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

REPLY BRIEF AND ANSWER BRIEF ON CROSS-APPEAL OF APPELLANTS/CROSS-APPELLEE, THE CIGNA GROUP

ALAN C. SUNDBERG
CYNTHIA S. TUNNICLIFF
F. TOWNSEND HAWKES
Carlton, Fields, Ward, Emmanuel
Smith, Cutler & Kent, P.A.
410 First Florida Bank Building
Tallahassee, Florida 32302
(904) 224-1585

Attorneys for Appellants/
Cross-Appellees

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I

CHAPTER 86-160 CONTAINS MULTIPLE SUBJECTS IN VIOLATION OF THE FLORIDA CONSTITUTION.

Appellees' only response to the argument of massive over-inclusion in Chapter 86-160 of subject matters unrelated to liability insurance concerns is to point to a few specific types of contracts which might conceivably involve liability insurance. Appellees point to breach of warranty and implied contracts for professional services to justify inclusion of all types of contracts. These narrow areas are pointed out as possibly involving liability insurance, thereby justifying inclusion of the entire field of contract actions for damages.[1]

This position suffers from two obvious fallacies. First, the Legislature is perfectly capable of reasonably designating the very limited areas of contracts which may implicate liability insurance. Indeed, in this Act the Legislature demonstrated its ability to focus its "tort reform" on litigation areas reasonably related to liability insurance concerns. Section 60 contains a comprehensive definition of negligence cases in which joint and

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[1]Neither the record nor logic supports the Department's broad assertion that liability insurance typically covers breach of contract actions. Only "tort-like contract liability," such as professional malpractice, is covered by liability insurance. On cross-examination, Defendants' expert witness, George Priest, recognized that most contract actions do not typically involve liability insurance. (TR VII, 1220-25).

several liability was abrogated:

> (4) APPLICABILITY.--
>
> (a) This section applies to negligence cases. For purposes of this section, "negligence cases" includes, but is not limited to, civil actions for damages based upon theories of negligence, strict liability, products liability, professional malpractice whether couched in terms of contract or tort, or breach of warranty and like theories. In determining whether a case falls within the term "negligence cases," the court shall look to the substance of the action and not the conclusory terms used by the parties.

Ch. 86-160, §60, Laws of Fla. This inclusive definition covers all types of claims for personal injury, malpractice, breach of warranty, as well as implied contracts for professional services. Yet, pure breach of contract actions, such as for the sale of goods under the U.C.C., are pointedly not included. This definition in Section 60 is similar to existing medical malpractice statutes, which generally apply to all malpractice claims, whether in contract or tort. But all of these existing statutes limit their scope to personal injury and negligence based claims, which obviously implicate liability insurance. Thus, the Legislature's ability to properly focus its tort reform is clearly underestimated by Appellees.

The second fallacy is that Appellees' argument rests upon an assumption which utterly destroys any meaning for the single-subject requirement of our Constitution. Appellees assume that

by justifying inclusion of a small fragment of a vast subject matter (contract damages actions) in an act reforming liability insurance, they can justify total inclusion of the entire world of that subject matter within the same act. Thus, they argue that because implied contracts for professional services or breach of warranty may implicate liability insurance, the Legislature can include all contract actions for damages in an act reforming liability insurance.

If one accepts the illogic of this argument, it will quickly destroy a single-subject requirement. Under this theory, so long as any tangential connection could be shown, any number of multiple subjects could easily be joined. For example, an act reforming regulation of abortion clinics could justify inclusion of reform of doctors' professional services contracts in an abortion clinic setting. Under the Appellees' theory of inclusion, all other types of contracts (construction, insurance, sale of goods, real property) could also be reformed in that same abortion clinic act since a fragment of contracts had been justifiably included. Thus, abortion clinic reform and U.C.C. reform are joined.

Appellee Florida Medical Association (FMA), apparently recognizing that the Act as it exists violates the single-subject requirement, posits that the undisputed inclusion of commercial contracts within the Act's litigation reforms is a "drafting

mistake", and that this Court should rewrite the applicability provision in Section 50, which provides:

> Section 50. Section 768.71, Florida Statutes, is created to read:
> 768.71 Applicability; conflicts.--
> (a) Except as otherwise specifically provided, this part applies to any action for damages, whether in tort or in contract.

The FMA does not, and indeed cannot, argue that Section 50 is ambiguous or unclear. Under these circumstances, "interpretation" by a court to save the Act is legally impermissible.

