IN THE SUPREME COURT OF FLORIDA

BOB MARTINEZ, et al.,

Appellants/Cross Appellees,

vs. CASE NO. 77,179

MARK SCANLAN, et al.,

Appellees/Cross Appellants.

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DEFENDANT/CROSS-APPELLEE TOM GALLAGHER'S
ANSWER TO BRIEFS OF CROSS-APPELLANTS

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## TABLE OF CONTENTS

## TABLE OF CITATIONS

**Page**

**CASES**

## STATEMENT OF CASE AND FACTS

Cross-Appellee/Defendants (hereinafter referred to as "Defendants") generally adopt the Statement of Case and Facts of the Cross-Appellant/Plaintiffs (hereinafter referred to as "Plaintiffs"), inasmuch as they represent transcript quotations and citations. Additionally, the Defendants would refer the Court to the Statement of Facts in their initial Appellants' brief and numerous transcript citations contained in the argument herein.

The Defendants would also particularly note that inasmuch as the substantive provisions of Chapter 90-201 were re-enacted in the 1991 Special Legislative Session, argument relating to Chapter 90-201 would equally apply to the workers' compensation provisions re-enacted in the 1991 Special Legislative Session.

## SUMMARY OF ARGUMENT

The focus of this brief is the evidence actually presented by the Plaintiffs and the constitutional tests by which it must be measured.

The Legislature went to great lengths in the "whereas" clauses of Chapter 90-201 to enunciate their sense of crisis in the workers' compensation system in this state. In this crisis situation, the Legislature made a specific finding that: "the reforms contained in this act are the only alternative available that will meet the public necessity of maintaining a workers' compensation system which provides adequate coverage to injured employees at a cost that is affordable for employers".

In this context, the "rational basis" test must be applied to the provisions challenged as violations of due process or equal protection. If the "rational basis" test is satisfied, the provisions must be upheld. Likewise, the "access to courts" challenge must be weighed against the "reasonable alternative" standard. The Plaintiffs have incorrectly sought to apply the "least restrictive alternative" standard.

The Plaintiffs have also incorrectly sought to apply the strict scrutiny standard to certain provisions on the basis of discrimination against handicapped persons. This is an issue already rejected by this Court in Acton v. Fort Lauderdale Hospital, 440 So2d 1282 (Fla. 1983).

Most importantly, it must be remembered that the Plaintiffs must prove beyond a reasonable doubt the invalidity of the provisions challenged. For this reason, the evidence presented by the Plaintiffs has been carefully laid out in this brief to demonstrate that the harm alleged is far more perceived than real.

The 25 percent rate rollback mandated in Section 57 of Chapter 90-201 is structured in an actuarially reasonable manner, based upon the 30 percent cost savings resulting from benefit changes in the act. Should any of the benefit changes which underpin the rate rollback be invalidated, the Court should proportionately reduce the rollback, rather than striking it in its entirety.

## ARGUMENT

### POINT I

THE EVIDENCE PRESENTED BY THE PLAINTIFFS FAILS TO PROVE THAT THE WORKERS' COMPENSATION LAW CHANGES CONTAINED IN CHAPTER 90-201, LAWS OF FLORIDA, ARE FACIALLY UNCONSTITUTIONAL.

The breadth of the Plaintiffs' objections to the workers' compensation law changes contained in Chapter 90-201, Laws of Florida, clearly indicate their dissatisfaction with the law. However, the crucial issue is whether the evidence presented by the Plaintiffs has proven beyond a reasonable doubt that their hypothetical conjectures rise to the level of facial constitutional defects. The arguments made by the Plaintiffs in their briefs, while difficult to synthesize or categorize, essentially appear to assert that particular provisions of Chapter 90-201 violate due process or equal protection of laws.

It is thus necessary to weigh the evidence presented at trial according to the legal tests for violations of due process or equal protection.

a) The Tests To Be Applied.

In matters of social and economic welfare, a party challenging the constitutionality of a statute on due process grounds must allege and prove that the statute is wholly arbitrary and capricious and that it bears no relationship to any demonstrated or conceivable public interest. Day v. High Point Condominium Resorts, Ltd., 521 So2d 1064 (Fla. 1988) Woods v. Holy Cross

Hospital, 591 F.2d. 1164 (5th Cir. 1979). In Lasky v. State Farm Insurance Company, 296 So.2d 9, 15 (Fla. 1974), the Supreme Court examined Florida's no-fault insurance law and described the test as follows:

> The test to be used in determining whether an act is violative of the due process clause is whether the statute bears a reasonable relation to a permissible legislative objective and is not discriminatory, arbitrary or oppressive...in [examining this relationship] we do not concern ourselves with the wisdom of the Legislature in choosing the means to be used, or even with whether the means chosen in fact accomplish the intended goal, our only concern is with the constitutionality of the means chosen.

The same test is applicable to equal protection challenges, Department of Corrections v. Florida Nurse's Association, 508 So2d 317 (Fla. 1987). In re Estate of Greenburg, 390 So.2d 40, 42 (Fla. 1980), the Court described the rational basis test as follows:

> The rational basis or minimum scrutiny test generally employed in equal protection analysis requires only that a statute bear some reasonable relationship to a legitimate state purpose. That the statute may result incidentally in some inequality or that it is not drawn with mathematical precision will not result in its invalidity. Rather, the statutory classification to be held unconstitutionally violative of the equal protection clause under this test must cause different treatments so disparate as relates to the difference in classification so as to be wholly arbitrary. Dandridge V. Williams, 397 U.S. 471, 90 S.Ct. 1158, 25 L.Ed.2d 491 (1970); Walters v. City of St. Louis, 327 U.S. 231, 74 S.Ct. 505, 98 L.Ed. 660 (1954).

The "rational-basis" test obviously involves considerable deference to the legislative branch, and prohibits the judiciary from substituting its judgment as to whether the legislature has chosen the "right" classification. As the Court stated in

Northridge General Hospital v. City of Oakland Park, 374 So.2d 461, 464-465 (Fla. 1979):

> The Legislature has wide discretion in creating statutory classifications. There is a presumption in favor of the validity of a statute which treats some persons or things differently from others.
>
> (I)f any state of facts can reasonably be conceived that will sustain the classification attempted by the Legislature, the existence of that state of facts at the time the law was enacted will be presumed by the Courts. The deference due to the legislative judgement in the matter will be observed in all cases where the court cannot say on its judicial knowledge that the Legislature could not have had any reasonable ground for believing that there were public considerations justifying the particular classification and distinction made. (Emphasis by the court)

The burden of proving the absence of any rational basis lies squarely with the party challenging constitutionality statute. Pinillos v. Cedars of Lebanon Hospital Corporation, 403 So.2d 365 (Fla. 1981), and In re State of Greenburg, supra.

Plaintiffs also contend that the 1990 law involves legislation involving handicapped persons, and therefore this law should be subjected to increased scrutiny. However, this law does not involve handicapped persons. To the contrary, the workers compensation law was created to compensate injured employees. No Florida court has held that a higher degree of scrutiny is warranted under the workers' compensation law, nor has any court held that these injured employees should be classified as handicapped.

