IN THE SUPREME COURT OF FLORIDA

CASE NOS.: SC05-2130 and SC05-2131

HARTMAN-TYNER, INC.; WEST FLAGLER ASSOCIATES LTD.; THE ARAGON GROUP, INC.; SUMMERSPORT ENTERPRISES, LLLP; and FLORIDA GAMING CENTERS, INC., and STATE OF FLORIDA, DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION, DIVISION OF PARI-MUTUEL WAGERING,

Appellants,

v.

GULFSTREAM PARK RACING ASSOCIATION, INC.,

Appellee.
_____/

APPELLEE'S SUPPLEMENTAL BRIEF

On Appeal from the District Court of Appeal, First District

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STATEMENT OF THE CASE

This Brief is submitted pursuant to the Court Order dated October 16, 2006 requesting supplemental briefs addressing the possible operation of the non-severability clause in § 550.71, Fla. Stat.

STATEMENT OF THE FACTS

Appellee adopts the Statement of the Facts set out in Appellants, Hartman-Tyner, Inc., et al.'s Supplemental Brief. Appellee challenged the constitutionality of § 550.615(6), Fla. Stat., on several grounds. Both the Circuit Court and the District Court of Appeal found the statute unconstitutional. Appellee did not challenge Section 15 of Chapter 96-364. Such act and every other statute of a general and permanent nature enacted prior to the regular 1997 legislative session was repealed by the adoption of the 1999 statutes. See § 11.2421, Fla. Stat (1999) and § 11.2422, Fla. Stat. (1999).

SUMMARY OF ARGUMENT

Appellee challenged the constitutionality of § 550.615(6), Fla. Stat., and both the Circuit Court and the District Court of Appeal held that statutory section unconstitutional. The statute as it existed in 1992 is very different than the challenged statute which was enacted in 1996. Appellee did not challenge the 1992 statute and to assert that there is a lack of evidentiary support for holding the 1992 statute unconstitutional is inapposite.

Principles of severability are judicially created and expressions of the Legislature as to the severability or non-severability are not binding on the Court. Courts will undertake their own analysis. Later acts of the Legislature can illuminate legislative intent and a severance clause should not be given force if it will produce an unreasonable or absurd result.

Here the Legislature has amended the provision of Chapter 96-364 every year since it was enacted, which is a clear indication that it did not intend for the Act to remain intact. Moreover, to enforce the non-severability clause would produce an unreasonable and absurd result.

SUPPLEMENTAL POINT ON APPEAL

WHETHER THE NON-SEVERABILITY CLAUSE IN § 550.71, FLA. STAT. SHOULD BE GIVEN ANY FORCE AND EFFECT IN THE INSTANCE THAT THE COURT FINDS § 550.615(6), FLA. STAT. UNCONSTITUTIONAL.

Appellee adopts the argument of Appellant, Hartman-Tyner, et al.

I. § 550.615(6), FLA. STAT., IS UNCONSTITUTIONAL.

The Division's first argument is improper reargument of the case on the merits and outside the scope of the order for supplemental briefs. The Division made the same argument under Point I of its Initial Brief (see Initial Brief of Appellant, p. 4, et. seq.). This Court's Order of October 16, 2006 directs the parties to address "the possible operation of the non-severability clause found in § 550.71, Fla. Stat (1996), in the instance that the Court finds § 550.615(6), Fla. Stat. (1996), unconstitutional." The Division takes issue with the question posed for briefing in order to reargue its case on the merits.

In any event and contrary to the assertions of the Division, the amendment to § 550.615(6) in 1996, which is the present language of § 550.615(6), is very different from the provisions of § 550.615(6) as it existed prior to 1996. It is the statute which is challenged and not the section of the chapter law which has no viability after the enactment of the statutes in 1999. See § 11.2421 and 11.2422, Fla. Stat. (1999).

