IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA, AGENCY FOR HEALTH CARE ADMINISTRATION, and STATE OF FLORIDA DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION,

Appellants, Cross-Appellees

vs.

CASE NO. 86,213

ASSOCIATED INDUSTRIES OF FLORIDA, INC., PUBLIX SUPERMARKETS, INC., NATIONAL ASSOCIATION OF CONVENIENCE STORES, INC., and PHILIP MORRIS, INC.,

Appellees, Cross-Appellants.

APPELLANTS' INITIAL BRIEF

On Direct Review from a Decision of the
Second Judicial Circuit, Certified for Immediate Resolution

ROBERT A. BUTTERWORTH
Attorney General

DEXTER DOUGLASS
General Counsel
Office of the Governor
Florida Bar No. 020263

LOUIS F. HUBENER
Florida Bar No. 140084

CHARLIE McCOY
Florida Bar No. 333646

JAMES A. PETERS
Florida Bar No. 230944

Attorneys General

OF COUNSEL:

LAURENCE H. TRIBE
Special Counsel
Cambridge, Mass.

JONATHAN MASSEY
Special Counsel
Washington, D.C.

SUSAN NIAL
Ness, Motley, Loadholt,
Richardson & Poole
Charleston, SC

WAYNE HOGAN
Brown, Terrell, Hogan,
Ellis, McClamma & Yegelwel
Florida Bar No. 142460
Assistant Attorneys
GeneralJacksonville, Fla.

W.C. GENTRY
Gentry & Philips
Florida Bar No. 137134
Jacksonville, FL

Attorneys for Appellants, Cross- Appellees

TABLE OF CONTENTS ii

TABLE OF CITATIONS iv

STATEMENT OF THE CASE AND FACTS 1

History of The Florida Medicaid Third-Party Liability Act, Section 409.910, Florida Statutes 2

(A) The States' Implementation of 1967 Federal mandate: 1967-1990. 2

(B) The 1990 Amendments to the Medicaid Third Party Liability Act. 3

(C) The 1994 Amendments. 5

SUMMARY OF ARGUMENT 7

ARGUMENT 12

I. THE COURT MUST UPHOLD THE CONSTITUTIONALITY OF THE 1994 AMENDMENTS 12

A. Standard of Review 12

B. The Provisions Allowing Aggregation of Damages and Directing Liberal Construction Do Not Offend the Court's Rulemaking Authority 13

1. Aggregation of Payments for Recovery in One Proceeding. 13

2. Liberal Construction. 16

II. THE 1994 AMENDMENTS PROPERLY APPLY TO RECOVERY OF MEDICAID EXPENDITURES WITHIN FIVE YEARS PRIOR TO ENACTMENT 20

A. The 1994 Amendments Embody Existing Florida Law 20

1. The 1994 Amendments Were Remedial in Nature. 21

2. Historic Policy of Full Recovery by the State. 23

(a) Statutory Assignment to the State. 23

(b) Statutory Subrogation Based on Equity is Distinct from Contractual Subrogation. 24

3. The State's Equitable Rights Against Product Manufacturers Remain Unchanged. 26

(a) Restitution/Unjust Enrichment. 27

(b) Indemnity. 29

B. The Trial Court Misapplied the Law Regarding Prospective Application of Statutes 33

III. THE TRIAL COURT LACKED JURISDICTION TO STRIKE THE STATUTE OF REPOSE LANGUAGE OF THE 1994 AMENDMENTS . . 36

IV. THE AGENCY IS CONSTITUTIONALLY STRUCTURED UNDER ARTICLE IV, SECTION 6 OF THE FLORIDA CONSTITUTION AS EITHER A SEPARATE DEPARTMENT OR AS A UNIT "WITHIN" D.B.P.R. 38

A. The Agency for Health Care Administration ("AHCA") is a Separate Department 38

1. Legislative History. 39

2. AHCA Functions as a Department. 41

3. AHCA Does Not Violate the Twenty-Five Department Limit. 42

4. The Case Law Supports A Savings Construction. 43

B. AHCA As A Non-Departmental Entity 44

C. The Trial Court's holding Will Produce Harsh and Absurd Results 45

CONCLUSION 47

CERTIFICATE OF SERVICE 49

APPENDIX . . . . . separate document

TABLE OF CITATIONS

CASES	PAGE(S)
Allstate Ins. Co., v. Metropolitan Dade County, 436 So.2d 976, 978 (Fla. 3d DCA 1983)	24
Blackburn v. Dorta, 348 So.2d 287, 292 (Fla. 1977)	24
Bunnel v. State, 453 So.2d 808 (Fla. 1984)	43
Capitol City Country Club v. Tucker, 613 So.2d 448 (Fla. 1993)	11, 43
Cheffer v. Reno, Case No. 94-2976, 9 Fla.L.Weekly Fed. C197, 198-99 (11th Cir. June 23, 1995)	36-37
City of Lakeland v. Cantinella, 129 So.2d 133, 136 (Fla. 2d DCA 1961), *cert.denied*, 115 So.2d 701 (Fla. 1961)	20, 21
City of New Orleans v. Duke, 427 U.S. 297, 303, 96 S.Ct. 2516 (1976)	21
City of New York v. Keene Corporation, 505 N.Y.S.2d 782, 787 (Sup. Ct. 1986), *aff'd*, 513 N.Y.S.2d 1004 (App. Div. 1987)	28
City of Philadelphia, et al., v. Lead Industries Assoc., 1992 WL 98452, at 21 (E.D. Pa. 1992)	28
City of St. Petersburg v. Briley, Wild & Associates, 239 So.2d 817, 822 (Fla. 1970)	45
City of St. Petersburg v. Siebold, 48 So.2d 291, 293, 294 (Fla. 1970)	32, 33
Conley v. Boyle, 570 So.2d 275 (Fla. 1990)	35
Cunningham v. State Plant Board, 112 So.2d 905 (Fla. 2d DCA 19 59), cert. denied, 115 So.2d 701 (Fla. 1959)	34, 36
Dept. of Agriculture and Consumer Services v. Quick Cash of Tallahassee, 609 So.2d 735, 739 (Fla. 1st DCA 1992)	18, 19, 45

Dept. of Environmental Regulation v. Goldring,
477 So.2d 532, 534 (Fla. 1985) 19

Diamond v. E.R. Squibb and Sons, 397 So.2d 671 (Fla. 1981) 36

Div. of Workers Comp., v. Brevda, 420 So.2d 887, 891
(Fla. 1st DCA 1982) 33

Dole v. Dow Chemical Co., 331 N.Y.S.2d 382 (N.Y. 1972) 31

Ferre v. State ex rel. Reno, 478 So.2d 1077 (Fla. 3d DCA 1985),
affirmed, 494 So.2d 214 (Fla. 1986), *cert. denied*,
481 U.S. 1037 (1987) 32

Florida Department of Education v. Glasser,
622 So.2d 944, 946 (Fla. 1993) 43

Florida Patient's Compensation Fund v. Von Stetina
470 So.2d 783, 787, 788 (Fla. 1985) 20, 21

Florida Wildlife Federation v. State Dept. Of
Environmental Resources, 390 So.2d 64, 66-67 (Fla. 1980) 14

Fulford v. Graham, 418 So.2d 1204, 1205 (Fla. 1st DCA 1982) 12, 44

Green v. American Tobacco Co., 154 So.2d 169, 173 (Fla. 1963) 7, 8, 26, 34

Hastings v. Earth Satellite Corp., 628 F.2d 85, 93 (D.C. Cir. 1980),
cert. denied, 449 U.S. 905, 101 S.Ct. 281 (1980) 22

Haven Federal S & L Assoc. v. Kirian,
579 So.2d 730, 732-33 (Fla. 1991) 16

Health Ins. Ass'n of Am., Inc. v. Shalala,
23 F.3d 412, 419 (D.C. Cir. 1994) 25

Hedgebeth v. Medford, 378 A.2d 226, 228 (N.J. 1977) 25

Hoffman v. Jones, 280 So.2d 431, 440 (Fla. 1973) 24, 34

Holbrook v. Anderson Corp., 996 F.2d 1339, 1341 (1st Cir. 1993) 25

Industrial Risk Insurers v. Creole Product Serv.,
746 F.2d 526, 538 (9th Cir. 1984) 24

In re Estate of Caldwell, 247 So.2d 1 (Fla. 1971) 12

Ison v. Zimmerman, 372 So.2d 431 (Fla. 1979) 12

Kass v. Lewin, 104 So.2d 572 (Fla. 1958) 12

Koscot Interplanetary, Inc. v. State, 230 So.2d 24, 25 (Fla. 1970) 18

Landgraf v. USI Film Products,
114 S.Ct. 1483, 1499 n.24, 1507 n.37 (1994) 22, 32

Leapai v. Milton, 595 So.2d 12, 14 (Fla. 1992) 12

Lincenberg v. Issen, 318 So.2d 386, 391 (Fla. 1975) 24

Linder v. Combustion Engineering, Inc., 342 So.2d 474 (Fla. 1977) 34

Mantilla v. State, 615 So.2d 809, 810 (Fla. 3d DCA 1993) 12

Martinez v. Scanlon, 582 So.2d 1167, 1170 (Fla. 1991) 19, 35

McKibben v. Mallory, 293 So.2d 48 (Fla. 1974) 12

Mozo v. State, 632 So.2d 623, 627 (Fla. 4th DCA 1994) 22

Peninsular & Oriental Steam Navigation Co. v.
Overseas Oil Carriers, Inc., 553 F.2d 830, 835 (2d Cir. 1977),
cert. denied, 434 U.S. 859 (1977) 28

Pullum v. Cincinnati, Inc., 467 So.2d 657, 659 (Fla. 1985),
appeal dismissed, 475 U.S. 1114, 106 S.Ct. 1626 (1986) 36

Quest v. Joseph, 392 So.2d 256 (Fla.3rd DCA 1981) 31

Ratner v. Hensley, 303 So.2d 41, 45 (Fla. 3rd DCA 1974) 22

Rollins v. State, 354 So.2d 61 (Fla. 1978) 12

Salvador v. Fennelly, 593 So.2d 1091, 1094 (Fla. 4th DCA 1992) 16

Santa Rosa County, Fla. v. Administration Comm. Div. of Admin. Hearings, 20 Fla. L. Weekly S333 (Fla. July 13, 1995) 19, 35

Seaboard Coast Line R. Co. v. Smith, 359 So.2d 427, 429 (Fla. 1978) 31

Sindell v. Abbott Laboratories, 607 P.2d 924, *cert. denied*, 449 U.S. 912, 101 S.Ct. 285-286 (1980) 34

Smith v. Department of Insurance, 507 So.2d 1080, 1092 (Fla. 1987) 14

State v. Bales, 343 So.2d 9 (Fla. 1977) ..... .12

State v. Elder, 382 So.2d 687, 690 (Fla. 1980) 42-43

State ex rel. Atty. Gen. v. Green, 18 So. 334 (Fla. 1895) 12

State ex rel. Grodin v. Barns, 119 Fla. 405, 161 So. 568, 575 (1935) 18

State v. Gale Distributors, Inc., 349 So.2d 150 (Fla. 1977) 12

State v. Kinner, 398 So.2d 1360 (Fla. 1981) ..... .12

State v. McDonald, 357 So.2d 405 (Fla. 1978) ..... .12

State v. State Board of Administration, 25 So.2d 880, 884 (Fla. 1946) 45

State v. Stalder, 630 So.2d 1072, 1076 (Fla. 1994) 42

State v. Webb, 398 So.2d 820, 824-25 (Fla. 1981) 32, 33

Stuart v. Hertz Corp., 351 So.2d 703, 705 (Fla. 1977) 9, 29, 30

Sunspan Eng. & Const. Co. v. Spring-Locke Scaffold Co., 310 So.2d 4 (Fla. 1975) 32

Trail Builders Supply Company v. Reagan, 235 So.2d 482 (Fla. 1970) 31

United States v. Consolidated Edison Co. of New York, 580 F.2d 1122, 1127-28 (2nd Cir. 1978) 28

United States v. Theriaque, 674 F.Supp. 395 (D.Mass. 1987) 25

Santa Rosa County, Fla. v. Administration Comm. Div. of Admin. Hearings, 20 Fla. L. Weekly S333 (Fla. July 13, 1995) 19, 35

Seaboard Coast Line R. Co. v. Smith, 359 So.2d 427, 429 (Fla. 1978) 31

Sindell v. Abbott Laboratories, 607 P.2d 924, *cert. denied*, 449 U.S. 912, 101 S.Ct. 285-286 (1980) 34

