OA 1-30-87

40

SUPREME COURT OF FLORIDA

DOCKET NO.: 69,551

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

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

Appellants,

-vs-

STATE OF FLORIDA, DEPARTMENT
OF INSURANCE, and BILL GUNTER,

Appellees.

INITIAL BRIEF OF APPELLANT

STATE FARM INSURANCE COMPANIES

Vincent J. Rio, III, Esq.
TAYLOR, DAY, RIO & MERCIER
Attorneys for Appellant,
State Farm Insurance
Companies
121 West Forsyth Street
Jacksonville, FL 32202
(904) 356-0700

TABLE OF CONTENTS

ISSUES PRESENTED FOR REVIEW

TABLE OF AUTHORITIES

STATEMENT OF THE CASE

AND OF THE FACTS

Appellant State Farm adopts and incorporates herein by reference the Statement of the Case and of the Facts filed herein by the law firm of Karl, McConnaughhay, Roland, Maida & Beal on behalf of the insurer/plaintiffs in Case Number 86-2262. Appellant State Farm further sets forth the following matters which are particularly applicable to the issues raised by State Farm in the trial court and on this appeal. These issues pertain to the provision contained in Section 44 of Chapter 86-160 which requires the Florida Medical Malpractice Joint Underwriting Association (hereinafter "FMMJUA") to write "deficit assessment coverage" for certain assessments that were levied by the Florida Patients Compensation Fund (hereinafter "FPCF") prior to the enactment. It is only this provision within Section 44 (hereafter retrospective deficit assessment coverage) and not the entire Section 44, which is the subject of this attack.

Citations to portions of the record on this appeal will be as follows:

1. Citation to those portions of the record which have been indexed and paginated will be referred to by the designation "R" followed by the record volume and page number, such as: R. Vol. 1, page 5.

2. Citations to the trial transcript will be preceded by the designation "Tr." followed by the name of the witness or other speaker and the page number(s) of the transcript, such as: Tr. Walters 138-9.

3. Citations to exhibits introduced in evidence will normally indicate the party introducing the exhibit into evidence, followed by the exhibit number and page number, such as: State Farm Ex. 2, page 3.

One exception is that various portion of State Farm Exhibit 1 (which is portions of the Department of Insurance Deposition that were entered into evidence) will be referred to as "Depo. of Dept." followed by the deposition page number, such as: Depo. of Dept., page 7.

In Count One of its Amended Complaint (R. Vol. 2-374) Appellant State Farm alleged that Chapter 86-160 is unconstitutional because it embraces more than one subject and matters properly connected therewith. In Count IX (R. Vol. 2-389-390) State Farm described the operation of retrospective deficit assessment coverage, and further alleged that it violates the equal protection clause of the United States Constitution and the due process clauses of the Florida and United States Constitutions by requiring Plaintiffs through the FMMJUA to underwrite such coverage at premiums known in advance to be inadequate; and constitutes a taking of property without full compensation in violation of the due process and eminent domain clauses of the Florida Constitution.

At the trial State Farm presented evidence that

retrospective deficit assessment coverage is not insurance, and not properly connected with the subject of this Act, as well as evidence in support of Count IX. This factual evidence is described below.

With regard to State Farm's contentions the trial court concluded that: (1) there is no violation of the "one subject" rule because all sections of Chapter 86-160 "are reasonably and logically connected, including Section 44."; (2) there has been no "taking" within the meaning and intendment of the eminent domain clause; and that (3) the provisions complained of do not violate the due process clauses of the State or Federal Constitution. R. Vol. 8-1420

The facts pertinent to this facial constitutional attack are (1) the context provided by various prior enactments of the Florida Legislature, and (2) testimony and stipulations as to the natural and normal effect of retrospective deficit assessment coverage in the context of these prior enactments. These may be summarized as follows:

The Florida Patients Compensation Fund is an organization created by Chapter 75-9, Laws of Fla., 1975, to provide specified limits of medical malpractice coverage to, among others, physicians. Though the limits have varied throughout the organization's history, it has generally offered "excess" coverage of limits higher than those of the Medical Malpractice Joint Underwriting Association. Depo. of Dept., page 7.

Revenues of the FPCF initially include the premium that it receives for coverage. Tr. Wester 605-6. If premiums of providers are not sufficient to pay losses, deficit assessments are levied against the members who purchased that coverage. Tr. Wester 604. The assessment liability of physicians has varied over the years, but Section 768.54(3)(c), Fla. Stat.(1981) as amended by Chapter 82-236 Laws of Fla., 1982, provided that for fund year July 1, 1982/June 30, 1983 those assessments were "capped" in the amount of 2 times each physician's premium. Thus for every $1.00 a physician paid in FPCF premium, he was exposed to a deficit assessment of $2.00

The FMMJUA, also created by Chapter 75-9, Laws of Fla., 1975, has traditionally written lower limits of coverage for physicians. Depo. of Dept, Page 7. Pursuant to Subsection (4) of Section 627.351 Fla. Stat. (1985), the FMMJUA is presently composed of all insurers which write specified liability coverages in Florida, irrespective of whether those carriers otherwise write any medical malpractice coverage whatsoever in the state. Tr. Wester 619.

