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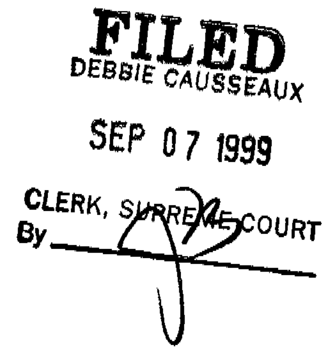
IN THE SUPREME COURT
STATE OF FLORIDA



CHICAGO TITLE INSURANCE CO., AMERICAN PIONEER TITLE INSURANCE CO., FLORIDA LAND TITLE ASSOCIATION, ATTORNEY'S TITLE INSURANCE FUND, INC., FLORIDA ASSOCIATION OF INDEPENDENT TITLE AGENTS, INC., STEWART TITLE GUARANTY CO., COMMONWEALTH LAND TITLE INSURANCE CO., LAWYERS TITLE INSURANCE CORP. and FIRST AMERICAN TITLE INSURANCE CO.,

Appellants,

CASE NO. 95,312

v.

S. CLARK BUTLER, FLORIDA HOME BUILDERS ASSOCIATION, and NATIONAL TITLE INSURANCE CO.,

Appellees.

ORIGINAL

APPELLANTS' REPLY BRIEF

On Review of A Final Judgment in The Second Judicial Circuit, Leon County, Florida, as Certified by the District Court of Appeal, First District, to Require Immediate Resolution

Robert Pass, Mark A. Brown, and Davisson F Dunlap, Jr., CARLTON, FIELDS, WARD, EMMANUEL, SMITH & CUTLER, P.A., Post Office Box 3239, Tampa, Florida 33602, ATTORNEYS FOR ATTORNEYS' TITLE INSURANCE FUND, INC., LAWYERS TITLE INSURANCE CORPORATION, AND STEWART TITLE GUARANTY COMPANY

William H. Hughes, III and Kevin X. Crowley, PENNINGTON, MOORE, WILKINSON, BELL AND DUNBAR, P.A., 215 S. Monroe, 2nd Floor, Tallahassee, Florida 32301, ATTORNEYS FOR AMERICAN PIONEER TITLE INSURANCE COMPANY

George P. Daniels, AMERICAN PIONEER TITLE INSURANCE COMPANY, 493 East Semoran Boulevard, Casselberry, Florida 32707

Lee Huszagh, FLORIDA LAND TITLE ASSOCIATION, 249 East Virginia Street, Tallahassee, Florida 32301

Zollie M. Maynard and William C. Owen, PANZA, MAURER, MAYNARD & NEEL, P.A., 215 South Monroe Street, Suite 310, Tallahassee, Florida 32301, ATTORNEYS FOR CHICAGO TITLE INSURANCE CO.

Douglas A. Mang and Wendy Russell Wiener, MANG LAW FIRM, P.A., 660 East Jefferson Street, Post Office Box 11127, Tallahassee, Florida 32302-3127, ATTORNEYS FOR FIRST AMERICAN TITLE INSURANCE CO.

Michael E. Marder, GREENSPOON, MARDER, HIRSCHFELD, RAFKIN, ROSS & BERGER, P.A., 135 W. Central Blvd., Suite 1100, Orlando, Florida 32801, ATTORNEYS FOR COMMONWEALTH LAND TITLE INSURANCE CO.

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PREFACE

For the convenience of the Court, Appellants have included an Appendix to this Reply Brief which is limited to three key items – three Affidavits filed below – and two comparable statutory schemes from other states. All references to the Appendix are in the form ("Reply App. ___"). The corresponding references to the Affidavits in the Record are identified in the Index to the Appendix.

Like Appellants' Initial Brief, all emphasis in quoted material is added unless otherwise noted. Also like Appellants' Initial Brief, references to the legislative history to the 1992 amendments to the title insurance statutes – contained within the Appendix to Appellants' Initial Brief at Tab 7 - are in the form "1992 Final Bill Analysis."

