So. 3d 187, 196 (Fla. 2011)("We have noted that the Legislature's inclusion of an effective date for an amendment is considered to be evidence rebutting intent for retroactive application of a law."); *Ramcharitar v. Derosins*, 35 So. 3d 94, 98 (Fla. 3rd DCA 2010)("The inclusion of this effective date rebuts the suggestion that [a revision to a statute] was intended to apply retroactively.").

While venturing beyond the clear text is not necessary, any inquiry into legislative history makes clear that §627.70152(3) was not intended to apply to existing policies. Importantly, the Florida Legislature has drafted recent amendments to statutes that explicitly state that they are intended to apply retroactively – for instance, in the notes to the legislature's amendment to Florida's negligence statute, the legislature expressly stated that any amendment "shall apply to all causes of action filed after [March 4, 2023]." FLA. STAT. §768.0701 (brackets in original). Additionally, as Respondent indicated in her Answer Brief, in the revisions to the Unclaimed Property Statutes, amending §717.107, Florida Statutes, the Legislature expressly stated: "[t]he amendments made by this act are

remedial in nature and apply retroactively." (Note 1 in Florida Statutes, citing section 2, ch. 2016-219). Thus, the legislature has the power and ability to expressly state when a statute's purview applies and if a statute should apply retroactively but chose not to do so here. In other words, if the legislature wanted to clearly state that the statute applied to policies with effective dates and claims arising before the effective date, it could have done so, as it has done with other statutes. *See, e.g., Deen v. Wilson*, 1 So. 3d 1179, 1182 (Fla. 5th DCA 2009)("Another principle of statutory construction, *expressio unius est exclusio alterius*, means that in construing a statute, the expression of one thing implies the exclusion of another."); Scalia & Garner at 107 (". . . the principle that specification of the one implies exclusion of the other validly describes how people express themselves and understand verbal expression.").

To assert that §627.70152(3) contains language supporting retroactivity, insurance carriers (and the Third and Fourth District

Courts of Appeal[1]) point to §627.70152(1), which that the pre-suit notice requirement applies "exclusively to all suits not brought by an assignee arising under a residential or commercial property insurance policy, including a residential or commercial property insurance policy issued by an eligible surplus lines insurer." To say that the phrase "all suits" implies or suggests retroactivity supports a narrow reading of the statute; rather, portions of statutes must be read in context with the entire statute. *Conage v. United States*, 346 So. 3d 594, 598 (Fla. 2022)("'[t]he plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole.'"(internal citations omitted)(brackets in original); Scalia & Garner at 56 ("[t]he words of a governing text are of paramount concern, and what they convey, in their particular context, is what the text means.").

Read as a whole, the text of §627.70152(1) continues that the notice requirement applies to all claims "not brought by an assignee

[1] *Cantens v. Certain Underwriters at Lloyd's London*, 388 So. 3d 242, 245 (Fla. 3d DCA 2024); *Cole v. Universal Prop. & Cas. Ins.*, 363 So. 3d 1089, 1093 (Fla. 4th DCA 2023).

. . . ." It is thus clear that, when read as a whole, the "all suits" language simply refers to who may bring a suit, not to what policies a suit may apply – specifically, that the statute would not apply to assignees. Such a reading is further bolstered by the inclusion of the word "exclusively," which again highlights that the limiting lead-in phrase was crafted to refer to potential claimants, not claims. We note that this interpretation was recently memorialized by the Second District Cour of Appeals. *See Buis v. Universal Prop. & Cas. Ins. Co.*, No. 2D2023-0655, 2024 WL 4096130, at *2 (Fla. 2d DCA Sept. 6, 2024)(Holding that retroactive application of §627.70152(3) is precluded by the absence of language suggesting retroactive application)("We reject Universal's argument—which is consistent with the rationale adopted by the Third and Fourth Districts—that the statute's application to 'all suits' indicates clear legislative intent for retroactive application.").

It is worth emphasizing that legislatures do not legislate by deception. *See, e.g., Whitman v. Am. Trucking Associations*, 531 U.S. 457, 468, 121 S. Ct. 903, 909–10, 149 L. Ed. 2d 1 (2001) ("Congress, we have held, does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might

say, hide elephants in mouseholes."). Suggesting that the Legislature intended for the phrase "all suits" to be used as language suggesting retroactivity would violate this principle.