In fact, in Acton v. Fort Lauderdale Hospital, 440 So.2d 1282 (Fla. 1983), the workers' compensation law was challenged as an inadequate alternative to tort remedies. The appellant had a

twenty-five percent permanent disability, yet the Court held that "since no suspect classification is involved here, the statute need only bear a reasonable relationship to a legitimate state interest". (Emphasis added). Thus, the Plaintiffs, in their brief have completely misapprehended the holding in Acton. The holding that no suspect classification is involved, and that the reasonable relationship test is to be applied, clearly means that a higher degree of scrutiny, such as that for handicapped persons, does not apply. Acton cannot be distinguished from the present case merely by suggesting that handicapped persons were not specifically addressed.

Further, in Smith v. Department of Insurance, 507 So.2d 1080 (Fla. 1987), the Court reviewed the Tort Reform and Insurance Act of 1986. This reform dealt with seriously injured persons, yet the Court held that the rational basis test was appropriate, and that the act did not "deny persons rights because of physical handicap." Id. at 1080.

The Florida Constitution does provide special protection for the physically handicapped, but the workers' compensation law does not involve this suspect classification.

b) The Legislative Objective and its Underlying Basis.

The "whereas" clauses contained in Chapter 90-201 present a graphic picture of the Legislature's objective in enacting the workers' compensation provisions contained in this enactment. The Legislature expressly found that the state's future economic growth was at odds with its reputation as a high cost workers'

compensation state. The Legislature understood that reforms were necessary in the workers' compensation system in order to avoid business failures and loss of jobs. Most importantly, the Legislature found that "the reforms contained in this act are the only alternative available that will meet the public necessity of maintaining a worker's compensation system which provides adequate coverage to injured employees at a cost that is affordable to employers". (Emphasis added).

The evidence in the record clearly demonstrates that the Legislature's objective of stabilizing the workers' compensation system in Florida was well founded. The cumulative overall rate increase for workers' compensation in Florida from 1982 to January 1, 1990 was over 200 percent (T 873). In Florida these rate increases brought the average rate to $4.93 per $100 of payroll, while nationwide the average rate was $2.60 per $100 of payroll (T 417). Since workers' compensation rates differ by employment class, some classes were significantly more impacted. For example, an employer of carpenters for construction of detached residences, a highly significant class in Florida, has experienced since 1982 a rate increase from $7.48 per $100 of payroll to $28.18 per $100 of payroll, a 276 percent increase (T 881). In other words, for every $100 of payroll paid by an employer in this class, his workers' compensation premium is $28.18, which must be included in the cost of doing business. For some employment classes, the workers' compensation rate is as much as $70 per $100 of payroll (T 454).

Moreover, these substantial increases in rates were not the result of workers' compensation carrier profiteering, but rather were an effort by these carriers to remain solvent. In 1988, losses paid for workers' compensation claims by Florida carriers, without consideration of expenses, were $1.34 for every dollar of premium collected (T 890). Insurers have not earned a profit on workers compensation in Florida, even including investment income, for any year from 1984 to 1990 (T 418). This escalation of workers' compensation rates was showing no signs of subsiding at the time Chapter 90-201 was enacted. Mr. Frederick Kist, an actuary testifying on behalf of the Defendants/Cross-Appellees testified that an additional 30 to 40 percent rate increase would have been needed on January 1, 1991, absent enactment of Chapter 90-201 (T 893). Thus, enactment of Chapter 90-201, with the 25 percent rate rollback in section 57 and the rate freeze until January 1, 1992, prevented a 30 to 40 rate increase, plus rolled back rates another 25 percent below their January 1, 1990, level. This is a cumulative savings of 65 to 80 percent.

While the evidence demonstrates that the 25 percent rate rollback was directly related to the cost savings of the benefit reductions in Chapter 90-201, many other provisions of this law will further contribute over time to rate stability and cost savings. Thus, it is incorrect to assume that the Legislature addressed the workers' compensation crisis simply by reducing benefits. Dr. David Appel, an economist testifying on behalf of the Defendants/Cross-Appellees testified that Chapter 90-201 was

an impressive piece of legislation, in that it deals with the workers' compensation system in its entirety (T 414). He indicated that this legislation addresses all issues related to workers' compensation: indemnity costs, medical costs, administration of the system, safety at the workplace, dispute resolution procedures, and a whole host of areas that are important to a smooth and functioning program (T 414). To illustrate this point, Dr. Appel cited the report of the National Commission on State Workers' Compensation Laws, which the U.S. Department of Labor uses on a semi-annual basis to review compliance by the various states (T 428). This report has five broad objectives for workers' compensation programs, and 19 essential recommendations (T 428). The five objectives are: 1) broad coverage of employees and occupational injuries and illnesses; 2) provide for substantial income protection in the event of on-the-job injury and wage loss; 3) provide for sufficient medical and rehabilitative services for injured workers; 4) the program should encourage safety; 5) an effective delivery system (T 430). Dr. Appel concluded that the provisions of the 1990 law were responsive to all five objectives, and was particularly strong in comparison to other states with respect to both encouragement of safety and the provision for an effective delivery system (T 430). With regard to compliance with the 19 essential recommendation of the Commission, Florida's level of compliance is 12 out of 19 recommendations (T 431). The average state compliance rate is 12.5 out of 19 recommendation and the highest level of compliance is 15 out of 19 recommendations (T

431). The balance contained in this legislation is further supported by Mr. Kist's testimony that in addition to the benefit reductions which could be presently costed, there were other elements of the 1990 law which have potential costs savings. They included: establishment of the Division of Safety, drug-free workplace provisions, creation of the Bureau of Workers' Compensation Fraud, establishment of cost containment pilot programs, and penalties and sanctions relating to improper training and claims reporting by carriers (T 948).

c) Plaintiffs' Witness Testimony.

The first two witnesses, Janet Osgood, Bureau Chief of Medical Services and Rehabilitation, Department of Labor and Employment Security, and Dr. Howard Hogshead, an orthopedic surgeon, discussed the medical fee schedule for reimbursement of physician charges for treating workers' compensation patients. Ms. Osgood's testimony, in short, was that the 1990 legislation replaced the 1988 medical fee schedule with a new fee schedule. Both fee schedules use the same 1985 and 1986 data. The 1988 medical fee schedule reimburses at the 44th percentile of all charges for that procedure in the state. The 1990 fee schedule reimburses at 95 percent of the 50th percentile of all charges for a particular procedure. Ms. Osgood was unable to testify whether the 1990 fee schedule will, overall, reimburse at a level above or below the 1988 fee schedule (T 42). She indicated that some payments will be above the old schedule, some will be below the old schedule, and some will have the same reimbursement (T 42). Dr. Hogshead also could not say whether or

not the reimbursement under the 1990 fee schedule would be more or less than the reimbursement under the 1988 fee schedule (T 59). Although Dr. Hogshead indicated that both medical fee schedules are outdated due to medical price increases since 1985 and 1986 when the data was collected (T 57), he indicated that the current workers' compensation reimbursement is below medicare but above medicaid (T 65). To put this in perspective, Dr. Hogshead testified that there are four basic databases that are used for medical reimbursement. They are: workers' compensation, usual and customary, medicare and medicaid (T 64). Usual and customary charges would be considered "retail" reimbursement and workers' compensation, medicare and medicaid would be "wholesale" reimbursement. Only between 10 to 25 percent of patients actually pay usual and customary charges (T 101). In discussing the reasonableness of current medical fee reimbursements, Dr. Hogshead made a very enlightening observation as to the reason that the reimbursement levels were not competitive. He testified that there is a prejudice in the medical fee reimbursement distribution due to clerical personnel in the doctor's office putting down the wrong reimbursement amount (T 82). Thus, any perceived deficiency in reimbursement amounts is due at least in part to carelessness by physicians seeking reimbursement.

