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IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. 85,949

IN RE ADVISORY OPINION TO THE GOVERNOR -
REVENUE CAP STATE INSURANCE PREMIUMS

**BRIEF OF FLORIDA RESIDENTIAL PROPERTY AND
CASUALTY JOINT UNDERWRITING ASSOCIATION**

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PREFACE

Unless specifically provided to the contrary, all section references herein are to the Florida Statutes, as amended through the 1995 Regular Session of the Legislature. References to "Article VII, section 1(e)" are to Article VII, section 1(e) of the Florida Constitution, as amended.

Amendments to §627.351(6) made during the 1995 Regular Session of the Legislature are contained in Laws of Florida 1995, Chapter 95-276.

STATEMENT OF THE CASE AND THE FACTS

On June 26, 1995, the Honorable Lawton Chiles, Governor of the State of Florida, pursuant to Article IV, section 1(c), Florida Constitution, sought the opinion of the Florida Supreme Court regarding the question of whether assessments, policy premiums and policy surcharges imposed by the Board of Governors of the Florida Residential Property and Casualty Joint Underwriting Association and collected pursuant to § 627.351(6) are to be considered state revenues for purposes of Article VII, section 1(e).¹ On Tuesday, June 27, 1995, this Honorable Court determined that the Governor's request was within its jurisdictional purview and indicated its intention to provide an opinion to the Governor. The Supreme Court's Order directed interested parties to file their briefs on or before July 5, 1995.²

The Florida Residential Property and Casualty Joint Underwriting Association (hereinafter referred to as "FRPCJUA" or the "Association") is an interested party to this proceeding. As an interested party whose substantial interests will be affected by this Honorable Court's resolution of the question presented by Governor Chiles in his advisory opinion request, the FRPCJUA is filing this brief pursuant to Rule 9.500(b)(2), Fla.R.App.P., and this Court's June 27, 1995 Order.

¹See June 26, 1995 letter from the Honorable Lawton Chiles to the Supreme Court of Florida. (Appendix 1).

²See June 27, 1995 Order, Supreme Court of Florida, Case No. 85,949. (Appendix 2).

FRPCJUA revenues are not, and should not be deemed to be, "state revenues" for purposes of Article VII, section 1(e). To fully comprehend why the FRPCJUA revenues are not "state revenues" for purposes of Article VII, section 1(e), a detailed understanding of the origin, purpose, responsibilities and current status of the FRPCJUA is necessary.

**The Florida Residential Property and Casualty
Joint Underwriting Association**

On August 24, 1992, Hurricane Andrew swept across the Florida Peninsula causing overwhelming losses unprecedented in American history. Hurricane Andrew dealt a particularly devastating blow to the insurance industry in Florida, which was caught unprepared for the magnitude of the disaster. As a result of the insured losses caused by Hurricane Andrew, which have been estimated to exceed seventeen billion dollars (\$17,000,000,000) industry wide, the insurance industry recoiled. Seven insurance companies writing residential property risks in Florida were deemed insolvent, causing a severe burden to the Florida Insurance Guaranty Association, which was forced to assume the outstanding claims of the insolvent companies.³ Many insurance companies sought to withdraw from the State in a massive exodus. Other companies simply chose not to renew existing coverages.⁴

³The Florida Insurance Guaranty Association is a statutorily created non-profit entity which provides for the payment of certain insurance claims in cases of insurer insolvency. See § 631.50 et. seq.

⁴See Department of Insurance Press Release, May 10, 1993, "Gallagher Proposes Catastrophic Fund to Protect Florida Homeowners" at 3. (Appendix 3); See also, Department of Insurance

Recognizing the problem, and in an effort to stabilize the industry and afford the much-needed insurance coverages and protections to the residents of Florida, the Legislature in its Special Session of November 1992, promulgated § 627.351(6), creating the Florida Residential Property and Casualty Joint Underwriting Association.⁵ The FRPCJUA, like all other statutorily created joint underwriting associations, was established to "correct a disruption or imperfection in the insurance market."⁶ Mandatorily composed of all insurers authorized to write personal lines residential coverage and commercial lines residential coverage in the State of Florida, the FRPCJUA was created as a temporary answer to Florida's residential insurance crisis and serves as a market of last resort. §§ 627.351(6)(b)1.; 627.351(6)(d)1; and 627.351(6)(e).

The FRPCJUA operates under the direction of a thirteen member Board of Governors, consisting of the insurance consumer advocate, five members designated by the insurance industry, five consumer

Property & Casualty Market Report, dated May 4, 1993. (Appendix 4).

