OA 1-30-87

56 f

IN THE SUPREME COURT OF FLORIDA

ROBERT SMITH, et al.

Appellants,

vs.

STATE OF FLORIDA, DEPARTMENT OF INSURANCE, and BILL GUNTER, as Insurance Commissioner of the State of Florida,

Appellees.

CASE NO. 69,551

APPEAL FROM THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT, IN AND FOR LEON COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANTS, AMERICAN INSURANCE ASSOCIATION, NATIONAL ASSOCIATION OF INDEPENDENT INSURERS, ALLIANCE OF AMERICAN INSURERS, et al.

Frederick B. Karl
Thomas J. Maida
Karl, McConnaughhay, Roland,
Maida & Beal, P.A.
Post Office Drawer 229
Tallahassee, Florida 32302
(904) 222-8121

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Constitution

Statutes

PRELIMINARY STATEMENT

This initial brief is filed on behalf of the American Insurance Association, the National Association of Independent Insurers, the Alliance of American Insurers, and over 240 separate insurance companies which are authorized to transact the business of commercial property and casualty insurance in the State of Florida. The names of the individual companies whose views are reflected in this brief are fully set forth in the Notice of Appeal. (R. 1,442).

References to the transcript of the trial proceedings below will be made by use of the abbreviation "TR.," followed by the arabic numeral corresponding to the specific page number. References to the transcript of the proceedings of July 11, 1986 will be made by use of the abbreviation "TR/July," followed by the page number. Reference to the transcript of the pretrial proceeding on August 22, 1986 will be made by the use of the abbreviation "TR/August," followed by the page number. Reference to other parts of the record on appeal will be made with the abbreviation "R.," followed by the page number indicated in the index of the Record on Appeal prepared by the Clerk of the Circuit Court.

STATEMENT OF THE CASE

This action was commenced on July 2, 1986 by the filing of a Complaint in the Circuit Court of the Second Judicial Circuit, in and for Leon County, Florida, on behalf of the American Insurance Association, the National Association of Independent Insurers, the Alliance of American Insurers, and twenty-three individual insurance companies, each of whom is authorized to write commercial property and casualty insurance in the State of Florida. (R. 1). The associations are each not-for-profit corporations, and are national trade associations which collectively represent over 800 insurance company members.

The Complaint attacked the facial constitutional validity of Chapter 86-160, Laws of Florida, (the Tort Reform and Insurance Act of 1986), on the grounds that it embraces more than one subject and matter properly connected therewith, contrary to Article III, Section 6, Florida Constitution. In addition, the Complaint made discreet attacks on Sections 4, 9, 10, 16, and 66 of the Act, on the grounds that those specific parts of the law variously violated Florida and federal constitutional guaranties of equal protection, due process, and freedom from the impairment of contracts.

Subsequently, an Amended Complaint was filed, adding several insurance companies. (R. 143). Later still, a Second Amended Complaint was filed, which brought to the suit an additional 220 plus insurance companies. (R. 349). Separate suits were brought on behalf of the Cigna group of companies, as well as the State Farm group of companies. Along the way, additional insurance companies intervened through separate counsel as parties-plaintiff. In addition, the trial court granted the Motion to Intervene of the Academy of Florida Trial Lawyers, making the Academy a plaintiff in the action. (R. 275). Motions to intervene as parties-defendant were granted to the Florida Railroad Association, Florida Power & Light Company and the Florida Medical Association.

In addition to requesting that the Act be declared unconstitutional in whole or in part, the Complaint requested that the trial court grant temporary injunctive relief and, in fact, a separate Motion for Temporary Injunction was filed with the trial court. (R. 161). On July 11, 1986, the Circuit Court convened a hearing on Appellants' Motion for Temporary Injunctive Relief. Following the conclusion of the evidentiary hearing, the trial court entered an Order on July 15, 1986 granting in part and denying in part this Motion for Temporary Injunctive Relief. (R. 184).

The Order on Motions for Temporary Injunction (a) enjoined the Department of Insurance from enforcing the rate rebate provisions of Section 66(1)-(3). The trial court also enjoined enforcement of the rate freeze provisions of Section 66(4) with regard to two lines of commercial liability insurance, viz: commercial automobile and hospital professional liability.[1] However, the trial court refused to enjoin enforcement of the rate freeze for other lines of insurance. The trial court also temporarily enjoined the Department of Insurance from enforcing the one-time claims reporting requirements of Section 64.[2] Finally, the court denied temporary injunctive relief with regard to the rate rollback provisions of Section 66 (5) and (6), as well as in regard to Sections 4, 16 and 66(7). On September 8, 1986, the trial court entered an Order on Motion for Additional Temporary Injunctive Relief, in which it extended the length of the previously granted injunctive relief and, in addition, granted for the first time injunctive relief with regard to Section 66(5) and (6). (R. 1,183). Lastly, on October 23, 1986, the trial court entered an Order on Joint Motion to Supplement Injunctive Relief,

---

[1] Testimony received at the injunction hearing indicated that the companies had filed for and received Departmental approval between May 1, 1986 and July 1, 1986 to increase rates for these two lines of insurance.

