IN THE SUPREME COURT OF THE STATE OF FLORIDA

DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION, DIVISION OF PARI-MUTUEL WAGERING,

Petitioner,

S. C. CASE NO: 93, 952
DCA CASE NO: 97-3414

v.

INVESTMENT CORP. OF PALM BEACH d/b/a PALM BEACH KENNEL CLUB, et al.

Respondents.
_____/

On a Review of a Petition to Invoke the Discretionary Jurisdiction of the Florida Supreme Court to Review a Decision of the Third District Court of Appeal Upon Asserted Express and Direct Conflict

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ANSWER BRIEF OF RESPONDENT, INVESTMENT CORPORATION OF PALM BEACH d/b/a PALM BEACH KENNEL CLUB

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INTRODUCTION

In the proceeding below, Investment Corporation of Palm Beach d/b/a Palm Beach Kennel Club, and Palm Beach Jai Alai, Calder Race Course, Inc., Tropical Park, Inc., and Gulfstream Park Racing Association were the Appellants and the Division of Parimutuel Wagering, Department of Business and Professional Regulation was the Appellee. In this brief they will be referred to as Palm Beach, Calder, Tropical Park, Gulfstream, and the Division, respectively. Florida's Administrative Procedures Act, Chapter 120, F. S., will be referred to as the APA. The decision below is Investment Corporation of Palm Beach v. Division of Pari-Mutuel Wagering, 714 So.2d 589 (Fla. 3DCA 1998). All emphasis has been supplied unless the contrary is indicated.

While the Division's Initial Brief did not address the merits of the declaratory statement, because acceptance of jurisdiction by this Court brings the entirety of the matter before the Court for review, Palm Beach has included an Issue III asserting that the Division's declaratory statement on the merits was clearly erroneous.

References to the record are identified by "R," volume and page number. The undersigned counsel certifies that this brief has been prepared and submitted using New Times Roman, 14-point typeface.

STATEMENT OF THE FACTS AND OF THE CASE

Palm Beach generally agrees with the Statement of the Facts and of the Case as noted from page one up to the first full paragraph on page four of the Division's brief. Palm Beach would note that the Division's description of the Calder, Tropical Park and Gulfstream petition is not accurate. Such petition is not limited to Palm Beach, but sets forth the following:

> "12. A dispute has arisen between Calder and Tropical as the host tracks and Palm Beach, Investment Corporation of South Florida d/b/a Palm Beach Kennel Club ("Palm Beach") (sic Hollywood Greyhound Track), West Flagler Associates d/b/a Flagler Greyhound Track ("Flagler"), The Aragon Group, Inc. d/b/a Dania Jai Alai ("Dania"), and Daytona Beach Kennel Club, Inc., a Florida corporation ("Daytona Beach"), as guest tracks, over the Calder and Tropical's entitlement to all of the breaks and outs generated by ISW . . .
>
> 13. A dispute has arisen between Gulfstream as the host track and Palm Beach, Investment Corporation of South Florida d/b/a Hollywood Greyhound Track ("Hollywood"), West Flagler Associates d/b/a Flagler Greyhound Track ("Flagler"), The Aragon Group, Inc. d/b/a Dania Jai Alai ("Dania"), and Daytona Beach Kennel Club, Inc., a Florida corporation ("Daytona Beach"), as gust tracks, over the Gulfstream's entitlement to all of the breaks and outs generated by ISW. . .(R 9-10)"

As the Division notes on page four of its Brief, notice of receipt of the petitions was published in the Florida Administrative Weekly and no requests to intervene were received. The Division notice, however, did not state that sections

550.1645(1) and Chapter 717, Florida States, would be construed or that the Division was considering the issue of whether the breaks and uncashed tickets escheated to the state. Instead, the Division's published notice of the receipt of the declaratory statement petitions in Vol. 23, No. 27 of the Fla. Ad. Weekly on June 3, 1997 reflected only the following:

> ". . . The Petitioners seek the Division's interpretation of the interplay between Sections 550.3551(3), 550.6305(9) and Section 550.6325, Florida Statutes, to determine whether the breakage tax and uncashed tickets:
>
> 1) Belong to Calder Race Course, Inc. (Calder), Tropical Park, Inc. (Tropical), and Gulfstream Park Racing Association, Inc. (Gulfstream), when conducting intertrack wagering on interstate wagering with Investment Corporation of Palm Beach; or
>
> 2) Are a part of the profit sharing split Calder, Tropical, and Gulfstream are required to share with Investment Corporation of Palm Beach when conducting intertrack wagering on interstate wagering with Investment Corporation of Palm Beach." (A-6)

It is agreed that the Division issued, on September 17, 1997, a single declaratory statement, in response to the two petitions filed, that the District Court of Appeals for the Third District reversed the declaratory statement in an opinion that included a dissent by Judge Cope. It is further submitted the remainder of the Statement of the Facts and Case set forth in the Division's brief is improperly argumentative.

The Division published notice in Vol. 23, No. 39 of the Fla. Ad. Weekly on September 26, 1997 of its intent to commence rule development regarding the distribution of uncashed tickets and breaks generated "on intertrack wagering of interstate wagering." This lone notice remains the sum total of its rule making efforts on the subject. (A-23)

SUMMARY OF ARGUMENT

When the Division published notice in the Florida Administrative Weekly of the receipt of Calder, Tropical Park, Gulfstream's and Palm Beach's declaratory statement petitions, it noticed only that an interpretation of sections 550.3551(3), 550.6305(9), and 550.6325, Fla. Stat., was sought and that the question presented was limited to the "either or" proposition of whether the guest and the host track shared such breaks and uncashed tickets according to the statutory split or whether the host track retained all of such funds. No notice was provided that the Division would apply the general escheat and abandon property statutes nor determine that the breaks and uncashed tickets escheat to the state.

Since the 1974 inception of the APA, the legislature has provided a uniform definition of the term "rule" as "each agency statement of general applicability that implements, interprets or prescribes law or policy." While the legislature has provided certain exceptions to the definition of the term "rule," declaratory

statements have never been included among such exceptions. Further, the legislature has mandatorily directed, in section 120.54(1)(a), Fla. Stat., that each "agency statement defined as a rule by s. 120.52 shall be adopted by rulemaking procedure provided by this section . . ."