Smith v. Department of Insurance, 507 So.2d 1080, 1092 (Fla. 1987) 14

State v. Bales, 343 So.2d 9 (Fla. 1977) ..... .12

State v. Elder, 382 So.2d 687, 690 (Fla. 1980) 42-43

State ex rel. Atty. Gen. v. Green, 18 So. 334 (Fla. 1895) 12

State ex rel. Grodin v. Barns, 119 Fla. 405, 161 So. 568, 575 (1935) 18

State v. Gale Distributors, Inc., 349 So.2d 150 (Fla. 1977) 12

State v. Kinner, 398 So.2d 1360 (Fla. 1981) ..... .12

State v. McDonald, 357 So.2d 405 (Fla. 1978) ..... .12

State v. State Board of Administration, 25 So.2d 880, 884 (Fla. 1946) 45

State v. Stalder, 630 So.2d 1072, 1076 (Fla. 1994) 42

State v. Webb, 398 So.2d 820, 824-25 (Fla. 1981) 32, 33

Stuart v. Hertz Corp., 351 So.2d 703, 705 (Fla. 1977) 9, 29, 30

Sunspan Eng. & Const. Co. v. Spring-Locke Scaffold Co., 310 So.2d 4 (Fla. 1975) 32

Trail Builders Supply Company v. Reagan, 235 So.2d 482 (Fla. 1970) 31

United States v. Consolidated Edison Co. of New York, 580 F.2d 1122, 1127-28 (2nd Cir. 1978) 28

United States v. Theriaque, 674 F.Supp. 395 (D.Mass. 1987) 25

United States v. University Hospital,
575 F.Supp. 607, 613 (E.D. N.Y. 1983) 25

University of Miami v. Bogorff, 583 So.2d 1000, 1004 (Fla. 1991) 36

Van Bibber v. Hartford Accident & Indemnity Ins. Co.,
439 So.2d 880, 882-83 (Fla. 1983) 14

Walter Denson & Son v. Nelson, 88 So.2d 120, 122 (Fla. 1956) 34

West American Ins. Co. v. Yellow Cab Co.,
495 So.2d 204, 207 (Fla. 5th DCA 1986) 24

West v. Caterpillar Tractor Co., 336 So.2d 80, 85, 86, 90, 92 (Fla. 1976) 8, 26, 34

West v. Cole, 390 F.Supp. 91, 97 (N.D. Miss. 1975) 27

Wiley v. Roof, 641 So.2d 66, 68 (Fla. 1994) 34

Williams v. Campagnulo, 588 So.2d 982, 983 (Fla. 1991) 14, 15, 16

FLORIDA CONSTITUTION

Article II, § 3, Florida Constitution 6, 13, 16

Article IV, § 6, Florida Constitution 2, 5, 11, 37-39, 41, 43-44, 46

Article IV, § 8(c), Florida Constitution 39

Article IV, § 9, Florida Constitution 39

Article IV, § 11, Florida Constitution 39

Article IV, § 12, Florida Constitution 39

Article V, § 2(a), Florida Constitution 2, 13, 16

FLORIDA STATUTES

Chapter 20, Florida Statutes (1993) 40

§ 20.02(2), Florida Statutes (1993) 43, 44

§ 20.03, Florida Statutes (1993) 41

§ 20.04(2), Florida Statutes (1993) 40

§ 20.04(3)(a), Florida Statutes (1993) 40

§ 20.04(3)(b), Florida Statutes (1993) 40

§ 20.05, Florida Statutes (1993) 40

§ 20.42, Florida Statutes (1993) 37, 42

§ 20.42(7), Florida Statutes 40

§ 61.075(7), Florida Statutes 18

Chapter 86, Florida Statutes (1993) 18

§ 86.101, Florida Statutes 18

§ 90.402, Florida Statutes (Supp. 1994) 17

§ 120.65(1), Florida Statutes (1993) 43

§ 121.1905, Florida Statutes (1993) 44

§ 193.451(1), Florida Statutes 17

§ 409.266, Florida Statutes (1978) 3

§ 409.2665, Florida Statutes (Supp. 1990) 3

§ 409.2665(1), Florida Statutes (Supp. 1990) 3, 23

§ 409.2665(7), Florida Statutes (Supp. 1990) 4, 22

§ 409.2665(7)(a), Florida Statutes (1990) 4, 22

§ 409.2665(7)(b), Florida Statutes (1990) 4, 22

§ 409.2665(7)(b)(2), Florida Statutes (1990) 4, 23

§ 409.2665(8)(a)(1), Florida Statutes (1990) 5, 6, 22

§ 409.2665(12)(h), Florida Statutes (1990) 7

§ 409.910, Florida Statutes 1, 3, 10

§ 409.910(1), Florida Statutes (1993) 6, 16

§ 409.910(6)(a), Florida Statutes (Supp. 1994) 5

§ 409.910(9), Florida Statutes (Supp. 1994) 5, 13-16

§ 409.910(9)(a), Florida Statutes 13, 15

§ 409.910(11)(h), Florida Statutes (1993) 35

§ 409.910(12)(h), Florida Statutes (Supp. 1994) 21, 35

§ 440.09(2), Florida Statutes 19

§ 440.09(7)(b), Florida Statutes 19

§ 447.205(3), Florida Statutes (1993) 44

§ 542.16, Florida Statutes (1993) 17

§ 627.351(6)(j), Florida Statutes (1993) 44

§ 627.7262, Florida Statutes (Supp. 1982) 15

§ 768.21, Florida Statutes (1993) 34

§ 794.05, Florida Statutes 18

§ 901.151, Florida Statutes (1977) 33

FLORIDA RULES

Florida Rule of Civil Procedure 1.010 16

Florida Rule of Civil Procedure 1.110(g) 15

Florida Rule of Civil Procedure 1.220(a) 15

Florida Rule of Civil Procedure 1.220(b) 15

LAWS OF FLORIDA

Chapter 21820, § 11, Laws of Florida (1943) 18

Chapter 69-106, §§ 19 & 35, Laws of Florida 2, 3

Chapter 69-268, § 1, Laws of Florida 2

Chapter 78-433, Laws of Florida 3

Chapter 82-159, Laws of Florida..... 3, 23

Chapter 90-232, § 4 , Laws of Florida 21

Chapter 90-295, § 33 , Laws of Florida 36

Chapter 90-295, § 47 , Laws of Florida 21, 23

Chapter 92-33, Laws of Florida 1, 38

Chapter 92-279, Laws of Florida 39

Chapter 92-279, § 4 , Laws of Florida 41

Chapter 92-326, § 55, Laws of Florida 41

Chapter 93-129, Laws of Florida 42

Chapter 93-179, Laws of Florida 42

Chapter 93-213, Laws of Florida 42

Chapter 93-216, Laws of Florida 42

Chapter 93-220, Laws of Florida 42

Chapter 94-251, Laws of Florida 1

UNITED STATES CODE

42 U.S.C. § 1396(a)(A)(25) 2

42 U.S.C. § 2651 25

42 U.S.C. § 2651(a) 25

CODE OF FEDERAL REGULATIONS

42 C.F.R. § 431.10 45

OTHER AUTHORITIES

Bill Analysis & Economic Impact Statement CS/HB 1477 (1992), dated March 6, 1992 38

Centers for Disease Control, Mortality, Morbidity Weekly Review, *Surveillance for Smoking-Attributable Mortality and Years of Potential Life Lost, by State -- United States, 1990*, Vol. 43/No. SS-1, at 1-6 (June 10, 1994) 9

Final Bill Analysis & Economic Impact Statement CS/SB 2390, at 66 (1992) 38

Florida Department of Health and Rehabilitative Services; State Health Office, Family Health Service, *A Florida Health Status Report: Behavioral Risk Factor Surveillance System* 1986-1992, 1994 9

Florida Department of Health and Rehabilitative Services, *Smoking Attributable Mortality, Morbidity, and Economic Costs: 1992 Report,* 1994 10

General Index, Volume 5, Florida Statutes, at E-1129 (1993) 17

Indemnity, 41 Am. Jur. 2d § 2, at 688 n. 13 (1968 & 1994 supp.) 29

Indemnity, 42 C.J.S. § 3, at 74-75 (1991 & 1994 supp.) 30

J. Sims, Cancer Control, Journal of the Moffitt Cancer Center, Vol. 1, No. 5, *Tobacco Use in Florida: Consequences and Costs* at 442 (September/October 1994) 9, 10

Restatement of Restitution § 1 27

Restatement of Restitution § 1, comment b 27

Restatement of Restitution § 76 ..... 9, 29

Restatement of Restitution § 115 28

Restitution and Implied Contracts, 66 Am. Jur. 2d § 4, at 947 29

When Statute of Limitations Commences to Run Against Claim for Contribution or Indemnity Based on Tort, 57 A.L.R. 3d 867, 881-84 31

STATEMENT OF THE CASE AND FACTS

This is an appeal by defendants below, State of Florida, Agency for Health Care Administration and State of Florida Department of Business and Professional Regulation ("The State") from the Final Order and Declaratory Judgment of the Circuit Court finding certain provisions of Chapter 94-251, Section 4, Laws of Florida, (the "1994 Amendments") to be unconstitutional and that other provisions may not be applied "to conduct or activities that occurred before July 1, 1994," the effective date of such statute. (Appendix A; hereinafter, "App. A"). Plaintiffs-appellees have also appealed from the trial court's ruling that certain provisions of the 1994 Amendments are constitutional.

Chapter 94-251, Section 4, Laws of Florida amended Florida's Medicaid Third-Party Liability Act, Section 409.910, Florida Statutes, so as to enable the State to more efficiently perform its federally mandated obligation to recoup Medicaid payments from responsible third parties. After passage of the 1994 Amendments, the Governor of the State of Florida announced his intent to recover Medicaid damages from the Tobacco Industry and this action was brought to challenge the State's statutory authority. Plaintiffs-appellees initially sought a declaration that the 1994 Amendments were unconstitutional. They then amended the complaint to question the constitutionality of the "structure" of the Agency for Health Care Administration ("AHCA") which was initially established in 1992. *See* Ch. 92-33, Laws of Fla. AHCA is the State's primary health care agency with responsibility to manage a $6.5 billion budget and oversee all health care services, including recoupment of Medicaid payments from liable third-parties. As of the time this action was filed, it was undisputed that all functions of the executive branch were allotted to no more than twenty-five departments. Nevertheless, the Circuit Court for Leon

County found that when AHCA was established, it was "structured in violation of the 25 department limit of Article IV, Section 6 of the Florida Constitution." (App. A). The State timely took this appeal and suggested the order below presented a question of great public importance requiring immediate resolution by this Court. The First District Court of Appeal certified the appeal directly to this Court and on August 17, 1995, this Court accepted jurisdiction.

History of The Florida Medicaid Third-Party Liability Act, Section 409.910, Florida Statutes

A. The State's Implementation of 1967 Federal mandate: 1967-1990. The action below attacked the 1994 Amendments as unconstitutionally authorizing the State to directly sue responsible third-parties to recoup all Medicaid expenditures incurred as a result of their wrongful conduct. Neither the Tobacco Industry's suit nor the trial court's ruling addressed the 1994 Amendments in the context of the State's longstanding right of recovery from liable third parties, even though the 1994 Amendments were only the last in a series of statutory revisions to comply with requirements of the Social Security Act (42 U.S.C. § 1396). Under that Act the states must "take all reasonable measures to ascertain the legal liability of third parties to pay for care and services available under the [state Medicaid] plan arising out of injury, disease or disability" and "seek reimbursement for such assistance to the extent of such legal liability." 42 U.S.C. § 1396a(a)(25).

In 1970 the Florida Division of Family Services became the responsible party to pursue Medicaid third-party liability claims and the State initially relied upon federal law to carry out its duty to seek reimbursement. *See* Ch. 69-268, § 1, Laws of Fla., and Ch. 69-106, § 19, 35, Laws

of Fla. In 1978, the Florida Medicaid Third-Party Liability Act, Ch. 78-433, Laws of Fla., statutorily subrogated the rights of individual Medicaid recipients to the Department of Health and Rehabilitative Services ("HRS") to "recover to the fullest extent possible the amount of all medical assistance payments made on behalf of the [Medicaid] recipient." § 409.266, Fla. Stat. (1978). This 1978 statute was the first affirmative step by the State of Florida to redress the inequitable financial burden arising out of the trilateral relationship between the innocent State, the tortfeasor and the injured Medicaid recipient. To strengthen the State's ability to avoid subsidizing tortfeasors who should bear Medicaid expenses as a cost of their enterprise, in 1982 the Act was again amended to require assignment of Medicaid claims to the State and to establish a lien on any third-party recovery. Ch. 82-159, Laws of Fla. In 1990, the Act was comprehensively amended to facilitate the State's federally mandated obligation to recoup Medicaid payments from responsible third-parties. At that time, the Legislature clearly and unequivocally expressed: "It is the intent of the Legislature that Medicaid be the payor of last resort for medically necessary goods and services furnished to Medicaid recipients." § 409.2665(1), Fla. Stat. (Supp. 1990).[1]

B. The 1990 Amendments to the Medicaid Third-Party Liability Act. The 1990 Amendments required full reimbursement to the State from third-party sources, without reduction, absent an express statutory exception. These amendments, like their predecessor statutory provisions, were unchallenged below. Effective October 1, 1990, Florida statutory law provided that the State was:

---

[1]The 1990 Amendments were codified at Section 409.2665, Florida Statutes and subsequently renumbered in 1991 at Section 409.910, Florida Statutes.