[2] This aspect of the Complaint was later dismissed, following the negotiation of a satisfactory settlement with the Department of Insurance. (TR. 6).

in which for the first time temporary relief was granted in regard to the enforcement of Section 13, which authorized the Department of Insurance to establish and implement the Florida Property and Casualty Joint Underwriting Association. (R. 1,381).

Because of time constraints facing the trial court, the trial proceedings were taken up in two segments, from September 4 through 6, 1986, and on September 18 and 19, 1986. Ultimately, on October 27, 1986, the trial court rendered a Final Judgment, declaring Section 66(1)-(3) constitutionally invalid, insofar as it applied to policies of insurance which were in effect prior to July 1, 1986. The remainder of the Act was found constitutionally valid. (R. 1,385).

Appellants timely filed their Notice of Appeal on October 27, 1986. (R. 1,442). Appellants then requested that the District Court of Appeal, First District of Florida, immediately certify the appeal to the Florida Supreme Court as involving a question of great public importance requiring immediate attention by the Supreme Court. The motion was granted by the District Court of Appeal, and the Supreme Court accepted jurisdiction pursuant to Article V, Section 3(b)(5), Florida Constitution.

STATEMENT OF THE FACTS

In the waning hours of the last day of the 1986 legislative session, the Florida Legislature enacted Chapter 86-160, Laws of Florida (The Tort Reform and Insurance Act of 1986). It represents the collection and compilation of some twenty-nine separate legislative bills which were introduced during the 1986 regular session of the Florida Legislature. The Act adds to or creates at least 41 sections of the Florida Statutes; repeals seven sections; amends 20 sections; and affects at least nine different chapters of the Florida Statutes. In addition to touching upon virtually every aspect of commercial liability insurance ratemaking, the Act affects numerous other subject matters, as well.

In addition to Appellants' attack on the validity of Chapter 86-160 on the grounds that it embraces more than one subject and matter properly connected therewith, Appellants discreetly challenged Section 66, Section 9, Section 10, and Section 44.[3] Section 66 has been euphemistically termed the "transitional rules," ostensibly because the provisions of that section affect the time period of July 1, 1986 through January 1, 1987. Within Section 66 is found the so-called special credit or rate rebate provisions, a six-month rate freeze, and the rollback of rates to 1984 levels. Section 9 embodies the new commercial insurance rating law, and Section 10 creates a new commercial insurance excess profits law.

Section 66(1)-(3), the so-called "special credit," requires insurers to reduce premiums for all commercial liability policies in effect at any time during the period October 1, 1986 until January 1, 1987, by an amount equal to forty percent of the

---

[3] These Appellants adopt in full the arguments set forth in the separate brief of The State Farm group of companies with regard to the invalidity of Section 44. Therefore, these Appellants will not separately address that issue in this brief.

premiums charged for one-fourth of the policy term. In other words, this requires reduction in premiums by ten percent on an annualized basis. The special credit provisions apply even to policies which were written and which went into effect prior to the enactment of the new law, so long as those policies were in effect for at least one day between October 1, 1986 and January 1, 1987.

Sections 66(2) and 66(3) purport to provide relief, in cases of hardship, from the special credit embodied in Section 66(1). Section 66(2) applies only to insurers whose solvency is endangered, while Section 66(3) permits insurers to apply for relief from the Department of Insurance.

At trial, experts retained by the insurers disagreed with the conclusion of the Department's experts on the issue on the standard of review provided under Section 66(3). The insurers' experts testified that Section 66(3) requires insurers to prove that implementation of the special credit will result in "clearly inadequate" rates. (TR. 287). Using the definition of inadequate rates found in Section 627.062(2)(e)3., they reasoned that insurers would have to show that the imposition of the special credit would result in insufficient revenue to cover insurers' losses and expenses. (TR. 287).

The Department's expert opined that the statute simply requires the Department to permit insurers to earn a fair rate of return after implementation of the special credit. Thus, he applied no particular significance to the "clearly inadequate" standard. Of the policies which will be affected by the special credit, the majority were written and went into effect prior to the enactment of Chapter 86-160. In the case of United States Fidelity & Guaranty Company, the fifth largest writer of commercial property and casualty insurance in Florida, 90 percent of its policies will be affected. (TR. 212). The estimated dollar loss to U.S.F. & G. -- premium dollars collected prior to the Act's adoption -- will be $5,600,000.00 to $5,688,000.00. (TR. 213).

Mr. Kevin Thompson, a casualty actuary employed by Insurance Services Office (ISO), estimated the loss to the industry as a whole to be in the neighborhood of $140,000,000.00. (TR/July. 60; TR. 120, 121).