The decision in PriceWise Buying Group v. Nuzum, 343 So.2d 115 (Fla. 1DCA 1977), construing an earlier, less restrictive version of the declaratory statement statute, section 120.565, Fla. Stat. (1975), held that issuance of a declaratory statement meeting the statutory definition of a rule was improper. The Court noted the legislature did not except declaratory statements from the definition of a rule and thus the APA rulemaking procedures exclusively governed.

The legislature sanctioned the PriceWise decision by enactment of Chapter 78-425, Laws of Florida. Since that date, the legislature has neither amended the core definition of the term "rule" nor included declaratory statements within the statutory exceptions to the definition of a rule.

The legislature's deletion of the term "only" from the declaratory statement statute, section 120.565, was both intended to be and was in fact non-substantive.

The declaratory statement statute, section 120.565, Fla. Stat., the definition of the term "rule" and the mandatory rule adoption procedures, sections

120.52(15) and 120.54, Fla. Stat., are part of the same APA and must be read *in pari materia*. The Division's argument, as well as the dissent below, failed to consider such statutes *in pari materia.* To permit declaratory statements to have the acknowledged effect of the rule would divest the public of the legislatively required safeguards of notice and opportunity to be heard, embodied in the mandatory rulemaking procedures set forth in section 120.54.

If there is error, it is clearly in the decision of Chiles v. Department of State, 711 So.2d 151 (Fla. 1DCA 1998) in the broad and unwarranted construction placed on the declaratory statement statute.

The Third District below correctly determined the Division improperly issued the declaratory statement when the Division itself on the face of the declaratory statement acknowledged that it amounted to a rule. While the Division contends that this error was not properly preserved, it is unable to distinguish the decision in Regal Kitchens, Inc. v. Florida Department of Revenue, 641 So.2d 158 (Fla. 1DCA 1994). The Division's declaratory statement further construed statutes and responded to an issue not raised by any petitioner, and reversed long standing policy that such breaks and uncashed tickets belong to the tracks.

The Division's declaratory statement on the merits is erroneous. The declaratory statement is grounded on the totally incorrect premise that the

parimutuel statutes are silent as to the distribution of the breaks and uncashed tickets.

The pari-mutuel statutes expressly address such matters. Section 550.3551(3), Fla. Stat., applies to the receipt of simulcast broadcasts of out of state thoroughbred races by Florida horse tracks, including Calder, Tropical Park and Gulfstream. This statute provides in pertinent:

> "(3) Any horse track licensed under this chapter may receive broadcasts of horse races conducted at other horse tracks located outside this state at the race track enclosure of the licensee during its racing meet.
>
> * * *
>
> (c) All forms of pari-mutuel wagering are allowed on races broadcast under this section . . . the takeout shall be increased by breaks and uncashed tickets for wagers on races broadcast under this section, notwithstanding any contrary provision of this chapter."

Florida horse tracks, including Calder, Tropical Park and Gulfstream, as host tracks, are authorized by section 550.6305(9), Fla. Stat., to rebroadcast the out of state simulcast race to other Florida permitholders, including Palm Beach, as an intertrack wagering race.

> "(9) A host track that is contracted with an out of state horse track to broadcast live races conducted at such out of state horse track pursuant to s. 550.3551(5) may broadcast such out of state races to any guest track and accept wagers thereon in the same manner as is provided in s. 550.3551."

As an intertrack wagering race, the receipt by the guest track, including

Palm Beach, of the rebroadcast is subject to the provisions of section 550.6305(4), Fla. Stat., which provides:

> "(4) The takeout on all intertrack wagering shall be the same as the takeout on similar parimutuel pools conducted at the host track."

Finally, section 550.6305(9)(a) and (d), Fla. Stat., governs the payment of net proceeds of the takeout attributable to wagering at the guest track, including Palm Beach, on the rebroadcast of the out of state simulcast race through Calder, Tropical Park and Gulfstream. This statute provides:

> "(a) For purposes of this section 'net proceeds' means the amount of takeout remaining after the payment of state taxes, the cost to the permitholder required to be paid to the out of state horse track and breeders awards . . ."

Calder, Tropical Park and Gulfstream's assertion that section 550.6325, Fla. Stat., applies is without merit since such statute provides:

> "Uncashed tickets and breakage tax on intertrack wagers shall be retained by the permitholder conducting the live racing or games."

In the case of the rebroadcast of the out of state simulcast races, neither Calder, Tropical Park nor Gulfstream conducts the live races.

ISSUE I

The Third District correctly ruled that once an agency determines that a petition for declaratory statement has general applicability requiring rule making, it may not issue the declaratory statement

but must utilize rule making procedures.

This proceeding raises the issue whether the 1996 amendment to section 120.565, Fla. Stat. (see Chapter 96-159, Laws of Fla.), which deleted the word "only" at the end of the phrase that a petitioner may request a declaratory statement regarding application of a statute "as it applies to petitioner's particular set of circumstances," permits a declaratory statement to have the acknowledged effect of a rule. For the reasons noted below, it is submitted that neither the APA or judicial precedent nor the facts of the matter or logic permit such a conclusion. The decision below is indisputably correct in its holding and, if error exists, it occurred in the broad and unwarranted construction placed on section 120.565, Fla. Stat., by the First District in Chiles v. Department of State, *supra*.