If medical malpractice insurance losses of the FMMJUA for a particular year exceed the premium received for that year, Section 627.351(4)(e), Fla. Stat. (1985), now provides that any surplus accrued from prior years which is not projected be needed for payment of claims relating to that year (hereinafter referred to as "surplus") is used to off-

set the deficit to the extent available. This sub-paragraph further provides that remaining deficits are funded from premium contingency assessments against Association policyholders. These policyholder assessments are, however, capped in the amount of one-third of the policyholder's premium, and the remaining deficits are assessed against the insurance company members of the FMMJUA. State Farm is required to be such a member of the FMMJUA because it writes homeowners insurance. Tr. Wester 619. State Farm's share of assessments in the FMMJUA deficits is increased by the fact that State Farm is the largest homeowners insurer in the State, and is further increased by its position as the second largest commercial multi peril insurance writer in the state. Tr. Wester 619-20.

During a special session in June of 1982 the legislature enacted Chapter 82-391, Laws of Fla., 1982, which required the FMMJUA to write deficit assessment coverage for physician members of the FPCF. The gist of this "insurance" was that for a statutorily set premium (which turned out to be grossly inadequate) the FMMJUA was required to sell to physicians an insurance coverage which would pay FPCF assessments to or on behalf of the physicians. As specified in the Statute, the physician would pay the FMMJUA an amount equal to one- third of that physician's FPCF premium; in return for this the FMMJUA was obligated to pay that physician's FPCF assessments, which were capped at 2 times his FPCF premium.

In other words, if the FPCF premium was $3.00, the physician could pay the FMMJUA $1.00, and thereby obligate the FMMJUA to pay out up to $6.00 on his behalf.

Chapter 82-391 originally provided that the coverage would be available for one year, and allowed physicians to buy coverage for that year anytime during the year.

During the 1983 session, the Legislature revisited the subject of deficit assessment coverage. By Section 1 of Chapter 83-206, Laws of Fla. 1983 (relevant portions attached as Exhibit "A"), the Legislature explicitly struck from the statute and repealed the requirement that the FMMJUA write deficit assessment coverage, effective upon that Act becoming law, which was June 23, 1983. A small number of physicians (the Department believes less than 20, Tr. Wester 622) did not apply for deficit assessment coverage until after the statute mandating its existence was repealed by Chapter 83-206.

It was stipulated at trial (Tr. Rio 375), and on deposition introduced into evidence (Depo. of Dept. pages 11 and 13) that the FPCF premium for physicians for the year 1982/1983 was approximately $9,000,000.00; and that by May of 1986 (which was prior to the enactment of retrospective deficit assessment coverage) the FPCF's paid losses were such that physicians had already been assessed approximately $18,000,000.00 by orders of the Department rendered in 1985. Depo. of Dept. page 16. In other words, it was clear when

retrospective deficit assessment coverage was enacted that the FPCF had already assessed the full 200% of premium and that certain physicians who had already paid or been levied these assessments would be authorized to go to the FMMJUA, and demand that they be immediately given $6.00 for every $1.00 in "premium" they then paid.

From the statutes summarized above, and from the Department of Insurance testimony at trial (Tr. Wester 621-2) and the Department's deposition entered in evidence (Depo. of Dept. pages 17-19), it is substantiated that the following chart summarizes how retrospective deficit assessment coverage would operate as to a physician with, for example, an FPCF premium of $30,000.00:

1. Assume Physician's FPCF premiums for fiscal year 1982-1983. . . . . $ 30,000.00

2. Physician is exposed to assessment of 2 times his premium. . . . . $ 60,000.00

3. Starting in July 1982, Physician allowed by Chapter 82-391 to buy deficit assessment coverage from FMMJUA for. . . . . $ 10,000.00

4. 1983 legislation (Chapter 83-206) repeals deficit assessment coverage effective June 23, 1983

5. In 1985 all physicians in FPCF are assessed 2 times their FPCF premiums. . . . . $ 60,000.00

6. Chapter 86-160 gives physician second chance to buy deficit assessment coverage <u>after</u>

assessments levied

7. Physician pays $10,000.00 to FMMJUA which must immediately pay assessments of. . . . . $ 60,000.00

Thus, by its natural and normal operation, the FMMJUA results in a physician paying a "premium" of $10,000.00 for losses that have already occurred in the amount of $60,000.00 - -a net transfer from the FMMJUA to the physician of $50,000.00.

Testimony of actuarial and economics experts was unanimous and unrefuted that this transaction is not insurance, because the loss had already occurred and was certain in amount at the time of the transaction, and was a subsidy because the loss was known in advance to greatly exceed the "premium."

The Plaintiffs' actuarial expert, Michael Walters testified that an essential ingredient in an insurance transaction is the transfer of a <u>risk</u> accompanied by a premium, (Tr. Walters 138-9) and that where it is known in advance that the loss has already occurred and known in advance that the amount of loss is greater than the "premium" the transaction is "clearly not insurance." Tr. Walters 139-40. Specifically addressing retrospective deficit assessment coverage as exemplified by the above hypothetical, he testified that where a $60,000.00 assessment is already known, the payment of $10,000.00 as if it were a premium for that transfer is clearly not insurance. Rather, it is a

clear subsidy. Tr. Walters 140-1. Professor Joseph Launie, an expert in insurance and economics also testified that where it is known in advance that losses have already occurred, and that those losses are immediately payable and are greater than the premium charged, this is not insurance, but is a subsidy. Tr. Launie 318-19.

The Defendants' only expert testifying remotely on point was Dr. George Priest, who testified that insurance is a transaction whereby a person pays a premium to shift to the insurer the risk of possible future catastrophes. Tr. Priest 1111. Where losses have already occurred that are six times the amount of the premium that is set by Statute, this obviously does not meet the definition of insurance.

