SUPREME COURT OF FLORIDA

AMERICAN BANKERS INSURANCE COMPANY, ET AL.,

Petitioners,

v.

LAWTON CHILES, ETC., ET AL.,

Respondents.

_____/

CASE NO. 86,682

District Court of Appeal,
1st District - No. 94-3111

REPLY BRIEF

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SUMMARY

SBA ignores critical language in Article III, § 19(f)(1), Florida Constitution. SBA argues as if that article said merely:

> No trust fund of the State of Florida .... may be created by law without a three-fifths (3/5) vote .... in a separate bill ....

Yet the final phrase of the clause, "for that purpose only," omitted from the quotation above, is critical to the clause's meaning. SBA does not confront that final phrase. However, the all words of the clause must be given meaning and effect.

Nor does SBA confront and overcome the offending nature of the subject law, in view of that final phrase. SBA does not explain how amending the retaliatory tax statute, deeming CAT Fund payments to be approved reinsurance for regulatory purposes, and expanding the regulatory power of the Department of Insurance were in any way related to the singular purpose of creating the CAT Fund, much less how any of those provisions was necessary to the "purpose only" of creating the fund. Instead, SBA argues a series of collateral propositions, themselves legally incorrect. They are summarized, and briefly refuted here, and more fully discussed below.

SBA asserts that the statute is presumptively valid, rendering it constitutional. Yet, every time the courts have stricken a law for violating single-subject limitations, the presumption of constitutionality had to be overcome, as it is here, by constitutional inquiry.

SBA asserts that the clause should be liberally construed to uphold § 215.555, Florida Statutes. That flies in the face of the

clause's purposefully restrictive language. Since the clause is clear, there is no occasion to "liberally interpret" it in a manner that does violence to its plain language. An apparent purpose of the clause is to restrict the subjects that may be included in a bill creating a trust fund.

SBA asserts that the clause was meant merely to "make it more difficult to create a trust fund" through heightened voting requirements for the creation of trust funds and for all items that relate to trust funds, and that logrolling is not an issue because the 3/5ths vote requirement removes concerns about logrolling. That is at odds with the plain wording of the clause which, besides requiring a super-majority vote, explicitly commands: "No trust fund .... may be created by law ... [except] in a separate bill for that purpose only." If the clause were intended merely to require that trust funds be created in a separate bill on a 3/5th's vote, then the ultimate phrase, "for that purpose only," is unnecessary surplusage and a nullity. In fact, the 3/5ths vote requirement makes logrolling an even greater danger, making the clause's ultimate phrase - "for that purpose only" - all the more important.

SBA asserts that antecedent single subject provisions may not be looked to in discerning the meaning of this constitutional provision. That assertion is at odds with the decisions of this Court, which have done exactly so in interpreting other single subject provisions.

SBA asserts that there is no proof of actual logrolling activity, so § 215.555 should be upheld. On the contrary, the

Constitution's various single subject provisions are preventative. No case holds that logrolling need actually have occurred, and that its actual occurrence need be proven, before a law offends single-subject clauses. Adopting SBA's reasoning would infuse an inappropriate and unmanageable standard of judicial review into single subject cases.

SBA asserts that we interpret the clause is too restrictively. SBA simply constructs a strawman, so that it may knock it down. We do not urge a "hypertechnical" interpretation. Instead, consistent with established rules of constitutional interpretation, we urge that the clause may not be construed to ignore the phrase "for that purpose [the purpose of creating the fund] only." We submit that including such detached subjects as changing the retaliatory tax and exempting insurers from regulatory review under generally applicable reinsurance accounting standards manifestly violates the plain meaning of the clause.

SBA asserts that matters in the Statement of Facts in the Initial Brief were not before the trial court and that it is premature to consider them. On the contrary, the "factual" matters SBA alludes to require no independent proof. They are apparent from the face of the statutes we discuss in the Initial Brief.