In considering this matter, several key facts must be borne in mind. First, the Division in issuing the declaratory statement acknowledged that it had the effect of a rule. The declaratory statement expressly noted "the Division is cognizant that a similar fact pattern may exist between other tracks in Florida . . . therefore, the Division will initiate rule making to establish an agency statement of general applicability." (R-1-15,16) Indeed, the District Court below noted:

> ". . . the Division reached the conclusion that the questions asked of it in the petitions had general applicability to the pari-mutuel industry, thus requiring rule making . . ." (*Supra* at 590)

In this regard, the Division's contention in its brief that Calder's and Gulfstream's petitions for declaratory statement merely concerned intertrack wagers taken at Palm Beach on the simulcast rebroadcasts (see pg. 4 of the Division's Brief) is belied by the express provisions of such petitions:

> "12. A dispute has arisen between Calder and Tropical as the host tracks and Palm Beach, Investment Corporation of South Florida d/b/a Palm Beach Kennel Club ("Palm Beach") [sic Hollywood Greyhound Track], West Flagler Associates d/b/a Flagler Greyhound Track ("Flagler"), The Aragon Group, Inc. d/b/a Dania Jai Alai ("Dania"), and Daytona Beach Kennel Club, Inc., a Florida corporation ("Daytona Beach"), as guest tracks, over the Calder and Tropical's entitlement to all of the breaks and outs generated by ISW . . .
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> 13. A dispute has arisen between Gulfstream as the host track and Palm Beach, Investment Corporation of South Florida d/b/a Hollywood Greyhound Track ("Hollywood"), West Flagler Associates d/b/a Flagler Greyhound Track ("Flagler"), The Aragon Group, Inc. d/b/a Dania Jai Alai ("Dania"), and Daytona Beach Kennel Club, Inc., a Florida corporation ("Daytona Beach"), as gust tracks, over the Gulfstream's entitlement to all of the breaks and outs generated by ISW . . . ® 9-10)"

Second, the Division's declaratory statement announced a new and totally different agency policy on the distribution of uncashed tickets and breaks generated from wagering on out of state thoroughbred races rebroadcast to guest tracks. The statutes governing such distribution have existed in substantially similar form since 1992. See sections 550.3551(3)(c) and 550.6305(4) and (9),

Fla. Stat. (1993). The Division, however, had never, prior to issuance of the September, 1997 declaratory statement, had made any assertion that the breaks and uncashed tickets escheated to the state, despite annual audits of every pari-mutuel permitholder which included review of the breaks and uncashed tickets. See section 550.125(2), Fla. Stat.

Third, while the Division published notice in the Florida Administrative Weekly, following receipt of the declaratory statement petitions, this notice reflected that an interpretation of sections 550.3551(3), 550.6305(9) and 550.6325, Fla. Stat., was sought and that the question presented was an "either or" proposition, i.e. whether the guest and the host track shared such items according to the statutory split or whether the host track retained all of such funds. While the Division makes much ado in its brief about the absence of any objection from a third party track following publication of this notice, the notice was clearly misleading since it in no manner referenced the statutes the Division ultimately interpreted, the general escheat and abandoned property provisions of section 550.1645(1) and Chapter 717, Fla. Stat., nor the fact that the Division would determine that the breaks and uncashed tickets escheat to the state. Indeed, the Division's ultimate determination that the pari-mutuel wagering statutes do not address the distribution of such breaks and uncashed tickets was thoroughly

unexpected. The Division had never previously asserted in any manner a claim to such funds and, as noted in Issue III of this brief, the Division's finding that the pari-mutuel statutes do not address the distribution of such breaks and uncashed tickets is patently erroneous given the clear language of sections 550.3551(3)(c) and 550.6305(4) and (9), Fla. Stat.

While the Division devotes much of its argument under Issue I, to a discussion of the general subject of access and standing under the APA, it fails to address the key issue of the distinction between a rule and a declaratory statement within the legislative parameters embodied in the APA. As noted in Florida Optimetric Assn. V. Department of Professional Regulation, 567 So.2d 928, 937 (Fla. 1DCA 1990):

> "We do observe, however, that declaratory statements and rules serve clearly distinct functions under the scheme of Chapter 120. Although the line between the two is not always clear, it should be remembered that declaratory statements are not to be used as a vehicle for the adoption of broad agency policies."

Indeed, after adoption of the 1996 amendments to section 120.565, Fla. Stat. which deleted the term "only," the Administration Commission, in accordance with section 120.54(5), Fla. Stat., adopted rule 28-105.001, F. A. C., concerning the purpose and use of declaratory statements. This rule provides in pertinent part:

"A petition for declaratory statement may be used only to resolve

> questions or doubts as to how the statutes, rules, or orders may apply to the petitioner's particular circumstances. A declaratory statement is not the appropriate means for determining the conduct of another person or for obtaining a policy statement of general applicability from an agency." (e. s.)

Contrary to the view expressed in footnote 7 of Judge Cope's dissent, *supra* at 594, the origin of the principle that declaratory statements are appropriate where they deal with the petitioner's particularized facts but are not appropriate where they result in agency statements of general applicability did not originate "in dictum in Florida Optimetric Assn. V. Department of Prof. Reg. . . ." Its origin is found in the consistent definition of the term "rule" since the inception of the APA.

Since the 1974 inception of the APA, the term "rule" has been defined to mean:

> ". . . each agency statement of general applicability that implements, interprets or prescribes law or policy." See sections 120.52(15), Fla. Stat. (1997), and 120.52(13), Fla. Stat. (1974 Supp.).

Further, since 1974 the APA has always provided a legislatively defined and mandated procedure for adoption of rules by an agency. See section 120.54, Fla. Stat. (1974 Supp.) and (1997).

While the legislature has, since 1974, excepted certain items from the definition of a rule, thus allowing such excepted matters to be adopted without the

formality and procedure required of a rule, declaratory statements have never been included in the statutory exceptions to the definition of a rule.

Further, the legislature has unequivocally provided in section 120.54(1)(a), Fla. Stat., that each "agency statement defined as a rule by s. 120.52 shall be adopted by the rulemaking procedure provided by this section . . ."

