**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF FLORIDA**
**Case No. 11-23912-Civ-SCOLA/BANDSTRA**

WEST PALM GARDENS VILLAS
CONDOMINIUM ASSOCIATION, INC.,
a Florida non-profit corporation,

Plaintiff,

vs.

ASPEN SPECIALTY INSURANCE COMPANY,
A foreign corporation,

Defendant.
_____/

**ORDER ON DEFENDANT'S MOTION TO DISMISS WITH PREJUDICE**

THIS MATTER is before the Court on the Defendant's Motion to Dismiss with Prejudice (ECF No. 8). The Court has reviewed the Motion, the record, and the relevant legal authorities, and for reasons set forth more fully below, it is **ORDERED and ADJUDGED** that the Motion (ECF No. 8) is **DENIED.**

## I. FACTUAL BACKGROUND

This matter concerns an insurance dispute regarding a loss resulting from Hurricane Wilma. For the purposes of the present Motion, the Court takes the Plaintiff's well-pled factual allegations as true. In 2005, Plaintiff West Palm Gardens Villas Condominium Association, Inc. ("West Palm") was allegedly insured under a homeowners insurance policy ("the Policy") issued by the Defendant, Aspen Specialty Insurance Company ("Aspen"). Compl. 3 ¶ 16, ECF No. 1. The terms of the Policy allegedly insured West Palm's property, located at 2205-2391 W. 69th Street, Hialeah, FL 33106, against certain losses. *Id.* at 4 ¶18. On October 24, 2005, West Palm allegedly suffered over $2 million in damages to that property as a result of Hurricane Wilma. *Id.* at 4 ¶ 19. West Palm alleges that Aspen initially acknowledged coverage for the loss and assigned a claim number and insurance adjuster to the loss; however, upon investigation of the property, Aspen allegedly determined that payment for the damages was not warranted as the damages were under the applicable Policy deductible. *Id.* at 4 ¶¶ 20–21. West Palm disputed

that the damages were below the deductible, and invoked the Policy's appraisal clause in order to resolve the apparent disagreement over the actual amount of the loss. The appraisal clause allegedly requires Aspen to take certain actions in compliance with the clause within twenty days of its invocation in order to finalize the appraisal process, which Aspen allegedly failed to do. Specifically, West Palm alleges that Aspen failed to name its appraiser and proceed with the appraisal process, all allegedly in breach of the Policy. *Id.* at 4 ¶¶ 23–26.

West Palm filed the instant case on October 31, 2011, raising a claim for breach of contract as a result of the alleged breach of the Policy (Count I), and a claim for declaratory relief, which requests that the Court declare that Aspen is required to name an appraiser and proceed with the appraisal process under the Policy (Count II). Aspen has moved to dismiss the Complaint with prejudice, arguing that the claims are time-barred by the statute of limitations.

## II. LEGAL STANDARD

To survive a motion to dismiss, a complaint must contain "sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its own face." *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009) (internal quotation omitted). While a court must accept well-pled facts as true, it need not assume the truth of conclusory allegations, nor are plaintiffs entitled to have the court view unwarranted deductions of fact or argumentative inferences in their favor. *See, e.g., Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (finding "labels and conclusions, and a formulaic recitation of the elements of a cause of action" insufficient to survive motion to dismiss); *Papasan v. Allain*, 478 U.S. 265, 286 (1986); *Fin. Sec. Assurance, Inc. v. Stephens, Inc.*, 500 F.3d 1276, 1282 (11th Cir. 2007) (per curiam). In order to be "minimally sufficient," a complaint must put the defendant on notice of the claims against him. *Bailey v. Janssen Pharmaceutica, Inc.*, 288 F. App'x. 597, 603 (11th Cir. 2008); *see also City of Fort Lauderdale v. Scott*, 773 F. Supp. 2d 1355, 1362 (S.D. Fla. 2011) ("Under the *Iqbal* standard, a plaintiff must allege facts which put each defendant on notice of the claims against him."). Moreover, a complaint will not suffice if it tenders "'naked assertion[s]' devoid of 'further factual enhancement.'" *Iqbal*, 129 S. Ct.at 1949 (2009) (quoting *Twombly*, 550 U.S. at 557 (2007)); *see also id.* at 1945 (well-pled complaint "demands more than an unadorned, the defendant-unlawfully-harmed-me accusation" (citing *Twombly*, 550 U.S. at 555)). The Supreme Court also held that this standard applies to all civil actions. *Id.* at 1953.

