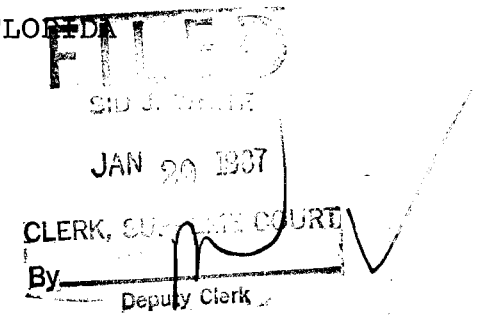
OA 1-20-87 35

IN THE SUPREME COURT OF FLORIDA



ROBERT SMITH, et al.

Appellants,

vs.

CASE NO. 69,551

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

Appellees.

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

REPLY BRIEF OF APPELLANTS, AMERICAN INSURANCE ASSOCIATION, NATIONAL ASSOCIATION OF INDEPENDENT INSURERS, ALLIANCE OF AMERICAN INSURERS, et al.

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FIRST ISSUE

CHAPTER 86-160, LAWS OF FLORIDA, IS VOID, BECAUSE IT VIOLATES ARTICLE III, SECTION 6 OF THE CONSTITUTION OF FLORIDA.

The arguments of the Department of Insurance and the other Appellees on this point all reach the same incorrect conclusion. They all conclude that the opinions in State v. Lee, 356 So.2d 276 (Fla. 1978) and Chenoweth v. Kemp, 396 So.2d 1122 (Fla. 1981) justify the validation of Chapter 86-160, Laws of Florida. These Appellants disagree and assert that those opinions would have to be dramatically enlarged and expanded to form the basis for upholding the act before the Court in this case.

There is little disagreement among the parties about what evils Article III, Section 6, is designed to prevent. Similarly, the general principles articulated by the Court in previous decisions are recited in all briefs. It is in the application of those principles and the interpretation of Lee and Chenoweth that the divergence occurs.

In both Lee and Chenoweth the Court was concerned with particular, limited types of insurance that related to tort law. Automobile insurance and medical malpractice insurance are di-

rectly affected by tort law, and the Court, in those cases, held they are related. But nothing in either of those opinions suggests Article III, Section 6 of the Constitution permits the joining of insurance proposals that are unrelated to tort law with tort reform provisions.

Moreover, it is absurd to suggest that because the Court has upheld two comprehensive legislative enactments that have certain discrete insurance provisions and certain discrete tort reform provisions the Legislature may thereafter, and for evermore, properly link any kind of insurance-related provision to any kind of tort provision. The opinions in Lee and Chenoweth do not stand for such a proposition and certainly do not commit the Court to rubber stamp every legislative logrolling package that bears the label "insurance and civil actions."

Those two opinions do not invalidate Article III, Section 6. It remains a viable, meaningful constitutional restraint placed on the Legislature by the people of the state. Each time the Legislature gathers up diverse and unrelated provisions and attempts to package them together, the package ought to be carefully scrutinized by the Court to be certain the limits have not been exceeded.

Appellants respectfully suggest that in this instance the Legislature has exceeded constitutional limits and that the

Circuit Court inappropriately stretched Lee and Chenoweth to uphold Chapter 86-160.

These Appellants did not challenge Chapter 86-160 on the grounds that the subject expressed in its title was too restrictive. That is the type of attack made in the case cited by Appellees, Colonial Inv. Co. v. Nolan, 100 Fla. 1349, 131 So. 178 (Fla. 1930); and in other similar cases, such as, Ex parte Knight, 52 Fla. 144, 41 So. 786 (Fla. 1906); and Williams v. Dormany, 126 So. 117 (Fla. 1930). We concede that the phrase accepted by the lower court, "insurance and civil actions," is about as big a net as the Legislature could have fashioned.

The contention is that in this situation in which the Legislature opted to define the subject it was legislating, the Court should look to that provision in the body of the law and accept it for review purposes. This approach is consistent with the approach taken in Lee and Chenoweth, Supra, in which the Court went to the body of the acts to determine whether their provisions were property connected.

