

FILED

SID J. WHITE

JUL 5 1995

SUPREME COURT OF FLORIDA

CLERK, SUPREME COURT

By

Chief Deputy Clerk

In re ADVISORY OPINION TO THE
GOVERNOR - REVENUE CAP
STATE INSURANCE PREMIUMS

CASE NO. 85,949

BRIEF OF

FLORIDA WINDSTORM UNDERWRITING ASSOCIATION,

An Interested Party

MAHONEY ADAMS & CRISER, P.A.

Barbara B. Slott
Florida Bar No. 0275352
50 North Laura Street
3300 Barnett Center
Jacksonville, FL 32202
904 354-1100

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	ii
I. THE INTEREST OF FLORIDA WINDSTORM UNDERWRITING ASSOCIATION	1
II. RPCJUA'S SOURCES OF REVENUES ARE NOT "STATE REVENUES" WITHIN THE MEANING OF THE REVENUE CAP	2
A. THE NATURE OF RPCJUA REVENUES	3
B. PREMIUM REVENUES	4
C. REVENUES FROM MEMBER ASSESSMENTS	4
III. WHY RPCJUA NEEDS POWER TO BORROW FUNDS	6
A. LIMITATIONS ON ASSESSMENTS	6
B. CATASTROPHE LOSSES	6
C. PLAN OF BORROWING	7
D. HOW UNCERTAINTY OVER THE MEANING OF THE "STATE REVENUES" UNDER THE REVENUE CAP AFFECTS RPCJUA	7
IV. CONCLUSION	8
CERTIFICATE OF SERVICE	10

TABLE OF AUTHORITIES

Page

Florida Constitution

Article VII, § 1(e), Fla. Const. 1, 2, 5

Florida Statutes

§ 215.555, Fla. Stat. (Supp. 1994) 3

§ 215.555(1)(f), Fla. Stat. (Supp. 1994) 3, 6

§ 627.351(2), Fla. Stat. (Supp. 1994) 1, 2

§ 627.351(6), Fla. Stat. (Supp. 1994) 7

§ 627.351(6)(g)(1), Fla. Stat. (Supp. 1994) 5

Florida Laws

Ch. 70-234, Laws of Fla. 1

SUPREME COURT OF FLORIDA

In re ADVISORY OPINION TO THE
GOVERNOR - REVENUE CAP
STATE INSURANCE PREMIUMS

CASE NO. 85,949

INTERESTED PARTY BRIEF OF
FLORIDA WINDSTORM UNDERWRITING ASSOCIATION

The Florida Windstorm Underwriting Association ("FWUA"), an association of property insurers created under Chapter 70-234, Laws of Florida (now, F.S. § 627.351(2)), files this brief in an effort to assist the Court in its consideration of the Governor's request, dated June 26, 1995, for an advisory opinion on whether the revenues of Florida Residential Property and Casualty Joint Underwriting Association ("RPCJUA") are "state revenues" within the meaning of Section 1(e) of Article VII of the Florida Constitution (referred to in this brief as the "Revenue Cap"). It urges the Court to conclude that RPCJUA's revenues are not "state revenues" under that section.

I. THE INTEREST OF FLORIDA WINDSTORM UNDERWRITING ASSOCIATION.

FWUA was established as a private association providing windstorm loss insurance to property owners in coastal areas who are unable to buy windstorm insurance through other channels. FWUA is a partnership under state and federal law (including tax laws).

F.S. § 627.351(2) requires that all members of FWUA to participate in its writings, expenses, profits, and losses proportionally to the amount of each member's net direct premiums for insurance written on Florida property.

In these respects, FWUA is similar to RPCJUA. Both have the same statutory function - to underwrite insurance risks that individual companies are unwilling to accept. Both have similar sources of revenue. Both have power to assess their members to pay policyholder claims.

Since RPCJUA's revenue sources are similar to those of FWUA, FWUA has a vital interest in the advisory opinion the Court will render in response to the Governor's request.

II. RPCJUA'S SOURCES OF REVENUES ARE NOT "STATE REVENUES" WITHIN THE MEANING OF THE REVENUE CAP.

The Revenue Cap limits "state revenues" in any fiscal year to the amount of state revenues in the prior year plus an adjustment for growth. It goes on to define state revenues as "taxes, fees, licenses, and charges for services imposed by the legislature on businesses, individuals or agencies outside state government."¹ When the electorate adopted this provision last

¹ Section 1(e) of Article VII specifically excludes from the calculation:

". . . state revenues that are necessary to meet the requirements set forth in documents authorizing the issuance of bonds by the state; revenues that are used to provide matching funds for the federal Medicaid program with the exception of the revenues used to support the Public Medical Assistance Trust Fund or its successor program and with the exception of state matching funds used to fund elective expansions made after July 1, 1994; proceeds from the state

November, it was clearly concerned with controlling the growth of state government by limiting the amount of funds that the state and its agencies could raise and spend. Viewed in this light, the essential characteristics of state revenues within the meaning of the Revenue Cap are that they (i) are collected by or on behalf of the state as taxes, fees, or charges for services rendered by the state; (ii) come into the hands of the state and are held at some point in a state account; (iii) are disbursable by the state for governmental purposes.