The declaratory statement statute, section 120.565, Fla. Stat., as initially enacted by Chapter 75-191, Laws of Florida, provided in pertinent part:

> "Each agency shall provide by rule the procedure for the filing and prompt disposition of petitions for declaratory statements as to the applicability of any statutory provision or of any rule or order of the agency. The agency shall give notice of each petition and its disposition in the Florida Administrative Weekly . . "

This initial statutory provision contained no language whatsoever limiting declaratory statements to the petitioner's particularized set of circumstances. An issue soon arose, however, as to the proper role of a declaratory statement *vis a vis* a rule. This was addressed in PriceWise Buying Group v. Nuzum, 343 So.2d 115 (Fla. 1DCA 1977). The Court noted that the issue "which is determinative of this review is whether the Declaratory Statement is a rule as defined in Section 120.52(14), Florida Statutes (1975)." (*Supra* at 115) The Court concluded that the declaratory statement at issue was in fact a rule because it met the statutory definition of an "agency statement of general applicability that implements,

interprets or prescribes law or policy" and did not fall within any legislative exception to the definition of a rule. The Court expressly noted that:

> "The Declaratory Statement does not fall within one of these exceptions because it is final agency action which effects the private interest of vendors belonging to cooperative pool buying groups. Therefore, the Declaratory Statement falls within the general definition of a rule, because it is a principle of statutory construction that where a statute sets forth exceptions, no others may be implied to be intended." *(Supra* at 116.)

The Court held that the declaratory statement procedure embodied in Section 120.565, Fla. Stat.(1975), is inapplicable to an agency statement of general applicability that implements, interprets or prescribes law or policy. The Court quashed the declaratory statement since it was "not properly identified as a rule and therefore did not give proper notice to interested parties that a rule was being promulgated." (*Supra* at 116)

Following the PriceWise decision, the legislature adopted Chapter 78-425, Laws of Florida, which included in Section 120.565, Fla. Stat., for the first time, the language that a declaratory statement "shall set out the agency's opinion as to the applicability of a specified statutory provision or of any rule or order of the agency as it applies to the petitioner in his particular set of circumstances only."

The legislature thus sanctioned the PriceWise decision by adoption of Chapter 78-425. Further, the legislature has, in accordance with the PriceWise

rationale, neither amended the core definition of the term "rule" nor included declaratory statements within the statutory exceptions to the definition of a rule. Indeed, it would be highly incongruous for the legislature, which adopted Ch. 96-159, Laws of Florida, with the avowed purpose of limiting agency authority to adopt rules and increasing legislative oversight of rules, to be deemed by virtue of its non-substantive amendment to section 120.565, to have impliedly created an exception to the definition of term "rule" for declaratory statements. This 1996 amendment, which deleted the term "only," was non-substantive since an agency statement not limited solely to the petitioner's particularized facts, would constitute an agency statement of general applicability and thus a "rule." See Public Service Commission v. Central Corp., 551 So.2d 568,570 (Fla. 1DCA 1989) - PSC order applicable to entire group rather than one member of the group is a rule.

In addition to the foregoing matters, a vast distinction exists between the adoption of a rule and the issuance of a declaratory statement in the area of required notice, opportunity to participate and the formalities of the procedures for adoption. While both the Division and Judge Cope, in his dissent below, reference that notice of a petition for declaratory statement must be published giving third parties an opportunity to participate, the Division's misleading notice and surprise

conclusion in its declaratory statement reflect that such provision can be illusory. Notice requirements, however, are not illusory with rule making.

Pursuant to section 120.54(2), Fla. Stat., an agency is required to both provide notice of rule development in the Florida Administrative Weekly and to conduct requested public workshops for the purposes of explaining the agency's proposal and responding to questions or comments regarding the rule being developed. Following the notice of the proposed rule development and the holding of any requested workshops, the agency, pursuant to section 120.54(3), Fla. Stat., must provide notice in the Florida Administrative Weekly containing the actual rule it intends to adopt and must file with the legislature's Administrative Procedures Committee, a copy of the proposed rule. The Administrative Procedures Committee is given, pursuant section 120.545, Fla. Stat., specific authority to review and question all proposed rules as well as authority to object to the proposed rules. An agency is required to provide to any person requesting the same in writing, notice of its intent to adopt any rule, thus obviating the need for exclusive dependence on a review of the Florida Administrative Weekly. See section 120.54(3)(a)3., Fla. Stat. If the agency desires to modify the rule in a substantive manner, section 120.54(3)(d), Fla. Stat., requires that the agency publish notice of the substantive amendment in the Florida Administrative

Weekly, and provide such proposed substantive change to the Administrative Procedures Committee. Additionally, before the rule can be adopted, section 120.54(3)(c), Fla. Stat., authorizes, on request of an affected party, the conduct of mandatory hearings by the agency and section 120.56, Fla. Stat., authorizes the challenge to the proposed rule by any substantially affected party in a proceeding before the independent Division of Administrative Hearings.

None of these procedural safeguards apply to a declaratory statement.

Had the Division issued a statement announcing that all breaks and uncashed tickets generated from wagering at a guest track on out of state thoroughbred races rebroadcast through Calder, Tropical Park or Gulfstream escheated to the state, there is absolutely no questions that such statement would constitute a rule pursuant to section 120.52(15), Fla. Stat., which the Division would be required to adopt in accordance with the formal rule making procedures of section 120.54, Fla. Stat. The fact that this same statement was issued in the form of a declaratory statement neither changes its status as a rule nor changes the requirement that it be adopted in accordance with the statutory rule adoption procedures. "Each agency statement defined as a rule by s. 120.52 shall be adopted by the rulemaking procedures provided herein . . ." See section 120.54(1)(a). As the Court noted in Chiles v. Department of State, *supra* at 154,

where an agency is presented with a petition for a declaratory statement requiring "a response that amounts to a rule," the agency must "decline to issue the statement and initiate rule making."

There is further no doubt that the question of whether such breaks and uncashed tickets in question escheat to the state pursuant to section 550.1645(1) and chapter 717, Fla. Stat., involved application of statutory provisions and consideration of an issue that were not mentioned in the July 3, 1997 notice in the Florida Administrative Weekly. Considerations of such matters would have constituted a material and substantive change or modification thus, triggering the notice requirements of section 120.54(3)(d), Fla. Stat., had the rule adoption procedures been utilized. Indeed, it was precisely to prevent such "blindsiding" by an agency that such provision was incorporated in section 120.54.