⁵Section 627.351(6) was substantially revised during the May and November 1993 Special Sessions. During this past 1995 Regular Session of the Legislature, the statute was again amended to, among other things, allow the FRPCJUA to provide both personal lines residential and commercial lines residential property coverages to qualified risks, as well as to authorize certain assessments and surcharges in the event of a deficit. (Commercial lines coverages had been previously afforded to eligible insureds by the Florida Property and Casualty Joint Underwriting Association, the "FPCJUA"). See § 627.351(5), Florida Statutes (1992 Supp.).

⁶See Florida House of Representatives Committee on Insurance February 7, 1994 Report, "Joint Underwriting Associations: Current Status and Issues" at 1. (Appendix 5).

representatives and two industry representatives appointed by the Insurance Commissioner. § 627.351(6)(c)4. The Board of Governors is responsible, inter alia, for establishing the FRPCJUA's Plan of Operation, establishing premium rates and underwriting criteria, and determining amounts of assessments and surcharges. All such assessments and surcharges are to be collected by the FRPCJUA to defray deficits incurred by its operational expenses and the payment of policyholder claims, all of which are subject to the approval, review and verification of the Department.

The FRPCJUA provides insurance coverage for personal lines and commercial lines residential coverages to applicants who are in good faith entitled, but unable, to procure insurance coverage through the voluntary market. §627.351(6)(a). Accordingly, the FRPCJUA holds a Certificate of Authority issued by the Department, directing the FRPCJUA to act and function as an insurance company.⁷ The FRPCJUA is empowered and authorized pursuant to its Certificate of Authority to write insurance for homeowners, mobile homeowners, condominium unit owners, rental dwellings, tenants, condominium associations, apartment buildings, common elements of homeowners associations and other commercial coverages of residences.

§ 627.351(6)(a).⁸

The FRPCJUA's current resources for paying policyholder claims and operational expenses are derived from premiums, investment

⁷See Appendix 6.

⁸See also § 627.351(6)(1), transferring all rights, obligations, assets and liabilities of the FPCJUA to the FRPCJUA.

income, surcharges and assessments.⁹ Rates for FRPCJUA coverage are statutorily directed to be actuarially sound and not competitive with approved rates in the voluntary market so as to cause the FRPCJUA to function as a residual market mechanism and provide insurance coverage only in the event that such coverage cannot be procured in the voluntary market. § 627.351(6)(d). Rates promulgated and filed by the FRPCJUA are reviewed by the Department pursuant to the rate standards of § 627.062, which statutory provision governs the premium and rate levels of all property and casualty insurance companies writing coverages in the State of Florida. In addition, recognizing that the FRPCJUA has "little or no capital or surplus" the Legislature requires that the FRPCJUA establish its premium rates based on the its actual loss experience, together with its actual catastrophic loss exposure. § 627.351(6)(d).

In the event of a major disaster, the FRPCJUA turns to its member insurance companies and their insureds, as well as to FRPCJUA insureds, for any deficit amounts that cannot be covered by the Association's current funds. In the event of an annual deficit that does not exceed 10% of the aggregate statewide direct written premium for the subject lines of business, the FRPCJUA is empowered to charge an initial assessment directly upon all member insurance

⁹In addition to assessments, policy premiums and policy surcharges, potential sources of FRPCJUA revenues include payments received under reinsurance contracts, reimbursements from the Florida Hurricane Catastrophe Fund, established pursuant to § 215.555, proceeds of long-term bonds and other borrowings and investment income on all of the foregoing.

companies providing property and casualty insurance in the State of Florida. § 627.351(6)(b)3.a. If any annual deficit incurred exceeds 10% of the aggregate statewide direct written premium for the subject lines of business, the Association may levy an initial assessment on insurers only in an amount equal to the greater of 10% of the deficit or 10% of the aggregate statewide direct written premium for the subject lines of business. § 627.351(6)(b)3.b. After an initial assessment has been made, and if a deficit still remains, the FRPCJUA may levy emergency assessments on all residential property and casualty policies in the State to be collected by all insurance companies (including the FRPCJUA) from their insureds. The aggregate amount of emergency assessments in any one year may not exceed the greater of 10% of the total deficit or 10% of the aggregate statewide direct written premium for the subject lines of business for the prior year. § 627.351(6)(b)3.d.

Despite its legislative origins, the FRPCJUA is not a State agency, board or commission. It is a political subdivision of the State for the limited purpose of exempting the Association's intangible personal property from the annual and nonrecurring taxes imposed by Chapter 199. Further, it is exempt from State corporate income tax. § 627.351(6)(j). With the exception of the intangibles tax and the corporate income tax, all premiums, surcharges and assessments collected by the FRPCJUA are subjected to the same premium taxes, charges and assessments imposed on insurance companies doing business in this State.

