We now move to the fourth and final case on today's docket. Petty versus the Florida Guaranty Association.

>> May it please the court. Brian Gowdy.

Today this court must decide whether the following type of claim is a claim that is a covered claim that FIGA must claim an insurance claim for section 6 to 7.428C incurred by insured in a suit against its now insolvent insurer that before the insolvency confessed judgment on the underlying loss claim.

The covered claim is one that must arise out of and be within the coverage of the insurance policy.

That is what section 631.54 sub 3 states.

The type if we claim we are here today on is a covered claim

because section 67.428 is a part
of every insurance policy in
Florida and it obligates every
insurer to cover the fees
incurred by its insured to
successfully prosecute a suit
against the insurer.
>> Mr. Gowdy, why doesn't
section 631.70 control the
outcome in this case?
>> Section 6 through 1.70
provides a separate analysis for
post-insolvency fees distinct
from the analysis under
section 631.54 which deals with
covered claims.
I am going to point into the
plain language and then I'm
going to point you to some
history.
First, you are right, doesn't
say post-insolvency but 63.170
says that 67.428 shall not be
applicable to any claim
presented to FIGA.

Let's stop there.

They conceded in the trial court, FIGA conceded in the trial court that the underlying loss claims were never presented.

Page 19 and 20 of the summary judgment transcript, hearing transcript.

The underlying loss claim was never presented to FIGA.

The only claim that has been presented to FIGA is the fee claim under 67.428.

That was the fact end Soto as well from the third DCA.

The underlying loss claim both here and in Soto were fully paid before the insolvency so the only claim that has ever been presented to FIGA is the 67.428 fee so let's continue on with the plain language.

Except when FIGA denies by affirmative action a covered

claim, and here we are
contending that the fee claim is
a covered claim under 631.543
and that FIGA clearly as we are
here before the Supreme Court
arguing whether it is a covered
claim as well as by other
proceedings below.
631.70 does not apply to the
plain language and I'm happy to
go into some history but --
>> This all turns on whether
this claim for attorney's fees
is a recovery claimed.
>> I agree.
>> That is not really
oversimplifying it.
There are different angles to
approach it from and if you get
these very statutes interact and
I think you have done a very
nice job in your brief of making
your case, but let me ask you
this.
Don't you have a problem with

the concept of covered claim in this context is that points us to a meaning that is not related to attorney's fees, but related to a claim that is against an insurable loss, something that is covered in the sense that insurance provides coverage for losses.

And that's kind of ordinary understanding of the term of coverage and a covered claim is really a cross purposes with your argument?

>> I agree it is at cross purposes with the ordinary and probably typical thing when you think of coverage, but let's go back to 631.5 sub 3.

The only example a gives of a covered claim is an unearned premium.

>> But is that really an example?

I think that is a good argument

but that is so different.

Oftentimes they say and we are going to add this even though it is not something you would think of as a covered claim but a tack-on.

That is not what the language says.

It doesn't say and.

A covered claim means an unpaid claim, including one for unearned premium, which arises out of and is in the coverage of the policy.

And so therefore the which cause modifies the covered claim -- excuse me, modifies the general term unearned premium and just to say, to show you how it is analogous to attorney's fees, both cover a risk that is controlled -- a risk of an occurrence controlled by the ensure.

For an unearned premium it is

typically going to happen when
the insurer decides how to
cancel the policy and let's say
an insurer 30 days before
insolvency, 15 days before
insolvency cancels the policy
and fails to return the premium.
I have a claim for the unearned
premium.
I can get it from FIGA.
Did FIGA do anything wrong
No but clearly and of the
statute I'm allowed.
>> But again it really is to
me -- and I sort of them going
along with what Justice Canady
said -- unearned premiums don't
arise out of coverage in a
typical sense.
My thought was they were
including this unearned premium
because that would not the
otherwise a definition of a
covered claim that arises from
coverage.

The alternative argument is to say that they could've just as easily said including one of honor and premiums and previously incurred attorney's fees under 6.27428.

>> They could've listed all the examples.

>> What other examples -- but what else other than -- what would you agree could not be undercovered claims?

>> I would tell you a negligence or a fraud claim where you are trying to get a return on a premium would not be a covered claim.

But if the statute says that an insurance company when it cancels the policy must return the premium, that would the a covered claim.

