IN THE SUPREME COURT OF FLORIDA

ROBERT P. SMITH, JR., et al.

Appellants/
Cross-Appellees,

vs.

DEPARTMENT OF INSURANCE,
et al.,

Appellees/
Cross-Appellants.

CASE NO. 69,551

INITIAL BRIEF OF
APPELLANTS/CROSS-APPELLEES, THE CIGNA GROUP

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STATEMENT OF THE CASE AND FACTS

Appellants, INSURANCE COMPANY OF NORTH AMERICA; INDEMNITY INSURANCE COMPANY OF NORTH AMERICA; CIGNA INSURANCE COMPANY; PACIFIC EMPLOYER'S INSURANCE COMPANY; AETNA INSURANCE COMPANY; CENTURY INDEMNITY COMPANY; AETNA FIRE UNDERWRITERS; BANKERS STANDARD INSURANCE COMPANY; BANKERS STANDARD FIRE AND MARINE COMPANY; and INA EMPLOYER'S INSURANCE COMPANY ("CIGNA"), filed a Complaint in the Leon County Circuit Court seeking to have the Tort Reform and Insurance Act of 1986 (Chapter 86-160, Laws of Florida, App. A) declared unconstitutional on several grounds. CIGNA's lawsuit was consolidated with two pending suits brought by other groups of insurers attacking the same Act. Appellees, STATE OF FLORIDA, DEPARTMENT OF INSURANCE, and BILL GUNTER, as Insurance Commissioner of the State of Florida ("the DEPARTMENT"), sought to uphold the constitutionality of the challenged Act. Intervention was granted to interested groups, including the Academy of Florida Trial Lawyers (Robert Smith) aligned with Plaintiffs and the Florida Medical Association, Florida Power and Light Company, and the Florida Railroad Association aligned with the Defendants.

After the trial judge, Charles E. Miner, Jr., reserved ruling on cross-motions for summary judgment regarding whether the Act violated the single-subject requirement of Article III, Section 6, Florida Constitution, the case proceeded to trial on

September 4-6 and 18-19, 1986. On October 27, 1986, Judge Miner rendered the Final Judgment declaring that Section 66(1)-(3) of the Act was unconstitutional (App. B). This part of the Act would have required insurers to refund or rebate a special credit to commercial liability policyholders for a portion of premiums already paid. Because the special credit applied to contracts of insurance in existence prior to the Act's effective date, the trial judge found that this provision unconstitutionally impaired existing contracts. In his holding, the trial judge noted there was no support for the general perception that commercial liability insurance rates were too high (App. B, Judgment at 39). The remainder of the Act, however, was held to be constitutional. It is from this finding of constitutionality of the balance of the Act that CIGNA appeals.

Chapter 86-160 is a multi-faceted law which first effectuates far-reaching regulatory reforms of commercial property and casualty insurance. Provisions which were of special interest during trial included Section 10, which provides for refund of newly defined excess profits to a limited class of insureds, Section 13 which grants unlimited discretion to the Department to establish various property and casualty joint underwriting associations (JUA's), and Section 66, which, in addition to mandating special credits, also requires that commercial liability insurance rates be effectively rolled back

to 1984 rates. CIGNA challenged each of these Sections on a discrete constitutional basis, arguing that the cumulative effect of these unconstitutional parts required invalidation of the entire Act. Second, Chapter 86-160 includes sweeping reforms of all types of civil damages litigation, including both contract and tort reform. Because the Act included both insurance regulatory reform and broad changes to all types of civil actions, CIGNA challenged the entire Act for containing multiple subjects in violation of Article III, Section 6, Florida Constitution. The single-subject argument raised by CIGNA was not directly addressed by the trial court and is the most significant issue raised on appeal.

SUMMARY OF ARGUMENTS

Chapter 86-160 as a whole violates Article III, Section 6, Florida Constitution, because the Act contains multiple subjects. The Act goes much further than previous statutes upheld against single-subject challenges by the Supreme Court in State v. Lee, 356 So.2d 276 (Fla. 1978), and Chenoweth v. Kemp, 396 So.2d 1122 (Fla. 1981). These cases must mark the outer-limits of permissible subject matter inclusion if the single-subject requirement is to retain any vitality whatsoever. Chapter 86-160 not only includes insurance regulation and tort reform, as did the laws in Lee and Chenoweth, but also includes extensive reforms in the entire field of civil damages litigation, including all contract cases. These expansive litigation reforms in areas such as contract claims are primarily unrelated to the subject and purpose of the Act, assuring available and affordable liability insurance.

This sweeping reform of all civil damages litigation results from Section 50 of the Act, which applies most tort reforms to all actions for damages, whether in contract or tort. By including all types of contract actions, such as sale of goods under the U.C.C., promissory notes, real estate, and franchises, the Act has included an array of subjects which do not implicate liability insurance. The classic contract claim involves a party's business decision not to perform under a

contract, a decision which is not an insurable matter. Since all contract claims are included in the Act and yet are primarily unrelated to liability insurance, the Act contains multiple subjects and must fall in its entirety.

Section 13 of the Act, which grants unlimited discretion to the Department to establish any type of joint underwriting association, is an unlawful delegation of legislative authority. This violation arises due to the lack of standards or guidelines imposed on the Department's exercise of its authority, which depends on the vague standard of "prudent business practices." Such a standard imposes no meaningful control over delegated authority and thus violates the principles of separation of powers.

Section 10 of the Act, which provides for a risk management incentive fund composed of newly defined excess profits, denies equal protection because the fund is distributed in an unfair and arbitrary fashion. This fund suffers the same defect as the Good Driver's Incentive Fund in State v. Lee, which was stricken as unconstitutional. Under this Act, only lucky insureds who both risk manage and who actually have low claims losses can receive distribution from the fund. This dual requirement is irrational since luck is the determining criterion for reward.