The Division, on page 17 of its brief asserts a substantive distinction between the Florida Optimetric Assn decision, *supra*, which noted that when an agency is presented with a declaratory statement question requiring a broad policy statement, the agency must "decline to issue the statement or institute rule making," and the Chiles decision, *supra*, which notes that the agency should "decline and initiate rule making." This purported distinction is nothing more than an exercise in semantics, since both cases clearly reflect the principle that an

agency cannot issue a declaratory statement that has the effect of a rule.

The Division notes on page 18 of its brief that "by focusing on whether the factual scenario presented by petitioners could apply to others, the Third District engrafted a restriction on the use of section 120.565 that does not appear in the law. Judge Cope recognized this departure from the statutory requirement, stating, 'the statute says no such thing . . .' ". What the Division and the dissent below failed to consider is that the declaratory statement statute, section 120.565, and the definition of a rule, section 120.52(15), are part of the same APA and must be read *in pari materia*. McGhee v. Volusia County, 679 So.2d 729, 730 (Fla. 1996) - "The doctrine of *in pari materia* requires the courts to construe related statutes together so that they illuminate each other and are harmonized." The definition of a rule fails to exclude from its purview a declaratory statement and section 120.565 cannot be used to effectuate any agency statement of general applicability falling within the section 120.52(15) definition of a rule.

The Division on page 20 of its brief, relying on the decision in Fletcher Properties, Inc. v. Florida Public Service Commission, 356 So.2d 289, 292 (Fla. 1978) appears to argue that its declaratory statement merely applied codified law and did not make a policy pronouncement. This is clearly incorrect. The Division, since the 1992 inception of the statutes governing such breaks and

uncashed tickets, had never before asserted that such funds escheated to the state despite annual audit of all tracks in the state. The determination in the declaratory statement that the breaks and uncashed tickets escheated to the state was a new interpretation of the pari-mutuel statutes which was in no manner foreseeable in light of the track's past retention of such items with Division knowledge and acquiescence and the statutes express direction that the tracks share such breaks and uncashed tickets. (See Issue III of this brief)

The Division, relying on Crow v. Agency for Health Care Administration, 669 So.2d 1160 (Fla. 5DCA 1996) contends that its declaratory statement announcing the breaks and uncashed tickets escheated to the state pursuant to section 550.1645(1) and Ch. 717, Fla. Stat., is "appropriately connected with the question posed" and thus justified. The Division, however, concedes that a declaratory statement may not be used as a means "for determining the conduct of another person," by acknowledging that its declaratory statement had the effect of a rule. The Division admits it is in violation of this requirement. Also, the Division's declaratory statement concerned the applicability of statutory provisions neither mentioned in nor even considered in the petitions for declaratory statement. The Division unquestionably knew its declaratory statement was not simply "appropriately connected with" the petitions, but in fact

was the announcement of a totally new and never before applied policy that was contrary to its practice since 1992. Consequently, the Crow decision is clearly inapplicable.

Finally, the decision in Chiles v. Department of State, *supra*, does not conflict with the decision below in light of its acknowledgment that a declaratory statement may not be used in place of a rule and the Division's acknowledgment that its declaratory statement had the effect of a rule. While Judge Cope, in the dissent below, expressed his views concerning the Chiles decision and section 120.565, Fla. Stat., his analysis was clearly flawed because it treated the declaratory statement statute as an isolated provision rather than as a part of the APA which must be viewed in *pari materia* with the definition of the term "rule" and the requirement for agency compliance with statutory rule making proceedings.

The Chiles decision blurred what had otherwise been a relatively defined demarcation between rules and declaratory statements. The flaws in the Chiles decision are both the same as that noted above relative to Judge Cope's dissent as well as its treatment of the deletion of the term "only" from section 120.565, Fla.

Stat., as a substantive change, when in fact it was not.[1] Indeed, acceptance of the Chiles rationale regarding the deletion of the term "only" would result in the adoption of a non-legislative exception to the statutory definition of a rule and significantly erode the legislatively mandated protections afforded by the rule adoption process.

It is respectfully submitted that the District Court below properly determined that the Division's Declaratory Statement had the effect of a rule, as the Division acknowledged, and thus was improperly issued.

ISSUE II

The Third District correctly determined that the Division improperly issued a declaratory statement since the Division on the face of the declaratory statement acknowledged that it amounted to a rule.

The Division essentially argues that because Palm Beach asked for a declaratory statement, it somehow waived any right to object to the over breadth of the declaratory statement actually issued. The Division asserts that the case presents "an astonishing reversal of position" by the tracks and notes from Judge Cope's dissent that while the tracks argue the Declaratory Statement might be applied to third parties, "no third party had objected to the issuance of the

[1] Palm Beach adopts the rationale on this point as set forth in the amicus brief of PhyCor, Inc.

Declaratory Statement." (Division's brief, pgs. 22 and 23)

It must be borne in mind that the Division itself on the face of the declaratory statement acknowledged that the declaratory statement had the effect of a rule. Since the Division is limited by statute, section 120.54, Fla. Stat., to promulgating rules only by use of the statutory rule making procedure, and since agencies have only such authority granted by statute, its action in issuing the declaratory statement was in error. Schiffman v. Department of Professional Regulation, 581 So.2d 1375, 1379 (Fla. 1DCA 1991) The parties could not, by simply requesting a declaratory statement, confer the necessary statutory authority to issue the declaratory statement, Swebilius v. Florida Construction Industry Licensing Board, 365 So.2d 1069, 1070 (Fla. 1DCA 1979), only the legislature could provide such authority. Accordingly, the judicial rulings have reflected that where the agency is presented with a declaratory statement that has the effect of a rule, the agency must decline to answer it. The Division's failure to do so was error.

It must also be borne in mind that the question effectively answered by the agency in the declaratory statement was one of its own creation. Indeed, the lack of third party objections noted by the Division and Judge Cope is thoroughly understandable in light of the misleading notice published by the Division in the

Florida Administrative Weekly concerning its receipt of the Petitions for Declaratory Statement. The Division clearly noticed in the Florida Administrative Weekly that the petitions concerned sections 550.3551, 550.6305 and 550.6325, Fla. Stat., and an "either or" request as to whether the guest and the host track shared the breaks and uncashed tickets or the host track retained all such sums.

