IN THE DISTRICT COURT OF APPEAL
THIRD DISTRICT OF FLORIDA

CASE NO.: 3D22-1109
L.T. CASE NO.: 2021-024502-CC-05

ALMA SANCHEZ
and NELSON CAMPOS,

Appellants,

v.

SECURITY FIRST INSURANCE COMPANY d/b/a Security First Florida,

Appellee.
_____/

AMICUS CURIAE BRIEF OF FLORIDA JUSTICE REFORM INSTITUTE IN SUPPORT OF APPELLEE

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PRELIMINARY STATEMENT

Amicus curiae, the Florida Justice Reform Institute, will be referred to as "the Institute." Appellee, Security First Insurance Company d/b/a Security First Florida, will be referred to as "Appellee." Appellants, Alma Sanchez and Nelson Campos, will be referred to as "Appellants." The Appendix to this brief is cited to as "A. page number."

IDENTITY AND INTEREST OF THIS AMICUS CURIAE

The Institute is a not-for-profit organization dedicated to reform of the state's civil justice system through the restoration of fairness, equality, predictability, and personal responsibility in that system.

This appeal presents an issue of paramount importance to Florida's first-party property insurance industry. The statute at issue was intended to provide for early resolution of first-party insurance claims before resort to a court system facing an already-overburdened case load due to COVID-19. The statute also was enacted in response to a crisis of first-party insurance claims. As industry data provider AM Best noted in describing the insurance crisis facing the state which has compelled legislative action:

> Florida personal property insurers have been reporting increasingly severe underwriting losses, owing to several challenges. . . . The deterioration in performance is a by-product of the greater frequency of secondary perils (severe thunderstorms, wind, hail), higher reinsurance costs, escalating litigation costs, and building codes/laws that have been flouted by parties looking to profit. Insurers have responded with rate increases, underwriting adjustments, and targeted non-renewals while avoiding more problematic areas of the state.
>
> * * * *
>
> The Florida Legislature attempted to course correct with reform measures aimed at curbing high litigation costs. In 2021, the Florida Senate approved Bill 76, which included a number of initiatives, ranging from pre-lawsuit requirements to how attorney's fees are awarded in first-party suits. . . .
>
> * * * *
>
> These bills were intended to dissuade bad actors and mitigate the expenses that insurers absorb based on a more equitable set of rules. There was some improvement after the bills passed, specifically related to assignment of benefits ["AOB"] and represented claims, but more legislative work is critical as litigated claims appear to be creeping up once again.

AM Best, *Troubled Florida Property Market Participants Under Immense Pressure* (May 2, 2022), appended at A.84. The dire situation is predicted to only worsen as insurers begin to process the devastating losses caused by Hurricane Ian.

The Institute's interest is aligned with that of Appellee, and it asks this Court to effectuate legislative intent and apply section 627.70152, Florida Statutes (2021), to any lawsuit filed on or after the statute's effective date of July 1, 2021. Applying the statute as written not only adheres to legislative intent but serves the important purpose of ensuring all Florida's citizens can participate in pre-suit, early resolution of their property damage insurance claims.

This Court's decision will have a direct impact on the mission of the Institute to reduce litigation by encouraging pre-suit resolution. The statute purposefully helps the insurance industry emerge from a crisis. As a bonus, the statute lessens the burden on an overcrowded post-COVID-19 court system by reducing the number of lawsuits filed based on low-dollar property insurance claims that could be resolved before litigation commences. The equitable administration of civil justice, access to the courts, as well as availability and affordability of property insurance in Florida, are squarely implicated.

SUMMARY OF ARGUMENT

Words matter. This truism is even more compelling here because the Florida Legislature wrote a statute with abundant clarity. This clarity as to the law's application provides stability for property insurance consumers and producers that have endured years of litigation fatigue caused by a rush to the courthouse. This Court must apply the law as written—to suits filed on or after the law's effective date—and allow the ensuing benefit of early pre-suit resolution to take place. To allow any other application would render the statute's plain words meaningless and run afoul of the supremacy-of-text principle embraced by the Florida Supreme Court.

As a matter of practical application, the Legislature enacted section 627.70152, Florida Statutes (2021), to provide immediate relief from the deluge of first-party property damage insurance lawsuits that harmed Florida's property insurance market and congested the courts. The statute mandates pre-suit notice which allows the insurer to reevaluate its coverage decision and/or payment *before* engaging in costly litigation to the insurer and delay to the customer.