Section 66(4) required insurers to freeze, from July 1, 1986 until January 1, 1987, commercial insurance rates at the levels in effect on May 1, 1986. There are no exceptions -- even for financial hardship -- from the rate freeze. (TR. 89).

Between May 1, 1986 and July 1, 1986, the Department agreed to new ISO rates for commercial automobile and hospital professional liability insurance. (TR. 87). Absent the temporary injunctive relief granted by the trial court, the insurers would have been retroactively required to return to May 1, 1986 rate levels. In addition, new rates for two other lines of commercial insurance -- physicians, surgeons and dentists, and products liability -- had been filed but not implemented prior to the passage of the legislation which became Chapter 86-160. (TR. 88).

Sections 66(5) and 66(6) make up the rate rollback requirement of the Act. Section 66(5) requires insurers to rollback their commercial liability insurance rates to the rates in effect on January 1, 1984, with adjustments for changes in coverage and to account for changes in investment income. Section 66(5) specifically forbids insurers from adjusting these rates to account for loss experience occurring since January 1, 1984.

Section 66(6) purports to provide some measure of relief from Section 66(5). According to the insurers experts, Section 66(6) uses the same standard as the special credit exception (Section 66(3)), by requiring insurers to prove that adjusted 1984 rates are inadequate before permitting a full, actuarily sound rate filing under Section 627.062 (Section 9 of the Act). The Department's expert contended Section 66(5) creates nothing more thna a "benchmark" against which to measure rates filed under Section 66(6). (TR. 857).

Rates produced under Section 66(5) will not be actuarily sound. Among the various components -- or building blocks -- of insurance rates, past loss experience is undoubtedly the most important. (TR. 317). Section 66(5) requires insurers to ignor that component of actuarilly sound ratemaking.

An understanding of the full impact of Section 66, as a whole, would not be compete without mention of Section 66(7). This subsection prohibits insurers from cancelling or refusing to renew policies to avoid the special credit and rate freeze.

Section 10 of the Act, which creates a commercial lines excess profits law, requires insurers to refund statutorily defined "excess profits" to a specially defined group of policyholders. These policyholders are those who, among other things, comply with a "risk management plan," developed by insurers, and whose loss experience does not exceed a permissible level. Mr. Michael Walters, president-elect of the Casualty Actuarial Society, testified that the excess profits laws will distribute money to certain policyholders randomly and inequitably. (TR. 135, 136). Thus, a policyholder who faithfully implements the risk management plan, but through no fault of his own suffers a significant loss, will receive nothing under the excess profits law. (TR. 136, 137). The money will go only to those "lucky policyholders" who, through good fortune, sustain an acceptable loss ratio. (TR. 135-137).

QUESTIONS PRESENTED

FIRST ISSUE

WHETHER CHAPTER 86-160, LAWS OF FLORIDA, IS VOID, BECAUSE IT EMBRACES MORE THAN ONE SUBJECT AND MATTER PROPERLY CONNECTED THEREWITH.

SECOND ISSUE

WHETHER SECTION 66 VIOLATES THE CONTRACTS CLAUSE AND THE DUE PROCESS AND EQUAL PROTECTION PROVISIONS OF THE CONSTITUTION.

THIRD ISSUE

WHETHER SECTION 9 VIOLATES THE DUE PROCESS AND EQUAL PROTECTION PROVISIONS OF THE CONSTITUTION.

FOURTH ISSUE

WHETHER SECTION 10 VIOLATES THE DUE PROCESS AND EQUAL PROTECTION PROVISIONS OF THE CONSTITUTION.

SUMMARY OF ARGUMENT

This case presents the Court with an opportunity to revisit the "single-subject" issue and determine whether the Legislature in enacting Chapter 86-160, a law even more comprehensive and complex than the acts reviewed in State v. Lee, 356 So.2d 276 (Fla. 1978) and Chenoweth v. Kemp, 396 So.2d 1122 (Fla. 1981), has finally gone too far.

The Court has held that tort reform may be combined with automobile insurance and medical malpractice insurance, and, indeed, there is logic in those combinations. But in this act, tort reform has been expanded to include contract actions; and, on the insurance side, the act expands the previous scope to include life insurance, property insurance, fire insurance, reinsurance and self-insurance (actually, non-insurance), which are not properly related to tort reform.

Moreover, the Legislature, in both the preamble and in Section 2 of the act, established the subject it wished to address, identified related matter, and then loaded up the vessel with all sorts of provisions that are outside of its own self-imposed parameters.

Appellants argue that the Court below improperly concluded the Lee and Chenoweth and other "single-subject" opinions permit the Legislature to package so many diverse subjects in one bundle. Those cases did not address the question of whether the Legislature can exceed the limits of its own subject, nor whether it may legislate in the fields of insurance that are not properly related to the tort system. Certainly it did not approve the inclusion of such unrelated matters as new employees for the Insurance Department, amendments to the medical osteopathic practice acts, permission for banks to enter the rein surance business, broad powers and responsibilities for a new task force, and reforms of the civil justice system beyond the scope of tort law.