It is the duty of a court to interpret, not enact legislation. Courts are without power to interpret an unambiguous statute where the words have a definite meaning:

> Where the words used have a definite and precise meaning, the courts have no power to go elsewhere in search of conjecture in order to restrict or extend the meaning. Black on Interpretation of Laws, 37. Courts cannot correct supposed errors, omissions, or defects in legislation.

State ex rel. Bie v. Swope, 159 Fla. 18, 30 So.2d 748, 751 (1947). The courts should not speculate on statutory constructions where the language itself conveys an unequivocal meaning. See Heredia v. Allstate Insurance Co., 358 So.2d 1353 (Fla. 1978). Courts cannot modify, amend, vary or complete statutes in order to render the statutes constitutional. See Metropolitan Dade County v. Bridges, 402 So.2d 411 (Fla. 1981).

Nor will courts rewrite a statute or vary the intent of the Legislature in order to render a statute constitutional. State v. Elder, 382 So.2d 687 (Fla. 1980); State v. Keaton, 371 So.2d 86 (Fla. 1979).

In the context of Section 50, there is simply no room for interpretation. It is pure speculation on the FMA's part that the Legislature did not intend to structure future damages in contract cases or to provide attorney's fees to the prevailing party who made a settlement offer in contract cases. There is nothing inherently "ridiculous" with these changes which the Act unquestionably effectuates. Surely this Court will not redraft legislation to fit what the FMA wishes the Act had provided. Therefore, the FMA's invitation to this Court to speculate on legislative intent in the face of an unambiguous statutory provision must be respectfully, but firmly, declined.

Although the trial court's findings of fact are accorded great deference on appeal, the Department errs in suggesting a similar deference for the trial court's pure legal conclusion that Chapter 86-160 does not violate the single-subject requirement of Florida's Constitution. Such a constitutional interpretation is subject to review by this Court simply for legal error, and is reversible if legally incorrect. See Foley Lumber Co. v. Koester, 61 So.2d 634 (Fla. 1952); Northwestern National Insurance Co. v. General Electric Credit Corp., 362

So.2d 120 (Fla. 3d DCA 1978), cert. denied, 370 So.2d 459 (Fla. 1979).

The position which Appellees must assume to uphold Chapter 86-160 is that all civil actions and all contract actions for damages are properly related to insurance concerns. Common sense dictates otherwise. A vast area of contract actions for damages, such as real estate or corporate buy-sell, do not involve insurance concerns of any type. Moreover, the areas of overlap between contracts and liability insurance concerns that do exist are quite limited, and hardly justify inclusion of the entire field of contract actions for damages. Because so much of contract damages litigation is unrelated to insurance concerns, blanket inclusion of this type of litigation in an insurance act is unjustified, and necessarily violates Article III, Section 6 of the Florida Constitution through the inclusion of multiple subjects. Accordingly, the entire Act should be declared invalid as violative of the Constitution.[2]

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[2]The Department's gratuitous suggestion that unconnected subject matters may be "severed" from the Act (DOI Brief at 17) is patently improper. Florida law is quite clear that upon the finding of a single-subject violation, the whole act must fall if it is challenged in its entirety. See Colonial Inv. Co. v. Nolan, 100 Fla. 1349, 131 So. 178, 180-83 (1930). Judicial guesswork as to what is the subject of an act and what is improperly connected matter is obviously an undesirable effort at legislating. The case cited by the Department, Albritton v. State, 82 Fla. 20, 89 So. 360 (1921), was later overruled by Colonial Inv. Co.

II

SECTION 13, CHAPTER 86-160, UNLAWFULLY DELEGATES LEGISLATIVE AUTHORITY.

The Department's terse reply to CIGNA's argument that Section 13 improperly delegates legislative authority to create joint underwriting associations (JUA's) is that there is no delegation of authority in Section 13 because the word "shall" appears in that provision. The Department's highly simplistic response is that no unlawful delegation can ever arise if the word "shall" rather than "may" is used, because no discretion is vested in the Department of Insurance.

Only a slight effort is required to pierce the thin veneer of the Department's reasoning. The Department completely ignores the actual operation of Section 13 which first requires the Department to make a determination that a need for additional property and casualty JUA's actually exists. Need for additional JUA's is defined by the statute to exist if insurance coverage is unavailable at adequate levels which, in turn, means the coverage required by "responsible or prudent business practices."

> If the department determines . . . that . . . insurance is not available at adequate levels . . ., the department shall implement by order a joint underwriting plan . . . . [A]n adequate level of coverage means that coverage which is required by state law or by responsible or prudent business practices.

