IN THE SUPREME COURT OF FLORIDA

IN RE:

ADVISORY OPINION TO THE
GOVERNOR - REVENUE CAP
STATE INSURANCE PREMIUMS

CASE NO. 85,949

BRIEF OF TREASURER AND INSURANCE COMMISSIONER BILL NELSON

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STATEMENT OF THE CASE AND FACTS

The Florida Residential Property and Casualty Joint Underwriting Association ("Association") is a legislatively created insurance company operating pursuant to the provisions of Section 627.351(6), Florida Statutes (1994 Supp., CS/HB 2619, 1995 Legislative Session). The Association operates pursuant to a certificate of authority issued by the Department of Insurance, as would any other insurance company licensed in this state. The Association provides property insurance coverage to over 740,000 Florida homeowners, mobile homeowners and condominium unit owners to satisfy their mortgage holders and to protect their homes in the event of a loss.

Subsequent to Hurricane Andrew, various private insurers withdrew from writing property insurance in the state. Also, numerous insurers substantially reduced their property insurance exposure in Florida through non-renewal and cancellation of policies. Pursuant to Section 627.7013(2), Florida Statutes (1993), an insurer is entitled to non-renew ten percent of its residential property policies in a county, not to exceed five percent of its policies statewide, per year, through November 1996. Thus, there is an ongoing need for an insurance mechanism to provide coverage during this period of market instability. While legislation passed in the 1995 Legislative Session provides incentives to depopulate the Association over time, the Association is the only source available to provide necessary

coverage for those whose needs are not met by individual private insurers, especially in the South Florida area.

As structured by law, the Association operates on a cash-flow basis and has no capital or surplus accumulated. Thus, any substantial claim obligations, such as payment of claims from a hurricane, must be funded by premiums, policy assessments, and policy surcharges. In order to secure funding for prompt and timely payment of policyholder claims in the event of a catastrophic occurrence, the Association is currently negotiating with financial institutions to obtain a $1.5 billion line of credit. The Association will secure this line of credit with assessments, policy premiums, and policy surcharges collected over time.

Whether association premiums, policy surcharges, and policy assessments are "state revenues" has been raised as an issue affecting the securing of a line of credit for the Association.

If Association funds are not "state revenues," the Association can proceed to secure a line of credit. However, if Association funds are "state revenues," the state's budgetary process must consider the potential adverse impact on the state of unpaid Association policyholder claims due to insufficient cash flow.

On June 9, 1995, Attorney General Bob Butterworth issued an opinion concluding that the revenues derived from assessments, premiums, and policy surcharges imposed by the Association are not "state revenues" subject to the "revenue cap" of Article VII,

Section 1(e), Fla. Const.

On June 26, 1995, Governor Lawton Chiles requested the opinion of this Court concerning his executive powers and duties under Article IV, Section 1(a), which charges him as the chief administrative officer of the State to plan and execute the State's budget. Specifically, Governor Chiles submitted the following question:

> Are assessments, policy premiums and policy surcharges imposed by the Board of Governors of the Florida Residential Property and Casualty Joint Underwriting Association collected pursuant to 627.351(6), Florida Statutes, "state revenue" within the meaning of Article VII, Section 1(e) of the Florida Constitution?

On June 27, 1995, this Court determined that the Governor's request fell within the purview of Article IV, Section 1(c) of the Florida Constitution, and exercised its discretion to render an opinion.

The Treasurer and Insurance Commissioner, as regulator of the Association, is an interested party in this matter and submits this brief in order to facilitate this Court's decision.

DISCUSSION

I. ASSESSMENTS, POLICY PREMIUMS AND POLICY SURCHARGES PAID TO THE FLORIDA RESIDENTIAL PROPERTY AND CASUALTY JOINT UNDERWRITING ASSOCIATION ("ASSOCIATION") COLLECTED PURSUANT TO SECTION 627.351(6), FLORIDA STATUTES, ARE NOT "STATE REVENUES" WITHIN THE MEANING OF ARTICLE VII, SECTION 1(e), FLA. CONST.,

During the 1994 general election, Florida voters approved an amendment to Article VII, Section 1 of the Florida Constitution. The purpose of this amendment, subsection (e), was to impose a limitation or "revenue cap" upon the revenues the state can collect.

The question presented to this Court by Governor Chiles in this cause is simple and straightforward: Do the Association funds described in the Governor's letter constitute "state revenues" under and for the purposes of the revenue cap contained in Article VII, Section 1(e), Fla. Const.,?

a. The Association as created by law is an extension of the insurance industry and not a part of state government.

As the following provisions indicate, the Association operates as an insurance company to supplement the private insurance market in periods of market disruption. The primary responsibility for the Association's operations lies with its member insurers.