Your Honor, I'm sorry to interrupt.

Honored premiums and fees can be

on both sides.

You have to do the analysis and ask whether it is within the coverage and arises out of the policy.

>> Part of your argument is that this is covered to cut close it is implied by law that the policyholder has.

Wouldn't that apply to the claim for negligence?

>> No, that would be a general tort claimed.

>> This is something that as the policyholder has, part of what the law provides as their rights --

>> A case that we cite does not say the general tort claims like fraud or generally applicable protection statutes that are outside of the insurance context are incorporated into the insurance policy.

>> You would have 624.125.

>> I think that would be a much closer question because if you go back and trace the history of that, and you even mention this and the court mentions this in the John's opinion, the does are often considered non-contractual damages.

>> That the statute in your argument is it is part of every contract and 624 and 155 is part of every contract.

>> I don't think this court has -- I am unaware that this court decision is held at 624155 is part of a contract.

67.428 is under Chapter 627 which is titled, the insurance contract.

>> I can see your argument if you had defended the insured and the contract we know, liability policies cover both defense and payment and they provided and if that had been done and those

attorneys fees could be I think
legitimately argued.
Which you are not agreeing as
part of a covered claim of the
policy.
>> Correct, I would agree.
[INAUDIBLE]
>> Again the category, you are
in a different category.
You are under first party
benefits under the contract.
>> Correct and it is a statute
that under 627 which is the
Title of the insurance contract
that this court has repeatedly
held as a part of every
insurance contract in Florida
and is usually held for 75
years.
And therefore because it is part
of the insurance contract, and
it covers a risk, that is
triggered when the insurer
refuses to pay.
So therefore it arises out of

the coverage of the policy.

I understand your point about

61255.

I think that as a whole leather

case.

Don't think it necessarily

follows that just because you

ruled today that 67-point or 28

would give rise to a covered

claim that is a bad faith claim

under 625.155.

>> I would agree with your

argument to a certain extent

that attorneys fees under the

example is suggested to you is

the nature of a covered claim

because a policy Thomas is to

defend you and promises to play

pay the claim in the liability

situation.

Not same with a first party like

we are involved with your.

>> But let's say the policy

expressively -- out of the

statute and put it into policy.

We are now putting form over substance.
Every policy by Florida law includes that provision, whether or not it is expressly in the policy.
There are lots of other examples where even if the insurance policy does not expressly say something, for example it has the incorrect amount of coverage required by law, that is going to be incorporated into the policy because of the heavily regulated nature of insurance contracts.
I think the lack of this expressed -- and you are agreeing with me just as Lewis that the liability provision would be covered.
Would easily to say if the insurer had written 62.74280 in a policy would be covered?
>> I can see interpreting that

where there is a duty to defend.

It is interesting but I hear

what you are saying.

>> Attorneys fees are applied in

every contract.

That derives from State Farm

versus Palma, is that correct?

>> Actually goes back 75 years.

Palma is the most famous case.

>> That would involve some kind

of radiology of something that

the attorney wanted that he had

to seek payment for and sought

attorneys fees for that?

>> I think the precise issue in

Palma was whether or not you

could get fees for time spent

litigating fees and the court

came down and -- the court

concluded you could walk for

entitlement of fees and the only

way the court could reach that

conclusion was to hold that six

to 7.428 was part of the policy

because if you go to 67.428

itself that makes it clear you
can only get fees for things
that are under a policy -- those
are the exact words -- under a
policy.
So for you to hold here
differently would be
inconsistent with Palma.
Because if it is not part of a
policy than Palma is wrong.
Because you can't get fees for
anything that you have spent
litigating outside of the
policy.
You are not going to be able to
reconcile the two decisions if
you disagree with those.
Be other reasons just real
briefly, I wanted to get back to
Justice Polston's case.
That was only involved posts
insolvency fees.
>> Let's talk about the plain
language again for a moment.
Your whole argument is that the

attorneys fees under 627.428
were part of the covered claim
in this case.
>> No, it is part of the
insurance policy and therefore
it is a covered claim.
We have to covered lamps in this
case.
>> If it is part of the claim,
you are still talking about it
is included in the claim to FIGA
so what you are really arguing
is saying that attorneys fees
under 627.428 is part of the
claim now being presented to
FIGA with 631.70 clearly
prohibits.
>> I guess I have to correct
your premise which is you keep
saying a claim presented to
FIGA.
You can imagine in an insurance
company you have multiple
coverages, one for UM1 for
liability and you can have

multiple claims under the same

policy.