The brief of Cross-Appellants Scanlan and Professional Firefighters asserts that setting the reimbursement level at 95 percent of the 50th percentile in the statutes amounts to fact finding by the Legislature without a lawful basis and usurps the

APA hearing on reimbursement levels held by the Three Member Panel. The Legislature is not obligated to delegate the establishment of reimbursement levels to the Three Member Panel. Moreover, there is no evidence in the record to indicate that the reimbursement percentile is not properly designated. In fact, placing reimbursement levels between those of Medicare and Medicaid appears entirely reasonable and prudent.

Dr. Hogshead discussed the requirement that physicians retain prior authorization of referrals. Dr. Hogshead described prior authorization as "another hassle" (T 71). However, on cross-examination Dr. Hogshead admitted that prior authorization of referrals will have cost containment benefits (T 87) and that he has never had an insurance clerk refuse treatment by him and would be very surprised if they did refuse treatment (T 87). In his practice, Dr. Hogshead usually obtained prior authorization even before enactment of the 1990 law (T 91), and his referral authorization calls are "made by a girl in the front office" (T 93). This requirement does not apply to emergencies. In the brief of Cross-Appellants Scanlan and Professional Firefighters the argument is reduced to the assertion that non-emergency referrals may occur after the 9:00 to 5:00 office hours of the carrier. This argument simply is not persuasive. The non-existence of a genuine problem with referrals is exemplified by the testimony of Defense witness Helen Neubauer (T 561-564) and John Fareed, Claims Manager for Hillsborough County at T 794-795.

Dr. Hogshead discussed the provision that deposition fees for treating physicians shall be $200 for matters relating to workers' compensation patients. Dr. Hogshead testified that this fee may be economically feasible for a one hour deposition, but many depositions do not terminate in one hour (T 76). Dr. Hogshead had given two or three depositions, at the most, in workers' compensation cases in 1990 (T 90). Dr. Hogshead's normal charge for depositions is $225 for the first half hour and $200 a half hour thereafter (T 91). He did not know how long the two or three depositions that he had done in 1990 lasted, but said that two hours is a fair average length for a workers' comp deposition (T 91). Thus, as a cost containment measure, the Legislature has "scheduled" treating physician deposition fees at $200, which would be $100 per hour using Dr. Hogshead's time estimation.

Mark Scanlan, one of the named plaintiffs in this case, raised two "problems" with the 1990 law. Mr. Scanlan testified that even prior to July 1, 1990, the effective date of the 1990 law, he had problems getting his drug prescriptions paid (T 107). In discussing the 1990 law, Mr. Scanlan testified that he had "a great amount of anxiety" whether the drug store would continue to do business with him if they discover that they are not going to be receiving what they feel to be a fair value for the product prescription (T 108). Mr. Scanlan was referring to the maximum reimbursement formula for prescription drugs, which is the average wholesale price times 1.2, plus $4.18 for the dispensing fee. (Section 440.13(4)(e)). Mr. Scanlan's "anxiety" does not prove any

defect in this formula, and no witness presented by the Plaintiffs offered any grounds for invalidating this provision. Mr. Scanlan also indicated that he had a lot of concern about the continuing availability of medical care under the new law (T 110), although he admitted on cross-examination that he was not aware of any specific problem with his doctor since July 1, 1990 (T 112).

Several Plaintiffs' witnesses testified regarding the removal of concurrent employment from the calculation of wages. Don Teems, Vice President of the Professional Firefighters of Florida indicated that since firefighters work 24 hours on, and 48 hours off, moonlighting is common among firefighters (T 137). Firefighters work at all sorts of jobs, particularly in the service and construction fields (T 138). Douglas Dagly, Business Manager and Financial Secretary of IBEW a local Union 606 indicated he did not have any knowledge of union members being hurt on second jobs (T 143). Charles Maddox, President of the Florida Police Benevolent Association indicated almost all union members work second jobs (T 149). He indicated that there is not so much of a difference in the hourly rate of pay between their police jobs and second jobs, but there is a difference in the amount of hours they work (T 149). Dan Miller, President of Florida AFL-CIO testified he was sure that many of the members of his union have second jobs and was concerned that the union members may not get compensation at the rate they are working on their higher paying job if they are hurt on their lower paying second job (T 157). David Parrish, a claimant's Attorney indicated that a lot of his clients have

concurrent employment (T 283). He cited a particular case where a firefighter had a concurrent job as a delivery man for Sears, working 20 hours per week. The claimant was hurt in his Sears job, and is now drawing compensation based on the hourly wage for the 20 hour a week job, and is about to lose his primary job as a firefighter (T 284). On cross-examination, Mr. Parrish admitted that under both the 1990 law and preceding law, if an individual is working two jobs, and the second job is not covered under workers' compensation, then the wages for the second job are not included in the calculation of average weekly wage (T 307). Testimony on this issue, taken in its entirety, is essentially anecdotal. The witnesses failed to present any evidence which proved that wages must be calculated to include wages other than those earned on the job at which he was injured. Since workers' compensation premium is based on payroll (T 875-876), it is obvious that if average weekly wage is calculated using wages earned outside the employment at which the injury occurred, and whose policy will pay the benefits, an imbalance will occur between the payroll on which premium is based and total wages on which benefits will be calculated. This imbalance could lead to chronic premium underpricing.

The issue of <u>independent medical examinations</u> is discussed briefly by David Parrish at (T 241-243), but Mr. Parrish never offers any testimony with regard to the manner in which the law works after July 1, 1990. This is the only time that testimony on the issue of independent medical examination is presented by the

Plaintiffs, except for Ms. Sims, responding to a question, stated a majority of her cases have IMEs (T 385).

Mr. Parrish also discussed the claims specificity requirements of section 440.19. Mr. Parrish indicated he understood the reasoning behind the specificity requirement, and that the changes were made to avoid anyone being sandbagged (T 252). He testified the changes have gone too far in that it is virtually impossible to file a claim that meets the specificity requirements (T 253). Mr. Parrish indicated on cross-examination that prior to the enactment of the 1990 law, he would file a "shotgun claim" (T 289). The shotgun claim would simply seek determination of maximum medical improvement, temporary total benefits or temporary partial benefits prior to maximum medical improvement (T 289). On this issue, in particular, testimony of witnesses testifying on behalf of the Defendants provide insight into the rational basis for this provisions. Helen Neubauer, Administrator for the Bureau of State Employees Workers' Compensation Claims, Division of Risk Management, testified that a specific claim is needed to determine what benefits are due the injured worker (T 576). While seeking to determine what benefits are due, Ms. Neubauer is on a 21-day time clock from the filing of the claim to avoid attorneys fees (T 576-577). Ellen Lorenzen, a board certified workers' compensation attorney, who predominantly represents insurance carriers, testified that she cannot advise her client what further action to take on general or "shotgun" claims (T 822). If claims are specific, benefits to the injured worker will be provided more

timely without attorney involvement (T 823). This testimony raises the suspicion that claimants' attorneys like Mr. Parrish and Ms. Sims want to continue to file shotgun claims to obscure benefits due so that attorneys fees can be awarded.