The misdirected question Appellants present to this Court is whether the Legislature intended section 627.70152's pre-suit notice requirement to apply to lawsuits arising under insurance contracts that predate the statute's July 1, 2021 effective date. The starting (and ending) point for this answer is the statutory language—yes, so long as the operative *suit* is filed after the statute's effective date.

If necessary, this Court's resort to legislative history provides the compelling legislative intent which is consistent with the statute's plain words. The position of Appellee and the Institute is fully supported by that legislative history: While there are numerous important dates in the life of an insurance claim pre-suit (date of loss, date contract incepted, date of breach by insurer), not one of these was referenced in the statute. Only one date was referenced in the "applicability" section of the statute: suit filed date.

The Legislature knows how to enact effective dates for statutory changes and uses precise language to trigger a law's applicability. Judicial deference to a statute's legislatively determined effective date recognizes that the Legislature is uniquely equipped through committee work and study to assess the need and economic impact of legislation, including the impact created by a statute's effective

date. Deference also ensures stability in the law, rejecting fluctuations from case to case according to the evidence presented by individual litigants. Because the legislative history supports applying the statute to lawsuits filed on or after its effective date, this Court should affirm the county court's Order Granting Security First Insurance Company's Motion to Dismiss, without prejudice and without leave to amend.

ARGUMENT

I. THE STATUTE'S PLAIN LANGUAGE ANCHORS ITS APPLICABILITY TO "SUITS" WHICH REQUIRES COURTS TO APPLY THE PRE-SUIT NOTICE PROVISION TO SUITS FILED ON AND AFTER JULY 1, 2021

A court's determination of the meaning of a statute begins with the language of the statute. *Halifax Hosp. Med. Ctr. v. State*, 278 So. 3d 545, 547 (Fla. 2019). If that language is clear, the statute is given its plain meaning, and the court does not "look behind the statute's plain language for legislative intent or resort to rules of statutory construction." *Id.* (citations omitted). When statutory language is susceptible to more than one meaning, legislative history may be helpful in ascertaining legislative intent. *Rollins v. Pizzarelli*, 761 So. 2d 294, 299 (Fla. 2000).

In this context, the Florida Supreme Court has spoken on the issue of statutory interpretation, emphasizing that words matter:

> In interpreting the statute, we follow the "supremacy-of-text principle"—namely, the principle that "[t]he words of a governing text are of paramount concern, and what they convey, in their context, is what the text means." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 56 (2012). We also adhere to Justice Joseph Story's view that "every word employed in [a legal text] is to be expounded in its plain, obvious, and common sense, unless the context furnishes some ground to control, qualify, or enlarge it." *Advisory Op. to Governor re Implementation of Amendment 4, the Voting Restoration Amendment*, 288 So. 3d 1070, 1078 (Fla. 2020) (quoting Joseph Story, *Commentaries on the Constitution of the United States* 157-58 (1833)).
>
> We thus recognize that the goal of interpretation is to arrive at a "fair reading" of the text by "determining the application of [the] text to given facts on the basis of how a reasonable reader, fully competent in the language, would have understood the text at the time it was issued." This requires a methodical and consistent approach involving "faithful reliance upon the natural or reasonable meanings of language" and "choosing always a meaning that the text will sensibly bear by the fair use of language." Frederick J. de Sloovère, *Textual Interpretation of Statutes*, 11 N.Y.U. L.Q. Rev. 538, 541 (1934*), quoted in* Scalia & Garner, *Reading Law* at 34.

Ham v. Portfolio Recovery Assocs., LLC, 308 So. 3d 942, 946–47 (Fla. 2020) (emphasis added) (some citations omitted).

Furthermore, "[t]he Legislature must be understood to mean what it has plainly expressed, and this excludes construction." *DMB*

Inv. Tr. v. Islamorada, Vill. of Islands, 225 So. 3d 312, 317 (Fla. 3d DCA 2017). Once legislative intent is plainly expressed and the act is "clear, certain and unambiguous, the courts have only the simple and obvious duty to enforce the law according to its terms." *Id.*

In the property insurance context, there are many dates in the life of a claim: (1) the date the insurance policy incepts (or renews), (2) the date the property loss occurs, (3) the date of breach (coverage denial or underpayment), and (4) the date the lawsuit is filed (here, September 27, 2021). This Court is called upon to determine *which* date triggers application of section 627.70152(3), Florida Statutes, for purposes of the pre-suit notice requirement. Notably, items 1 through 3 must exist before 4 (suit) can be ripe; if any one element is missing, no breach of insurance contract action is viable. *Abbott Labs., Inc. v. Gen. Elec. Capital*, 765 So. 2d 737 (Fla. 5th DCA 2000) (elements of breach of contract action are: (1) a valid contract; (2) a material breach; and (3) damages).