Section 66(5)-(6), which provides for mandatory insurance rate rollback to 1984 adjusted rates, violates due process guarantees because no notice or hearing is provided before those 1984 rates are arbitrarily imposed on insurers. Regardless of an insurer's profits, the Act imposes a blanket disallowance of existing rates, previously accepted by the Department under prior law. Moreover, because the trial court found no basis for asserting that existing rates were excessive, the rollback to 1984 adjusted rates is unwarranted and arbitrary, unconstitutionally denying insurers the opportunity to earn a fair return. These discrete constitutional defects, when cumulated, again result in the unconstitutionality of the entire Act.

I

CHAPTER 86-160 VIOLATES THE SINGLE-SUBJECT REQUIREMENT OF THE FLORIDA CONSTITUTION.

Chapter 86-160 contains multiple subjects and thus violates Article III, Section 6, Florida Constitution, which mandates, in pertinent part:

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

Chapter 86-160 not only affects insurance and tort laws, but also works extensive changes in all other types of civil damages cases, such as contract litigation. These widespread changes result in the inclusion of unrelated subject matters, which significantly exceed the limits of prior case law interpreting Article III, Section 6. The choice this Court faces is whether to condone the final erosion of the single-subject requirement or to firmly establish prior cases as the outer-limits of constitutional tolerance.

An analysis of the constitutionality of a law under this provision must begin with the purpose and origin of the single-subject requirement. Only through an appreciation of the evil sought to be avoided can an accurate assessment of a statute's validity under this provision be made. The most comprehensive exposition of the provision's purpose is set forth in _Colonial Investment Co. v. Nolan_, 100 Fla. 1349, 131 So. 178 (Fla. 1930):

> The object of this constitutional provision, which in substance has been placed in practically all of the constitutions of the several states, was to prevent hodgepodge, logrolling, and omnibus legislation. It had become quite common for legislative bodies to embrace in the same bill incongruous matters having no relation to each other, or to the subject specified in the title, by which means measures were often adopted without attracting attention. And frequently such distinct subjects, affecting diverse interests, were combined in order to unite the members who favored either in support of all. And the failure to indicate in the title the object of a bill often resulted in members voting ignorantly for measures which they would not knowingly have approved. And not only were members thus misled, but the public also; and legislative provisions were sometimes pushed through which would have been made odious by popular discussion and remonstrance if their pendency had been seasonably demonstrated by the title of the bill. Thus it was long since decided that these evils should be corrected by constitutional provisions preventing such aggregations of incongruous measures by confining each act to one subject and matter properly connected therewith, which subject should be briefly expressed in the title.

Colonial, 131 So. at 179. The primary evil addressed by the single-subject requirement is "logrolling", and hence the correct focus of inquiry is the unity of subject matter enacted by a law rather than the law's subsequent effects.

Logrolling undermines the democratic process in two ways. First, when various unrelated measures are lumped together, the effect is to secure passage of provisions which, if

considered individually, would never garner majority support. In this way a legislator is forced to vote for measures which he does not favor in order to pass one he does support. Indeed, each subject in a multifarious bill may lack majority support individually, but, when aggregated, the multiple subjects create a passable bill. Second, the representative process is subverted by hodgepodge legislation since it creates a realistic danger that lawmakers will inadvertently enact laws through ignorance of the laws' content.

The trial judge found that Chapter 86-160 did not violate the single-subject requirement because State v. Lee, 356 So.2d 276 (Fla. 1978), and Chenoweth v. Kemp, 396 So.2d 1122 (Fla. 1981), approved the combination of the Act's subject matters. See App. B, Judgment at 3-12. This finding is in error because the trial court simply ignored the critical differences between the subject matters included in Chapter 86-160 and those included in laws upheld by Lee and Chenoweth.[1] Significantly, both Lee and Chenoweth approved laws concerning liability

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[1]The trial court also confused the single-subject requirement with the adequacy of title requirement of Article III, Section 6: ". . . and the subject shall be briefly expressed in the title." These are separate requirements. CIGNA does not challenge, on appeal, the adequacy of title, but submits that both the title and the body contain two subjects. Mere provision of an adequate title does not mean that the single-subject requirement is also satisfied. In this case, it merely means that two subjects are adequately titled.

insurance and related tort litigation reforms. Neither case approved a law which contained liability insurance reform and civil litigation reform which encompassed all civil litigation for damages. The trial court failed to recognize that civil litigation is a much broader field than just tort litigation. See App. B, Judgment at 8. The Act's pervasive reforms even affect cases such as commercial contract litigation which are primarily unrelated to liability insurance. Therefore, the broad field of civil damages litigation is not a matter properly connected with liability insurance since so many areas of civil litigation do not concern insurance.

Chapter 86-160 goes much further in its inclusion of subject matters, because it does not merely deal with insurance and tort reform as did the laws under review in Lee and Chenoweth. Surprisingly, the Act applies many of its misnomered "tort reforms" to any type of contract claim, including sale of goods, insurance policies, real estate, promissory notes, business buy-sell, and franchises. This unexpected inclusion of subject matters unrelated to liability insurance concerns is caused by the Section 50 universal application effect, which enlarges applicability of the "tort reforms" (Part III) to cover all damages actions:

> 768.71 Applicability; conflicts. -
>
> (a) Except as otherwise specifically provided, this part applies to any action

for damages, whether in tort or in contract. (emphasis supplied).

This deceptively simple provision has the startling consequence of blanket application of the "tort reform" provisions to every type of damages action, including personal or commercial contracts actions. This universality effect is undisputed.