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Introduction

Butler repeats in mantra-like fashion throughout his Brief that the Statutes under attack authorize a non-rebatable "commission" in favor of title agents. However, if the prohibition on rebating can be rationally viewed as having the *effect* of preserving the quality of agent underwriting, and thus the actuarial soundness of title insurance policies, Butler's desire to engage the Court in a debate over whether the agent's share of the premium is purely a "commission" is constitutionally immaterial. [1]

Moreover, Butler's position concedes that if some portion of the premium paid to title agents is not a sales commission, but instead represents payment for services that actually "affect the net insurance premium" or "are []related to the actuarial soundness of insurance policies," then his entire claim fails under *Dept.*

[1] As discussed in Appellants' Initial Brief, Butler's attempt to characterize the constitutional issue as whether the portion of the premium paid to title agents is a "commission" is a red herring. The real issue is whether there is any conceivable public interest rationally served by the statutory scheme. The constitution does not ask "What is it?" but rather "What public purpose might it rationally serve?" If a rationally perceived *effect* of the statutory scheme is to further the legitimate end of preserving the quality of agent underwriting, or the efficient delivery of title services to the public, that is the end of the inquiry. In addition to being irrelevant, however, Butler's position is also demonstrably wrong. Accordingly, this Reply Brief explains why a portion of the premium paid title agents is not a "commission," but instead is for the performance of underwriting services – and specifically determining insurability – on behalf of insurers.

of Ins. v. Dade County Consumer Advocate's Office, 492 So. 2d 1032, 1035 (Fla. 1986).

Dade County was premised on the conclusion that a prohibition against rebating non-title agents' commissions did not rationally further any conceivable public interest. The Court indicated, on the other hand, that if the payment served a purpose other than merely to compensate agents for producing a customer – specifically, if it served the end of promoting the actuarial soundness of insurance policies – then the prohibition against rebating would be constitutional.

Here, Butler's entire attack ignores the face of the Statutes which only authorize payment of the premium to title agents for their underwriting services. Butler argues that agents get paid separately for *certain* of their services – namely "related title services" – but then completely closes his eyes to the fact that the Statutes only authorize payment of the premium to agents for "primary title services," namely determining insurability. And, in the words of the Legislature, these primary title services "[are] essential to the maintenance of the solvency and soundness of title insurers." Ch. 99-286, Preamble, Laws of Fla.

I. In Challenging the "Facial Constitutionality" of the Statutes, Butler Contends the Statutes Mean Exactly the Opposite of What They Say

First, Butler argues that the Statutes mean exactly the opposite of what they say. The 1997 Statute listed the specific criteria that made up the "risk premium,"

a portion of which was paid to agents. §627.782(2). There was no authorization on the face of that statute for any "commission" or payment to agents for "procuring a customer." Now, since the entry of the Final Judgment below, the 1999 Legislature has made this even clearer. The 1999 Statute expressly states "the word 'premium' does *not* include a commission." Ch. 99-286, §6 (amending §627.7711(2)). Instead, the 1999 Legislature has specified that the premium paid to title agents is for their "primary title services" in "determining insurability" on behalf of insurers. *Id.* (amending §§627.7711(1)(b) and (2)).

A statute which expressly specifies that the premium paid to agents is for agents' *underwriting* services in determining insurability, and "does not include a commission," simply cannot be "facially unconstitutional" on the ground that it authorizes the payment of a non-rebatable commission.[2] *Id.* (amending §627.7711(2)).

[2] The Department of Insurance has filed a "Statement of Limited Purpose" stating that prior to the 1999 Statute, it "considered the expense of producing business to be an administrative expense described in Section 627.782(2)(c), Florida Statutes," and that "[t]his statutory section was undisturbed by the enactment of Chapter 99-286, Laws of Florida." DOI Statement at 2. To the extent DOI suggests that this is the statutory authority for including a "sales commission" in the premium, and that this authority "was undisturbed" by the 1999 Legislation, DOI has overlooked the clear and unequivocal mandate of the 1999 Statute which expressly prescribes that "the word premium does *not* include a commission." Ch. 99-286, §6. Indeed, because the Legislature decided the setting of title insurance rates was so critical to the public interest, the 1999 Legislature took away DOI's rate-setting function and has now established the rates itself and prohibited DOI

II. The Statutes Authorize the Payment of a Portion of the Premium to Agents for Their Services in Determining Insurability, Which is Rationally Related to the Public Interest

Butler obfuscates the issue under the 1997 Statute, ignores the changes made in the 1999 Statute, and then simply debates the wisdom of the Legislature's policy choice. Nowhere does he cogently explain, let alone meet, his heavy burden of proving that the Statutes bear no rational relation to any conceivable public interest.