The law always recognizes that.

>> You are trying to make --

>> But you keep saying it is

part of the claim.

It is part of the fee claim,

yes.

The fee claim was presented to

FIGA of the lost claim was not.

The fee claim is presented to

FIGA and denied and therefore

six through 1.70 does not

protect FIGA.

>> Does the procedural setting

in this case make a difference

with regard to come in your

case, you already have the

judgment was already entered,

correct?

>> That is critical.

There was a confession of

judgment which under this

court --

[INAUDIBLE]

>> If they're not in a judgment there would be I would concede we would not be able to get our fees in this case.

>> Just to sort of follow-up, does it matter -- there was a motion for an award of attorney fees but there was not a judgment entered for attorneys fees or a determination of an amount.

>> There was not that under this court, Waller to another case this court is has held that once the insurer pays that is tantamount to a judgment.

>> But the amount was not determined.

>> The amount of the lost claim was.

>> The amount of the attorney fee.

>> No.

>> Now let's go one step where there.

You say you are entitled to

50,000 it is presented to FIGA

and they say we will give you

attorneys fees but we think

looking at this you are only

entitled to 10,000.

That is litigated.

You get fees in determining how

much is the amount of the?

>> Not under Palma.

>> Well also not only under --

you can't get it against FIGA.

>> If FIGA admits, if FIGA

admits that they have to pay the

fees.

If one it was presented and they

say yeah we have to pay and then

we spend time litigating the

amount of fees, I would agree

under both the statute and Palma

we are not entitled to fees for

time spent litigating.

I am into my rebuttal time.

I am happy to answer questions

for the reserve of my balance.

>> May it please the court.

I represent the Florida

insurance Guaranty Association.

I have some important points to

cover but I would like to

discuss some questions that have

been asked.

>> Has FIGA always taken the

position that any attorneys fees

say in this case the judgment

that had already been entered is

not within the coverage of the

FIGA statute?

Does it matter at what phase the

attorney's fee claim -- go.

>> It doesn't make a difference.

631.70 is rival and point.

>> I am relying on the covered

claim portion but you actually

are saying that we decided just

under .70 being that is a

separate reason for upholding

the second District decision?

>> Correct, Your Honor.

>> How do you distinguish Palma

from this case?

>> Palma, the only portion of that decision that is relevant is about one sentence which states 672.428 is an implicit part red into the policy.

When a dispute arises over either a delay in resolving the case or resolving the claim or in outright refusing coverage and a lawsuit has to be filed to attempt to obtain the benefits, the coverage under the policy, then that's statute declares that the insured will be able to recover reasonable attorney's fees.

It is part of the policy that the Florida legislature is a statutory obligation that has been determined repeatedly to be in the nature of four to actually be a penalty which is a separate argument.

>> Why is it a reasonable

reading of 631.70 really is that
you cannot get attorneys fees
for your dealings with FIGA
unless they are doing something
that is delaying it?
I don't read that, quite
frankly, I don't read that is
saying that FIGA is not going to
have to pay attorneys fees that
I've already been determined.
They were not liable for
attorneys fees in your
interaction with FIGA unless
having some unreasonable delay.
>> I think the key word in that
sentence is the provisions of
67428 which their entire claim
is predicated on -- provides
attorneys fee shall not be
applicable to any claim, any
claim.
Doesn't say pre-insolvency
versus posts insolvency and the
word and he has brought all
inclusive meaning and you would

have to -- -- go.

>> Any claim that is brought to FIGA as opposed to any claim that has already been litigated? It seems to me that is a reasonable reading of that as your reading of it.

>> What would make it from a policy standpoint unreasonable is that if it only applied to posts insolvency, things that FIGA can't control but leaves open this wide door for the assessment of attorney's fees based upon the failure of the insolvent insurer to properly handle the claim and to pass that enormous amount of attorneys fees that typically are way beyond what the value of the claim was --

>> But you do agree that there are two aspects to a liability policy, crack? You have been doing this for a

lot of years.

>> A lot of years.

