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SUPREME COURT OF FLORIDA

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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.

REPLY BRIEF OF APPELLANT
STATE FARM INSURANCE COMPANIES

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ARGUMENT

I. APPELLANT'S REPLY TO POINT 5 OF APPELLEE DEPARTMENT OF INSURANCE'S ANSWER BRIEF (Constitutionality of Retrospective Deficit Assessment Coverage)

Appellee Department of Insurance argues at pages 40 through 44 of its brief that retrospective deficit assessment coverage, as enacted by Section 44 of Chapter 86-160, does not constitute a "taking" in an eminent domain sense, and does not violate the due process clauses of the State and Federal Constitutions because it is rationally related to increasing the availability and affordability of "insurance." These contentions will be discussed separately:

A. RETROSPECTIVE DEFICIT ASSESSMENT COVERAGE EFFECTUATES AN OBVIOUS TAKING OF DOLLARS IN WHICH STATE FARM HAS A SIGNIFICANT INTEREST.

In opposition to Appellant's "taking" argument (pages 17 through 26 of State Farm's Initial Brief) the Department initially argues, that (1) State Farm cannot "identify any specific property being 'taken.'"; (2) State Farm makes much "noise" about assessments but can not demonstrate that it will ever suffer any economic losses as a result of retrospective deficit assessment coverage; and (3) it is extremely unlikely that State Farm would ever be required to pay losses as a result of the operation of retrospective deficit assessment coverage. Each of these assertions are misleading and incorrect.

(1). THERE IS AN OBVIOUS "TAKING"

The Department's assertion that State Farm can not identify "any specific property being 'taken,'" is in a sense correct, but it is misleading. It is obvious that we do not know the serial numbers of the dollars that will be taken, but it is equally obvious that there will be a net taking of $5.00 for every $1.00 in "premium" the FMMJUA receives for retrospective deficit assessment coverage. As summarized in the Statement of Facts in State Farm's Initial Brief, for every $1.00 of premium received, the FMMJUA will be required to immediately pay $6.00 for losses that have already occurred. The occurrence of an actual taking is indisputable.

(2). THE DEPARTMENT'S ASSERTION THAT STATE FARM WILL NOT SUFFER ECONOMIC LOSS AS A RESULT OF RETROSPECTIVE DEFICIT COVERAGE IS SIMILARLY INCORRECT AND MISLEADING.

Initially it should be noted that the Department's own witness acknowledged that there is surplus in the Florida Medical Malpractice Joint Underwriting Association (hereinafter FMMJUA) and that the losses on deficit assessment coverage decrease that surplus. Tr. Wester 618, Lines 17 through 20. He also agreed that decreases in surplus increase the likelihood of future assessment of insurers such as State Farm. Tr. Wester 619 Lines 1 through 4; Tr Wester 617 Lines 13 through 15. It is further obvious that if the surplus is not available to pay losses in deficit years, its

absence will increase the amount of those deficits and of State Farm's assessments.

More importantly, Mr. Wester acknowledged that "on a projected basis, there are indications that they [the FMMJUA] are going to need to roll forward some surplus..." to fund future losses of that organization. Tr. Wester 615, Line 14. Though he initially attempted to belittle these acknowledged projected losses as "speculation" because they have not yet been paid out, (Tr. Wester 615) he later acknowledged that they are no less real than paid losses, and are estimates of payouts to be made in the future for losses that have already occurred. Tr. Wester 615, Line 25 through 616, Line 7.

In summary, Mr. Wester admits that based on presently estimated future payouts for losses that have already occurred there will be a need to roll forward surplus; and that losses of the FMMJUA on retrospective deficit assessment coverage will decrease the surplus available to roll forward to pay losses, and will therefore increase both the likelihood and magnitude of assessments to be levied against State Farm in the future.