Nor are they "premature" in the sense that SBA suggests. We do not here ask the Court to decide whether legislatively directing the Florida Department of Insurance to treat CAT Fund payments as approved reinsurance violates the principles of federalism under the 14th Amendment. Nor do we ask the Court to decide the wisdom

of amending the retaliatory tax statute. We do, however, note the broad-ranging collateral consequences of those items, which is appropriate in deciding if such far-ranging provisions fit within the constitutional restriction on bills creating trust funds.

ARGUMENT

I. SBA'S ARGUMENTS FOR THE CONSTITUTIONALITY OF § 215.555, FLORIDA STATUTES, DO NOT WITHSTAND SCRUTINY.

A. SBA'S INTERPRETATION OF ARTICLE III, § 19(f)(1) RENDERS THE CLAUSE'S FINAL PHRASE A NULLITY, AND THEREFORE CANNOT BE ACCEPTED.

It is rudimentary that an interpretation which does not give meaning and effect to all of the clause's words, and which renders a portion of it merely surplusage, may not be adopted. *See, e.g., In re Advisory Opinion to Governor*, 374 So. 2d 959 (Fla. 1979); *Askew v. Game and Freshwater Fish Comm'n*, 336 So. 2d 556 (Fla. 1976). SBA's arguments violate that principle. SBA argues that this constitutional provision is meant merely to "make it more difficult to create a trust fund" through a heightened vote requirement for the creation of trust funds, and was intended merely to require that all matters related to trust funds be subjected to a 3/5ths vote. This assertion disregards the plain words of the clause which, besides requiring a 3/5ths vote, explicitly command: "No trust fund .... may be created by law ... [except] in a separate bill <u>for that purpose only</u>." If the clause were intended merely to require that trust funds be created in a separate bill passed by a 3/5th's vote, then the ultimate phrase "for that purpose only" is unnecessary surplusage and a nullity.

SBA's position violates another principle of constitutional construction: that the clause should not be read in a way which leads to absurd results. SBA asserts that the clause means all subjects related to a trust fund must be in the separate bill creating the fund, and subjected to a 3/5ths vote.[1] Probing that proposition reveals its flaws. If SBA's interpretation is correct, not only was inclusion of the reinsurance accounting provision permitted by Article III, § 19(f)(1); it was demanded, because the real purpose of the constitutional clause, says SBA, is to force a 3/5ths vote on all subjects related to the Fund. Yet, reinsurance accounting has long been the subject of other regulatory statutes. § 624.610, *Fla. Stat.* Section 9, Ch. 93-410, Laws of Florida, passed contemporaneously with Ch. 93-409, tightened reinsurance accounting standards generally applying to insurers. Under SBA's logic, the Legislature could not make insurers account for CAT Fund reinsurance in accordance with those tighter standards without a super-majority vote in the bill creating the CAT Fund, even though such revised standards serve a broader regulatory purpose. That result is absurd.

B. THE "PRESUMPTION OF CONSTITUTIONALITY" ATTACHING TO § 215.555, FLORIDA STATUTES, DOES NOT SAVE IT.

SBA asserts that the statute is presumptively valid. Yet, every time the courts have stricken a law for violating "single-subject" limitations, the presumption of correctness had to be

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[1]From this premise SBA claims that statutory accounting for CAT Fund reinsurance on insurance companies' own books is related to the trust fund, and therefore had to be subjected to a 3/5ths vote.

overcome, and was. Likewise, it has been overcome here. The only reasonable interpretation of Article III, § 19(f)(1), Florida Constitution, applied to § 215.555, Florida Statutes, renders it unconstitutional. SBA seeks to save the statute by arguing an interpretation which offends principles of interpretation.