The Eleventh Circuit has held that a statute of limitations bar is an affirmative defense, and that plaintiffs are not required to negate such defenses in the Complaint. *La Grasta v. First Union Secs., Inc.*, 358 F.3d 840, 845 (11th Cir. 2004). Dismissal on statute of limitations grounds "is appropriate only if it is 'apparent from the face of the complaint' that the claim is time-barred." *Sec'y of Labor v. Labbe*, 319 F. App'x. 761, 764 (11th Cir. 2008). *See also Tello v. Dean Witter Reynolds, Inc.*, 410 F.3d 1275, 1288 (11th Cir. 2005) (same); *La Grasta*, 358 F.3d at 845 (same); *Omar ex rel. Cannon v. Lindsey*, 334 F.3d. 1246, 1251(11th Cir. 2003) (noting that Rule 12(b)(6) dismissal is appropriate "if noncompliance with the statute of limitations is apparent on the face of the complaint"). The court in *Labbe* went on to hold that dismissal is only appropriate if a plaintiff "can prove no set of facts that toll the statute." *Labbe*, 319 F. App'x. at 764 (quoting *Tello*, 410 F.3d at 1288 n.13).

## III. ANALYSIS AND CONTROLLING AUTHORITY

The applicable statute of limitations for an action on a contract, such as an insurance policy, is five years. Fla. Stat. 95.11(2)(b). Aspen notes that the current version of § 95.11(2)(b) notes that this five-year limitations period runs "from the date of loss." *Id.* at § 95.11(2)(e). Citing the Complaint's alleged date of loss of Hurricane Wilma on October 24, 2005, Aspen asserts that the period of limitations began to run from that date, expiring five years later on October 24, 2010. As West Palm filed the present action on October 31, 2011, Aspen argues that the Complaint shows that the action is clearly time-barred and should be dismissed.

As both parties acknowledge, however, the current version of the statute—which added subsection (e) and its designation of the "date of loss" as the date from which the limitations period runs—was signed into law on May 17, 2011. Prior versions of § 95.11(2), including the version in effect when the policy was allegedly issued, did not expressly provide the date from which the five-year limitations period ran. Absent express provision otherwise, Florida law provides that "[a] cause of action accrues when the last element constituting the cause of action occurs." Fla. Stat. § 95.031 (2006); *see also Rowe v. City of Fort Lauderdale*, 279 F.3d 1271, 1286 (11th Cir. 2002) (stating same). Arguing that the last element of its cause of action—the breach of the policy—occurred when Aspen allegedly failed to comply with the appraisal process and denied coverage for the loss on October 13, 2011, West Palm contends that the five-year limitations period under the applicable version of the statute began to run from that date,

only 18 days before the filing of this action. Therefore, the straightforward question before this Court is whether it is appropriate to apply the now-effective version of § 95.11(2), with its "date-of-loss" designation, retroactively to the policy and events in question.

"The question of whether a statutory change in the law should be applied retroactively is governed by state law." *Rivera v. Wal-Mart Stores E., LP*, No. 3:10-cv-956-J-20TEM, 2011 WL 7575393, at *2 (M.D. Fla. Jan. 13, 2011) (citing *Turner v. United States*, 514 F.3d 1194, 1199 n.3 (relying upon Florida law to determine retroactive application of Florida statutory amendment)). The Supreme Court of Florida has applied a two-part analysis for determining when a substantive statutory amendment should be applied retroactively to an insurance policy issued prior to the amendment. *See, e.g., Menendez v. Progressive Express Ins. Co.*, 35 So.3d 873, 877 (Fla.2010). First, the Court must determine whether the Legislature intended for the statute to apply retroactively. Second, if such intent is clearly expressed, the Court must determine whether retroactive application would violate any constitutional principles. *Id.*; *see also Rivera*, 2011 WL 7575393, at *2 (quoting *Menendez* and applying same inquiry); *Fla. Hosp. Waterman, Inc. v. Buster*, 984 So.2d 478, 487 (Fla. 2008) (same). "The presumption against retroactive application is a well-established rule of statutory construction that is appropriate in the absence of an express statement of legislative intent." *Fla. Ins. Guar. Ass'n, Inc. v. Devon Neighborhood Ass'n, Inc.*, 67 So. 3d 187, 195 (Fla. 2011).

*a. Substantive or Procedural Amendment*

Since this two-pronged analysis only applies to *substantive* changes in the law, the Court must first determine whether the May 17, 2011 amendment to § 95.11(2) is substantive or procedural. Aspen argues that the amendment was designed only to "clarify" the statute as to the relevant date for the running of the statute of limitations, and that the substantive portion of the statute—the five-year period—remained unchanged both before and after the amendment. However, while merely procedural or remedial statutes may operate retroactively even without a clear expression of legislative intent, "that is not the case with respect to amendments that constitute a *substantive* change." *Bay Farms Corp. v. Great Am. Alliance Ins. Co.*, No. 8:10-CV-2460-T-27EAJ, 2011 WL 6099367, at *6 (M.D. Fla. Dec. 7, 2011) (emphasis added).