(3). <u>APPELLEES HAVE INADVERTENTLY MISCHARACTERIZED MR. WESTER'S TESTIMONY AS TO THE LIKELIHOOD OF FUTURE ASSESSMENTS.</u>

Mr. Wester did not testify at Pages 610-611 (or anywhere else) that it is "extremely unlikely that State Farm or any other insurer would <u>ever</u> be required to pay any losses as a result of the operation of Section 44," (emphasis in

original) as asserted by Appellees at Page 41 and in other portions of their brief. Placed in context, Mr. Wester was speaking <u>only</u> of assessments for FMMJUA fund year 1982/83. The only germane colloquy at these pages includes:

BY MR. YON:

Q. Okay. Now you have heard some testimony about how much <u>the assessments</u> were, and how the F.M.M.J.U.A. had to pay for <u>those assessments</u>?

A. Yes.

Q. Is there any, or have any of the plaintiffs in this case or any of the insurers in this case been required to, to contribute or pay any of <u>those assessments</u>?

* * *

Q. Is there any significant likelihood that they will ever be required to pay any of <u>that money</u>?

A. <u>For that year</u>, no.

Q. All right.

(Emphasis added.) The only specific assessments which were in evidence were the assessments rendered by the Florida Patients' Compensation Fund (FPCF) during the year 1985 related to deficits arising from FPCF fund year 1982/83. Much of these assessments were paid in 1985 by the FMMJUA on behalf of doctors who had purchased <u>prospective</u> deficit

assessment coverage in 1982.[1] State Farm freely acknowledges that there was just enough surplus in the FMMJUA available for fund year 1982/83 to pay those losses; so that State Farm will not be required to pay any of "that money" for "that year." As outlined above, and in State Farm's initial Brief, the further unconstitutional retrospective depletion of surplus resulting from retrospective deficit assessment coverage does, as acknowledged by the Department, increase the likelihood and amount of assessments that State Farm will be required to pay for other years in the future. Mr. Wester acknowledged this operation of retrospective deficit assessment coverage as outlined above. The portions at Pages 610-11 deal only with 1982/83 and assessments "for that year,"; and such testimony is irrelevant to the effect of retrospective deficit assessment coverage on other years.[2]

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[1] Even though the original deficit assessment coverage as enacted by Chapter 82-391, Laws of Fla., 1982 depleted FMMJUA surplus and adversely affects State Farm, State Farm is not challenging the original statute because it was enacted prospectively in 1982 prior to the FPCF assessments that were levied in 1985. State Farm is challenging only the further depletion that will occur if retrospective deficit assessment coverage is required to be written after the assessments were levied.

[2] The Department's apparent assertion that State Farm has no interest in the surplus of the FMMJUA, is further inconsistent with the basic nature of the Joint Underwriting Plan mandated by Section 627.351(4) Fla. Stat. (1986 Supp.) Review of the entire statute demonstrates that the insurers are the "joint underwriters" with an inherent interest in the surplus of their joint plan. Indeed, were the surplus of the organization not "rolled forward" to alleviate future assessments, the insurers could claim entitlement to net profits accruing from a particular year after payout of required losses, expenses, policyholder dividends etc.

In closing on this point State Farm would note that the Department's arguments amount to a shell game in time. They assert that we can not sue now even though (1) there is a present taking of money from the FMMJUA; (2) we are compulsory members of that organization with an interest in its funds; and (3) this FMMJUA taking increases the likelihood and amount of assessments for deficits that are projected for the future. If their argument is accepted and the FMMJUA is required to write this so-called insurance on losses that have already occurred, then when State Farm is assessed in future years for the presently projected deficits it will be too late for State Farm to sue anyone to recapture that surplus.[3]

B. <u>RETROSPECTIVE DEFICIT ASSESSMENT COVERAGE IS NOT "REASONABLE REGULATION" WHICH CAN SURVIVE EMINENT DOMAIN OR DUE PROCESS ANALYSIS.</u>

The Department's remaining germane arguments[4] assert

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[3] It is also notable that the Florida Legislature must believe that there is a significant possibility of FMMJUA deficits, or it would not have made provision for the funding of such deficits via rolling surplus forward instead of distributing it as profits, and via assessments against both insureds and insurer members of that organization. Section 627.351(4)(e), Fla. Stat. (1986 Supp.)