Similarly, SBA relies on the phrase "at least the following" in § 215.3207, Florida Statutes, to argue that, through contemporaneous construction, the Legislature fashioned an indulgent interpretation of Article III, § 19(f)(1), to which the courts should defer. This argument is likewise unconvincing. Section 215.3207, Florida Statutes, binds no one. The Legislature is free to ignore it in subsequent legislation. Its passage presented no ripe, justiciable controversy by which to test it. No such case arose until the Legislature actually passed the bill which created this trust fund. The self-serving and unreviewable declaration of § 215.3207 does not rise to the level of persuasive contemporaneous construction. Moreover, the Legislature may not, by its own fiat, loosen the strictures placed upon it by the clear words of Article III, § 19(f)(1).

SBA's relies on *Vinales v. State*, 394 So. 2d 993 (Fla. 1981), to argue to the contrary. *Vinales* held that Article II, § 5(a), Florida Constitution (dual office holding) proscribed only dually compensated appointments. The Court held that permitting the appointment of City of Miami police officers as State's Attorney investigators without additional pay did not violate that prohibition. *Vinales* cites *Greater Loretta Improvement Association*

v. State ex rel. Boone, 234 So. 2d 665 (Fla. 1970). *Boone* discusses "conclusive" legislative interpretation as follows:

> The situation then, as it presents itself in connection with our constitutional provision, is at least that by the decisions of the courts of Florida and other jurisdiction the word 'lottery' may have either of several meanings, and that either is reasonable and possible. In such a situation, where a constitutional provision may well have either of several meanings, it is a fundamental rule of constitutional construction that, if the Legislature has by statute adopted one, its action in this respect is well-nigh, if not completely, controlling.

Id. at 669 (emphasis added). In that case, the legislature selected a reasonable meaning of the word "lottery," one which the courts had previously given it. Since there was more than one reasonable meaning for the ambiguous word "lottery," the Legislature's choice was given great weight.

Here, though, the language of Article III, § 19(f)(1) is clear. When constitutional language "is clear, unambiguous, and addresses the matter in issue, then it must be enforced as written." *Florida Soc. of Opthamology v. Florida Optometric Assn.*, 489 So. 2d 1118, 1119 (Fla. 1986). There is no occasion for the Legislature to "liberally interpret" Article III, § 19(f)(1); no deference is owed to an interpretation at odds with the Constitutions's clear text.

C. "LIBERAL PRINCIPLES" OF CONSTITUTIONAL INTERPRETATION DO NOT SAVE § 215.555, FLORIDA STATUTES, FROM UNCONSTITUTIONALITY.

SBA asserts that Article III, § 19(f)(1) should be "liberally" construed to uphold § 215.555, Florida Statutes. That flies in the face of the clause's restrictive language. Since the clause is

clear, it may not "liberally interpreted" in a manner that does violence to its plain language. An apparent purpose of the clause is to restrict the subjects that may be included in a bill creating a trust fund. SBA argues that such judicial revision is supported by *Florida Society of Opthamology v. Florida Optometric Association*. Answer Brief, p. 12-13. That case does not support the SBA's notion. It construed Article III, § 8(a), dealing with the timing of the Governor's veto. The Court noted that the clause in question was ambiguous. 489 So. 2d at 1119. It cautioned that if constitutional language is clear, it must be enforced as written. *Id.* The case is no authority for the notion that the courts may disregard the plain language of Article III, § 19(f)(1).

D. THE PURPOSES OF ARTICLE III, § 19(f)(1) INCLUDE SUBJECT RESTRICTIONS TO PREVENT LOGROLLING. THE CLAUSE IS NOT SIMPLY A SUPER-MAJORITY PROVISION, AS SBA ASSERTS.

SBA asserts that this constitutional provision was meant merely to "make it more difficult to create a trust fund" through heightened voting requirements, and that the 3/5ths vote requirement removes concerns about logrolling. This assertion disregards the plain wording of the clause which, besides requiring a 3/5ths vote, commands: "No trust fund .... may be created by law ... [except] in a separate bill for that purpose only." If the clause were intended merely to require that trust funds be created in a separate bill passed by a 3/5th's vote, then the ultimate phrase "for that purpose only" is unnecessary surplusage and a nullity. The intent that SBA urges -- merely to subject items relating to a trust fund to a 3/5ths vote -- is achieved without

the final phrase. Yet the clause includes the phrase "for that purpose only." It must be read to give meaning and effect to that phrase.