An examination of the laws dealt with in Lee and Chenoweth demonstrates that this broad sweep of the new Act has exceeded even the outer-limits established in those cases. In Lee, the law under review, Chapter 77-468, dealt with automobile insurance reform and several tort reforms relating to automobile liability insurance, such as abolishing the collateral source rule and increasing the remittitur/additur powers of the trial court in automobile negligence cases. Rating standards for automobile insurance were created along with a "Good Driver's Incentive Fund" which was designed to encourage safe driving. Importantly, the limited area of tort litigation affected by the law "relate[d] primarily to tort litigation arising from automobile negligence." Id. at 282. Because automobile negligence suits had a discernible effect on the automobile insurance industry, the act was upheld in Lee against a single-subject attack. Id. at 282. It should be noted, however, that the act under review in Lee dealt with automobile tort reform, risk avoidance, and automobile liability insurance, all of which had recognized interrelated effects.

Similarly, in Chenoweth, the act under review, Chapter 76-260, focused its changes on insurance and tort reform in the medical malpractice arena. The act in Chenoweth implemented tort reforms similar to those in Lee for medical malpractice cases, such as abolishing the collateral source rule, expanding the trial court's remittitur/additur powers, and structuring future damage awards in malpractice cases. The act also established insurance related devices of medical incident committees for hospitals, and revised the Florida Medical Malpractice Joint Underwriting Association and Patient's Compensation Fund. Finally, the act reorganized the insurance code provision relating to unfair insurance practices. Again, since all provisions related to insurance or the properly connected subject of medical malpractice litigation reform, and because these had apparent interconnected effects, the Act was upheld. Chenoweth, 396 So.2d at 1124.

In contrast, review of the "tort reforms" implemented by Chapter 86-160 reveals many significant changes to areas other than tort litigation, such as all contract actions. Not only does the Act fail to limit its litigation reforms to a narrow area of torts, such as automobile negligence or malpractice, but, critically, the Act also fails to limit its reforms to tort litigation itself. Under Section 53, a trial court is given expanded powers to award remittitur or additur, and all damage awards must

be subject to "close scrutiny" of the court. The trial judge is given broader power to determine the appropriateness of the amount of contract damages awarded, changing the prior general rule under Wackenhut Corp. v. Canty, 359 So.2d 430 (Fla. 1978), which had severely restricted the use of remittitur. Also, the power of additur is newly created for all contract actions for damages.

Further, Section 57 provides that all future economic losses exceeding $250,000 must be paid by periodic payments upon a defendant's request, unless the court determines that "manifest injustice" would result. If an automobile dealer successfully sued a manufacturer for breach of franchise, and recovered damages for future lost profits accruing over a five-year period, then these damages would be subject to periodic payments over a five-year period. This limitation on recovery of damages would also directly affect all contracts for the sale of goods under Article II of the Uniform Commercial Code (U.C.C.) whenever an injured party sought damages for future lost profits.

Additionally, Section 58 requires awards of attorney's fees to either party who prevailed by a factor of 25% above his settlement offer, in any type of damages action. This rule, which obviously conflicts with the existing Offer of Judgment Rule, Florida Rule of Civil Procedure 1.442, effectively abrogates the "American Rule" which requires each side to bear

its own attorney's fees in litigation. Every contract action for damages, including actions under the U.C.C., now has an attorney's fee clause written into the case regardless of what the contract itself provided. This is a significant and unexpected change to our legal system, concealed under the rubric of "tort reform."

These effects on contracts and breach of contract actions cannot be primarily related to the "commercial liability insurance crisis." Obviously, liability insurance is simply not implicated in most breach of contract cases, which typically involve the intentional, business choice of one party not to perform contractual obligations, which are uninsured events. These changes apply directly to rights and remedies for all contracts as well as contracts under Article II of the Uniform Commercial Code (U.C.C.).

Surely there must exist some subjects which cannot be joined together in a single law. "For example, it is clear that a subject such as abortion should not be combined with revision of the Uniform Commercial Code." _Lee_, 356 So.2d at 287 (Sundberg, J., concurring in part, dissenting in part). Tort reform, liability insurance, and doctors' financial responsibility certainly are not connected with the U.C.C., any more than abortion laws are related to the U.C.C.

This lack of connection to liability insurance is critical since the purpose of the Act, stated in Section 2, is to "cure the current crisis and to prevent the recurrence of such a crisis" in liability insurance. There can exist no liability insurance crisis in areas such as commercial contracts or franchise agreements, because one cannot purchase insurance against the eventuality that he will make a business decision to breach such a contract. Because this vital connection is so utterly lacking, the Act violates the single-subject requirement of the Florida Constitution.

Considering the purposes of the single-subject requirement, it is difficult to conceive of an Act which could more clearly illustrate the evils of "hodgepodge, logrolling, and omnibus legislation." It cannot seriously be contended that the individual members of the Legislature, in enacting the Tort Reform and Insurance Act of 1986, intended or realized the full consequences of their action. Indeed, the Act's statement of legislative intent in Section 2 belies any recognition of changes except to the tort system and insurance:

> 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.

Chapter 86-160 has achieved exactly what this Court stated was prohibited by the single-subject requirement, which "is to prevent a single enactment from becoming a 'cloak' for dissimilar legislation having no necessary or appropriate connection with the subject matter." Lee, 356 So.2d at 282. What legislator realized in passing this Act that rights under all types of commercial and personal contracts were being seriously altered?