> automatically subrogated to any rights that an applicant, recipient, or legal representative has to any third-party benefit for the full amount of medical assistance provided by Medicaid. Recovery pursuant to the subrogation rights created hereby shall not be reduced, prorated, or applied to only a portion of a judgment, award, or settlement, but is to provide full recovery by the department from any and all third-party benefits. Equities of a recipient, his legal representative, a recipient's creditors, or health care providers shall not defeat, reduce, or prorate recovery by the department as to its subrogation rights granted under this paragraph.

(§ 409.2665(7)(a) Fla. Stat. (Supp. 1990) (emphasis added).

The statute also provided for assignment to the State of "any right, title, and interest such person has to any third-party benefit", Section 409.2665(7)(b), Florida Statutes (Supp. 1990) and expressly provided that **"The department is a bona fide assignee for value in the assigned right, title, or interest, and takes vested legal and equitable title free and clear of latent equities in a third-person."** § 409.2665(7)(b)(2), Fla. Stat. (Supp. 1990) (emphasis added). The 1990 law also made it clear that these rights, **"as to which the department may assert independent principles of law, . . . shall nevertheless be construed together to provide the greatest recovery from third-party benefits . . .."** § 409.2665(7), Fla. Stat. (Supp. 1990) (emphasis added).

Lest there be any doubt as to the State's absolute right to independent recovery from responsible third-parties without reduction, regardless of any "latent equities in a third person" (§ 409.2665(7)(b)(2), Fla. Stat. (Supp. 1990), the 1990 law expressly provided:

> The department shall recover the **full amount** of all medical assistance provided by Medicaid on behalf of the recipient to the **full extent** of third-party benefits.
>
> **(a) Recovery of such benefits shall be collected directly from:**
>
> **1. Any third party . . ..**

§ 409.2665(8)(a)(1), Fla. Stat. (Supp. 1990) (emphasis added).

C. The 1994 Amendments. In 1994, the Medicaid Third-Party Liability Act was again amended to further facilitate the State's established right and federally imposed obligation to recover the full amount of Medicaid payments from any responsible third-party. The provisions of the Act continue to provide that "the department" (HRS) is empowered to carry out its provisions. However, the 1994 Amendments recognized that AHCA also "has a cause of action against a liable third-party to recover the full amount of medical assistance provided by Medicaid, and such cause of action is independent of any rights or causes of action of the recipient . . .," thus empowering AHCA to pursue such claims. § 409.910(6)(a), Fla. Stat. (Supp. 1994). This 1994 provision prompted the constitutional attack on the 1992 establishment of AHCA, which the trial judge found was established in violation of Article IV, Section 6 of the Florida Constitution. Although the Court's order does not speak to the effect of its finding, presumably it would prohibit AHCA from prosecuting third-party liability claims.

The 1994 Amendment to Section 409.910(9), Florida Statutes (Supp. 1994), provides that when an action to recover Medicaid payments involves more than one recipient and there are common issues of fact or law, the State may sue in one proceeding to recover all such damages and that the evidence code should be liberally construed regarding issues of causation and aggregation of damages. In the same vein, the 1994 amendment provides that where the number

of recipients is so large that it is impracticable to join or identify each of the State's expense claims, the State may seek recovery for payments to health care providers for an entire class of recipients without identifying particular claims. As ordered below (App. A, para. 2), the trial judge expressed the opinion that these provisions violated this Court's exclusive power to establish practice and procedure as provided by Article II, Section 3 and Article V, Section 2(A) of the Florida Constitution.

The 1994 amendment to subsection (9) also provides that issues of causation and damages may be proved by use of statistical analysis and that, in products liability actions, the State may proceed under a market share theory if the products are substantially interchangeable among brands and substantially similar factual or legal issues are involved. The amendments to subsection (1) reaffirm the right to recover the "full amount" of Medicaid damages from "Any third party" (§ 409.2665(8)(a)(1), Fla. Stat. (Supp. 1990), and emphasize that the State's right to recover for Medicaid expenditures is not reduced by the alleged comparative fault of the Medicaid recipient or any other third-party. Also, as first expressed in 1990, the 1994 amendments to subsection (1) reiterate that common law principles of recovery should be liberally construed to effectuate the purposes of the Act. The trial court expressly found that the provision regarding use of statistical evidence did not violate the separation of powers provisions of the Florida Constitution and also declined to find the subsection (1) amendments and market share provisions to be unconstitutional. However, as to the provisions which the trial court thought passed constitutional muster, the judge concluded that the 1994 Amendments created "new substantive rights and imposed new legal burdens" (App. A, para. 3) and could not be constitutionally applied to "conduct" or "activities" that occurred before July 1, 1994.

The other provision of the 1994 Amendments in issue had to do with an amendment to previous Section 409.2665(12)(h), Florida Statutes (Supp. 1990) which provides a five year statute of limitations for recovery of Medicaid damages. The 1994 amendment eliminated the defense of the statute of repose in any such actions. Although there was no contention that any previously barred claims were at issue, the trial judge found this provision could not be constitutionally applied to revive any already time-barred claim. (App. A, para.4).

It is from the trial judge's Order finding the subject provisions to be unconstitutional and determining that the 1994 Amendments can only apply to conduct or activities that occurred after the Amendment's effective date of July 1, 1994, that the State has taken this appeal.

SUMMARY OF ARGUMENT

Somewhat understandably, since the Tobacco Industry's attack was focused solely on the 1994 Amendments, the trial judge failed to appreciate that, rather than creating new substantive rights or imposing new legal burdens, the 1994 Amendments were simply another statutory step to facilitate the federally mandated and longstanding right of the State to restitution from third-parties who have wrongfully caused the expenditure of Medicaid funds. In so doing, the trial judge erroneously confused the general prohibition against retroactive creation of a substantive duty with the permissible right of the State to create or modify remedies for previously cognizable wrongs. Florida law has long recognized the rules of primary conduct that put a manufacturer on notice that it may be held accountable for all damages caused by its defective product. Over three decades ago, in *Green v. American Tobacco Co.*, 154 So. 2d 169, 173 (Fla. 1963), this Court declared:

> There exists . . . no real alternative and no valid objection to this distribution of the burden [to the manufacturer], if the public health is to be protected in any practical sense from exploitation by those who, for a profit motive, undertake to supply the vast and ever increasing variety of products which the people by unprecedented powers of commercial persuasion are daily urged to use and consume.

See also West v. Caterpillar Tractor Co., 336 So. 2d 80 (Fla. 1976). The 1994 Amendments and the Governor's expressed intent to pursue full recovery from the Tobacco Industry did not impose a new duty on the tobacco industry or create any new substantive rights; rather, it simply awoke the industry's concern that it was finally going to be held accountable for the State's medical subsidy which should be a cost of its "mercantile function." *Green v. American Tobacco Co.*, 154 So.2d at 173.

Regardless of the common law of Florida which has long recognized the right of an innocent party to be indemnified for costs which should be borne by a wrongdoer, as of the 1990 Amendments to the Medicaid Third-Party Liability Act, neither the Tobacco Industry nor any other potentially liable tortfeasor could have any doubt as to the State's statutory authority to recoup all Medicaid expenses caused by the sale of defective products. The arguments below amount to complaints that the State has finally exercised its political prerogative to recover monies long due, not that the Industry has have suffered any legally cognizable prejudice.

Indeed, the 1994 Amendments are not nearly as far reaching as the underlying federal mandates, or the prior Florida laws enacted to implement the federal and Florida policy of making the State the payor of last resort and subordinating the rights of all third-parties (recipients, health care providers and third-party tortfeasors alike) to the State's paramount right of full reimbursement. The State is wholly innocent in the trilateral relationship between itself,

the tortfeasor who has profited from the sale of defective products and the recipient of Medicaid benefits. Pursuant to its legal and federally-imposed obligation to pay the medical costs of indigent citizens, the State has borne many of the costs of smoking-related diseases. The State's expenditures have allowed the tobacco industry to reap the profits of their enterprise while disregarding its harmful externalities. Long established principles of law and equity, together with basic policy considerations of deterrence and just compensation, dictate that the Tobacco Industry not continue to enjoy the windfall that it has received by leaving it to the State to pay the medical expenses of Medicaid patients. Even in the absence of statutory authority, basic principles of indemnity and restitution require full recovery for a party who has borne a burden which in fairness and equity should be borne by another.

> A person who, in whole or in part, has discharged a duty which is owed by him but which as between himself and another should have been discharged by the other, is entitled to indemnity from the other, unless the payor is barred by the wrongful nature of its conduct.

§ 76, Restatement of Restitution; *Stuart v. Hertz Corp.*, 351 So.2d 703, 705 (Fla. 1977).

Under the long-established law of Florida, tobacco companies have had a duty not to distribute unreasonably dangerous products; this duty runs, at least in part, directly to the State because of the foreseeable damages that the distribution of unsafe products inflicts upon the State's coffers.[2] Given the Tobacco Industry's longstanding knowledge of the health risks of

---

[2]In 1992, 28,350 Floridians died from tobacco-related causes, representing 77 preventable deaths every day or 20% of all deaths in the state. Florida Department of Health and Rehabilitative Services; State Health Office, Family Health Service, *A Florida Health Status Report: Behavioral Risk Factor Surveillance System 1986-1992*, 1994:9-12, *cited in,* J. Sims, Cancer Control, Journal of the Moffitt Cancer Center, Vol 1, No. 5, *Tobacco Use in Florida: Consequences and Costs*, p. 442, (September/October 1994). Medicaid costs attributable to

smoking, nothing could be more foreseeable than the State expending public funds for treatment of Medicaid recipients injured by cigarettes. It is the State's damages that are in issue, not the harm that may have been visited on Medicaid patients or those exposed to the smoke. Under Section 409.910 and the 1994 Amendments, the State has the affirmative duty of proving a product is defective or negligently manufactured and that it caused the Medicaid damages to the State.

The Tobacco Industry has no legal or constitutional grounds to complain about being accountable for the State's damages caused by its wrongdoing, or to seek to lessen the innocent State's full recovery because of the alleged fault of the Medicaid patient. If not previously apparent to affected wrongdoers, the State's unfettered right to full recovery was clearly announced by the 1990 amendments. In the least, the State is entitled to utilize all the remedies provided by the Act to recover full Medicaid damages incurred after October 1, 1990, the effective date of the 1990 law. The 1994 Amendments are designed to enable the State to more efficiently perform its obligation to recoup Medicaid benefits from liable third-parties and to implement the policies underlying the Medicaid Third-Party Liability Act. These paramount policies should not be frustrated by a myopic view of the 1994 Amendments or an expansive application of the separation of powers doctrine.

---

smoking in Florida from 1990-1995 have been estimated at $1.4 billion. Florida Department of Health and Rehabilitative Service, *Smoking Attributable Mortality, Morbidity, and Economic Costs: 1992 Report*, 1994, *cited in*, J. Sims, Cancer Control, Journal of the Moffit Cancer Center, Vol. 1, No. 5, *Tobacco Use in Florida: Consequences and Costs*, p. 442, (September/October 1994).

Appellees did not allege an instance of a time-barred claim actually being revived by the 1994 Amendments. Instead, they speculated upon such possibility. The trial court lacked jurisdiction to enter declaratory relief on this matter. Moreover, the statute of repose was never intended to apply, and cannot constitutionally be applied, to latent disease claims.

The trial judge also took a hypertechnical view of the Article IV, Section 6, Florida Constitution, limitation on the number of executive departments without regard to the history and function of AHCA. AHCA is a freestanding entity equivalent to a "department" irrespective of the fact that it is, literally, an "agency" located "within" the Department of Business and Professional Regulation (DBPR). AHCA is a department in everything but name; it is structured like and functions as a department. Therefore, AHCA's structure meets the requirements in Article IV, Section 6 of the Florida Constitution. Moreover, except possibly for a brief six-month period, AHCA has always been and now is within the limit of 25 imposed by Article IV, Section 6 of the Florida Constitution. Appellees never alleged otherwise, but grounded their claim on the assumption that AHCA was not a department. Alternatively, placement of AHCA within DBPR reflects the 1992 Legislature's reasonable interpretation of Article IV, Section 6 of the Florida Constitution. As established in 1992 (with fewer duties at that time), AHCA could benefit from DBPR's experience in health care regulation. This Court must decline Appellees' invitation to second guess the Legislature's proper structuring of the executive branch.