Moreover, at page 15 of Appellant's initial brief we assert the invalidity of a subject as broad as "insurance and civil actions."

The constitutional proscription is stated in two parts. The first is related to the body of the law:

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

while the second is related to title:

> . . . and the subject shall be briefly stated in the title.

(emphasis supplied).

Thus, the law is invalid if (a) the body of the law embraces more than one subject and matter properly connected thereto; or (b) if the title does not fully express the subject. Certainly where both the title and the body contain more than a single subject and matter properly connected therewith, the law fails. See Colonial, Supra. These Appellants brought their challenge under (a) above.

If Article III, Section 6, can be construed to authorize the Legislature to write a subject in the title in extremely broad terms and then gather together under such an umbrella diverse and unconnected matter, simply because it fits under the umbrella, the result will be ludicrous. In that situation the Legislature could say in the title that the subject is "government" and then include in the body provisions of criminal law, road building, education, appropriations, insurance, sovereign immunity, taxation, and every other activity of all three branches of government.

Here, as has been argued, the Legislature announced in plain language a subject within the permissible limits of Article III, Section 6, then added matters not properly connected. The defect is not cured by an overly broad phrase placed in the title.

Appellees are correct in their contention that once the subject is identified, other matters are required only to have the requisite proper connection with that subject. But this necessarily takes the argument back to the identification of the subject. Is it the overly broad phrase found only in the title, or is it the subject identified by the Legislature?

The subject is "liability insurance and tort reform." All other matters must be related to liability insurance and/or tort reform. In the initial brief Appellants have identified many of the provisions that fail this test.

Appellees lightly dismiss the significance of Fine v. Firestone, 448 So.2d 984 (Fla. 1984) and Evans v. Firestone, 457 So.2d 1351 (Fla. 1984). The opinions in those cases were handed down long after Lee and Chenoweth, and manifest an awareness that there must be some limitation on what can be offered to the public in one proposal.

Certainly there are differences between the legislative and initiative processes, but there are significant similarities in

the words the people have chosen to write into the two provisions of their constitution. Does "single subject" mean something different in Article XI, than in Article III? Does "matter related thereto" take on a totally different meaning because "properly" is used in Article III, while "directly" is found in Article XI? Shouldn't words used in the Constitution have the same meaning whereever used?

Appellants, acknowledging the differences, suggest that the Fine and Evans opinions ought to be considered by the Court in its revisitation of Lee and Chenoweth, made necessary by this case.

Appellees' cursory treatment of Appellants' specific objections is both inappropriate and incorrect. (Department's Answer Brief at pgs. 18-20). Self-insurance, for example, does not become "insurance" or even connected to "insurance" simply because Appellees say it does. Self-insurance is not insurance, because it is by its terms non-insurance, and it is not within the statutory definition of insurance.

Neither can the other unrelated and unconnected matters be made relevant and/or connected by saying they are. Many of those matters do not even fall within the four broad categories or parts of the law identified by Appellees at pages two through five of their brief. The unrelated and unconnected provisions

are not "long-term insurance reform," or "civil litigation reform," or "temporary insurance market adjustment and control," or "continued Academic Task Force study." They are purely and simply extraneous matters that were "logrolled" into a bill in an effort to help it pass.

These appellants concur with the arguments on this point contained in the briefs of CIGNA and State Farm.

The Legislature perceived a crisis in the availability and affordability of commercial liability insurance and embarked on an effort to solve the crisis. Along the way, as often happens, matters were written into the bill that are unrelated and unconnected to either the goals or the subject identified. Anytime this occurs, the Legislature should be reminded of its constitutional limitations and its product should be invalidated.

SECOND ISSUE

SECTION 66 VIOLATES THE CONTRACTS CLAUSE AND THE DUE PROCESS AND EQUAL PROTECTION PROVISIONS OF THE CONSTITUTION

AIA asserts in its initial brief, as its second issue, that Section 66 violates the contracts clause and the due process and equal protection provisions of the Constitution. The Department responded to AIA's equal protection and due process arguments under its "POINT VI" while responding to AIA's contract clause argument in the Department's "CROSS-APPEAL POINT I." In this section, AIA will both reply to the Department's "POINT VI" and answer the Department's CROSS-APPEAL ARGUMENT.