If any meaning is to remain vested in the single-subject requirement, Lee and Chenoweth must mark the "outer limits of constitutional tolerance". Carter v. Sparkman, 335 So.2d 802, 806 (Fla. 1976). The straightforward question facing this Court is whether the Legislature can go beyond the outermost limits of Lee and Chenoweth and combine various types of subject matters into one law that the Legislature deems politically expedient, regardless of any logical relationship of the subjects. Even under the liberal tests of Lee and Chenoweth, Chapter 86-160 cannot stand.[2] The intended subject and stated purpose of the Act are to cure the "liability insurance crisis". Reformation of

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[2]Each part of the Act affects one or more of the challenging parties to this litigation. Hence, the entire Act has been challenged by Plaintiffs. Under these circumstances, a violation of the single-subject requirement mandates that the entire law be declared unconstitutional. See Colonial Inv. Co. v. Nolan, 100 Fla. 1349, 131 So. 178, 180-183 (1930).

all contract actions is not primarily related to this subject, or to the insurance regulation reforms of the Act. Chapter 86-160 is an aggregation of incongruous measures which violates Article III, Section 6 of the Florida Constitution. Accordingly, the Legislature should be required to properly enact these as separate laws next session, and the single-subject requirement should not be totally sacrificed.

II

SECTION 13 OF CHAPTER 86-160 UNLAWFULLY DELEGATES LEGISLATIVE POWERS TO CREATE ANY TYPE OF JOINT UNDERWRITING ASSOCIATION.

As construed by the Department of Insurance, Section 13 of the Act delegates to the Department the power to create, at its election, an omnibus joint underwriting association [JUA] for all property and casualty insurance.[3] Joint underwriting associations are a state-imposed involuntary insurance market, which require insurers writing insurance in the state to participate in writing risks which would not be written on a voluntary basis. Currently, the Legislature has determined that certain designated types of insurance should be made available under a JUA program. These coverages include narrow areas such as workers' compensation, automobile liability, windstorm, political subdivision, and medical malpractice. Many of these coverages are effectively required by law, such as medical malpractice, workers' compensation or automobile liability. As to windstorm insurance, the Legislature made a specific finding of

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[3]The Department's recent implementation of the generic Florida Property and Casualty Joint Underwriting Association containing all lines of property and casualty insurance demonstrates the unbridled scope of delegated power. (Order attached as App. C; see R: 1364-72). This action was originally stayed by the trial court's extended injunction (R: 1381-84).

unavailability and a resulting detriment to economic growth. See § 627.351(2)(b)1., Fla. Stat. (1985).

Under Section 13 of the Act, the Legislature has delegated to an executive agency the task of designating which types of insurance are subject to a JUA. Thus, the Department can create, in its discretion, a JUA for every type of insurance provided to some degree in Florida, subject to a single standard: unavailability at "adequate levels", meaning unavailability of coverage "which is required by state law or by responsible or prudent business practices". Ch. 86-180, § 13, Laws of Fla. (emphasis supplied). This standard of "prudent business practices" is a vague and meaningless guideline for the exercise of delegated power and is, therefore, an unlawful delegation of legislative authority.

Although many states have not vigilantly enforced the separation of state constitutional powers, this Court has taken a strong stand based on Florida's unique constitutional provision. In Askew v. Cross Keys Waterways, 372 So.2d 913 (Fla. 1978), the Supreme Court revitalized the doctrine of nondelegation of legislative powers. In that case, the Legislature had delegated to an agency the designation of areas of critical state concern, defined in vague terms as areas of regional importance. This delegation was found to be unlawful, violating Article II, Section 3, Florida Constitution:

> Branches of government. - The powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein.

The Court pointed out that this provision, unlike its federal counterpart, contained an express limitation upon the exercise by a member of one branch of any power appertaining to another branch. The law under review delegated the basic legislative task of determining which geographic areas needed the greatest state protection. This violated the state constitution:

> When legislation is so lacking in guidelines that neither the agency nor the courts can determine whether the agency is carrying out the intent of the legislature in its conduct, then, in fact, the agency becomes the lawgiver rather than the administrator of the law.
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> * * *
>
> Regardless of the criticism of the courts' application of the doctrine, we nevertheless conclude that it represents a recognition of the express limitation contained in the second sentence of Article II, Section 3 of our Constitution. Under the fundamental document adopted and several times ratified by the citizens of this State, the legislature is not free to redelegate to an administrative body so much of its lawmaking power as it may deem expedient.

Cross Keys Waterways, 372 So.2d at 918-19, 924.

In Florida Home Builders Association v. Division of Labor, 367 So.2d 219 (Fla. 1979), this Court again held a statute

violative of Article II, Section 3 as an unlawful delegation. The agency was given authority to approve architects' apprenticeship programs "upon a determination of need." This discretionary authority was held unconstitutional since the guidelines and policies for determining "need" were unspecified. Because the agency could choose from many different possibilities, the delegation was unlawful. Also cited by the Court was a similar case, Dickinson v. State ex rel. Bryant, 227 So.2d 36 (Fla. 1969), in which a law required one wishing to open a cemetery to demonstrate "need for a cemetery" and "need for further facilities." This was held unconstitutional because the law allowed an agency to exercise its discretion at whim and without accountability. This Court similarly stated in Delta Truck Brokers, Inc. v. King, 142 So.2d 273 (Fla. 1962):

> [I]t is obvious that the legislative delegation of power to the respondent Commission is totally devoid of any standards whatsoever. It leaves to the Commission the authority to exercise an unlimited discretion in forming its opinion as to when and how "the public interest may be best served." The Legislature has not in any degree laid down a rule which defines, even generally, what constitutes "the public interest." An applicant for a transfer has no legislative guide as to the showing which he is required to make to meet this requirement. The respondent Commission, on the other hand, is granted the power to decide, in its own discretion, just what constitutes "the public interest." Such a delegation of power is violative of the organic law and must fall.

Id. at 275-76; see also Sarasota County v. Barg, 302 So.2d 737 (Fla. 1974) (statute regulating use of property based on undue or unreasonably harmful activity too vague to be lawful delegation); Conners v. Joe Hatton, Inc., 216 So.2d 209 (Fla. 1968) (statute allowing agency to control unfair trade practices constitutes standardless and unlawful delegation).