ARGUMENT

I. THE COURT MUST UPHOLD THE CONSTITUTIONALITY OF THE 1994 AMENDMENTS

A. Standard of Review

Fundamental Florida law presumes the 1994 Amendments valid and constitutional. If it is reasonably possible to do so, the Supreme Court is obligated to interpret statutes in such a manner as to uphold their constitutionality. *Capitol City Country Club v. Tucker*, 613 So.2d 448 (Fla. 1993). The 1994 Amendments are not to be viewed in a vacuum, but in relationship to existing law and the purposes sought to be affected. *State v. Gale Distributors, Inc.*, 349 So.2d 150 (Fla. 1977). Every reasonable presumption must be indulged, and any rational view taken, in favor of constitutionality. *State v. Kinner*, 398 So.2d 1360 (Fla. 1981); *Ison v. Zimmerman*, 372 So.2d 431 (Fla. 1979); *State v. McDonald*, 357 So.2d 405 (Fla. 1978); *State v. Bales*, 343 So.2d 9 (Fla. 1977); *Kass v. Lewin*, 104 So.2d 572 (Fla. 1958); *State ex rel. Atty. Gen. v. Green*, 18 So. 334 (Fla. 1895). "[I]f any statement of fact known or to be assumed, justifies the law, the power of the court inquiry ends." *Fulford v. Graham*, 418 So.2d 1204, 1205 (Fla. 1st DCA 1982). The conflict between the statute and the constitution must be clear and appellees have the heavy burden of establishing the 1994 Amendments invalidity *"beyond a reasonable doubt."* *Kinner*, 398 So.2d at 1363 (emphasis added); *Rollins v. State*, 354 So.2d 61 (Fla. 1978); *State v. Gale Distributors, Inc.*, 349 So.2d at 150. Moreover, regardless of the ruling by the trial court, the appellate court in its *de novo* review presumes the constitutionality of the statute. *In re Estate of Caldwell*, 247 So.2d 1 (Fla. 1971).

The courts must exercise particular caution when the far-reaching consequences of a dispute involving separation of powers is at issue:

> We have consistently held that statutes should be construed to effectuate the express legislative intent and all doubt as to the validity of any statute should be resolved in favor of its constitutionality. *McKibben v. Mallory*, 293 So.2d 48 (Fla. 1974). [footnote omitted] *This is particularly so in areas of the judicial process that necessarily involve both procedural and substantive provisions to accomplish a proposal's objective.*

Leapai v. Milton, 595 So.2d 12, 14 (Fla. 1992)(emphasis added); *see also Mantilla v. State*, 615 So.2d 809, 810 (Fla. 3d DCA 1993). *Leapai* stands for the proposition that the Legislature must have greater latitude when it adopts "judicial process" proposals having procedural as well as substantive aspects.

B. <u>The Provisions Allowing Aggregation of Damages and Directing Liberal Construction Do Not Offend the Court's Rulemaking Authority</u>

1. <u>Aggregation of Payments for Recovery in One Proceeding</u>. The trial court held that "portions" of the 1994 Amendments violate separation of powers:

> Those portions of Section 409.910(9) of the Amendments dealing with joinder and identifying injured Medicaid recipients violate Article II, section 3 and Article V, section 2(a), of the Florida Constitution because they impermissibly infringe on the exclusive power of the judiciary to establish practice and procedure in Florida courts.

(R __, par. 2 [App. A])(citations omitted). Apparently, the trial court had in mind these "portions" of Section 409.910(9) and (9)(a):

> (9) In the event that medical assistance has been provided by Medicaid to more than one recipient, and the agency elects to seek recovery from liable third parties due to action by the third parties or circumstances which involve common issues of fact or law, the

> agency may bring an action to recover sums paid to all such recipients in one proceeding.
>
> * * *
>
> (a) In any action under this subsection wherein the number of recipients...is so large as to cause it to be impracticable to join or identify each claim, the agency shall not be required to so identify the individual recipients for which payment has been made, but rather can proceed to seek recovery based upon payments made on behalf of an entire class of recipients.

These provisions do not establish court procedure. Instead, they collectively establish conditions under which AHCA can maintain a cause of action distinct from any individual action by a Medicaid recipient. This is reasonable and logical given that the injury being redressed is the State's damages arising from mandatory payment of a multitude of medical expenses.

The complaint that the 1994 Amendments allow for a "joinder of claims" erroneously implies that the State is "representing" a class of Medicaid recipients in an action when, in fact, the State is merely asserting *its own claim* to recoup State funds. To be sure, the law provides that "[e]ach item of expense provided by the agency shall be considered to constitute a separate cause of action," (§ 409.910(12)(h), Fla. Stat. (Supp. 1994) -- thereby allowing the State to sue separately for each item of expense if it chooses to proceed in that manner. But this does not invalidate Section 409.910(9), Florida Statutes (Supp. 1994). This provision merely identifies the damages that may be recovered, not the judicial procedure by which the cause of action is to be governed. *See, e.g., Van Bibber v. Hartford Accident & Indemnity Ins. Co.*, 439 So.2d 880, 882-83 (Fla. 1983); *Williams v. Campagnulo*, 588 So.2d 982, 983 (Fla. 1991); *see also Florida Wildlife Federation v. State Dept. of Environmental Resources*, 390 So.2d 64, 66-67 (Fla. 1980) (holding that statute vesting citizens with standing to sue to enjoin environmental violations was

not a procedural rule subject to judicial enactment because it set forth the elements to pursue a cause of action).

Regardless of the self-serving spin the plaintiffs put on the 1994 Amendments, it remains clear that the 1994 Amendments set forth elements defining the measure of damages and are therefore within the Legislature's power to enact. *Smith v. Department of Insurance*, 507 So.2d 1080, 1092 (Fla. 1987). The fact that statutory conditions upon the State's authority have procedural implications does not overcome the 1994 Amendments' remedial nature, particularly in a heavily regulated field such as health care. *See VanBibber*, 439 So.2d at 882-883 (provisions of Section 627.7262, Florida Statutes (Supp. 1982), relating to nonjoinder of insurers and accrual of a cause of action against insurers is a matter in a "field in which the legislature has historically been deeply involved"); *see also, Williams v. Campagnulo,* 588 So.2d at 983 (rejecting contention that notice requirement of Section 768.57, Florida Statutes (1985), was procedural, and holding that such notice was part of a "process to promote settlement of meritorious [medical malpractice] claims").

In any event, Section 409.910(9), Florida Statutes, is completely consistent with existing procedural rules. The 1994 Amendments involving aggregation of separate Medicaid expenditures are substantively the same as corresponding parts of Florida Rule of Civil Procedure 1.110 (g), which provides that a pleader may "set up in the same action as many claims or causes of action. . . as the pleader has . . . . All pleadings shall be construed so as to do substantial justice." *Id.* The language of the 1994 Amendments mirrors the language contained in Rule 1.110(g). The ability of the State to bring a single action -- rather than fragmenting its claims into a multitude of small lawsuits -- reflects a basic pleading prerogative enjoyed by all

plaintiffs under Florida's rules of civil procedure. Thus, no conflict exists between Rule 1.110(g) and the 1994 Amendments' provision governing the aggregation of separate Medicaid expenditures by the State.[3]

There is simply no conflict between the 1994 Amendments and this Court's rules of procedure. Therefore, there is no separation of powers violation. *See Campagnulo*, 588 So.2d at 983 (upholding statute against separation of powers attack when statute is already implemented through court rule); *see also, Haven Federal S & L Assoc. v. Kirian*, 579 So.2d 730, 732-33 (Fla. 1991) (holding that procedural statute was unconstitutional "to the extent of the conflict" with court rules); *Salvador v. Fennelly*, 593 So.2d 1091, 1094 (Fla. 4th DCA 1992) (requirement of "immediate" hearing in Ch. 119 does not violate separation of powers; since, "if there is no direct conflict between a [prior] statutory rule and a rule promulgated by the Supreme Court, the statutory rule stands, pursuant to Rule 1.010").

2. Liberal Construction. The trial court also held:

> Those portions of Section 409.910(1) and 409.910(9) dealing with the interpretation of common law theories of recovery and the evidence code violate Article II, section 3, and Article V section 2(a) of the Florida Constitution for the *same reason*.

---

[3]While it is clear that Section 409.910(9) and 9(a) do not deal with joinder of parties or claims in a class action setting, the preconditions which must be met by the State before it can aggregate its payment for reimbursement in one proceeding are consistent with Florida Rules of Civil Procedure 1.220(a) and (b), governing class actions. Rule 1 .220(a) and (b) permits separate claimants with substantially interchangeable causes of action to bring a single suit. If separate claimants are allowed to bring forth a multitude of similar claims in a single cause of action, the State, as the sole claimant, should also be allowed to aggregate its own multiple claims with substantially similar facts in a single action.

(R __ , App. A, para. 2) (emphasis added). Having invalidated the ostensibly procedural aspects of the 1994 Amendments as infringing on this Court's power to establish practice and procedure, the trial court invalidated directives for liberal construction "for the same reason." *Id.* Frankly, the State is at a loss to discern how legislative directives that the law be liberally construed can ever infringe on this Court's rulemaking authority.

Again, the trial judge did not identify exactly which "portions" were being invalidated. However, Sections 409.910(1) and (9), Florida Statutes (Supp. 1994), contain parallel language:

> (1) ... Common law theories of recovery shall be liberally construed to accomplish this intent.
>
> * * *
>
> (9) ... In any action brought under this subsection, the evidence code shall be liberally construed regarding the issues of causation and of aggregate damages.

It is axiomatic that the Legislature can statutorily modify common law as it relates to substantive issues. Since the Legislature enacted the evidence code itself, the Legislature certainly can set forth directions on how to interpret that code. In fact, the evidence code itself manifests a policy of liberal admissibility. § 90.402, Fla. Stat. (Supp. 1994) ("All relevant evidence is admissible, except as provided by law.").

Providing that the evidence code should be liberally construed does not change the rules of evidence. The 1994 Amendments do not make evidence admissible which would otherwise

be inadmissible. Legislative directives on how to construe various laws appear throughout the Florida Statutes.[4]

Ironically, plaintiffs brought this action under the Declaratory Judgment Act,[5] the very statute upon which the plaintiffs rely contains a directive regarding liberal construction. Section 86.101, Florida Statutes, provides:

> This chapter is declared to be *substantive* and remedial ... and is to be liberally administered and construed.

(Emphasis added). This language has remained unchanged in substance since its enactment in 1943. *See* Ch. 21820, § 11, Laws of Fla. (1943). It would be difficult to find a civil statute which arguably imposes on judicial procedure to a greater extent than does Chapter 86. Yet in more than five decades, no separation of powers attack has been successful. To the contrary, this Court has recognized that Chapter 86 is to be liberally construed; and, "[i]n doing so, a multiplicity of suits can be avoided while affording an adequate and expedient remedy for litigants in one action." *Koscot Interplanetary, Inc. v. State*, 230 So.2d 24, 25 (Fla. 1970). The 1994 Amendments do the same.

---

[4]See page E-1129 of the "General Index" in vol. 5 of the Florida Statutes (1993), which lists approximately 200 entries under the heading "Statutory Construction." Some require liberal construction. Such directions can be self-contained, applying only to the immediate statute. *See, e.g.*, § 193.451(1), Fla. Stat. (requiring liberal construction in favor of the taxpayer). Others address the interpretation and application of the immediate statute with other law. One example is the Legislature's declaration that the purpose of the "Florida Antitrust Act of 1980" is to "complement the body of federal law prohibiting restraints of trade or commerce." To that end, the Antitrust Act is to be "liberally construed to accomplish its beneficial purpose." § 542.16, Fla. Stat. (1993).

[5]Chapter 86, Florida Statues (1993).

The Legislature can direct how statutory provisions are to be construed when to do so will advance the cause of justice. *See, e.g., Dept. of Agriculture and Consumer Services v. Quick Cash of Tallahassee,* 609 So.2d 735, 739 (Fla. 1st DCA 1992); *State ex rel Grodin v. Barnes*, 119 Fla. 405, 161 So. 568, 575 (1935) (concurrence Whitfield, Terrell and Davis). In fact, the provisions of the 1994 Amendments requiring liberal construction of the evidence code are less of an intrusion into judicial power than is the well-recognized power to establish statutory presumptions.[6]

The 1994 Amendments facilitate recovery of Medicaid payments, made with taxpayers' money. By so doing, the 1994 Amendments are in the public interest, and confer a benefit on the public. This Court has held that such laws must be liberally construed. *Dept. of Environmental Regulation v. Goldring*, 477 So.2d 532, 534 (Fla. 1985) ("The provisions of statutes enacted in the public interest should be given a liberal construction in favor of the public."); *Quick Cash of Tallahassee*, 609 So.2d at 739 (noting that trial court's interpretation of consumer protection statute would be at odds with rule of giving liberal construction to statutes enacted in the public interest).