[4] At pages 41 and 42 the Department discussed irrelevant amendments to Section 627.351, including the provision of "tail coverage" to certain insureds. This Appellant has consistently stated that it is presently complaining only of the retrospective deficit assessment coverage provision within Section 44, and the discussion of "tail coverage" is a paper tiger not involved in the fight.

Similarly, the argument that the legislature increased the accessibility of physicians to 200% of their FPCF premium "at the same time" it provided assessment coverage is both irrelevant and just plain wrong. If Appellee is implying

that retrospective deficit assessment coverage is justifiable on the grounds that it attempts to correct a legislative error by allowing certain physicians to purchase the coverage after the covered losses have occurred.

State Farm's initial brief adequately addresses the points (1) that there is no evidence to suggest a defect or error that needs to be corrected;[5] (2)that even if there were such an error, the legislature could not retrospectively cure this defect at the expense of the members of the FMMJUA;[6] and that even if there is a laudable public purpose, this "taking" for that purpose requires full compensation under the eminent domain clause.[7]

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that there was a legislative "quid pro quo" to increase physician assessability only on the condition that that assessability could be passed on to the FMMJUA, this is incorrect. Assessability was increased to 200% in the regular session of the 1982 legislature by Chapter 82-236. This was totally independent of enactment of deficit assessment coverage, which was not conceived until the special session in June of 1982, via Chapter 82-391, Laws of Florida.

[5] The referenced testimony of Mr. Wester as to there having been in error in a prior enactment was objected to, with that objection being sustained. Further, the assertion in the brief that Mr. Wester was knowledgable as to legislative intent because he was the "chief lobbyist" for the Department is totally irrelevant. Not even a legislator (much less a lobbyist) is permitted to speak for the intent of the legislature. McLellan v. State Farm Mutual Automobile Insurance Company, 366 So. 2d. 811 (Fla. 4th DCA 1979).

[6] See Pages 31 through 33 of State Farm's Initial Brief.

[7] See Pages 23 through 31 of State Farm's Initial Brief.

II. APPELLANT'S REPLY AS TO POINT 1 OF APPELLEES' BRIEFS (Retrospective Deficit Assessment Coverage and the Single Subject Rule.)

The Department affords retrospective deficit assessment coverage only passing reference in its "single subject" analysis, stating at Page 19:

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

This analysis is clearly deficient. Neither evidence nor argument of counsel throughout months of litigation have gone beyond the naked assertion that retrospective deficit assessment coverage is somehow "clearly connected" to something else in the bill. Appellees have not yet devised even a colorable argument as to how this provision naturally or functionally interrelates with any other provision of the bill to address the commercial liability insurance crises allegedly giving rise to the Act.[8]

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[8] The Department contends at Page 1 of its brief and repeatedly argues that Chapter 86-160 is a comprehensive response to a "complex economic and public crisis," of escalating costs and concurrent restrictions and availability of insurance. If the Department is urging that this provision makes available insurance or some functional alternative to it, they disregard both the record and their own expert as to the purpose of insurance. Footnote 14, infra.

For the first 10 pages of its brief the Department describes its view of how the legislative approach consists of long term insurance regulatory reform, civil litigation reform, temporary insurance market adjustment and control, and an academic task force study; and summarizes the evidence which it contends supports the need and appropriateness of the various specific provisions of the bill. Conspicuously, not a scintilla of evidence is proposed to show how retrospective deficit assessment coverage contributes to solving the crisis, either directly, or through any of the 4 specified areas. It certainly is not "long-term" insurance regulatory reform, nor is it asserted to be.[9] It is equally clear that it has nothing to do with civil litigation reform, or with temporary insurance market adjustment and controls;[10] or with the academic task force study.