In the same fashion, Section 13 sets a standard for exercise of the Department's power which is inherently too vague and ambiguous to provide any reasonable benchmark. The Legislature has not even attempted to define what constitutes "responsible or prudent business practices." Nord Bjorke, Vice-President of the CIGNA Group, the largest commercial property and casualty insurer in Florida, testified that in the insurance field the term "prudent business practices" simply has no significant meaning which has been developed by custom or usage (TR: III, 406). Furthermore, he stated that the determination of adequate coverage is an enterprise-specific determination depending on wealth, assets, finances, and type of products (TR: III, 407). This testimony was unrebutted. Thus, one person's assessment of adequate coverage could vary drastically from another's, and both may still be prudent businessmen. In

short, the standard by which the Department's discretion is controlled is not a standard at all, but merely a vague ethos.[4]

This overbroad standard of "prudent business practices" also makes impractical the establishment of actuarially sound rates, as required by Section 627.351(5)(b) of the new law. Unlike existing JUA's which focus on a narrow risk such as windstorm or medical malpractice, the property and casualty JUA's include a vast spectrum of risks as well as types and amounts of coverage, subject only to what "prudent business practices" in a given circumstance may theoretically require. This lack of guidelines results in the unpredictable exposure of insurers to JUA assessments caused by inadequate rates.

In a comparable case, it was the vagueness of standards which caused this Court to strike a statute which prohibited

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[4]Even the Senate Staff Analysis and Economic Impact Statement for CS/CS/SB 465 at 10 (June 9, 1986)(CIGNA Exhibit 6), recognized that this broad and standardless delegation might be an unconstitutional delegation:

> The bill authorizes, but does not require, the department of adopt a joint underwriting plan for all types of property and casualty insurance risks, except for the types of insurance for which a joint underwriting plan is currently authorized. The bill's provision that the department "may" adopt the joint underwriting plan may be an unconstitutional delegation of legislative authority, in that no standards are provided.

public officials from accepting gifts that would cause a "reasonably prudent person" to be influenced. D'Alemberte v. Anderson, 349 So.2d 164 (Fla. 1977). Citing Joe Hatton, the Court found no set customary or useful legal interpretation of "reasonably prudent person" to save the statute from constitutional attack. D'Alemberte, 349 So.2d at 168-69. In the same vein, the term "prudent business practices" carries no set meaning in law or common usage. Therefore, this standard provides the Department with no meaningful guidelines or restrictions in the exercise of its discretion to create JUA's for individual lines of insurance. Accordingly, Section 13 violates the Florida Constitution and must fall as an unlawful delegation of legislative power.

III

THE RISK MANAGEMENT INCENTIVE FUND OF SECTION 10, CHAPTER 86-160 DENIES EQUAL PROTECTION OF THE LAWS.

Section 10 of Chapter 86-160 creates Section 627.0625, Florida Statutes, entitled "Supplemental funding for risk management plans through excessive profits." The statute provides that any commercial property or casualty insurer or insurer group which realizes excessive profits[5] must place the profits in an interest-bearing fund called the "risk management incentive fund." This money will ultimately be distributed among eligible policyholders who meet certain criteria of the statute.

Insurers are charged with the responsibility of developing guidelines for risk management plans and making these available to their policyholders. The plans developed by the insurers must include safety measures applicable to the insured, training to insureds in safety management techniques, and safety management counseling services. Those policyholders who comply with the guidelines are potentially eligible for distributions

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[5]The definition of excessive profit is found in subsection (5)(a), "[e]xcessive profit has been realized if underwriting gain is greater than the anticipated underwriting profit plus 4 percent of earned premiums for the 4 most recent calendar years."

from the risk management incentive fund (the "fund"). Section 627.0625 (3), Florida Statutes (1986), adopted in Chapter 86-160, Section 10(3), Laws of Florida.

While subsection 3 governs potential eligibility, subsection 11 governs the actual distributions of the excessive profits collected in the fund. This provision sets forth the conditions which control the distributions, and in relevant part provides:

> (11)(a) All money placed in the fund and interest thereon shall be distributed to those policyholders of the insurer or insurer group who:
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> 1. Have a policy in force on December 31 of the final compilation year;
>
> 2. Have had a policy in force for a [sic] least 1 year; and,
>
> 3. Have complied with the guidelines for the applicable risk management plan <u>which shall include maintenance by the insured of loss experience, measured as a loss ratio, which does not exceed, on average ... the appropriate permissible loss ratio utilized in the rate filings in effect during the reporting period</u>, provided that maintenance of such loss experience requirements shall be applied equally to all insured risks. (emphasis supplied)

Ch. 86-180, § 10, Laws of Fla.

Section 10 of Chapter 86-160 has two purposes. The first is to provide a disincentive to insurers to charge high premiums which result in excessive profits. This is accomplished

by requiring the insurers to return such excessive profits to a limited group of policyholders. The second goal of the provision is to provide an incentive to insureds to implement and maintain various risk management measures by offering a "reward" to those who comply with the guidelines developed by the insurers. This second purpose of necessity creates two categories of commercial property and casualty policyholders: those who comply with the risk management guidelines and are potentially eligible to receive distributions from the fund ("good insureds"), and those who fail to comply and are thus excluded from participation in the fund ("bad insureds").

Whenever a statute creates groups which are treated differently, it is subject to an equal protection analysis in order to assess the constitutional validity of the classifications. The equal protection test applied to statutory categories is two-pronged: (1) the classification must serve a legitimate governmental objective, and (2) the division into groups must be a reasonable means of achieving that goal. Zablocki v. Redhail, 434 U.S. 374 (1978). In other words, "in order for a statutory classification not to deny equal protection, it must rest on some difference that bears a just and reasonable relation to the statute in respect to which the classification is proposed." Gammon v. Cobb, 335 So.2d 261, 264 (Fla. 1976).