As noted above, absent an express provision of a date from which the statute of limitations begins to run, Florida law provides that "[a] cause of action accrues when the last

element constituting the cause of action occurs." Fla. Stat. § 95.031 (2006). State and federal courts in Florida previously applied this principle to cases involving insurance policies, holding that the statute of limitations under § 95.11(2)(b) ran from the date that the policies were breached rather than the date of loss. *See, e.g.*, *Dinerstein v. Paul Revere Life Ins. Co.*, 173 F.3d 826, 828 (11th Cir. 1999) ("[A] breach of contract action on an insurance contract accrues on the date the contract is breached." (citation omitted)); *Specialty Nat. Ins. Co. v. U-Save Auto Rental of Am., Inc.*, No. 8:07-CV-878-33MAP, 2008 WL 4888864, at *4 (M.D. Fla. Nov. 12, 2008) (citing Fla. Stat. § 95.031 for proposition that "a cause of action on a contract accrues and the statute of limitations begins to run from the time of the breach of contract"); *State Farm Mut. Auto. Ins. Co. v. Lee*, 678 So. 2d 818, 821 (Fla. 1996) ("Using the date the insurance contract is breached is the most logical event to begin the running of the statute of limitations.").

Section 95.11(2)(e) changed this prior understanding with respect to actions founded upon insurance contracts, designating the date of loss as the new date from which the limitations period would run. The date of loss often precedes the date of alleged breach, meaning that this clarification effectively caused the limitations period for insurance contract actions to run earlier than it would have under previous versions of the statute. Considering the fact that the fundamental purpose of a statute of limitations is to designate the timeframe in which a plaintiff may bring suit, an amendment altering this period has an essentially substantive effect on the statute. "Just because the Legislature labels something as being remedial . . . does not make it so." *State Farm Mut. Auto. Ins. Co. v. Laforet*, 658 So. 2d 55, 61 (Fla. 1995). Thus, the May 17, 2011 amendment to § 95.11(2) was a substantive change in the law, and the presumption against retroactive application applies, requiring the Court to engage in the two-pronged inquiry to determine whether the amendment applies retroactively.

*b. Legislative Intent*

The first prong of the relevant inquiry is a determination of whether or not there is clear evidence of legislative intent to apply the statute retroactively. *See Hassen v. State Farm Mut. Auto. Ins.*, 674 So.2d 106, 108 (Fla.1996) ("This Court will not divine an intent that a new law be applied to disturb existing contractual rights or duties when there is no express indication that such is the legislature's intent."). If the Court resolves that the requisite legislative intent is not clearly found, it is unnecessary to proceed to the second issue of constitutional permissibility.

*Fla. Ins. Guar. Ass'n*, 67 So.3d at 197 ("Because we have reached this conclusion [of no clear legislative intent] under prong one of the two-prong test, we need not address whether retroactive application of the amendments would be constitutional.").

State and federal courts in Florida have looked to the plain text of a statute to assess evidence of retroactive intent. *See, e.g., Jasinski v. City of Miami*, 269 F. Supp. 2d 1341, 1346 (S.D.Fla.2003) (finding retroactive intent when newly enacted ordinance expressly stated "the administrative fee to be legal and valid and to ratify, validate and conform in all respects the administrative fees imposed prior to the adoption of this ordinance..."); *Fitchner v. Lifesouth Cmty. Blood Centers, Inc.*, 37 Fla. L. Weekly D886 (Fla. 1st DCA 2012) (noting that express use of phrase "prior medical incidents" in Florida statute led court to conclude it was intended to apply retroactively); *Campus Comms, Inc. v. Earnhardt*, 821 So.2d 388, 397 (Fla. 5th DCA 2002) (finding retroactive intent when Legislature stated in enabling act that "the exemption provided in this act should be given retroactive application because it is remedial in nature"). Thus, the Legislature has previously demonstrated that it is fully capable of assigning specific effective dates to various statutes, and more importantly for the instant Motion, that it can expressly indicate the intent for a statute to apply retroactively.