At the outset, one glaring inaccuracy in the Department's brief must be brought to the court's attention. At page 46 of its brief the Department asserts that the Appellants have not "renewed their challenge" to the rate freeze embodied in Section 66(4). That statement is incorrect. To the contrary, AIA asserted in its initial brief that Section 66, taken in its entirety, violates fundamental constitutional provisions which guarantee due process, equal protection, and freedom from the impairment of contracts. The constitutional flaws of Section 66 cannot be fully understood or appreciated without due consideration of the interrelationship of the special credit or refund,

the rate freeze, the 1984 rate rollback, and the prohibition against cancellation and nonrenewal of contracts. AIA addressed in its brief the invalidity of Section 66 as a whole. However, specific comments were directed to the rate freeze at pages 26, 29, 31, and 32.

The Department accuses Appellants of advancing "strained constructions" of Section 66. In truth, these Appellants have constructed nothing. Rather, Appellants have taken the statute to mean what it says, according due weight to its plain and unambiguous language, based upon the assumption that the Legislature knew the plain and ordinary meaning of words used in the statute. Citizens of State v. Public Service Commission, 425 So.2d 534 (Fla. 1982). Brooks v. Anastasia Mosquito Control District, 148 So.2d 64 (Fla. 1st DCA 1963).

In reality, it is the Department of Insurance which has argued for strained constructions of this statute. Throughout this case, the Department seems to have taken the view that if the plain meaning of a statute leads to an unconstitutional result, the Department is at liberty to alter the meaning and intent of the statute to yield the result it desires. Nowhere is this attitude more apparent than at page 52 of the Department's brief, where it is said: "The Department's construction of Section 66(3) and (6), therefore, is entitled a great weight and should not be overturned unless shown to be clearly erroneous."

These Appellants have requested a review of the facial validity of the statute by the judicial branch of government. The Department's construction of the statute is entitled to no greater weight than the interpretation of these Appellants. It is not the Department's interpretation which is hereunder review, but the interpretation of the trial court.

Administrative agencies are not empowered to render decisions on the facial constitutionality of statutes. The power, authority and jurisdiction over such weighty matters is vested in judicial tribunals. We are not here dealing with a situation where a rule adopted by an administrative agency is challenged simply on the grounds that the authorizing statute is an unlawful delegation of legislative power because it lacks sufficient standards and guidelines. Rather, this is an attack upon the facial validity of the statute based upon allegations of the violation of fundamental notions of equal protection, due process, and freedom from the impairment of contracts. Thus, this court is free to interpret and construe the statutes under review unfettered by the Department's tortuous interpretation of Section 66.

A. Section 66 is an Unconstitutional Impairment of Contracts.

Under the three part balancing test articulated by the Florida Supreme Court in United States Fidelity & Guaranty

Company v. Department of Insurance, 453 So.2d 1355 (Fla. 1984), the court must examine (1) whether the law has, in fact, operated as a substantial impairment of a contractual relationship and, if so, (2) the State must show that there is a significant and legitimate public purpose behind the regulation. If such a purpose is shown to exist, the court must then examine whether the impairment is based on "reasonable conditions" and is "of a character appropriate to the public purpose justifying the adoption of the legislation." In its brief, the Department seems to pay little heed to the issue of whether the statute operates, in fact, as a substantial impairment of these insurers' contractual relationships. That is not surprising in light of the fact that the special credit will require the insurers to regurgitate some $140,000,000.00 of premiums collected by the companies. Instead, the Department chooses to emphasize that the so-called "tort reforms" will save the insurers in loss costs sufficient sums to cover the money they will have to refund to policyholders.

The Department's naked assertion that the Legislature estimated that the tort reforms will result in a savings of at least ten percent is totally unsupported by the evidence. In fact, in the legislation there was no linkage at all.

The insurance companies collected their premium dollars in good faith reliance on the expectation that they would be per-

mitted to keep that money in return for providing insurance to policyholders. They had no reason to expect that along would come the Florida Legislature and require them to return part of the money after the fact. The insurers had a vested right in those premiums, a right which was unreasonably abrogated by the Legislature.