---

[6]Examples of statutory presumptions include § 61.075(7), Fla. Stat., ("All assets acquired and liabilities incurred by either spouse subsequent to the date of marriage and not specifically established as nonmarital assets are presumed to be marital assets and liabilities"); § 794.05, Fla. Stat., (child under 18 conclusively presumed to be incapable of consenting to sexual intercourse); § 440.09(2), Fla. Stat., (presumption in workers' compensation statute that if, at time of injury, employee had blood alcohol level of .10% or more, "it shall be presumed that the injury was occasioned primarily by the intoxication" and therefore no compensation shall be paid); § 440.09(7)(b), Fla. Stat., (refusal to submit to drug test is presumptive evidence that injury occurred due to use of controlled substances).

Additionally, the plaintiffs' facial attack is based on the hypothetical assumption that liberal construction would be improper in a given case. The trial court did not have jurisdiction to reach this issue. *See Santa Rosa County, Fla. v. Administration Comm., Div. of Admin. Hearings,* 20 Fla. L. Weekly S333 (Fla. July 13, 1995) (declaratory judgment act not available when all disputes between parties were settled, as there was "no pending controversy"; and, "absent a bona fide need for a declaration based on present, ascertainable facts, the circuit court *lacks jurisdiction* to render declaratory relief.") (emphasis added). As this Court reaffirmed in *Martinez v. Scanlon*, 582 So.2d 1167, 1170 (Fla. 1991), the showing of a bona fide controversy is "necessary in order to maintain the status of the proceeding as being judicial in nature and therefore within the constitutional powers of the courts." *Id.*

II. THE 1994 AMENDMENTS PROPERLY APPLY TO RECOVERY OF MEDICAIDEXPENDITURES WITHIN FIVE YEARS PRIOR TO ENACTMENT

A. The 1994 Amendments Embody Existing Florida Law

When viewed in the context of previous amendments to the Medicaid statutes and the policies underlying them, the 1994 Amendments are clearly remedial. As will be discussed below, the 1994 Amendments merely codify existing rights of the State and facilitate the enforcement of those rights. The 1994 Amendments do not make new substantive law. This Court has been very clear about the retroactive application of such remedial statutes. In *City of Lakeland v. Catinella*, 129 So. 2d 133, 136 (Fla. 1961), this Court said:

> Remedial statutes or statutes relating to remedies or modes of procedure, which do not create new or take away vested rights, but only operate in furtherance of the remedy or confirmation of rights already existing, do not come within the

> legal conception of a retrospective law, or the general rule against retrospective operation of statutes.

(Citing *Cunningham v. State Plant Board*, 112 So. 2d 905 (Fla. 2d DCA), *cert. denied*, 115 So. 2d 701 (Fla.). *See also Florida Patient's Compensation Fund v. Von Stetina*, 474 So. 2d 783, 787 (Fla. 1985).

The trial court's view that the 1994 Amendments can only be given prospective application seems to be the result of a misapprehension of the meaning and effect of the 1994 Amendments.[7]

1. The 1994 Amendments Are Remedial In Nature. As a matter of statutory construction, the 1994 Amendments apply to Medicaid payments by the State, limited only by the 5-year statute of limitations placed within the law in 1990.[8] This construction is constitutional. As this Court has previously opined "the judiciary may not sit as a super-legislature to judge the wisdom or desirability of legislative policy determination made in areas

---

[7]In the most confusing aspect of its ruling, the trial court said:

> The Amendments create new substantive rights and impose new legal burdens and therefore, as a matter of statutory construction and due process, the Amendments may only be applied prospectively--specifically, *to conduct of potential defendants that occurred after the Amendments' effective date* of July 1, 1994. The Amendments shall not be applicable to conduct or *activities* that occurred before July 1, 1994.

(R __, App. A, par. 3)(citations omitted)(emphasis added). This holding is troublesome because it combines two crucial but distinct determinations: (1) *when* the 1994 Amendments apply; and (2) to *what* events the 1994 Amendments apply. Further, it fails to identify what new substantive rights or legal burdens are created by the 1994 Amendments.

[8]The 1994 Amendments did not change the Florida law permitting the State to sue for Medicaid reimbursement "within 5 years after the cause of action accrues." § 409.910(11)(h), Fla. Stat. (1993); Ch. 90-232, § 4, Laws of Fla. and Ch. 90-295, § 33, Laws of Fla.

that do not effect fundamental rights or proceed along suspect lines". *City of New Orleans v. Duke*, 427 U.S. 297, 303, 96 S.Ct. 2516 (1976) (*cited with approval, Florida Patient's Compensation Fund*, 474 So.2d at 788).

Although the trial court did not identify specifically what "new substantive rights" and "new legal burdens" it believed were created by the 1994 Amendments, the court apparently believed that the 1994 Amendments created a new substantive obligation on the part of responsible third-parties to repay Medicaid expenditures. But the trial court erroneously confused the general law that prohibits retroactive creation of a substantive duty with the permissible power of the state to create or modify remedies for previously cognizable wrongdoing. *City of Lakeland v. Catinella*, 129 So.2d at 136; *Florida Patient's Compensation Fund*, 474 So.2d at 787. The 1994 Amendments "merely flesh out" the existing prerogatives of the State and give "guidance" to the responsible state agency as to enforcement of the State's rights of recovery. *See, generally Mozo v. State*, 632 So.2d 623, 627 (Fla. 4th DCA 1994). Consequently, the 1994 Amendments are not "retroactive" legislation at all. *See Landgraf v. USI Film Products*, 114 S.Ct. 1483, 1507 n.37 (1994) (distinguishing "remedial" statute from one that creates new liability where none had existed before). "Modification of remedy merely adjusts the extent, or method of enforcement, of liability in instances in which the possibility of liability previously was known." *Hastings v. Earth Satellite Corp.*, 628 F.2d 85, 93 (D.C. Cir. 1980), *cert. denied*, 449 U.S. 905, 101 S.Ct. 281 (1980). *See also, Ratner v. Hensley*, 303 So.2d 41, 45 (Fla. 3rd DCA 1974) ("alteration or modification of remedies" to provide a basis for "obtaining redress for breach of preexisting duties" is not retroactive legislation).

2. Historic Policy of Full Recovery by the State. Following passage of the 1967 federal mandate requiring the States to seek reimbursement of Medicaid assistance, the State was required to pursue recovery from liable third-parties through a blanket Medicaid authorization statute. However, in 1978 and again in 1982, the legislature enacted specific provisions clearly establishing the statutory right and State policy of full recovery of Medicaid damages from any available resource. In 1990, the legislature confirmed that the State may recover Medicaid damages pursuant to theories of statutory subrogation, statutory assignment and statutory lien unencumbered by any equities that may reside in third parties. *See* §§ 409.2665(7)(a)(b) (1990). The legislature also clearly and unequivocally provided that traditional principles of law should be construed "to provide the greatest recovery" (§ 409.2665(7), Fla. Stat. (Supp. 1990)) and that the State "shall recover the full amount" of Medicaid payments "to the full extent of third-party benefits... directly from... any third party...." § 409.2665(8)(a)(1), Fla. Stat. (Supp. 1990). It is unquestioned and unchallenged that for at least four years prior to the 1994 Amendments, the State of Florida was invested with statutory authority to directly recover from third parties all Medicaid damages incurred as a result of their wrongful conduct.

(a) Statutory Assignment to the State. Assignments, at common law, were total and left no rights in the assignor. The assignee took the assignment subject to the equities which would have been faced by the assignor. Further, personal injury claims were not assignable at common law. In Chapter 82-158, Laws of Florida, the legislature changed the common law and provided the State, for the first time, with a statutory assignment of the Medicaid covered aspects of the personal injury tort claim, but did not strip the patient of

the continued right to seek recovery of the tortiously-caused medical costs. However, the 1982 amendments did not address the effect of the State's assignment on potential defenses to the assignor's claim.

In 1990 the legislature revised the Medicaid law to enhance the effectiveness of the assignment. Chapter 90-295, § 33, Laws of Florida. The 1990 amendments declared: "Principles of common law and equity as to assignment ... are to be abrogated to the extent necessary to ensure full recovery by Medicaid from third-party resources." Section 409.2665(1), Fla. Stat. (Supp. 1990). With explicit clarity the legislature declared to all the world that the statutory assignment was "free and clear of latent equities in a third person." § 409.2665(7)(b)2, Fla. Stat. (Supp. 1990).

Thus, the legislature pointedly changed the common law to "ensure full recovery" of expended tax monies, by mandating, in 1982, the assignment to the State of the medical expense part of a personal injury claim and, in 1990, by declaring that the State takes such assignments free of latent equities such as the defense of comparative negligence or its subset, assumption of the risk. *See, Hoffman v. Jones*, 280 So.2d 431, 436-38 (Fla. 1973); and *Blackburn v. Dorta*, 348 So.2d 287, 292 (Fla. 1977). *Cf, Lincenberg v. Issen*, 318 So.2d 386, 391 (Fla. 1975).

(b) Statutory Subrogation Based on Equity is Distinct from Contractual Subrogation. The action by the Florida Legislature reflects key differences between statutory and contractual subrogation. Courts have distinguished between contractual subrogation rights of private insurance companies and the rights of entities that assume risks by operation of law, without compensation. Hence, in *Allstate Ins. Co., v. Metropolitan Dade County*, 436 So.2d 976, 978 (Fla. 3d DCA 1983), the court distinguished between "contractual

subrogation" and equitable remedies, including indemnification. Where a risk is assumed for a premium under an insurance contract, the insurer may be entitled to be subrogated only to the claims of the insured. The remedy is entirely different, however, when the obligation is imposed by law or statute.[9] In *West American Ins. Co. v. Yellow Cab Co.*, 495 So.2d 204, 207 (Fla. 5th DCA 1986), the court explained the difference between "conventional subrogation" and "equitable subrogation". The latter doctrine "is based on the policy that no person should be unjustly enriched by another's loss, and may be invoked wherever justice demands its application, irrespective of technical legal rules." *Id.*

Medicaid is not a conventional insurance scheme.[10] It follows that Florida's statutory cause of action was always separate from the claims of Medicaid recipients and was not subject to any affirmative defenses which might be asserted by tobacco companies in suits brought by individual smokers. Indeed, the Federal Government's own statutory right to recover medical

---

[9]Courts have explained the difference:

> [S]ince the insurer's obligation to pay is due solely to its contract, it presumably received consideration for agreeing to bear the risk; allowing indemnity gives the insurer a windfall. Implied indemnity is not intended for such persons. As a general rule, "[t]he right to indemnity inures to a person who, without active fault on his part, is compelled by reason of legal obligation or relationship to pay damages which have been caused by the acts of another.

Industrial Risk Insurers v. Creole Product Serv., 746 F.2d 526, 528 (9th Cir. 1984)(citations omitted).

[10]"[T]he relationship between a hospital receiving reimbursement under Medicaid or Medicare and the government is not analogous to an insurance contract. Medicare and Medicaid are not funded by beneficiaries' premium payments, but by a payroll tax. This is not the form of conventional insurance." *United States v. University Hospital*, 575 F. Supp. 607, 613 (E.D.N.Y. 1983).

assistance costs from responsible third-parties, codified at 42 U.S.C. § 2651(a), is "an independent right of recovery against the tortfeasor" and "is not defeated even by certain restrictions that might bar the injured person's own recovery."[11] The Supreme Court of New Jersey relied upon just such an analogy to 42 U.S.C. Section 2651 to conclude that, under the New Jersey Medicaid statutes, "[t]he state has two avenues by which it may seek reimbursement for Medicaid payments; it may either institute an action directly against the tortfeasor who is liable for the medical expenses or seek recovery by way of the Medicaid recipient through a right of subrogation."[12] No Florida court has ever held that the State is forbidden from suing to fully vindicate its rights.