Moreover, the Final Judgment which was reviewed by the District Court of Appeal was based on the record of an evidentiary hearing. The Circuit Court concluded "that the issue of the facial validity of § 515.615(6) is a mixed question of law and fact because of the language chosen by the Legislature and Florida's special law jurisprudence." The Trial Court quoting *Ocala Breeders Sales Company, Inc. v. Florida Gaming Centers, Inc.*, 731 So. 2d 21 (Fla. 1st DCA 1999), stated that in determining whether a statute is a special law it must first determine whether "it is possible in the future for others to meet the criteria set forth in the statute. If it is, it is a general law and not a special law even if the statute only affected a single person or geographic subdivision at the time of enactment."

The Trial Court found that "[t]he preponderance of the evidence and Florida's legislative scheme supports the conclusion that the classification created by § 550.615(6) was constitutionally closed at the time of its enactment and remains so." On review, the District Court held that the factual findings of the Circuit Court were accepted while the legal conclusions were to be reviewed de novo. The Division did not challenge the factual findings as being unsupported in the record. Both the Circuit Court and the District Court of Appeal held that the conditions described in § 660.615(6) exist "only in the area where Gulfstream is located and they will never exist in other parts of the state in the future."

The lack of evidentiary support to determine that the class was closed in 1992 is a red herring. Appellee here challenged § 550.615(6), Fla. Stat., not Section 15 of Chapter 96-364 which by force and effect of § 11.2421, Fla. Stat. (1999) and § 11.2422, Fla. Stat. (1999), is no longer extant. The Circuit Court and the District Court of Appeal held that § 550.615(6) as it appears in the Florida Statutes is unconstitutional.

II. SECTION 550.71, FLA. STAT., IS NOT BINDING ON THIS COURT.

The effect of a non-severability clause contained in an act of the Legislature is a question of first impression in Florida.

Non-severability clauses are almost unheard of and have been addressed by only a few courts. See *Louk v. Cormier*, 622 S.E. 2d 788 (W. Va. 2005).[1] The courts have generally held, however, that a non-severability clause does not bind a court, but merely establishes a presumption that guides but does not control a reviewing court's severability determination. See *Biszko v. RIHT Financial Corp.*,

[1]The cases cited by the Division involved non-severability clauses, but offer little analysis: *Zobel v. Williams*, 457 U.S. 55 (1982), left the issue of the non-severability clause to the Alaska state court; *Pueblo of Sandia v. Babbitt*, 477 Supp. 49 (DDC 1999), dismissed the case without ruling on the severability clause; *State v. Ammerman*, 52 N.W. 2d 903 (Wis. 1952), upheld the statute as constitutional and therefore never reached the severability issue; *Alaska Airlines, Inc. v. City of Long Beach*, 951 F. 2d 977 (9th Cir. 1991), *Scinto v. Kollman*, 677 F. Supp. 1106 (D. My. 1987); and *Wisconsin Realtors Ass'n v. Ponto*, 233 F. Supp. 2d 1078 (W.D. Wis. 2002), simply applied non-severability clauses without discussion of the rationale for such application.

758 F. 2d 769, 773 (1st Cir. 1985) ("a non-severability clause cannot ultimately bind a court, it establishes a presumption of non-severability."); *Steins v. Fire and Police Pension Association*, 684 P. 2d 180 (Col. 1984) (non-severability clauses are "not conclusive as to legislative intent" but "give rise only to a presumption . . ."), and *Stilp v. Commonwealth of Pennsylvania*, 905 A. 2d 918 (Penn. 2006) ("No doubt because the severance principle has its roots in a jurisprudential doctrine . . . the courts have not treated legislative declarations that a statute is severable or non-severable as inexorable commands but rather have viewed such statements as providing a rule of construction.").

