OA 1-30-87
78

IN THE SUPREME COURT OF FLORIDA

ROBERT P. SMITH, JR., et al.,

Appellants,

vs.

CASE NO. 69,551

STATE OF FLORIDA, DEPARTMENT OF INSURANCE, and BILL GUNTER, as Insurance Commissioner of the State of Florida, et al.,

Appellees.

FILED
SID J. WHITE
JAN 12 1987
CLERK, SUPREME COURT
By _____
Deputy Clerk

APPEAL FROM THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT, IN AND FOR LEON COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEES, STATE OF FLORIDA DEPARTMENT OF INSURANCE, AND BILL GUNTER, AS INSURANCE COMMISSIONER OF THE STATE OF FLORIDA, ET AL.

AND

INITIAL BRIEF OF CROSS-APPELLANTS

DAVID A. YON
DANIEL Y. SUMNER
Office of Legal Services
State of Florida, Department of Insurance
413-B Larson Building
Tallahassee, Florida 32301
(904) 488-4540

THOMAS M. ERVIN, JR.
ROBERT KING HIGH, JR.
of the law firm of
Ervin, Varn, Jacobs, Odom & Kitchen
Post Office Drawer 1170
Tallahassee, FL 32302
(904) 224-9135

ATTORNEYS FOR APPELLEES/ CROSS-APPELLANTS

TABLE OF CONTENTS

ARGUMENT CONTINUED:

TABLE OF AUTHORITIES

Case Citations

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the Answer Brief of Appellees, State of Florida, Department of Insurance, and Bill Gunter, as Insurance Commissioner of the State of Florida, et al., and Initial Brief of Cross-Appellants has been furnished by Hand Delivery this 12th day of January, 1987, to the following:

FREDERICK B. KARL, ESQ.
Karl, McConnaughhay, Roland,
Maida & Beal, P.A.
Post Office Drawer 229
Tallahassee, FL 32302

ROBERT P. SMITH, JR., ESQ.
and THE ACADEMY OF FLORIDA
TRIAL LAWYERS
P. O. Box 6526
Tallahassee, FL 32314

ALAN C. SUNDBERG, ESQ.
Carlton, Fields, Wards, Emmanuel,
Smith & Cutler, P.A.
Post Office Drawer 190
Tallahassee, FL 32302

A copy of the foregoing has been furnished by U. S. Mail this 12th day of January, 1987 to:

DuBOSE AUSLEY, ESQ.
Ausley, McMullen, McGehee,
Carothers & Proctor
Post Office Box 391
Tallahassee, FL 32302

DONALD WEIDNER, ESQ.
Post Office Box 2411
Jacksonville, FL 32203

W. DONALD COX, ESQ.
Fowler, White, Gillen, Boggs
Villareal and Banker, P.A.
Post Office Box 1438
Tampa, FL 33601

DOUGLAS A. MANG, ESQ.
Mang & Stowell, P.A.
Post Office Box 1019
Tallahassee, FL 32302

ARTHUR J. ENGLAND, JR., ESQ.
Fine, Jacobson, Schwartz,
Nash, Block & England, P.A.
2401 Douglas Road
Miami, FL 33134

D. STEPHEN KAHN, ESQ.
Kahn and Dariotis, P.A.
227 E. Virginia Street
Tallahassee, FL 32301

G. W. JACOBS, ESQ.
219 South Orange Avenue
Sarasota, FL 33579

WILLIAM H. ADAMS, III, ESQ.
Mahoney, Adams, Milam,
Surface & Grimsley
P. O. Box 4099
Jacksonville, FL 32201

JAMES A. DIXON, JR., ESQ.
Dixon, Dixon, Hurst & Nicklaus
Post Office Box 13767
Tallahassee, FL 32317-3767

BRUCE CULPEPPER, ESQ.
Culpepper, Pelham, Turner,
& Mannheimer
P. O. Box 11300
Tallahassee, FL 32302-3300

HONORABLE JAMES W. SLOAN
Assistant Attorney General
Department of Legal Affairs
The Capitol, Suite 1501
Tallahassee, FL 32301-8048

A. BROADDUS LIVINGSTON, ESQ.
P. O. Box 3239
Tampa, FL 33601

FRANCIS X. SEXTON, JR., ESQ.
Sage, Gray, Todd & Sims
801 Brickell Ave., Ste. 1100
Miami, FL 33131

DOMINIC M. CAPARELLO, ESQ.
Messer, Vickers, Caparello,
French & Madsen
Post Office Box 1876
Tallahassee, FL 32301

VINCENT J. RIO, ESQ.
121 West Forsythe Street
10th Floor
Jacksonville, FL 32202

ATTORNEY

PRELIMINARY STATEMENT

The State of Florida, Department of Insurance, and Bill Gunter, as Insurance Commissioner of the State of Florida, shall be referred to collectively as "the Department" or "Defendants." Should the need arise to refer to the plaintiffs individually, the CIGNA Group shall be referred to as "CIGNA," American Insurance Association, et al., shall be referred to as "AIA," State Farm Insurance Company shall be referred to as "State Farm," and Robert P. Smith, Jr., and the Academy of Florida Trial Lawyers shall be referred to as the "Academy." Reference to the record shall be by (R - ___) and reference to the volumes of the trial transcript shall be by volume number and page.

STATEMENT OF THE CASE

The Department adopts the statement of the case set forth by AIA.

STATEMENT OF THE FACTS

I. OVERVIEW OF CHAPTER 86-160, LAWS OF FLORIDA

Chapter 86-160, Laws of Florida, is a comprehensive legislative response to a complex economic and public crisis, consisting of the escalating cost of insurance and a concurrent restriction and availability of insurance to citizens and businesses in Florida. The Florida Legislature found that drastic rate increases for insurance caused some businesses to shut down operations and others to dramatically increase their charges to the public for goods and services. Likewise, the decrease in affordability and availability left some businesses and professionals uninsured, and others underinsured. The legislature specifically found that while there are a number of contributing factors to this complex societal and economic crisis, two primary causes are the lack of adequate, existing insurance regulation and shortcomings in the current civil litigation system. The

legislature's response was the enactment of Chapter 86-160, which is a four-part comprehensive plan of reform. The four parts are summarized below.

A. LONG-TERM INSURANCE REGULATORY REFORM

In Section 9 of the law, the legislature has modified existing law to provide clear statutory standards for rate review and to provide authority for the Department to disapprove any rate which is determined to be excessive, inadequate or unfairly discriminatory. This new, expanded power of rate regulation is very similar and analogous to that enacted and upheld in previous legislation in this State and is commonplace throughout the country. The law also provides clear authority to the Department to regulate credits and surcharges of insurers, a device used increasingly by insurers to dramatically affect the actual premiums collected from insureds.

A second aspect of long-term regulatory reform is that of an excess profits insurance law, found in Section 10 of the statute. The legislature has provided the Department with the authority to review the actual profits of insurance companies, as compared with the profitability projections and representations of the companies during the rate-setting process, and to require the discharging of profits determined to be excessive according to statutory guidelines and criteria. Like the rate regulation provided for in Section 9, this excess profits system is similar and analogous to that enacted and upheld previously in Florida.

A third aspect of long-term insurance regulatory reform deals with the increased availability of insurance. Section 13 of Chapter 86-160 provides for the establishment of a joint underwriting association to assure greater availability of insurance. Related measures, such as expansion and creation of self-insurance trust funds to expand the availability of that form of insurance, are also provided for in the statute.

Finally, the fourth aspect of long-term insurance regulatory reform consists of greater notification and cancellation requirements to insureds.

B. CIVIL LITIGATION REFORM

The legislature provided for a package of civil litigation reform designed to improve the system of tort and related actions and of recovery in Florida. The civil litigation reforms include restricting pleadings for punitive damages and limiting the recovery of punitive damages (Sections 51 and 52); expansion of the courts' power to grant remittitur or additur for a damage award found by the court to be excessive or inadequate (Section 53); expanded authority to require settlement conferences (Section 54); revision and expansion of the system of offer of judgment and demand for judgment (Section 58); use of itemized verdict forms (Section 56); reduction of damage awards for payments from defined collateral sources (Section 55); a provision for periodic payment of future economic damages which exceed $250,000 (Section 57); the limitation of non-economic damages to a sum not exceeding $450,000 (Section 59); and a provision in defined negligence cases where total damages exceed $25,000 that each liable party shall suffer judgment based only on that party's own percentage of fault, except that if the liable party's fault exceeds that of the claimant, then judgment for economic damages will be based on the preexisting doctrine of joint and several liability (Section 60).

These civil litigation reforms are each related to the exposure and liability of parties and their insurers and, therefore, to the objects and purposes of the legislation with respect to the insurance crisis and its resolution. By a combination of controls, enhanced objectivity, limitations, and judicial review, the legislature has chosen to fine-tune the civil litigation system to reduce arbitrariness of exposure and liability.

C. TEMPORARY INSURANCE MARKET ADJUSTMENT AND CONTROL

This aspect of the statute was designed to provide immediate relief and protections, together with an orderly transition from the prior period of little rate regulation to the comprehensive regulation described above as long-term insurance regulatory reform.

The first aspect of the temporary market adjustments consisted of a rate freeze providing immediate (from June 26, 1986) but temporary (until December 31, 1986) relief from rate increases by prohibiting rates which exceed those in effect on May 1, 1986 [Section 66(4)].

The second temporary market adjustment consists of credits and refunds [Sections 66(1)-(3)]. These provisions are justified by a combination of the legislature's determination of existing excessive rates and the anticipated benefits of tort reform in which the legislature determined insureds should share. The legislature determined that civil litigation reform without a corresponding credit and refund provision would result in an improper windfall to the insurance companies.

A third aspect of the temporary market adjustments governs rates to be effective on January 1, 1987 [Sections 66(5)-(6)]. The statute provides for each insurer to make a filing by October 1, 1986, of rates which were in effect on January 1, 1984, as adjusted for changes in coverage and investment income which have occurred since that date. Having so filed, any insurer may proceed to implement the adjusted rates if it so desires. If, however, an insurer seeks to use some other rate, then a separate filing must be made setting forth the intended rate and actuarial justification of same. The Department is empowered to review this supplemental filing and approve the intended rate if determined to be actuarially justified. If not approved, the insurers are merely deprived of the excessive

portion only, and are not forced to use the January 1, 1984, rates as adjusted. Such Department review and action are subject to the usual procedures and protections respecting appeal and review of agency action.

The final aspect of the temporary market adjustments includes a temporary prohibition against mass cancellations or nonrenewals by any insurer for the purpose of avoiding the rate freeze or premium refund provisions of the act [Sections 4, 16 and 66(7)]. The legislature has not prohibited contract cancellations for cause, but has declared that cancellations or nonrenewals by an insurer at a defined level in excess over past experience will create a rebuttable presumption that the cancellations are for the purpose of avoiding the law.

D. CONTINUED ACADEMIC TASK FORCE STUDY

The fourth element of the legislature's comprehensive plan consists of creation of an academic task force and study and related required filing of information by insurers (Sections 63 and 64). This final aspect is a recognition by the legislature that further refinement of its present comprehensive response may be appropriate, desirable or required in future sessions.

II. THE EVIDENCE

In Section 2 of Chapter 86-160, the legislature made the following express finding: "The legislature finds and declares that a solution to the current crisis in liability insurance has created an overpowering public necessity for a comprehensive combination of reforms to both the tort system and the insurance regulatory system."

The evidence presented to the trial court confirmed the "overpowering public necessity" to enact reforms to afford relief to citizens of the State of Florida. Kevin Thompson, a casualty actuary for Insurance Services

Offices, Incorporated, who was retained by the insurance companies, agreed that there is a lawsuit crisis for commercial lines of insurance in the United States (TR I - 120). The fact that there exists a crisis in the marketplace in Florida for commercial insurance was echoed by Gerald C. Wester, Deputy Insurance Commissioner for the Department of Insurance (TR IV - 553). Wester commented that the need for meaningful reform was rooted in both the lack of affordability of insurance, as well as its availability to the citizens of Florida (TR IV - 549-550). John Wilson, an expert in economics and insurance matters, described the need for Chapter 86-160 as involving "affordability and availability of insurance, the accountability of insurers and the fairness of prices charged in the marketplace for insurance services" (TR V - 807). Robert Hunter, an expert in actuarial sciences, also agreed that there was a crisis in both the availability and affordability of insurance (TR - 1002-1003).

The CIGNA Group conducted an evaluation of the tort reform provisions of Chapter 86-160 in an effort to assess the relative value of the tort reform, particularly as it relates to similar statutes in other states (TR III - 411-413). The CIGNA Group concluded that the tort reform provided for in the subject enactment was the third best in the country (TR III - 413), and that but for the sunset provision, CIGNA would give consideration to implementing a positive business response in Florida because of its favorable tort reform (TR III - 416).

Mel Martinez, an expert attorney retained by the Academy, agreed that Sections 59 and 60 of the civil litigation reform do not remove any cause of action (TR III - 466). Martinez also agreed that the civil litigation reform does not in any way cap economic damages (TR III - 467) and,

importantly, that no right to recover noneconomic damages has been abolished by the statute (TR III - 469).