3. The State's Equitable Rights Against Product Manufacturers Remain Unchanged. Even in the absence of any statute, the State would have been able to assert long-standing equitable theories of recovery against tobacco companies such as restitution, unjust enrichment, and indemnity. These independent claims against tortfeasors responsible for Medicaid expenditures are not derivative, and the State is therefore not limited to the rights and remedies of individual victims. These claims could have been brought without any need to show that individual patients such as smokers, would succeed in personal injury suits for damages against tortfeasors; moreover, they would not have been subject to any affirmative defenses that

---

[11] *Holbrook v. Anderson Corp.*, 996 F.2d 1339, 1341 (1st Cir. 1993); *see also Health Ins. Ass'n of Am., Inc. v. Shalala*, 23 F.3d 412, 419 (D.C. Cir. 1994)(noting that the "government's independent right of action entitles it to full recovery even where [the] tort victim's right would be limited by comparative negligence.")(*citing United States v. Theriaque*, 674 F.Supp 395 (D.Mass. 1987).

[12] *Hedgebeth v. Medford*, 378 A.2d 226, 228 (N.J. 1977).

the tortfeasor might have asserted against those persons. Thus, not only have the rules of primary conduct remained unchanged, *Green, West, supra*; so has the defendants' potential liability to the State.

The salient relationship is trilateral, not bilateral. For example, paraphrasing the Court in *Green*, the tobacco company sells cigarettes; the smoker predictably becomes ill; and the State is called upon to pay the smoker's medical costs. This situation does not involve only tobacco companies and smokers. Here, an innocent third-party -- the State of Florida -- has been forced to pay enormous sums which should in equity have been borne by the tortfeasors. The State is not a participant in the enterprise that has caused it, collectively, to incur billions of dollars in health care costs. It has instead been compelled to subsidize the externalities of tobacco companies' activities, to the great detriment of the taxpayers. As between tobacco companies and the State, the former should bear the cost of the injuries attributable to their tortious activities - costs this Court three decades ago said were "intended to be attached to the mercantile function." *Green,* 154 So. 2d at 173.

(a) Restitution/Unjust Enrichment. "A person who has been unjustly enriched at the expense of another is required to make restitution to another."[13] The concept of "conferred benefit" is construed broadly:

> A person confers a benefit on another if he . . . satisfies a debt or a duty of another, or *in any way adds* to the other's security or advantage. He confers a benefit not only where he adds to the property of another, but also where he saves

[13]Restatement of Restitution § 1.

> the other from expense or loss. *The word "benefit," therefore, denotes any form of advantage.*[14]

Tobacco companies, through the production, promotion and sale of their products, have knowingly created a massive public health crisis. The State, as guardian of the public health, has acted to meet this crisis through necessary medical treatment. Indeed, once it has entered the federal Medicaid program, a State is obligated to treat all indigents on a nondiscriminatory basis.[15] In fulfilling its duty, the State has assumed a crushing financial burden -- a burden which in all equity and fairness should be borne by those whose lucrative enterprise is responsible for the harm.

Moreover, the State has demonstrably enriched tobacco companies. It has relieved them of the possibility of immense liability and litigation expenses from thousands of individual suits for medical expenses by the victims of smoking. More fundamentally, the nature of a defendant's duty met by a plaintiff seeking restitution need not be such as would give rise to legal liability.[16] Thus, even accepting, arguendo, that tobacco companies could not have been

---

[14]Restatement of Restitution § 1, comment b (emphasis added).

[15]"[The State] becomes bound by all federal regulations and standards, including federal eligibility requirements." *West v. Cole*, 390 F. Supp. 91, 97 (N.D. Miss. 1975).

[16]*See, e.g., United States v. Consolidated Edison Co. of New York*, 580 F.2d 1122, 1127-28 (2nd Cir. 1978) (defendant "had, if not an absolute, at least a manifest, duty to provide its customers with electricity . . . [D]istinguishing its general duty to provide service from an absolute legal duty to pay damages to individual customers would be hypertechnical and would ignore Con Edison's overriding responsibilities to the public."); *Peninsular & Oriental Steam Navigation Co. v. Overseas Oil Carriers, Inc.*, 553 F.2d 830, 835 (2d Cir. 1977), *cert. denied*, 434 U.S. 859 (1977)(ship coming to aid of sick crewman of another ship entitled to restitution for costs even though sick crewman's own ship "did not have an absolute duty to provide the sailor with medical attention, [because] it had a 'manifest duty' to do so."); *City of Philadelphia, et al., v. Lead Industries Assoc.*, 1992 WL 98452, at 21 (E.D. Pa. 1992)(rejecting argument that defendants must have a specific legal duty to abate lead paint hazard in order for plaintiff to

held legally liable for the medical expenses of individual smokers, the companies would still be liable to the State for the sums it has expended in meeting their "manifest" responsibilities to the victims of their enterprise. The Restatement of Restitution § 115, provides for such relief under precisely these circumstances:

> A person who has performed the duty of another by supplying things or services, although acting without the other's knowledge or consent, is entitled to restitution from the other if
>
> (a) he acted unofficiously and with intent to charge therefor, and
>
> (b) the things or services supplied were immediately necessary to satisfy the requirements of public decency, health, or safety.

Such liability would not be dependent on the State's showing that individual smokers could recover from tobacco companies. Indeed, restitution is not a fault-based doctrine at all.

> [I]t is *not essential*, in order to create the obligation to make restitution for benefits, *that the recipient should himself have been guilty of any tortious conduct or fault*. Moreover, incapacity . . . to incur liability in tort is not in itself a defense to an action for restitution . . . since *restitution does not depend upon the existence of a wrong*.

Restitution and Implied Contracts, 66 Am. Jur. 2d § 4, at 947 (emphasis added).

(b) Indemnity. The State could also recover taxpayer expenses under the equitable doctrine of indemnity. This concept should be distinguished from contribution among joint tortfeasors. Equitable indemnity is instead a cost-shifting doctrine governed by the basic principle that "[a] person who in whole or in part has discharged a duty which is owed by him but which as between himself and another should have been discharged by

---

recover costs of such abatement); *City of New York v. Keene Corporation*, 505 N.Y.S.2d 782, 787 (Sup. Ct. 1986), *aff'd*, 513 N.Y.S.2d 1004 (App. Div. 1987)(allowing claims in restitution and indemnity for asbestos removal even though future injuries were purely hypothetical: "Since . . . the ultimate responsibility is on the manufacturer, in equity the manufacturer has the duty to remove asbestos if proven hazardous.").

the other, is entitled to indemnity from the other, unless the payor is barred by the wrongful nature of his conduct.[17] These principles have been expressly recognized and approved by this Court. *Stuart v. Hertz Corp.*, 351 So.2d 703 (Fla. 1977). The doctrine "rests upon the proposition that when one is compelled to pay money which in justice another ought to pay, the former may recover of the latter the sum so paid, unless the one making the payment is barred by the wrongful nature of his conduct."[18] In the words of this Court, indemnity is "a right which inures to a person who has discharged a duty which is owed by him but which, as between himself and another, should have been discharged by the other." *Stuart*, 351 So.2d at 705. Distinguishing indemnity from contribution, the Court observed "in case of indemnity the defendant is liable for the whole outlay, while in contribution he is chargeable with a ratable

---

[17] *Restatement of Restitution* § 76.

[18] *Indemnity*, 41 Am. Jur. 2d §2, at 688 n. 13 (1968 & 1994 supp.). As another commentator states:

> The right of indemnity is essentially equitable in nature, with principles of equity furnishing a more satisfactory basis for indemnity; thus, an award of indemnity should follow traditional concepts of equity. Indemnification is a flexible, equitable remedy designed to accomplish a fair allocation of loss among parties, based on the legal concepts of restitution and unjust enrichment, with the prevention of unjust enrichment as its underpinning.
>
> As an equitable remedy, indemnity does not lend itself to hard and fast rules, and its application must turn on the facts of each case. The right to indemnity stands upon the principle that everyone is responsible for the consequences of his own acts, and arises among parties exposed to liability by the action of another who, in equity or law, should make good the other's loss.

Indemnity, 42 C.J.S. § 3, at 74-75 (1991 & 1994 supp.).

proportion." *Id.* at 706. This Court also rejected a concept akin to what the tobacco industry and its stalking horses now argue:

> The District Court notes the fact that the indemnity sought is not for total damages awarded, but is only from the consequences brought about solely by the malpractice, thereby espousing a hybrid doctrine of partial equitable indemnification which will most certainly lead to confusion and nonuniformity of application by the lower courts.

Id.

As with restitution and unjust enrichment, a State's equitable indemnity claim is an independent, not derivative, cause of action. It does not depend on tobacco companies' liability in tort to individual Medicaid patients. Indeed, courts have allowed parties standing in similar shoes as the State, obliged by law to pay a sum of money to an injured person, to recover the amount in indemnity against a tortfeasor, even when the person hurt could not have recovered against the tortfeasor.

For example, in *Trail Builders Supply Company v. Reagan*, 235 So.2d 482 (Fla. 1970), an employee was injured on the job by a roll press operated without a safety device. The exclusivity provision of the Workmen's Compensation Act barred the employee from suing the employer in tort. The employee, however, recovered against the manufacturer of the machine; then, the manufacturer sued the employer in indemnity to recover the damages that it paid out to the employee. Like the tobacco companies, the employer argued that since the employee could not have recovered, the indemnity action was precluded. This Court, however, refused to apply the affirmative defense to the indemnity action, recognizing that the manufacturer's claim was

"direct against the employer for an independent act of [the employer] which may result in damages to the manufacturer."[19]

Subsequent to *Trail Builders Supply Company v. Reagan*, over objection that it violated fault-based equitable principles, the legislature was allowed to immunize joint tortfeasor employers from contribution by third parties found liable to the employee. *Seaboard Coast Line R. Co. v. Smith*, 359 So.2d 427, 429 (Fla. 1978). However, on the other hand, it has been held to be unconstitutional to immunize an at-fault employer from the indemnity claim of a blameless third-party. *Sunspan Eng. & Const. Co. v. Spring-Lock Scaffold Co.*, 310 So.2d 4 (Fla. 1975). Similarly, indemnity could not be denied to the blameless State seeking to recover public monies expended because of the tortious conduct of cigarette producers.

---

[20]*Id.* at 484. In addition, courts have allowed third-party actions against tortfeasors protected from a first-party suit by interspousal or intrafamilial immunity. *E.g., Quest v. Joseph*, 392 So.2d 256 (Fla. 3rd DCA 1981)(allowing contribution against plaintiff-minor's contributory negligent mother despite the fact that parent-child immunity would have barred suit between injured minor and mother). Moreover, courts, recognizing the independent nature of indemnity claims, have established the general rule that an indemnity action's statute of limitations does not begin until the payment for which the party is seeking reimbursement has been made and, therefore, does not depend upon the viability of the originally injured party's claim. Annot., *When Statute of Limitations Commences to Run Against Claim for Contribution or Indemnity Based on Tort*, 57 A.L.R. 3d 867, 881-84 ("[T]he generally recognized rule . . . is that a claim for indemnity based on tort does not accrue, and the statute of limitations does not start to run thereon, at the time of the commission of the tort . . . or at the time an action is instituted by the person injured . . . The claim accrues at the time the indemnity claimant suffers loss or damage, that is, at the time of payment of the underlying claim, payment of a judgment thereon, or payment of a settlement thereof by a party seeking indemnity.") Finally, courts have allowed a third-party action despite first-party affirmative defense based upon an implied duty running between indemnitor and indemnitee. *E.g., Dole v. Dow Chemical Co.*, 331 N.Y.S.2d 382 (N.Y. 1972).

B. The Trial Court Misapplied the Law Regarding Prospective Application of Statutes

Assuming for argument that the 1994 Amendments could not be applied retroactively, the Circuit Court's judgment on the issue must still be reversed, for the court misunderstood how a statute is applied "prospectively". "[A] statute is not made retroactive merely because it draws upon antecedent facts for its operation." *Langraf v. USI Film Products*, 114 S.Ct. 1483, 1499 n.24 (1994). There is nothing in the language or background of the 1990 or 1994 Amendments that remotely suggests the Florida legislature had in mind the unworkable and incoherent rule that application of the 1990 or 1994 Amendments should turn on precisely when various third-parties manufactured or sold the defective products that caused the disease for which the State has paid. Such an approach would severely impair the State's statutory rights.

This result is not constitutionally required. It defeats the purpose of the statute and conflicts with well established law that statutes are not to be interpreted to reach absurd results. *City of St. Petersburg v. Siebold*, 48 So.2d 291 (Fla. 1950); *State v. Webb*, 398 So.2d 829 (Fla. 1981); and *Ferre v. State ex rel. Reno*, 478 So.2d 1077 (Fla. 3d DCA 1985), *affirmed*, 494 So.2d 214 (Fla. 1986), *cert. denied*, 481 U.S. 1037 (1987). *Siebold* is this Court's seminal case on point. It addressed the question of whether the broad "repealing clause" (48 So.2d at 293) of a general law superseded the city's ability to license opticians. Ultimately concluding that the city's power to license was not repealed, the Court said:

> The courts will not ascribe to the Legislature an intent to create absurd or harsh consequences, and so an interpretation avoiding absurdity is always preferred.