The Association was created for the equitable apportionment or sharing among insurers of property and casualty insurance covering residential property for applicants who are in good faith entitled, but are unable, to procure insurance through the

admitted voluntary market. (See Section 627.351(6)(a), Fla. Stat. (1994 Supp.)) Membership in the Association is mandatory for all insurers authorized to write such insurance in Florida. (See Section 627.351(6)(b), Fla. Stat. (1994 Supp.)). Each member's portion of losses and expenses incurred are calculated based upon a ratio between its direct premiums written on residential property within the state during the preceding calendar year and the aggregate direct premiums written by all members on residential property in the state for the preceding calendar year. Id. Association policies, which are approved by the Department, are sold by licensed insurance agents who receive a commission on each sale. (See Section 627.351(6)(c)1, Fla. Stat. (1994 Supp.))

Most importantly, Section 627.351(6)(d)1, Florida Statutes, requires that the rates of the Association be actuarially sound, and must be based on the Association's actual loss experience and expenses together with an appropriate catastrophic loading factor that reflects the actual catastrophic exposure of the Association. Therefore, the amount of funds received by the Association will necessarily increase or decrease based upon the number of policyholders in the Association and the risk exposure they represent. In CS/HB 2619, the Legislature specifically provided that the Association's rate structure "recognizes that the association has little or no capital or surplus." It is evident the Legislature intended for the rates and revenues of the Association to be increased as needed to be actuarially

adequate. In contrast, the language in Article VII, Section 1(e), speaks in terms of revenues collected in a fiscal year adjusted by growth in Florida personal income. Obviously, insurance rates are not capable of being managed on a fiscal year personal income growth basis.

In addition, Section 627.351(6)(j), Florida Statutes, explicitly provides that the Association is not a state agency, board or commission, nor are Association funds deposited or invested in the State Treasury, subject to the provisions of Chapter 216, Florida Statutes.

Finally, Article VII, Section 1(e), Fla. Const., speaks in terms of "state revenues" as taxes, fees, licenses, and charges imposed by the legislature... In CS/HB 2619, the Legislature carefully provided that "the association shall levy assessments", "the association board shall levy emergency assessments", and "the association shall adopt rating plans" (See CS/HB 2619 amending s. 627.351(6)(b)3.b.,627.351(6)(b)3.d., and 627.351 (6)(b)d.1., Fla. Stat.) This post-"revenue cap" language should be construed as the Legislature's intent to grant the power to charge premiums and levy assessments to the Association so that the Association can accomplish its purpose of providing insurance coverage.

II. THE LEGISLATURE SPECIFICALLY AUTHORIZED THE ASSOCIATION TO BORROW FUNDS, AND DID NOT INTEND TO PRECLUDE THIS ACTIVITY BY ARTICLE VII, SECTION 1(e), FLA. CONST.,

Prior to the enactment of the "revenue cap" provision, Section 627.351(6)(c)3, Florida Statutes (1994 Supp.) provided the following authorizing language for the Association:

> ". . . and shall have the power to borrow funds . . ."

During the 1995 Legislative session, Section 627.351(6)(c)3, was amended to expand the Association's ability to issue bonds and pledge assessments and other funds available to the Association as security for bonds or other indebtedness. Specifically, CS/HB 2619 provides:

> The Association shall have the power to borrow funds by issuing bonds or by incurring other indebtedness, and shall have other powers reasonably necessary to effectuate the requirements of this subsection . . .
>
> The Association shall have the authority to pledge assessments and other funds available to the Association as security for bonds or other indebtedness.
>
> (underlining contained in CS/HB 2619)

The Legislature further provided that:

> [I]t 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.
>
> (underlining contained in CS/HB 2619)

This statutory provision recognizes that Association funds to be used as security for indebtedness are outside the state revenue process. It must be presumed that the Legislature was

aware of the "revenue cap" in committing funds of the Association to secure indebtedness, and would not have established a process which would be unworkable if such funds were included in the "revenue cap". Tamiami Trail Tours v. Lee, 194 So. 305 (Fla. 1940); Carcaise v. Durden, 382 So.2d 1237 (Fla. 5th DCA 1980).

The actions of the Legislature regarding the Association, particularly the authorization to borrow funds, reflects the fundamental understanding that the Association's purpose is to meet insurance risks and operates on an actuarial rather than a budgeting standard.

CONCLUSION

For the reasons stated herein, it is respectfully submitted that this Court should issue an advisory opinion to Governor Chiles that assessments, policy premiums, and policy surcharges imposed by the Association and collected pursuant to Section 627.351(6),Fla. Stat.,(1994 Supp.) are not "state revenues" under and for the purposes of Article VII, Section 1(e), Fla. Const.

Respectfully submitted this 5th day of July, 1995.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing Amicus Brief was forwarded by Hand Delivery/U.S. Mail to Dexter Douglass, General Counsel, Office of the Governor, 209 Capitol, Tallahassee, FL 32399-0001, this 5th day of July, 1995.

Daniel Y. Sumner

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