Mr. Parrish testified regarding the wage loss job search (T 263). He indicated that the wage loss job search requirement is the same in the 1990 law as previously, except that an injured worker has to go out and conduct a job search even though he is working (T 263). On cross-examination, Mr. Parrish admitted that his understanding that a fully employed claimant did not have to conduct job search prior to the 1990 law was not set forth in the statute, but was established by case law (T 294). While Mr. Parrish indicated that the 1990 law overruled that case law (T 294), citing s. 440.15 (3)(b)(2)), the language cited by Mr. Parrish contains no language which could not be consistently construed with the existing case law. Mr. Parrish also testified regarding the requirement that wage loss claims must be filed within 14 days of the time they are due (T 264). Mr. Parrish testified that getting an injured worker back to work is an important part of the workers' compensation system (T 291), and requiring a job search is an appropriate incentive to get people to go back to work (T 292). Mr. Parrish further testified that one of the hardest things about the law is to make a person go out and do a job search. He has two secretaries in his office that wage loss is all they do (T 265), and the paperwork is overwhelming (T 266). Yet the law before the 1990 enactment already required wage

loss claims every two weeks (T 297). Mr. Parrish has, in fact, justified this procedure as requiring the claimant to conduct a disciplined job search.

Mr. Parrish discusses supplemental benefits for permanent total disability at (T 247-251). If a worker who is permanently totally disabled is eligible to receive either social security disability or retirement benefits, then there is a setoff against workers' compensation supplemental benefits (T 251). Mr. Parrish indicated that under certain circumstances which arise when the supplemental benefit has been in effect for a number of years, the injured worker would be forced to accept a lesser amount under social security disability or retirement than that provided under supplemental benefits (T 251). Defense witness Helen Neubauer gave a striking example of the rationale for setting off supplemental benefits when the injured worker becomes eligible for social security benefits. For a state worker, a permanently, totally disabled worker, receiving wage loss, supplement benefits, social security benefits and retirement benefits will earn 170 percent of what that individual would have earned if he or she had stayed on the job where he or she was injured (T 572).

With regard to Mr. Parrish's testimony regarding the presumptions contained in section 440.26 and the liberal construction requirement, it is interesting that the question was posed as: "How important as a trial lawyer are [these factors] in your case?" (T 274). Whether a particular provision is important

to a trial lawyer has no bearing upon the constitutional validity of a statutory provision.

Mr. Parrish described the significance of the prohibition against escrowing attorneys fees unless benefits are secured, as an attempt to keep lawyers from representing workers' compensation claimants (T 283). On cross-examination, Mr. Parrish indicated that he escrows a straight 15 percent out of the claimant's checks for the claimants he represents (T 302). This is done apparently even though Mr. Parrish indicated that the claimant is living week to week on the compensation rate (T 283) and the majority are financially strapped (T 272). Mr. Parrish further testified on cross-examination that when a case is settled he receives a fee from the carrier (T 303-304). Thus, in a lot of cases where he can't escrow fees, he gets a fee at the end of the cases due to settlements (T 304). Dorothy Clay Sims, a claimants' attorney from Ocala, also discussed escrowing of attorney fees at (T-390). She indicated that her clients do not have lump sums of money to pay her, and if she can't escrow that when the time comes she will never be paid (T 390). These witnesses have not proven beyond a reasonable doubt that preventing claimants' attorneys from escrowing a portion of their clients' much needed benefits until benefits are secured is irrational, arbitrary or capricious. Once benefits are secured, the attorney can then begin escrowing attorneys fees.

The majority of Ms. Sims testimony related to the use of the Minnesota Guides as an interim source for impairment ratings. The

Minnesota Guides are only an interim resource until a permanent rating guide is promulgated. (Section 440.15 (3)(a)(3).) Ms. Sims has never had a claim adjudicated or settled under the Minnesota Guides (T 396). Her limited knowledge of the Minnesota Guides is described at (T 377-378). On cross-examination, Ms. Sims admitted that her only independent knowledge and experience of the Minnesota Guides was from sitting down and reading the guides and applying them to her own cases (T 402). Ms. Sims' impartiality in the issue of the Minnesota Guides was brought into question on cross-examination by her admission that she has formed a corporation called Minnesota Rating Guide Institute, Incorporated, which is a for profit corporation for the purpose of putting on educational programs with regard to the Minnesota guides (T 976-977). Thus, it is not surprising that Ms. Sims' criticism of the Minnesota Guides was contradicted by Defense witness Ellen Lorenzen who testified that generally speaking, the Minnesota Guides have equal or higher ratings when compared to the AMA Guides, Third Edition (T 833).

Ms. Sims indicated that the majority of the clients with whom she is familiar cannot afford to pay the deductibles that are provided for in Section 440.38 (T 390). What Ms. Sims is referring to is a provision in Section 440.38 (1)(e) which allows the employer to secure the payment of compensation by obtaining a <u>24-hour health insurance policy</u> to provide medical benefits required under the Workers Compensation Law. The employer would also obtain an insurance policy to provide indemnity benefits so that the total

coverage afforded by both the twenty-four hour health insurance policy and the policy providing indemnity benefits would provide the total compensation required by Chapter 440.

This provision recognizes a trend toward universal health coverage whereby health coverage and workers' compensation are integrated. The Plaintiffs argue that authorizing deductibles and copayments under the twenty-four hour policy is a "complete departure from the theory of workers' compensation" and is unreasonable and outrageous. Apparently, the Plaintiffs are unwilling to tolerate any innovation in addressing the health care needs of employees and injured workers. The statutory provision provides that the twenty-four hour health insurance policy should meet criteria established by the Department of Insurance by rule. There are several ways the deductible and coinsurance provisions could be implemented without infringing upon an injured workers' compensation remedy in an unreasonable manner. First, the copayments or deductibles could be applied only to non-work related treatment under the policy. Secondly, the copayments or deductibles could be applied in such a manner as to encourage utilization of health maintenance organizations or preferred provider organization utilization. In either instance, the employee would come out ahead with around-the-clock coverage.

In summation, the Plaintiffs were obligated to make a case to support their allegations. Other than the issues discussed herein, no other issues were discussed by Plaintiff witnesses during their case in chief! This detailing of the evidence presented clearly

indicates that the Plaintiffs fall far short indeed in proving arbitrary, capricious or irrational legislative action in the workers' compensation provisions addressed, and the failure to present evidence on many other issues raised on Cross-appeal further underscores the insufficiency of the Plaintiffs' case.

## POINT II

THE MANDATORY RATE ROLLBACK AND RATE FREEZE CONTAINED IN SECTION 57 OF CHAPTER 90-201, LAWS OF FLORIDA DOES NOT VIOLATE DUE PROCESS, AND CAN BE IMPLEMENTED IN AN ACTUARIALLY REASONABLE MANNER.

Plaintiffs Mark Scanlan and Professional Firefighters of Florida have asserted in their brief that the mandated 25 percent rate rollback and rate freeze contained in Section 57 of Chapter 90-201 violate due process. The argument does not specify whose due process rights are being violated, though it appears to refer to the rights of the carriers. In any event, it is difficult to perceive the standing of Mr. Scanlan or the Professional Firefighters of Florida to raise due process questions regarding application of the rate rollback and rate freeze.