Robert Hunter opined that a necessary impact of tort reform will be that insurers will incur lower costs both as to loss payouts and loss reserves (TR VI - 1020). Hunter calculated what he believed to be the impact of each of the key sections of the tort reform and concluded that the major impact would come from Section 55, which deals with collateral sources, and that that section alone should be worth 10% to 20% savings to the insurers (TR VI - 1023-1024). Overall, Hunter estimated that the tort revisions would save on an ongoing basis approximately 15% to 30% (TR VI - 1024). Hunter also testified regarding a study made by Tillinghast, an actuarial consulting firm for whom Michael Walters, an expert actuary retained by the insurers is employed. The report concluded that savings of approximately 10% to 20% would result from tort reform very similar to that ultimately enacted and was in line with Hunter's findings (TR VI - 1031-1032). Notably, Hunter did a study with regard to the savings that tort reform would cause as to policies of insurance impacted by the special credit provision of Sections 66(1)-(3), and concluded that tort reform will reduce costs for policies in effect during the period of the special credit by approximately 13% (TR VI - 1030-1031). The special credit required by Section 66 of the statute calls for a 10% credit or refund of premiums on an annualized basis (TR IV - 588) and, according to Hunter, the favorable impact of tort reform upon the insurers exceeds the credits or refunds required to be made by Chapter 86-160.

Gerald Wester testified that before the enactment of Chapter 86-160, commercial insurance "regulation" consisted of an open competition use and file rating law. Before the Department could find a given rate excessive,

a finding had to be made that the premium was too high for the level of benefits to be provided under the policies and, second, the Department was required to demonstrate that there was a lack of competition (TR IV - 554-555). Even if the Department met this strict two-part test, it did not have the authority to disapprove rates (TR IV - 559-560). Wester explained that the purpose of Section 9 is to provide rate review and approval for the Department so that clear accountability can be required of the insurers (TR IV - 570). Similar laws have been enacted and upheld in the State of Florida with regard to automobile insurance and workers' compensation (TR IV - 571-572).

John Wilson opined that, after having studied the actual profitability of the insurance industry, it was apparent that a much closer level of regulatory scrutiny was essential in order to give insurance rate payers minimum protection against overcharges (TR V - 852). Wilson explained to the trial court that "losses" can be broken into three parts: losses that are incurred and paid, losses that are incurred but not yet paid, and losses that are incurred but not yet reported. These latter losses, referred to as IBNR, are speculative losses (TR V - 817-818). Wilson studied the commercial liability lines of insurance and concluded, for example, that over 60% on average of incurred losses in the general liability lines are of the IBNR category. Thus, the majority of the "losses" were neither cash losses nor even reported losses (TR V - 821-822). Wilson concluded that while incurred losses have been increasing for insurers, the IBNR aspect of incurred losses is what has been really driving up the loss claims made by the insurers (TR V - 828).

Both Wilson and Hunter expressed opinions to the trial court that the excess profits portion of the law is reasonable and will contribute

toward resolving the insurance crisis (TR V - 879; TR VI - 1016). The excess profits law present in Chapter 86-160 is very similar to excess profits laws that have worked successfully with regard to private passenger automobiles and workers' compensation (TR V - 879-880; TR VI - 1016). Wester agreed with the experts that the excess profit laws already in operation as to automobiles and workers' compensation have been successful (TR IV - 580). Wester explained that the risk management provision present in Section 10 of the statute was included as a response to complaints by insurers that the operation of the previous excess profits laws permitted refunds to go to policyholders regardless of whether they had made any efforts to engage in risk management practices (TR IV - 580-581). Only policyholders of the insurer who have earned an excess profit are eligible for a refund and the policyholders are only entitled to such a refund if they achieved a favorable loss ratio experience (TR IV - 582).

Joseph Launie, an expert witness in insurance matters retained by the insurers, was asked a hypothetical question. Launie was requested to assume, first, that certain policyholders adhere to an effective risk management program and that other policyholders in the same rating class do not so participate and, second, that the insurer unexpectantly has favorable loss experience over a period of four years with no change in overall risk. Launie then agreed that those policyholders who engaged in effective risk management procedures were more likely to have contributed to favorable results than those policyholders who did not participate in risk management programs (TR II - 339-340).

Wester explained that the joint underwriting association, provided for in Section 13 of the law, is a statutorily created mandatory participation by certain property and casualty insurers to provide coverage to citizens

who could not otherwise obtain insurance through the voluntary market (TR IV - 583). Wilson testified that Section 13 encompasses a desirable broad economic proposition and that similar programs are in place throughout the country (TR V - 882-883). The Department's other expert, Robert Hunter, concurred (TR VI - 1017).

With regard to Section 66 of the statute, there was substantial evidence that Chapter 86-160 expressly provides that insurers shall be permitted a reasonable margin for underwriting profit and contingencies. Michael Walters, an expert retained by the insurers, agreed that Section 9 of the act allows insurers a reasonable rate of return on classes of insurance written in the State of Florida (TR I - 152). Wester explained to the trial court that the intent that insurers earn a reasonable rate of return is set forth three different times in Section 9 (TR IV - 574). Wester explained that it was his understanding that the term "deemed inadequate" found in Section 9(2)(e)(3) simply means that a rate is absolutely inadequate if it is so insufficient that even losses and expenses are not covered (TR IV - 576). Wester further opined that if an insurer were able to demonstrate that a reasonable profit on its business in Florida would be $1,000,000 and that if in a given year it had made only one dollar in profits, then the insurer would be permitted to raise its rate since the rate would be inadequate. The insurer would be permitted to earn the entire reasonable profit even though the one-dollar profit was in excess of the amount needed to pay losses and expenses (TR IV - 576-577).

John Wilson agreed with Wester and explained that the statement found in Section 9(2)(e)(3) should be one characterized as a "per se statement of inadequacy" (TR V - 873). Wilson agreed that Sections 66(3) and (6) each provide that insurers shall be permitted to earn reasonable rates

of return (TR V - 869-876). Joseph Launie, an expert retained by the insurers, concurred that Section 9 of the statute permits a reasonable margin for profit and contingencies (TR II - 325) and admitted that the term "clearly" in front of inadequate adds nothing in the way of understanding to the term found in Section 66(3) (TR II - 335-336).

SUMMARY OF ARGUMENT

The issue before this Court is the validity of Chapter 86-160, Laws of Florida, which is a comprehensive legislative response to a complex, multi-cause insurance and litigation crisis in Florida. The lower court upheld the act in all respects, except the application of the premium refund-credit provision [§§66(1)-(3)] to insurance contracts in effect prior to the effective date of the act.

The lower court properly rejected appellants' challenges to Sections 9 (rate regulation), 10 (excessive profits) and 13 (joint underwriting authorities). Each of these provisions is comparable to and indistinguishable from existing insurance regulatory law previously upheld by this Court. Each has adequate and requisite standards, terms and guidelines to determine its proper scope and application. Each is rationally related to the long-term legislative objective of making insurance coverage more affordable and available to the public.

The lower court also properly rejected appellants' challenge to Section 44, which is a corrective or remedial measure which merely restores to a limited class of health care providers an entitlement to purchase certain coverage specifically guaranteed by earlier law, and inadvertently repealed seven days prematurely.

The lower court properly rejected appellants' challenges to the litigation reforms of Chapter 86-160. Sections 59 and 60 of the act constitute a

limitation on non-economic damages and an application of comparative fault liability on defendants under defined circumstances. No cause of action is thereby abolished, and the provisions neither deny access to courts nor unconstitutionally deprive injured persons of equal protection or due process of law.

It is equally clear that properly viewed, as by the lower court, the litigation reform provisions address substantive issues of law and are rationally related to, and intended to promote, the legislative objective of making insurance ultimately more affordable and available in Florida and, in so doing, enhancing the availability of coverage and resources from which injured persons may secure recovery. Thus, the lower court properly held that the litigation reform provisions did not invade or exercise the judicial power, but rather addressed substantive law within the province of the legislature.

The lower court also held properly that the transitional provisions of Section 66 were valid (with a limited exception subject to cross-appeal). Sections 66(1)-(3), in their application to post-July 1, 1986, insurance contracts, merely reflect legislative judgment that litigation reforms will benefit insurers in the second half of 1986, and that this benefit should be passed on, at least in part, to policyholders by premium refunds or credits. Sections 66(5)-(6), in their application to rates charged after January 1, 1987, merely use adjusted, historical 1984 rates as a permissive bench mark, and require any insurer which contends such rates are inappropriate to submit a separate filing of actuarily justified intended rates.

Each of these provisions [§§(1) and (5)] may be avoided by a filing seeking to avoid an inadequate rate [§66(3)] or to apply an adequate rate

[§66(6)]. Alternative rates are to be measured by the statutory and actuarial standards of Section 9, and including a reasonable rate of return. The lower court properly held that the transitional provisions do not deny equal protection or due process, and were valid legislative enactments.

The lower court was also entirely correct in rejecting appellants' single-subject challenge. The Florida Constitution authorizes the legislature to include within an act not only a "subject," but also any additional "matters properly connected therewith." In recognition of constitutional separation of powers, inherent safeguards in the legislative process, and the necessity of comprehensive legislative response to complex public problems, the foregoing terms have been liberally construed.

The lower court properly rejected the narrow single-subject review applicable to constitutional initiative proposals, and upon application of the proper test, found that all provisions of the act were embraced within the subject "insurance and civil actions," or had a proper connection to that subject. The lower court should be affirmed in this holding.

The lower court erred in only one respect, which is addressed by the Department's cross-appeal. The erroneous holding was that Sections 66(1)-(3), as applied to require premium credits or refunds on policies existing prior to the act's effective date, would violate constitutional proscriptions against impairment of existing contract.

The premium refunds in question are calculated, however, to apply only to policies of insurance (though preexisting the act) which receive at least three months and up to six months of benefit of litigation reform (and consequent insurer savings) under the act. The intention and operation are not to remove from insurers any vested, contemplated contractual right,

but to ensure that savings from new legislative litigation reform are passed on, at least in part, to insurance consumers rather than retained as an unexpected "windfall" for insurers.

Further, the potential impact of the refund provision is statutorily limited by the provisions of Sections 66(2) and (3), which enable an insurer to seek and secure reduction or elimination of the refunds if they would threaten the insurer's solvency or result in an inadequate rate. Under these circumstances, and the balancing of interests tests, the lower court erred in holding this provision invalid as applied to preexisting contracts of insurance.

POINT I

THE LOWER COURT CORRECTLY HELD THAT CHAPTER 86-160, LAWS OF FLORIDA, DOES NOT VIOLATE THE SINGLE-SUBJECT RESTRICTION OF ARTICLE III, SECTION 6, FLORIDA CONSTITUTION.

This point is in answer to Point I of CIGNA; the "First Issue" of AIA; Point I of State Farm; and Point III of the Academy.

The lower court held that Chapter 86-160, Laws of Florida, embraced a single subject and matter properly connected therewith, and, therefore, complied with the command of Article III, Section 6, that:

> Every law shall embrace but one subject and matter properly connected therewith, and the subject shall be briefly expressed in the title.

Appellants contend this holding was error.

The lower court held that the subject of Chapter 86-160, Laws of Florida, was "insurance and civil actions" (R 8-1391) rather than the narrower "liability insurance and tort reform" urged by appellants. It is clear that the lower court considered all parts of the chapter in its determination of the "subject" of the act. It is equally clear that such a holding was proper and correct where the very first line of the title

of Chapter 86-160 announces the subject as "(a)n act relating to insurance and civil actions."

Appellant AIA makes the novel argument, without citation of authority, that the determination of the subject of the law must be made solely by reference to the body of the law, to the exclusion of consideration of the title of the law as announced by the legislature, or of legislative findings other than within the body of the law. By such reasoning, AIA argues that the lower court erred in even considering the legislature's specific announcement by title that Chapter 86-160 is "(a)n act relating to insurance and civil actions."

Appellant's contention that the title must be ignored in determining the "subject" of an act is without merit. A court is clearly authorized to look to an act's title in ascertaining the "subject," where Article III, Section 6, specifically directs that "the subject shall be briefly expressed in the title." Contrary to AIA's argument, in Colonial Inv. Co. v. Nolan, 100 Fla. 1349, 131 So. 178 (Fla. 1930), this Court specifically held at page 179:

> This court has held that, in determining whether provisions contained in a legislative act are embraced in one subject and matter properly connected therewith, as required by section 16 of Article 3 of the Constitution, the subject to be considered is the one expressed in the title. (Emphasis by court.)

Thus, it is clear that the lower court properly referred to and considered the title of Chapter 86-160, Laws of Florida, in determining what the subject of the law was for purposes of Article III, Section 6, of the Florida Constitution.

As noted earlier, Article III, Section 6, states in pertinent part that:

> Every law shall embrace but one subject and matters properly connected therewith, . . .

Thus, the Constitution expressly authorizes any law to extend beyond the single subject and include any matters properly connected to the subject.

Both of the constitutional terms ("subject" and "matters properly connected therewith") have been addressed, defined and explained numerous times by this Court. In Board of Public Instruction v. Doran, 224 So.2d 693 (Fla. 1969), this Court explained at page 699:

> The term 'subject of an act' within this provision means the matter which forms the groundwork of the act and it may be as broad as the Legislature chooses so long as the matters included have a natural or logical connection. (Emphasis supplied.)

This test or standard was expressly approved and applied more recently in State v. Lee, 356 So.2d 276 (Fla. 1978), and Chenoweth v. Kemp, 396 So.2d 1122 (Fla. 1981), wherein it was held that comprehensive insurance revision laws which addressed reform to both insurance and tort litigation did not violate the single-subject restriction.