The governmental objective behind the creation and distribution of the fund is to encourage and reward insureds who attempt to curtail hazards and their attendant losses through implementation of various risk management measures. The question remains whether the classification chosen "rests upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." State v. Lee, 356 So.2d 276, 279 (Fla. 1978) (citation omitted).

It is in this respect that Section 10, Chapter 86-160 is fatally flawed. Subsection 11 allows a distribution from the risk management incentive fund only to those policyholders who both employ recognized risk management techniques and who maintain an acceptable loss experience as defined. This latter requirement means that not only must a policyholder institute safety measures, but the measures must be effective when measured by the statutory definition of effectiveness.

The result is a further classification of good insureds into two groups: good insureds (who implement risk management programs) and better insureds whose programs actually achieve an acceptable level of effectiveness, and who are thus eligible for a distribution from the fund. This is an irrational division which catapults insureds who may have risk managed perfectly (increasing safety and probably reducing their losses thereby),

but had unfortunate accidents in spite of these measures, into the ranks of the bad insureds who never even attempted to avoid claims.[6] The effect of the distribution scheme is to reward the lucky risk managers and to penalize the unlucky ones. A more arbitrary, less rational plan can scarcely be imagined. Surely, a system whose linchpin is luck cannot reasonably be expected to provide an incentive to policyholders to implement the burdensome, often costly, risk management measures prescribed by the statute.

It is clear, then, that this statutory classification is fatally underinclusive, and so bears no reasonable relationship to the purpose of the statute. As a result, similarly situated policyholders are treated differently, and the statute denies equal protection of the laws.

In State v. Lee, 356 So.2d at 276, this Court held unconstitutional on equal protection grounds a statute similar to the one at issue here. That statute provided for increased civil penalties for drivers convicted of certain moving traffic violations enumerated in Chapter 316, Florida Statutes ("bad drivers"). The additional money was to be placed into a fund and paid out to drivers who had no convictions and who demonstrated a

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[6]"Accident" is defined by Webster's as "an event or condition occurring by chance or arising from unknown or remote causes." Webster's Third New International Dictionary at 11 (1976) (emphasis supplied).

particular degree of financial responsibility via liability insurance or other acceptable means ("good drivers"). The purpose was to provide a disincentive to drivers inclined to abuse their driving privileges, while rewarding the safe drivers.

The Court, applying an equal protection analysis, held that this method of identifying good and bad drivers was not reasonably related to the purpose of the law. The "good driver" category excluded from the fund both those drivers who had a single conviction for a minor violation, and those who were convicted under sections of Chapter 316 which were "in no way related to the driver's efforts to drive his automobile safely." 356 So.2d at 281. Since the statutory scheme penalized otherwise safe drivers, this Court struck it down.

Just as the law in Lee was ill-suited to achieve its intended purpose of encouraging safe drivers, so Section 10, Chapter 86-160 fails to accomplish its objective of promoting the institution of risk management programs. Section 10's classification for distribution is similarly "in no way related to" an insured's efforts to conduct his business safely. It serves merely to reward lucky policyholders twice, with lower premiums because of their good loss experience rating, and with a credit or cash rebate from the incentive fund. The unlucky risk managers will face not only higher insurance rates, but the outright forfeiture of a pro rata share of excessive premiums

previously assessed, despite their rigorous compliance with a risk management program. This classification is based on merely fortuitous distinctions and does not relate rationally to the legislative goal. In the face of an equal protection challenge, such a "Robin Hood" approach fails to pass constitutional muster just as it did in Lee.

IV

PARAGRAPHS 5 AND 6 OF SECTION 66 OF CHAPTER 86-160 DENY DUE PROCESS OF LAW.[7]

1. Mechanics of Paragraphs 5 and 6.

Paragraph 5 of Section 66, Chapter 86-160 provides that all commercial liability and property insurers shall review their manual rates for liability insurance which were in effect on January 1, 1984, shall adjust the 1984 rates to reflect only changes in coverage and investment income, and shall file the adjusted rates with the Department by October 1, 1986. By January 1, 1987, each insurer must implement rates not to exceed the adjusted 1984 rates submitted to and approved by the Department. Adjustments to this base level are not permitted to take into account loss experience occurring since January 1, 1984. In sum, this subsection requires commercial liability and property insurers automatically to bring their rates to the level they were on January 1, 1984.

Paragraph 6 permits an insurer who believes that the adjusted 1984 rate is "inadequate" to file what it considers an appropriate rate (the "excepted rate") together with its 1984 rate on October 1, 1986. The excepted rate must be accompanied

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[7]Although these arguments were made to the trial court in substantially the same form as here presented, the Final Judgment completely failed to address them.

by supporting data and will be reviewed by the Department pursuant to the rate standards in Section 627.062, Florida Statutes, adopted in the Act. The burden of justifying the excepted rate is upon the insurer who must at least show that the 1984 rate produces a clearly inadequate rate under Section 627.062.

If the Department does not issue a notice of intent to disapprove the excepted rate by March 1, 1987, it shall be deemed approved. Furthermore, if an insurer files an excepted rate on October 1, 1986, and the Department has not issued a preliminary order regarding it by January 1, 1987, the insurer may implement the excepted rate subject to the refund provisions of Section 627.062(2)(h), Florida Statutes, adopted in the Act, upon subsequent disapproval.[8] However, by implication, if the Department does issue a preliminary order for an excepted rate by January 1, 1987, the insurer is precluded from using the rate and must instead implement the adjusted 1984 rate, pursuant to Paragraph 5.