Nonetheless, the arguments raised can be easily addressed. The first matter raised is the prohibition against a carrier or self-insurer making written application for permission to file a uniform percentage decrease during the rate freeze. This provision serves several purposes. First, section 57 is quite clear in explaining that the 25 percent rate rollback is a reflection of the estimated 30 percent reduction in the cost of benefits resulting from this bill. Given the fact that insurers have been losing money on workers compensation in Florida every year since 1984 (T 418), it is obvious that the 25 percent rate rollback will absorb all of the potential rate savings available. Any downward price pressure beyond the rolled back rates is a threat to carrier solvency. Thus, the prohibition on additional uniform rate

decreases provides a stable market and avoids predatory pricing during the rate freeze period. Secondly, the Legislature recognized the close relationship between the 25 percent rate rollback and the estimated 30 percent cost savings from the benefit changes. The best way to monitor whether the relationship between the rate rollback and benefit cost reduction was correctly calculated is to require the carriers to adhere to the rolled back rate during the rate freeze. If deviations or discounts are allowed, aberrations in the data may occur which degrade the ability to determine if the rate rollback was correctly set at 25 percent. On the other hand, if the rate rollback is uniformly utilized, actual experience will demonstrate the accuracy of this measure. This information will be invaluable for ratemaking once the freeze expires.

Plaintiffs Scanlan and Professional Firefighters next raise the point that implementation of the 25 percent rate rollback and elimination of discounts and deviations may have some net effect other than a 25 percent premium reduction. It is correct that pursuant to Section 57, two adjustments are to be made to rates in effect January 1, 1990 for each particular insured. First, the rate is adjusted to its base by removing discounts and/or deviations. Then the base rate is reduced 25 percent. As earlier discussed, both adjustments have a specific purpose and no deception is involved; even though the net effect may not be precisely a 25 percent reduction for all policyholders.

A comment is also made that individual self-insurers paid no rate at all. Individual large businesses which self insure, as opposed to businesses which participate in group self insurance funds, do not purchase coverage. However, the 30 percent estimated benefit cost savings would certainly apply to their workers compensation exposure, and the 25 percent rate rollback would be a good benchmark for setting their loss reserves.

Plaintiffs Scanlan and Professional Firefighters assert that in mandating the 25 percent rate rollback, the Legislature engaged in fact finding without any basis in fact. This is not correct! The Legislature commissioned an actuarial study by Ernst and Young (Stipulated Exhibit 1) which verified that the rate rollback was supported by calculable cost savings.

In this respect, Plaintiffs Scanlan and Professional Firefighters are correct that the rate rollback and benefit savings are interrelated. It would be irresponsible for the Legislature to require premium reductions for which there was no basis. Thus, if the benefit changes which form the basis for the quantifiable cost savings are invalidated, it would in fact be inappropriate to mandate a rate rollback which is no longer justified.

This point also relates to the Cross Appeal of the National Council on Compensation Insurance ("NCCI") and Employers Insurance of Wausau ("Wausau"). Cross-Appellants NCCI and Wausau properly assert that implementing the entire 25 percent rate rollback if substantial portions of the benefit reductions are invalidated would be actuarially unreasonable. NCCI and Wausau have posited

two options should some benefit provisions be invalidated: strike the rollback in its entirety, or decrease the rollback proportionately to the value of the benefits reductions which are invalidated. Inasmuch as there is a stipulation in the record which specifies the proportions involved, (T 998-1003; Joint Appendix 21) it is respectfully submitted that in the event the Court must decide between striking the rollback in its entirety and proportionately decreasing the rollback, the appropriate course would be to proportionately decrease the rollback to pass along any available savings to employer policyholders. To completely sever the rate rollback for a relatively small benefit cost reduction which is invalidated appears contrary to the argument of NCCI and Wausau that the rate rollback and benefit provisions are not independently severable. For example, elimination of fringe benefits from the definition of wages in Section 440.02(24), Florida Statutes, by Section 9, is .14 (14 %) of the 25 percent rate rollback. This amounts to 3.5 percent, leaving 21.5 percent of the rate rollback intact. Invalidating the entire rate rollback in this circumstance does an injustice to the relationship between the rate rollback and benefit cuts, carefully crafted by the Legislature.

## POINT III

**THE TRIAL COURT PROPERLY HELD THAT ALL OF THE PROVISIONS OF CHAPTER 90-201, LAWS OF FLORIDA, CHALLENGED IN PLAINTIFFS' CROSS APPEAL WERE NOT VIOLATIVE OF ARTICLE I, SECTION 21 OF THE FLORIDA CONSTITUTION**

Other than for two provisions of Chapter 90-201, Laws of Florida,[1] the trial court found that the provisions of Chapter 90-201, Laws of Florida, did not violate the access to courts provision of Article I, Section 21 of the Florida Constitution.

The Plaintiffs have challenged nearly all of the amendments to Chapter 440, F.S., passed by the Florida Legislature, as violative of the constitutional guarantee of the "redress of any injury" provision contained in Article I, Section 21 of the Florida Constitution, commonly known as the right of "access to courts".[2]

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[1] These two provisions are contained in Sections 18 and 20 of Chapter 90-201, Laws of Florida. Referred to as the "super doc" and "100 mile radius provisions", these provisions were held to be violative of access to courts by the trial court but were found to be severable from Chapter 90-201, Laws of Florida. The trial court also found Section 440.15(3)(b)4.e., F.S., to be "constitutionally offensive" in light of the decisions in Regency Inn v. Johnson, 442 So.2d 870 (Fla. 1st DCA 1982) and City of Clermont v. Rumph, 450 So.2d 573 (Fla. 1st DCA 1984). However, the trial court never stated the specific constitutional basis for its ruling on this point. Defendants have challenged the trial court's ruling regarding the constitutionality of these three provisions in their appeal. (See AIF's Initial Brief.)

[2] The specific provisions of Chapter 90-201, Laws of Florida, challenged by Plaintiffs on cross appeal as violative of access to courts are addressed in the answer briefs submitted by the other Defendants and amicus.

The seminal case in Florida concerning statutory abolition of an existing civil remedy is Kluger v. White, 281 So.2d 1 (Fla. 1973). In that case, this court set forth the rule to be followed in cases seeking to invalidate statutes based upon Article I, Section 21 of the Florida Constitution, stating:

> [W]here a right of access to the courts for redress for a particular injury has been provided by statutory law predating the adoption of the Declaration of Rights of the Constitution of the State of Florida, or where such right has become a part of the common law of the State pursuant to Fla.Stat. §2.01, F.S.A., the Legislature is without power to abolish such a right without providing a reasonable alternative to protect the rights of the people of the State to redress for injuries, unless the Legislature can show an overpowering public necessity for the abolishment of such right, and no alternative method of meeting such public necessity can be shown.

281 So.2d 4.

This Court stated in Kluger that the Legislature could constitutionally abolish a statutory or common law right of access to courts if it enacted a statute that provides "a reasonable alternative to protect the rights of the people of the state to redress for injuries ...." Id. In Kluger, the Court compared the challenged statute, which abolished the right to sue in tort for property damage arising from an automobile accident unless a threshold amount of property damage was met, to the workers' compensation act, which had abolished tort actions against employers. The Court noted that the workers'

compensation system provided "adequate, sufficient, and even preferable safeguards" as an alternative to the right to sue, thus satisfying the requirement that the legislature must provide a reasonable alternative. Id.