Although intended as a stop gap measure, the FRPCJUA has, since its inception, expanded to insure currently over 751,000 policyholders. During 1993, the FRPCJUA added insureds at a rate of 7,000 per week.¹⁰ Currently, the FRPCJUA is adding policies at the rate of approximately 10,000 per month.¹¹ In fulfilling its statutory fiat of providing insurance to those who are eligible but unable to secure property and casualty coverage, the FRPCJUA has grown to cover an unprecedented number of insureds. It is currently the third largest writer of residential property and casualty coverage in the State of Florida. This growth in the FRPCJUA's policy writings has created the imminent potential of a substantial shortage of funds to meet its policyholder claims obligations in times of catastrophe and has prompted the Legislature to adopt measures designed to depopulate the FRPCJUA.¹²

¹⁰See Florida House of Representatives Committee on Insurance February 7, 1994 Report, "Joint Underwriting Associations: Current Status and Issues" at 14. (Appendix 5).

¹¹See Appendix 7.

¹²Section 627.3511 provides:

The Legislature finds and declares that the Residential Property and Casualty Joint Underwriting Association has written an amount of policies beyond legislative expectations and has become, by virtue of its size, a significant impediment to the restoration of a stable and competitive residential property insurance market in this state; that the public policy of this state requires the maintenance of a residual market for residential property insurance; and that extraordinary measures, beyond implementation of eligibility criteria and noncompetitive rates, are required to reduce the number of policies written by the Residential Property

Currently, the FRPCJUA has \$238,116,590.40 available to pay policyholder claims.¹³ All cash on hand would be used to pay policyholder claims. Based upon the FRPCJUA's current exposure, actuarial projections indicate that in the event of a major hurricane or other like disaster the FRPCJUA's cash position is severely deficient and could not begin to cover anticipated policyholder claims that could arise.

Section 627.351(6) was specifically amended by the 1995 Legislature to authorize the FRPCJUA to borrow funds by issuing bonds or by incurring other indebtedness. Further, the FRPCJUA was granted the authority to pledge assessments and other funds available to the Association for such borrowings. Recognizing the imminent need of the FRPCJUA to engage in a borrowing, the 1995 Legislature further provided that:

it is the intent of the Legislature that no action be taken whose purpose is to impair any bond indenture or financing agreement or any revenue source committed by contract to such bond or indebtedness.¹⁴

Faced with a severe potential shortfall in its ability to pay policyholder claims, and with the hurricane season already in progress, the FRPCJUA is currently attempting to negotiate a \$1.5 billion line of credit with a syndicate of lenders. The FRPCJUA would utilize this line of credit to finance its claims exposure

and Casualty Joint Underwriting Association to a reasonable level.

¹³See Florida Residential and Commercial JUA Cash and Cash Equivalents, dated 6/16/95. (Appendix 8).

¹⁴§ 627.351(6)(c)3.

should policyholder claims exceed the Association's available resources as the result of a catastrophic event. However, due to the lack of clear judicial guidance on the question of whether or not the FRPCJUA's assessments, policy premiums and policy surcharges are "state revenues" under Art VII, section 1(e), the FRPCJUA has been unable to secure this crucial financing.

For the reasons stated below, the FRPCJUA believes that its revenues are not "state revenues" for purposes of Article VII, section 1(e). A holding to the contrary would severely and adversely affect the Governor's ability to perform his constitutional planning and budgeting functions. Moreover, inclusion of the FRPCJUA's revenues in the definition of "state revenues" for purposes of the constitutional revenue limitation would serve as a death knell to the Association's ability to obtain its much-needed line of credit financing, as well as future long-term bond financing. Without such financing mechanisms in place, it is virtually a foregone conclusion that the FRPCJUA would be unable to timely and fully pay the policyholder claims that would result from a catastrophic event. One can only guess at the resultant disruption to the State's economy and the certain impairment of the health, safety and welfare of the residents of the State if such claims were not paid.¹⁵

¹⁵As the Legislature recognized in creating the Florida Hurricane Catastrophe Fund:

Mortgages require reliable property insurance, and the unavailability of reliable property insurance would therefore make most real estate transactions impossible. In addition,

SUMMARY

- I. The FRPCJUA is a statutorily created insurance company of last resort whose revenues are not considered "state revenues" for purposes of Article VII, section 1(e). The FRPCJUA provides insurance coverage in consideration for the premiums charged and assessments and surcharges levied. All FRPCJUA revenues are in the nature of "trust funds" for the payment of insurance claims and are not deposited in the State treasury. The classification of FRPCJUA revenues as "state revenues" would severely burden the functioning of the FRPCJUA and materially impair the Association's ability to responsibly meet its duty to pay policyholder claims.