From the foregoing it is clear that the "subject" of an act may be so broad as to include insurance and civil actions as long as the matters have a natural or logical connection. The lower court was entirely correct in so holding.

This Court has also addressed the nature of matters "properly connected" with the subject of an act. In State v. Canova, 94 So.2d 181 (Fla. 1957), this Court explained and held at page 184:

> In determining if matters are properly connected with the subject, the test is whether such provisions are fairly and naturally germane to the subject of the act, or are such as are necessary incidents to or tend to make effective or promote the objects and purposes of legislation included in the subject. (Emphasis supplied.)

Appellants overlook that under this test, once the subject is identified, other matters in the act are only required to have the requisite proper connection with the subject. The other matters are not required to have

any specific connection with each other, so long as the connection with the subject is present. If some other matter lacks the requisite connection with the subject of the act, the other matter may be severed. Albritton v. State, 82 Fla. 20, 89 So. 360 (1921).

The appellants have cited numerous decisions to the general effect that the object of Article III, Section 6, is to prevent "logrolling" and "hodgepodge" legislation. It is true that this is the general purpose, but the words "logrolling" or "hodgepodge" appear nowhere in the Constitution and the scope of actual constitutional restriction on legislative discretion must be determined from that which is actually set forth in the Constitution, as construed by this Court.

What this means is that so long as matter included within the subject of an act has a natural or logical connection, and so long as other matter included within the act is properly connected to the subject (i.e., fairly and naturally germane; tends to make effective; tends to promote the objects and purposes of legislation included in the subject) there is no constitutional violation of the single-subject restriction. As long as the requisite connection is present, it is irrelevant that the matters included might, under other circumstances, each stand independently as a "subject" of legislation, and it is irrelevant that different parts of the properly connected matter might appeal more to different members, or segments, of the legislature.

The lower court properly recognized, and applied, the provisions of Article III, Section 6, in upholding the validity of Chapter 86-160, Laws of Florida. Appellants' argument by invocation of the general term "logrolling" is nothing more than a meritless attempt to amend Article

III, Section 6, of the Florida Constitution by the addition of non-existent restrictions on legislative discretion.

Appellants have cited, and sought support from, recent decisions of this Court dealing with Article XI, Section 3, of the Florida Constitution and initiative constitutional amendments. Fine v. Firestone, 448 So.2d 984 (Fla. 1984); Evans v. Firestone, 457 So.2d 1351 (Fla. 1984). Appellants' reliance on these decisions is sorely misplaced.

In Fine v. Firestone, supra, this Court specifically noted and held at page 988 that the authorization of Article III, Section 6, for legislation to include any matter "properly" connected to the subject is significantly broader than Article XI, Section 3, and the latter's restriction of other matter in constitutional initiative proposals to matter "directly" connected to the subject. This Court further noted that a broader view was appropriate as to legislation because of the nature of the legislative process, and because constitutional initiative proposals are directed to our Constitution, the fundamental document controlling governmental functions. Properly viewed, the decisions cited by appellants are better authority for appellees, and for affirmance of the lower court.

Turning to specific objections of appellants, it is clear that all provisions of Chapter 86-160, Laws of Florida, are either within or properly connected to the subject of the act. Appellants' contention that a single-subject violation arises from provisions dealing with self-insurance is absurd. Whether or not self-insurance is "insurance" under Florida law is irrelevant, for it is clearly properly connected to subject of insurance and lack of available or affordable insurance. Simply put, self-insurance is an alternative method of protection which takes the place of commercial

insurance. The expanded authorization for self-insurance in Chapter 86-160, Laws of Florida, is clearly permissible.

For exactly the same reasons, provisions authorizing expanded establishment of financial responsibility by medical personnel as an alternative to the purchase of insurance, and provisions expanding the authorization for creation of joint underwriting associations, are properly connected and included. By like measure, the provision providing assessment insurance for medical care providers inadvertently omitted by repeal of prior law is clearly connected to the subject of the act.

It is equally clear that revision of the securities laws to exempt from registration self-insurance agreements is properly connected, as is revision of the law to allow financial institutions to enter the reinsurance market. The suggestion that creation of an academic task force to conduct further study of aspects of insurance regulation and litigation reform violates the single-subject restriction is patently without merit, as is the suggestion that an insurance closed claim study is not properly connected.

Appellants have vigorously contended that, because civil litigation reforms included in the act extend beyond tort to actions for damages in contract, the single-subject restriction is thereby violated. The lower court properly rejected this contention. The record established and this Court is well aware that under modern Florida law, claims in tort and contract are commonly alternatively pled and tried in a single action. Commercial insurers commonly issue policies of insurance, including liability insurance, that insure against damage awards for breach of contract, as well as against vicarious liability for punitive damages (TR VII - 1149-1152).

It is pertinent also that under Section 50 of the act, the litigation reforms do not extend to all contract actions, but only to actions "for damages." Thus, traditional contract matters such as declaratory judgment or actions to enforce the terms of a contract are not encompassed and the litigation reforms come into application only when it is "damages" which are sought.

Having given due consideration to the foregoing, and to the evidence that litigation reforms would ultimately serve or tend to promote the legislative goal of increasing the affordability and availability of insurance, the lower court turned to and followed recent decisions of this Court including State v. Lee, 356 So.2d 276 (Fla. 1978); Chenoweth v. Kemp, 396 So.2d 1122 (Fla. 1981), and United States Fidelity and Guaranty Co. v. Department of Insurance, 453 So.2d 1355 (Fla. 1984). In each of these cases, single-subject challenges were asserted against comprehensive insurance legislation which extended as well to such matters as tort and litigation reform. In each of these cases the comprehensive acts were upheld and the challenge rejected.

Consistent with, and guided by, the above-cited controlling decisions of this Court, the lower court held in pertinent part:

> The contents of a legislative enactment can cover whatever matters the legislature wills without being vulnerable to a single subject attack provided it contains only one subject and matters properly and logically connected to that subject. The Court can find nothing contained in Chapter 86-160 that warrants a departure from the established precedents on this issue. Therefore, the Court finds as a matter of law that Plaintiffs' challenge to Chapter 86-160, Laws of Florida alleging that it violates Article III, Sec. 6 of the Florida Constitution must fail.

(R 8-1397)

This decision of the lower court comes clothed with a presumption of correctness which is exceeded only by the presumption of validity accorded

Chapter 86-160, Laws of Florida. The lower court recognized and applied this presumption of validity, citing numerous decisions of this Court (R 8-1396). This Court has held time and again that upon a single-subject challenge in order to overcome this strong presumption, invalidity must be demonstrated "beyond reasonable doubt." State v. Canova, 94 So.2d 181, 184 (Fla. 1957); Warren v. Pope, 64 So.2d 564 (Fla. 1953); State ex rel. Moodie v. Bryan, 50 Fla. 293, 39 So. 929 (1905). Appellants have clearly not met this standard. The decision of the lower court must be affirmed and Chapter 86-160, Laws of Florida, upheld.

POINT II

AIA HAS FAILED TO DEMONSTRATE THAT SECTION 9 OF CHAPTER 86-160 UNLAWFULLY DISCRIMINATES OR DELEGATES UNBRIDLED DISCRETION.

In Point 3 of its Initial Brief (page 35) AIA argues that Section 9 unconstitutionally violates the due process and equal protection clauses of the Florida Constitution. No other appellant raises any specific challenge to this provision.

AIA first contends that Section 9 is unconstitutional because it impacts classes of insurance that are "in no way involved in any real or perceived crisis in liability insurance" (pp. 38-39). AIA contends that Section 9 unlawfully discriminates against certain companies because it does not specifically apply to (a) individually rated risks, (b) commercial motor vehicle risks, (c) surplus lines companies and (d) self-insurance groups. Finally, AIA maintains that Section 9 delegates unbridled discretion to the Department and is, therefore, unconstitutional. AIA's arguments are wholly without merit.

Section 9 must be presumed to be valid unless the appellants can prove that it is wholly arbitrary and capricious and bears no relationship to any demonstrated or conceivable public interest. Section 9 is clearly

related to the legitimate state interest of regulating insurance rates to the end that they are not excessive, inadequate or unfairly discriminatory. The regulation provided for by Section 9 is strikingly similar to regulation already accorded to the Department with respect to private passenger motor vehicles and workers' compensation, laws which have withstood scrutiny by the courts.

In matters of social and economic welfare, a party challenging the constitutionality of a statute on due process grounds must allege and prove that the statute is wholly arbitrary and capricious and that it bears no relationship to any demonstrated or conceivable public interest. Woods v. Holy Cross Hospital, 591 F.2d 1164 (5th Cir. 1979). In Lasky v. State Farm Insurance Company, 296 So.2d 9, 15 (Fla. 1974), the Supreme Court examined Florida's no-fault insurance law and described the test as follows:

> The test to be used in determining whether an act is violative of the due process clause is whether the statute bears a reasonable relation to a permissible legislative objective and is not discriminatory, arbitrary or oppressive . . . In [examining this relationship] we do not concern ourselves with the wisdom of the Legislature in choosing the means to be used, or even with whether the means chosen in fact accomplish the intended goal, our only concern is with the constitutionality of the means chosen.

And at page 17:

> It may seem from the above discussion that we are ascribing consequences to our no fault insurance law which have yet to be demonstrated, and which may turn out to be non-existent. What we actually are doing is presuming the existence of circumstances supporting the validity of the Legislature's action, in the absence of any evidence to the contrary. This is the course we must follow, pursuant to Munn v. Illinois, 94 U.S. 113, 24 L.Ed. 77 (1877); State ex rel Adams v. Lee, 122 Fla. 639, 166 So. 249 (1935); and Ex Parte Lewis, 101 Fla. 624, 135 So. 147 (1931).

Clearly, this test does not require or permit a court to reexamine the "wisdom" of the legislature. Nor is it necessary for the Department

to demonstrate, or for this Court to find, that the legislature had before it evidence that the law would accomplish a particular end. To the contrary, the appellants were compelled to prove below that there is no demonstrated or conceivable public interest to be served. The existence of facts supporting the validity of the act must be presumed, in the absence of evidence to the contrary.

The same test is applicable to equal protection challenges.

In the case of In re Estate of Greenberg, 390 So.2d 40, 42 (Fla. 1980), the Court described the rational basis test as follows:

> The rational basis or minimum scrutiny test generally employed in equal protection analysis requires only that a statute bear some reasonable relationship to a legitimate state purpose. That the statute may result incidentally in some inequality or that it is not drawn with mathematical precision will not result in its invalidity. Rather, the statutory classification to be held unconstitutionally violative of the equal protection clause under this test must cause different treatments so disparate as relates to the difference in classification so as to be wholly arbitrary. Dandridge v. Williams, 397 U.S. 471, 90 S.Ct. 1158, 25 L.Ed.2d 491 (1970); Walters v. City of St. Louis, 347 U.S. 231, 74 S.Ct. 505, 98 L.Ed. 660 (1954). (Emphasis added.)

The deference is greatest in areas of economics and social welfare. Dandridge v. Williams, 397 U.S. 471, 485-486, 90 S.Ct. 1153, 25 L.Ed.2d 491 (1970). The "rational-basis" test obviously involves considerable deference to the legislative branch, and prohibits the judiciary from substituting its judgment as to whether the legislature has chosen the "right" classifications. As the Court stated in Northridge General Hospital v. City of Oakland Park, 374 So.2d 461, 464-465 (Fla. 1979):

> The Legislature has wide discretion in creating statutory classifications. There is a presumption in favor of the validity of a statute which treats some persons or things differently from others.
>
> (I)f any state of facts can reasonably be conceived that will sustain the classification attempted by the Legislature, the existence of that state of facts at the time the law was enacted will be presumed by the courts. The deference due to the

> legislative judgment in the matter will be observed in all cases where the court cannot say on its judicial knowledge that the Legislature could not have had any reasonable ground for believing that there were public considerations justifying the particular classification and distinction made. (Emphasis by the Court.)

The burden of proving the absence of any rational basis lies squarely with the party challenging the constitutionality of the statute. Pinillos v. Cedars of Lebanon Hospital Corporation, 403 So.2d 365 (Fla. 1981), and In re Estate of Greenberg, supra.

The application of the rational basis test mandates that Section 9 passes both due process and equal protection tests. Section 9 of Chapter 86-160 amends Section 627.062, Florida Statutes, and provides the Department with specific authority, standards and procedures for reviewing the rates charged by authorized insurers for all lines other than workers' compensation and private passenger motor vehicle insurance. (Rates for these two lines have been and continue to be regulated under the provisions of Sections 627.091, et. seq., and 627.0651, et. seq., respectively.) The trial court correctly described the rational basis for Section 9 and applied the test as follows:

> The overriding purpose of Chapter 86-160 is to re-introduce stability and accountability into the Florida insurance market. Surely these are legitimate state objectives if they result in the greater availability of insurance and more affordable rates. However, even if the legislature be misguided and the pudding does not bear ultimate proof of its wisdom, that does not condemn Section 9 to the constitutional waste heap on due process grounds so long as the legislative determination embodied therein is rationally related to the legislative objective. The court finds that Plaintiffs have not shouldered their heavy burden in this regard and that their due process challenge to Section 9 must fail (R 8-1410).