Appellants urge the Court to establish a reasonable line beyond which the Legislature may not venture in similar enactments, and find that Chapter 86-160 falls on the unconstitutional side of such line.

Section 66 of the Act, which imposes a rate rebate, called a "special credit," and which temporarily freezes insurance rates, and purports to impose artificially low rates on January 1, 1987, violates the insurers' right to be free from contract impairments and violates the due process and equal protection provisions of the Florida and federal constitutions.

Section 66 applies to insurance policies written and in effect both prior to and after the enactment of Chapter 86-160. The Supreme Court has held that "virtually no degree of contract impairment is tolerable in this state." Pomponio v. Claridge of Pompano Condominium, Inc., 378 So.2d 774, 780 (Fla. 1979). This section fails the three-part balancing test articulated in United States Fidelity & Guaranty Co. v. Department of Insurance, 453 So. 2d 1355 (Fla. 1984), and therefore should be stricken as violative of the contract clause.

Section 66 also deprives the insurers of their property without due process of law. In part, it requires insurers to rebate or credit policyholders 40 percent of the premiums charged for one-fourth of the year. In most cases the policies were written prior to the law's enactment, and therefore requires insurers to return premium dollars already collected. The rate freeze prohibits insurers from changing their rates from July 1, 1986 until January 1, 1987, even if they are otherwise entitled to do so.

Section 66(5) requires insurers on January 1, 1987, to use rates which were in effect on January 1, 1984, with adjustments for changes in coverage and to account for investment income. It does not permit insurers to adjust for past loss experience. Section 66(5) therefore deprives the insurers of their right to earn a fair rate of return. The so-called "escape clause," embodied in Section 66(6), is insufficient to

overcome the constitutional deficiencies inherent in this arbitrary rollback of insurance rates to 1984 levels.

Section 9, which provides a radical departure from the prior commercial lines rating law, violates insurers' rights to due process and equal protection of the law. This commercial lines rating law grants to the Insurance Commissioner virtually unbridled discretion in approving rates. It also unjustifiedly treats dissimilarly companies similarly situated by excluding from its ambit surplus lines insurers, individually rated risks and self-insured funds.

The commercial lines excess profits law -- Section 10 of the Act -- unconstitutionally uses the police power of the State to collect funds from one group and arbitrarily and discriminatorily distribute them to a special limited class of private individuals. This practice was strongly condemned by the Supreme Court in State v. Lee, 356 So.2d 276 (Fla. 1978), in which the "Good Drivers' Incentive Fund" was declared unconstitutional.

* * *

The trial court correctly ruled that the special credit, insofar as it applies to policies in effect prior to policies in effect prior to July 1, 1986, violates the contract clause. It erred, however, in failing to declare the remainder of the Act unconstitutional. Chapter 86-160 in its entirety, as well as the various components here challenged, violate fundamental constitutional principles and therefore, should be held invalid.

ARGUMENT

FIRST ISSUE

CHAPTER 86-160, LAWS OF FLORIDA, IS VOID, BECAUSE IT VIOLATES ARTICLE III, SECTION 6 OF THE CONSTITUTION OF FLORIDA.

Appellants begin their argument on this point by asserting the urgent need for this Court to revisit and refine judicial precedent of the single subject issue. The opinions in the recent cases of State v. Lee, 356 So.2d 276 (Fla. 1978), and Chenoweth v. Kemp, 396 So.2d 1122 (Fla. 1981), which involved automobile insurance and medical malpractice insurance, respectively, did not specifically address certain critical issues in the instant case; they contain dicta that implies any type of insurance law may be linked with any kind of tort reform (whether or not they are properly related); and they lead students of the subject to conclude there is no limitation" on the Legislature imposed by Article III, Section 6, Florida Constitution.

Thus, we respectfully suggest, the Honorable Charles E. Miner, Circuit Judge, in his final judgment on this point, incorrectly concluded that Lee and Chenoweth, supra, are dispositive of the issues in the instant case.

Neither of those opinions were concerned with a legislative enactment as broad as Chapter 86-160, and appellants urge refinement of them for legislative and public guidance as the Court has heretofore done in the similar, single-subject provision, Article XI, Section 3, Florida Constitution, which governs initiative petitions for constitutional amendments.

Article III, Section 6, Florida Constitution, provides in pertinent part:

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

This provision, or one almost identical to it, has been a part of every recent version of Florida's Constitution. It was last adopted by the people as a part of the 1968 Constitution. It was included, precedent tells us, to prevent "logrolling" and "hodgepodge" legislative practices which are used to deceive or trick legislators or the general citizenry.