A. The 1997 Statute Authorized a Reasonable Margin For Underwriting Profit, Not a Commission

The 1997 Statute authorized a reasonable margin for underwriting profit to agents without any specific attribution to the precise underwriting service for which it was being furnished. §627.782(2)(b). At that time, as now, agents performed two separate functions. They performed "related title services" as described in §627.7711(1), and they "determined insurability" as referred to in §627.7845(1).

"Related title services" include conducting a title search, an examination and a closing. Fla. Admin. Code R. 4-186.003(13)(b). "Determining insurability" constitutes the actual determination, based upon what is revealed by the title search and examination and other relevant information provided at or before the

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from granting any rate deviations for the next three years. Ch. 99-286, §12.

closing, of what risks to include or exclude in the title insurance policy.

Specifically, determining insurability includes an evaluation of such factors as:

- evaluating the sufficiency of an instrument purporting to convey title from the present title holder to the new proposed title holder (such as a deed from the seller to the buyer), and then determining whether to issue a policy in favor of a new title holder based upon that evaluation of the new instrument;
- evaluating the sufficiency of an instrument purporting to create a new lien on property (such as a mortgage in favor of the new owner's lender), and then determining whether to issue a policy based upon that evaluation of the new instrument;
- evaluating the sufficiency of instruments purporting to satisfy or release liens, encumbrances, or other matters of record that currently affect title to property (such as a release of the seller's mortgage or a release of a mechanics' lien, lis pendens or judgment lien), and then determining based upon that evaluation whether to remove such matters as exceptions to coverage in a proposed policy, or continue to show them as exceptions to coverage in the new title policy.

Supp. Aff. of Gay, ¶7 (Reply App. 2).

As explained by Mr. Gay:

> This critical underwriting function in determining whether the documentation is sufficient to permit the removal of otherwise listed exceptions to coverage, or to insure a new conveyance or new lien, is almost always performed by the agent; it requires underwriting judgment and expertise to be conducted properly; and it results in a policy being issued by the agent which, if not handled properly, will result in risk and liability to both the insurer and the title agent.

Id.[3]

Because the 1997 Statute did not define what underwriting service was the subject of the premium paid to title agents, and because "related title services" were required to be charged for separately, Butler argues that the portion of the premium paid to agents was nothing more than a sales commission for procuring a customer. But in doing so, Butler completely ignores the fact that agents *also*

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[3] While Mr. Gay's description of the specific services that comprise "determining insurability" is uncontroverted in the record, Butler has characterized certain of the general functions of title agents differently from the Affidavits of Appellants. When reviewing this evidence, it is important to keep in mind that: (a) this is a *facial* constitutional challenge, so as long as title agents *can* perform the functions described in Appellants' Affidavits, "the legislature *could* (have) properly decide(d) to act as it did," and that should be the end of the inquiry as that is all the Statutes authorize, *Glendale Fed. Sav. & Loan Ass'n. v. Dept of Ins.*, 587 So.2d 534, 537 (Fla. 1st DCA 1991), *rev. denied,* 599 So.2d 656 (Fla. 1992), and (b) every possible inference must be made in favor of the constitutionality of the Statutes. *Fieldhouse v. Public Health Trust*, 374 So.2d 476, 478 (Fla. 1979) ("It is not our duty to envision theoretical combinations of factors which, if present, might render a statute unconstitutional. Rather, it is our responsibility to examine the facts as they exist and resolve all doubts as to the validity of a statute in favor of its constitutionality."); *State v. Globe Communications Corp.*, 648 So.2d 110, 113 (Fla. 1994).

determine insurability on behalf of the insurers and actually decide what risks insurers will assume in the policies they issue and what risks will be excepted from coverage. And now under the 1999 Statute, *those* are the expressly-stated services for which title agents receive their share of the premium, *not* "related title services" and "*not* ... a commission."[4]

B. The 1999 Statute Now Clearly Specifies That The Portion of the Premium Paid To an Agent Is For the Agent's Determination of Insurability

Given the Final Judgment below, and the confusion Butler wrought, the 1999 Legislature wanted to avoid all possible further confusion on this point. Accordingly, it made absolutely clear that the portion of the premium paid to