>> So there are two different

things.

The duty to defend and the duty

to lay claim.

If they don't abandon the

liability context you are saying

that the FIGA statute has no

responsibility for that even

though the policy covers the

Defense?

>> No, and Jones held that.

That is a contractual obligation

that is within the coverage.

>> They should have to pay those

fees so what you are talking

about is first party claims

where there is a denial of

coverage and you have to see --

sue your own insurance company

not for defense of the claim but

for the benefit of the claim.

>> The legislative history bears

that out.

It basically said back in 1977
that FIGA was automatically
being held responsible for these
fees and people were seeking to
recover them in the legislature
wanted to limit the
recoverability of fees based
upon the actions, affirmative
actions of FIGA itself.
>> 67.428 applies to FIGA but
only if denied by affirmative
action.
What does that mean?
>> If they deny a claim.
There were several recent
decisions --
>> Isn't the claim that was
presented to FIGA the claim for
the attorneys fees that have
been previously incurred?
And they denied it and said it
wasn't within the scope of their
obligation, correct?
>> Correct.
>> So, if the decision in this

case is that it is within the
scope, then you would be
responsible for additional
attorneys fees, wouldn't you?
>> If it was in the scope of the
policy.
Then they are not relying upon
67.42 A..
It is within the coverage of the
policy and we are obligated
because of the definition.
>> I'm simply not saying and I
understand others have a
different view but .70 gets get
to their Saletti go back to the
one that I think is the stronger
argument and you tell me if it
is plain language or ambiguous
whether this is a covered claim
or not.
That is a prior claim for
attorney attorneys fees.
>> First we believe that the
term used in the statute, the
three elements of covered claim

means unpaid claims.

It arises out of the insurance

policy.

It is within the coverage of and

in this case that is the key.

>> There is the problem.

Just like Justice Lewis is

saying.

SO LET ME GO BACK TO THE ONE

THEY THINK IS THE STRONGER

ARGUMENT, AND YOU TELL ME IF

IT'S PLAIN LANGUAGE OR

AMBIGUOUS ABOUT THAT THIS IS

A COVERED CLAIM OR NOT THAT

IS THE PRIOR CLAIM FOR

ATTORNEY'S FEES.

>> FIRST, WE BELIEVE THAT

THE TERM THAT IS USED IN THE

STATUTE, THE 3 ELEMENTS OF

COVERED CLAIM MEANS UNPAID

CLAIM.

IT ARISES OUT OF AN

INSURANCE POLICY.

IT'S WITHIN THE COVERAGE OF

AND IN THIS CASE IT'S THE

KEY.

>> HERE IS THE PROBLEM.

IT IS WITHIN THE COVERAGE

AND JUST LIKE JUSTICE LEWIS

WAS SAYING THE COVE --

COVERAGE COULD BE AN

ATTORNEY AND THEY'RE

SUPPOSED TO GET PAID, COULD

THEY GET PAID?

THE EMPLOYER WHO DIDN'T GET

PAID BY THE INSOLVENT

INSURER?

>> THEY WOULD NOT HAVE A

COMPANY DEFENSE LAWYER, IT

WOULD BE A CLASS SIX.

BECAUSE HE IS NOT --

THERE IS NO CONTRACT BETWEEN

THE INSURANCE COMPANY WITH

RESPECT THE CONTRACT BEING

BREACHED IS NOT THE

EMPLOYMENT COMPANY AND THE

INSURANCE.

>> THAT IS NOT A COVERED --

>> IS THAT CORRECT, IT'S NOT

A CLAIM?

>> CORRECT.

>> SO HOW DO YOU THEN, AND

MAYBE THIS IS --

INCLUDING ONE OF UNEARNED

PREMIUMS, IF THAT WAS NOT IN

THERE, INCLUDING ONE OF

UNEARNED PREMIUMS, WOULD

THAT BE A COVERAGE CLAIM?

>> UNEARNED PREMIUMS ARE A

CLAIM WHETHER THEY ARE

SPECIFICALLY INCLUDED IN THE

POLICY --

>> HOW DOES IT ARISE FROM

THE COVERAGE POLICY.

IS A PREMIUM SEPARATE?

IT'S WHAT GETS YOU THE

POLICY?

IT DOESN'T ARISE WITHIN THE

COVERAGE OF THE POLICY.