Prior to the enactment of Chapter 86-160, the legislature chose to rely upon competition as the primary tool for regulating all insurance rates other than private passenger motor vehicle and workers' compensation. Section 627.062, Florida Statutes, as it existed prior to enactment of

Chapter 86-160, did not give the Department specific authority to review and disapprove rates. A rate could not even be found to be excessive unless: (1) the rate was unreasonably high for the insurance provided; and (2) a reasonable degree of compensation did not exist in the area with respect to the classification to which the rate was applicable. As the testimony at trial demonstrated, this left the Department with little or no regulatory authority over rates and allowed insurers to charge as much or as little as they could justify competitively (TR IV - 553-560; 565-568; V - 807-808; 812).

Under this system, an availability and affordability problem developed for many lines, types and classes of insurance. As discussed in the statement of facts, this crisis had numerous sources and necessitated a comprehensive solution. However, one very important contributing factor was the growing tendency of insurers to ignore actuarial principles in determining rates and premiums. During the late seventies and early eighties practices such as "cash flow underwriting" became prevalent for many insurers (TR IV - 560-562; VI - 1004-1006). Insurers engaging in cash flow underwriting tended to ignore both the loss experience of prospective insureds and their own underwriting rules. In an attempt to take advantage of extremely high interest rates, these insurers indiscriminately utilized premium discounts and rate reductions to attract as much business as possible. The results of this practice were disastrous (TR V - 812-814; Department Exhibit No. 5).

Since insurers were ignoring proper underwriting practices in pricing the policies they sold, losses began to increase dramatically. This, combined with a perception that the civil justice system was awarding damages more frequently and of greater severity than at any time in the

past, caused insurers to react in two ways. First, insurers dramatically increased the price of their policies. This was accomplished both by replacing premium credits and discounts with premium surcharges and by increasing rates. Second, insurers began to dramatically restrict the number and types of policies they were willing to write. Consumers and businesses were either unable to obtain insurance or were forced to buy reduced coverage at dramatically increased rates. Ultimately the crisis became such that the legislature enacted Chapter 86-160. The nature and extent of the crisis are spelled out in great detail in the preamble to Chapter 86-160, wherein the legislature made numerous express findings.

Section 9, along with Section 10 (excess profits), is designed to bring stability and accountability back to the ratemaking process, by controlling the wild swings and requiring insurers to justify their rates on an actuarial basis. Section 9 requires the Department to review rate filings, including premium credits and surcharges, and disapprove those which are excessive, inadequate or unfairly discriminatory. The section places the burden on insurers to actuarially justify the rates they propose. The act is similar in most respects to model acts used in other states and represents a combination of the private passenger motor vehicle and workers' compensation rating laws currently in existence in Florida (TR IV - 570-574; VI - 1010-1013). The end result will be insurance coverage which is more affordable and available and far less subject to the up and down swings seen in the past.

AIA contends that Section 9 violates the equal protection and due process clauses because it is too broad and addresses lines of insurance for which a crisis does not presently exist. This argument is frivolous and totally without merit. Clearly, there is a legitimate State interest

in regulating all insurance rates, not just commercial liability rates. Often a single policy is a combination of liability, property and other classes of insurance. Requiring that these be separated out and some governed by the old "open competition" law and some by the new rating law is ludicrous and certainly not required by the Constitution.

AIA also maintains that Section 9 unlawfully discriminates because it excludes (a) individually rated risks, (b) commercial motor vehicle risks, (c) surplus lines companies and (d) self-insurance groups. Only three of these are, in fact, excluded, and there is a logical and rational justification for each. Certainly it is within the prerogative of the legislature to enact laws which pertain only to specific areas of insurance. A statute is not rendered unconstitutional merely because the Legislature does not regulate all related matters. State v. White, 194 So.2d 601 (Fla. 1967); Hunter v. Flowers, 43 So.2d 435 (Fla. 1949); Biscayne Kennel Club v. Florida State Racing Commission, 165 So.2d 762 (Fla. 1964).

Individually rated risks, or "A" rates as they are often termed, are unique risks for which no general rate is applicable. Since each risk is unique and unlike any other, general ratemaking techniques do not apply. There is no large pool of similar risks from which to draw experience to develop rates. For example, the launching of a satellite or the operation of a nuclear power plant may be individually rated risks. The premium for such risks must be developed on an individual risk basis and the "rate" is used only for that single risk. "A" rates are, therefore, logically subject to different filing requirements (Section 627.062(3), Florida Statutes).

Commercial motor vehicle rates are, in fact, regulated under Section 9. Section 627.062, Florida Statutes, is in Part I of Chapter 627 and applies to all "property, casualty and surety insurances" (Section 627.021, Florida Statutes) except to "workers' compensation and employer's liability insurance and to motor vehicle insurance" (Section 627.062(2), last paragraph). However, the exclusion for motor vehicle insurance, by definition, applies only to private passenger automobile insurance. Section 627.041(8), Florida Statutes, limits the definition of "motor vehicle insurance" to:

> a policy of motor vehicle insurance delivered or issued for delivery in this state by an authorized insurer: (a) insuring a natural person . . . and (b) insuring a motor vehicle of the private passenger type . . . .

Rates for surplus lines companies have traditionally been excluded from standard rate regulation. Surplus lines companies are companies which are not authorized by certificate of authority to transact insurance in this state (TR II - 229-230, 239). Nevertheless, these companies are allowed to write a limited amount of business in the state pursuant to the surplus lines law (Sections 626.913 - 626.937, Florida Statutes). The purpose of the surplus lines law (as set forth in 626.913) is to allow residents of the State of Florida to procure insurance coverage from insurers outside the state when such coverage is not procurable from authorized insurers (TR II - 239). It is not intended to be a primary market, but rather a market of last resort, a safety valve. Section 626.916 establishes conditions under which a surplus lines policy may be written. Most important among these is the requirement that the insurance not be procurable from the admitted or authorized market. Each policy written under the surplus lines law must carry a warning that it is written pursuant to the surplus

lines law and not subject to the protection of the Florida Insurance Guaranty Act in the event the insurer becomes insolvent (TR II - 241).

Finally, self-insurance trust funds are governed by Sections 624.460 et. seq., 627.356, and 627.357. These statutes authorize qualified commercial or professional risks to group together and "self-insure". In essence, these groups are allowed to operate as an insurer without having to meet the minimum capital and surplus requirements. (Without specific statutory authority, these groups would be prohibited from transacting insurance without a certificate of authority by Section 624.401, Florida Statutes.) The rates these trust funds charge are subject to regulation. Among other things, each section specifies its own type of rate regulation. See e.g., 624.482, Florida Statutes (1986 Supp.).

The interest to be protected by regulating rates for self-insurance trust funds is different than for other insurers. Self-insurance trust funds are non-profit groups or associations of similar commercial or professional risks. Section 624.462(1)(a)1, Florida Statutes (1986 Supp). These risks pool their resources in order to protect each other from unexpected losses. The incentives to overcharge are simply not the same as in the case of a for-profit insurer. The primary focus of regulation, therefore, is maintaining solvency and making certain that expenses and charges of administrators are reasonable. Each member of a self-insurance trust fund is subject to assessments if the fund runs out of money and to refunds if the fund ultimately has an excess.

AIA's next contention is that Section 9 is an unconstitutional delegation of legislative authority providing the Department with "unbridled discretion". Once again, appellant's argument is wholly without merit

and it ignores a large body of case law which has approved similar standards for ratemaking.

The rating standards contain more than sufficient standards and guidelines to meet the requirements of Article III, §3, of the Florida Constitution. The general rule to be followed in applying this provision is that while "the Legislature may not delegate the power to enact a law, or to declare what the law shall be, or to exercise an unrestricted discretion in applying a law," it may "enact a law complete in itself, designed to accomplish a general purpose, and may expressly authorize designated officials within valid limitations to provide rules for the operation and enforcement of the law within its expressed general purpose." Department of Citrus v. Griffin, 239 So.2d 577, 580 (Fla. 1970); quoting with approval Bailey v. Van Pelt, 78 Fla. 337, 82 So. 789 (1919). The distinction is said to be one between "the delegation of the power to make the law, which necessarily involves a discretion as to what the law shall be, and the conferring of authority or discretion in executing the law pursuant to and within the confines of the law itself." Conner v. Joe Hatton, Inc., 216 So.2d 209, 211 (1968). So long as the Legislature has made the policy decisions and provided adequate standards for the courts to review administrative implementation of the statute, the non- delegation doctrine is not violated. Lewis v. Bank of Pasco County, 346 So.2d 52 (Fla. 1977).

In the instant case, the legislature has clearly made the basic policy decisions — insurance rates shall be regulated to the end that they are not excessive, inadequate or unfairly discriminatory (Section 9 the act).

The degree of specificity required in such guidelines and standards depends, in part at least, on the subject matter of the statute. In State,

Department of Citrus v. Griffin, supra, at 581, the court quoted from State v. A.C.L.R. Co., 47 So. 969 (Fla. 1908):

> But the subject-matter may be such that only a general scheme or policy can with advantage be laid down by the Legislature, and the working out in detail of the policy may be left to the discretion of administrative or executive officials.

In North Broward Hospital District v. Mizell, 148 So.2d 1, 3 (Fla. 1962), the court stated that the usual construction of laws delegating authority to a professional or occupational licensing board is that the discretion to be exercised is "reasonable or judicially reviewable." The Court also noted:

> Where it is impracticable to lay down a definite comprehensive rule, such as where regulation turns upon the question of personal fitness, or where the act relates to the administration of a policy regulation and is necessary to protect the general welfare, morals and safety of the public, it is not essential that a specific prescribed standard be expressly stated in the legislation. In such situations the courts will infer that the standard of reasonableness is to be applied. (Emphasis added.)

Id., at 4, fn. 11.

The instant case certainly involves issues relating to the public health, safety and welfare. See e.g. Williams v. Hartford Accident & Indemnity Company, 245 So.2d 64 (Fla. 1971); Pinillos v. Cedars of Lebanon Hospital Corp., 403 So.2d 365, 367 (Fla. 1981); Woods v. Holy Cross Hospital, 591 F.2d 1164 (5th Cir. 1979); and Carter v. Sparkman, 335 So.2d 802 (Fla. 1976). It also involves a very complex issue - ratemaking - which requires a heavy reliance on the actuarial sciences. Courts in the State of Florida have recognized the difficulty and complexity of ratemaking in a number of cases for many years. In Nationwide Mutual Insurance Company v. Williams, 185 So.2d 368, 372 (Fla. 1st DCA 1966), the court stated:

> Insurance ratemaking is a technical, complicated, and involved procedure. It is not an exact science. Judgments based upon a thorough knowledge of the problem must be applied. Courts cannot abdicate their duty to examine the alleged errors in

> light of the evidence, to interpret and apply the law, and to give just credence to the judgment of the Insurance Commissioner who specializes in the field of insurance, when his adjudication is supported by the testimony of experts. (Emphasis supplied)

See also, Travelers Indemnity Company v. Williams, 190 So.2d 27, 29 (Fla. 1st DCA 1966).

In M'Whorter v. Pensacola & A.R. Co., 24 Fla. 417, 5 So. 129, 136 (1888), the Court cited with approval the following language from an 1881 5th Circuit Court decision, Tilley v. Railway Commissioners, 5 F. 641, 4 Woods 427 (5th Cir. 1881):

> The fixing of just and reasonable maximum rates for the railroads in the states is clearly a duty which cannot be performed by the legislature, unless it remains in perpetual session and devotes a large portion of its time to its performance. The question, what are just and reasonable rates? is one which presents different phases from month to month... (Emphasis supplied)

A number of recent cases has confirmed the appropriateness of this greater deference to administrators in insurance ratemaking. In Department of Insurance v. Southeast Volusia Hospital District, 438 So.2d 815 (Fla. 1983), the Court upheld a statute providing that rates be "actuarially sound" and based on "past and prospective loss and expense experience" and "the prior claims experience of members," and reversed a finding that Section 768.54(3)(c), Florida Statutes (1981), was unconstitutionally vague and ambiguous and violative of the non-delegation doctrine. In upholding that statute, the Court stated that:

> (t)he courts of Florida have found concepts of actuarial soundness to be a meaningful standard. (citation omitted) The Florida Constitution employs the standard of 'sound actuarial basis'. Article X §14, Fla. Const. These principles are also incorporated in other statutes. §§627.062(2)(a) & 627.0651(2), Fla. Statute (Supp. 1982). There simply is no merit to this argument.

Id. at 819.

The First District Court of Appeal reaffirmed these principles in John Deere Insurance Company v. Department of Insurance, 463 So.2d 385

(Fla. 1st DCA 1985). The court found that the terms "anticipated underwriting profit" and "due recognition of investment income" were actuarial concepts that "can be specifically defined and consistently applied." The court, quoting from Southeast Volusia Hospital District, supra at 820, found that to "require constant legislative supervision of the technical determination of 'anticipated underwriting profit' is neither practical nor required by the constitution." Id. at 387. Other terms such as "loss development factor," "past and prospective losses," and "fairly reflect the classification prescribed above" have been specifically held to provide adequate standards and guidelines. See also United States Fidelity and Guarantee Company v. Department of Insurance, 453 So.2d 1355 (Fla. 1984); and Florida Welding & Erection Service, Inc. v. American Mutual Insurance Co., 285 So.2d 386 (Fla. 1973).

In light of the principles announced in the cases cited above, AIA's suggestion that Section 9 is unconstitutionally vague and ambiguous or that it violates the non-delegation doctrine clearly must be rejected.