Earlier this year, the Fourth District Court of Appeal had occasion to review the 2019 statute that pertains to attorney's fees in suits related to assignments for post-loss property insurance claims. *See Water Damage Express, LLC v. First Protective Ins. Co. d/b/a*

Frontline Ins., 336 So. 3d 310 (Fla. 4th DCA 2022) (citing § 627.7152, Fla. Stat. (2019)). The Court was faced with a similar issue of when to apply a new statute impacting insurance disputes. *Id.* at 312.

Declining to apply the statute to the date of suit filing, the Court framed the scope of its review in this manner:

> [T]he fundamental question in this case is whether the motion for attorney's fees is governed by: (a) section 627.428(1), the statute in effect when the homeowners became insured by Insurer, when the homeowners suffered a covered loss, and when the AOB agreement was entered; or (b) section 627.7152(10), the statute in effect when Appellant filed suit.

Id. (emphasis added). In studying the plain words of the statute and acknowledging the concept of retroactivity, the Fourth District declined to apply the statute to the date of suit filing because the plain language of the statute clearly stated that "[t]his section applies to an assignment agreement executed on or after [the statute's effective date]." *Id.* at 312, 314. Retroactivity was front and center because "[a]ll three of these pertinent events [policy inception, date of loss, and assignment agreement] occurred before . . . the effective date of [the statute]." *Id.* at 314. Therefore, the statute could not be applied going back in time.

Relevant to this appeal, the Fourth District pointed out in *Water Damage*:

> Moreover, section 627.7152(10)'s plain language does not demonstrate a legislative intent to designate the date a complaint *was filed* as the reference point for determining the applicability of the 2019 statutory amendment. To the contrary, section 627.7152(1), as amended, states "[t]his section applies to an assignment agreement executed on or after [May 24, 2019]."

Id. (emphasis added). This analysis fits squarely with the Institute's position concerning section 627.70152: the plain language here *does* demonstrate a legislative intent that the statute's reference point for applicability is "suits," not insurance contract, and not breach.

Shortly after *Water Damage*, the Fourth District decided *Total Care Restoration, LLC v. Citizens Property Insurance Corporation*, 337 So. 3d 74 (Fla. 4th DCA 2022). In *Total Care*, the Court reached a different result because, unlike in *Water Damage*, the insured assigned her benefits under the policy *after* the effective date of the statute. *Id.* at 75. Thus, once again, the same court was appropriately guided by the identical, unambiguous statutory reference point:

> The [trial] court observed that the legislature made clear that the new statutory requirements for assignments of benefits under section 627.7152 applies to all assignments executed on or after July 1, 2019.
>
> * * * *

> This case does not involve the application of a statute to a preexisting insurance policy; it concerns a statute's application to an assignment created after the effective date of the statute. Thus, section 627.7152—the law in effect at the time the assignment of benefits was executed—was properly applied to the assignment in this case.

Id. at 75, 77 (emphasis added); s*ee also* *Kidwell Grp., LLC v. United Prop. & Cas. Ins. Co.*, 343 So. 3d 97 (Fla. 4th DCA 2022); *Kidwell Grp., LLC v. Olympus Ins. Co.*, 47 Fla. L. Weekly D1571 (Fla. 5th DCA July 22, 2022) (aligning the Fifth District with *Total Care* and emphasizing adherence to the "supremacy-of-text principle"); *Kidwell Grp., LLC v. Am. Integrity Ins. Co. of Fla.*, No. 2D21-205, 2022 WL 4281847 (Fla. 2d DCA Sept. 16, 2022).

Just as the AOB fee statute in *Water Damage* and *Total Care* plainly stated when the statute applies ("This section applies to an assignment agreement executed on or after July 1, 2019"), the plain language of section 627.70152 also clearly sets out its applicability:

> (1) Application.--This section 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.