The courts in both *Louk* and *Stilp* applied severability principles to an analysis of the non-severability provisions at issue in those cases. The Court in *Louk* stated:

> We have discerned from courts and commentators that statutory construction principles that apply to "severability" provisions are equally applicable to "non-severability" provisions. *See* Richard H. Fallon, Jr., *As-Applied and Facial Challenges and Third-party Standing*, 113 Harv. L. Rev. 1321, 1349(2000) ("[G]eneral separability principles apply in all contexts to determine whether particular states are nonseverable[.]"); Israel E. Friedman, *Inseverability Clauses in Statutes*, 64 U. Chi. L. Rev. 903-04 (1997) ("Despite the explicit statutory language in severability and [non-] severability clauses, courts all but ignore the clauses and apply their own tests and presumptions to determine severability. These tests generally begin with a presumption that all statutes are either severable or inseverable. . . . Courts will also consider whether the statute can reasonable function as an autonomous whole without the invalid provision."). . . .When a non-severability provision is

> appended to a legislative enactment and this Court invalidates a statute contained in the enactment, we will apply severability principles of statutory construction to determine whether the non-severability provision will be given full force and effect.

Florida has a wealth of cases discussing severability principles which can be utilized by this Court in its analysis of the non-severability clause in § 550.71, Fla. Stat. Just as the Pennsylvania Supreme Court recognized that non-severability clauses have roots in jurisprudential doctrine, this Court has recognized on several occasions that "severability is a judicial doctrine." *Florida Dept. of State v. Martin*, 916 So. 2d 763 (Fla. 2005); *Ray v. Mortham*, 742 So. 2d 1276 (Fla. 1999). See also, *Barndollar v. Sunset Realty Corp.*, 379 So. 2d 1278 (Fla. 1979)("A severability clause is not, of course, determinative of severability"), and *Moreau v. Lewis*, 648 So. 2d 124 (Fla. 1995) (a legislative expressed preference for severability is persuasive but not binding).

Indeed, the Court as early as 1936 held that "[t]he authority of the Court to eliminate from an act of the Legislature an invalid clause does not flow from legislative authority authorizing the Court to do so, but from the inherent power of the Court to preserve the constitutionality of the act if it is possible to do so even by the elimination of invalid clauses, where it appears that the elimination of such clauses would not destroy the main and essential features of the act and the portion left is a completed and workable statute and where it cannot be said that the

Legislature would not have enacted the remaining portions of the act without the invalid clause which is stricken." *State v. Calhoun County*, 170 So. 2d 883 (Fla. 1936).

The test for when an unconstitutional provision of a statute may be severed has also been set out in many Florida cases and is generally attributable to *Cramp v. Board of Instruction of Orange County*, 137 So. 2d 828 (Fla. 1962), which is cited in the Division's Brief. This Court has also held that "[w]hen a severability clause is included in the statute as it was in the Act Sub judice, the expressed legislative intent in this respect should be carried out unless to do so would produce an unreasonable, unconstitutional or absurd result." *Small v. Sun Oil Company*, 222 So. 2d 196 (Fla. 1969).

Applying the above precedent to this case, the non-severability clause should not be given any force and effect. It does not express the legislative intent and it would produce an unreasonable and absurd result.

Section 550.71, Fla. Stat., refers to "any section of this act" being held invalid and expresses legislative intent that "this act" "would not have been adopted had any provision of this act not been included." The act is no longer extant by virtue of the adoption of the Florida Statutes. See §§ 11.2421 and 11.2422, Fla. Stat. (1999). The effect of § 11.2421, Fla. Stat., is that the versions of Chapter 550 and § 849.086, Fla. Stat., published in the Florida Statutes are the

official statutory law and are not subject to repeal under the provisions of § 550.71, Fla. Stat., which pertains only to the provisions contained in Chapter 96-364, Laws of Florida, itself, which stand repealed pursuant to §11.2422, Fla. Stat. See, e.g., *Dockery v. Hood*, 922 So. 2d 258, 260-61 (Fla. 1st DCA 2006); *Kawasaki of Tampa, Inc. v. Calvin*, 348 So. 2d 897 (Fla. 1st DCA 1977); *Romano v. State*, 718 So. 2d 283, 283-84 (Fla. 4th DCA 1998). To hold otherwise would impermissible operate to bind the acts of subsequent legislature. *Neu v. Miami Herald Publishing Co.*, 462 So. 2d 821 (Fla. 1985) ("A legislature may not bind the hands of future legislatures by prohibiting amendments to statutory law."); *Straughn v. Camp*, 293 So. 2d 689, 694 (Fla. 1974).