Contrary to this notice and the petitions, the Division determined that the uncashed tickets and breaks escheated to the state pursuant to sections 550.1645(1) and Chapter 717, Fla. Stat. The issue of escheat under the statutes cited by the Division was neither set forth in the FAW notice nor presented or briefed in the petitions. As previously noted in Issue I, such ruling was wholly unexpected since the Division had never before asserted a claim to these breaks and uncashed tickets despite its annual audits of all tracks in the state and since the ruling is contrary to the clear wording of the statute.

The Division on page 25 of its brief concedes that in Regal Kitchens, Inc. v. Florida Department of Revenue, 641 So.2d 158 (Fla. 1DCA 1994) the party requesting the declaratory statement successfully challenged its issuance on the grounds that it constituted a rule. The Division seeks to distinguish the Regal Kitchens decision by noting on page 25 of its brief "where the petitioner has also challenged the breadth of the declaratory statement, the challenge has focused on

the agency going beyond the issue raised in the petition." Such occurred in the instant matter since the Division's declaratory statement construed statutes and an issue, escheat to the state, neither raised nor referenced in the petitions. The Division acknowledged its declaratory statement constituted a rule and to utilize the Division's terminology, the declaratory statement was an "astonishing reversal" of long standing Division policy that such funds belong to the tracks, albeit a question remained as to how such funds were shared between the guest and the host track.

Judge Cope's dissent failed to consider the precedent of Regal Kitchens, even though cited in the majority opinion. Further, the cases relied upon by Judge Cope, Commission on Ethics v. Barker, 677 So.2d 254, 256 (Fla. 1996), Kanter v. School Board of Monroe County, 648 So.2d 1266, 1267 (Fla. 3DCA 1995) and Couch v. Commission on Ethics, 617 So.2d 1119, 1124 (Fla. 5DCA 1993), all involved the factually and legally distinguishable circumstances of failure to file exceptions to the findings of fact set forth in the recommended order of the administrative law judge.

Similarly, the Division's reliance on United Bank of Pinellas v. Farmers Bank of Malone, 511 So.2d 1078, 1080 (Fla. 1DCA 1987) and Wilson v. Milligan, 147 So.2d 618, 622 (Fla. 2DCA 1962) is misplaced in light of Regal Kitchens, the

Division's acknowledgment that the declaratory statement constituted a rule, the Division's construction of statutes and an issue neither raised nor referenced in the petition and the Division's announcement of an "astonishing reversal" its long standing policy.

ISSUE III

The Division erred in its Declaratory Statement in concluding that Sections 550.3551 and 550.6305, Fla. Stat. (1997), do not apply to the distribution of uncashed tickets and breaks generated at Palm Beach on out of state simulcast thoroughbred races rebroadcast through Calder, Tropical Park and Gulfstream, since such statutes expressly make provision for and govern the distribution of such items.

Consideration of this issue requires a brief excursion into the unique parlance of the pari-mutuel wagering industry.

By definition set forth in Section 550.002(22), Fla. Stat. (1997):

> " 'Pari-mutuel' means a system of betting on races or games in which the winners divide the total amount bet, after deducting management expenses and taxes, in proportion to the sums they have wagered individually and with regard to the odds assigned to particular outcomes."

The amounts wagered, as this definition notes, are divided three ways; the majority share is returned to the bettors as winnings, the state receives a share in the form of pari-mutuel taxes and a share goes to the permit holder.

All wagers on a race become part of one or more pari-mutuel pools, defined in section 550.002(24), Fla. Stat. (1997), as "the total amount wagered on a race or game for a single possible result."

From each pari-mutuel pool the permit holder deducts the "takeout," defined in section 550.002(34), Fla. Stat (1997), as " the percentage of the pari-mutuel pools deducted by the permit holder prior to the distribution of the pool." Distribution of the pool is the payment of winnings to the successful bettors. See section 550.155(3), Fla. Stat. (1997).

From the "takeout" the permit holder pays state taxes and keeps the remainder from which its costs and expenses of the race, as well as overhead and profit are covered. See section 550.155(2), Fla. Stat. (1997).

Section 550.3551(3), Fla. Stat. (1997), expressly applies to the receipt of the simulcast broadcasts from out of state horse tracks and governs all Florida horse tracks including Calder, Tropical Park and Gulfstream. Such statute provides in pertinent part:

> "(3) Any horse track licensed under this chapter may receive broadcasts of horse races conducted at other horse tracks located outside this state at the race track enclosure of the licensee during its racing meet.
>
> *** * ***

> (c) All forms of pari-mutuel wagering are allowed on races broadcast under this section, and all money wagered by patrons on such races shall be computed as part of the total amount of money wagered at each racing performance for purposes of taxation under ss. 550.0951, 550.09512, and 550.09515. Section 550.2625(2)(a), (b) and (c) does not apply to any money wagered on races broadcast under this section. Similarly, the takeout shall be increased by breaks and uncashed tickets for wagers on races broadcast under this section, notwithstanding any contrary provision of this chapter.

This last sentence, which includes the breaks and uncashed tickets as a part of the takeout on the simulcast of out of state horse races, "notwithstanding any contrary provision of this chapter" is necessary because such items would not ordinarily be a part of "takeout." Breaks, by definition in section 550.002(1), Fla. Stat. (1997) are neither distributed as winnings nor "withheld by the permitholder as takeout." Uncashed tickets are unclaimed winnings and fall outside the definition of takeout. Thus the legislature in section 550.3551(3)(c), Fla. Stat. (1997) expressly directed that breaks and uncashed tickets be made a part of "takeout" on wagers on simulcast broadcasts of out of state horse races.

Consequently, the takeout of the host track, Calder, Tropical or Gulfstream, on broadcasts received from out of state horse tracks is increased by the breaks and uncashed tickets.

Horse race permitholders are authorized by section 550.6305(9), Fla. Stat. (1997) to rebroadcast the out of state simulcast races to other Florida

permitholders, including Palm Beach:

> "(9) A host track that is contracted with an out of state horse track to broadcast live races conducted at such out of state horse track pursuant to s. 550.3551(5) may broadcast such out of state races to any guest track and accept wagers thereon in the same manner as is provided in s. 550.3551."