Though the Department of Insurance presented testimony from its Deputy Insurance Commissioner, from economist John Wilson, and from actuary Robert Hunter, it presented absolutely no evidence contrary to that summarized above, or otherwise even remotely touching on whether deficit assessment coverage amounts to "insurance" or to a subsidy.

SUMMARY OF ARGUMENT

This Appellant contends that once the nature of retrospective deficit assessment coverage is understood, as summarized in the Statement of the Facts, several points of constitutional law emerge. First among these is that this provision of the legislation, by itself, causes the Act to violate the one subject rule of the Florida Constitution even if this Court agrees with the trial court's view of the precedents and formulation of constitutional principles. This is so simply because retrospective deficit assessment coverage is not "insurance"; and even if it were somehow related to the general field of insurance, it has absolutely no natural, logical, or functional interrelation to the present liability insurance crisis which is asserted to be the subject of the Act. Though the trial court would not allow the Plaintiff to prove the development of legislative history that would have shown the actual process of log rolling in fact, it is obvious from the operation of retrospective deficit assessment coverage that it has nothing to do with any of the other subjects or objects of legislative effort contained within Chapter 86-160, and that log rolling is the only possible explanation for its inclusion in the Act.

Once the nature of retrospective deficit assessment coverage is understood, it is also obvious that this

legislation was enacted purely to transfer money from the FMMJUA to a very small number of doctors. It has nothing to do with regulation, and it has nothing to do with the health safety or welfare of the general public. Because it is not regulatory, and because it amounts to a seizure of private property for the benefit of a limited class only, retrospective deficit assessment coverage is violative of the due process clause of the Florida Constitution.

Due process analysis aside, retrospective deficit assessment coverage is also violative of the eminent domain provision of the Florida Constitution. Again, this Statute has nothing to do with prospectively regulating anything. It is simply a transfer from one group of citizens to another, and even if some public purpose were involved the eminent domain provision would require that full compensation accompany this taking. Though this taking does not involve an immediate seizure of physical assets directly from State Farm, the provision immediately seizes cash from the limited surplus of the FMMJUA, and thus transfers to State Farm a greater risk of assessments for FMMJUA deficits that are projected for the future. Further, the taking inherent in retrospective deficit assessment coverage can not now be constitutionally excused as remedial legislation because such excuse was not properly pleaded and tried, and because such excuse also fails for substantive reasons.

ARGUMENT

I. THE RETROSPECTIVE DEFICIT ASSESSMENT COVERAGE PROVISIONS OF THE ACT ARE NOT REASONABLY AND LOGICALLY CONNECTED TO OTHER PROVISIONS OF THE ACT AND THEREFORE CAUSE THE ACT TO VIOLATE THE CONSTITUTIONAL "ONE SUBJECT" RULE.

A. Summary Of Precedents And Formulation Of Constitutional One Subject Rule.

Though the parties disagree in some respects as to the meaning of prior precedent and as to the permissible breadth of legislation, these differences need not be material to analysis of retrospective of deficit assessment coverage, because this provision of the Act violates two principles to which all the parties agree. The first of these principles is that the central purpose of the one subject rule is to prevent log rolling. As stated in Colonial Investment Co. v. Nolan, 100 Fla. 1349, 131 So. 178 (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 hodge podge, log rolling, and omnibus legislation.

Id. 131 So. at 179.

The second principle is that even though wide latitude is afforded to the legislature in defining the subject of an enactment and what matters are properly connected therewith, this latitude exists only "as long as the matters included in the Act have a natural or logical connection." Chenoweth v. Kemp, 396 So. 2d 1122, 1124 (Fla. 1981) and cases cited

therein.

In determining whether provisions within an act are "naturally or logically" connected on one hand, or constitute "log rolling" on the other, the Courts have eschewed a purely semantic analysis of the title. Such analysis would entail only a determination of whether the words employed in the title were sufficiently broad to encompass everything in the act. Obviously, such an analysis would allow the one subject rule to be perverted by clever draftsmanship and the use of broad phraseology in the title.

Instead of the semantic approach, the Courts have looked at the real functional interrelation of various provisions within an act to the central purpose of the Act. In Chenoweth v. Kemp, 396 So. 2d 1122 (Fla. 1981) for example, the Court recognized that the matters included in the act must "have a natural or logical connection," id. at 1124; and concluded that the particular insurance reforms and tort reforms being scrutinized operated in a natural and interrelated fashion to lower medical malpractice premium rates. Similarly, in the very close case of State v. Lee, 356 So. 2d 276 (Fla. 1978), the Court upheld the Insurance and Tort Reform Act of 1977 only after reviewing the intended operation of the various provisions, and finding that each naturally related to lowering automobile insurance rates.

In the Nolan case the Court also looked for a functional interrelation of the various provisions, but in that case

found the interrelation to be so attenuated as to not constitute a natural, logical or intrinsic connection. The Act scrutinized in Nolan required certain persons to make and file certain tax returns, and also prohibited the recording of deeds unless the post office address of the grantee was stated thereon. After searching for some working or functional relationship between the two provisions the Court stated:

> The working feature connecting the two is extremely tenuous and artificially created by certain provisions of the Act itself. It is not a natural, logical, or intrinsic connection....There is nothing in common between the two..."

Colonial Investment Co. v. Nolan, 131 So. at 181.