The Department apparently misunderstands this Court's holding in Pomponio v. Claridge of Pompano Condominium, Inc., 378 So.2d 774 (Fla. 1979). In Pomponio, the Supreme Court once again affirmed the "well accepted principle that virtually no degree of contract impairment is tolerable in this State." 378 So.2d 780. Still later, in State v. Edward M. Chadbourne, Inc., 382 So.2d 293, 297 (Fla. 1980), the Supreme Court said that it "has generally prohibited all forms of contract impairment."

It is interesting that the Department relies so heavily upon the court's decision in United States Fidelity & Guaranty Company v. Department of Insurance, 453 So.2d 1355 (Fla. 1984). There, U.S.F. & G. challenged the retroactive application of the motor vehicle excess profits law. The Department ignores significant factual distinctions between U.S.F. & G. and the present case. In U.S.F. & G., the original version of the motor vehicle excess profits law was declared unconstitutional. It was subsequently renacted by the Florida Legislature. The

second version of the excess profits law was then challenged in U.S.F. & G. There, the Supreme Court found that the retroactive application of the excess profits law was reasonable because the insurer was placed on notice by the unconstitutional version of the law that it might be required to refund excess profits in the future. In the present case, the insurance companies had absolutely no prior warning that they might be required to regurgitate premiums retroactively to policyholders. Parenthetically, it should also be noted that the trial court said that there was no finding that any insurer was charging excessive rates. (Final Judgment, at pgs. 39).

The Department also seems to ignore the fact that the compulsory continuance of coverage deprives the insurers of one of the most basic of contractual freedoms -- the right to terminate a contract in accordance with its terms or to refuse to renew it. Section 66(7) abrogates that fundamental contract right. It compels insurers to continue coverage in effect or to renew coverage, at a frozen rate, with the certain prospect that a large portion of the premium dollars they collect will be subject to compulsory regurgitation. All of this clearly violates the insurers rights to be free from contract impairment.

B. Section 66 Violates Fundamental Notions of Due Process and Equal Protection.

After Section 66(1) requires insurers to regurgitate retroactively a significant part of premiums collected, it then purports to provide some relief in extraordinary cases. Section 66(2) permits relief to insurers whose financial solvency would be impaired by implementation of the special credit. Section 66(3) affords relief from the special credit to insurers who can prove that implementation of the special credit will result in "clearly inadequate" rates.

The Department protests that the insurers are not required to prove "clear inadequacy" before they are permitted some measure of relief from the special credit. Rather, the Department says, it must simply review filings under Section 66(3) to insure the insurers will earn a reasonable rate of return. The statute does not say that insurers are excused from implementing the special credit if its application will result in insurers not earning a reasonable rate of return. Rather, it provides an "escape hatch" if, and only if, the insurers can demonstrate that the special credit will result in clearly inadequate rates.

The Department advances a similar argument with regard to Section 66(5) and (6). The Department's argument defies the plain language of the statute. Section 66(5) requires insurers to rollback their commercial liability insurance rates to the

rates in effect on January 1, 1984, with adjustments for changes in coverage and to account for changes in investment income. Section 66(5) specifically forbids insurers from adjusting these rates to account for loss experience occurring since January 1, 1984; this despite the fact that even the Department's own witnesses acknowledged that loss experience is the most important component of insurance ratemaking.

Section 66(6) then purports to provide some measure of relief. However, no relief is obtained unless the insurers can demonstrate that the 1984 rates are "clearly inadequate." Section 627.062(2)(e)3., Florida Statutes (1986 Supp.), defines inadequate rates as those which are "clearly insufficient, together with investment income attributable to them, to sustain projected losses and expenses in the class of business to which they apply." Thus, an insurer must demonstrate that it is actually losing money before receiving relief from Section 66(5).

Section 66, taken as a whole, violates the insurers fundamental rights to due process, equal protection of the law, and their right to be free from impairment of contracts. Therefore, it must be stricken as being unconstitutional.