Ch. 86-160, §13, Laws of Fla. (emphasis supplied). Thus, the

Department is clearly granted unlimited discretion to determine whether need for additional JUA's actually exists. If the Department determines a need does exist, then JUA's must be implemented. On the other hand, if the Department determines that no need exists, additional JUA's cannot be implemented. Obviously, the key is this initial departmental determination of need for additional JUA's, and not the subsequent directive to implement JUA's.

The Department's position that the use of "shall" in Section 13 precludes unlawful delegation concerns is also undercut by other cases which have found an unlawful delegation to exist even when the word "shall" was used to direct the executive agency's actions. Thus, in Florida Home Builders Association v. Division of Labor, 367 So.2d 219 (Fla. 1979), this Court held a similar statute unconstitutional as an unlawful delegation in spite of the statute's inclusion of the word "shall". The statute at issue in Florida Home Builders provided that "upon a determination of need" the Division of Labor "shall" approve an apprenticeship program:

> Apprenticeship sponsors.--One or more local apprenticeship sponsors shall be approved in any trade or group of trades by the Bureau of Apprenticeship, upon a determination of need . . . .

Section 446.071, Fla. Stat. (1977) (emphasis supplied). Because the standard for "need" was not specified, the statute was held

to unconstitutionally delegate legislative authority.

Other statutes have also been stricken as unconstitutional delegations of legislative authority, in spite of including the word "shall" in their directives. In Sarasota County v. Barg, 302 So.2d 737 (Fla. 1974), the act which was found to be an unlawful delegation directed that a conservation district must prohibit dredging:

> [N]o undue or unreasonable dredging, filling, or disturbance of submerged bottoms shall be permitted. . . .

Ch. 71-904, §6, Law of Fla. (emphasis supplied). Thus, the use of "shall" does not preclude unlawful delegation of legislative authority.

Section 13 suffers much the same fault as did the statute in Florida Home Builders, which failed to provide any standards for the agency's determination of need for a program. Section 13 similarly directs the Department to make a determination of need for additional JUA plans, but fails to provide any meaningful standard to control this determination of need. Although some statutory effort is made by Section 13 to define need for additional JUA's, the standard provided is wholly inadequate since it turns on interpretation of "prudent business practices," a vague and meaningless standard previously rejected by this Court in D'Alemberte v. Anderson, 349 So.2d 164 (Fla. 1977) ("reasonably prudent person" held to be vague and meaningless

standard). Because there is no adequate standard to control the Department's determination of need for additional JUA's, Section 13 is an unlawful delegation of legislative authority.

ANSWER BRIEF ON CROSS-APPEAL

SUMMARY OF ARGUMENT ON CROSS-APPEAL

The trial court was correct in holding that the special credit provision in Section 66(1)-(3), Chapter 86-160, violated the constitutional prohibition against impairment of existing contractual obligations. CIGNA presented unrebutted proof that the special credit would cost it millions of dollars in refunds on premiums collected under insurance contracts entered into before the Act's effective date. This undisputed and substantial impairment of existing contracts is totally unwarranted since the trial court made several factual findings which proved that the state's objectives for the special credit were unsupported. Most importantly, the purported objective of returning to insureds predicted savings resulting from tort reform was specifically found to be "speculative" in light of the evidence presented. Because the impairment is substantial and because the state's objectives were factually unsupported, the special credit unconstitutionally impairs existing insurance contracts through its retroactive effects.

I
THE SPECIAL CREDIT PROVISION OF SECTION 66, CHAPTER 86-160, UNCONSTITUTIONALLY IMPAIRS OBLIGATIONS OF EXISTING CONTRACTS

Section 66(1)-(3) of Chapter 86-160 provides that commercial liability insurers must refund or credit "special credits" which will reduce existing premiums by 40% for the final quarter of 1986. The "special credit" indisputably applies to any existing commercial liability policy, regardless of when entered, so long as it is in effect during the final quarter of 1986. Any insurer objecting to the special credit must establish for the Department of Insurance that the special credit will result in "clearly inadequate" rates. The insurer is also required to notify all insureds that it intends to contest the special credit. Notably, if the special credit is contested, the Department may order a special credit even higher than the 40% credit if the Department finds it warranted under the new rating standards of Section 627.062, Florida Statutes, enacted by Section 9 of the Act.

At trial, CIGNA presented unrebutted evidence that the special credit provision of the Act unreasonably intrudes into the contracts entered into between CIGNA and its insureds prior to the Act's effective date. The degree of contract impairment was extremely heavy. Nord Bjorke, Vice-President of the CIGNA Group, testified that CIGNA, representing ten plaintiff insurance

companies, is the largest commercial property and casualty insurer in Florida. (TR III, 384-89). Mr. Bjorke stated that the special credit in Section 66 would cost CIGNA $8.5 million in premium losses on contracts entered into prior to the Act's effective date. (TR III, 396-98). Moreover, should CIGNA decide to seek relief from the special credit in an attempt to prove clearly inadequate rates under Section 66(3), this filing alone would cost CIGNA $150,000. (TR III, 398-99). This testimony was directly adopted by the trial court in its factual findings. See App. B, Judgment at 38-39.