The wagers accepted at the guest track on such simulcast rebroadcasts are intertrack wagers. See section 550.002(17), Fla. Stat. (1996 Supp.):

> ". . . a particular form of pari-mutuel wagering in which wagers are accepted at a permitted, instate track . . . on a . . . simulcast signal rebroadcast from another instate pari-mutuel facility."

Consequently, the wagers placed at the guest track. Palm Beach, are intertrack wagers.

In section 550.6305, Fla. Stat. (1997), entitled "Intertrack wagering; guest track payments . . . ," the legislature has further provided that:

> "(2) For the purposes of calculation of odds and pay-offs and distribution of the pari-mutuel pools, all intertrack wagers shall be combined with pari-mutuel pools at the host track.
>
> (3) All forms of pari-mutuel wagering shall be allowed on all wagering authorized under s. 550.615 and this section.
>
> (4) The takeout on all intertrack wagering shall be the same as the takeout on similar pari-mutuel pools conducted at the host track."

It is quite indisputable that the legislature expressly directed in section 550.3551(3)(c) that the portion of the wagers constituting the breaks and uncashed

tickets on simulcast broadcasts of out of state horse races are included in "takeout" for the host track, i.e. Calder, Tropical Park and Gulfstream; that wagers on the rebroadcast of the simulcast races are to be accepted at the guest track in "the same manner as is provided in s. 550.3551"; and that the "takeout" for a guest track, receiving the rebroadcast of such simulcast races "shall be the same" as that of the host track.

Consequently, the takeout at both the guest track, such as Palm Beach, and the host track, such as Calder, Tropical Park and Gulfstream, on simulcast rebroadcasts, are mandated by statute to be the same, i.e. to include the breaks and uncashed tickets.

Section 550.6305(9)(a) - (d), Fla. Stat. (1997) further governs the payment of the net proceeds of takeout attributable to the guest track on the rebroadcast of simulcast horse races:

> "(a) For purposes of this section <u>'net proceeds' means the amount of takeout</u> remaining after the payment of state taxes, the cost to the permitholder required to be paid to the out of state horse track and breeders awards paid to the Florida Thoroughbred Breeders Association and the Florida Standardbred Breeders and Owners Association, to be used as set forth in s. 550.625(2)(a) and (b).
>
> *** * ***
>
> (c) All guest tracks other than the thoroughbred permitholders that are eligible to receive wagers on out of state horse races rebroadcast from

> a host track racing under a thoroughbred horse permit shall be subject to the distribution of the net proceeds as specified in paragraph (a) . . .
>
> (d) Any permitholder located in any area of the state where there are only two permits, one for dog racing and one for jai alai, may accept wagers on rebroadcasts of out of state thoroughbred horse races from an in state thoroughbred horse racing permitholder and shall not be subject to the provisions of paragraph (b) if such thoroughbred horse racing permitholder located within the area specified in this paragraph is both conducting live races and accepting wagers on out of state horse races. In such case, the guest permitholder shall be entitled to 45% of the net proceeds on wagers accepted at the guest facility. The remaining proceeds shall be distributed as follows: one half shall be retained by the host facility and one half shall be paid by the host facility as purses at the host facility."

Palm Beach, located in a county where there are only two permits, one for dog racing and one for jai alai, is patently entitled by express legislative directive to 45% of the net proceeds of the takeout, in accordance with section 550.6305(9)(a) and (d), Fla. Stat. (1997).

It is further undisputed that section 550.6305(9), Fla. Stat., defines the payments that are to be received by the guest track, Palm Beach, when taking intertrack wagers on a simulcast re- broadcast from the host track, Calder, Tropical Park or Gulfstream. Pursuant to section 550.6305(9)(a) and (d), the legislature specifically directed that Palm Beach is to receive 45% of the "net proceeds," i.e. "the amount of takeout" which remains after payment of state taxes, the cost the host track is required to pay to the out of state horse track for the simulcast

broadcast and certain breeders awards.

Section 550.6325, Fla. Stat. (1997), asserted by Calder, Tropical Park and Gulfstream as the basis for their entitlement to the breaks and outs on wagers at Palm Beach is, on its face, inapplicable. Such statute provides:

> "Uncashed tickets and breakage tax on intertrack wagers shall be retained by the permitholder conducting the live racing or games."

In the case of the rebroadcast of out of state simulcast races, neither Calder, Tropical Park not Gulfstream conducts the live races. It is undisputed that such tracks, pursuant to section 550.6325, Fla. Stat. (1997) would be entitled to the uncashed tickets and breaks on intertrack wagers of live Calder, Tropical Park or Gulfstream races broadcast to Palm Beach. However, intertrack wagers taken on the rebroadcast of out of state simulcast horse races is a different matter and is governed by section 550.6305 and 550.3551(3)(c), Fla. Stat. (1997).

Further, section 550.6305(9), Fla. Stat., last amended in 1996, is the latest and more specific expression of the legislature and, thus, controls. McKendry v. State, 641 So.2d 45, 46 (Fla. 1994).

The Division contends the pari-mutuel statutes "are silent" as to the distribution of the breaks and uncashed tickets. (R-27-28). As noted above, sections 550.3551 and 550.6305, Fla. Stat. (1996 Supp.) expressly address the

disposition of such items, and the Division's contention is clearly erroneous.

The Division further rejected Palm Beach's position regarding the applicability of section 550.3551(3)(c) and 550.6305(9) noting:

> "Therefore, under Palm Beach's analysis, uncashed tickets and breaks generated on ITW of ISW must increase the takeout from which 'net proceeds' are derived for purposes of the profit sharing split between the guest track and host track that must be paid out pursuant to section 550.6305(9)(b), (9)(d), or (9)(e), Florida statutes.
>
> However, this analysis also fails because the reference in section 550.6305(9) to section 550.3551 is limited to the type of wagers that can be accepted on ITW of ISW . . . The plain meaning of the phrase 'and accept wagers thereon in the same manner as is provided in s. 550.3551' only incorporates that part of section 550.3551 which sets forth the type of wagering permitted. Therefore, the only phrase of section 550.3551(3)(c) incorporated by section 550.6305(9) is '[a]ll forms of pari-mutuel wagering are allowed on races broadcast under this section . . .' Without this provision, wagering could not be conducted on the out of state races that are rebroadcast by the host track to a guest track in florida. It would improper to incorporate all of the requirements set forth in section 550.3551, Florida Statutes, such as which taxing scheme applies, whether purses had been paid, or what items are included in takeout, when the only requirement specifically incorporated by reference is the type of pari-mutuel wagering that can be accepted when a Florida permitholder engages in ITW of ISW. (R-25-26)

The Division's rationale is patently flawed and such error is a direct result of the Division's failure to consider the provisions of section 550.6305, Fla. Stat. (1997).