In fact, the 3/5ths vote requirement makes logrolling all the more a danger, compared to an ordinary bill. In the case of a super-majority bill, each member is more pivotal to passage. A super-majority bill is more fertile ground for members to insist upon questionable provisions of marginal nexus to the bill's object, as the price for their votes. The anti-logrolling effect of the clause's ultimate phrase -- "for that purpose only" -- is therefore all the more important, and cannot be ignored.

E. ARTICLE III, § 19(f)(1) IS PREVENTATIVE, AND FOCUSES NOT ON WHETHER LOGROLLING ACTUALLY OCCURRED, BUT ON REQUIRING A STRUCTURE THAT PREVENTS IT.

SBA suggests that § 215.555, Florida Statutes, should be upheld because there is no direct evidence that logrolling actually occurred in the passage of Ch. 93-409. This is a distraction. No case holds that logrolling need actually have occurred, and that its actual occurrence need be proven, before a law offends single-subject clauses. Such clauses are preventative. They outlaw bills structured to facilitate logrolling, without regard to whether the disapproved conduct actually took place.

That framework standard preserves the proper roles of the legislature and the judiciary. If, as SBA suggests, the test were otherwise, the courts constantly would be engaged in broad factual investigations into events surrounding the passage of bills, searching out whether improper logrolling influence was actually

brought to bear. The Legislature would be constantly distracted from its duties to satisfy the courts' inquiries on that score. Contrary to SBA's contention, the single-subject clauses outlaw bills that on their face violate the structural restrictions imposed by those clauses, and the courts faithfully enforce that constitutional discipline without inquiry into whether logrolling actually took place.

F. IT IS APPROPRIATE TO EXAMINE THE INTERPRETATION OF SINGLE SUBJECT PROVISIONS PRECURSING ARTICLE III, § 19(f)(1) TO DISCERN ITS INTENT.

SBA asserts that antecedent single subject provisions, and judicial discourse upon them, may not be examined and compared in ascertaining the meaning of this constitutional provision. That assertion is at odds with the decisions of this Court, which have done exactly so in interpreting other single subject provisions. *E.g., Fine v. Firestone*, 448 So. 2d 984 (Fla. 1984).

G. THE MATTERS STATED IN THE INITIAL BRIEF'S STATEMENT OF FACTS ARE ESTABLISHED BY THE LEGISLATION CITED, AND ARE ENTIRELY APPROPRIATE FOR CONSIDERATION HERE.

SBA claims the Statement of Facts in the Initial Brief contained matters not before the trial court, and that are premature to consider. The "factual" matters to which SBA alludes require no independent proof. They are apparent from the face of the statutes we discuss in the Initial Brief. Nor are they "premature." We do not here ask the Court to decide whether legislatively directing the Florida Department of Insurance to treat CAT Fund payments as approved reinsurance violates the principles of federalism under the 14th Amendment; nor do we ask

the Court to decide the wisdom of amending the retaliatory tax statute. We appropriately ask the Court to consider the far-ranging nature of those provisions in deciding if they fit within constitutional restrictions on bills creating trust funds.

SBA does not refute the analysis in the Initial Brief of the detached nature of these provisions, because it cannot. There is simply no necessary nexus between the amendment of the retaliatory tax contained in Ch. 93-409, Laws of Florida, and the creation of the CAT Fund. The retaliatory tax is not a source of funds for the trust fund. The retaliatory tax amendment merely posited general tax and revenue policy, not required to create the trust. So, too, for example, the provision deeming payments to the fund to be for "approved reinsurance" is completely detached from the narrow objective of creating the fund. The question of whether insurers may take a credit against liabilities for particular reinsurance on their financial statements has nothing to do with the creation of Fund, or the Fund's administration. It has to do, instead, with the regulation of insurers' solvency. SBA, the fund's administrator, lacks any authority to regulate the business of insurance.