As this Court is aware, there have been numerous challenges to Florida's workers' compensation law in the past fifteen years. The validity of the workers' compensation system as a reasonable alternative to the right to sue has been upheld time and time again against multifaceted challenges to its constitutionality. See Newton v. McCotter Motors, Inc., 475 So.2d 230 (Fla. 1985) ( provision requiring that death must occur within one year of accident or must follow continuous disability and must result from the accident within five years of the accident in order for death to be compensable under the worker's compensation statute did not deny access to courts); Sasso v. Ram Property Management, 452 So.2d 932 (Fla. 1984) ( provision limiting wage loss benefits when injured employee reaches age 65 did not deny access to courts); Mahoney v. Sears, Roebuck & Co., 440 So.2d 1285 (Fla. 1983) (provision reducing the amount of recovery for loss of vision in one eye, even if recovery appeared inadequate and unfair, did not deny access to the courts); Acton v. Ft. Lauderdale Hospital, 440 So.2d 1282 (Fla. 1983) (provisions eliminating "scheduled injury" benefits did not deny access to courts); Iglesia v. Floran, 394 So.2d 994 (Fla. 1981)

(provision repealing right to bring a lawsuit against a co-employee for death or injuries negligently inflicted except in cases of gross negligence did not deny access to courts.); Scholastic Systems, Inc. v. LeLoup, 307 So.2d 166 (Fla. 1975) (provision creating the Industrial Relations Commission did not deny access to courts); and Wood v. Harry Harmon Insulation, 511 So.2d 690 (Fla. 1st DCA 1987) (provision establishing additional evidentiary requirements necessary for spouse to receive death benefits compensation did not deny access to courts).

Contrary to Plaintiffs' assertions, the cases interpreting Article I, Section 21 of the Florida Constitution provide criteria and sufficient guidance as to whether a legislative act constitutes a "reasonable alternative". Cases such as Kluger, supra, Acton, supra, and Mahoney, supra, establish that a workers' compensation statute constitutes a reasonable alternative if it "continues to afford substantial advantages to injured workers, including full medical and wage-loss payments for total or partial disability without having to endure the delay and uncertainty of tort litigation." Acton, at 1284. The fact that a particular individual may receive reduced benefits (Mahoney, supra ) or be barred from receiving a certain type of benefit (Newton, supra ) does not prevent a workers' compensation law from providing a reasonable alternative to litigation.

Plaintiffs' arguments that the "considerations" utilized by this Court in The Florida Bar v. Brumbaugh, 355 So.2d 1186 (Fla. 1978) and by the U.S. Supreme Court in Jacobellis v. Ohio, 378 U.S. 184, 84 S.Ct. 1676 (1964) should be applied to determine whether legislation constitutes a reasonable alternative are devoid of merit. Plaintiffs appear to suggest that based on Brumbaugh, the standard to be applied in an access to courts analysis should be a "least restrictive alternative" standard rather than a "reasonable alternative" standard. This flies in the face of the unequivocal language of Kluger, supra, and its progeny. Further, Brumbaugh is factually distinguishable from the case sub judice as it did not involve the constitutionality of legislation, but was an unauthorized practice of law proceeding brought by the Florida Bar in which the Court discussed, in dicta, an individual's constitutional right to represent herself or himself in legal proceedings. Jacobellis, supra, is similarly inapplicable as it addresses the totally unrelated inquiry of whether a state's obscenity statute is constitutional on First Amendment grounds.

Plaintiffs' approach of analyzing Chapter 90-201, Laws of Florida, in light of the previous workers' compensation statutes to determine if it is a reasonable alternative is also flawed. All of the cases analyzing whether the workers' compensation statute is a reasonable alternative have looked, in

a general fashion, to the original tort civil cause of action the workers' compensation system was designed to replace. See, e.g., Acton, supra; Newton; supra, Mahoney; supra, and LeLoup,supra . These cases do not go into an analysis of whether the challenged workers' compensation law is a reasonable alternative to the previous workers' compensation law or a reasonable alternative to the specific procedures and methodologies of Florida's current civil trial system.

**Chapter 90-201, Laws Of Florida, Provides A Reasonable Alternative To Litigation**

It is clear from the preface to Chapter 90-201, Laws of Florida, that the Legislature was concerned about the workers' compensation system and the overpowering public need for reform to preserve the system, reduce the cost of the system, and protect the ability of employees to obtain benefits for job related injuries. Some of the more relevant provisions of the preface are set forth below:

* * *

> WHEREAS, the Legislature finds that there is a financial crisis in the workers' compensation insurance industry, causing severe economic problems for Florida's business community and adversely impacting Florida's ability to attract new business development to the state, and
>
> WHEREAS, the Legislature finds businesses are faced with dramatic increases in the cost of workers' compensation insurance coverage, and

WHEREAS, a report to the Joint Select Committee on Workers' Compensation of the Florida Legislature reveal that the rates for workers' compensation insurance are 54% higher than the nationwide average, 75% higher than the average of all states in the southeastern United States, and 60% higher than the average of those states contiguous to Florida, and

WHEREAS, such report also indicated that Florida has experienced one of the highest rates of increase in premiums for workers' compensation insurance anywhere in the United States during the last five years, and

WHEREAS, such report also indicated that the present level of medical benefit payments under the Florida Workers' Compensation Law is 42% higher than the nationwide average level of such benefit payments, 38% higher than the southern United States average level of such benefit payments, and 38% higher than the average level of such benefit payments in the states contiguous to Florida, and

WHEREAS, such report also indicated that the present level of indemnity benefit payments under the Florida Workers' Compensation Law is 31% higher than the nationwide average level of such benefit payments, 60% higher than the southern United States average level of such benefit payments, and 106% higher than the average level of such benefit payments in states contiguous to Florida, and

WHEREAS, the reductions in benefits provided by this act are necessary to ensure rates that allow employers to continue to comply with the statutory requirement of providing workers' compensation coverage but are nonetheless calculated to provide an adequate level of compensation to injured employees, and

WHEREAS, it is the sense of the Legislature that if the present crisis is not abated, many businesses will cease operating and

> numerous jobs will be lost in the State of Florida, and
>
> WHEREAS, the Legislature believes it is necessary to avoid the workers' compensation crisis, to maintain economic prosperity, and to protect the employee's right to benefits if injured on the job, and
>
> WHEREAS, the Legislature finds that there is an **overpowering public necessity** for reform of the current workers' compensation system in order to reduce the cost of workers' compensation insurance while protecting the rights of employees to benefits for on-the-job injuries, and
>
> WHEREAS, the Legislature finds that the reforms contained in this act are the only alternative available that will meet the public necessity of maintaining a workers' compensation system which provides adequate coverage to injured employees at a cost that is affordable to employers, and
>
> WHEREAS, the magnitude of these compelling economic problems demands immediate, dramatic, and comprehensive legislative action, NOW, THEREFORE . . . (emphasis supplied)

The Legislature looked at a variety of alternative proposals before it the adopted changes to the workers' compensation system which it concluded were reasonable and constituted a rational balance between the cost of the system to employers and the need for employees to be assured both a reasonable alternative to the tort system and adequate, sufficient benefits. The uncontroverted evidence and testimony that was presented by the Defendants below established that the Legislature considered a massive amount of testimony, expert

opinion, actuarial data, alternative proposals, and debate before adopting the amendments to Chapter 440, F.S., as contained in Chapter 90-201, Laws of Florida.