In similar fashion, other major Florida insurers demonstrated the extreme impairment caused by the special credit. State Farm Insurance Company established that the special credit would cause losses of almost $1.3 million on policies entered into before the Act's effective date. (TR III, 358-59). U.S.F. & G. likewise showed that the special credit would cause it losses of about $5.6 million for rebates or credits on policies entered into before the Act's effective date. (TR II, 212-13). Again, the trial court adopted this unrebutted evidence as findings in its Final Judgment at 38-39, and concluded based on these findings that,

> It seems plain to the Court that the portion of Sec. 66 which requires the premium refund impairs very substantially existing contracts of insurance.

App. B, Judgment at 40-41.

Both the Florida and Federal Constitutions prohibit any laws from impairing obligations under existing contracts:

> Prohibited laws - No bill of attainder, ex post facto law or law impairing the obligation of contracts shall be passed.

Fla. Const. art. I, § 10; U.S. Const. art. I, § 10. Florida's courts have traditionally been vigilant in enforcing this constitutional prohibition, allowing virtually no degree of impairment of vested rights under existing contracts:

> It is axiomatic that subsequent legislation which diminishes the value of a contract is repugnant to our Constitution. As this Court stated in Pinellas County v. Banks, 154 Fla. 582, 19 So.2d 1, at 3 (1944):
>
> > Any conduct on the part of the legislature that detracts in any way from the value of the contract is inhibited by the Constitution. State of Louisiana v. City of New Orleans, 102 U.S. 203, 26 L.Ed. 132; Edwards v. Kearzey, 96 U.S. 595, 24 L.Ed. 793.

Dewberry v. Auto-Owners Insurance Co., 363 So.2d 1077, 1080 (Fla. 1978) (existing insurance contracts may not be impaired by retroactive application of statute prohibiting stacking of coverages). Dewberry also cited Yamaha Parts Distributors, Inc. v. Ehrman, 316 So.2d 557 (Fla. 1975), which has become the bellwether impairment case by stating the Florida rule succinctly:

> Virtually no degree of contract impairment has been tolerated in this state.

Id. at 559 (footnote omitted) (police power to control franchise agreements does not outweigh sanctity of contracts).

This explicit prohibition was restated in Pomponio v. Claridge of Pompano Condominium, Inc., 378 So.2d 774 (Fla. 1979), to better articulate the balancing test inherent in the Yamaha court's recognition that there were very limited instances in which the police power might override the sanctity of contracts. To discern those limited instances, this Court developed a balancing test which was specifically held to be consistent with Yamaha's virtually complete prohibition:

> [T]his becomes a balancing process to determine whether the nature and extent of the impairment is constitutionally tolerable in light of the importance of the state's objective, or whether it unreasonably intrudes into the parties' bargain to a degree greater than is necessary to achieve that objective.
>
> . . . .
>
> We believe that the balance between the state's probable objectives and its method of implementation, on the one hand, and the degree of contract impairment inflicted in furtherance of its policy, on the other, favors preservation of the contract over this exercise of the police power. Bearing on our view is the fact that the manner in which the police power has been wielded here is not the least restrictive means possible. See City of El Paso v. Simmons, 379 U.S. 497, 516-17, 85 S.Ct. 577 (1965).

Pomponio, 378 So. 2d at 780-82. Importantly, this Court was clear in pointing out that Florida's constitutional protections were less tolerant of contract impairment than were federal constitutional protections:

> Our conclusion in Yamaha that "virtually" no impairment is tolerable necessarily implies that some impairment is tolerable, although perhaps not so much as would be acceptable under traditional federal contract clause analysis.

Id. at 780. Under the Pomponio analysis, a critical concern becomes whether the "least restrictive means possible" was used in a statute to accomplish a permissible state goal. This very exacting criterion effectively restates the Yamaha prohibition against virtually any degree of contract impairment.