POINT III

APPELLANTS HAVE NOT DEMONSTRATED THAT THE EXCESSIVE PROFITS LAW CONTAINED IN SECTION 10, CHAPTER 86-160, VIOLATES THE DUE PROCESS CLAUSE OR DENIES EQUAL PROTECTION

AIA maintains that the excessive profits provisions of Section 10, Chapter 86-160, constitute an improper use of the police power and denies equal protection to certain policyholders, while CIGNA contends that Section 10 arbitrarily divides insurers into "good" and "better" insureds and thereby denies equal protection to the former group.

Appellants rely heavily on State v. Lee, 356 So.2d 276 (Fla. 1978), to support their misguided position. Once again, the rational basis test, as discussed in Point I above, is the proper test to apply. And once

again, application of this test shows the appellants' arguments to be without merit. The excessive profits test is clearly rationally related to legitimate State interest of reducing insurance rates by, among other things, returning overcharges to policyholders and creating incentives for insureds to implement effective risk management programs.

It is clear that this Court has determined in prior decisions that excessive profits laws are rationally related to the legitimate State interest of protecting policyholders from exorbitantly high rates. See United States Fidelity & Guaranty Company v. Department of Insurance, 453 So.2d 1355 (Fla. 1984), and Department of Insurance v. Teachers Insurance Company, 404 So.2d 735 (Fla. 1981). Each of these decisions upheld an almost identical excessive profits law (Section 627.066) for private passenger motor vehicle insurance. In addition, the First District Court of Appeal followed these decisions in upholding an excessive profits law for workers' compensation insurance (Section 627.215, Florida Statutes) in John Deere Insurance Company v. State, Department of Insurance, 463 So.2d 385 (Fla. 1st DCA 1985).

The trial court found that Section 10 has at least two legitimate purposes. First, it provides a disincentive to insurers to charge high premiums which result in excessive profits. The lower court found that this was accomplished by requiring insurers to refund such excessive profits to policyholders. Second, the law encourages insureds to implement and maintain risk management measures, thereby reducing accidents (R 8-1416).

Reduced to its basics, Section 10 simply requires any insurer which has earned an excessive profit over a four-year period to return that money to the policyholders whose positive loss experience produced the unexpected windfall. Section 10 states that an excessive profit has been

realized if underwriting gain is greater than the anticipated underwriting profit, plus 4 percent of earned profit for the four most recent calendar years. Section 627.0625(5)(a). The anticipated underwriting profit is the amount of profit set forth in an insurer's rate filings during the four-year review period. In other words, this test allows an insurer to retain the entire amount of underwriting profit it anticipated making, plus an additional amount equal to 4% of all earned premiums for the review period. John Wilson testified that most companies would be permitted to earn well in excess of 30% on investment capital per year after taxes (TR V - 880). Essentially the same test is utilized in the workers' compensation and the private passenger motor vehicle laws.

Refunds, however, of excessive profits are distributed slightly differently under Section 10 than under the workers' compensation and private passenger motor vehicle laws. Pursuant to each of those laws, refunds are made only to those policyholders of record on December 31 of the final compilation year. Challenges to this refund mechanism were rejected by both the Supreme Court in U.S.F.&G., supra, and by the First District Court of Appeal in John Deere, supra. In John Deere, the appellants argued that this refund mechanism "arbitrarily advantages some policyholders, while disadvantaging others, because it conditions entitlement to refunds to one's status as a policyholder on the last day of the three-year reporting period." John Deere, 463 So.2d at 388. The court rejected these arguments, stating that:

> The test to determine whether the WCEPL refund mechanism violates the due process clause is whether it bears a reasonable relationship to the statute's objectives and is not discriminatory or arbitrary. (citation omitted) We find that the refund mechanism bears a reasonable relationship to the objective of protecting policyholders from the adverse effects of excessive insurance rates by providing an orderly mechanism that is administratively reasonable for both the Department and insurers. Admittedly,

> an individual who holds a policy every day but the last day of the reporting period would not receive a refund under the WCEPL. Courts, however, do not require perfection in statutory classifications; indeed practical, but unscientific accommodations often are necessary... We cannot say under the circumstances there is no rational basis for the refund mechanism. Id.

The refund mechanism provided for in Section 10 adds two important criteria to those contained in the workers' compensation law and private passenger motor vehicle law. Paragraph 11(a) of Section 627.0625 states that, to be eligible for a refund, a policyholder must have complied with the applicable risk management guidelines of the insurer and must have had a loss ratio which does not exceed the permissible loss ratio utilized by the insurer in its rate filings. By definition then, eligible insureds are those who contributed favorably to the unexpectedly positive underwriting results of the insurer which in turn produced the unexpected and excessive profit. These additional requirements for eligibility are designed to encourage loss prevention and risk management practices, thereby reducing the cost of insurance in the future. Clearly, then, the eligibility requirements of this excessive profits law are rationally related to a legitimate State interest.

Appellants rely heavily on State v. Lee, 356 So.2d 276 (Fla. 1978). However, the good driver fund found to be unconstitutional in State v. Lee is not analogous to the excess profits provisions of Section 10, Chapter 86-160. In State v. Lee, fines for drivers convicted of traffic violations were increased. This increased revenue was to be placed in a fund and distributed to "good drivers." The Court found this attempt to take money from "bad drivers" and give it to "good drivers" unconstitutional because: (i) "it improperly uses the police power to take private property from one group of individuals solely for the benefit of another limited class of individuals; and (ii) it violates the Equal Protection Clause of the

United States and Florida Constitutions in that it constitutes an irrational classification." Id. at 278.

There are a number of important distinctions between Section 10 and the good driver fund in State v. Lee. First, the excess profits law does not impose any civil penalties, nor does it take property from one group and give it to another limited group. As defined by Section 10, excessive profits are unanticipated windfalls. Insurers are put on notice by Section 10 that this is not their money and they are not entitled to retain it. By law it belongs to those policyholders whose favorable loss experience created the unexpected gain. This Court specifically found as much in Department of Insurance v. Teachers Insurance Company, 404 So.2d 735 (Fla. 1981), wherein it stated:

> What the statute envisions is that the insurer must, from the beginning of any three-year period, take steps to guarantee that those premiums representing excess profits will be available to be refunded should the department order it. To those refunds the insurers have no vested rights; to those funds representing profits below the definition of excess, they do have vested rights. Id. at 742. (Emphasis supplied.)

This finding was reaffirmed in U.S.F.&G., supra, 453 So.2d 1355, 1361.

In addition, the classifications provided for in Section 10, unlike those in State v. Lee, are rationally related to a legitimate State interest. In State v. Lee, the Court found the purpose of the challenged law was to provide an incentive for those persons operating motor vehicles to do so in a safe and financially responsible manner. Despite this stated purpose, the law classified drivers as "bad drivers" for traffic violations which had nothing to do with safety.

The classifications contained in Section 10 of Chapter 86-160, on the other hand, are clearly and rationally related to a legitimate State interest. Insureds who establish effective risk management programs and

who have favorable loss experience that results in unexpected profits are entitled to share in those gains. These provisions provide a powerful incentive for insureds to take all possible precautions to reduce or eliminate losses.

The appellants' arguments that this classification is irrational and arbitrary because "luck" plays an overwhelming role in determining losses is absurd. Testimony at trial demonstrated that insurers routinely use loss experience to develop rates and often use retrospective rating to adjust premiums and charges to policyholders on the basis of their individual loss experience (TR V - 881-882; VI - 1016).

POINT IV

SECTION 13 OF CHAPTER 86-160 DOES NOT UNLAWFULLY DELEGATE LEGISLATIVE POWERS TO CREATE JOINT UNDERWRITING ASSOCIATIONS.

CIGNA maintains that Section 13, Chapter 86-160, which provides for the establishment of a Joint Underwriting Association (JUA), is unconstitutional because it delegates too much discretion to the Department and contains vague and meaningless standards. More specifically, CIGNA contends that the law allows the Department the discretion to determine which lines of insurance the JUA will write and that it contains the purportedly vague phrase "responsible or prudent business practice."

Section 13 amends Section 627.351, Florida Statutes, to provide for the establishment of a property and casualty joint underwriting association. Section 627.351 already provides for establishment of JUA's to provide coverage for private passenger motor vehicle [627.351(1)], windstorm [627.351(2)], political subdivision [627.351(3)], and medical malpractice risks [627.351(4)]. JUA's currently exist and are operating in each of these areas except for political subdivision risks. These

JUA's provide coverage to consumers who are unable to obtain coverage in the open market.

The appellant's first argument relies upon a misunderstanding or misinterpretation of Section 13. Section 13 states in part, as follows:

> (5) Property and Casualty Insurance Risk Apportionment.--If the department determines, after consultation with the insurers authorized in this state to write property insurance as defined in s. 624.604 or casualty insurance as defined in s. 624.605, that any class, line, or type of coverage of property or casualty insurance is not available at adequate levels from insurers authorized to transact and actually writing that kind and class of insurance in this state or in a particular geographic area, the department shall implement by order a joint underwriting plan to equitably apportion among such insurers the underwriting of property insurance or casualty insurance, except for the types of insurance that are included within property insurance or casualty insurance for which an equitable apportionment plan, assigned risk plan, or joint underwriting plan is authorized under s. 627.311 or subsections (1), (2), (3), or (4) of this section to persons with risks eligible under subparagraph (a)1. and who are in good faith entitled to, but are unable to, obtain such property or casualty insurance coverage, including excess coverage, through the voluntary market. For purposes of this subsection, an adequate level of coverage means that coverage which is required by state law or by responsible or prudent business practices. (Emphasis supplied.)

This provision mandates that if there is "any" class, line or type of coverage of property or casualty insurance not available at adequate levels from insurers authorized to transact and actually writing that kind and class of insurance in this state, then the Department "shall" implement a joint underwriting plan to equitably apportion among insurers the "underwriting of property insurance or casualty insurance," except for the types of insurance that are included in other JUA's established pursuant to statute. This language leaves no discretion to the Department. If it finds any class, type or line of insurance to be unavailable from the admitted market, it must establish a JUA for all property and casualty lines not already covered by some other JUA. The Senate Staff Analysis cited in footnote 4 on page 23 of CIGNA's Initial Brief obviously refers

to an earlier draft of Section 13 which did not contain the word "shall" as the enacted version does.

Appellants also attack as overbroad the law's definition of adequate level of coverage. Adequate level of coverage is defined as that coverage which is required by State law or by responsible or prudent business practice. The law requires the Department to establish a JUA if coverage for any class, line or type is not available at adequate levels. This simply means that if insurers are offering coverage at levels which do not meet the needs of responsible or prudent business practices, the Department should go forward with the establishment of the JUA. It is impossible to set forth one definition or test for all classes, types or lines for all types of business. Section 13, therefore, contains sufficient standards and guidelines to meet the constitutional standards described in Point II.

POINT V

THE PROVISIONS OF SECTION 44, CHAPTER 86-160, DO NOT CONSTITUTE A "TAKING" WITHIN THE INTENDMENT OF THE EMINENT DOMAIN CLAUSE OF THE FLORIDA CONSTITUTION, NOR DO THEY VIOLATE THE DUE PROCESS CLAUSES OF EITHER THE STATE OR FEDERAL CONSTITUTIONS.

State Farm's entire 32-page Initial Brief is devoted to the propriety of Section 44 of Chapter 86-160. State Farm is the only appellant which specifically raises this issue. State Farm contends that Section 44 constitutes an unlawful taking and is violative of the Due Process Clause.

Section 44 is rationally related to the legitimate State interest of making available to health care providers insurance protection against medical malpractice claims. In addition, neither State Farm nor any other appellant can identify any specific property being "taken." While State Farm makes much noise about assessments which were made by the Florida Patients Compensation Fund (FPCF), it is unable to demonstrate that State Farm will ever likely suffer any economic loss as a result of the operation

of Section 44. To the contrary, the Department's representative, Gerald Wester, testified that it would be extremely unlikely that State Farm or any other insurer would ever be required to pay any losses as a result of the operation of Section 44 (TR IV - 610-611).

Section 44 amends Section 627.351(4), Florida Statutes, which provides for the establishment of a JUA for health care providers such as hospitals and physicians. This JUA, known as the Florida Medical Malpractice Joint Underwriting Association (FMMJUA), offers coverage to health care providers who cannot obtain the same from the voluntary market. It is funded from fees paid by such health care providers. In the event that these fees are inadequate to fund the losses and expenses incurred by the FMMJUA, the health care providers may be assessed an additional fee equal to one-third their original fee. If this amount is still insufficient, participating insurers may be assessed for the difference. To date, no assessment has been levied against health care providers or against participating insurers. It would appear extremely unlikely that either will be assessed in the foreseeable future (TR V - 610-611).

The first amendment to Section 627.351 requires the FMMJUA to provide "tail coverage" to insureds whose "claims-made" coverage with another insurer or trust has or will be terminated [Section 627.351(4)(d)(4)]. Under a claims-made policy, an insurer provides coverage only for claims which are reported to it by a policyholder during the period the policy is in effect. Usually the incident giving rise to the claim must have occurred after the inception date of the policy. In effect, this means that if an insurer writes a claims-made policy to be effective from January 1, 1986 - December 31, 1986, that it will only pay for claims for injuries which occur after January 1, 1986, and which are reported by the insured

to the insurer by December 31, 1986. In the area of medical malpractice, an insured may not know about a claim until well after the December 31, 1986, deadline; therefore, the physician must purchase "tail coverage" to provide protection for claims made after the December 31, 1986, date. Because of the restricted market, "tail coverage" was extremely difficult to buy and the legislature, therefore, directed the FMMJUA to make THIS meaningful insurance coverage available to health care providers. None of the appellants challenge this provision.