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[8]Rate filings under Section 66(5)-(6) have been held in abeyance by a temporary injunction issued by the trial court and extended by order of this Court (R: 1521).

2. Paragraphs 5 and 6 Violate Procedural Due Process.

Procedural due process does not in itself constitute an independent right; rather, it constitutes a condition precedent to the deprivation of life, liberty, or property. Haitian Refugee Center v. Smith, 676 F.2d 1023 (5th Cir. 1982). Procedural due process is guaranteed by both the Florida and Federal Constitutions. Fla. Const. Art. I, § 9; U.S. Const. Amend. XIV, § 1. There are essentially three elements which must be present before the right to procedural due process arises. First, an individual or entity must have a recognized liberty or property interest at stake. Smith v. Organization of Foster Families, 431 U.S. 816 (1977). Second, a deprivation of the liberty or property interest must be imminent. However, even a temporary deprivation of the interest will receive procedural due process protection. North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975); Fuentes v. Shevin, 407 U.S. 67 (1972). The third element is that the deprivation be caused by some form of state action and that a governmental or public reason be asserted in justification of the deprivation.

Once a deprivation is found to be subject to procedural due process protection, the question arises: what process is due? Although the right to due process is absolute, the details of the due process required vary from situation to situation. Mathews v. Eldridge, 424 U.S. 319 (1976). However, the basic

safeguards are notice and a hearing before an impartial decision-maker which provides an opportunity for the aggrieved party to be heard at a meaningful time and in a meaningful manner. Armstrong v. Manzo, 380 U.S. 545 (1965). If the hearing is to be meaningful, the opportunity to be heard must be afforded either before the deprivation takes place, or in limited cases promptly afterward. Mackey v. Montrym, 443 U.S. 1 (1979); Fuentes, 407 U.S. at 67; Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950).

All the elements which trigger procedural due process protection are present in the instant case. The state, through passage of Chapter 86-160, Section 66(5)-(6), is attempting to deprive all commercial property and liability insurers of important property and liberty rights. The right to charge rates which will afford the opportunity to earn a fair and reasonable rate of return and meet operating expenses is such a property interest. Gulf Power Co. v. Bevis, 289 So.2d 401 (Fla. 1974); Keystone Water Co. v. Bevis, 278 So.2d 606 (Fla. 1973); Village of Virginia Gardens v. Haven Water Co., 91 So.2d 181 (Fla. 1956). So too, the right to make contracts of any kind for goods or services has been held to be an important element of civil liberty. State ex rel. Fulton v. Ives, 123 Fla. 401, 167 So. 394 (1936). Balanced against this deprivation is the State's effort to provide affordable insurance, which cannot in itself justify the lack of procedural protections found here.

When a procedural due process analysis is applied to the Act, it is fatally deficient. On October 1, 1986, every commercial property and liability insurer in Florida will be stripped of its current rates and be forced to file new rates conforming to adjusted 1984 rates. That is, insurers will be deprived of rates which the trial court found were at least tacitly approved by the Department under prior existing rating laws (App. B, Judgment at 38-39).[9] In effect, the current rates have been retroactively disallowed. This deprivation is not based upon any previous finding of excessiveness or discrimination of individual rates; rather, its sole justification is "a generalized perception that commercial liability insurance rates were too high" (App. A, Judgment at 39). However, even this "perception" was specifically rejected by the trial court, which stated:

> There has been no finding, in fact, that such is the case or that any particular insurance company was charging excessive rates.

Id. Furthermore, there is no opportunity for each insurer to present relevant data supporting the current rates to an appropriate reviewing body such as the Department prior to the

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[9]This factual finding is amply supported by the trial record. See, e.g., TR III, 366-70; TR IV, 631-32, 670-75; TR IV, 713-14, 717.

deprivation. There is simply an across-the-board disallowance, regardless of the individual insurer's profits.

The Act does not stop here. Without regard for the established insurance rate-making process, the Legislature has imposed a new rate, the 1984 adjusted rate, which is by definition presumptively adequate and fair, although there has been no opportunity for the affected parties to test the validity of this assumption prior to its implementation. When assessing similar legislative rate-making in Williams v. Hartford Accident & Indemnity Co., 245 So.2d 64 (Fla. 1970), this Court upheld a statute temporarily freezing automobile insurance rates, but noted,

> [i]f the freezing of rates was for a more extended period of time, there would be serious questions of a constitutional nature in the legislation. The Legislature does not have the constitutional authority to permanently establish rates for automobile insurance without providing an opportunity to be heard by interested parties and provisions for judicial review. (emphasis supplied)

Id. at 68 (Drew and Adkins, JJ. concurring specially).

Nor do the provisions for filing an excepted rate cure the procedural due process defects of Section 66(5)-(6). Only extraordinary circumstances will justify postponing the opportunity for hearing until after the deprivation has occurred. Smith v. Organization of Foster Families, 431 U.S. at 816; Boddie v. Connecticut, 401 U.S. 371 (1971). Post-deprivation hearings have

been found adequate only when necessary to protect the public against such clear and present evils as bank failures, misbranded drugs and contaminated food, situations where time was of the essence. See Fuentes, 407 U.S. at 67.

Such exigent circumstances are not present in the instant case. Indeed, the trial court found that there was no factual basis for an assertion that existing rates were generally excessive. It is clear that the blanket disallowance of current approved rates and the summary imposition of the presumptively adequate 1984 adjusted rates by the Legislature rather than a pre-deprivation, case-by-case, determination by the Department merely serves the ends of convenience and efficiency. Such considerations will not suffice to support a pre-hearing deprivation:

> The establishment of prompt efficacious procedures to achieve legitimate state ends is a proper state interest worthy of cognizance in constitutional adjudication. But the Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones.