Therefore, because §627.70152(3) is completely devoid of any language reflecting legislative intent to apply retroactive application, it cannot be applied retroactively now.

B. Retroactive application of §627.70152(3) would be unconstitutional.

It is a well-established truism of contract law that "[t]he laws in force at the time of the making of a contract enter into and form a part of the contract as if they were expressly incorporated into it." *Florida Beverage Corp. v. Div. of Alcoholic Beverages & Tobacco, Dept. of Bus. Regulation*, 503 So. 2d 396, 398 (Fla. 1st DCA 1987) citing *Shavers v. Duval County*, 73 So. 2d 684 (Fla. 1954). Additionally, as it relates specifically to insurance policies, "the statute in effect at the time an insurance contract is executed governs substantive issues arising in connection with that contract." *Hassen v. State Farm Mut. Auto. Ins. Co.*, 674 So. 2d 106, 108 (Fla. 1996).

This is further supported by the Contract Clause of Florida's Constitution which states "[n]o bill of attainder, ex post facto law or

law impairing the obligation of contracts shall be passed." FLA. CONST. art. I, § X. Essentially, the execution of a contract creates a snapshot in time incorporating any and all relevant laws in effect at the time of formation as if they were written in full as part of said contract.

The constitutional analysis regarding statutory changes is addressed at length in *Menendez*. There, an insurance carrier failed to pay personal injury protection ("PIP") benefits to its insured after she was injured in an automobile accident in June 2001. *Menendez*, 35 So. 3d at 874. The policy in question was issued with effective dates of coverage between April 1, 2001, and October 1, 2001. *Id.* at 876. Beginning on June 19, 2001, during the effective dates of coverage for the insured's policy, the legislature effectuated an amendment to Section 627.736, Florida Statutes, which, for the first time, required that an insured seeking PIP benefits must, in pertinent part, provide "written notice of an intent to initiate litigation." FLA. STAT. § 627.736(11)(a) (2001). The insured in *Menendez* initiated their lawsuit against the insurance carrier in November 2002, nearly a year and a half after the effective date of the newly enacted presuit notice provision in the relevant statute. *Id.* at 875. After extensive

litigation at both the trial and appellate levels, *Menendez* was brought before the Supreme Court of Florida where it was ultimately determined that such a notice of intent to initiate litigation, even in the face of legislative intent for retroactive application, violated the substantive rights of the insured and, therefore, were not permissible to be applied retroactively. *Id.* at 880.

In reaching the decision regarding the second prong analysis, the *Menendez* Court stated that "the central focus of this Court's inquiry is whether retroactive application of the statute 'attaches new legal consequences to events completed before its enactment.'" *Id.* at 877 (quoting *Landgraf v. USI Film Prod.*, 511 U.S. 244, 270, 114 S. Ct. 1483, 1499, 128 L. Ed. 2d 229 (1994)). In analyzing this second prong, the *Menendez* Court noted that, as with the enaction of Section 627.70152, Florida Statutes, the operative statutory changes in *Menendez* "(1) impose a penalty, (2) implicate attorneys' fees, (3) grant an insurer additional time to pay benefits, and (4) delay the insured's right to institute a cause of action." *Menendez*, 35 So. 3d at 878.

The *Menendez* Court first illustrated that the Florida Supreme Court "generally held that statutes with provisions that impose

additional penalties for noncompliance or limitations on the right to recover attorneys' fees do not apply retroactively "because it is, in substance, a penalty." *Id.* (quoting *State Farm Mut. Auto. Ins. Co. v. Laforet*, 658 So. 2d 55, 61 (Fla. 1995)). Furthermore, the Court previously held that "the statutory right to attorneys' fees is not a procedural right, but rather a substantive right." *Menendez*, 35 So. 3d at 878 (citing *Moser v. Barron Chase Sec., Inc.*, 783 So. 2d 231, 236 (Fla. 2001)). Finally, the *Menendez* Court determined that, as is the exact scenario with the matter sub judice, because the statutory amendment in *Menendez* allowed the avoidance of payment of attorney's fees which were available at the time the policy took effect, permitted delayed payment regarding a claim by the insurer, and deferred the insured's ability to file a cause of action for unpaid policy benefits, the statutory changes were substantive, not procedural, in nature and could not be applied retroactively. *Menendez*, 35 So. 3d at 879-80.