This Court has held that title defects cannot be brought after the adoption of the official Florida Statutes. See *Rodriguez v. Jones*, 64 So. 2d 278 (Fla. 1953). Similarly, the provisions of § 550.71, Fla. Stat., which refers only to the Act cannot be given effect once the act has no validity by virtue of the adoption of the official Florida Statutes.

Moreover, the Legislature itself has failed to adhere to its once expressed intention. As set out in detail in Appellee, Hartman-Tyner's, Brief, the sections of 96-364 have been amended every year since 1996. See also Appendix A which is an analysis of the provisions of Chapter 96-364 and subsequent amendments.

In *Steins, supra*, the Court refused to give effect to a non-severability clause because of subsequent acts of the Legislature which had "probative value in illuminating legislative intent." The Court held that "later acts of the General Assembly may be relevant in resolving a severability question" and concluded that the "presumption of unseverability has been overcome." *Id.*

If the Legislature had truly intended that the provisions of 96-364 remain inviolate even after the adoption of the official statutes it would not have amended its provisions every year since its enactment. The true legislative intent must be gleaned from the later acts of the Legislature. Given the express wording of § 550.71, Fla. Stat., and the subsequent acts of the Legislature, the expression of legislative intent appears to be that the act should remain intact only until the official Florida Statutes were adopted. The later acts of the Legislature in amending the provisions of 96-364 overcome the presumption of non-severability.

While the tests for severability set out in *Cramp* and *Small* might not be applicable here given that the Act – Chapter 96-364, Laws of Florida – does not remain intact, they are nonetheless met here: The unconstitutional section – 550.615(6) – can be separated from the remainder of the statute; the legislative purpose in the valid section can be accomplished; the good and bad features are not so inseparable that it can be said that the Legislature would not have passed one

without the other given the later acts of the Legislature in amending the statute; and an act complete in itself remains after 550.615(6) has been stricken.

Secondly, to sever all the provisions of Chapter 96-364 from the existing statutes would produce an unreasonable and absurd result. Would only the actual provisions of Chapter 96-364 be stricken from the Florida statutes? Would the amendments to the provisions remain dangling in the statutes without context? Would the 1995 version of Chapter 550 spring back to life without any of the amendments of the last ten years? Any of those possibilities are unreasonable and absurd.

A more specific example of the unreasonableness of enforcing the non-severability clause is found in the question of what becomes of § 550.615(8), Fla. Stat. (1995). Section 550.615(9) was declared unconstitutional in *Ocala Breeders Sales Company, Inc. v. Florida Gaming Centers*, *supra*, ("[w]e hold that section 550.615(9) is invalid as a violation of Art. III, Section 10 of the Florida Constitution, because it is a special law enacted in the guise of a general law" and because it "violates the right to equal protection of the law guaranteed by Art. I, Section 2 of the Florida Constitution."). The Court recognized that § 550.615(9) was renumbered without substantive change by Chapter 96-364 and appears in the 1995 statute as § 550.615(8). (See Appendix B to Division's Brief).

Aside from the fact that a court in 1999 has already declared a provision of Chapter 96-364 unconstitutional without invoking the non-severability clause, to do so now produces unreasonable and absurd results. Is new life breathed into § 550.615(8), Fla. Stat. (1995)? Does the declaration of the unconstitutionality of § 550.615(9) apply to § 550.615(8), Fla. Stat. (1995)? Does the constitutionality of § 550.615(8), Fla. Stat. (1995), need to be relitigated?