Appellants suggest that the beneficial effects of the restraint on legislators can only be achieved if the provision is understood to provide two distinct constitutional mandates. The first is that the law must embrace but one subject and matter properly connected therewith. The single-subject must be determined from the law, not a legislative summary, the preamble, or the title. The second mandate is that the subject -- as determined from the law -- shall be briefly expressed in the title. The first prohibits "logrolling and "hodgepodge" legislation, while the second required disclosure of the subject. In testing a title under this provision of the Constitution, the test is whether the subject contained in the law is briefly expressed.

One does not look to the title to find the subject, but rather to be certain that the title is broad enough, and sufficiently clear to disclose the subject selected by the Legislature and embraced in the law.

As will be discussed below, the Legislature, in fashioning Chapter 86-160, articulated the subject it intended to embrace and then improperly embraced other subjects as well. The title was crafted to give notice of the multitude of subjects, not to expand or otherwise change the subject which is unmistakeably articulated in Section 2 of the act to be liability insurance. Chapter 86-160, Section 2, provides:

> The Legislature finds and declares that a solution to the current crisis in liability insurance has created an overpowering public necessity for a comprehensive combination of reforms to both the tort system and the insurance regulatory system. This act is a remedial measure and is intended to cure the current crisis and

> prevent the recurrence of such a crisis. It is the purpose of this act to ensure the widest possible availability of liability insurance at reasonable rates, to ensure a stable market for liability insurers, to ensure that injured persons recover reasonable damages, and to encourage the settlement of civil actions prior to trial. (emphasis supplied)

The plain language of the Legislature defines the subject as liability insurance; the matter properly connected therewith is tort reform.

Liability insurance is but one of many types of insurance. It is limited in scope by its statutory definition found in Section 624.605(1)(b), Florida Statutes (1985):

> Liability Insurance. Insurance against legal liability for the death, injury, or disability of any human being, or for damage to property, with provision for medical, hospital, and surgical benefits to the injured persons, irrespective of the legal liability of the insured, when issued as a part of a liability insurance contract.

There can be no argument concerning the propriety of connecting tort reform with the subject of liability insurance, for it is through the tort system that fault is determined and damages are assessed.

The Legislature did not adopt a subject broader than liability insurance, consequently provisions relating to life insurance, property insurance (fire and windstorm), credit insurance, surety, and other statutorily defined lines of insurance are neither within the scope of the subject nor properly connected therewith. There was no finding of a crisis in fire, windstorm, life or other lines of insurance.

Moreover, there can be no proper connection between non-liability lines of insurance and tort reform. How could a cap on non-economic damages have an effect on either the availability or affordability of property insurance or life insurance? What possible effect or connection can there be between the tort system and variable or indeterminent value insurance policies?

The Court below, looking to the title of the act, rather than the law as required by the Constitution, concluded that the subject is "insurance and civil actions," a subject broader than the one announced by the Legislature. The Court on page six of its judgment recited:

> To be sure, a reading of the act will reveal that the primary motivating factor behind the enactment of this legislation was legislative concern over the cost and availability of commercial liability insurance. (Emphasis supplied)

Then, and notwithstanding its own finding, indicated that the subject of the act, as drawn by the Legislature, was a broader one. The phrase adopted by the Circuit Judge, "insurance and civil actions" appears only in the title. It cannot be found within the law itself and should not be substituted for the subject selected by the Legislature.

But, assuming, arguendo, that somehow the subject is "insurance and civil actions," that Act still fails to comply with the Constitution. This is true because both terms are so broad that certain elements of each are incompatible, and not properly connected, with elements of the other. More importantly, this act contains subjects that are neither "insurance" nor "civil actions." One such example is self-insurance. Self-insurance is not within the definition of insurance as found in Section 624.02, Florida Statutes 1985.

> "Insurance" is a contract whereby one "undertakes to indemnify another or pay or allow a specified amount or a determinable benefit upon determinable contingencies.

Similarly, Section 44 of Chapter 86-160, which amends Section 627.351, Florida Statutes, by adding paragraph (j), includes a scheme to pass money from the Florida Patients Compensation Fund to certain doctors. The record is uncontradicted that such a scheme is not insurance. (See separate brief of State Farm on this issue).

It is apparent that the Legislature intended to address only the crisis in liability insurance, and set out to attempt to make it more available and affordable by reforming the tort system, wherein the amount of liability insurance payments are determined. It also intended to reform the regulatory scheme as to liability insurance. The selection of liability insurance as the subject of the law and tort reform as the properly related matter is manifested in various parts of the law. In the twelfth paragraph of the preamble there is the affirmative finding that "tort law and liability insurance systems are interdependent and interrelated," and in Section 66(6), which is a rate filing requirement for liability insurance the following is included:

> Each insurer or rating organization shall include in the filing the expected impact on losses, expenses, and rates of the tort reform implemented by this act. If any tort reform measure contained in this act is held unconstitutional by a court of competent jurisdiction, the Department shall permit an adjustment of all rates filed under this section to reflect the impact on such holding on such rates, so as to ensure that the rates are not excessive, inadequate, or unfairly discriminatory. (emphasis supplied)