In addition, Section 44 also directed the FMMJUA to provide "assessment insurance" to physicians who had purchased insurance from the FPCF.

The FPCF was a statutorily created fund (Section 768.54, Florida Statutes) through which hospitals and physicians could self-insure against medical malpractice claims. Each "member" of the Fund was required to pay a fee to cover losses and expenses. If this fee turned out to be high, the member was to receive a refund. If the fee turned out to be inadequate, the member was required to pay an assessment. Each membership year operated independently of all other years, with coverage provided on a fiscal year basis from July 1 to June 31. Prior to 1982 the amount physicians could be assessed was limited to 100% of their initial fee.

In 1982, the legislature increased this amount to 200%. At the same time it provided (see Section 1 of Chapter 82-391, Laws of Florida) these physicians with the opportunity to purchase "assessment insurance" from the FMMJUA for a one-third additional premium. The initial premium charged the physicians was established by the actuarial firm of Tillinghast, Nelson and Warren, Inc., at an actuarially sound level, with the expectation that such would avoid the need for assessments (TR IV - 607). The additional

protection was merely an extra safeguard. Chapter 82-391 required that this coverage be made available until June 30, 1983, the last day of the 1982-83 fiscal year.

In 1983, Chapter 83-206, Laws of Florida, was enacted. The title to the law describes it as "an act relating to professional malpractice; amending s. 627.351(4), Florida Statutes (1982 supplement); requiring the Florida Medical Malpractice Joint Underwriting Association to make certain levels of coverage available to physicians, osteopaths, hospitals and ambulatory surgical centers; deleting obsolete language." The "obsolete" language referred to was the requirement that the FMMJUA offer assessment insurance coverage to physician members of the FPCF. Since the FMMJUA was not required to offer this insurance after June 30, 1983, this language would have been "obsolete" on July 1, 1986. However, Chapter 83-206 became effective "upon becoming law" which, unfortunately, was June 23, 1983, instead of June 30, 1983. This, of course, was a fortuity, since the Governor could have signed the bill after June 23, 1983. This left a number of physicians who had specifically applied for and attempted to purchase assessment insurance coverage during this seven-day period unable to obtain such coverage. The use of the word "obsolete" in the title to describe this language clearly demonstrates that this was <u>not</u> the intended effect of Chapter 86-160. In addition, the testimony of Gerald Wester, chief lobbyist for the Department of Insurance, clearly establishes that this was a technical unintended mistake (TR IV - 609-611). Section 44 attempts to correct this error by allowing those physicians who in good faith applied for insurance coverage during this seven-day period to obtain such coverage.

Neither State Farm nor any other appellant is likely to be directly affected by this amendment. All losses to date in the FMMJUA have been funded and paid for by its physician and hospital members, including all losses paid to the FPCF for the "assessment insurance" provided. The only conceivable way that any insurer could be held responsible for any of these losses is if the premium collected, plus additional assessments from policyholders, is insufficient to pay losses and then an assessment is made against insurers who participate in the FMMJUA. The uncontroverted testimony of Gerald Wester was that this has never happened in the past and is extremely unlikely to happen in the near future. The ability of the FMMJUA to accumulate surplus as outlined in State Farm's brief reduces the likelihood of this occurring to nearly zero. The number of physicians affected is, as State Farm indicates, small. But this is relevant only in that the number of dollars which the FMMJUA will have to pay in losses as a result of the operation of Section 44 is extremely small and insignificant.

In view of Section 44's clear relationship to Chapter 86-160's purpose of increasing the availability and affordability of insurance, this Court should determine it to be constitutional.

POINT VI

THE APPELLANTS HAVE FAILED TO DEMONSTRATE THAT SECTION 66, CHAPTER 86-160, VIOLATES EITHER THE EQUAL PROTECTION OR DUE PROCESS CLAUSES.

AIA and CIGNA each contend that some parts of Section 66, Chapter 86-160, violate the due process and equal protection clauses. To support their argument, appellants attempt to place before this Court various strained constructions of this section which have no basis in fact. Section 66 contains provisions for various temporary market adjustments which

were designed to immediately address the insurance crisis facing the legislature in July of 1986 and to provide a transition from a period of little regulation to more comprehensive regulation. The nature and extent of this crisis are detailed in the Statement of Facts of this brief and in the preamble to Chapter 86-160. The legislature specifically found that the need for a solution to the crisis had created "an overpowering public necessity for a comprehensive combination of reforms." Section 2, Chapter 86-160, Laws of Florida.

As previously discussed, one important part of the solution was the enactment of various reforms to the civil litigation system designed to reduce the cost and to increase the availability of insurance. Paragraphs (1) - (3) of Section 66 were designed to make certain that the benefits of this reform were passed to the policyholders and not simply retained as windfall profits by insurers.

Chapter 86-160, including the civil reforms, went into effect on July 1, 1986 (with a few exceptions). The legislature's most reasonable estimate was that these reforms would reduce costs to insurers by at least 10% of the annualized premium. The legislature, therefore, mandated that insurers provide a premium credit of 10% on an annualized basis. (This figure is expressed in the statute as 40% of one-fourth of the term of the policy affected, which, of course, equals 10% of the actual premium charged.)

The legislature provided two important exceptions to the application of this credit or refund. First, any company whose financial solvency would be impaired by the application of the premium is automatically excluded [Section 66(2)]. Second, any company which contends that application of the special credit would result in an inadequate rate may file for

an exemption [Section 66(3)]. The Department must then review the filing and, utilizing the factors contained in Section 627.062, determine the appropriate special credit to be implemented, if any.

Paragraph (4) of Section 66 froze commercial property and liability rates at their May 1, 1986, level for all policies issued from July 1 to December 31, 1986. Obviously, this date has now passed and insurers have been implementing new rates pursuant to paragraphs (5) and (6) of Section 66 and this Court's Order of December 1, 1986. The trial court found Section (4) to be a valid exercise of legislative authority and analogous to the "rate freeze" upheld in Williams v. Hartford Accident and Indemnity Co., 245 So.2d 64 (Fla. 1971). Appellants have not renewed their challenge to this provision.

Paragraphs (5) and (6) set forth a procedure for review of all commercial liability rates in Florida and for determining the appropriate rate to be charged at the expiration of the rate freeze on December 31, 1986. Each insurer is required to file with the Department the rates, if any, it had in effect on January 1, 1984, adjusted for changes in investment income and coverage. Trial testimony (TR IV - 600; V - 857-858; VI - 1083) demonstrated that rates began their exorbitant escalation after January 1, 1984. The trial court denominated this as the "red line rate" (R 1421-1422). Insurers desiring to implement these 1984 rates were free to do so beginning January 1, 1987.

Any insurer desiring to charge rates other than the red line rate was required to submit a separate filing pursuant to paragraph (6). The filing must specify the rate which the insurer could actuarially justify under the provisions of the new rating law, Section 627.062, Florida Statutes, as amended by Section 9, of Chapter 86-160. The Department is required

to review each rate filing utilizing the standards and procedures contained in 627.062, Florida Statutes, and either approve or disapprove it. If the Department approved the proposed rate, the insurer was then authorized to begin using it on January 1, 1987. If the Department disapproved the rate, and that disapproval ultimately became final agency action, then the insurer would be required to submit a new filing which "responds to the findings of the Department." If the Department's disapproval was only preliminary agency action or if the Department did not review the filing before January 1, 1987, the insurer was free to implement the proposed rate until such time as the Department's review became final or the rates were deemed approved (March 1, 1987). However, any insurer implementing its proposed rates before review became final was subject to an order directing that any portion of the rate ultimately found to be excessive be refunded to policyholders.

AIA argues that Section 66, paragraphs (1) - (3) and (5) and (6), are not rationally related to any legitimate State interests and, therefore, violate the due process and equal protection clauses. CIGNA does not specifically challenge paragraphs (1) - (3), but raises due process challenges to paragraphs (5) and (6). Once again appellants' arguments are based upon strained and erroneous readings of the pertinent provisions.

Section 66, paragraphs (1) - (3), are rationally related to the legitimate State interest of assuring that changes made to reduce the insurers' costs of doing business are passed on to policyholders in the form of lower premiums. U.S.F.&G. v. Department of Insurance, 453 So.2d 1355, 1361 (Fla. 1984); Department of Insurance v. Teachers, 404 So.2d 735, 742-743 (Fla. 1981).

With regard to paragraphs (5) and (6), the record clearly demonstrated that rates have risen at an incredible pace since January 1, 1984 (TR IV - 600; Department's Exhibit 5). These increased rates have forced many businesses to close their doors and to pass these increased insurance costs on in the form of higher prices. These increases have dramatically affected all parts of our lives from the type and cost of medical care we receive to the availability of day care centers to care for children. The legislature sought a mechanism to not only stop these increases but to actually try to reduce where possible some of the increases which have occurred.

Two major reasons are given for the dramatic increases which have occurred: first, increased losses being paid by insurers as a result of more frequent and severe damage awards; second, bad business practices and overcharges on the part of insurers. Both reasons appear to have contributed to the crisis. The testimony of John Wilson, an expert economist, demonstrated that the greater portion of the rate increases have been the result of increases in the IBNR figures of insurers (TR V - 829; Department's Exhibit 6). IBNR represents claims which have been incurred but not reported. They are claims for which insurers believe they will have to pay at some time in the future but of which they do not now actually have knowledge. While there are actuarial methods for calculating these numbers, insurers often use highly speculative numbers involving much judgment in calculating IBNR figures. Wilson testified that this has occurred more since 1984 than at any other time in the past.

Read together and fairly, paragraphs (5) and (6) provide for a specific review process whereby the Department is directed to review all commercial liability rates to be implemented in Florida after the

rate freeze expires. Paragraph (5) provides a base line or bench mark for this review. It requires insurers to go back to the rates in effect before the dramatic increases of the last few years. If an insurer wants to utilize a rate in excess of its 1984 rate, it must make a filing under (6) and justify all rate increases, including the IBNR figures. It may utilize all reasonable actuarial techniques, but must, however, state with specificity the impact on rates, losses and expenses which it contends the litigation reforms in Chapter 86-160 will have. Clearly, it is not expected that all or even most insurers will return to their 1984 rate levels. Paragraph (5) is not an automatic rollback to 1984 rates, as appellants would have this Court believe. It is, rather, the first step in evaluating the legitimacy of the rates to be charged effective January 1, 1987, and the impact of the liability reforms enacted in Chapter 86-160.

The above notwithstanding, the appellants contend that they are deprived of due process because the provisions of paragraphs (3) and (6) can only be utilized if they contend the rates provided for in paragraphs (1) and (5) are inadequate. They further argue that an insurer cannot allege that a rate is inadequate unless premiums are less than losses and expenses, excluding a reasonable provision for profit. The argument is absurd and relies upon a contorted and erroneous reading of Section 627.062, Florida Statutes. Clearly, these provisions allow the appellants to earn a reasonable rate of return on their business investment. The express wording of the law precludes the Department from construing these provisions any other way.

Section 66(3) provides that any insurer which contends that implementation of the special credit provisions will result in a rate which is clearly inadequate under the provisions of Section 9 may make

a special filing to the Department of Insurance for an exemption. Likewise, Section 66(6) provides that any insurer which contends that a rate provided for in subsection 5 (the bench mark 1984 adjusted rate) is inadequate may make a filing setting forth the rate it contends is appropriate and, in doing so, is permitted to use all of the generally accepted actuarial techniques as provided for in Section 9 of Chapter 86-160.

Section 9 emphatically, and in several places, sets forth the legislature's specific intent that all insurers be permitted to earn a reasonable rate of return. Paragraph (2)(a) of Section 9 provides in pertinent part as follows:

> Insurers or rating organizations shall establish and use rates, rating schedules, or rating manuals to allow the insurer a reasonable rate of return on such classes of insurance written in this state.

Paragraph (2)(b) provides that upon receiving a rate filing, the Department shall review the filing to determine if a rate is excessive, inadequate, or unfairly discriminatory. It specifically mandates and requires the Department to make such a determination in accordance with generally accepted and reasonable actuarial techniques and sets forth thirteen specific factors to be considered by the Department before it can make a finding that a rate is excessive or inadequate.

Two of the factors listed make it again abundantly clear that the legislature intended for insurers to earn a reasonable rate of return. The fourth factor provides that the Department shall consider investment income reasonably expected by the insurer. In particular, it states that the manner in which investment income will be calculated "shall contemplate allowances for an underwriting profit factor and full consideration of investment income which produce a reasonable rate of return." The eleventh

factor plainly and clearly requires the Department to allow for a reasonable margin for underwriting profit and contingencies.

A determination as to whether a rate is excessive, inadequate or unfairly discriminatory should first be made in light of the factors set forth in Section 627.062(2)(a) and (b). Paragraph (e) simply provides additional standards for review. It establishes certain factual situations which "per se" constitute excessive or inadequate rates (TR V - 873). Subsection (e)(1) sets forth a top extreme - a point beyond which rates are "deemed" to be excessive. Subsection (e)(3), on the other hand, sets forth a bottom extreme - a point beyond which rates are "deemed" to be inadequate. In between these extremes there is room for reason and actuarial judgment. However, if rates taken together with investment income, are insufficient to sustain projected losses and expenses, the statute leaves no room for judgment or flexibility. Such rates are deemed to be inadequate.