Later cases make clear that the Yamaha standard has not been repudiated by Pomponio, but merely recast in different terms to afford a practical means of assessing a statute subject to an impairment challenge. Thus, in Park Benziger & Co. v. Southern Wines & Spirits, Inc., 391 So.2d 681 (Fla. 1980), this Court refused to allow a statute to impair existing liquor distribution contacts. Citing both Yamaha and Pomponio, this Court refused to permit the state's police power regulating the liquor industry to override existing contractual obligations. Likewise, in State, Department of Transportation v. Edward M. Chadbourne, Inc., 382 So.2d 293 (Fla. 1980), the conceded state police power to prevent excess profits of state road contractors was not permitted to

override the sanctity of contractual obligations. In Edward M. Chadbourne, Inc., this constitutional prohibition was again recognized (post-Pomponio) as a virtual wall against impairment:

> Unfortunately, that part of the amendment which attempted to affect existing contracts flies into the wall of absolute prohibition. The fact that a law is just and equitable does not authorize its enactment in the face of a constitutional prohibition.
>
> This Court has generally prohibited all forms of contract impairment.

Edward M. Chadbourne, Inc., 382 So.2d at 297 (footnote omitted). Even though the Court noted that the act was a "noble and just attempt to" prevent excess and windfall profits, the act was nevertheless held to impair contracts unconstitutionally. The Court in conclusion adopted the reasoning of the dissent by Chief Judge Grimes in State, Department of Transportation v. Cone Brothers Contracting Co., 364 So.2d 482, 490-91 (Fla. 2d DCA 1978), reversed to conform to Chadbourne, 384 So.2d 154 (Fla. 1980). See also State Farm Mutual Automobile Insurance Co. v. Gant, 478 So.2d 25 (Fla. 1985) (Supreme Court's most recent impairment case, following Dewberry to protect insurance companies from statute impairing existing contracts).

The Department principally relies on two companion cases, Department of Insurance v. Teachers Insurance Co., 404 So.2d 735 (Fla. 1981), and United States Fidelity & Guaranty Co. v. Department of Insurance, 453 So.2d 1355 (Fla. 1984), in its

effort to uphold the contractual impairment effectuated by Section 66(1)-(3). The Department miscolors this Court's holding in Teachers Insurance Co., suggesting through selective quotation that excess or windfall profits are never protected by the constitutional prohibition against contract impairment. The Department ignores other parts of this opinion by Justice Overton which clearly demonstrate that even excess profits are protected from retroactive impairment if the insurer had no notice of existing laws which prohibited such profits:

> If the law existing when motor vehicle insurance contracts were entered into or renewed in 1977 or thereafter provided that the insurance premiums were the vested property of the insurers, then any retroactive divestment of those funds would be an impairment of contract as well.
>
> . . . .
>
> Thus, the 1977 law, as of its effective date of September 1, 1977, changed the nature of motor vehicle insurance ratemaking. As of September 1, 1977, insurers were put on notice that the rights to some premiums from contracts entered into or renewed after that same date may not vest for at least three years. . . .
>
> . . . . The 1977 law did not take effect until September 1, 1977. Prior to that date the insurers had vested rights in all profits realized, even excess ones, because there was nothing in the law to indicate otherwise.

Id. at 741-42 (emphasis supplied). In that case, because

insurers were placed on notice by a 1977 law that excess profits could be recaptured, no rights vested in profits after that time. However, prior to 1977, even excess profits could not be retroactively affected.

U.S.F. & G. v. Department of Insurance merely follows the rationale of Teachers Insurance Co., finding that no vested contract obligations ever arose because insurers were on notice from an existing law that automobile insurance excess profits "might be subject to refund orders." Id. at 1361. Therefore, the insurers "did not obtain a vested right to those funds". Id. (citation omitted). Since premiums were collected subject to the existing law disallowing excess profits, an amendment merely clarifying its operations did not impair contracts.

In the present case, insurers had no notice from any prior statute that special credits of a set percentage would be imposed. As the trial court observed,

> It cannot be persuasively argued that Plaintiffs were put on notice, prior to the passage of the act, that their contractual rights were in danger. This case is unlike United States Fidelity and Guaranty, supra, where the court held that a previous statute that had required insurance companies to issue refunds has served notice on the companies that profits from previous years might be subject to refund. 453 So.2d at 1361. The act in dispute in this case has no predecessor, and the substantial retroactive impairment effected by the Premium Refund Section of Sec. 66 comes entirely without prior notice.

App. B, Judgment at 41 (footnote omitted). Thus, even if the failure to impose the special credit would lead to extra profits for insurers, because no prior notice existed that premiums would be subject to a refund, insurers would clearly be entitled to fully retain existing premiums.