§ 627.70152(1), Fla. Stat. (2021) (emphasis added). Of course, it carved out AOB suits because the 2019 statute in *Water Damage* already covers assignment of benefits issues.

Indisputably, there is no reference in the statute to any other date in the life of a property insurance claim: "date of loss," "property loss," "breach" or "claim denial" or "insurance policy inception." Understandably so, the legislative concern and focus was to reduce *litigation* or suits. Thus, the statute plainly applies to, and is thus triggered by, *any lawsuit* (except for an assignment suit). Similar to the plain language of the AOB statute that applies to assignment agreements, the trigger under this broader pre-suit statute is "any suit" filed.

Likewise, in defining basic terms such as "claimant," the Legislature focused on "an insured who is filing suit…." § 627.70152(1)(b), Fla. Stat. (emphasis added). Again, the statute's focus remains consistent throughout with the triggering event being a suit.

Further dissecting the statute, its cornerstone, the pre-suit notice of subsection (3), provides that as a "condition precedent to filing a suit under a property insurance policy, a claimant must

provide the [Department of Financial Services] with written notice of intent to initiate litigation.…" § 627.70152(3), Fla. Stat. The filing of the suit is the act tethered to the pre-suit notice requirement; logically, suit filing date is the most common-sense date to draw a line from for purposes of complying with the pre-suit notice requirement.

Finally, the consequence for not complying with the procedural pre-suit notice is dismissal of the suit without prejudice, as the circuit court did here. § 627.70152(3), Fla. Stat. There is no suit preclusion and no removal of any substantive prospective fee expectation once suit is ripe. However, the statute is clear: suit is the applicable date for triggering the statute's application because the core of the statute's procedural requirements pertain to a pre-suit notice and dismissal without prejudice of a suit.

Therefore, the Legislature's clear and singular focus throughout the statute on "suit" compels only one conclusion: the statute applies to any suit filed on or after the statute's effective date of July 1, 2021. If a claimant files suit on or after the statute's effective date of July 1, 2021, and has not first satisfied the pre-suit notice and potential

resolution period, the statute requires a mandatory, ministerial dismissal without prejudice. § 627.70152(5), Fla. Stat.

Significantly, no substantive right is removed, diminished, or impaired—the right to file suit and seek fees remains intact for the claimant once he or she complies with the law. All that must first be performed is compliance with pre-suit notice and if not resolved, then file the suit. Simply, there can be no alternative reading of the clear words contained in the statute. *See Water Damage, supra.* The suit is the triggering event implicating the applicability of section 627.70152's pre-suit notice requirement and mandatory dismissal without prejudice consequence.

II. LEGISLATIVE HISTORY SUPPORTS THE CLEAR LANGUAGE OF THE STATUTE'S APPLICABILITY TO SUITS FILED ON OR AFTER JULY 1, 2021

If the plain text is not sufficiently compelling, legislative history supports Appellee's and the Institute's interpretation of the text. Only one conclusion can be drawn: the statute applies to lawsuits filed on or after the statute's effective date.

When interpreting statutory law, legislative intent is the polestar guiding a court's analysis. *Diamond Aircraft Indus., Inc. v. Horowitch*, 107 So. 3d 362, 267 (Fla. 2013). For well more than half

a century, the Florida Supreme Court has acknowledged that "courts should construe a statute so that the plain intent of the Legislature would be given effect and the courts should not construe a statute in such manner as to reach an absurd conclusion if any other construction is possible." *State Dep't of Pub. Welfare v. Bland*, 66 So. 2d 59, 61 (Fla. 1953).

In enacting section 627.70152, through Senate Bill 76, the Florida Legislature considered and rejected a focus on other triggering events in the life of a claim. Senate Bill 76's companion bill in the House, House Bill 305, provided in one draft that the statute "applies exclusively to all suits arising under a residential or commercial property insurance policy not brought by an assignee which is issued or renewed on or after July 1, 2021." *See* A.76. Significantly, this language concentrating on the insurance contract's issuance or renewal date in HB 305 was not included in the legislation passed by the Legislature and signed into law. The intentional deletion of this language and replacement with the specific text applying the statute to all suits filed on or after July 1, 2021 emphasizes the intent for the statute to yield *immediate* relief to the insurance industry and the courts. Had the rejected version

been enacted, the application of SB 76 would not provide the palliative impact for some time, waiting on policy inception or renewal after July 1, 2021. This was considered and rejected by the Legislature.