The appellants have plainly misread the effect and application of the standards which follow the introductory language of paragraph (2)(e). The testimony of John Wilson appropriately categorized the standards as "per se" guidelines (TR V - 873). Thus, the third "per se" standards states that after consideration of the factors set forth above (including a provision for a reasonable rate of return) "rates shall be deemed inadequate if they are clearly insufficient, together with the investment income attributable to them, to sustain projected losses and expenses in the class of business to which they apply." During the course of trial the appellants suggested that this per se standard was, instead, a "definition" of the term "inadequate." They have then attempted to bootstrap this clear erroneous reading of Section 9 into a contention that Sections 66(3) and (6) preclude a filing in the first instance if they have earned a profit.

Such a construction of Sections 66 and 9 ignores the clear intent of the legislature that all insurance companies in the State of Florida earn a reasonable rate of return. Appellants' construction would require this Court to reach an absurd result. It has long been the law of Florida that where two or more interpretations can reasonably be given a statute, the one that will sustain its validity should be given and not the one that will destroy the purpose of the statute. City of St. Petersburg v. Siebold, 48 So.2d 291, 294 (Fla. 1950). The purpose and intent of a legislative act should be construed so as to fairly and liberally accomplish the beneficial purpose for which it was adopted and courts should avoid application of a rule of strictness which defeats fundamentals of legislative power. Hanson v. State, 56 So.2d 129 (Fla. 1952).

In Department of Insurance v. Southeast Volusia Hospital District, 438 So.2d 815, 820 (Fla. 1983), this Court reversed the decision of the district court finding a statute unconstitutional because it was subject to "different interpretations." The court reversed, stating that:

> This finding is contrary to well established principles of law. A statute is not unconstitutional simply because it is subject to differing interpretations. The administrative construction of a statute by the agency charged with its administration is entitled to great weight. We will not overturn an agency's interpretation unless clearly erroneous. (citations omitted) In addition, when an interpretation upholding the constitutionality of a statute is available to this Court, we must adopt that construction. (citations omitted)

The Department's construction of Sections 66(3) and (6), therefore, is entitled to great weight and should not be overturned unless shown to be clearly erroneous. It is a constitutional construction which clearly represents the legislature's plain intent and should, therefore, be adopted by this Court. See also Shultz v. State, 361 So.2d 416 (Fla. 1978), and

Lowry v. Parole and Probation Commission, 473 So.2d 1248, 1249 (Fla. 1985). The lower court acted properly in so construing the act.

CIGNA argues vehemently that Section 66 deprives it of its procedural rights. This argument assumes that rates for insurers will automatically be rolled back to their 1984 levels and it ignores the application of Chapter 120, Florida Statutes, to actions taken by the Department. If an insurer elects to make a filing under paragraph (6), then it must implement a rate which is consistent with any final order issued by the Department pursuant to that paragraph. During the pendency of such proceedings the insurer may, after January 1, 1987, either implement its proposed rate at risk of being ordered to refund or it may continue to charge its current rate without such risk. There is no provision which requires an insurer which has made a filing pursuant to paragraph (6) to implement its 1984 rates during the pendency of such review.

CIGNA argues (pp. 33-34 of their Initial Brief) that since paragraph (6) specifically allows an insurer to proceed with implementation of any filing for which the Department has not issued a preliminary notice of disapproval, that by implication, if such a notice has been issued, the insurer is precluded from using these rates and must, instead, implement its 1984 rates under paragraph (5). While this contention is convenient for appellants' due process argument, it ignores the express direction in paragraph (6) for the Department to approve or disapprove each filing pursuant to the provisions of Section 627.062. Under that section it is clear that a notice of intent to disapprove a rate filing does not prevent an insurer from implementing the filing; it merely subjects the insurer to the possibility of having to refund any portion of the rate found to be excessive. Once an insurer files under paragraph (6), it

is no longer governed by (5) and is free after January 1, 1987, to implement its paragraph (6) filing.

POINT VII

THE LOWER COURT CORRECTLY HELD THAT THE CIVIL LITIGATION REFORMS OF CHAPTER 86-160, LAWS OF FLORIDA, NEITHER DENY ACCESS TO COURTS OR EQUAL PROTECTION NOR INVADE THE JUDICIAL POWER.

This point is in answer to Points I and II of the Academy. Consistent with appellants' format of presentation, this point will be presented in three subpoints.

A. ACCESS TO COURTS

The Academy contends that Sections 59 and 60 of Chapter 86-160, Laws of Florida, constitute a deprivation of access to courts, contrary to Article I, Section 21, of the Florida Constitution. Section 59 of the act limits recoverable, defined "noneconomic" damages to a maximum of $450,000. Section 60 of the act substitutes comparative fault for joint and several liability under defined circumstances where total damages exceed $25,000. As the record establishes and the lower court held (R 8-1398), neither of these provisions abolishes any cause of action.

Appellants' contention is that the cap on noneconomic damages (§59) and its application under circumstances of comparative fault (§60) must be held invalid as a denial of access to courts unless the legislature either demonstrates an overpowering public necessity for the changes, or provides an alternative remedy. Appellants' contention is based upon a misreading of applicable law.

In Kluger v. White, 281 So.2d 1 (Fla. 1973), this Court did not hold that legislation which merely limited or capped damages, or which enunciated the effect of contributory fault and apportionment of damages among defendants, came within the terms and protections of Article I, Section 21.

To the contrary, in Kluger v. White, supra, this Court recognized and held that:

A. If the legislature abolished a cause of action or right of redress to the courts; and

B. If the legislature did not provide a reasonable alternative to protect the rights so abolished;

C. Then the legislation abolishing such a cause of action could be upheld only upon a showing:

1. of an overwhelming public necessity for abolishment of such right, and

2. of an absence of any alternative method of meeting such public necessity.

Appellants' claim of invalidity (and of required showing of overwhelming public necessity and lack of alternative) fails as a matter of law because Chapter 86-160, Laws of Florida, shows on its face that there is no abolishment of a cause of action which would bring into play Article I, Section 21, or the further requirements of Kluger v. White, supra. The Academy's lawyer-expert admitted that Sections 59 and 60 do not abolish any cause of action (TR III - 466).

Subsequent to Kluger, in Jetton v. Jacksonville Elec. Authority, 399 So.2d 396 (Fla. 1st DCA 1981); **pet. for rev. den.** 411 So.2d 383 (Fla. 1981), the district court of appeal held legislation limiting damages against a municipality engaged in proprietary functions to $50,000 did not violate Article I, Section 21, of the Florida Constitution. Specifically, the district court rejected the contention that the "cap" on damages violated the Constitution, holding in pertinent part:

> Guided by case law subsequent to Kluger, we narrowly construe the instances in which constitutional violations will arise.

> The constitution does not require a substitute remedy unless legislative action has abolished or totally eliminated a previously recognized cause of action.
>
> As discussed in Kluger and borne out in later decisions, no substitute remedy need be supplied by legislation which reduces but does not destroy a cause of action. (Emphasis supplied.)

Jetton v. Jacksonville Electric Authority, 399 So.2d 396, 398, supra.

Again, in Alterman Transport Lines, Inc. v. State, 405 So.2d 456, 459 (Fla. 1st DCA 1981), the district court considered a statutory challenge based on Article I, Section 21, and held that "(n)o substitute remedy need be supplied by legislation which only reduces but does not destroy a cause of action." See also, Abdin v. Fisher, 374 So.2d 1379 (Fla. 1979); Mahoney v. Sears Roebuck & Co., 419 So.2d 754, 755 (Fla. 1st DCA 1982); **approved with opinion** 440 So.2d 1285 (Fla. 1983); Beauregard v. Commonwealth Electric, 440 So.2d 460 (Fla. 1st DCA 1983).

In Sasso v. Ram Property Management, 431 So.2d 204 (Fla. 1st DCA 1983), the district court held in pertinent part at page 209 as to Article I, Section 21:

> In addition to defining two situations in which a right of action may be completely abolished, [(1) reasonable alternative remedy provided or (2) overwhelming public necessity] the Court has recognized that the doctrine precluding access to courts does not apply to statutes that limit the right of action to some extent and do not completely bar redress in a judicial forum. See McMillan v. Nelson, 149 Fla. 334, 5 So.2d 867 (1942). As a result, subsequent Florida Supreme Court cases have declined to hold statutes unconstitutional where rights of action have not been completely abolished. (Bracketed information provided.)

Sasso v. Ram Property Management, 341 so.2d 204, 209, supra.

In White v. Clayton, 323 So.2d 573 (Fla. 1975), it was contended that Article I, Section 21, and the rule of Kluger v. White, supra, were violated by legislation which eliminated as damages recoverable in wrongful death actions by certain beneficiaries' "pain and suffering" of the decedent.

This Court rejected the "access" challenge, holding in pertinent part at page 575:

> The right of recovery in a wrongful death action has not been abolished; only the elements of damages have been changed.

From the foregoing authorities, it is clear that Article I, Section 21, becomes applicable only where legislation completely abolishes a cause of action. Since Sections 59 and 60 do not abolish any cause of action, but merely limit or cap one element of damages and modify the scope of liability of defendants based on fault, Article I, Section 21, has no application.

The decision of the lower court upholding the validity of Chapter 86-160 is, therefore, entirely correct and must be affirmed.

B. EQUAL PROTECTION OF THE LAW

The Academy contends that Sections 59 and 60 of the act must be subjected to "strict scrutiny" as embodying a suspect classification. At the heart of appellants' contention is the erroneous view that because persons handicapped by injury will suffer a limitation of recovery of noneconomic damages (as will all other persons), the act is prohibited by Article I, Section 2, of the Florida Constitution which provides in pertinent part:

> No person shall be deprived of any right because of . . . physical handicap.

The lower court properly rejected this contention, noting that Sections 59 and 60 do not limit the rights of anyone "because of" physical handicap (R 8-1404).

It is clear that the contentions of appellants respecting "suspect" legislation and "strict scrutiny" must fail unless there is first some legislative classification based on physical handicap. See Graham v. Ramani,

383 So.2d 634, 635 (Fla. 1980). Chapter 86-160 does not even mention, much less base any legislative classification upon, physical handicap. It applies to all persons impacted by this law.

Under these circumstances it is clear that equal protection analysis is to be provided under the "rational basis" test, as the lower court held, and that no violation of Article I, Section 2, is present.

Appellant also urges that the statutory classification of damages based upon their "economic" and "non-economic" nature is without rational basis and constitutes a denial of equal protection.

In Lasky v. State Farm Insurance Co., 296 So.2d 9 (Fla. 1974), and Chapman v. Dillon, 415 So.2d 12 (Fla. 1982), it was contended that the Florida "no-fault" law denied equal protection because economic damages (i.e., medical expense, property damages, loss of income) were recoverable without any threshold barrier, while non-economic or intangible damages (i.e., pain and suffering, loss of enjoyment of life) could be recovered only upon meeting a threshold requirement.

In each of the above-cited cases the equal protection challenge was rejected, and the legislative classification based upon the economic and non-economic nature of damages was upheld. In the instant case the lower court was equally correct in rejecting appellants' equal protection challenge to the legislative classification based upon the nature of damages.

Though not precisely stated, the Academy's final equal protection contention appears to be that a cap or limitation on recoverable damages inherently denies equal protection. In Jetton v. Jacksonville Elec. Auth., 399 So.2d 396 (Fla. 1st DCA 1981), **pet. for rev. den.** 411 So.2d 383 (Fla. 1981), the court held that a legislative cap or limit of $50,000 did not deny equal protection guarantees. See also Mahoney v. Sears Roebuck &

Co., 419 So.2d 754 (Fla. 1st DCA 1982), approved with opinion 440 So.2d 1285 (Fla. 1983), rejecting an equal protection challenge.

It is respectfully submitted that the trial court properly held that under the rational basis test the equal protection clause is satisfied if the legislature "could rationally have decided that the statute might assist in fostering the legislative object" (R 8-1402). Indeed, as this Court held in a similar case, that a statute may not actually accomplish its goals is not a sufficient ground for a holding of unconstitutionality. U.S. Fidelity & Guar. Co. v. Dept. of Ins., 453 So.2d 1355, 1362 (Fla. 1984).

In the instant case it is clear that the legislature could, and did, rationally decide that the limitation on recovery of noneconomic damages, revision of joint and several liability, and other litigation reforms in the act would assist in fostering the legislative objective of greater availability and affordability of insurance. Evidence before the Court, and referred to in earlier portions of this brief, supported this decision of the legislature. The decision of the lower court was clearly correct and must be affirmed.

C. THE LITIGATION REFORMS IN CHAPTER 86-160, LAWS OF FLORIDA, DO NOT INVADE THE PROVINCE OF THE COURTS

The final challenge of the the Academy is based upon the contention that Sections 50 through 54 and 56 through 58 of the act unconstitutionally attempt to exercise the judicial power, contrary to the commands of Article II, Section 3, of the Florida Constitution. The lower court correctly rejected this challenge.

While there is no hard and fast rule distinguishing between substantive and procedural rules, it is recognized that the legislature regulates substantive law. See In Re: Clarification of Florida Rules of Practice

and Procedure, 281 So.2d 204 (Fla. 1973). It is recognized in VanBibber v. Hartford Accident & Indemnity Ins. Co., 439 So.2d 880 (Fla. 1983), that where a statute pronounces public policy and is substantive in nature, operating in an area of legitimate legislative concern, then a holding of unconstitutionality is precluded.