The Plaintiffs have the burden of proving to this court that the changes to Chapter 440, F.S., contained in the Act are unconstitutional, or are in some way violative of the Kluger test. To carry that burden, they must do more than argue the changes are "inadequate or unfair". That theory of attack was rejected by this Court in Mahoney, supra,. In that case, the Court reasoned that the petitioner had received medical and wage loss benefits under workers' compensation and that the Legislature had eliminated delay and uncertainty of recovery. The Court recognized that the plaintiff in that case might have well received more compensation under the prior act than could be received under the challenged amendments. However, the Court found that the plaintiff continued to receive fully paid medical care and wage loss benefits during his recovery for his on-the-job accident without having to proceed to litigation. As such, the statute provided a reasonable alternative and thus was constitutional. Id., at 1286.

Many of the changes to Chapter 440, F.S., contained in Chapter 90-201, Laws of Florida, were designed to eliminate or clarify areas of litigation and contention within the workers' compensation system regarding the compensability of an injury or

the amount of benefits an injured employee should receive.[3] These changes were rationally related to the legitimate state interest of improving the efficiency of the payment of benefits by eliminating endless, costly debates over what benefits are due in a case. See Carr v. Central Florida Aluminum Products, 402 So.2d 565, 568 (Fla. 1st DCA 1981),(where the court held that the workers' compensation legislation was rationally related to the legitimate state interest of efficiency of payment of benefits by "eliminating endless debates ... over exactly what percentage of use, ... has been lost" ).

The amendments to Chapter 440, F.S., in Chapter 90-201, Laws of Florida, were the Legislature's effort to arrive at a comprehensive, cohesive reform of the workers' compensation

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[3] Pursuant to Chapter 90-201, Laws of Florida, a number of provisions were adopted that are of benefit to claimants. See, e.g., Section 440.13(5), F.S., (ensuring more timely payment of medical bills) Section 440.15(2)(b), F.S., (expanding catastrophic benefits to injured workers rendered paraplegic, paraparetic, quadriplegic or quadriparetic), Section 440.19(1)(e), F.S., (requiring DLES to take a pro-active stance to resolve disputes), Section 440.20(9)(c), F.S., (establishing fines for late payments of benefits); Section 440.25(3)(b) 2 & 3, F.S., (stepping up time for hearings before judges of workers' compensation claims). Additionally, Chapter 90-201, Laws of Florida, adds provisions to Chapter 440, F.S. that are geared towards reducing job-related injuries. See, e.g. Section 5 of Chapter 90-201, Laws of Florida (creating the Division of Safety) and Section 440.56(6), F.S., (increasing fines for safety violations). Finally, Chapter 90-201, Laws of Florida, contains numerous provisions geared to improve and guarantee the solvency of the workers' compensation insurance system and gives DLES greater powers to regulate financially insolvent employers and carriers, see, e.g., Sections 30, 31, 32, 33, 34, 46, 47, 48, 49 and 57, of Chapter 90-201, Laws of Florida.

system which ensured the system's continuing existence as an efficient and effective alternative to litigation and balanced the interests of both employers and employees. Whether Chapter 90-201, Laws of Florida, establishes a perfect workers' compensation system that is completely workable or fair in every instance is not the proper inquiry before this Court. Florida Farm Bureau Casualty Insurance Co. v. Ayala, 501 So.2d 1346, 1348 (Fla. 4th DCA, 1987) ("Workers' Compensation is entirely a creature of statute and must be governed by what the statute provides, not by what the deciding authorities feel the law should be.") Instead, this Court must determine whether Chapter 90-201, Laws of Florida, provides a reasonable alternative to the tort system that injured employees would have to utilize if the workers' compensation system had not been created. Defendants contend that Chapter 90-201, Laws of Florida, does provide a reasonable alternative and thus does not violate Kluger v. White, supra, by denying or impeding an employer's or employee's access to courts.

The amendments to the workers' compensation system effectuated by Chapter 90-201, Laws of Florida, were done in a comprehensive, thorough manner to minimize the impact upon injured employees as a whole and still effectuate the maximum amount of savings within the system to employers. Pursuant to these amendments, Florida's current workers' compensation system

continues to offer employees adequate and sufficient safeguards to ensure that they will receive fully paid medical care and wage loss benefits related to on-the-job accidents without having to proceed to litigation. The amendments to Chapter 440, F.S., set out in Chapter 90-201, Laws of Florida, are therefore constitutional because they were adopted by the Legislature as its only reasonable alternative, and constitute a fair, rational, and comprehensive solution to the workers' compensation crisis.

## POINT IV

**THE TRIAL COURT PROPERLY HELD THAT THE SPECIFIC PROVISIONS OF CHAPTER 90-201, LAWS OF FLORIDA WERE NOT VIOLATIVE OF DUE PROCESS AND EQUAL PROTECTION OF THE LAW**

Other than one provision,[4] the trial court found that the provisions of Chapter 90-201, Laws of Florida, did not violate due process of law. The trial court also found that no provision of Chapter 90-201, Laws of Florida, was violative of equal protection.

Those portions of Chapter 90-201, Laws of Florida, not held unconstitutional by the trial court come before this Court clothed with a presumption of constitutionality. Dept. of Legal Affairs v. Sanford-Orlando Kennel Club, Inc., 434 So.2d 879, 881 (Fla. 1983). Since an analysis of the constitutionality of Chapter 90-201, Laws of Florida, must begin with the presumption that the Act is constitutional, all reasonable doubts are to be resolved in favor of its validity. Belk-James, Inc. v. Nuzum, 358 So.2d 174, 177 (Fla. 1978). As discussed previously, to overcome this presumption, the challenger bears the heavy burden of proving the alleged invalidity beyond a reasonable doubt.

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[4] This provision is contained in Section 18 of Chapter 90-201, Laws of Florida. Referred to as the "super doc" provision, it was held to be violative of due process by the trial court but was found to be severable from Chapter 90-201, Laws of Florida. Defendants have challenged the trial court's ruling regarding this provision in their appeal.

Dept. of Business Regulation v. Smith, 471 So.2d 138, 142 (Fla. 1st DCA 1985).

Throughout the pendency of the proceedings below, Plaintiffs have stated that they are challenging only the facial validity of Chapter 90-201, Laws of Florida, and are not making any challenge to the Act on an as applied basis. A legislative enactment is void on its face only if it cannot be constitutionally applied to any factual situation. Voce v. State, 457 So.2d 541, 543 (Fla. 4th DCA 1984), pet. for review den., 464 So.2d 556 (Fla. 1985). Thus, as to each provision of Chapter 90-201, Laws of Florida, challenged by the Plaintiffs on appeal, the Plaintiffs must demonstrate that the provision cannot be constitutionally applied to any factual situation.

Regarding Plaintiffs' due process challenges to Chapter 90-201, Laws of Florida, this Court stated in Johns v. May, 402 So.2d 1169, 1169 (Fla. 1981):

> The test to be applied to determine if a particular statute is in violation of the due process clause is whether it bears a reasonable relation to a permissible legislative objective and is not discriminatory, arbitrary or oppressive.

And, with regard to the Plaintiff's equal protection challenges, this Court stated in The Florida High School Activities Association, Inc. v. Thomas, 434 So.2d 306, 308 (Fla. 1983), that

> [u]nder a "rational basis" standard of review a court should inquire only whether it is conceivable that the regulatory

> classification bears some rational relationship to a legitimate state purpose. [citation omitted] The burden is upon the party challenging the statute or regulation to show that there is no conceivable factual predicate which would rationally support the classification under attack. Where the challenging party fails to meet this difficult burden, the statute or regulation must be sustained.