THIRD ISSUE

SECTION 9 VIOLATES THE DUE PROCESS AND EQUAL PROTECTION PROVISIONS OF THE CONSTITUTION

The Department's answer to Appellants challenge to the validity of Section 9 of the Act is based in large measure upon its urgent plea for greater regulatory authority. The Department asserts that prior to the enactment of Chapter 86-160 it had "little or no regulatory authority over rates." (Department's brief, at page 25). This is simply not true. While the former commercial rating law did not grant the Insurance Commissioner the degree of discretion -- unbridled discretion, in the view of Appellants -- as does the law under review, it did afford the Insurance Commissioner the authority to prohibit rates which were excessive, inadequate, or unfairly discriminatory. It was similar to laws on the books of many other states.

AIA has not challenged the wisdom of the Legislature in choosing to grant greater regulatory authority to the Insurance Commissioner. However, AIA cannot leave unanswered the false implication that the insurance companies were solely responsible for recent premium escalations, and that the Department was powerless to do anything about "excessive" rates. Once again, it is important to note, as the trial court found, that no com-

pany was shown to have charged excessive rates. (Final Judgment, pg. 39).

Former Section 627.062, Florida Statutes, which preceded the present version of the law, provided as follows:

> 627.062 Rate standards. --
>
> (1) The rates for all classes of insurance to which the provisions of this part are applicable shall not be excessive, inadequate, or unfairly discriminatory.
>
> (2) As to all such classes of insurance, other than workers' compensation, employer's liability insurance, and motor vehicle insurance:
>
> (a) No rate shall be held to be excessive unless:
>
> 1. Such rate is unreasonably high for the insurance provided; and
>
> 2. A reasonable degree of competition does not exist in the area with respect to the classification to which the rate is applicable. The department may promulgate rules utilizing generally accepted actuarial and economic principles to describe the factors that will be utilized in determining when price competition and other elements of competition are sufficient to assure that rates are not excessive in relation to the benefits provided.
>
> (b) No rate shall be held to be inadequate unless:

> 1. The rate is unreasonably low for the insurance provided, and the continued use of the rate endangers the solvency of the insurer using the same; or
>
> 2. The rate is unreasonably low for the insurance provided, and the use of the rate by the insurer using the same has, or if continued will have, the effect of destroying competition or of creating a monopoly.
>
> (c) A rate shall be deemed excessive if, among other things, the rate structure established by a stock insurance company provides for replenishment of surpluses from premiums, when such replenishment is attributable to investment losses.

* * * *

Plainly evident from the very words of the statute was the prohibition against rates which were excessive, inadequate, or unfairly discriminatory. The predecessor statute also defined the terms "excessive" and "inadequate," but in ways which are different than the new rating law.

Under the former law, the Department of Insurance was empowered to act against any insurance company which used excessive, inadequate or unfairly discriminatory rates. Section 627.031, Florida Statutes (1985) provided in part:

> (2) It is the purpose of this part to protect policyholders and the public

> against the adverse effects of excessive, inadequate, or unfairly discriminatory insurance rates. If at any time the department has reason to believe any such rate is excessive, inadequate, or unfairly discriminatory under the law, it is directed to take the necessary action to cause such rates to comply with the laws of this state.

(emphasis added).

By law the Department was then and still is empowered to "adopt reasonable rules necessary to effect any of the statutory duties of the Department." § 624.308, Fla. Stats.

Not only was the Department empowered to adopt all necessary rules to carry out its responsibilities, but the Insurance Code backed up that authority with the Code's version of an insurer "death penalty." Section 624.308, Florida Statutes, provided:

> (2) In addition to any other penalty provided, willful violation of any such rule shall subject the violator to such suspension or revocation of certificate of authority or license as may be applicable under this code as for violation of the provision as to which such rule relates.

(emphasis added).

The power and authority of the Department over rates developed by insurers under the former law may be summed up this way:

(1) Insurers were expressly prohibited from using rates which were excessive, inadequate or unfairly discriminatory;

(2) The Department was authorized to adopt reasonable rules necessary to prevent the use of unlawful rates; and

(3) If any insurer used unlawful rates, it faced a statutory "death penalty" -- suspension or revocation or its certificate of authority or license.