>> IT'S NOT GOING TO MEET

THOSE THREE ELEMENTS AND I

AGREE IT'S SOMEWHAT

AWKWARDLY WORDED.

WHAT'S BETWEEN THE TWO

COMMAS IF YOU'RE DEALING

WITH GRAMMAR COULD HAVE BEEN

PUT AT THE END --

>> DOESN'T THAT CREATE A

PROBLEM FOR THIS BECAUSE IT

--

WHETHER IT INCLUDED ONE OF

BROADENING THE TERM OF

CLAIM.

AND I'M MORE SYMPATHETIC TO

YOUR CONSTRUCTION ARGUMENT,

BUT I'M STRUGGLING, SO I

WANT TO UNDERSTAND, SOMEHOW,

DOING THAT UNEARNED

PREMIUMS, I'M NOT SURE IF

THAT HELPS OR HURTS.

>> IT'S NOT INCLUDED AND

THAT SPECIFIC REMEDY IS

USUALLY A STATUTORY REMEDY

WHERE UNEARNED PREMIUMS HAVE

TO BE GIVEN BACK.

UNDER THE LIQUIDATION,

WITHIN 30 DAYS OF SOLVENCY,

ALL OF THE INSURERS POLICY

ARE NOT SOONER CANCELLED BY

THE INSURER WILL BE

CANCELLED AND REPLACEMENT

COVERAGE HAS TO BE LOCATED.

THE STATUTE AND THE

LEGISLATURE WANTED TO MAKE

SURE AS THEY DO ACROSS THE

COUNTRY, THAT THAT MONEY

GOES BACK AND IT'S LEFT ON

THAT POLICY, THE UNEARNED

PREMIUM GOES BACK TO THE

INSURED.

AND THEY DIDN'T WANT A

SITUATION WHERE SINCE IT'S

NOT TECHNICALLY IN THE

COVERAGE OF THE POLICY, THAT

UNEARNED PREMIUM WOULD NOT

BE CLASSIFIED AS A CLAIM.

THAT'S WHY IT'S MADE CLEAR.

AND WHETHER IT MENTIONED IT

IN THE POLICY OR BY A

STATUTE, WHICH REQUIRES

THAT, IT'S GOING TO BE

CONSIDERED A CLAIM, AND IT

WOULD PAY.

AND THAT'S CONSISTENT

BECAUSE THAT ASSISTS THE
UNFORTUNATE INSURED IN
SECURING ADDITIONAL COVERAGE
TO CARRY OUT THE REMAINDER
OF THE TERM.
AND I THINK WHERE WE
STARTED, AS I LISTENING TO
THE PREVIOUS ARGUMENT, AND
WE'RE DEALING BASICALLY WITH
PLAIN UNAMBIGUOUS LANGUAGE.
SO I AGREE IT WAS VERY
INTERESTING WITH A LOT OF
DIFFERENT TWISTS AND TURNS.
BUT IN REALITY, THIS IS A
VERY STRAIGHTFORWARD CASE.
SPRAT AND APART AS WE
DISCUSSED 63170.
IT'S A QUESTION OF, DO THE
ATTORNEY'S FEES UNDER
267428.
IT DOESN'T MAKE ATTORNEY'S
FEES COVERAGE OR BUNTS UNDER
--
COVERAGE OR BENEFITS UNDER
THAT POLICY.

THAT'S GOING TO CHANGE THE

COVERAGE OF A POLICY.

IF THE INSURERS POLICY

DOESN'T COMPLY WITH THE PIP

STATUTE OR UM STATUTE.

THAT STATUTE IS GOING TO BE

REFORMED, AND IT WILL BE

READ AS IF IT INCLUDES,

WITHIN THE COVERAGE, THAT

STATUTORY MANDATES COVERAGE.

THERE'S NOTHING YOU'LL FIND

IN 627428 THAT SAYS THE

POLICY HAS TO BE AMENDED SO

IT PROVIDES COVERAGE FOR

ATTORNEY'S FEES.

I CAN'T MAKE IT ANY SIMPLER

THAN THAT.