Furthermore, no debate exists that the statute intentionally addressed an immediate need and legitimate legislative policy decision to alleviate the first-party insurance crisis in Florida by requiring a pre-suit resolution path. *See* Prof'l Staff of the Comm. on Rules, Fla. S. Bill Analysis & Fiscal Impact Statement, S.B. 76, (Mar. 29, 2021) (final bill staff analysis of SB that enacted § 627.70152(5)); *see also* Feb. 28, 2022 Senate Committee on Appropriations, A.9 ("…the horror stories of the property insurers in Florida that are struggling just to provide coverage for countless Floridians who need homeowners insurance."). Indeed, carriers stopped writing policies in Florida due to the property litigation crisis, or others were taken over. (A.9). Florida domestic property insurers were projected to double their claims from 2019 to 2020. (Prof'l Staff of the Comm. on Judiciary, Fla. S. Bill Analysis and Fiscal Impact Statement, S.B. 76, (March 11, 2021), A.6). Not only did claims steadily climb, but claims-

related litigation steeply ascended between 2016 to 2020. *Id.* at A.8; *see also* A.84-87.

Significantly relevant to the pre-suit notice aspect of the new statute, the Office of Insurance Regulation analyzed data that revealed "[t]he percentage of claims filed with legal representation at the first notice of loss increased from 10.3 percent in 2017 to 43.1 percent in 2018, 63.3 percent and 64.5 percent in years 2019 and 2020, respectively." *Id.* at A.10. In turn, this drove an increasing trend of domestic property insurers filing for rate increases. *Id.* at A.7. Therefore, the goal of requiring immediate relief beginning on the statute's effective date motivated the focus on suits filed. If the pre-suit notice works effectively as intended, the insurer's first notice of a loss will be non-adversarial, outside of litigation, and provide both parties an opportunity to resolve the dispute before litigating.

Finally, the preamble to Senate Bill 76 made clear the legislative intent:

> An act relating to insurance;… providing applicability; providing definitions; requiring a claimant to provide written notice to the department **before a suit is filed** under an insurance policy; requiring certain information to be included in the notice; requiring a claimant to serve notice within specified time limits; requiring an insurer to provide a response to the notice within a specified

> timeframe; providing for tolling of time if appropriate; requiring an insurer to have a procedure for the prompt investigation, review, and evaluation of a dispute stated in the notice and to investigate each claim in the notice in accordance with the Florida Insurance Code; requiring an insurer to provide a response to the notice within a specified timeframe; requiring an insurer to provide a response in a certain manner; requiring a court to dismiss without prejudice a claimant's suit under certain circumstances;… providing an effective date.

Ch. 2021-77, Laws of Fla. (S.B. 76) at 1 (emphasis added).

III. RETROACTIVITY AND *MENENDEZ* COMPEL INTERPRETATION CONSISTENT WITH THE STATUTE'S PLAIN TEXT

An important foundational fact for this Court's consideration pertains to when fee entitlement attaches to a property insurance claim. Under section 627.70152's predecessor, no fee right existed until a suit resulted in a decree or judgment in favor of the insured. *See* § 627.428, Fla. Stat. Simply, the existence of an insurance contract does not form any entitlement to attorneys' fees; suit filing and a subsequent recovery under that suit in an insured's favor do. Section 627.70152 does not remove the substantive fee entitlement tethered to suit filing. Instead, it simply places a procedural condition precedent *before* this substantive right can vest—when it always vested—with the filing of a lawsuit.

Under either fee statute, before a lawsuit is filed, there is only an expectation of fees, but no vested right to fees exists before a lawsuit is filed in the property insurance context. Therefore, the argument that enactment of section 627.70152 impacts a substantive right if applied "retroactively" to an insurance contract created before the statute constitutes a logical fallacy based on an incorrect presumption that the contract created the fee entitlement; it does not.