The cursory reference to retrospective deficit assessment coverage contained in the Answer Brief of Appellee Florida Medical Association is also a mere naked assertion, unsupported by either evidence or logic. That Brief states

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[9] Retrospective deficit assessment coverage has nothing to do with regulating anything and is certainly irrelevant to the long term prospective "reforms" argued. Even if it is somehow justifiable public policy, it can only be characterized as retrospectively and on a short term basis (indeed a one time basis) redressing an allegedly unfair situation that occurred years ago.

[10] These controls are described at Page 4 of the Department's Brief as providing immediate relief and orderly transition from one system of rate regulation to the more comprehensive system contained in the bill. Retrospective deficit assessment coverage has nothing to do with this.

at Page 11:

> "Regardless of any other problems Section 44 may create, it clearly <u>does</u> deal with liability insurance coverage. It is germane to the general subject covered by other sections of the Act and is properly within the broad single subject chosen by the legislature."

This naked and totally unsupported assertion of germanity closely parallels the FMA's obvious disdain for the one subject rule itself.[11] State Farm requests that this Court resist such urgings to judicially delete an important constitutional safeguard.

As to almost every other portion of the legislation Appellees have at least attempted some argument that such provision somehow addresses the <u>present crisis</u> in commercial liability insurance. Indeed it is only this present crisis that is repeatedly urged as the reason the legislation needed to be so "comprehensive." As to retrospective deficit assessment coverage, however, even proponents can only urge that it is aimed at an alleged "defect" in a prior law. <u>The critical factor is that even if they are correct,[12] such defect and the remedy of it have absolutely nothing to do</u>

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[11] At Page 7 of the FMA Brief the Court is urged to regard <u>any</u> argument based on the one subject rule as that of a "desperate advocate who lacks a sufficiently sound and persuasive one."

[12] It should also be noted that if Appellees are not correct as to due process or eminent domain arguments, the striking of the provision in no way obviates the one subject violation. The one subject rule is clearly aimed at protecting the integrity of the legislative process, and would be violated even if the offending portion were independently unconstitutional on other grounds.

with comprehensively[13] and prospectively[14] addressing the present crisis. As stated by the Florida Supreme Court in striking legislation in Colonial Investment Company v. Nolan, 100 Fla. 1349, 131 So. 178, 181 (Fla. 1930):

> "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 then two...."

(Emphasis added.)

In our case, the "working feature" connecting retrospective deficit assessment coverage to the remainder of the bill is not just extremely tenuous, it is totally absent. Retrospectively curing the alleged past "defect" and the present commercial liability insurance are totally unrelated subjects. Even if the remainder of the legislation works

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[13] The various Appellees' arguments pertaining to State v. Lee, 356 So. 2d 276 (Fla. 1978), and Chenoweth v. Kemp, 396 So. 2d 1122 (Fla. 1981) can have no application to retrospective deficit assessment coverage. In those cases the Court found that each segment of the enactment examined was necessary to comprehensively deal with the crises of automobile insurance and medical malpractice insurance respectively. There can be no assertion that retrospective deficit assessment coverage is a provision necessary to deal with the commercial liability insurance crisis of 1986.

[14] Contrary to FMA's assertion at Page 7 of its brief,it is not just State Farm that "says that real insurance always looks forward...." The evidence was unanimous on this point as summarized at Pages 8-9 and Page 17 of State Farm's Initial Brief. FMA's own expert 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.)

towards solving the commercial liability insurance crisis,[15] and even if retrospective deficit assessment coverage is valid remedial legislation, there is no natural, logical, or intrinsic connection between these two subjects, and the entire Act must fall.

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[15] State Farm adopts the arguments contained in the Briefs of Appellants AIA and the CIGNA Group as to the violations of the one subject rule posed by other portions of the legislation, and as to other respects in which Chapter 86-160 violates various provisions of the Florida Constitution.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by U. S. Mail this 19th day of January, 1987, to the following:

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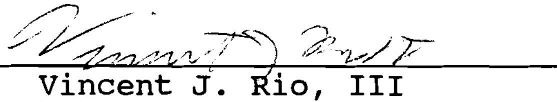

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