Id. at 294. In *Webb*, this Court was willing to depart from the literal wording of an important criminal law statute in order to avoid an absurd or unreasonable result. At issue was the degree of culpability a police officer must perceive to effect a warrantless arrest under Section 901.151, Florida Statutes (1977), the "Stop and Frisk Law." After noting that the statute literally required "probable cause," this Court determined the Legislature had adopted a "reasonable belief" standard for temporary stops. *Webb*, 398 So.2d at 824-25. In so doing, the Court held that the purpose of the statute should be given effect "even though it may contradict the strict letter of the statute. Furthermore, construction of a statute which would lead to an absurd or unreasonable result. . .should be avoided." *Id.* at 824.

Regarding the 1994 Amendments, the proper focus for retroactivity purposes is on the tobacco companies' duty to repay Medicaid expenses. The 1994 Amendments do not purport to create any new legal duties as between manufacturers' and injured consumers, nor do they purport directly to regulate manufacturers' business activities or other aspects of their primary conduct -- which in any event were already tortious under Florida law. Rather, the 1994 Amendments are limited to the State's cause of action in suing on its own behalf to vindicate its independent interest in recouping Medicaid expenditures for which third-parties are responsible.

There can be no substantial reliance interest in affirmative defenses and other rules which do not directly control the applicable standard of primary conduct. Vested rights do not result from expectations that laws will remain unchanged. *Div. of Workers Comp. v. Brevda*, 420 So.2d 887, 891 (Fla. 1st DCA 1982) ("[T]o be vested, a right must be more than a mere expectation based on an anticipation of the continuance of an existing law...."). For example, the "Legislature has the power to increase a prescribed period of limitation and to make it applicable

to existing causes of action provided the change in the law is effective before the cause of action is extinguished by the force of a pre-existing statute." *Wiley v. Roof*, 641 So.2d 66, 68 (Fla. 1994), *(quoting Walter Denson & Son v. Nelson*, 88 So.2d 120, 122 (Fla. 1956)). *See Sindell v. Abbott Laboratories*, 607 P.2d 924, *cert. denied*, 449 U.S. 912, 101 S.Ct. 285-286 (1980) (applying principle of market share liability retroactively).

The proper way to make a law "prospective" is illustrated by the example of the Wrongful Death Act, § 768.21, Fla. Stat. The legislature established an entirely new type of remedy and procedure applied to all wrongful deaths after its effective date, regardless of when the defendants' underlying conduct occurred. Applying a new statute to cases filed after its effective date -- without regard to when the underlying conduct occurred -- is the standard way that a legislature makes a law "prospective." Indeed, Florida courts have often applied changes in the law to pending suits arising from a defendant's behavior many years ago. *Hoffman v. Jones*, 280 So.2d 431, 440 (Fla. 1973)(abrogating the complete defense of contributory negligence and applying the change to pending causes of action based on acts of negligence that occurred long before the change in law); *Conley v. Boyle Drug Co.*, 570 So.2d 275 (Fla. 1990)(adopting and applying market share liability to conduct that occurred 35 years before the decision); *Linder v. Combustion Engineering, Inc.*, 342 So.2d 474 (Fla. 1977)(applying *West v. Caterpillar Tractor Co., supra*, to pending causes of action).[20]

---

[21]As noted above, the 1994 Amendments do not create a new cause of action or subject potential defendants to new liability. Not later than this Court's 1963 decision in *Green*, manufacturers knew they would be absolutely liable for the unfitness of their products. Not later than this Court's 1976 decision in *West*, manufacturers knew they would be strictly liable for defective and unreasonably dangerous products. Even before these decisions, such manufacturers knew that medical expenses could be recovered as compensatory damages. The

The terms "conduct of potential defendants" and "activities" found in the circuit court's holding that the 1994 Amendments do not apply retroactively do not appear in the Amendments. Nothing in them supports such a narrow reading. To the contrary, Section 409.910(11)(h), Florida Statutes (1993), provides that actions must be brought "within 5 years after...the provision of medical assistance to a recipient." The 1994 Amendments codify extant law and, limited only by the 5-year limitation, are applicable to all actions for recovery of Medicaid payments.

III. The Trial Court Lacked Jurisdiction To Strike The Statute Of Repose Language Of The 1994 Amendments [21]

A trial court has no jurisdiction, even under the Declaratory Judgment Act, unless and until an actual controversy has arisen between the parties. *Martinez v. Scanlon*, 582 So. 2d 1167, 1170 (Fla. 1991), *Santa Rosa County, Florida v. Administration Comm. Div. of Admin. Hearings*, 20 Fla. L. Weekly S333 (Fla. July 13, 1995) (absent bona fide controversy no

---

duty to manufacture products which are not unfit, defective, or unreasonably dangerous is hardly novel.

[21]The following language is included in the 1994 Amendments:

> Except as otherwise provided in this section, actions to enforce the rights of the department under this section shall be commenced within 5 years after the date of a cause of action accrues, with the period running from the ... provision of medical assistance to a recipient. Each item of expense provided by the agency shall be considered to constitute a separate cause of action for purposes of this subsection. The defense of statute of repose shall not apply to any action brought under this section by the agency.

§ 409.910(12)(h), Fla. Stat. (Supp. 1994) (1994 Amendment underlined).

jurisdiction to render declaratory relief). Below, Plaintiffs could not allege a single instance of an otherwise barred claim being revived by the 1994 Amendments. Even if such a claim were improperly revived, the challenged provision would be unconstitutional only as applied to that claim and others of the same type. Until such a claim arises, thus providing a real-life example subject to an adversarial proceeding, the trial court lacked jurisdiction to reach this issue.

The trial court construed the 1994 Amendments' statute of repose language to result in the elimination of the statute of repose defense and held that part of the 1994 Amendment "cannot apply to revive any claim already time-barred by the statute of repose." [citation omitted] (R __, App. A, par. 4) The trial court's ruling illustrates the danger of rendering broad legal conclusions in the absence of a ripe dispute. Preliminarily, the language requiring Medicaid recovery actions to be brought within 5 years was enacted, *not* in the 1994 Amendments, but in 1990. *See* Ch. 90-295, § 33, Laws of Fla., effective October 1, 1990. Any unconstitutional application of the 1994 Amendments would depend on whether a claim was legally barred before that date.

This Court has directly declared that the statute of repose was never intended to, and cannot constitutionally, apply to latent disease claims. *Pullum v. Cincinnati, Inc.*, 467 So.2d 657, 659 (Fla. 1985), *(citing Diamond v. E.R. Squibb and Sons*, 397 So.2d 671 (Fla. 1981)); *Conley v. Boyle Drug Co.*, 570 So.2d at 283; *University of Miami v. Bogorff*, 583 So.2d 1000, 1004 (Fla. 1991). Smoking cigarettes causes latent diseases, including, but not limited to, lung cancer. Thus, the trial court's holding as to revival of time barred claims operates only in the abstract. It does not comport with established Florida law as to claims seeking recovery of damages due to latent diseases. The holding should be vacated until the issue is ripe; that is, presented to a court as part of a case seeking to recover Medicaid payments. *See Cheffer v. Reno*, 9 Fla. L. Weekly

Fed. C197, 198-199 (11th Cir. June 23, 1995) (plaintiffs' Eighth Amendment challenge to fines imposed by the Access [to abortion clinics] Act not ripe until such fines are impending).

IV. ACHA is Constitutionally Structured UnderArticle IV, Section 6 of The Florida Constitution asEither a Separate Department or as a Unit "Within"D.B.P.R.

A.The Agency for Health Care Administration is a Separate Department

This appeal has been expedited because the State's primary health care regulatory agency has been held to be "unconstitutionally structured." This ruling places at risk every action AHCA has taken since its inception, including every license for every hospital, nursing home, and medical professional granted, denied or revoked. The trial court held:

> Article IV, Section 6 of the Florida Constitution requires all functions of the executive branch to be allotted to twenty-five departments. The Agency for Health Care Administration ("AHCA") was created "within" the Department of Business and Professional Regulation ("DBPR") but AHCA is not subject to the "control, supervision, or direction" of DBPR. § 20.42, Fla. Stat. (1993). A "function" cannot be "allotted" to a department if the department has no control over that function. Since DBPR has no control or supervision over AHCA, AHCA is unconstitutionally structured in violation of the 25 department limit of Article IV, § 6, of the Florida Constitution.

The trial court's order holds AHCA to be in essence a department, in violation of the twenty-five department limit. Although AHCA may have temporarily violated the twenty-five department limit at the time of its creation, during the same legislative session two other departments were merged to make room for AHCA. Unquestionably, AHCA did not violate the twenty-five department rule as of the time the 1994 Amendments authorized it to pursue recovery of Medicaid expenditures. As the plaintiffs did in other respects, they improperly

sought and obtained a declaratory judgment as to an issue that was not appropriate for adjudication.

1. Legislative History. AHCA was created by the 1992 Legislature, effective July 1, 1992, to become the single state agency in charge of health care regulation. Ch. 92-33, Laws of Fla. Prior to that time health care regulatory functions were spread among several boards and departments. Many of those functions were transferred to AHCA at the time of its creation in 1992. Although AHCA was placed "within" the Department of Professional Regulation in 1992, it was made a separate budget entity and the agency head was instructed to report directly to the Governor, not the Secretary of DBPR. Thus, it is clear that the Legislature intended to vest AHCA with substantial and independent authority.

Examination of the legislative history reveals that the 1992 Legislature originally planned to create a Department of Health instead of the Agency for Health Care Administration. *See Bill Analysis & Economic Impact Statement* CS/HB 1477 (1992) dated March 6, 1992. (App. B). This bill passed the House Health Care and House Appropriations Committees with only one dissenting vote. After passing the Appropriations Committee, the bill was amended to create the Agency for Health Care Administration. According to the Final Bill Analysis & Economic Impact Statement, the reason for those floor amendments was:

> Because of the constitutional limitation placed on the number of state agencies that can exist (Article IV, Section 6), the new Department of Health was converted to the Agency for Health Care Administration which is located for administrative purposes within the Department of Professional Regulation.

See Final Bill Analysis & Economic Impact Statement CS/SB 2390 (1992), at page 66. (App. C). Clearly, the Department of Health became the Agency for Health Care Administration

only because of a possible breach of the constitutional limitation on the number of departments.[22] However, the Legislature did not effect any change to structure, organization, powers or purpose when it substituted the word "agency" for "department."

During the same 1992 session, the Legislature merged two existing departments, the Department of Administration and the Department of General Services. Ch. 92-279, Laws of Fla. That merger became effective January 1, 1993. It reduced the existing number of departments by one.

In subsequent sessions in 1993 and 1994, the Legislature added to AHCA's authority by giving it additional responsibilities. For example, AHCA was given regulatory authority over nursing homes, adult congregate living facilities and home health agencies in 1993. In 1994, AHCA was given licensing and disciplinary authority over doctors, nurses, dentists and other health care professionals. These subsequent enactments evidence the legislative intent to give AHCA department-like powers.

---

[23]In 1987, the Attorney General's Office opined that the Board of Trustees of the Internal Improvement Trust Fund was a department for purposes of Article IV, § 6, Fla. Const. *See* informal Op. Atty. Gen. (letter to Rep. Dick Locke, 11/10/87, attached as App. B) At the beginning of 1992 there were 24 statutory departments subject to the limit of 25. These were: (1) State; (2) Legal Affairs; (3) Banking & Finance; (4) Insurance; (5) Agriculture & Consumer Services; (6) Education; (7) Business Regulation; (8) Commerce; (9) Labor & Employment Security; (10) Community Affairs; (11) HRS; (12) Law Enforcement; (13) Revenue; (14) General Services; (15) Transportation; (16) Highway Safety & Motor Vehicles; (17) Natural Resources; (18) Environmental Regulation; (19) Citrus; (20) Professional Regulation; (21) Administration; (22) Corrections; (23) Lottery; and (24) Military Affairs. The Parole Commission is authorized by Art. IV, § 8(c); the Game & Fresh Water Fish Comm., by Art. IV, § 9; the Dept. of Veterans Affairs, by Art. IV, § 11; and the Dept. of Elderly Affairs, by Art. IV, § 12.

2. AHCA Functions as a Department. As noted above, AHCA is responsible for a wide variety of statewide health care purchasing and regulatory functions which were previously assigned to other departments. For example, AHCA is in charge of Florida's Medicaid program and is responsible for spending 6.5 billion Medicaid dollars. AHCA is also charged with the primary responsibility for selecting and contracting with the health insurance providers for all current and retired state employees, and their dependents. This program costs almost one-half billion dollars annually. AHCA's budget accounts for about one-sixth of Florida's entire state government budget. AHCA's size and scope of responsibilities are consistent with departmental status.