Thus the rule is clear. If retrospective deficit assessment coverage does not bear a necessary, intrinsic relation to the single subject of the Act, neither the words of the title nor the argument of counsel can artificially create such relationship, and the entire Act must fall.

B. What Is The "Subject" And Permissible Scope Of This Legislation?

(1) This Appellant contends that the trial court initially erred in defining the "subject of the act" to include not just liability insurance but rather all insurance; and to include not just related tort liability litigation, but rather all civil actions.

The trial court stated in the final order:

"To be sure, a reading of the Act will reveal that the primary motivating factor behind the enactment

> of this legislation was legislative concern over the cost and availability of commercial liability insurance. However, the subject of the act as drawn by the legislature was 'insurance and civil actions', a subject considerably more broad than 'liability insurance and tort reform'."

(Emphasis added.)(R. 8-1391)

This postulation of the "subject of the act" was error for two reasons. Initially, even though the Court adopted the first line of the title as the subject of the act, scrutiny of the whereas clauses and of the substantive provisions of the Act clearly demonstrate that Chapter 86-160 was not intended to be an act comprehensively addressing all phases of insurance and all phases of civil litigation. More importantly, however, unquestioning acceptance of such broad legislative declarations would abdicate the Court's role and allow the legislature to totally subvert the purpose of the one subject rule, by using broad words to define the scope of the legislation even where there is no natural or logical relationship between the provisions of the Act. Surely, for example, no one would contend that provisions relating only to life insurance underwriting criteria could be combined in an act dealing with the statute of limitations on slander, even though each has a relation to insurance or civil actions. Such a combination would be blessed by the trial court's approval of looking just at the scope of the words employed in the title, even though there is absolutely no natural relation between the two subjects, and they do not combine to address any common problem.

If this Court accepts the correctness of State v. Lee and Chenoweth it is obvious that some insurance regulation can be combined with some tort reform where the provisions of each interrelate and are necessary to remedy a crisis of liability insurance availability or affordability. This does not mean, however, that any provision dealing with insurance can be combined with any provision dealing with civil actions. A functional interrelation to achieve a central purpose is required, and where that relation is lacking, the Act must fall.

(2) Even if the Defendants postulation of subject and purpose of the legislation is accepted, it is clear that retrospective deficit assessment coverage has no natural logical or functional relationship to that subject.

Throughout the litigation the Defendants witnesses have taken the position that the provisions of Chapter 86-160 were intended to address, in an interrelated fashion, the present crisis of commercial liability insurance affordability and availability. Though identifying different aspects or sub-problems, each of the Department's witnesses attempted to postulate this crisis as the problem the legislation was designed to address. Tr. Wester, 547, Lines 19 through 24 and 553 Lines 8-12; Tr. Wilson Page 807, Lines 18-21; Tr. Hunter, 1003, Lines 15-24.

Retrospective deficit assessment coverage simply has nothing to do with addressing the present liability insurance crisis; and none of Defendants witnesses presented any evidence relating it to this crises.

The nature of retrospective deficit assessment coverage is described in the statement of the facts. The testimony of Michael Walters, Dr. Launie, and Dr. Priest was unanimous and was not contradicted anywhere else in the record. Professor Priest, on behalf of the defense, testified that "insurance is a way of spreading the burdens of catastrophic loss that may or may not occur sometime in the future." (Emphasis added.)(Tr. Priest 1111). He twice stated (Tr. Priest 1111 Lines 22-23 and 1112 Lines 5-7) that we do not know whether these losses will occur. Obviously where the losses have already occurred and we know the amount of the losses retrospectively shifting them to the FMMJUA can not be categorized as insurance.

Even more directly, Mr. Walters (Tr. Walters 139-40) and Dr. Launie (Tr. Launie 318-19)testified, based on hypotheticals that exemplify the normal operation of retrospective deficit assessment coverage, that the transaction is not insurance, but is a subsidy. This subsidy has nothing to do with making available insurance for future catastrophes, and has nothing to do with decreasing the cost of that insurance. Since there is no natural, logical, or intrinsic relation between retrospective deficit assessment coverage and the present liability insurance crisis, the enactment must fall.

II THE TRIAL COURT ERRED IN HOLDING THAT RETROSPECTIVE DEFICIT ASSESSMENT COVERAGE DOES NOT RESULT IN A "TAKING" WITHIN THE MEANING AND INTENDMENT OF THE EMINENT DOMAIN CLAUSE; WHICH TAKING IS ALSO A VIOLATION OF THE DUE PROCESS

CLAUSES OF THE STATE AND FEDERAL CONSTITUTIONS.

At Page 35 of its final order, R. 8-1420, the Trial Court concluded that there has been no "taking" within the meaning and intendment of the eminent domain clause. It appears that the Court found that there is no "actual" taking because there is presently enough money in the FMMJUA surplus to pay the losses that would immediately flow from retrospective deficit assessment coverage, and because retrospective deficit assessment coverage would not lead to an assessment of member insurers occurring in the "near future." (R. 8-1420)

State Farm respectfully suggests that retrospective deficit assessment coverage does result in the occurrence of an actual taking; and that when the taking is understood it is clearly unconstitutional because it is not within the State's police power to regulate, and because it is not accompanied by full compensation as required by the eminent domain clause.

A. It Is Clear From The Record That An Actual Taking Will Occur As A Result of Retrospective Deficit Assessment Coverage.