The Florida Supreme Court's decision in *Home Insurance Co. v. Drescher*, 220 So. 2d 902 (Fla. 1969), illustrates that statutory changes involving an insured's right to attorney's fees are not presumed to create a retroactivity problem vis-à-vis a policy's inception date. There, an insurance contract was entered into before July 25, 1967 (the date final judgment against the insurance company was entered). *Id.* at 903. On July 26, 1967, an amendment to section 627.0127, Florida Statutes, became effective, which provided Florida's first statutory basis permitting an insured to recover appellate attorney fees. *Id.* The insurance company appealed on September 22, 1967. *Id.* Yet, the Florida Supreme Court *authorized* the insured to recover appellate attorneys' fees:

> [W]e hold that attorneys' fees may be awarded under the amended statute for services in the appellate court, whether on direct appeal or in certiorari proceedings, in all cases where the notice of appeal is filed subsequent to July 26, 1967.

Id. at 903-04. Thus, the insurance company was held liable for appellate attorney's fees, although no right to such fees existed at policy inception. Although uncited in *Menendez v. Progressive Ex. Ins. Co.*, 35 So.3d 873 (Fla. 2010), *Drescher* is highly instructive and should be considered in this Court's retroactivity analysis.

Moreover, "the presumption against retroactivity is only a default rule of statutory construction. The essential purpose of statutory construction is to determine legislative intent." *Metro. Dade Cnty. v. Chase Fed. Hous. Corp.*, 737 So. 2d 494, 500 (Fla. 1999). The presumption can be rebutted by clear evidence of legislative intent. *Id.* But, where the statute's language is clear, there is no need to resort to canons of statutory construction. *Id.* In determining legislative intent as to retroactivity, "both the terms of the statute and the purpose of the enactment must be considered." *Id.* at 500 (internal citations omitted).

The Institute acknowledges that, citing *Menendez*, the Second District Court of Appeal has summarily denied three petitions for writ of certiorari filed by an insurer in matters that ostensibly involved denials of motions to dismiss pursuant to section 627.70152. *See Security First Ins. Co. v. Fields*, 338 So. 3d 872 (Fla. 2d DCA 2022) (table); *Security First Ins. Co. v. Stokely*, 338 So. 3d 872 (Fla. 2d DCA 2022) (table); *Security First Ins. Co. v. Peyton*, 338 So. 3d 865 (Fla. 2d DCA 2021) (table). Southern District of Florida Judge Beth Bloom has also skeptically viewed the statute's reference to suit filing date and concluded that the date of policy issuance controlled. *Villar v. Scottsdale Ins. Co.*, No. 22-cv-21362-BLOOM/Otazo-Reyes, 2022 WL 3098912, at *4 (S.D. Fla. Aug. 4, 2022); *cf. also Bharratsingh v. Lexington Ins. Co.*, No. 0:22-cv-60037-GAYLES/STRAUSS, 2022 WL 3279537 (S.D. Fla. Aug. 10, 2022). In addition, the Middle District's Judge Timothy Corrigan compared section 627.70152 to the PIP statute in *Menendez* on the basis that it "imposes new duties, obligations, and penalties" on an insured. *Dozois v. Hartford Ins. Co. of the Midwest*, NO. 3:21-cv-951-TJC-PDB, 2022 WL 952734, at *3 (M.D. Fla. Mar. 30, 2022); *cf. also Carmel Townhomes Condo. Ass'n*

v. Rockhill Ins. Co., No. 22-CV-23437-SEITZ, 2022 WL 17324848 (S.D. Fla. Nov. 29, 2022).

However, the Second District's unelaborated rulings, *Villar*, *Bharratsingh*, *Dozois*, *Carmel Townhomes*, and at bottom, Appellants' reliance on *Menendez* in support of their retroactivity argument are unavailing. While *Menendez* admittedly involved a pre-suit notice requirement, the PIP statute there differed in significant ways and so cannot govern this Court's analysis.

Specifically, the statute in *Menendez*, subsection 627.736(8), Florida Statutes titled "[a]pplicability of provision regulating attorney fees," leads with the following language: "[w]ith respect to any dispute…." The PIP statute contained no express reference to applicability to suits filed by an insured that would trigger the "start" date of the statute's effectiveness. As a result, *Menendez* followed the basic principle that "the statute in effect at the time an insurance contract is executed governs the substantive issues arising in connection with that contract." *Id.* at 876.

Perhaps most clearly why section 627.70152 is not controlled by *Menendez* is gleaned from the Florida Supreme Court's reasoning to decline retroactive application of the PIP statute. The Florida

Supreme Court recognized that the amended PIP statute provides an insurer additional time to pay an overdue claim. *Menendez,* 35 So. 3d at 878. Additionally, the amendment capped the penalties to an insurer at $250. *Id.* These concerns do not exist here.