As noted, the facts of this case are materially indistinct from those considered by this Court in *Menendez*. Section 627.70152, Florida Statutes, sets forth the notice requirements. FLA. STAT. § 627.70152(3)(a) (2021). In addition, the statute provides that the

"[s]ervice of a notice tolls the time limits provided in s. 95.11 for 10 business days if such time limits will expire before the end of the 10-day notice period." FLA. STAT. § 627.70152(3)(b) (2021). Furthermore, the statute provides the insurer with 10 business days to respond to the pre-suit notice by accepting coverage, denying coverage, asserting the right to reinspect the property, making a settlement offer, or requiring the claimant to participate in appraisal or another method of alternative dispute resolution. FLA. STAT. § 627.70152(4) (2021). Additionally, the statute imposes a penalty for non-compliance with the pre-suit notice. FLA. STAT. § 627.70152(5) (2021). Finally, the statute drastically impacts a claimant's ability to collect attorney fees. FLA. STAT. § 627.70152(8) (2021).

The provisions found to be "problematic" by the *Menendez* Court are directly contemplated by the statute in question in this matter. As in *Menendez*, the statutory provisions of Section 627.70152 explicitly (1) implicate attorney's fees and impose a penalty in altering the calculation regarding attorney's fees through the creation of the fee quotient, (2) grant an insurer additional time to pay benefits, and (3) delay the insured's right to institute a cause of action by creating additional conditions which must be met before

suit can be filed. *See Menendez*, 35 So. 3d at 878. As Hughes' answer brief shows, the attempts to limit *Menendez* to uninsured motorists' insurance are refuted by the Court's reliance on it in a property insurance case, *Devon, supra.*

Accordingly, it is patently frivolous to suggest that Section 627.70152 is anything but substantive or that retroactive application is permissible under the binding precedent set by this Honorable Court. Any retroactive application would cause the law to impair the insurance contract in violation of the Contracts Clause of our State's Constitution. FLA. CONST. art. I, § X. Of course, given that the first prong of the analysis is not met, this Honorable Court should never get to the second prong regarding constitutionality.

II. INSURERS REGULARLY ADMIT THAT SECTION 627.70152(3) SHOULD NOT BE APPLIED RETROACTIVELY

Because insurers – the parties that §627.70152(3) is designed to protect – regularly admit that the statute does not apply to polices issued before and claims occurring after its effective date of July 1, 2021, the waters of retroactive intent become even murkier and the impermissibility of retroactive application consequently becomes even clearer.

Following enactment of the statute, prior to filing suits, many potential claimants provided insurance carriers with written notices of intent to initiate litigation. Critically, on numerous occasions, *insurance carriers replied to these claimants and asserted that no written notice was required*. For instance, in a July 14, 2021, letter to a policyholder in response to a notice, Citizens Property Insurance Corporation stated: "[w]hile we thank you for providing this notice, Citizens believes that the notice requirement in the statute will only apply to insurance issued or renewed on or after the effective date of the statute, which is July 1, 2021." [R. 277]. Additionally, in a similar letter dated July 13, 2021, Assurant wrote a policyholder and stated ". . . Fla. Stat. §627.70152 does not apply to the subject Claim because the subject Policy and Claim predate July 1, 2021." [R. 278]. Furthermore, Castle Key Insurance Companies wrote a policyholder on August 18, 2021, again stating that it believed "that the notice requirement in the statute will apply only to insurance policies issued or renewed on or after the effective date of the statute." [R. 279].

Insurers cannot now state that the legislature intended for the statute to apply retroactively, given these clear statements to the contrary.

At a minimum, this is a telltale sign of lack of clarity with respect to intent, and at best, it is a direct statement from the parties the statute was designed to protect indicating that the statute only applies to policies issued after its application. Either way, there is no possible justification for insurance companies to argue that retroactive application was intended or permissible.

CONCLUSION

For the above reasons, respectfully, this Court should affirm the Sixth District in *Hughes.*

{Signature Block located on the following page}

CERTIFICATE OF COMPLIANCE

This brief complies with font requirements of Rule 9.045, Florida Rules of Appellate Procedure. It is typed in Bookman Old Style 14-point font and is proportionately spaced type. Additionally, this brief complies with Rule 9.210, Florida Rules of Appellate Procedure, as it is 3,857 words.

Dated: September 27, 2024

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