It is clear beyond dispute from the testimony of the Department of Insurance that a taking will occur. It is fully acknowledged that for every $10,000.00 in "premium" the FMMJUA receives, it will pay out $60,000.00 for assessments that have already been levied. The Department's

representative (Mr. Wester) acknowledged at trial, that this was the natural and normal operation of the Statute. Tr. Wester 622. The Trial Court apparently held that because there is enough money in the FMMJUA till to sustain these losses without immediately assessing member insurers, no taking has occurred. Such holding fails to appreciate the member insurers' interest in the surplus of the FMMJUA.

Prior to June,1985, the FMMJUA was arguably required by statute to operate on a discrete year-by-year basis. If the premiums attributable to a particular year exceeded funds necessary to pay and reserve for claims attributable to that year, there was no specific authorization to roll forward profits in surplus and make that surplus available to off-set deficits that might otherwise result in assessments in future years.

In 1985, Chapter 85-175, Sec. 24, Laws of Fla., 1985, the legislature injected into the statute the specific provision that the FMMJUA would use this "surplus" accrued from profitable years in order to pay losses and preclude or reduce assessments in deficit years. Section 627.351(4)(e) Fla. Stat. (1985) now provides:

> (e) In the event an underwriting deficit exists for any policy year the plan is in effect, any surplus which has accrued from previous years and is not projected within reasonable actuarial certainty to be needed for payment of claims in the year the surplus arose shall be used to off-set the deficit to the extent available.

Thus all assessable members of the FMMJUA have a clear

interest in the surplus of the FMMJUA; to assure that such surplus not be unconstitutionally taken, and that it remains available to preclude or minimize assessments in the future. The interest of the members and the deprivation of that interest is clear from the statute, and further appears from the testimony.

The Department's Deputy, Mr. Wester was allowed to testify (over objection) that there was not a significant likelihood that Plaintiffs will be required to pay any money "for that year," which in context apparently referred to the year deficit assessment coverage was enacted. Tr. Wester 611. On cross examination, however, Mr. Wester also agreed that if there is surplus from one year, it is rolled forward to another year, and that this decreases the likelihood of assessments as to that subsequent year. Tr. Wester 615. Mr. Wester also testified that "on a projected basis, there are indications that they are going to need to roll forward some surplus..." though he does not think that has occurred on an actual cash basis. Tr. Wester 615. He also testified repeatedly that the absence of surplus generally increases the likelihood of assessments (Tr. Wester 617, lines 9-15; and 619, lines 1-4); and that losses on deficit assessment coverage decrease that surplus. Tr. Wester 618.

Mr. Wester further testified that the FMMJUA does not include only medical malpractice insurers; that State Farm is a compulsory member because it writes homeowners insurance;

and that State Farm's accessibility for FMMJUA losses is increased by its position as the state's largest homeowners insurer, and as the state's second largest commercial multi-peril insurer. Tr. Wester 619-20. Thus it is clear that the subsidy inherent in deficit assessment coverage will result in immediate losses that will decrease FMMJUA's surplus, that such reductions in surplus increase the likelihood and the amount of assessments for deficits that are presently projected for the future; and that State Farm will be required to pay a significant portion of such projected assessments.

The reality of a taking from the FMMJUA and its members is clear.

(B) The Subsidy Of Retrospective Deficit Assessment Coverage Constitutes A Taking Of Property For The Benefit Of A Limited Group Of Persons, And Thus Violates Both The Due Process Clause And Eminent Domain Clause Of The Florida Constitution.

Appellants fully recognize that all "actual" takings are not unconstitutional takings, and that certain actual takings may be constitutionally permissible under the due process and eminent domain clauses. For a seizure of property to be justified under the police power, or for it to be constitutionally permissible under the eminent domain clause, however, such seizure must first be for the benefit of the public generally as opposed to the benefit of a special segment of society. This is true in a due process sense because the police power justifies legislation only for the

public health, safety and welfare. The same principal holds true under the eminent domain clause which explicitly prohibits the taking of property "except for a public purpose."

The case of State v. Lee, 356 So. 2d 276 (Fla. 1978) has been extensively argued in this litigation in the context of other issues. In the context of Section 44, however, it is clear that retrospective deficit assessment coverage must fall for the same reasons cited by the Supreme Court as to the "good driver fund" in State v. Lee.

In that case the Court declared the "good drivers" incentive fund to be "unconstitutional on the grounds that...it improperly use[d] the police power to take private property from one group of individuals solely for the benefit of another limited class of individuals...." Id. at 278. This holding was not novel, and merely recognized that:

> "The state's police powers...are not absolute and any legislation resting on the police power, to be valid, must serve the public welfare as distinguished from the welfare of a particular group or class. United Gas Pipe Line Co. v. Bevis, 336 So. 2d 560 (Fla. 1976); Liquor Store, Inc. v. Continental Distilling Corporation, 40 So. 2d 371 (Fla. 1949).

Id. at 279.

In Lee, it was argued that fining "bad drivers" and distributing that money to "good drivers" was beneficial to society by providing an incentive to good driving. Reviewing the operation of the Statute, the Court concluded that there was not a sufficient benefit for the public generally, and

that the Statute was unconstitutional. In our case, absolutely no benefit to the public generally emerges from deficit assessment coverage. The losses that are "insured" have already occurred and were certainly beyond the control of anyone at the time retrospective deficit assessment coverage was enacted. Indeed, the defendants have admitted that they estimate there to be fewer than twenty persons entitled to purchase this "insurance." This provision is purely and simply a taking from one class of persons for the benefit of another very limited class.