However, after selecting a proper single subject, and along the way to passage, financial institutions were authorized to participate in reinsurance and insurance exchanges; the Insurance Department was authorized to hire an unspecified number of actuaries; premiums for universal life, variable or indeterminent value insurance policies were addressed; major changes in property and casualty insurance laws were included; a section of the administrative code was amended; workers compensation laws were addressed; commercial self-insurance was authorized; the security laws of Florida were amended; a few doctors were given a financial gift; medical and osteopathic practice acts were amended; an Academic Task Force was created; and the closed claims study was mandated. Many other sections that would properly be connected to liability insurance or tort reform were crafted to apply to lines or types of insurance outside the scope of liability insurance, and so-called tort reform provisions were made to apply to actions not sounding in tort.

After identifying the crisis and making clear the subject it intended to address, the Legislature loaded up the vehicle with matters not properly connected with its original subject and brought forth the legislative package that is a manifestation of all the evils condemned by Article III, Section 6.

Florida Courts have been consistent in construing Article III, Section 6, and its predecessors. The reasons for inclusion of such a section in the Constitution, the evils it is designed to protect against, and the need for such protection, have all been articulated and repeated over the years. Judicial rules for measuring each challenged law are similarly well understood and often repeated. However, in applying the rule to specific legislative enactments, the Court has ranged from a conservative position of restraining the Legislature to the liberal position which tends to encourage the very legislative mischief the constitutional provision was designed to eliminate.

An early opinion, often cited, is Colonial Inv. Co. v. Nolan, 100 Fla. 1349, 131 So. 178 (1930). Speaking to the object of constitutional limitations on legislative enactments, the Court said:

> The object of this constitutional provision, which in substance has been placed in practically all of the constitutions of the several states, was to prevent hodgepodge, logrolling, and omnibus legislation. It had become quite common for legislative bodies to embrace in the same bill incongruous matters having no relation to each other, or to the subject specified in the title, by which means measures were often adopted without attracting attention. And frequently such distinct subjects affecting diverse interests, were combined in order to unite the members who favored either in support of all, and the failure to indicate in the title the object of a bill often resulted in members voting ignorantly for measures which they would not knowingly haue approved, and not only were members thus misled, but the public also; and legislative provisions were sometimes pushed through which would have made odious by popular discussion and remonstrance if their pendency had been seasonably demonstrated by the title of the bill. Thus it was long since decided that these evils should be corrected by constitutional provisions preventing such aggregations of incongruous measures by confining each act to one subject and matter properly connected therewith, which subject should be briefly expressed io the title. Lewis' Southerland, Statutory Construction, Section 3. (Emphasis supplied)

Similar conclusions are found in State ex rel. X-Cel Stores v. Lee, 122 Fla. 685, 166 So. 568 (1936); Rouleau v. Avrach, 233 So.2d 1 (Fla. 1970); State v. Lee, 356 So.2d 276 (Fla. 1978), (in the dissent by Sundberg, J.); and other cases cited in the foregoing.

The test of duplicity of subject was said in State ex rel. Landis v. Thompson, 120 Fla. 860, 163 So. 270 (1935), to be whether or not the provisions of the bill are designed to accomplish separate and disassociated objects of legislative effort. In X-Cel Stores, supra, the Court identified as a practice to be remedied, the bringing together into one bill subjects that are diverse in their nature, and having no necessary nor appropriate

connections. Even in the two recent decisions wherein the Court upheld statutes which were complex and diverse, (but which did not rise to the level of complexity and diversity of the Act here being considered) it recognized and accepted principles announced in previous decisions. State v. Lee, 356 So.2d 276 (Fla. 1978), and Chenoweth v. Kemp, 396 So.2d 1122 (Fla. 1981).

More recently, the District Court of Appeal, Fifth District, in Williams v. State, 459 So.2d 319 (Fla. 5th DCA 1984) (Appeal dismissed, 458 So.2d 274), forthrightly applied the same tests and declared unconstitutional a 1982 legislalive enactment. Recognizing the liberal interpretation sometimes used by the Supreme Court, but reaffirming the rules of construction, Judge Sharp wrote:

> The bill in question in this case is not a comprehensive law or code type of statute. It is very simply a law that contains two different subjects or matters. . . .
>
> As we stated above, the general objective of the legislative act should not serve as an umbrella subject for different substantive matters.

Id. at 321. (Emphasis supplied)

No discussion of the applicable law of this issue would be complete without comment on opinions vis-a-vis Article XI, Section 3, Florida Constitution. That is the section which proscribes multiple subjects in proposed constitutional amendments. It provides, in relevant part:

> . . . provided that, any such revision or amendment shall embrace but one subject and matter directly connected therewith.