- II. The inclusion of FRPCJUA revenues as "state revenues" for purposes of Article VII, section 1(e) would severely and adversely affect the Governor's ability to fulfill his constitutional planning and budgetary functions. As a legislatively created non-state agency, the FRPCJUA has never been required to comply with the provisions of Chapter 216, Florida Statutes. Due to the unpredictable nature of the amount of FRPCJUA revenues collected in any given year and the concomitant variable nature of FRPCJUA expenses, inclusion of the FRPCJUA in the State budgetary process would cause confusion and uncertainty at all levels of State government.

- III. By statute, the FRPCJUA is not a governmental entity and its revenues are not "state revenues" for purposes of Article VII, section 1(e). The Legislature, the Attorney General and the State Comptroller have similarly determined that FRPCJUA revenues are not "state revenues" and should not be subjected to the constitutional revenue limitation. The Auditor General does not audit the FRPCJUA because of the Association's non-governmental status.

the public health, safety and welfare demand that structures damaged or destroyed in a catastrophe be repaired or reconstructed as soon as possible. § 215.555(1)(c).

DISCUSSION

I. THE FRPCJUA IS, IN EFFECT, AN INSURANCE COMPANY AND ITS REVENUES ARE NOT "STATE REVENUES" FOR PURPOSES OF ARTICLE VII, SECTION 1(e).

The FRPCJUA is an insurance company, albeit a legislatively-created insurer of last resort, which provides property and casualty insurance to residents of the State who otherwise are unable to obtain such coverage in the voluntary market. The FRPCJUA is licensed as an insurance company by the Department and is subject to all of the insurance laws and regulations applicable to other private insurance companies operating in the State. The FRPCJUA must adopt premium rates, adhere to underwriting standards and follow claims adjustment procedures like any other private insurance company. See § 624.11. It must file audited financial statements and follow the same accounting principles as other private insurance companies. See § 624.424. It must additionally file its insurer expenses reports for each line of insurance it writes by April 1 of each year in accordance with § 627.915(2). The FRPCJUA is also subject to examination by the Department, e.g., market conduct examinations and regular examination, like any other private insurance company. See §§ 624.316 and 624.3161. Furthermore, the FRPCJUA is governed by the same insolvency provisions applicable to other private insurance companies under Chapter 631, Florida Statutes. In sum, the FRPCJUA is an insurance company.

The relationship between the FRPCJUA and insureds is one wherein, in consideration for providing property and casualty insurance coverage, the FRPCJUA charges premiums and levies assessments and surcharges. The revenues received by the FRPCJUA, as with other insurance companies, must be held as "trust funds" and invested in such a manner as to enable the Association to meet its contractual obligations to policyholders to pay covered claims, as well as to pay the Association's claims adjustment expenses and other administrative expenses. Premiums, assessments and surcharges received by the FRPCJUA represent amounts contractually paid in consideration of the provision of property and casualty insurance coverage, as well as to assure the stability of the property and casualty insurance market and, therefore, the availability of coverage to all State residents.

Indeed, if the FRPCJUA mechanism as a market of last resort were not in place to bring order and stability to the State's property and casualty insurance market, each and every resident of the State would live with the fear that he or she might very well be the next victim of an insurance company's decision to reduce its property and casualty writings within the State or to altogether withdraw from the State. More critically, the hundreds of thousands of state residents currently insured by the FRPCJUA would be left with no ability to obtain property and casualty coverage for their homes and businesses. Accordingly, while the FRPCJUA's assessments, policy premiums and policy surcharges are authorized by the general laws of the State, these revenues are payments in consideration for

contractual agreements to provide insurance coverage and not "state revenues" for purposes of Article VII, section 1(e).¹⁶

Precisely because FRPCJUA revenues are in the nature of "trust funds" held by the FRPCJUA for the payment of insurance claims, the revenues of the FRPCJUA are not received by the State or deposited in the State treasury. In passing on the identical question presented to this Honorable Court, the State's Attorney General noted that:

This office has not been provided with any information that such assessments, premiums or policy surcharges are received by a state agency or otherwise deposited in the state treasury. Thus, while authorized by state statute, they are not collected or expended by the state.¹⁷

That the FRPCJUA revenues are not "state revenues" is further evidenced by the State appropriations acts. A review of the State appropriations acts passed in the three fiscal years since the FRPCJUA has been in existence reveals that neither the FRPCJUA, nor its revenues and expenses, are included in the State's budget.¹⁸

Due to its very recent enactment, there is a dearth of authoritative material interpreting Article VII, section 1(e). On its face, however, the constitutional provision appears to be a budgetary measure aimed at limiting the growth of State programs

¹⁶Article VII, section 1(e) defines state revenues as "taxes, fees, licenses, and charges for services imposed by the legislature on individuals, businesses, or agencies outside state government."