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[4] In addition, Butler has never explained why the Legislature was constitutionally precluded from including within the premium a margin for underwriting profit for the agents' provision of "related title services." There simply was nothing unconstitutional about a statutory scheme which included a margin for underwriting profit to agents in the premium, and also permitted agents to collect at least their actual cost for their services by way of a separate charge. In fact, the Legislative History reflects that such a scheme made perfect sense. Prior to the 1992 revisions which created the statutory category of "related title services," agents were charging *less* than their actual costs for their "related title services." 1992 Final Bill Analysis p. 34. Thus, assuming similar competitive conditions continued after 1992, and agents began charging just their actual costs for their "related title services," which was the minimum permitted by the 1992 changes, the *only* underwriting profit agents would receive for those services would come from the premium. Accordingly, the portion of the premium agents would receive was still for their *underwriting services,* never a "commission." Nevertheless, this entire point is now moot in light of the 1999 Legislative changes which have identified "determining insurability" as the underwriting service for which agents receive their portion of the premium.

agents is for the agents' "determining insurability." "Premium" is now defined in §627.7711(2) as the charge for a title insurance policy "including the charge for performance of primary title services by a title insurer or title insurance agent . . . ." Ch. 99-286, §6. And in new §627.7711(1)(b), "primary title services" are defined as follows:

> "Primary title services" means determining insurability in accordance with sound underwriting practices based upon evaluation of a reasonable search and examination of the title, determination and clearance of underwriting objections and requirements to eliminate risk, preparation and issuance of a title insurance commitment setting forth the requirements to insure, and preparation and issuance of the policy.

Id. These are precisely the services described *supra*.

Thus, there can be no question today under the face of the statutes that the portion of the premium paid to agents is compensation for their underwriting service of "determining insurability."[5] Butler fails to address this fact at all, except to say that title agents have always performed this service. Butler Brief at

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[5]Even if there were any question remaining over whether the Legislature intended that the non-rebatable portion of the premium paid to agents is for their "determining insurability" as opposed to a "sales commission," where two interpretations of a statute are possible, but one renders the statute unconstitutional, (at least according to Butler), it is incumbent upon the court to choose the alternative that renders the statute constitutional. *Russo v. Akers*, 724 So.2d 1151, 1153 (Fla. 1998); *Vildibill v. Johnson*, 492 So.2d 1047, 1050 (Fla. 1986); *City of St. Petersburg v. Siebold*, 48 So.2d 291, 293-94 (Fla. 1950).

43. That does not even begin to explain why it is unconstitutional to prohibit rebates of promulgated rates that have a direct impact on the actuarial soundness of insurance policies, as distinguished from prohibiting rebates of mere sales commissions. ***Clearly this core difference between payment solely for a sales commission, and payment for actually determining what risks will be covered by an insurance policy, and whether to even issue an insurance policy, removes this case from the holding, and the rationale, of Dade County.***

C. Butler's Debate Over the Legislature's Policy Choice to Establish a Regulated Rate for Determining Insurability Simply Does Not Rise to a Constitutional Level

Once Butler finally gets to the face of the statute, which specifies that the portion of the premium paid to agents is for their "determining insurability" and "does not include a commission," he simply debates the wisdom of the Legislature's policy choice. Specifically, he argues that:

> [E]conomic theory and logic suggest that guaranteeing financial well-being is destabilizing because it rewards inefficiency, laziness and poor performance equally with efficiency, hard work and superior performance.

Butler Brief at 35.

Butler's debate over "economic theory," however, does not constitute a constitutional basis to overcome the Separation of Powers. Butler's argument is suited for the floor of the Legislature, not the courts. All such laws are open to

public debate, but they are only unconstitutional when there is no rational basis to believe they serve any conceivable public interest.[6] Clearly there is a rational basis to believe, and indeed in this case there is actual historical proof which demonstrates, that left unchecked, the competitive conditions in the title insurance market will lead to agents performing their services *at a loss*. 1992 Final Bill Analysis p. 34. It takes no leap of faith to then recognize that since title agents actually determine the risks that insurers indemnify against, and the quality of their determination of insurability has a direct impact on the solvency of insurers, if agents are forced to cut costs or cut corners due to competitive conditions the public interest will be threatened.

As to Butler's argument that setting a regulated rate for this underwriting service will lead to private gain, that is nothing new or unconstitutional. Florida has long recognized that incidental private gain does not render unconstitutional a statute that rationally advances a public purpose. This Court recently reiterated:

> The mere fact that someone engaged in private business for private gain will be benefited by every public improvement undertaken by the government or a

[6] Indeed, Butler's characterization of the Statutes as "guaranteeing (the) financial well-being" of agents is a misnomer. The Statutes provide no guaranty of financial well-being at all. Just like other regulated rates, as with electric rates for example, if an agent fails to operate his or her business efficiently and cost-effectively, the agent will not be profitable. The premium set by the Legislature merely gives agents an *opportunity* to earn a reasonable rate of return, not a guaranty.