More importantly, however, the trial court specifically rejected the Department's factual position that insurers would even realize extra profits as a result of tort reforms installed by the Act, finding instead that these theoretical savings were purely "speculative" on the Department's part. App. B, Judgment at 42. In applying the Pomponio balancing test, the trial court considered three asserted state objectives for the special credit provision, and properly discounted each objective. The first purported objective of the special credit, as argued by the Department, is to assure that anticipated savings theoretically resulting from effects of the Act's tort reforms are passed on to commercial insureds. This objective, however, was found to be "speculative":

> The Defendants argued that this 10% rebate will be offset by an anticipated 10% reduction in losses and expenses as the result of the Act's civil law reforms. This argument, however, is speculative and what effect tort reforms will have on the insurance industry remains to be seen.

App. B, Judgment at 42.[3] This factual finding is amply supported by the record. The Deputy Insurance Commissioner, Gerald Wester, conceded that the Department had conducted no study of savings anticipated from tort reform, and had no real grasp of the actual amount of savings, if any. (TR IV, 690-92). Moreover, one of the Defendants' expert witnesses testifying on the effects of tort reform recognized that the effects on litigation of Chapter 86-160 would only be felt after some time. Since the Act contains a Sunset provision in Section 65 giving only 4 years of life to the Act, the task of accurately quantifying savings became even more difficult and less predictable. (TR VII, 1213-16).

The Department chooses to ignore the trial court's factual finding that anticipated benefits of tort reform were "speculative", and could not therefore support the special credit and refund provision. This factual finding is not subject to reexamination by the Department, and carries the weight of a jury verdict on appeal. See Marsh v. Marsh, 419 So.2d 629 (Fla. 1982). Findings of fact should not be disturbed on appeal unless there is no competent substantial evidence to sustain them. See Herzog v. Herzog, 346 So.2d 56 (Fla. 1977). It is not the function of an appellate court to reweigh the evidence or to

[3]This factual finding is directly contrary to the Department's representation that the trial court allowed insurers to "retain gains" resulting from tort reform. (DOI Brief at 62).

substitute its factual findings for the trial court's. Greenwood v. Oates, 251 So.2d 665 (Fla. 1971). Thus, the factual finding that anticipated savings from tort reforms were purely speculative must be accepted because it is supported by competent evidence.

The second objective advanced by the Department is to lower insurance rates which are perceived to be excessive. However, the factual basis for this objective was again rejected by the trial court:

> It should be noted at this point that Sec. 66(1)-(3) resulted from a generalized perception that commercial liability insurance rates were too high. There has been no finding, in fact, that such is the case or that any particular insurance company was charging excessive rates.

App. B, Judgment at 39. This factual finding was well supported by the record. The Deputy Insurance Commissioner, when explaining the reasons for the special credit, conceded that no evidence of excessive rates existed:

> A. That there is a general feeling that perhaps rates or premiums being charged in some situations are excessive.
>
> Q. But you had no evidence of that, did you?
>
> A. No, I didn't.

(TR IV, 688-89). The trial court's finding was also supported by the Department's prior, informal approval of existing rates, a fact which the trial court found significant in assessing this

purported objective of lowering excessive rates:

> The Court finds it to be significant that at the time the special credit was adopted by the Legislature, the insurers were using rates which had, if not the express approval of the Department, at least the Department's informal approval.
>
> . . . .
>
> Here we have a situation where the executive branch of government has acceded to (tacitly approved) an insurance rate, contracts of insurance have been negotiated at that rate and are in place and the legislative branch of government, acting on a generalized perception that the acceded-to rate was excessive, requiring that a portion of the bargained for contract benefits be returned to the policy holder. . . .

App. B, Judgment at 38-39. Finding no evidence of excessive rates and considering the Department's informal approval of existing rates, the objective of reducing excessive rates was rejected as being without basis.

The Department, relying on an unsupported legislative finding, again refuses to accept the factual finding of the trial court that there was no evidence of existing excessive rates. The trial court was certainly correct in examining the basis of this legislative finding, and rejecting it as being without factual support. This Court has often observed that legislative findings are subject to judicial scrutiny:

> The general rule is that findings of fact made by the legislature are presumptively correct. However, it is well recognized

> that the findings of fact made by the legislature must actually be findings of fact. They are not entitled to the presumption of correctness if they are nothing more than recitations amounting only to conclusions and they are always subject to judicial inquiry.

Moore v. Thompson, 126 So.2d 543, 549 (Fla. 1961) (quoting Seagram-Distillers Corp. v. Ben Greene, Inc., 54 So.2d 235, 236 (Fla. 1951)). A legislative finding of an economic emergency has been rejected when unsupported in fact:

> The Legislature cannot decide the question of emergency and regulation free from judicial review. The legitimacy of the conclusions drawn from the facts is a matter of consideration by the court.
>
> . . . .
>
> The method of reasoning apparently adopted consists of piling one supposition upon another and invoking the arbitrary dictum of legislative expressions as the only test of the truth of them.