¹⁷Op. Att'y. Gen. Fla., dated June 9, 1995, to the Honorable Bill Nelson, at 2 (unpublished). (Appendix 9).

¹⁸See Laws of Florida 1995, Chapter 95-429; Laws of Florida 1994, Chapter 94-357; and Laws of Florida 1993, Chapter 93-184. See also Section II, infra.

and services and the corresponding revenues and expenses. The only aspect of the FRPCJUA and its operations that would even remotely suggest that the FRPCJUA is a State program or service is the fact that the Association is statutorily created and that its assessments, policy premiums and policy surcharges are authorized by general law. This should not, however, convert the FRPCJUA into a State program, nor FRPCJUA revenues into "state revenues" for purposes of Article VII, section 1(e). While the Legislature has stated that the public policy of the State requires the maintenance of a residual market for residential property insurance, see § 627.3511(1), and has expressed its intent that the Association function "as a residual market mechanism to provide insurance only when the insurance cannot be procured in the voluntary market," see § 627.351(6)(d)1., this does not mean that the State views itself as being in the property and casualty insurance business. Indeed, the Legislature has expressly declared that the FRPCJUA "is not a state agency, board or commission." See § 627.351(6)(j)

To date, the only official interpretation of the constitutional revenue limitation and its potential applicability to the FRPCJUA's revenues is contained in Attorney General Butterworth's opinion letter, dated June 9, 1995, to Insurance Commissioner Nelson. Addressing the identical question currently pending before this Court, the Attorney General concluded as follows:

I am of the opinion that revenues derived from assessments, premiums and policy surcharges imposed by the Board of Governors of the Residential Property and Casualty Joint Underwriting Association are not 'state revenues' for purposes of Article VII, Section 1(e), Florida Constitution.

Op. Atty Gen. Fla., dated June 9, 1995 to the Honorable Bill Nelson, at 3 (unpublished) (Appendix 9).

The Legislature obviously considers it of paramount importance to the economy of the State and for the preservation of the public health, safety and welfare that property and casualty insurance be available to every resident of the State, and has opted to ensure this through a private market mechanism consisting of an amalgamation of all private insurers that write property and casualty insurance in the State.

There is no express basis on the face of the constitutional amendment, nor any implied basis in the legislative history, to support that the Legislature intended to abandon the existing detailed structure of the statute through the enactment of Article VII, Section 1(e). Yet, if FRPCJUA revenues were classified as "state revenues" for purposes of the constitutional revenue limitation, the Legislature's attempt to prevent market instability by providing actuarially sound rates and preventing insurers from abandoning the property and casualty insurance market would be virtually emasculated. Any application of a revenue cap on FRPCJUA premiums, assessments or surcharges would not only abolish the Association's ability to responsibly meet its duty to pay policyholder claims through the provision of actuarially sound rates,¹⁹ but would decimate recent Legislative attempts to downsize

¹⁹Unlike private insurance companies, the FRPCJUA which was created as an emergency insurer of last resort, is not required to have start-up capital or surplus capital. Having "little or no capital or surplus," see § 627.351(6)(d)1., it is of paramount importance that FRPCJUA premiums, which are its primary source of revenue, be actuarially sound.

the number of policies written through the FRPCJUA.²⁰ Accordingly, FRPCJUA revenues cannot be construed as being state revenues under Article VII, Section 1(e), as such a construction would serve to devastate legislative and industry efforts to stabilize the property and casualty insurance market in this State.

The FRPCJUA is, in effect, an insurer of last resort that provides property and casualty insurance to State residents who otherwise would not be able to obtain such coverage. The FRPCJUA is not a State program or service. An understanding of the true nature of the FRPCJUA and its function leads to the inevitable conclusion that neither assessments, policy premiums nor policy surcharges of the FRPCJUA, nor any other source of the FRPCJUA's revenues, constitutes "state revenues" for purposes of Article VII, section 1(e).

²⁰ Built into the FRPCJUA statute is the concept that any rates charged must be higher than those charged in the admitted voluntary market so as not to encourage insureds from seeking coverage through the Association. § 627.351(6)(d)1. In fact, the number of policyholders insured under the FRPCJUA has grown to such proportions that the Legislature has been forced to take extraordinary measures, in the form of financial incentives to insurers willing to replace FRPJUA policies, recognizing that implementation of eligibility criteria and noncompetitive rates were insufficient. See § 627.3511. If FRPCJUA rates are subjected to the revenue cap, the FRPCJUA's premium charges may fall at or below those charged in the admitted voluntary market, further exacerbating a volatile situation.