Acknowledging the important difference between legislative acts and constitutional amendments, as well as the difference in the phrases "matters directly

connected therewith," and "matters properly connected therewith," we nevertheless suggest there are important similarities between the two provisions of the same constitution, and that there are significant lessons in the opinions which are relevant and helpful in this case.

Both constitutional provisions speak in the same words of limitation. Both say: "shall embrace but one subject and matter. . . connected therewith." Except for the relationship between the single subject and related matters (properly v. directly) the words are the same and ought to be construed as having the same meaning whether they appear in Article III or Article XI of the Constitution.

As later mentioned, the Court, in consideration of proposed constitutional admendments, has opined that "single subject" meant single governmental function. That construction was used to support a liberal approach to a challenged proposal. Subsequently, in its two most recent decisions, there is evidence that the Court, though continuing to use the functional test, has returned to a conservative approach and, by taking propositions off of the ballot, has protected the people from the logrolling mischief that is common to both statutory and constitutional drafting exercises.

The two most notable and most recent decisions construing Article XI, Section 3, Florida Constitution, are: Fine v. Firestone, 448 So.2d 984 (Fla. 1984) and Evans v. Firestone, 457 So.2d 1351 (Fla. 1984).

Fine involved a proposal for citizens' choice on government revenue. The Court denied the people of Florida an opportunity to vote on the proposal because it found at least three subjects, in violation of Article XI, Section 3.

Significantly, the Court recognized and repeated the justification and logic for single subject requirements:

> The single-subject requirement in Article XI, Section 3, mandates that the electorate's attention be directed to a change regarding one specific subject of government to protect against multiple precipitous changes in our state constitution.

> This requirement avoids voters having to accept part of an initiative proposal which they oppose in order to obtain a change in the constitution which they support. An initiative proposal with multiple subject, in which the public has had no representative interest in drafting, places voters with different views on the subjects contained in the proposal in the position of having to choose which subject they feel most strongly about. . .
>
> In our view, the single-subject restraint on constitutional change by initiative proposals is intended to direct the electorate's attention to one change which may affect only one subject and matters directly connected therewith, and that includes an understanding by the electorate of the specific changes in the existing constitution proposed by any initiative proposal.

448 So.2d at 988,989. (Emphasis supplied)

The evil condemned in Fine is precisely the same evil in multi-subject legislative acts. Those who have the right to vote on a proposal, whether legislators or regular citizens have the constitutional right to make their decisions as to a single subject.

The Court, at some length, explained why its conservative approach to constitutional proposals and its prior liberal approach to legislative acts were appropriate. But it is noteworthy that even the dicta does not purport to change the principles to be applied in both situations.

In Evans, the constitutional proposal was to (a) limit a party's damages to his percentage of liability (abolition of the doctrine of joint and several liability); (b) mandate the entry of a summary judgment in specified cases (a mandate already in the Florida Rules of Civil Procedure); and (c) cap noneconomic damages at $100,000.00 (the same approach as in Chapter 86-160). Three easily understandable provisions, each with a similar counterpart in Chapter 86-160, (without the burden of being linked to regulatory reforms, premium rebates, rate freezes or rate rollbacks), were withheld from the ballot because they were not considered to be a single subject.

As in Fine, the Evans court was tough on logrolling:

> Where separate provisions of a proposed amendment are an "aggregation of dissimilar provisions [designed] to attract support of diverse groups to assure its passage," 448 So.2d at 988, the defect is not cured by either application of an over-broad subject title or by virtue of being self-contained.

457 So.2d at 1354.

The decision in Evans, is so relevant to the instant case that it bears further study. For example, the Court stated:

> Nor can we hold that the summary judgment provision is "directly connected" to the other two provisions. The general effect of provisions a and c is to limit the amount of damages for which any defendant will be liable. A summary judgment is a procedural mechanism whereby liability and damages may be adjudicated when material facts are undisputed. The existence of this mechanism in no way limits the generalized concepts of liability or damages. Furthermore, the provision would reach far beyond those civil actions in which liability and damages are a issue, e.g. declaratory judgments, mortgage foreclosures, dissolution proceedings. The ballot summary reveals that the purpose for including subsection b is that it would, arguably, lower litigation costs. Those costs, however, are qualitatively different from liability for damages and cannot be held to be "directly connected" for purposes of currying a "single-subject" defect.

457 So.2d at 1354. (Emphasis supplied)

Again, conceding the distinction between the two sections of our constitution which proscribe multiple subjects in a single proposal, we believe the Court in Fine and Evans, supra, has given us an insight into its thinking about the words used in both sections. More importantly, it has specifically signaled that the mixing of substance and procedure in so-called tort reform provisions is not to be tolerated.

Article III, Section 6, Florida Constitution, should be given meaning. The people have consistently placed it in the constitution of Florida, for a laudable purpose, which will be defeated unless it is construed to place a reasonable restraint on legislative logrolling. It is not all that different from its sister provision which was designed to prevent the same problem in proposed constitutional amendments and which has been held to restrain the proponents and limit their proposals to a single subject. Yet in both Lee and Chenoweth, supra, the message seems to be that the Legislature may do that which the people may not.