C. Deficit Assessment Coverage Amounts To A "Taking" As Opposed To "Regulation" And Is Thus Outside Of The State's Police Power.

Even if retrospective deficit assessment coverage was enacted for a legitimate state purpose, it would not be justified by the police power because it has nothing to do with regulation. It has absolutely nothing to do with governing the way companies conduct their operations in Florida or regulating the way they use their property. Though regulatory purposes may justify what would otherwise be unconstitutional deprivations of property, the Florida Supreme Court has recognized a clear distinction between statutes which are regulatory in nature and those which are essentially in the nature of taking or appropriating property. Thus in the case of State Plant Board v. Smith, 110 So. 2d 401 (Fla. 1959) the Florida Supreme Court upheld

the outright destruction of property (infected plants) because the State was not appropriating the plants for its own use, but was directing their destruction as part of a legitimate regulatory statute. The Court stated:

> "There is a very clear distinction between an appropriation of private property to a public use in the exercise of the power of eminent domain, and the regulation of the use of property--and its destruction, if necessary--in the exercise of the police power. "Under the power of eminent domain the sovereign may make a compulsory purchase of the property of the citizen when such property is to be appropriated to a public purpose or use, but such compulsory purchase, or taking as it is called, cannot be made even by the sovereign 'without just compensation.'"

Id. at 404.

Another example of the distinction between "appropriation" and "regulation" is found in the case of Alford v. K. O. Finch, 155 So. 2d 790 (Fla. 1963) In that case the Court scrutinized an order of the Game and Fresh Water Fish Commission which had prohibited hunting on a certain parcel of Appellee's property for the purpose of allowing wildlife breeding on that property. The Court regarded the right to hunt on one's own property as a property right that is subject to regulation. Looking at the true substance and purpose of this supposed "regulation" however the Court recognized that this "regulation" in effect amounted to a taking of hunting rights in order to create a game preserve. Even though the fostering of game preservation was recognized as a permissible state purpose, the Court was unwilling to tolerate such a taking, under the guise of

regulation. The Court stated

> "The predominant feature in the instant case is the taking, with neither consent nor compensation, by the Appellant from the Appellees of a property right--the right to pursue the game on their land. It is our view that the Commission is empowered to regulate the taking of game and to acquire property, by purchase and gift, but that under the authority delineated in the Constitution, it is not, under the guise of regulation or otherwise, empowered to take private property for public purpose without just compensation."

(Emphasis added.) Id. at 793.

Just as the State could not take hunting rights in order to create a game refuge, it can not take Plaintiffs property through the FMMJUA under the guise of regulation, in order to use that property to subsidize a few physicians.

(D) The "taking" effectuated by retrospective deficit assessment coverage is not accompanied by full compensation, in violation of the eminent domain clause of the Florida Constitution.

As described above deficit assessment coverage has nothing to do with regulation, and constitutes taking of property for a particular purpose. Thus even if that purpose were a public one (which it is not), the taking would have to satisfy the full compensation requirements of the eminent domain clause. This clause provides:

> "SECTION 6. **Eminent domain.--**
> (a) No private property shall be taken except for a public purpose and with full compensation therefor paid to each owner or secured by deposit in the registry of the court and available to the owner."

The meaning of this clause is clear. Even if this

taking of property were related to some public purpose (as opposed to the benefit of a few physicians), it is unaccompanied by any compensation whatsoever, and is clearly unconstitutional.

(E) The Trial Court erred to the extent it even considered a claim that retrospective deficit assessment coverage was designed to cure or remedy a defect in prior law.

At the eleventh hour and fifty-ninth minute of the trial in this action, and with absolutely no predicate in either the pleadings or in competent evidence, Defendants asserted that the recreation of deficit assessment coverage after the covered assessments were levied was "remedial" legislation. They generally alleged in closing argument (Tr. Closing Argument of Dept. 1304, 5) that it was designed to cure a "defect" in the law that occurred when deficit assessment coverage was repealed effective June 23, 1983.

All parties would concede, and the statutes are clear that when deficit assessment coverage was originally enacted, the legislation specified that physicians could apply any time during the period July 1, 1982 through June 30, 1983. This was the clear language of Chapter 82-391. It is equally clear that in 1983 the legislature repealed the mandated availability of deficit assessment coverage 7 days earlier than originally contemplated, when Chapter 83-206 clearly and explicitly struck the mandatory offer of deficit assessment coverage from the Statutes effective June 23, 1983.

Aside from substantive errors discussed below, State Farm contends that the trial court erred in even considering a contention that this 7 day "hiatus" was an "oversight"or was a "defect" properly subject to corrective legislation. In its final order the Court stated:

> In 1983, the Legislature repealed these provisions. Through oversight, this repealer created a hiatus period of seven (7) days during which some Florida physicians applied for and attempted to pay their assessment premium. The effect on these physicians was to leave them without the ability to fully insure themselves for the 1982-83 fiscal year. Sec. 44(j) attempts to correct this defect in the Florida Medical Malpractice Joint Underwriting Association Law by allowing these physicians who in good faith applied for coverage during this seven-day period to obtain such coverage.

(Emphasis added.) R. 8-1419-20.

This basis of decision was error because the defensive claim of "remedial legislation" was never placed in issue by the pleadings, the trial court sustained State Farm's objection to one witness' belated and unpleaded conjecture that the 7 day hiatus was an unintended error;[1] and the existence of such a defect was simply an issue that was not raised in the pleadings or tried by the consent of the parties.