AND THE LEGISLATURE HAS

SPOKEN, AND FROM A POLICY

STANDPOINT, IF YOU INCREASE

THE OPERATING EXPENSES, THEN

THE ONLY PEOPLE THAT ARE

ULTIMATELY GOING TO BEAR THE

BURDEN OF THAT, ARE THE

FLORIDA CITIZEN'S AND

BUSINESSES THAT PURCHASE
INSURANCE BECAUSE ASSESSMENT
WILLS GO RIGHT THROUGH THE
INSURANCE COMPANY AND BY
STATUTE THEY CAN PASS THOSE
ON.
AND WE WOULD REQUEST THAT
THIS COURT APPROVE THE
SECOND DCA IN THIS CASE,
THANK YOU.
>> I WANT TO FOCUS ON THE
631.54 COVERED DEFINITION.
FIRST, AMBIGUOUS, THEY JUST
SAID UNEARNED PREMIUMS ARE
NOT WITHIN THE COVERAGE BUT
THEY'RE COVERED CLAIMS.
IF YOU READ WHICH CLAUSE
MODIFIES UNPAID CLAIM AND
UNEARNED PREMIUM.
SO IF IT DOESN'T ARISE OUT
OF OR WITHIN THE COVERAGE IT
CAN'T APPLY.
SECOND I HEARD ANALOGYIES TO
THE CASES.
SINCE 1980, FLORIDA COURTS

HAVE HELD THAT WORKER COMP

FEES ARE COVERED CLAIMS

UNDER 631.543.

AND THAT IS A MUCH MORE --

THAT IS A MUCH CLOSER

ANALYSIS TO THIS.

BECAUSE THERE, THE WORKER IS

ADVERSE TO THE CARRIER.

YOU CAN SUE THE CARRIER IN

WORKERS COMP.

IT'S LIKE FIRST PARTY.

AND UNDER 443.4, WHETHER OR

NOT THE POLICY SAY IT'S OR

NOT, IF THE WORKER WINS, HE

GETS HIS FEES.

AND SINCE 1980, 3-DISTRICT

COURTS OF APPEAL HELD THAT

WORKERS COMP'S FEES ARE A

COVERED CLAIM IF INCURRED

PREINSOLVENCY.

AND THE LEGISLATURE HAS DONE

NOTHING TO CHANGE THAT.

AND THE SKY IS NOT FALLING

EVEN THOUGH WORKERS COMP

CLAIMS ARE COVERED FEES.

AND TO ADDRESS THE POLICY

ARGUMENT HERE.

WHAT THEY'RE ASKING YOU TO

DO, IS YOU'RE RIGHT, THEY

INSURE THAT WHEN WE HAVE AN

INSOLVENT COMMENT, --

POLICY, THAT IS SPREAD

THROUGH EVERYONE --

SPREAD THROUGH EVERYONE IN

THE STATE.

THEY ARE BORN ONLY BY THE

POLICY HOLDERS OF THE

PARTICULAR INSURANCE

COMPANY.

THE FEW INSURED IN THE STATE

INCUR ALL OF THE RISK.

AND I ENCOURAGE YOU TO READ

THE BRIEF THAT EXPLAINS HOW

IF YOU DON'T ALLOW THESE

FEES TO BE COVERED CLAIMS,

IT MEANS THAT HOMEOWNERS

LOST IN HURRICANES WILL NOT

BE ABLE TO REBUILD THEIR

HOMES.

THE ATTORNEYS ARE NOT

BEARING THE RISK HERE.

THEY'RE GOING TO GET PAID

ONE WAY OR ANOTHER.

THEY'RE GOING TO GET PAID ON

A CONTINGENT BASIS.

AND THE HOMEOWNER MAY NOT

HAVE ENOUGH MONEY TO REBUILD

THEIR HOME OR WHATEVER OTHER

LOSSES THEY MAY HAVE HAD.

SO WE ASK THE COURT, BASED

ON THE ARGUMENTS PRESENTED

IN THE BRIEF, JUST TO

REVERSE THE DECISION ON THE

SECOND DISTRICT COURT OF

APPEAL.

FIND THAT A CLAIM FOR

PREINSOLVENCY FEES IS A

COVERED CLAIM AND NOT BARRED

BY 6314670.

>> THANK YOU FOR THE

ARGUMENT, THAT'S THE FINAL

CASE ON THE DOCKET TODAY,

THE CASE WILL NOW STAND

ADJOURNED.

>> ALL RISE.