Nor does SBA refute our analysis showing that grave prospects of discrimination in favor of domestic insurers inhere in that "approved reinsurance deemer" provision, which illustrates why such provisions may not be included in a bill whose only purpose may be to create the trust fund, according to the Constitution.[2]

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[2]SBA off-handedly suggests in a footnote on page 5 of the Answer Brief that Appellants lack "standing" to raise the question of discrimination, asserting that none of the plaintiffs below were

II. THE COURT MAY NOT ATTEMPT TO DIVINE THE PROPER SCOPE OF A LAW COMPLYING WITH ARTICLE III, § 19(f)(1) AND SEVER THE "OFFENDING PROVISIONS." SUCH ACTION WOULD EVISCERATE SINGLE-SUBJECT CONSTITUTIONAL LIMITATIONS AND WOULD BE DIRECTLY CONTRARY TO THE LANGUAGE OF ARTICLE III, § 19(f)(1).

SBA asserts that, if the law offends this single-subject provision, the Court should not declare the law unconstitutional; rather, because the Legislature perceived an emergency, the Court should divine the proper scope of a complying law, and excise (sever) the offending provisions. That suggestion is wrong, for a number of reasons.

SBA cites no pertinent authority for that suggestion, because there is none. Indeed, in view of the purposes of Article III, § 19(f)(1) and its kin, there can be no severance in cases of single-subject defect, aside from the appropriations context. Judicial redaction or re-writing of a statute offending the Constitution's single-subject demands would, in one stroke, defeat the very constitutional discipline which those clauses impose on the Legislature and thrust the judiciary into the exercise of the

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foreign insurers. There are two answers to this. First, Jewelers Mutual Insurance Company was a plaintiff below, and is an out-of-state insurer. Jewelers withdrew from the case after the appeal was taken, but another foreign insurer has joined as a plaintiff below. *See* Appellant's Motion to Supplement Record on Appeal. More fundamentally, it is unimportant for single-subject purposes whether Appellants are foreign or domestic insurers. All are subject to Ch. 93-409. Each is therefore entitled to raise the act's single-subject invalidity. For example, in *Department of Admin. v. Horne*, 269 So. 2d 659 (Fla. 1972) taxpayers could challenge provisos to an appropriation without showing they were directly affected by the particular provisos. It was enough that they, as taxpayers, had an interest affected by the appropriations act in general. So it is here, as well.

legislative power. Outside of the appropriations context,[3] judicial severance has never been viewed as appropriate in a single-subject violation case. *See State v. Johnson*, 616 So. 2d 1, 4 (Fla. 1993); *State v. Lee*, 356 So. 2d 276, 286 (Fla. 1978) (Sundberg, J., concurring in part and dissenting in part). The cases on which SBA relies all arise either in the appropriations context, *Moreau v. Lewis*, 648 So. 2d 124 (Fla. 1995), or in contexts other than single-subject invalidity. *State ex rel. Boyd v. Green*, 355 So. 2d 789 (Fla. 1978); *High Ridge Management Corp. v. State*, 354 So. 2d 377 (Fla. 1977). For the reasons expressed, they do not govern here.

Furthermore, the language Article III, § 19(f)(1) itself precludes severance when that clause is violated. In contrast to Article III, §§ 6, 12 Florida Constitution,[4] Article III, §

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[3] Bills dealing with appropriations are accorded different constitutional treatment. As the Court explained in *Brown v. Firestone*, 382 So.2d 654 (Fla. 1980), a specific appropriation "is an identifiable, integrated fund which the legislature has allocated for a specified purpose." *Id.* at 668. An appropriations act is a series of such discrete and segregated items. Unlike portions of any other bill, those segregated items are subject to line-item veto. Art. III, § 8(a), *Fla. Const.* Thus, the Constitution itself presumes that portions of an appropriations act may be eliminated without invalidating the entire act.