Throughout the trial defendants had presented no

---

[1]The Department's Deputy briefly conjectured that the seven (70) day hiatus was an "error", and the Trial Court sustained State Farm's objection. Tr. Wester 609-610. Thus there was neither pleading nor evidence supporting an allegation of defect in Ch.83-206, and no occasion for State Farm to present rebuttal evidence.

evidence whatsoever rebutting Plaintiffs claim that Section 44 amounts to a subsidy to a small group of physicians. Defendants in effect confessed the validity of Plaintiffs characterization of deficit assessment coverage but in closing argument sought to avoid the constitutional consequences of this retrospective subsidy, by arguing that it was "remedial." Thus Defendants adopted a trial strategy of confession and avoidance, in the form of an affirmative defense that they had not pleaded or proven by competent evidence. More importantly, by the timing of their naked assertion, Defendants prevented Plaintiffs from introducing evidence that would have shown the speciousness of the claim of "remedial" legislation and would have buttressed presumptions that the legislature acted very intentionally and reasonably in repealing deficit assessment coverage effective June 23, 1983.[2]

As broad as they are, modern rules of pleading and admissibility of evidence are designed to prevent exactly this type of prejudicial surprise. It is for this reason that Rule 1.110(d), Florida Rules of Civil Procedure requires

---

[2]Such evidence would have included the fact that when deficit assessment coverage was repealed by Chapter 83-206, the FPCF had then incurred or was projecting deficits as to every past year of its operation; that the FMMJUA ultimately lost almost $12,000,000.00 by paying out $6.00 in losses for every $1.00 in premium in deficit assessment coverage even without present reopening of that coverage; and that the legislature acted quite reasonably and intentionally in repealing deficit assessment coverage.

that in pleading to a previous pleading "a party shall set forth [certain listed affirmative defense]...and any other matter constituting an avoidance or affirmative defense." (Emphasis added.)

In discussing what matters constitute such unlisted affirmative defenses, the Second District Court of Appeal in Tropical Exterminators, Inc. v. Murray, 171 So. 2d 432 (2nd DCA,

1965) at 433, noted that the defenses listed in the rule:

> "...seem to have one thing in common. They don't deny the facts of the opposing party's claim, but they raise some new matter which defeats the opposite party's otherwise apparently valid claim."

Belatedly urging that there was a defect in prior law which justifies an otherwise unconstitutional taking is clearly a matter which does not deny the facts of the Plaintiffs claim of subsidy, but seeks to raise a new matter in attempt to defeat the Plaintiffs' otherwise apparently valid claim of unconstitutionality.

In both closing argument (Tr. Closing Argument of Dept. 1304, 5) and at pages 12 and 13 of its post trial memorandum (R. Vol. 7 - 1327-8) State Farm reserved its objection to the belated "remedial legislation claim," and suggested to the trial court that if it were inclined to accept the Defendants characterization as to a defect in Chapter 86-206, when the Court had previously sustained objection to evidence on that point, Plaintiffs should be afforded the opportunity to present contrary evidence.

(F) Even if the issue were properly before the Court, retrospective deficit assessment coverage is clearly not remedial legislation.

It is logically obvious that before retrospective deficit assessment coverage can be characterized as "remedial" there must be some identifiable "defect" to be remedied in a prior enactment. In this instance the Trial Court appeared to find that Chapter 83-206 was defective in unintentionally repealing deficit assessment coverage, to the detriment of those doctors who had not yet purchased it. In fact, there was no defect in Chapter 83-206, which is a clear and explicit enactment that obviously achieved exactly what the legislature intended. The legislature's clear intent was to no longer require the FMMJUA to expose itself to $6.00 in assessments for every $1.00 in premium received.

The Court will note from a review of that enactment that the legislature did not subtly or obscurely repeal deficit assessment coverage by simply listing a statute number hidden among other repealers. As can be clearly seen from the third page of the legislation, (page 823 of Laws of Fla., 1983, included in Exhibit "A" attached) the legislation explicitly set forth and then struck from the statutes Subparagraph 5 of Section 627.351(4)(d). Even if a legislator only scanned the enactment he would see that this subparagraph pertaining to deficit assessment coverage was explicitly stricken from the statutes upon the bill becoming law.

It is also clear that consciously repealing deficit

assessment coverage is the only plausible motive that the legislature could have had in mind when it enacted this provision of Chapter 83-206. At the time of this enactment, the imposition of deficit assessment coverage on the FMMJUA was already set to expire on July 1, 1983. Indeed the last sentence of the subparagraph creating that coverage had already stated that "this subparagraph shall stand repealed July 1, 1983." Thus, if the legislature had desired deficit assessment coverage to stay in effect until July 1, 1983 it would have simply done nothing on the subject. The only reason the matter was addressed was because the legislature clearly and consciously chose to no longer require the FMMJUA to sell deficit assessment coverage on the "you give me one dollar and I'll give you six dollars" basis it had previously established.

(G) Even if retrospective deficit assessment coverage were"remedial" in nature this could not preserve it or obviate the fact that it constitutes a violation of the "one subject" rule.