> governmental agency, should not and does not deprive such improvement of its public character or detract from the fact that it primarily serves a public purpose.

Poe v . Hillsborough County, 695 So.2d 672, 677 (Fla. 1997) (quoting *State v. Bd. of Control*, 66 So.2d 209, 210 (Fla. 1953)). See also *Linscott v. Orange County Indus. Dev. Auth.*, 443 So.2d 97, 101 (Fla. 1983) ("[I]t is immaterial that the primary beneficiary of a project be a private party" so long as a public interest "even though indirect" is served.) (quoting *State v. Housing Finance Auth. of Polk County*, 376 So.2d 1158, 1160 (Fla. 1979)); *State v. Orange County Indus. Dev. Auth.*, 417 So.2d 959, 962 (Fla. 1982); *State v. Dixon*, 594 So.2d 295, 298-99 (Fla. 1992).

The insurance industry is closely intertwined with the public interest. Ensuring the solvency of title insurers achieves far more than simply providing a private industry with a fair profit – it protects Florida's entire real estate market and all Florida's purchasers of title insurance.

III. The Statutes Directly Achieve Their Intended Purpose

Butler's next argument is that the statutory scheme "does not achieve the purported public interests." Butler Brief at 39. Butler argues that the only purpose of providing a regulated rate of underwriting profit to agents is to "attract and retain adequate capital investment in the title insurance business." He then argues that since agents, unlike insurers, are not required to maintain any level of

capital, the Statutes fail to accomplish their intended purpose and must, therefore, be declared unconstitutional. Butler Brief at 39-42.

But there are many potential benefits to the public that are reasonably advanced by the Statutes. And any conceivable benefit is enough to sustain them. One such benefit is primarily for insurers. The Legislature was concerned that if agents were not receiving an adequate rate of return, insurers would suffer greater losses due to poor underwriting and a lower quality agency pool. This was certainly a conceivable concern in 1992 when insurers were reporting three straight years of multi-million dollar losses. The logical result of such continuing losses would be that insurers would leave Florida.

Moreover, Butler completely ignores the 1999 changes in the Statutes. The Legislature added to §627.782(2)(b) the following language: "and maintain an efficient title insurance delivery system." Ch. 99-286, §11. The Legislature understood that title insurers in this State are *dependent* on agents to underwrite their risks statewide and to determine insurability on their behalf. It therefore rationally perceived that if it authorized a regulated rate for the underwriting service agents perform, a service that "is essential to the maintenance of the solvency and soundness of title insurers" (Ch. 99-286, Preamble), such action would further the efficient delivery of title services to the public.

Butler's heavy reliance on the decision in *Horsemen's Benevolent and Protective Ass'n v. Div. of Pari-Mutuel Wagering*, 397 So. 2d 692 (Fla. 1981) is misplaced. The flaw with the statute in *Horsemen's* was that the identified public interest of encouraging continuous stabling of horses in Florida was simply not enhanced by the payment of money to a private organization that could spend those funds completely "as it chooses." *Id.* at 695. Here, however, the very activities for which title agents receive their share of the premium serve the intended public interest. Only upon their actual performance of underwriting services do agents receive their portion of the premium, and the public interest is thereby simultaneously served. No additional steps are required to achieve that goal.

Although Butler argues the statutory scheme could be even *more* effective if it also required that agents maintain specified levels of capital, a statutory scheme need not be perfect to be constitutional. *In re Estate of Greenberg*, 390 So.2d 40, 46 (Fla. 1980) ("Equal protection does not require a state to choose between attacking every aspect of the problem or not attacking it at all ...."); *Belk-James, Inc. v. Nuzum*, 358 So.2d 174, 177 (Fla. 1978) ("The arguments . . . which essentially question whether the best means of regulation has been chosen, can be seen as directed more to the wisdom of the legislation than its asserted rationality."); *U.S. Fidelity & Guaranty Co. v. Dept. of Ins.*, 453 So.2d 1355, 1362

(Fla. 1984) ("The fact that a statute may not actually accomplish its intended goals is not a sufficient reason for declaring the statute unconstitutional. The test is whether the legislature at the time it enacts the statute has a reasonable basis for believing that the statute will accomplish a legitimate legislative purpose.").