In sum, the principles of severance are judicially created. Expressions by the Legislature as to severability or non-severability are persuasive, but not binding on the courts. Courts will undertake their own analysis to determine whether an unconstitutional provision of a statute can be severed. In doing so, later acts of the Legislature have probative value in illuminating legislative intent and a severance clause should not be given force if it would produce an absurd or unreasonable result.

Here, the Legislature obviously did not intend Chapter 96-364 to remain intact since it amended its provision every year since its enactment. Moreover, to strike only the provisions of 96-364 from the existing statute would produce an unreasonable and absurd result.

CONCLUSION

For the foregoing reasons, the non-severability clause in § 550.71, Fla. Stat., should not be given any force and effect.

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 U.S. Mail, to JOSEPH M. HELTON, JR., ESQUIRE, Chief Attorney for Pari-Mutuel Wagering, Department of Business and Professional Regulation, 1940 North Monroe Street, Tallahassee, Florida 32399-2202; and HAROLD F. X. PURNELL, ESQUIRE, of Rutledge, Ecenia, Purnell & Hoffman, P.A., Post Office Box 551, Tallahassee, Florida 32302-0551, this _____ day of November, 2006.

_____

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that in compliance with the font requirements of Fla. R. App. P. 9.210(a)(2), the font used in this Supplemental Brief is Times New Roman 14-point.

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APPENDIX

Statute amended by 96-364	Explanation	Subsequent amendments
550.002(26)	Definition of "post time"	None
550.002(29)	Definition of "racing greyhound"	None
550.01215	Added (2) and (3)	2000-158 Repealed (2) and (3)
550.0351	Added (9)	2000-157 and 2000-354 repealed (9)
550.0951	Amended (1) Daily license fee, (3)(c)1. Tax on handle for intertrack rebroadcasts, 2. tax on handle for dogtracks specified and 3., (4) eliminated breaks tax on dogracing, (6) renumbers paragraph reference	2000-354 reenacts (1) and (3)(c)1. and 2. and repealed subsection (3)(c)3. 2003-261 amends (1)(a)
550.09511	Amended (2)(a) and (b); (3)(a) and (5)	99-4 repealed (5)
550.09514	Created 550.09514	Reenacted 2000-158, 2000-354
550.09515	Amended (2)(a) regarding tax on handle for live thoroughbred performances	Reenacted 2000-354; 2000-2; 2002-402
550.135	Amended (2)	Reenacted and amended 2000-354; 2003-261; 2004-281
550.2415	Created (6)(d), (14), (15), (16) and (17)	2002-51 s. 2, amends (6)(d)
550.2625	Amended (2)(a) and (e)	98-190 revived, reenacted and amended (2); amended by 2000-354
550.26352	Substantial rewording of this section	Sections ((3), (5), (6), (8) and (10) reenacted 2000-354
550.3551	Amended Section (6)(a) and (b), and (14)	Section (6)(a) reenacted 2000-354
550.475	Added referenced to dog racing	Reenacted in 2000-354
550.5251	Amended (4)	Amended by 98-190; amended by 2003-295
550.615	Amended (6) and (10), renumbered (8) and (9) as (9) and (10), added (8) and (11)	Reenacted 98-190; 2000-354 and 2002-2
550.01215	Amended (1) and (6) re: cardrooms	98-190 amends (1)
550.6305	Amended (1) and (9)(a)-(g). Created (9)(a) definition of net proceeds.	(9)(a) and (g) reenacted 2000,2002 and 98-190
550.6335	Regarding surcharge	None
550.70		None
550.71	Reverse severability clause	None
849.086	Creates cardrooms	**2001-64** amends (6)(f) and (13)(g); **2003-261** amends (5)(d) and (13)(c); **2003-295** amends (2)(a), (5), (7), (8), and (13)(a) and (d); **2005-288** amends (5)(a) and (17)(a)
550.0251	Created (12) and 913) re: Division's duties re: cardrooms	2005-2 amended (12)