State ex rel. Fulton v. Ives, 123 Fla. 401, 167 So. 394, 401 (1936). Thus, the trial court properly examined and rejected this legislative finding as being without factual support.

The third and most general objective of the special credit was purportedly to increase availability and affordability of commercial liability insurance. This was again rejected by the trial court:

> Premiums have already been paid and coverage remains largely in force. Future affordability and availability of commercial liability insurance will not be

> effected one way or another by requiring insurance companies to rebate premium dollars for policies written and in force before the effective date of Chapter 86-160.

Id. at 41. The special credit does not increase or ensure availability since all beneficiaries of the provision already have insurance. Likewise, affordability is not ensured since the insurance has already been purchased, and was thus, by definition, affordable. This final objective is thus rendered baseless due to the complete lack of correspondence between the special credit and the Act's announced goal of increasing the availability and affordability of liability insurance. See Ch. 86-160, §2, Laws of Fla.

In addition to the lack of substance to support the above three objectives of the special credit, the public purpose of this provision is suspect since only a limited group of businesses receive a benefit from the credit. Here, the benefited class of insureds is a selected group of "commercial" insureds, which excludes private, individual insureds. The average citizen receives no special credit rebate, while Florida's corporations and businesses do. This limited public benefit has been held to decrease the weight of the state's exercise of its police power:

> Appellees contend that the Act has a public purpose even though a limited number of commercial enterprises may benefit from its provisions. They concede

> that this legislation is not directed to the general public, and that the Act carries no guarantee that ultimate consumers of industrial users will benefit from price reductions ordered by the Commission. Although legislation is not necessarily invalid because it benefits only a limited group, the class of "public" affected by the Act is relevant when we are weighing an exercise of the State's police power against the impingement of contract rights. Town of Bay Harbor Islands v. Schlapik, 57 So.2d 855 (Fla. 1952).

United Gas Pipe Line Co. v. Bevis, 336 So.2d 560, 563 n.12 (Fla. 1976) (holding that a statute giving the Public Service Commission authority to reduce existing contract rates for natural gas unconstitutionally impaired contracts). In United Gas Pipe Line Co. this Court further noted that the Legislature could not reform existing contracts to order refunds since this also intruded into the judicial process:

> We have generally prohibited all forms of contract impairment. E. g., Yamaha Parts Distr. Inc. v. Ehrman, Fla., 316 So.2d 557 (1975); Fort Lauderdale v. State ex rel. Elston Bank & Tr. Co., 125 Fla. 89, 169 So. 584 (1936). The Legislature's enactment here is really designed to offer a form of relief which is similar to that historically provided by courts of equity for unconscionable contracts. See 1 Corbin on Contracts § 128 (1963). In those situations, however, courts will invalidate the entire contract rather than reform any particular contract term. It follows, therefore, that a legislative exercise, let alone delegation, of the power to modify "discriminatory" or "unreasonable" contract terms is doubly defective, being an impermissible

> impairment of contracts and an invalid intrusion into the powers of the judiciary.

Id. at 564 n. 18. Because only a limited class of commercial insureds rather than the general public is benefited by this intrusion into contract rights and judicial powers, the state's exercise of police power carries significantly less weight.

Balanced against these questionable state objectives and purposes is the significant and substantial impairment of CIGNA's existing insurance contracts. CIGNA is now required to pay back millions of dollars of premiums it has lawfully collected under contracts entered long before this Act became law. Furthermore, this refund affects all commercial liability insurance contracts, not merely a few, discrete cases as did the stacking provisions considered in Dewberry. The impairment here is plain and it is severe.

Nor does the contestability provision of Section 66(3) alter the significance of this impairment. That provision attempts to offer some minimal due process protections regarding the special credit. But merely because some margin of due process is afforded does not, in itself, alleviate the contract impairment. The Legislature has no ability retroactively to change contractual obligations simply by offering some marginal due process protections before the impairment of contractual obligations is completed. Moreover, the expense and burden of

the contestability provision impose alternative contractual burdens which are significant in themselves ($150,000 in CIGNA's case alone). Also, even if CIGNA chose to contest the special credit, its chances of showing "clearly inadequate" rates are, at best, speculative. The Legislature has no constitutional ability to strip CIGNA of vested contract rights and to substitute a procedure whereby CIGNA may be able to reclaim these rights at significant costs. Surely, this is impairment of contracts in the guise of procedural protection, but, nevertheless, is still a prohibited contractual impairment.