Under the predecessor rating law, insurers were not required by statute to obtain the final approval of the Department before using their rates -- a so-called "prior approval" requirement. Rather, from a technical standpoint, Florida had in effect an open competition rating law which permitted insurers to use their rates (put the rates into effect and charge premiums based on those rates) and then file the rates with the Department. The Department was empowered to then review the rates to determine whether the rates were unlawful -- that is, excessive, inadequate or unfairly discriminatory.

From an operational standpoint, the insurers did not use newly adopted rates until <u>after</u> they were certain that the rates would not meet with subsequent disapproval by the Department. Mr. Kevin Thompson, of Insurance Services Office (ISO), testi-

fied that ISO never adopted new advisory rates until after they had been reviewed by the Department and ISO was virtually certain of the Department's approval. (Tr. 366, 367, 372). As a matter of fact, Mr. Thompson said that at the time the rate freeze went into effect -- July 1, 1986 -- rate increases for two lines of insurance (physicians and surgeons and commercial liability) had been proposed by ISO, but not agreed to by the Department.[1] (Tr. 88).

The testimony showed that companies did not use rates until after approval by the Department because the Department could, if the rates were found to be unlawful, force the companies to cease using the rates thereby causing disruption to the companies' business. Likewise, ISO would not promulgate advisory rates until after they were sure of departmental agreement, because of the chaos such a hasty move would cause to its member companies. (Tr. 369).

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1. The two lines for which increases were proposed by ISO, but not agreed to by the Department, are different than the two lines which were affected in another way by the freeze. Rate increases for hospital professional liability and commercial automobile - increased limits were agreed to by the Department and were available for use by the insurers after May 1, 1986, but before July 1, 1986. Temporary injunctive relief was granted with regard to those two lines.

In theory, prior to the adoption of Chapter 86-160, Florida operated under a "use and file" law. In reality, it was treated by the insurers and the Department as a virtual "prior approval" rating law.

The nomenclature is unimportant, however. What is significant is that at the time the special credit and rate freeze were adopted the insurers were using lawful rates which had been legally adopted and tacitly approved by the Department, pursuant to rating laws which provided standards, a means of enforcement, and a substantial penalty for violations.

The 1986 Legislature replaced the former commercial rating law with the statute which vests in the Insurance Commissioner the ability to pick and choose which insurance companies will be more profitable than others. The Department has been granted the authority to force insurers to adopt rates selected by the Department, so long as they do not rise to the level of "excessiveness" or fall below the standard of "inadequacy." The actuarial sciences are as much art as science. Honest and competent actuaries can and do disagree, and actuarial judgment is an important component in establishing fair rates.

One of the great deficiencies of this act is that it permits the Department of Insurance to virtually dictate the rates which will be charged by insurers. Over 275 insurance companies

were parties to this litigation; hundreds more are authorized to transact the business of insurance in Florida. The Court is not here confronted with a law designed to regulate the activities of legal monopolies, such as utility companies, where free market forces play no part in the setting of fees or rates. Rather, as the testimony below clearly showed, there is a great deal of competition in the insurance marketplace, competition which will be stifled if not extinguished under the new law.

Section 9 is unconstitutional because it unlawfully discriminates and because it vests in the Department of Insurance unbridled discretion. It should, therefore, be declared invalid.

FOURTH ISSUE

SECTION 10 VIOLATES THE DUE PROCESS AND EQUAL PROTECTION PROVISIONS OF THE CONSTITUTION

The Department's answer to Appellants attack on the validity of Section 10 of the Act focuses upon the issue of whether or not the State may constitutionally impose an excess profits law. That is not the issue raised by AIA in its brief, and the Department's treatment of this issue serves only to lead the discussion away from the question presented to this Court. The issue here is whether the State's police power can be envoked to distribute so-called "excess profits" in the manner provided and to the private individuals defined in Section 10.