Thus, analyzing the sources and uses of revenue available to RPCJUA is essential before one can assess whether RPCJUA revenues meet the Revenue Cap definition.

A. The Nature of RPCJUA Revenues.

RPCJUA revenues come from four sources: (i) policy premiums; (ii) assessments against members; (iii) earnings on invested funds; and (iv) emergency policyholder surcharges. No provision of state law permits the state or any local government to provide funds to RPCJUA, and there is no procedure under which RPCJUA may apply for or receive an appropriation or grant from the state or any local government.²

lottery returned as prizes; receipts of the Florida Hurricane Catastrophe Fund; balances carried forward from prior fiscal years; taxes, licenses, fees, and charges for services required to be imposed by any amendment or revision to this constitution after July 1, 1994."

² Having a contract of reinsurance from the Florida Hurricane Catastrophe Fund (the "Fund") is mandated by Section 215.555, Florida Statutes. While the Fund is, for federal tax purposes, a state trust fund (Section 215.555(1)(f)), the Fund's monies come from reimbursement premiums paid by insurers, not

B. Premium Revenues.

RPCJUA receives premiums paid by policyholders at rates the Department of Insurance has determined to be actuarially sound (under the same procedures that apply to premiums charged by property and casualty insurance companies). Policyholders pay these premiums under contracts with RPCJUA in the expectation of receiving insurance coverage against property damage losses.

Thus, premiums represent payment for a financial commitment made by RPCJUA. They are not taxes, fees or charges for a governmentally provided service. Premium revenues are voluntary contractual payments made by insureds in exchange for insurance coverage provided by member companies. They never come into the possession or control of state government.

C. Revenues from Member Assessments.

Although, over time, premium revenues are the primary source of funds for the payment of policy claims, in any insurance program that must pay claims arising from catastrophic losses, they may not produce funds sufficient to pay all claims resulting from a given catastrophe because the catastrophe may occur before sufficient funds from premiums have accumulated. Therefore, access to members' capital, surplus and other revenues may be necessary to enable RPCJUA to pay claims arising from catastrophic losses. Access through member assessments is provided under statute.

from state appropriations.

By statute, assessments are apportioned among members pro rata according to their respective writings of property insurance in the state. Under F.S. § 627.351(6)(g)(1), the RPCJUA board must make reasonable efforts to collect assessments. These efforts include filing suit against members who fail to pay.

Assessments can be used only to pay the claims and (for RPCJUA) start-up expenses. Absent a major catastrophe, the assessment mechanism permits the payment of policyholder claims even if the funds on hand from collected premiums and reinsurance are insufficient.

Since assessments can be used only to pay claims, they represent nothing more than a means of enforcing the members' obligation to make good on the risks they assumed when they collectively wrote insurance through the underwriting association. The money raised through assessments is money that, in reality, belongs to insureds under their contracts with the association. Assessments are simply a mechanism for collecting it so that it can be paid to them. Thus, assessments are not taxes, fees, licenses or charges for services and they are neither collected nor disbursed by the state. Like premiums, they are private funds that never come into the hands of the state.³

³ Section 1(e) of Article VII contains an express exclusion for funds of the Florida Hurricane Catastrophe Fund. This express exclusion was necessary for the very reason that it is not necessary for RPCJUA - the funds of the Florida Hurricane Catastrophe Fund are legislatively required to be held as state trust funds, administered by the State Board of Administration. This was done to permit such funds to accrue and be invested free

III. WHY RPCJUA NEEDS POWER TO BORROW FUNDS.

A. Limitations on Assessments.

To protect the solvency of member companies, assessments on members are limited in any year to an aggregate maximum of 10% of the total, statewide gross premiums for all property insurance written in the prior year.⁴

If policyholder claims in any year exceed the sum of funds on hand plus maximum assessment revenues and reinsurance recoveries, policyholder claims cannot be paid unless the joint underwriting association can borrow sufficient funds to enable it to meet those obligations.