Furthermore, because the Department could increase special credits beyond the statutory percentage, CIGNA is further deterred from risking a special credit contest. Finally, the required notice to every individual policyholder is a costly deterrent, both in terms of actual costs and in terms of customer relations. Thus, the burdens imposed on CIGNA's insurance contracts, including costs to implement the special credit, are not alleviated by the contestability requirements, which are in themselves both severe obstacles to regaining vested rights as well as speculative and uncertain procedures.

CONCLUSION

The impairment of insurance contracts is substantial; the interest of the state in ordering refunds to a limited class of businesses is suspect. As the goal of the Act is to enhance

affordability and availability of liability insurance, the special credit is hardly the "least restrictive" means of accomplishing that goal, as Pomponio requires. Indeed, the special credit fails logically to further this goal. Applying Pomponio's standards, it becomes evident that this contractual intrusion is unwarranted, and does not even approach that very limited class of permissible impairments of contracts. This Act runs directly into the wall of constitutional prohibition and must, therefore, fall. Accordingly, the trial court's holding that Section 66(1)-(3) unconstitutionally impairs insurance contracts entered into prior to the Act's effective date, which is amply supported by competent substantial evidence, should be affirmed.

Respectfully submitted,

CARLTON, FIELDS, WARD, EMMANUEL
SMITH, CUTLER & KENT, P.A.

By: Alan C Sundberg

ALAN C. SUNDBERG
CYNTHIA S. TUNNICLIFF
F. TOWNSEND HAWKES
410 First Florida Building
Post Office Drawer 190
Tallahassee, Florida 32302
(904) 224-1585

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished, by Federal Express*, U.S. Mail** or Hand Delivery***, this 20th day of January, 1987, to:

C. DUBOSE AUSLEY, ESQ.***
WILLIAM M. SMITH, ESQ.
Ausley, McMullen, McGehee, Carothers & Proctor
227 South Calhoun St.
Post Office Box 391
Tallahassee, FL 32302

MITCHELL D. FRANKS, ESQ.***
Chief Trial Counsel
JAMES W. SLOAN, ESQ.
Asst. Attorney General
Dept. of Legal Affair
The Capital, Suite 1501
Tallahassee, FL 32301-8048

THOMAS M. ERVIN, JR., ESQ.***
ROBERT KING HIGH, JR., ESQ.
Ervin, Varn, Jacobs, Odom & Kitchen
305 South Gadsden Street
Post Office Box 1170
Tallahassee, FL 32302

DOMINIC M. CAPARELLO, ESQ.***
Messer, Vickers, Caparello, French & Madsen
701 First Florida Bank Bldg.
Post Office Box 1876
Tallahassee, FL 32302

FREDERICK B. KARL, ESQ.***
THOMAS J. MAIDA, ESQ.
Karl, McConnaughhay, Roland Maida & Beal, P.A.
Post Office Drawer 229
Tallahassee, FL 32302-0229

JOHN E. THRASHER, ESQ.**
DONALD WEIDNER, ESQ.
Florida Medical Association
760 Riverside Avenue
P.O. Box 2411
Jacksonville, FL 32203

JAMES A. DIXON, JR., ESQ.***
Dixon, Dixon, Hurst & Nicklas
902 North Gadsden St.
Post Office Box 13767
Tallahassee, FL 32317-3767

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

W. DONALD COX, ESQ.**
Fowler, White, Gillen, Boggs, Villareal & Banker, P.A.
P.O. Box 1438
Tampa, FL 33601

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

VINCENT J. RIO, ESQ.*
Taylor, Day, Rio & Mercier
121 West Forsyth Street
Jacksonville, FL 32202

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

P. BRUCE CULPEPPER, ESQ.***
Culpepper, Pelham, Turner & Mannheimer
300 East Park Avenue
Tallahassee, FL 32302-3300

ROBERT P. SMITH, JR., ESQ.***
Hopping, Boyd, Green & Sams
420 First Florida Bank Bldg.
P.O. Box 6526
Tallahassee, FL 32302

DOUGLAS A. MANG, ESQ.***
Mang & Stowell, P.A.
740 Barnett Bank Bldg.
P.O. Box 1019
Tallahassee, FL 32302

DAVID A. YON, ESQ.***
DANIEL Y. SUMNER, ESQ.
Office of Legal Services
Department of Insurance
413-B Larson Building
Tallahassee, FL 32301

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

D. STEPHEN KAHN, ESQ.***
Kahn & Dariotis, P.A.
227 East Virginia Street
Tallahassee, FL 32301