II. INCLUSION OF THE FRPCJUA'S REVENUES AS "STATE REVENUES" FOR PURPOSES OF ARTICLE VII, SECTION 1(e) WOULD SEVERELY AND ADVERSELY AFFECT THE GOVERNOR'S ABILITY TO FULFILL HIS CONSTITUTIONAL PLANNING AND BUDGETARY FUNCTIONS.

As chief budget officer of the State,²¹ the Governor receives from each state agency a final legislative budget request based on the agency's independent judgment of its needs. §§ 216.023, 216.0235. Since its creation, the FRPCJUA has not participated in the requirements of filing budget requests pursuant to Chapter 216, Florida Statutes, despite the sweeping definition of "state agency" or "agency" contained therein.²² As FRPCJUA revenues are neither received by a State agency, nor deposited, collected, or expended by the State,²³ they are clearly not part of the State treasury and are not considered in the Governor's budget.²⁴

²¹Article IV, Section 1(a), Florida Constitution provides, inter alia: "The governor shall be the chief administrative officer of the state responsible for the planning and budgeting for the state."

²²Said provision states in part:

. . . except as otherwise provided herein, "state agency" or "agency" means any unit of organization of the executive branch, including any official, officer, department, board, commission, division, bureau, section, district, office, authority, committee or council or any other unit of government, however designated, and the Public Service Commission.

§ 216.001 (emphasis supplied).

²³See Op. Att'y. Gen. Fla., dated June 9, 1995, to the Honorable Bill Nelson, at 2 (unpublished). (Appendix 9).

²⁴That FRPCJUA funds are not "state moneys" and thus part of the State treasury is further evidenced by the fact that policyholder claims paid from FRPCJUA moneys are drawn from an FRPCJUA bank account and not disbursed by State warrant drawn by the Comptroller under the State Treasury. See § 216.331.

Nor do FRPCJUA revenues lend themselves to budgetary prognostications. The amount of FRPCJUA revenues collected, or needed, in any given year are subject to great uncertainty. Both the amount of policy premium rates, which may be revised up to four times a year, § 627.351(6)(d)(2), and the amount of assessments or surcharges to be levied, are contingent upon unpredictable meteorological activity affecting the State. As rates for coverage must be actuarially sound, they are to be based on the Association's actual loss experience together with an appropriate catastrophe loading factor reflecting actual catastrophic exposure. § 627.351(6)(d)1. The amount of assessments levied in any given year, if any, similarly hinges on whether or not a deficit situation has been created by a catastrophic storm. § 627.351(6)(b)(3). Moreover, the annual amounts that might be collected by the FRPCJUA from reinsurance contracts or from the Florida Hurricane Catastrophe Fund is incapable of being ascertained, or projected, in advance.

Thus, in any given year, it is virtually impossible to forecast and present the expected revenues and budgetary needs of the FRPCJUA for contemplation by the Governor and the Legislature. Further complicating matters, the yearly hurricane season commences in June and runs through November. The State's fiscal year, by contrast, runs from July 1 through June 30. Planning for the State budget commences months before the start of the fiscal year. Accordingly, a major catastrophic storm, which could incalculably alter both the FRPCJUA's costs and revenues, would more than likely

occur well beyond the time that the fiscal year's budget was determined by the Governor and the Legislature.

In sum, if FRPCJUA revenues are classified as "state revenues" they would by necessity have to be included in the budgetary process. This would not only create mass confusion and a continuing budgetary uncertainty affecting all levels of State government, but it also would severely affect the Governor's ability to fulfill his constitutional planning and budgetary functions.

III. THE FRPCJUA IS NOT A GOVERNMENTAL ENTITY AND, THEREFORE, ITS REVENUES SHOULD NOT BE CONSIDERED "STATE REVENUES" FOR PURPOSES OF ARTICLE VII, SECTION 1(e).

That the FRPCJUA is not a governmental entity is clear from the legislation creating the Association. This is also evident from the manner in which the Legislature, and both legislative and executive branch officials, have dealt with the FRPCJUA. Even the Internal Revenue Service has consistently held that joint underwriting associations, similar in structure and operation to the FRPCJUA, are not political subdivisions or entities that perform essential governmental functions. While the constitutional revenue limitation contained in Article VII, section 1(e) does not appear, on its face, to rest on whether an entity is governmental in nature, the governmental or non-governmental status of an entity should be considered in determining whether such entity's revenue sources are included in the definition of "state revenues".