The Division's contention that section 550.6305(9) by its reference to

section 550.3551 incorporates only that portion of section 550.3551(3)(c), which provides "[a]ll forms of wagering are allowed on races broadcast under this section," is devoid of logic and ignores the plain language of section 550.6305(3), Fla. Stat. (1997). It appears that the Division's position is that no other statute authorizes the acceptance of "all forms of pari-mutuel wagering" at guest tracks on the rebroadcast of simulcast horse races and, thus, the legislature's reference in section 550.6305(9) to section 550.3551 was limited to adoption of this phrase. Indeed, the Division asserts "without this provision, wagering could not be conducted" at the guest track. (R-25)

Had the Division merely reviewed section 550.6305(3), Fla. Stat. (1997) it would have realized that its analysis was in error. Section 550.6305(3), Fla. Stat. provides:

> "All forms of pari-mutuel wagering shall be allowed on all wagering authorized under . . . this section."

Wagering at a guest track such as Palm Beach on simulcast rebroadcasts from Calder, Tropical Park and Gulfstream is, of course, authorized by section 550.6305, Fla. Stat., and in particular subsection (9) thereof.

The Division's rationale further ignores section 550.6305(4), Fla. Stat. (1997) which provides that the guest track's takeout shall be the same as the host

tracks. Clearly, the host tracks takeout, pursuant to section 550.3551(3)(c), Fla. Stat., includes the breaks and uncashed tickets. The entirety of the Division's construction in its declaratory statement is fatally flawed since it is predicated on the legislature's purported failure to consider or address the subject of breaks and uncashed tickets on the rebroadcast of interstate simulcast races, when in fact the legislature clearly and unequivocally addressed such matter in sections 550.3551(3) and 550.6305, Fla. Stat. (1997).

Any contention of the Division that the provisions of section 550.6305(2) - (4), Fla. Stat., apply only to intertrack wagering on broadcasts of live races conducted at a Florida track is wholly without merit. Absolutely no authority or basis can be advanced or presented by the Division for this assertion. The statutory definition of intertrack wagering found at section 550.002(17), Fla. Stat., patently encompasses the rebroadcast of a simulcast signal from another in state pari-mutuel facility. Thus, when the legislature uses the term "intertrack wagering," it has statutorily directed that it include simulcast rebroadcasts.

The Division noted below the principle that its interpretation of a statute it is charged with enforcing is entitled to great deference. Such deference is not accorded, however, "where there is clear error or conflict with the intent of the statute," SanSouci v. Division of Florida Land Sales and Condominiums, 421

So.2d 623, 626 (Fla. 1DCA 1982); where the agency "interpretation" "is contrary to the express terms of the statute" Hughes v. Variety Children's Hospital, 710 So.2d 683, 686 (Fla. 3DCA 1998); where the agency's interpretation is "contrary to clear legislative intent," Abramson v. Florida Psychological Association, 634 So.2d 610, 612 (Fla. 1994); or results "in a statute being voided by administrative fiat." Palm Harbor Special Fire Control v. Kelly, 516 So.2d 249, 250 (Fla. 1987). Indeed, as the Court noted in Turnberry Isle Resort v. Fernandez, 666 So.2d 254,256 (Fla. 3DCA 1996):

> "An agency's construction of a statute, however, must have some nexus to the context of the statute . . . A rule of liberal construction may not be employed to support a conclusion that has no basis either in the statute, . . . or common sense."

The Division's construction of sections 550.3551(3) and 550.6305, Fla. Stat., in the Declaratory Statement is contrary to the express language of the statute and results in the administrative voiding or repeal of the wording of such statutes that takeout on simulcast broadcasts and rebroadcasts of out of state horse races "shall" be the same for both the guest and host facility and "shall" include the breaks and uncashed tickets. Such declaratory statement is further devoid of common sense since it assumes, contrary to the clear wording and plain meaning of the statutes, that the legislature failed to consider a subject it specifically

addressed.

CONCLUSION

Based on the foregoing argument and citation of authority, it is respectfully prayed that this Court find that the Third District below correctly ruled that the Division improperly issued the declaratory statement. In the event this Court reaches the merits of the declaratory statement, it is respectfully prayed that this Court find that based on sections 550.3551(3) and 550.6305, Fla. Stat., Palm Beach is entitled to 45% of the net proceeds of the takeout from wagering at Palm Beach on such out of state thoroughbred races, inclusive of the breaks and uncashed tickets.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via U. S. Mail to Lisa Nelson, Esq., Department of Business and Professional Regulation, 1940 North Monroe Street, Tallahassee, Florida 32399-1007; Wilbur E. Brewton, Esq., and Kelly B. Plante, Esq., Gray, Harris & Robinson, P.A., 225 South Adams Street, Suite 250, Tallahassee, Florida 32301; and to David S. Romanik, Esq., Romanik, Lavin, Huss & Paoli, 1901 Harrison Street, Hollywood, FL 33020, this _____ day of February, 1999.

Harold F. X. Purnell

IN THE SUPREME COURT OF THE STATE OF FLORIDA

DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION, DIVISION OF PARI-MUTUEL WAGERING,

Petitioner,

S. C. CASE NO: 93, 952
DCA CASE NO: 97-3414

v.

INVESTMENT CORP. OF PALM BEACH d/b/a PALM BEACH KENNEL CLUB, et al.

Respondents.
_____/

APPENDIX

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