The "rational basis" standard clearly applies in an analysis of the constitutionality of the workers' compensation law since the right to workers' compensation law is not a fundamental right, Ayala, supra, at 1348, and that classifications of injured workers are not considered suspect, Acton, supra, at 1284.

Florida courts are to give wide latitude to the Legislature when reviewing the constitutionality of statutes. The Court's task in this appeal is limited to determining whether the provisions of Chapter 90-201, Laws of Florida, are constitutional, not whether they are wise, or whether theycomprise the most workable workers' compensation law possible. Thus, this Court should not substitute its judgment for that of the Legislature with respect to the need for, or wisdom of, or workability of these sections. Florida Patient's Compensation Fund v. Von Stetina, 474 So.2d 783, 789 (Fla. 1985); Hamilton v. State, 366 So.2d 8 (Fla. 1978). The provisions of Chapter 90-201, Laws of Florida, bear a rational relationship to a legitimate state interest and they do not divest these Plaintiffs of any vested property right. The Act, therefore,

does not violate either the due process or the equal protection rights of the Plaintiffs.

Other than the argument set out below, which is directed to Point I of the initial brief of Communication Workers of America, the specific provisions challenged in Plaintiffs' cross appeal on the basis of due process and equal protection are set forth in the briefs of the other defendants and amici.

**The Wage-Loss Benefits Provisions of Section 20 Of Chapter 90-201, Laws Of Florida, Amending Section 440.15(3)(b)4.d., F.S., Do Not Violate Equal Protection Under Article I, Section 2 Of The Florida Constitution.**

The CWA brief argues that Section 440.15(3)(b)4.d, F.S., as amended by the 1990 Act, is facially unconstitutional on equal protection grounds because it discriminates against the handicapped. The argument fails for a number of reasons. First, the provisions by their clear terms do not apply to handicapped persons but to those suffering various degrees of impairment, some as low as one to three percent. Second, the classifications are rational and serve a valid state interest. Third, the argument does not explain how the law discriminates against impaired persons. Fourth, even assuming the point was preserved for appeal,[5] the CWA does not correctly identify the statutory

[5] While paragraphs 153 of Plaintiffs' Second Amended Complaint challenged Section 440.15(3)(b)4.d, F.S., Plaintiffs waived their challenge to this provision by their failure to present testimony or evidence on this issue in the proceedings below. Further, while the Plaintiffs briefly referenced this provision in one of their trial memorandums, this provision was not challenged in

subsection with which it takes issue. Section 440.15(3)(b)4.d, F.S., merely provides that workers with varying degrees of impairment (ranging from 3 percent or less to 24 percent or more) will be eligible for compensation for different lengths of time, according to the degree of impairment. There is nothing unconstitutional about this and CWA's brief does not even discuss the constitutionality of this provision. CWA's real argument seems to be with Section 440.15(3)(b)4.e, F.S., (although this subsection is not specifically identified) and this subsection's requirement that a worker suffering up to 20 percent permanent impairment bear the burden of demonstrating that

> his post-injury earning capacity is less than his preinjury average weekly wage and is not the result of economic conditions or the unavailability of employment or of his own misconduct.

The same subsection provides the employer must bear the burden of proving the worker's "post-injury earning capacity is the same or more than his preinjury wage" if the impairment is equal to or greater than 21 percent. As the trial court below ruled that this provision was unconstitutional, Defendants are at a loss as to why Plaintiffs have raised this issue in their cross appeal.[6]

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that memorandum on the basis that it discriminated against the handicapped. See Plaintiffs' trial memorandum entitled "The Nuts Do Not Fit the Bolts", p. 57 (R 2243).

[6] Defendants point out, however, that the trial court did not hold Section 440.15(3)(b)4.e., F.S., unconstitutional on the basis that this provision violated the right of equal protection,

CWA first attempts to demonstrate that a worker who is "permanently impaired" to any degree within the meaning of Section 440.15(3)(b)4.d., F.S., is also "handicapped" within the meaning of Article I, Section 2 of the Florida Constitution. It attempts to do this by reference to various provisions of wholly unrelated Florida and federal statutes and cases, not by reference to the content of Chapter 90-201, Laws of Florida, or the Florida Constitution. In order to establish a predicate for its facial attack on the statute, Plaintiffs must show that a one percent impairment under the workers' compensation law constitutes a "handicap" within the meaning of the Florida Constitution. None of the so called authority Plaintiffs cite even faintly suggests such an illogical conclusion. Had the Legislature wished to create a presumption somewhere in Florida law that any degree of impairment, no matter how exiguous, constituted a handicap, it could have done so. However, the Legislature did not, and its failure to do so hardly bespeaks a basis for reading such an absurdity into the Constitution. Moreover, as was mentioned previously, this Court has already stated that classifications of injured worker are not suspect.

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and as discussed in FN5, supra, Plaintiffs never raised the handicap discrimination argument below. Defendants also point out that they have challenged the trial court's ruling on the constitutionality of 440.15(3)(b)4.e., F.S., in their initial brief (See AIF's Initial Brief). Because this section was declared unconstitutional by the trial court, this point is not properly at issue on cross appeal.

Acton, supra, at 1284. Nonetheless, Plaintiffs baldly assert that the subsection "discriminates on the basis of whether workers [are] handicapped." CWA Brief at 20-21. Plaintiffs identify no other group compared to which those falling within the 1 -20 percent impairment range suffer discrimination. The class not bearing the burden consists of those more seriously impaired. Point I of CWA's brief therefore not only lacks authority, it also lacks an argument.

What Plaintiffs ultimately attempt to dispute is the Legislature's decision to draw the line at 20 percent, which Plaintiffs call "arbitrary" and "unrelated to an important government objective." These wholly conclusory and unelaborated assertions fail to establish unconstitutionality beyond a reasonable doubt, which is the Plaintiffs' burden, see State v. Canova , 94 So.2d 181 (Fla. 1957), and conveniently ignore this Court's ruling that classifications need not be established with precision in order to survive an equal protection challenge. Greenberg, supra, at 42.

Under the standard established in Greenberg, it need only be demonstrated that the statute bears "some reasonable relationship to a legitimate state purpose." Id. The relationship and purpose of this provision of Chapter 90-201, Laws of Florida, are apparent. Those workers whose impairments are less serious bear the burden of demonstrating a decline in

their earning capacity and that the decline is not the result of economic conditions or personal misconduct. This requirement is simply calculated to reduce unmeritorious claims and the high insurance rates to which such claims contribute. To this end, the classification is reasonable and its purpose, legitimate. The wisdom and efficacy of such a provision are not for the courts to decide. Lasky, supra.

## CONCLUSION

The evidence presented by the Plaintiffs found in the record before this Court simply does not measure up to the burden of proof they were required to meet in order to invalidate any provision of Chapter 90-201 on facial constitutional grounds. Volumes of hypothesizing do not compensate for the fact that the actual evidence adduced by the Plaintiffs is inconsequential, and effectively rebutted by evidence prsented by the Defendants. The Courts should affirm the trial court's validation of the provisions challenged on Cross-Appeal by the Plaintiffs.

Respectfully submitted,

Daniel Y. Sumner

DANIEL Y. SUMNER

**CERTIFICATE OF SERVICE**

**I HEREBY CERTIFY** that a true and correct copy of the foregoing has been furnished by U.S. Mail or hand delivery to the attached service list, this 12th day of February, 1991.

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