From its inception the FRPCJUA has not been considered a governmental entity by the Legislature. Section 627.351(6)(j), stating that the Association "is not a state agency, board or commission," has been in the FRPCJUA statute since 1992 and was reconfirmed by the enactments of the 1995 Legislature. The only limited exception to this provision for purposes of the State intangibles tax and corporate income tax is attributable to the Legislature's recognition that the FRPCJUA would be strapped for revenues and, given the importance of the FRPCJUA's functions, did not want to exacerbate the Association's financial burden. It should be noted, however, that because the FRPCJUA is an insurer,

it is subject to the insurance premium taxes and other fees and surcharges applicable to all other property and casualty insurance companies.²⁵

Knowledge of this legislative treatment of the FRPCJUA must be attributed to the Legislature when it passed the joint resolution that culminated in Article VII, section 1(e). As the Attorney General stated in its recent opinion letter to Insurance Commissioner Nelson:

It is, however, a general rule of construction that the Legislature is presumed to know the existing provisions of law. Accordingly, it must be presumed that at the time the Legislature considered and adopted the joint resolution proposing the amendment of Article VII, section 1(e), Florida Constitution, that was subsequently approved by the electorate, it was aware that it did not consider the association to be a state agency.

Op. Att'y. Gen. Fla., dated June 9, 1995, to the Honorable Bill Nelson, at 3 (unpublished). (Appendix 9).

Surely, armed with the knowledge that the Association by prior legislative articulation was not a governmental entity, the Legislature did not, in passing the joint resolution that became Article VII, section 1(e), intend to include the FRPCJUA revenues within the definition of "state revenues". In fact, the Legislature, subsequent to the joint resolution, again reconfirmed that the FRPCJUA was not a governmental entity in 1995.

See § 627.351(6)(j).

²⁵For example, the FRPCJUA must pay Florida Insurance Guaranty Association surcharges, Florida Hurricane Catastrophe Fund premiums and Emergency Management and Preparedness and Assistance Fund policy fees.

Even after adoption of Article VII, section 1(e), the Legislature evidenced its belief and understanding that the FRPCJUA and its revenues do not fall within the ambit of the constitutional revenue limitation. While legislation seeking to implement the provisions of Article VII, section 1(e) during the 1995 Regular Session of the Legislature ultimately was not considered, the provisions of the bills that would have accomplished such implementation, and the corresponding staff analyses, are instructive.²⁶ As stated in the Bill Analysis and Economic Impact Statement prepared for the House of Representatives Committee on Finance and Taxation in connection with one such pending bill:

The Revenue Estimating Conference requested an opinion from the Comptroller's Office inquiring whether the Comptroller would consider certain enumerated entities "state governmental entities" pursuant to the definition in SB 456. The definition of "state governmental entity" in this bill is identical to the definition in SB 456. In a response dated April 12, 1995, the Comptroller's office stated that the State Board of Administration, university direct support organizations, university auxiliary enterprises, university faculty practice plans, insurance guaranty associations, and the Florida Birth-Related Neurological Injury Compensation Plan (NICA) will be considered state governmental entities and, to the extent that such entities have revenues which are taxes, licenses, fees, or charges for services, the revenues will be included in the revenue limitation calculations. The Comptroller's office also stated that community colleges, insurance risk apportionment plans (JUA's), and the Florida Comprehensive Health Association will not be considered state governmental entities.²⁷

²⁶See PCB FT 95-07, SB 456 and HB 2731, all of which were pending during the 1995 Regular Session of the Legislature. (Appendix 10).

²⁷Bill Analysis and Economic Impact Statement, House of Representatives Committee on Finance and Taxation, dated April 25, 1995, relating to PCB FT 95-07, at 7. (emphasis added) (Appendix 11).

To the best knowledge of the FRPCJUA, the Legislature's failure to pass the implementation bills, which would have clarified the status of various entities and their revenues for purposes of the constitutional revenue limitation, was not due to any controversy regarding the status of the FRPCJUA.

The Legislature is not alone in its belief that the FRPCJUA is a non-governmental entity and should not be included within the constitutional revenue limitation. As noted above, the Florida Comptroller's Office is also of the view that risk apportionment plans, such as the FRPCJUA, should not be considered state governmental entities for purposes of the constitutional revenue limitation.²⁸

Significantly, the bill analysis to the joint resolution that ultimately became Article VII, section 1(e) expresses the view that the State Comptroller would have some responsibility in determining which revenues are "state revenues" for purposes of the constitutional revenue limitation. More specifically, the bill analysis states, in relevant part, that:

In order to comply with the revenue limitation contained in CS/CS/HJR 2053, the Comptroller will have to identify receipts which are "state revenues" subject to the limitation.²⁹

²⁸See Letter from Thomas D. McGurk, Director, Division of Accounting and Auditing, dated April 12, 1995, to Mr. David Beggs, Florida Senate Committee On Ways and Means. (Appendix 12).

²⁹Final Bill Analysis and Economic Impact Statement, House of Representatives Committee on Finance and Taxation, dated June 6, 1994, relating to CS/CS/HJR 2053, at 3. (Appendix 13).