IV. Other States Also Have Promulgated Rates That Authorize Insurers and Agents to Earn a Reasonable Rate of Return

Lastly, Butler argues that no other State establishes a non-rebatable "commission" to title agents. Butler Brief at 46-47. But as explained above, Florida does not establish "commissions" for title agents. Florida recognizes within its promulgated rate the critical role title agents perform in determining insurability, just as other States have done.[7] Thus, rather than being the only State that authorizes non-rebatable "commissions," Florida has joined other States in seeking to protect the solvency of its insurers, and the viability of its title insurance delivery system, through the establishment of regulated rates that promote insurer solvency by taking into account the unique role and impact title agents have on insurers. The application of this Legislative scheme has resulted in

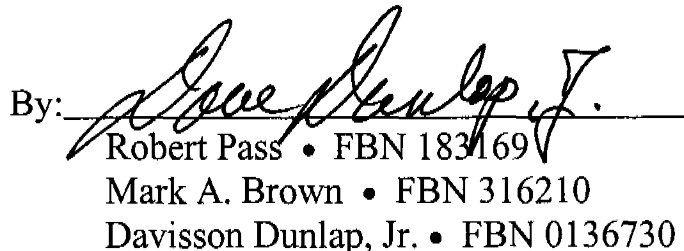
[7] Both Texas and New Mexico, for example, also recognize the underwriting role that title agents perform and each has set a regulated rate which includes a reasonable margin for underwriting profit to insurers *and agents*. §59A-30-6, N.M. Stat.; 13 N.M. Admin. Code R. 14.4.11.1; Art. 9.07(b), Tex. Ins. Code Ann. (Reply App. 4, 5). Both states also, of course, have corresponding anti-rebating

a cost to the consumer for title insurance in Florida that is "neither excessive nor inadequate." Cox Dep. at 151 (R. V, 967).

Conclusion

Title insurance is an industry affected with the public interest and title agents perform a function integral to that interest – the underwriting of risks and actual determination of what specific exposure title insurers will face in any given transaction. The dependency of the title insurance industry on the determination of insurability functions performed by title agents rationally justifies the legislation. Accordingly, this Court should reverse the Final Judgment and uphold the constitutionality of the Statutes.

CARLTON, FIELDS, WARD,
EMMANUEL, SMITH & CUTLER, P.A.
Post Office Drawer 190
Tallahassee, Florida 32302
850-224-1585; FAX 850-222-0398



By: ______________________
Robert Pass • FBN 183169
Mark A. Brown • FBN 316210
Davisson Dunlap, Jr. • FBN 0136730

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laws, like Florida, to prevent any end-run around their promulgated rates. §59A-16-17(A), N.M. Stat.; Art. 9.30(A), Tex. Ins. Code Ann. (Reply App. 4, 5).

CERTIFICATE OF SERVICE AND TYPE SIZE

I CERTIFY that a copy of the foregoing was furnished by U.S. Mail to:

Thomas Guilday, Esq.
Huey, Guilday & Tucker, P.A.
P.O. Box 1794
Tallahassee, Florida 32302

Benjamin K. Phipps, Esq.
P.O. Box 1351
Tallahassee, Florida 32302

Keith Hetrick, Esq.
Florida Home Builders Association
201 East Park Avenue
Tallahassee, Florida 32301

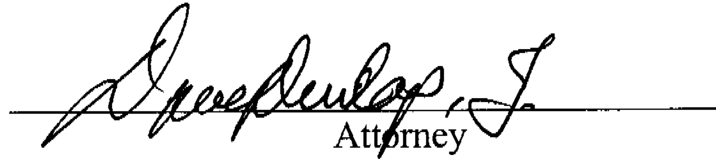
S. Marc Herskovitz, Esq.
Department of Insurance
Division of Legal Services
612 Larson Building
Tallahassee, Florida 32399-03333

Michael L. Peterson, Esq.
Malloy, James & Peterson
218 Apollo Beach Boulevard
Apollo Beach, Florida 33572

John Crabtree, Esq.
John G. Crabtree, P.A.
8185 NW 48th Lane
Ocala, Florida 34482

G. Thomas Smith
Smith, Sauer, DeMaria
510 East Zaragoza Street
Pensacola, Florida 32501

this 7th day of September, 1999, and that the size and style of the print used herein is 14 point proportionally spaced Times New Roman type.



Attorney