Because section 627.70152 meaningfully contrasts with *Menendez*'s PIP statute for purposes of whether it imposes new "duties, obligations, and penalties," Judge Corrigan's limited analysis (finding "the provisions that are triggered by § 627.70152(3): §§ 627.70152(4), (5), and (8)(b) . . . include additional duties, obligations, and penalties," 2022 WL 952734, at *2–*3) in *Dozois* is misplaced. Section 627.70152(8)(b)'s provision for dismissal of suit if the statutory notice conditions are not met is wholly unlike the PIP statute's "penalty" in *Menendez* where an insurer's payment following notice "shield[ed]" it from further liability.[1] Here, significantly, the insured may include a claim for attorney's fees *in the Notice of Intent*,

[1] Section 627.736(11)(d), Fla. Stat. (2001), provided, "[i]f, within 7 business days after receipt of notice by the insurer, the overdue claim specified in the notice is paid by the insurer together with applicable interest and a penalty of 10 percent of the overdue amount paid by the insurer, subject to a maximum penalty of $250, no action for nonpayment or late payment may be brought against the insurer." (emphasis added).

and the Legislature expressly precluded argument that the Notice of Intent should limit evidence of attorney's fees that may be recovered if the insured is successful in suit. § 627.70152(3)(a)5.a., Fla. Stat.; § 627.70152(6)(b), Fla. Stat.

The *Dozois* court's limited analysis is also unpersuasive for a more fundamental, threshold reason. By assuming *arguendo* that the Legislature intended section 627.70152 "to apply retroactively," *Dozois*, 2022 WL 952734 at *2, the court side-stepped the threshold inquiry of analyzing the Legislature's words and discerning its true intentions ("suits filed"). Moreover, if applying the statute to a suit that post-dates July 1, 2021, is not "retroactive," it is not necessary to reach the substantive versus procedural questions focused on in *Menendez*, and rushed to in *Villar* and *Dozois*. *See Total Care*, 337 So. 3d, at 77 ("Because we hold that section 627.7152(9)(a) was not retroactively applied to the assignment, we do not reach the question of whether the statute is procedural or substantive.").

In section 627.70152, the only "benefit" to an insurer concomitantly results in an equal benefit to the insured: pre-suit notice and possible early resolution without delay and cost of litigation. There is no additional time or benefit given to an insurer.

Rather, the statute expedites the procedural aspects of claim determination and promotes early settlement. Simply, the statute adopts a commonsense approach to the crisis facing the industry and courts.

CONCLUSION

In response to the avalanche of first-party property insurance litigation and its deleterious impact to Florida's property insurance market, the Florida Legislature passed and Governor DeSantis signed into law SB 76 to immediately govern lawsuits filed on or after July 1, 2021. The purpose of section 627.70152 is to encourage pre-suit resolution and avoid property insurance lawsuits driven by the proverbial fee tail wagging the claim dog.

The statute's plain language defines its applicability and this Court can be assured of that clarity by the consistent legislative history confirming that applicability. Accordingly, the Institute joins Appellee, Security First Insurance Company, in asking this Court to give effect to the plain language and intent of the statute, and apply the mandate of dismissal without prejudice to all suits filed on or after July 1, 2021, that have not first satisfied the pre-suit notice requirement.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

We hereby certify that a true and correct copy of the foregoing has been filed with the Florida Court's e-Filing Portal and thereby served in compliance with Florida Rule of General Practice and Judicial Administration 2.516(b)(1) on this 5th day of December, 2022, upon: Kenneth R. Duboff, Esq., Duboff Law Firm, 680 NE 127th Street, North Miami, FL 33161, Emails: Kduboff@dubofflawfirm.com and Courtdocument@dubofflawfirm.com, (*Counsel for Appellants*); and Mihaela Cabulea, Esq., Butler Weihmuller Katz Craig, LLP, 400 N. Ashley Drive, Suite 2300, Tampa, FL 33602, Emails: mcabulea@butler.legal; and rburnison@butler.legal; (*Counsel for Appellee*).

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CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that this Amicus Curiae Brief is prepared in Bookman Old Style 14-point font and, excluding the parts of the Brief exempted by Florida Rule of Appellate Procedure 9.045(e), complies with the word count limit requirement of Rule 9.370(b).

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