It is unlikely that, by the foregoing statement, the Legislature intended to abdicate all responsibility with regard to determining what is and what is not "state revenues" and delegate the same to the Comptroller's Office. It does appear, however, that both prior to and after passage of the constitutional revenue limitation, the Legislature felt the Comptroller would play some role in the determination. And, as evidenced by the April 12, 1995 letter from Thomas D. McGurk to David Beggs, referred to above, the Comptroller's Office is of the view that risk apportionment plans, such as the FRPCJUA, are not governmental entities for purposes of the state revenue limitation.

It should be noted that, in a totally different context, the State Comptroller also has determined that the FRPCJUA is not part of State government. For purposes of Governmental Accounting Standards Board Statement No. 14, which establishes standards for financial reporting by governmental entities, the Comptroller's Office has classified the FRPCJUA as a "non-component unit" of State government.³⁰ In other words, the State, as a primary governmental entity, is not entitled to the FRPCJUA's resources, nor is the State obligated for the FRPCJUA's obligations or deficits. Accordingly, the FRPCJUA is not included within the financial reports of the State.

³⁰See State of Florida, List of All Potential Component Units Per GASB 14 Criteria. (Appendix 14). There are four possible classifications for purposes of GASB Statement 14: component unit (CU), non-component unit (NCU), related organization (RO) and joint venture (JV).

Further evidence that the FRPCJUA has not been considered to be a governmental unit by State officials can be found in the fact that the Association has not been audited by the State's Auditor General.³¹ Under State law,³² the Auditor General is charged with annually making financial audits of all state agencies³³ and the Auditor General may at any time make financial audits and performance audits of all governmental entities³⁴ created pursuant to law. As indicated in the Auditor General's July 4th letter to Mr. James Newman, Executive Director of the FRPCJUA, the Auditor General has not audited the FRPCJUA because it is not considered to be part of the State budget.

In reviewing various situations involving joint underwriting associations for purposes of determining their appropriate treatment under the federal tax laws, the Internal Revenue Service has determined that such entities are not governmental entities and that they do not fulfill an essential governmental function. The

³¹See Letter from Mr. Charles Lester, dated July, 4, 1995 to Mr. James Newman, Executive Director of the FRPCJUA. (Appendix 15).

³²See §11.45(3)(a) 1. and 2.

³³§11.45(1)(h) defines "state agency" as: "a separate agency or unit of state government created or established by law and includes, but is not limited to, the following and the officers thereof: authority, board, branch, bureau, commission, department, division, institution, office, officer, or public corporation, as the case may be, except any such agency or unit within the legislative branch of state government."

³⁴§11.45(1)(c) defines "governmental entity" as "a state agency, a county agency, or any other entity, however styled, that independently exercises any type of state or local governmental function."

Internal Revenue Service, therefore, has determined that joint underwriting associations, similar in structure to the FRPCJUA, are subject to federal income taxation.³⁵

Finally, the FRPCJUA has itself recognized in its Plan of operation that it is not a state agency, board or commission.³⁶ In addition, persons or entities aggrieved by FRPCJUA actions or decisions in covering insurance risks are not entitled to administrative redress and review pursuant to Chapter 120, Florida Statutes,³⁷ but rather are limited to judicial review or the FRPCJUA review procedures set forth in the Association's Plan of Operation.³⁸

³⁵PLR 9347001 (July 26, 1993) (joint underwriting association providing insurance to small businesses); PLR 9218014 (February 4, 1992) (plan to provide health insurance to residents unable to obtain same); and PLR 9109031 (November 30, 1990) (association providing medical malpractice insurance). (Appendix 16).

³⁶See § 27, FRPCJUA Second Amended Plan of Operation. (Appendix 17).

³⁷See § 627.351(6)(c)8.

³⁸See §§ 15, 16, 17 and 24, FRPCJUA Second Amended Plan of Operation. (Appendix 17).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Honorable Court should issue an advisory opinion to the Governor that FRCPJUA assessments, policy premiums and policy surcharges are not "state revenues" for purposes of Article VII, section 1(e).

Respectfully submitted this 4th day of July, 1995.

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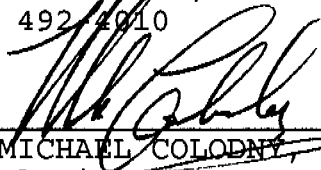

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CERTIFICATE OF SERVICE


WE HEREBY CERTIFY that a true and correct copy of the foregoing has been provided by hand delivery to the Honorable Lawton Chiles, Governor of the State of Florida, The Capitol, Tallahassee, Florida, this 5th day of July, 1995.

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