Therefore, if policyholder claims exceed the aggregate of available funds on hand, plus reinsurance proceeds and maximum assessment collections, RPCJUA must either: (i) borrow to meet its claims obligations; or (ii) default on those obligations and leave policyholder claims unpaid.

B. Catastrophe Losses.

Recent occurrences (Hurricane Andrew) have shown that in the event of a large hurricane in Florida, property damage claims by RPCJUA policyholders may far exceed the cash, reinsurance recoveries and maximum assessments available to RPCJUA.

of federal taxation. F.S. § 215.555(1)(f).

⁴ Members' participation in the writings, profits and losses of RPCJUA are based on their pro rata share of total premiums.

C. Plan of Borrowing.

In order to meet its potential policyholder obligations, RPCJUA is seeking a line of credit from banking institutions in the amount of \$1.5 Billion. This facility will enable RPCJUA to meet any policyholder claims that exceed its available cash, reinsurance proceeds and collections from assessments. However, the lending institutions must be assured that a source of revenue exists from which they can expect repayment. The chief source of repayment is future RPCJUA member assessments. Unless a bank lender can be assured that collection of these assessments is legally enforceable, it will not commit the funds of its depositors by granting a line of credit.

Banks generally do not provide loans (other than residential mortgage loans) that are amortized over more than 5-7 years. Therefore, RPCJUA may eventually issue long-term bonds to refinance any borrowings under its line of credit. However, bondholders, too, will demand a dedicated, enforceable source of repayment. RPCJUA will be unable to sell its bonds unless it can give bondholders a security interest in future assessments that it has power to collect.

D. How Uncertainty Over the Meaning of the "State Revenues" Under The Revenue Cap Affects RPCJUA.

The legislature's only purpose in creating RPCJUA was to make insurance available to citizens who could not obtain it in ordinary markets.⁵ The legislature determined that a joint

⁵ F.S. § 627.351(6).

underwriting association which is able to pool the risks and resources of many insurance companies could achieve this objective. In order to be sure that it can provide insurance against catastrophic losses, RPCJUA must have power to make arrangements now to finance payment of policyholder claims that will result from future catastrophes.

To obtain financing, RPCJUA must be able to assure lenders (banks and bondholders) that they have the power to collect assessment revenues. Unless it can give this assurance, the lending market (banks and bond funds) will not make the needed capital resources available. If Florida is struck with another devastating hurricane and RPCJUA's line of credit is not in place, it will be unable to pay policyholders' claims.

IV. CONCLUSION.

RPCJUA revenues are not (i) collected by or on behalf of the State; (ii) held at any time in a state account; (iii) required to be disbursed in accordance with state appropriation procedures; or (iv) used by the state for governmental purposes.

Member assessments are collected from private sources by a private entity for a private purpose - to pay the claims of policyholders.

The legislature created joint underwriting associations to provide a means for the private market to serve the needs of Florida residents who could not otherwise obtain insurance. It did not thereby transform member assessments into state revenues

any more than the grant of a utility franchise by the state turns private utility company charges into state revenues.

The Revenue Cap was intended to limit the size of state government by restricting the growth of expenditures by the state and its various agencies and departments. RPCJUA is a private entity that provides contractual insurance protection to Florida citizens. The legislature could have created a state insurance fund to underwrite these policies, but it chose to rely on private insurers and created a private association as the mechanism to achieve this goal.

RPCJUA's member assessments are collections from private insurance companies by a private association. They are enforceable by the private association, not the state. They are spent without regard to state appropriation procedures, and they are collected and used to pay the claims of policyholders under voluntary insurance contracts. State regulation of the insurance industry and RPCJUA does not convert these private funds into "state revenues" within the meaning of the Revenue Cap.

The Attorney General has opined that the revenues at issue are not "state revenues" within the meaning of the amendment. We submit that he was correct, and we urge the Court to issue an opinion reaching the same conclusion.

Respectfully submitted,

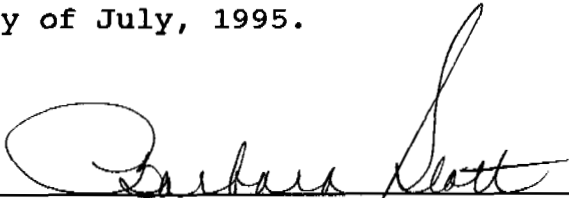
MAHONEY ADAMS & CRISER, P.A.

By: 

Barbara B. Slott
Florida Bar No. 0275352
50 North Laura Street
3300 Barnett Center
Jacksonville, FL 32202
904 354-1100

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was furnished by Hand Delivery to The Honorable Lawton Childes, Governor of the State of Florida, The Capitol, Tallahassee, Florida 32399, this 5th day of July, 1995.



Attorney