The statutes, or sections, complained of by appellants clearly do not violate the separation of powers or attempt to exercise the judicial power. Sections 50 and 51 of the act deal with the prerequisites for seeking and recovering punitive damages. Within the past three months this Court has again acknowledged that punitive damages serve the purpose of punishment and deterence. American Cyanamid Co. v. Roy, 11 FLW 544, 545 (Fla. Oct. 23, 1986 - Case No. 67,124). Such damages are punishment for a civil wrong. Arab Termite and Pest Control v. Jenkins, 409 So.2d 1039 (Fla. 1982).

It is clear that punishment is a matter of substantive law. Indeed, it is virtually unquestioned that, as such damages are a substantive matter of public policy, the legislature is empowered to abolish them entirely. Under these circumstances the lower court was clearly correct in holding that Sections 50 and 51 were within the legislative province.

Section 53 of the act deals with remittitur and additur and is indistinguishable from the analogous remittitur-additur upheld in Adams v. Wright, 403 So.2d 391, 394 (Fla. 1981), as a "remedial statute designed to protect the substantive rights of litigants."

The lower court acknowledged that Section 54 of the act deals with practice and procedure, but correctly noted that the provision was not mandatory, but rather the provision is entirely optional with the courts (R 8-1406). Thus, the lower court properly held that the section constituted

no more than an expression of legislative desire or preference for settlement conferences and settlement of cases rather than extended litigation.

By like token, Section 56 of the act, in requiring itemized verdicts, clearly relates directly to, and facilitates, substantive law imposing limits on types of damages. As such, the section is clearly remedial and substantive in nature.

Section 57 provides an alternative, deferred method of payment for future economic damages exceeding $250,000. As such, it is legally indistinguishable from the periodic payment statutory mechanism upheld by this Court in Florida Patients Compensation Fund v. Von Stetina, 474 So.2d 783, 789 (Fla. 1985).

Finally, Section 58 of the act dealing with offers of judgment is essentially an attorney's fee statute. Countless attorneys' fees statutes exist under Florida law and are uniformly viewed as substantive law. In Florida Patients Compensation Fund v. Rowe, 472 So.2d 1145, 1148 (Fla. 1985), this Court expressly acknowledged that a comparable statute was "a matter of substantive law."

From the foregoing it is clear that appellants' contentions are without merit and provide no ground for any holding of invalidity. The lower court properly held that the above-discussed sections do not invade or exercise the judicial power. The judgment of the lower court rejecting appellants' challenge and holding the subject sections valid should be affirmed.

CROSS APPEAL POINT I

THE LOWER COURT ERRED BY HOLDING THAT THE SPECIAL CREDIT PROVISIONS OF CHAPTER 86-160, SECTIONS 66(1)-(3), VIOLATE THE IMPAIRMENT OF CONTRACT CLAUSE.

The trial court found that the application of the special credit provision of Sections 66 (1)-(3) to policies in effect prior to July 1,

1986, unconstitutionally impaired insurers' contractual rights, rejecting the Department's argument that requiring the benefits of the reforms to be passed to policyholders was not an unlawful impairment. Instead, the court found the appellants should be allowed to retain the gains resulting from the civil litigation reforms enacted by the legislature in Chapter 86-160. The Department urges this Court to reverse the trial court's ruling.

The civil reforms contained in Chapter 86-160 were effective on July 1, 1986. Policies which were in effect from October 1, 1986, through December 31, 1986, are subject to a special premium credit of 10% under Section 66(1). The special credit requires insurers to pass at least a portion of the litigation reform benefits to the policyholders. The special credit will not be applied to policies issued after December 31, 1986, because the rate which applies to these policies will have been reviewed and approved by the Department pursuant to Sections 66(5) and (6) of Chapter 86-160. These provisions (for 1987 rates) require that insurers specifically consider and include in the filing, inter alia, the expected impact on losses, expenses and rates of the litigation reforms implemented by the act.

However, policies issued before December 31, 1986, will be adjusted for litigation reform benefits unless the special credit is applied. Since the civil reforms are effective July 1, 1986, they will have a direct impact on all claims arising after that date. Since most policies pay for all losses which occur during the policy period, even if they are not reported until some later date, the civil reforms will lower the losses insurers must pay for all policies which were in effect after July 1, 1986, even if those policies were issued before July 1, 1986.

For example, assume a grocery store has a general liability policy which provides coverage for liability suits. Also, assume the policy was purchased on January 1, 1986, and expires on December 31, 1986. Finally, assume that on November 1, 1986, a customer slips on a wet floor, falls and hits his head on a shelf. The customer suffers injuries and some time during 1987 brings a suit against the grocery store. Even though the policy was issued before July 1, 1986, the civil reforms will still apply to the action brought by the customer and potentially limit the amount he can recover in damages. This, in turn, will lower the losses the insurer will pay out and result in an unbargained for gain. Without the special credit, the litigation reforms would result in an unbargained for windfall to the insurers. The special credit attempts to avoid this obvious inequity. The legislature estimated that the civil litigation reforms would result in savings of at least 10%. This legislative judgment was supported by expert testimony as being reasonable (TR V - 851; 867-874; VI - 1024-1032).

Having recognized that savings would only be realized on policies which were in effect for some period of time after July 1, 1986, the legislature limited the special credit to policies in effect at any time during the period of October 1, 1986, and December 31, 1986. A policy issued before the effective date of Chapter 86-160 would have to be in effect for at least three months after the effective date of the law to be affected by the special credit provision. It is important to understand that all policies affected by the special credit have a reduced exposure to losses as a result of the litigation reforms. If the savings anticipated from the litigation reforms are to be passed on to all policyholders, the special credit must apply to policies issued before July 1, 1986.

Since the rates charged for these policies did not contemplate the savings which will occur as a result of the litigation reforms, insurers cannot claim that they have a "vested right" protected by the impairment clause to the savings. Absent the legislature's actions, the savings would not have occurred.

If, in an individual case, it is not reasonable to assume that the savings will be 10%, insurers are given the opportunity, pursuant to Section 66(3) of the act, to avoid the special credit altogether. If the insurer can show that application of the special credit will result in an inadequate rate, it may receive an exemption or may issue a credit or refund less than 10%.

The special credit provisions should not be found to unlawfully impair contract rights for two reasons. First, as set forth above, the special credit does not "impair" the appellants' existing contract right. Instead, it merely attempts to pass on the benefits of the new tort and contract reforms of Chapter 86-160 to policyholders. Second, even if some minimal impairment exists, the case law in this state clearly provides that such impairment is not unconstitutional where there is an important State interest to be served.

In Pomponio v. Claridge of Pompano Condominium, Inc., 378 So.2d 774 (Fla. 1979), this Court specifically rejected the argument that no impairment of contract is tolerable in Florida. Instead, this Court, looking to federal case law, set forth a balancing test to determine how much impairment is tolerable. In evaluating the federal case law, the Court stated:

> We recognize that this Court, when construing a provision of the Florida Constitution, is not bound to accept as controlling the United States Supreme Court's interpretation of a parallel provision of the Federal Constitution. Yet such rulings have long been considered helpful and persuasive and are obviously entitled to great weight (footnote omitted). With this in mind,

we now choose to adopt an approach to contract clause analysis similar to that of the United States Supreme Court.

* * *

> To determine how much impairment is tolerable, we might weigh the degree to which a party's contract rights are statutorily impaired against both the source of authority under which the state purports to alter the contractual relationship and the evil which it seeks to remedy. Obviously, this becomes a balancing process to determine whether the nature and extent of the impairment is constitutionally tolerable in light of the importance of the state's objective, or whether it unreasonably intrudes into the parties' bargain to a degree greater than is necessary to achieve that objective. Id. at 779-780.

The impairment of contract issue was addressed again by this Court in a series of cases related to the automobile excess profits law. In 1977, the legislature enacted Chapter 77-468, Laws of Florida, which was described by the Court as a far-reaching act relating to insurance and tort reform. The act created various incentives that were designed to reduce escalating motor vehicle insurance rates and created an automobile insurance excess profits law.

This Court, in United States Fidelity and Guaranty Company v. Department of Insurance, 453 So.2d 1355 (Fla. 1984), went into great detail to describe how the excess profits law was initially found to be unconstitutional, its reenactment by the 1980 Legislature, and a subsequent challenge. The Department appealed the initial finding of unconstitutionality, but dismissed those appeals when the excess profits law was amended and reenacted as Chapter 80-236. The new legislation, effective in 1980, expressly directed that "excess profits" realized from contracts entered into between 1977 and 1980 should be refunded.

The 1980 excess profits law was immediately challenged by a number of insurers as being an unconstitutional retroactive application of a statute. The law was held to be unconstitutional on that basis by the

circuit court and the Department appealed. In Department of Insurance v. Teachers Insurance Company, 404 So.2d 735 (Fla. 1981), the Court reversed and found the statute to be constitutional, finding the Department had the authority to order refunds under the 1977 law. It held that there was no impairment issue unless the companies could show that "but for" the 1980 amendment the Department would not have ordered excess profits to be refunded. The Court concluded its opinion by stating:

> Clearly the legislature did not intend there be insurance company excess profits resulting from the tort and insurance law reform of 1976 and 1977. The intent was rather to have both policyholders and insurance companies benefit from the reform. We emphatically reject the assertion that windfall profits are protected by the impairment of contract clause. (Emphasis supplied.) Id., at 742.

Subsequent to the Court's ruling in Teachers, the plaintiffs amended their complaints to allege that "but for the 1980 amendment the Department would not have issued refund notices because the 1977 law had been declared unconstitutional." The plaintiffs argued that since the 1977 law was found to be unconstitutional, it could not have operated as authority for the Department to have ordered refunds. This time, however, the circuit court upheld the statute, rejecting the plaintiffs' impairment of contract, due process and equal protection arguments.

On appeal, this Court upheld the decision in United States Fidelity and Guaranty Company v. Department of Insurance, 453 So.2d 1355 (Fla. 1984). The Supreme Court, first noting that it was not receding from its prior decision that the 1977 law could have served as a valid source of authority for ordering refunds, specifically stated that the 1980 amendment authorizing the Department to order refunds of excess profits earned since 1977 was not an unconstitutional impairment of contracts. Unlike in Teachers, where the Court relied on the 1977 law to reject the plaintiffs' arguments,

this Court resolved directly the impairment issues by applying the balancing test enunciated in Pomponia, supra.

The Court specifically held that Florida had adopted the method of analysis of the United States Supreme Court in contract clause cases. At page 1360 the Court stated:

> In contract clause cases such as this, we have decided to adopt the method of analysis used by the United States Supreme Court. Pomponio v. Laridge of Pompano Condominium, Inc., 378 So.2d 774 (Fla. 1979). This method requires a balancing of a person's interest not to have his contracts impaired with the state's interest in exercising its legitimate police power.

The Court specifically noted the following language in El Paso v. Simmons, 375 U.S. 497, 515; 85 S.Ct. 577, 13 L.Ed.2d 446 (1965):

> Laws which restrict a party to those gains reasonably to be expected from the contract are not subject to attack under the Contract Clause, notwithstanding that they technically alter an obligation of contract.

Similarly, Chapter 86-160 is, at most, an attempt to restrict parties to gains "reasonably to be expected from (their contracts)" in accord with those expectations existing prior to the enactment of Chapter 86-160. The 10% credit is designed to make certain that the benefits of the tort and contract reforms are passed on to policyholders. There is, therefore, no real impairment. This Court in United States Fidelity and Guaranty Company used this analysis to reject the appellants' impairment arguments:

> Furthermore, what minimal impairment does exist is outweighed by the state's interest in eliminating unforeseen windfall profits. Section 627.066(13) specifically states that excess profits were realized in the years of 1977-79 due to statutory changes. These changes were made in response to escalating insurance costs in order to protect policyholders from paying exorbitantly high premiums. Changes were made to reduce the insurers' costs of doing business so that these savings could be passed on to policyholders in the form of lower premiums. United States Fidelity and Guaranty Company, supra, at 1361. (Emphasis supplied.)

Since the refunds are designed to correspond with the savings created by the statute and since insurers are not required to issue credits or

refunds if to do so would leave them with less than a reasonable profit, any impairment which might exist is truly minimal.

The decision of the trial court holding that the special credit provisions of Section 66 violate the impairment of contract clause should be reversed.

CONCLUSION

For the foregoing reasons, appellees urge that the decision of the lower court was correct in all respects, save and except that portion of the decision holding Sections 66(1)-(3) invalid as applied to insurance contracts entered into prior to July 1, 1986.

Appellees respectfully submit that this Court should:

A. Affirm the decision of the lower court in its rejection of appellants' various claims and contentions; and

B. Reverse the decision of the lower court in its erroneous holding that Sections 66(1)-(3) are invalid in their application to insurance contracts preexisting the effective date of Chapter 86-160, Laws of Florida.

Appellees thus urge that this Court should uphold Chapter 86-160, Laws of Florida, in its entirety as a valid, comprehensive legislative response to a complex public and economic problem.

DAVID A. YON

AND

DANIEL Y. SUMNER
Office of Legal Services
State of Florida, Department
of Insurance
413-B Larson Building
Tallahassee, Florida 32301
(904) 488-4540

THOMAS M. ERVIN, JR.

AND

ROBERT KING HIGH, JR.
of the law firm of
Ervin, Varn, Jacobs,
Odom & Kitchen
Post Office Drawer 1170
Tallahassee, FL 32302
(904) 224-9135

ATTORNEYS FOR APPELLEES/
CROSS-APPELLANTS