The structure of AHCA is consistent with departmental status. The only place in Florida law where the formation of a department is described is Chapter 20, Florida Statutes (1993). Under Section 20.04(2), Florida Statutes (1993), departments may have field offices organized as district or area offices. AHCA has 11 area offices. Under Section 20.04(3)(a), Florida Statutes (1993), the "principal unit" of the department is the "division." AHCA is comprised of four divisions: (1) Health Quality Assurance, (2) Health Policy and Cost Control, (3) State Health Purchasing, and (4) Administrative Services. § 20.42(2), Fla. Stat. (1993). Under Section 20.04(3)(b), Florida Statutes (1993), departmental divisions shall have bureaus headed by chiefs. AHCA has bureaus headed by chiefs within its divisions. Under Section 20.05, Florida Statutes (1993), the heads of departments are given certain powers. The Director of AHCA has and exercises all of those powers. Under Section 20.05, Florida Statutes (1993), each statement agency must have an "agency inspector general." AHCA has an inspector general. Thus, AHCA possesses virtually every characteristic of a department under Florida law.

Of the indicia of departmental status, AHCA lacks only the word "department" in its title. But that deficiency, standing alone, should not be fatal to a judicial determination of departmental status because Section 20.03, Florida Statutes (1993), defines the term "agency" to include a "department", "as the context requires."

These structural and functional characteristics all point to and reinforce the implicit conclusion that AHCA may be regarded as a department. Therefore, if AHCA is recognized as a department, then the 1992 Legislature acted properly in allocating to AHCA its vital executive branch functions.

3. AHCA Does Not Violate the Twenty-Five Department Limit.

Recognition of AHCA as a department today, under this historical, functional and structural analysis gives vitality to the twenty-five department limit of Article IV, Section 6 of the Florida Constitution. A logical approach is to examine the entity and treat it like a department if it functions and is structured as a department and has other attributes of a department.

The trial court found that AHCA was unconstitutional because its "structure" violated the twenty-five department limit. While the trial court did not elaborate, there is an inherent finding of a violation of the twenty-five department limit on July 1, 1992 when AHCA came into existence. Assuming this finding to be true, AHCA's creation only temporarily violated the twenty-five department limit. During that same session, two departments, the Department of Administration and the Department of General Services, were merged to create the Department of Management Services which became effective on January 1, 1993. *See* Ch. 92-279, § 4, Laws of Fla., and Ch. 92-326, § 55, Laws of Fla. The result was to reduce the number of executive departments by one, back down to twenty-five. AHCA may have been a twenty-sixth

department for a few months but the same Legislature reduced the number of departments to make room for AHCA.

The 1993 Legislature took several steps which demonstrated its intent to ratify the creation of AHCA as a department. As noted above, the 1993 Legislature added significantly to AHCA's responsibilities by giving it the authority to regulate nursing homes, adult congregate living facilities, and hospices. *See* Chs. 93-129, 93-179 and 93-216, Laws of Fla. The Agency also was given a mandate to establish a new system of health care purchasing called community health care purchasing alliances. *See* Ch. 93-129, Laws of Fla. Thus, the 1993 Legislature treated AHCA like a department by adding to its powers rather than reducing them

Furthermore, the 1993 re-enactment of the statutes likewise served to ratify the existence of AHCA at a time when there was no arguable twenty-sixth agency problem. The 1993 Legislature merged four departments into two, thus creating even more room for AHCA within the 25 limit. The Department of Natural Resources and the Department of Environmental Regulation were merged to form the Department of Environmental Protection. *See* Ch. 93-213, Laws of Fla. The departments of Business Regulation and Professional Regulation were merged to form the Department of Business and Professional Regulation. *See* Ch. 93-220, Laws of Fla. At no time since 1992 have there been more than twenty-five departments, AHCA included.

4. The Case Law Supports A Saving Construction. In construing the constitutionality of Section 20.42, Florida Statutes (1993), this Court "is bound 'to resolve all doubts as to the validity of [the] statute in favor of its constitutionality, provided the statute may be given a fair construction that is consistent with the federal and state constitutions as well as with the legislative intent.'" *State v. Stalder*, 630 So.2d 1072, 1076 (Fla. 1994) (*quoting State v.*

Elder, 382 So.2d 687, 690 (Fla. 1980). Moreover, statutes are presumed to be constitutional and the courts must construe them in harmony with the constitution if it is reasonable to do so. *Florida Department of Education v. Glasser*, 622 So.2d 944, 946 (Fla. 1993); *Capital City Country Club*, 613 So.2d at 448; *Bunnel v. State*, 453 So.2d 808 (1984).

Thus if AHCA's creation in 1992 breached the twenty-five department limit it did so only for a period of six months until the Department of Management services was officially created on January 1, 1993.

B. AHCA As A Non-Departmental Entity

Even if AHCA is not a departmental entity, it is still constitutional. As the state argued below, AHCA's existence as a non-departmental entity fully comports with Section 20.02(2), Florida Statutes (1993).

That statute provides:

> Within constitutional limitations, the agencies that compose the executive branch must be consolidated into no more than 25 departments, exclusive of those specifically provided for or authorized in the State Constitution, consistent with executive capacity to administer effectively at all levels. *The agencies in the executive branch should be integrated into one of the departments of the executive branch to achieve maximum efficiency and effectiveness as intended by § 6, Art. IV* of the State Constitution.

Id. (emphasis added).

Section 20.02(2) is fully consistent with Article IV, Section 6 of the Florida Constitution. Significantly, the Legislature has implemented Article IV, Section 6 of the Florida Constitution several times to create "agencies" such as AHCA. *See* 120.65(1), Fla. Stat. (1993) (Division of Administrative hearings "shall not be subject to control supervision, or direction by the

Department of Management Services in any manner"); § 447.205(3), Fla. Stat. (1993)(same as to PERC); and § 121.1905, Fla. Stat. (1993)(same as to the Division of Retirement). *See also,* § 627.351(6)(j), Fla. Stat. (1993)("the Residential Property and Casualty Joint Underwriting Association is not a state agency, board or commission" and shall be treated as a political subdivision for some tax purposes). The structure of these entities has not been challenged, strongly indicating the Legislature has been properly implementing Article IV, Section 6 of the Florida Constitution.

Implementing Article IV, Section 6, Florida Constitution, and Section 20.02(2), Florida Statutes (1993), the Legislature sought to promote efficiency and effectiveness by placing AHCA within DBPR. Such placement is entitled to a "rebuttal presumption of the existence of necessary fact support," and these facts may be known or assumed. *Fulford v. Graham*, 418 So.23 1204, 1205 (Fla. 1st DCA 1982). The Legislature would be presumed to know that both DBPR and AHCA were charged with regulating health care activities. The Legislature could reasonably assume DBPR's accumulated expertise in health profession regulation would assist AHCA.

In this light, placement of AHCA within DBPR was rational. The creation of AHCA and DBPR had complementary roles within the field of health care.

C. The Trial Court's Holding Will Produce Harsh and Absurd Results

If the trial court's holding is correct, a resulting argument is that AHCA's actions to date are voidable or void. The trial court's interpretation of Article IV, Section 6, Florida Constitution, leads to the harsh and absurd result of virtually unregulated health care since 1992. Every certificate of need issued to any hospital, hospice or nursing home issued

since 1993 would be void as would every license. Every revoked or denied license for such facilities would be reinstated or granted. The same might be true as to the license of every doctor and other health care professional granted during this interim.

In *City of St. Petersburg v. Briley, Wild & Associates*, 239 So.2d 817, 822 (Fla. 1970), this Court said:

> [C]onstitutional interpretation is actuated by the rule of reason, and unreasonable -- or absurd consequences should, if possible, be avoided. [Citation omitted.] A literal interpretation should not be accorded if it leads to an unreasonable conclusion or to a result not intended by the law makers.

Id. The trial court's 1995 holding, when there clearly are not twenty-six departments, completely ignores this principle.

Constitutional provisions were never intended to hinder experimentation in the interest of the public when such experimentation is necessary. *Coral Gables v. Crandon*, 25 So.2d 1 (Fla. 1946). Here, the 1992 Legislature's action was necessitated by escalating health care costs and federal law requiring a single state agency to administer the Medicaid program. *See* 42 C.F.R. 431.10. The Legislature should not be constrained from addressing the changing needs of Florida's citizens related to health care. As this Court has stated:

> [When] the major question is one that concerns the general welfare...constitutional questions should be approached from the pragmatic rather than the legalistic point of view.... The Constitution...was not intended to bind like a strait-jacket but contemplated experimentation for the common good.

State v. State Board of Administration, 25 So.2d 880, 884 (Fla. 1946).

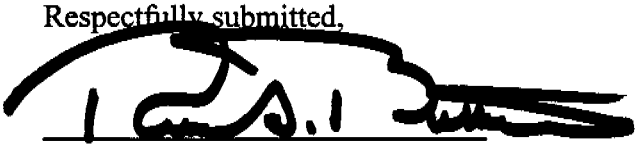
Whether viewed as a freestanding department or an autonomous agency within DBPR, AHCA is constitutionally structured. It is not a twenty-sixth department, and, hence, there is no

impediment to its pursuit of any action to recoup Medicaid payments. The ruling of the trial court should be reversed.

CONCLUSION

The effect of this Court's decision to uphold all of the 1994Amendments as constitutional and rejecting the trial court's erroneously broad retroactivity ruling would allow the State to effectively and efficiently enforce its well-settled independent right to recoup Medicaid damages from culpable third parties. Consistent with the 1990 statute of limitations, the State will be able to obtain reimbursement for costs expended from 1989. Alternatively, the Amendments should at a bare minimum be given application no later than the effective date of the 1990 amendments which clearly expressed the State's independent authority to recover full Medicaid damages from culpable third parties. The enforcement pursuant to the 1994 Amendments and prior Florida statutory and common law of the State's right to reimbursement will do no violence to plaintiffs' federal or state constitutional rights and will provide significant benefits to the State and its citizens by returning to the State the expenditures which unjustly enriched the Tobacco Industry. The trial court's application of Article IV, Section 6, of the Florida Constitution to invalidate a $6.5 billion Department of the State of Florida in 1995, in a controversy arising out of its authority under 1994 Amendments, because it may have temporarily violated the twenty-five department limit in 1992, is clearly erroneous. The final order must be reversed.

Respectfully submitted,



ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

DEXTER DOUGLASS
General Counsel
Executive Office of
the Governor
Florida Bar No. 020263
The Capitol, Ste. 209
Tallahassee, FL 32399-0001
(904) 488-3494
(904)488-9810 (fax)

LOUIS F. HUBENER
Florida Bar No. 140084

CHARLIE McCOY
Florida Bar No. 333646

JAMES A. PETERS
Florida Bar No. 230944

Assistant Attys. General
Office of Attorney General
The Capitol, Ste. PL-01
Tallahassee, FL 32399-1050
(904) 488-9935
(904) 488-4872 (fax)

Of Counsel:

LAURENCE H. TRIBE
Special Counsel
Hauser Hall 420
1575 Massachusetts Ave.
Cambridge, MASS 02138
(617) 495-4621
(617) 495-3383 (fax)

JONATHAN MASSEY
Special Counsel
3920 Northampton Street
Washington, D.C. 20015
(202)686-0457
(202)686-1497 (fax)

SUSAN NIAL
Ness, Motley, Loadholt,
Richardson & Poole
P.O. Box 1137
Charleston, SC 29402
(803) 577-6747
(803) 577-7513 (fax)

W. C. GENTRY
Gentry and Phillips
6 East Bay St., Suite 400
Jacksonville, FL 32202
(904) 356-4100
(904) 358-1895 (fax)

WAYNE HOGAN
Brown, Terrell, Hogan,
Ellis, McClamma & Yegelwel
Florida Bar No. 142460

804 Blackstone Bldg.
233 East Bay Street
Jacksonville, FL 32202
(904)632-2424
(904)632-2027 (fax)

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand delivery to **ARTHUR J. ENGLAND, JR.**, Esquire, and **BARRY RICHARD**, Esquire, Greenberg, Traurig, Hoffman, Lipoff, Rosen & Quentel, P.A., 101 East College Avenue, Tallahassee, Florida 32302; and **ALAN C. SUNDBERG**, Esquire, Carlton, Fields, Ward, Emmanuel, Smith & Cutler, P.A., 500 First Florida Bank Tower, 215 South Monroe Street, Post Office Drawer 190, Tallahassee, Florida 32302; this 7th day of September, 1995.

Assistant Attorney General