By contrast, the Court cannot find such expressly-stated, clear legislative intent for the current version of § 95.11(2) or its enacting legislation to take effect or apply retroactively. A plain reading of §95.11 provides no clear, express, or manifest intent that the provision in question is to be applied retroactively. The enabling act provides individualized effective dates to many different provisions, but is silent regarding the new § 95.11(2)(e). CASUALTY AND PROPERTY INSURANCE--LOSSES--LIMITATION OF ACTIONS, 2011 Fla. Sess. Law Serv. Ch. 2011-39 (C.S.C.S.C.S.S.B. 408). Absent an express statement of intent, this Court cannot find as a matter of law that the Legislature *clearly* intended the May 17, 2011 amendment to § 95.11(2) to apply retroactively for the purposes of the present Motion to Dismiss. *See, e.g., Florida Ins. Guar. Ass'n*, 67 So. 3d at 196 (finding no clear retroactive intent where "the amendment itself is silent as to its forward or backward reach," noting other sections received different effective dates in enabling act); *Bionetics Corp. v. Kenniasty*, 69 So. 3d 943, 949 (Fla. 2011), reh'g denied (Sept. 6, 2011), cert. denied, 132 S. Ct. 848 (U.S. 2011) (finding plain statutory language stating effective date "telling" in absence of other language suggesting intent to apply retroactively); *Old Port Cove Holdings, Inc. v. Old Port Cove Condo. Ass'n One, Inc.*,

986 So. 2d 1279, 1284 (Fla. 2008) (declining to find intent to retroactively apply rule where statute failed to state or imply it should be applied retroactively and only evidenced intent to "abrogate the common law rule").

Aspen's reliance on *View W. Condo. Ass'n, Inc. v. Aspen Specialty Ins. Co.*, a factually similar case involving the current version of § 95.11(2), is unavailing. While that court found the plaintiff's claims time-barred by § 95.11(2)(e), it expressly noted that it was never asked to address the issue of retroactivity which is presently before the Court. *See View W. Condo. Ass'n, Inc. v. Aspen Specialty Ins. Co.*, No. 11-20423-CIV, 2011 WL 3704782, at *2 n.4 (S.D. Fla. Aug. 23, 2011) (Seitz, J.) ("[I]t is not necessary to determine whether the law applies retroactively….Plaintiff also does not raise either of these arguments"). Accordingly, in light of the presumption against retroactive application, the Court does not find express, clear, or manifest legislative intent for the May 17, 2011 amendment to § 95.11(2) to apply retroactively.

Having found no clear legislative retroactive intent under prong one of the two-prong inquiry, the Court need not address the second prong. Thus, for the purposes of the present matter, West Palm's claim is governed by the version of § 95.11(2) that was in effect at the time that the Policy was executed, prior to the May 17, 2011 amendment. Under Florida law, the five-year limitations period began to run not upon the date of loss of October 24, 2005, but upon the accrual of West Palm's cause of action, which occurred when the last element constituting the cause of action occurred—that is, when Aspen denied coverage for West Palm's claim by refusing to proceed with the appraisal process under the Policy.[1] *See* Fla. Stat. § 95.031; *Dinerstein*, 173 F.3d at 828; *State Farm Mut. Auto. Ins. Co. v. Lee*, 678 So. 2d at 821. Thus, the

[1] West Palm states in its Response that this date is October 13, 2011, when Aspen allegedly issued a denial letter. Aspen argues briefly that the Complaint itself does not give a specific date for the denial, asserting that the Complaint alleges that the policy was breached when Aspen allegedly determined that the loss caused by Hurricane Wilma was below the applicable deductible. Aspen claims that it is reasonable for the Court to assume that the breach occurred before October 2006, rather than on October 13, 2011. The Court does not find this assumption reasonable. First, the Complaint actually alleges that Aspen breached the policy "by not *providing payment* for the covered Loss and *denying the appraisal process*." Compl. 6 ¶¶ 32–34 (emphasis added). Second, for the purposes of the present Motion, West Palm is not required to negate Aspen's affirmative statute of limitations defense in the Complaint. *La Grasta*, 358 F.3d at 845. Dismissal on statute of limitations grounds is only appropriate if it is apparent on the face of a complaint that the claim is time-barred. *Labbe*, 319 F. App'x at 764.

Court cannot find as a matter of law that West Palm's claims are clearly time-barred on the face of its Complaint.

## IV. CONCLUSION

Based on the foregoing, it is **ORDERED and ADJUDGED** that the Defendant's Motion to Dismiss with Prejudice (ECF No. 8) is **DENIED**. The Defendant shall file an Answer to the Complaint (ECF No. 1) on or before **July 9, 2012.**

**DONE AND ORDERED** in Chambers at Miami, Florida on June 25, 2012.

**ROBERT N. SCOLA, JR.**
**UNITED STATES DISTRICT JUDGE**

*Copies to:*
Counsel of Record
Designated U.S. Magistrate Judge