The Department implies that the commercial insurance excess profits law embodied in Section 10 employs the same or virtually the same distribution mechanism as the workers' compensation excess profits law and the motor vehicle excess profits law. According to the Department, the Supreme Court upheld "an almost identical excessive profits law (Section 627.066) for private passenger motor vehicle insurance," United States Fidelity & Guaranty Company v. Department of Insurance, 453 So.2d 1355 (Fla. 1984), and Department of Insurance v. Teacher's Insurance Company, 404 So.2d 735 (Fla. 1981), and that the First District

Court of Appeals did the same thing for the workers' compensation excess profits law in John Deere Insurance Company v. State, Department of Insurance, 463 So.2d 385 (Fla. 1st DCA 1985).

The Department's representation that the motor vehicle excess profits law and the workers' compensation excess profits law are "almost identical" to Section 10 is patently erroneous. Neither the motor vehicle excess profits law nor the workers' compensation excess profits law created the types of special classes of individuals to whom "excess profits" are to be distributed. In the case of the motor vehicle excess profits law (Section 627.066, Florida Statutes), excess profits are to be refunded on a pro rata basis to policyholders of record on the last day of the final compilation year. § 627.066(8), Florida Statutes. The workers' compensation excess profits law employs a similar mechanism. It is, therefore, preposterous to say that Section 10 of the Act distributes excess profits to policyholders in a manner similar to the motor vehicle and workers' compensation excess profits laws.

Section 10 of the Act is unconstitutional for the same reason the "Good Drivers' Incentive Fund" was found unconstitutional in State v. Lee, 356 So.2d 276 (Fla. 1978). In State v. Lee, the State's authority to levy fines for traffic law violations was not at issue. Similarly, Appellants to do not here

challenge the State's authority to compel refunds of so-called excess profits.

As the Department's theory goes, the State will reward policyholders whose good loss experience contributes to the "excess profits" earned by insurers. The logic, and therefore the classifications, underpinning this law is defective in several respects. The law rewards only those policyholders who have a risk management plan in place and who are lucky enough to have a low loss ratio. This game of chance results in the following inequities:

1. If a policyholder does not adopt a risk management plan (does not do the paperwork, for example), but is as careful and prudent in his conduct as any reasonable person can possibly be, and this policyholder has no claims at all, he will not receive any of the funds. (Tr. 136, 137).

2. If a policyholder does adopt the plan, but through absolutely no fault of his own still has claims which exceed the permissible loss ratio, he will not receive any funds. (Tr. 137).

It is entirely conceivable, in fact quite likely, that certain policyholders who do adopt the plan will suffer loss ratios which exceed the permissible level even though those losses were completely unavoidable from the standpoint of the policyholder.

This will occur because Section 10 applies to property insurance as well as liability insurance. The payment of property insurance benefits, such as for windstorm damage, often has nothing to do with fault. In fact, quite often property losses are caused by the forces of nature over which the policyholder has absolutely no control. The implementation of risk management plans will have little, if any, effect on such property loss claims.

The distribution of "excessive profits" to a select group of policyholders defined in Section 10 of the Act suffers from the same defects as the law challenged in State v. Lee. It is an unconstitutional exercise of the state's police power to distribute collected funds arbitrarily and discriminatorily to a special class of private individual persons. It is, therefore, unconstitutional.

CONCLUSION

The Department of Insurance has failed to demonstrate that the trial court erred in declaring Section 66, as it applies to policies written prior to the effective date of the Act, unconstitutional. Therefore, that portion of the Final Judgment should be affirmed. The remainder of the Final Judgment is, however, erroneous and it should be reversed.

Respectfully submitted,

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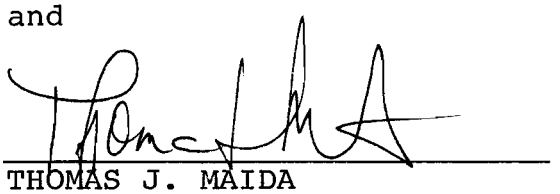

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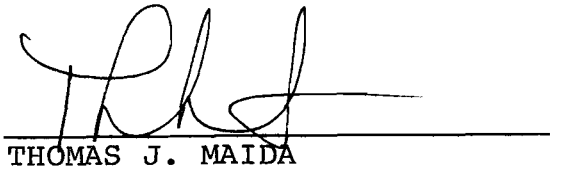

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