Even if the legislature had made some kind of mistake (which it clearly did not) in originally repealing deficit assessment coverage, it could not now constitutionally remedy such mistake solely at the expense of the members of the FMMJUA. State Department of Transportation v. Edward M. Chadbourne, Inc., 382 So. 2d 293 (Fla. 1980) serves as an example of what the legislature may not do in the name of remedial legislation. In that case there was a blatant defect in a 1974 statutory formula, which defect had enabled

certain road contractors to obtain what all agreed were "windfall" profits at taxpayers expense. When a 1976 enactment purported to apply retroactively in order to remedy that defect and to require disgorgement of the windfall profits, the Supreme Court struck the '76 enactment as unconstitutional retrospective legislation. Thus even where "remedial legislation" was aimed at a clear defect that had resulted in windfall profits, it could not operate retrospectively to seize property.

If "remedial" legislation can not be used to discorge windfall profits from contractors who unjustly received them, it certainly can not be used to seize funds from the insurers of the FMMJUA, which have never gained a penny's profit from that organization.

If the state perceives some sort of moral obligation to a few physicians because it did not allow those physicians to shift their FPCF assessments to the FMMJUA, the legislature could have passed a claims bill for the relief of these physicians. Indeed it is the explicit function of claims bills to satisfy the moral obligations of the sovereign, for which the sovereign would otherwise enjoy immunity.[3] It is,

---

[3]Dissenting as to a point not material to this litigation Justice Irvin stated in Dickenson v. Board of Public Construction of Dade County, 247 So. 2d 553 (Fla. 1968) at 560

> Claims bills are enacted to satisfy moral obligations of the State, its agencies or political subdivisions. Claims against the State are referred to as moral obligations because sovereign immunity precludes suit thereon as legal claims absent legislative consent."

however, constitutionally impermissible under the due process and eminent domain provision to enact what amounts to legislation for the relief of a few persons, and to fund that relief solely from one segment of society, the FMMJUA and its members.

Totally aside from such due process and eminent domain considerations, however, and even if it were "remedial legislation," retrospective deficit assessment coverage would remain offensive to the one subject rule. This is so because a "remedy" designed to give relief to a few physicians for their 1985 FPCF assessments has absolutely no relation to the present liability insurance crisis.

CONCLUSION

When the operation of retrospective deficit assessment coverage is understood clearly, the constitutional consequences of its inclusion in Chapter 86-160 are obvious. These include:

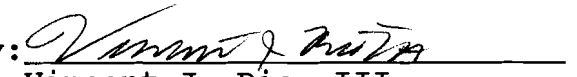
(1) Inclusion of retrospective deficit assessment coverage in Chapter 86-160 causes the entire enactment to violate the one subject rule, and the Act thus to fall.

(2) Retrospective deficit assessment coverage constitutes a taking of property without full compensation in violation of the due process and eminent domain clauses of the Florida Constitution.

(3) The naked assertion that retrospective deficit assessment coverage is "remedial legislation" came too late in the litigation to be properly heard; is clearly specious if it is considered; and could not, in any event, save the provision from its unconstitutionality or save the entire enactment from its violation of the one subject rule.

Appellant State Farm therefore prays that this Court reverse the order of the trial court and remand with instructions that the trial court permanently enjoin Chapter 86-160, Laws of Fla., 1986; and that this Court grant such other relief as this it deems appropriate.

TAYLOR, DAY, RIO & MERCIER

By: 
Vincent J. Rio, III
Attorneys for State Farm
121 West Forsyth Street
Jacksonville, Florida 32202
(904) 356-0700

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by U. S. Mail this 15th day of December, 1986, to the following:

DAVID A. YON, ESQUIRE
DANIEL Y. SUMNER, ESQUIRE
Office of Legal Services
State of Florida, Department of Insurance
413-B Larson Building
Tallahassee, Florida 32301

THOMAS M. ERVIN, JR.
ROBERT KING HIGH, JR.
Ervin, Varn, Jacobs, Odom & Kitchen
P. O. Drawer 1170
Tallahassee, FL 32302

D. STEPHEN KAHN, ESQUIRE
Kahn and Dariotis, P. A.
227 East Virginia Street
Tallahassee, Florida 32301

FREDERICK B. KARL, ESQUIRE
Karl, McConnaughhay, Roland, Maida & Beal, PA
Post Office Drawer 229
Tallahassee, FL 32302

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

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

DONALD WEIDNER, ESQUIRE
Post Office Box 2411
Jacksonville, Florida 32202

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

DOUGLAS A. MANG, ESQUIRE
Post Office Box 1019
Tallahassee, Florida 32302

ARTHUR J. ENGLAND,JR.,ESQ.
Nash, Block & England
2401 Douglas Road
Miami, Florida 33134

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

G. W. JACOBS, ESQUIRE
219 South Orange Avenue
Sarasota, Florida 33579

WILLIAM H. ADAMS, III, ESQUIRE
Mahoney, Adams, Milam
Surface & Grimsley
Post Office Box 4099
Jacksonville, Florida 32201

JAMES A. DIXON, ESQUIRE
Dixon, Dixon, Hurst
& Nicklaus
Post Office Box 13767
Tallahassee, FL 32317

BRUCE CULPEPPER, ESQUIRE
Culpepper, Pelham, Turner
& Mannheimer
P. O. Box 11300
Tallahassee, Florida 32302

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

A. BROADDUS LIVINGSTON, ESQUIRE
P. O. Box 3239
Tampa, Florida 33601

FRANCIS X. SEXTON, JR.ESQ.
Sage, Gray, Todd & Sims
801 Brickell Avenue,
Suite 1100
Miami, Florida 33131

Vincent J. Rio, III