Stanley v. Illinois, 405 U.S. 645, 656 (1972).

Even in the limited cases where a post-deprivation hearing is warranted, it must be available immediately after the taking in order to meet the due process requirements which afford a hearing at a meaningful time and in a meaningful manner. The administrative process provided by Paragraph 6 fails to provide any outside time limit within which the Department must proceed to final hearing. During this time, insurers with excepted rates for which a preliminary order has been timely issued by the Department cannot use their excepted rates. The Department will have no "incentive" to proceed to a prompt hearing since adjusted 1984 rates are in effect. Insurers face an open-ended review process during which they have lost valuable property. This lack of practical relief in the administrative process simply does not comport with the constitutional requirement that full and fair post-deprivation hearings be guaranteed promptly.

In enacting Section 66(5)-(6) the Legislature has effectively deprived insurers of their current rates which had previously been evaluated and approved and which represented a fair and reasonable return to insurers under prior law. In their stead, the Legislature has arbitrarily imposed other rates which are presumptively correct. Although some potential exists for post-deprivation administrative review of these actions, "no later hearing and no damage award can undo the fact that the arbitrary taking that was subject to the right of procedural due

process has already occurred." Fuentes, 407 U.S. at 82. These drastic changes have been wrought without affording the affected parties any opportunity for prior notice and hearing and are therefore unconstitutional.

3. Paragraphs 5 and 6 Violate Substantive Due Process.

Article I, Section 9 of the Florida Constitution and the 14th Amendment to the U.S. Constitution also prohibit state actions which violate substantive due process. This guarantee protects individuals and entities from arbitrary legislative action.

> 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.

Lasky v. State Farm Insurance Co., 296 So.2d 9, 15 (Fla. 1974); see also Johns v. May, 402 So.2d 1166 (Fla. 1981). Violations of substantive due process may not be cured procedurally, "no matter what process precedes, accompanies, or follows the unconstitutional action." Fundiller v. City of Cooper City, 777 F.2d 1436, 1440 (11th Cir. 1985) (citations omitted).

The legislation at issue here imperils the right of insurers to the opportunity of earning a fair return. The Legislature may, of course, regulate the insurance industry or control rates in a reasonable manner. However, the arbitrary and

unilateral nature of the Act in rate-making does not conform to the established principle that

> [t]he State's regulation of commercial enterprise is generally a bilateral bargain. The enterprise gives up an unlimited right to compete in the market-place and relinquishes, among other business prerogatives, the freedom to set its own prices. In exchange, the State guarantees (among other things) at least an opportunity to earn a reasonable return on capital and a forum in which to seek price adjustments.

United Gas Pipe Line Co. v. Bevis, 336 So.2d 560, 564 (Fla. 1976). Section 66(5)-(6) operates arbitrarily to deprive all insurers of rates which have been previously shown to assure a fair rate of return and approved by the Department. In their places are substituted adjusted 1984 rates which probably will not in most cases permit a reasonable profit.

By enacting Section 66(5)-(6), the Legislature has undertaken a highly specialized task, insurance rate-making, a job which has been described as follows by one Florida court:

> Insurance rate-making is a technical, complicated, and involved procedure. It is not an exact science. Judgment based upon a thorough knowledge of the problem must be applied.

Nationwide Mutual Insurance Co. v. Williams, 188 So.2d 368, 372 (Fla. 1st DCA 1966). Yet the Legislature has performed this task without taking steps necessary to inform itself. The Florida Supreme Court has held that when a government body makes a rate

> without any substantial and relevant evidence, or pertinent inquiry, investigation, or consideration of matters, conditions, facts and circumstances directly and materially affecting its reasonableness, <u>such rate, rule, or regulation is not duly made</u>, and there is no presumption that it is reasonable and just .... (emphasis supplied)

<u>State ex rel. Railroad Commissioners v. Florida East Coast Railway Co.</u>, 64 Fla. 112, 59 So. 385 (1912); <u>see</u> <u>also</u> <u>Florida Gas Co. v. Hawkins</u>, 372 So.2d 1118 (Fla. 1979); <u>Florida Rate Conference v. Florida Railroad & Public Utilities Commission</u>, 108 So.2d 601 (Fla. 1959). In the instant case the legislative action supports exactly the opposite presumption--<u>i.e.</u> that the rates set under these circumstances are arbitrary and capricious, especially in light of the trial court's finding of no factual support for the excessiveness of existing rates.

It is recognized that the Legislature is vested with the power to regulate the insurance industry. However, "[w]hat this legislation undertakes is not regulation, but management, control, dictation." <u>State ex rel. Fulton v. Ives</u>, 167 So. at 403. The result is a statute which operates arbitrarily to deprive commercial property and liability insurers of their previously-approved adequate rates, and to impose upon them in Draconian manner a presumptively adequate 1984 rate. Principles of due process cannot tolerate such an arbitrary means of rate-making.

CONCLUSION

Constitutional scrutiny of the Tort Reform and Insurance Act reveals that it is more a product of political expediency than of a rational decision-making process. Multiple subjects are impermissibly included in an ill-advised attempt to modify all damages actions within an insurance regulation act. This fault alone results in the constitutional failure of the entire Act. Moreover, drastic measures such as insurance rebates impairing existing contracts and blanket rate rollbacks without prior notice and hearing bespeak political desperation rather than reasoned law-making. Nonexistent standards for implementing a generic JUA and an irrational design for refunding excess profits indicate at best a haphazard and ill-conceived design. These discrete constitutional failings cumulate to undermine the foundations of the Act, again resulting in the unconstitutionality of the entire Act. Thus ladened with constitutional fault, Chapter 86-160 does not deserve to stand as the law of Florida.

Respectfully submitted,

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