[4] Article III, § 6:

> Every law shall embrace but one subject and matter properly connected therewith, and the subject shall be briefly expressed in the title. . . . .

Article III, § 12:

> Laws making appropriations for salaries of public officers and other current expenses of the state shall contain provisions on no other subject.

19(f)(1) is crafted to make certain that a trust fund cannot be established in violation of its provisions at all. It provides:

> No trust fund of the State of Florida .... may be created by law without a three-fifths (3/5) vote .... in a separate bill for that purpose only.

"Create" means "to bring into being." *Black's Law Dictionary* 366 (6th ed. 1990); *see Advisory Opinion to the Governor*, 22 So. 2d 458, 459 (Fla. 1945). Because the provisions of Article III, § 19(f)(1) were violated, no trust fund was ever brought into being. By the very terms of the constitutional clause, a bill violating it is void *ab initio*. It never creates a trust fund in the first instance. The Court can no more "sever" the offending provisions of Ch. 93-409, Laws of Florida, and thereby "save" the law from constitutional invalidity, than it could "save" the law by judicially excusing compliance with the 3/5ths vote requirement. In either case, this constitutional provision mandates in plain and unequivocal words that a bill offending its provisions never creates a trust fund, in the first instance. The trust fund itself being void from the outset, there is no means by which it may be "saved" through severance or otherwise, assuming severance were a generally acceptable judicial response in single subject cases.

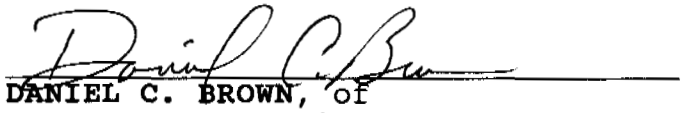
Article III, § 19(f)(1) may vex the Legislature. But failure to heed its command may not be excused by invoking the shibboleths of "crisis" and "emergency." Indeed, in times of crisis the discipline meted out by the Constitution to the Legislature is most sorely needed; and it is then that it must be most faithfully insisted upon by the courts, to preserve constitutional integrity.

The courts' constitutional duty to enforce Article III, § 19(f)(1)'s restrictions on the Legislature may not be shirked here by an imaginative distortion of the device of "severance," any more than severance could "circumvent this Court's responsibility to determine whether the proposed amendment may constitutionally be placed before the voters" in *Fine v. Firestone,* 448 So. 2d at 992.

CONCLUSION

For the reasons stated herein and in the Initial Brief, the Court should reverse the decision below, and remand with instructions to enter judgment declaring that the Fund was not constitutionally created, since Chapter 93-409, Laws of Florida, failed to comply with the command of Article III, § 19(f)(1), Florida Constitution, that the Fund be created "in a separate bill for that purpose only."

Respectfully submitted,



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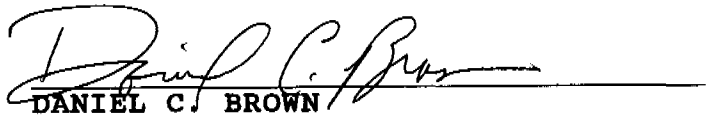
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by United States Mail to **JOHN K. AURELL, KENNETH R. HART** and **STEVEN SEYMOE**, MacFarlane, Ausley, Ferguson & McMullen, 277 South Calhoun Street, Tallahassee, Florida 32301; **JAMES A. PETERS**, Assistant Attorney General, PL-01, The Capitol, Tallahassee, Florida 32399-1050 and **ALAN J. LEIFER**, Division of Legal Services, Department of Insurance, 200 East Gaines Street, #412, Tallahassee, Florida 32399-6554, this 12th day of February, 1996.



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