Appellants respectfully urge the Court to distinguish this omnibus bill, with its unrelated provisions, from those reviewed in Lee and Chenoweth and hold that this time the Legislature has gone too far.

SECOND ISSUE

SECTION 66 VIOLATES THE CONTRACTS CLAUSE AND THE DUE PROCESS AND EQUAL PROTECTION PROVISIONS OF THE CONSTITUTION

A. Section 66 is an Unconstitutional Impairment of Contracts.

The Florida Supreme Court has stated, "[i]t is axiomatic that subsequent legislation which diminishes the value of a contract is repugnant to our Constitution." Dewberry v. Auto-Owners Insurance Co., 363 So.2d 1077, 1080 (Fla. 1978). Accord, State v. Edward M. Chadbourne. Inc., 382 So.2d 293, 297 (Fla. 1980); Fleeman v. Case, 342 So.2d 815, (Fla. 1976); Yamaha Parts Distributors, Inc. v. Ehrman, 316 So.2d 557, 559 (Fla. 1975). The United States Supreme Court has also held that the retroactive application of laws so as to affect existing contracts may violate the contract clause of the United States Constitution. Allied Structural Steel Co. v. Spannaus, 438 U.S. 234 (1978); United States Trust Co. v. New Jersey, 431 U.S. 1 (1977).

Section 66, like the statute at issue in Allied Structural Steel, imposes "sudden, totally unanticipated, and substantial retroactive obligation[s]" upon the plaintiffs. 438 U.S. at 249. Section 66 is in clear violation of the United States and Florida Constitutions.

In Pomponio v. Claridge of Pompano Condominium, Inc., 378 So.2d 774, 779-80 (Fla. 1979), the Florida Supreme Court reaffirmed the "well-accepted principle that virtually no degree of contract impairment is tolerable in this state." 378 So.2d at 780. Thus,

> To "impair" has been defined as meaning to make worse; to diminish in quantity, value, excellency or strength; to lessen in power; to weaken. Whatever legislation lessens the efficacy of the means of enforcement of the obligation is an impairment.

Id. at 781 n.41 (quoting State ex rel. Women's Benefit Ass'n v. Port of Palm Beach Dist, 121 Fla. 746, 759, 164 So. 851, 856 (1935)). Using this standard, the Florida Supreme Court "has generally prohibited all forms of contract impairment." State v. Edward M. Chadbourne, Inc., 382 So.2d 293, 297 (Fla. 1980).

The Pomponio Court set forth a balancing test to be used to determine whether an impairment of contract rises to the level of a constitutional violation as follows:

> To determine how much impairment is tolerable, we must weigh the degree to which a party's contract rights are statutorily impaired against both the source of authority under which the state purports to alter the contractual relationship and the evil which it seeks to remedy.
>
> Obviously, this becomes a balancing process to determine whether the nature and extent of the impairment is constitutionally tolerable in light of the importance of the state's objective, or whether it unreasonably intrudes into the parties' bargain to a degree greater than is necessary to achieve that objective.

Id. at 780. Applying this test, the Court found unconstitutional a Florida statute that, applied retroactively, required condominium lessors -- absent the lessors' express consent in the lease -- to deposit their rent moneys into court during periods of litigation with the condominium's unit owners.

The Supreme Court of Florida articulated a three-part balancing test in the later case of United States Fidelity & Guaranty Co. v. Department of Insurance. 453 So.2d 1355, 1360-61 (Fla. 1984), where it adopted the United States Supreme Court's analysis in Energy Reserves Group, Inc. v. Kansas Power and Light Co., 459 U.S. 400 (1983). The threshold inquiry in this contract-clause analysis is "whether the state law has, in fact, operated as a substantial impairment of a contractual relationship." 453 So.2d at 1360. It is clear that "[t]otal destruction of contractual expectations is not necessary for a finding of substantial impairment." Energy Reserves Group, 459 U.S. at 411. The second step of the analysis provides that, if the law is found to operate as a substantial

impairment, the state must show that there is a significant and legitimate public purpose behind the regulation. If such a purpose is shown to exist, the Court must inquire whether the state's impairment of contract is based on "reasonable conditions" and is "of a character appropriate to the public purpose justifying [the legislation's] adoption." United States Fidelity & Guaranty Co., 453 So.2d at 1361 (quoting United States Trust Co. v. New Jersey, 431 U.S. 1, 22 (1977)). Section 66 fails to withstand constitutional scrutiny under this analysis.

(1) Section 66 Substantially Impairs Existing Contracts.

It is plain beyond dispute that Section 66 substantially impairs existing contracts of insurance. As noted above, the special credit provision of the statute purports to compel a 40% rate reduction for the period October-December 1986, thus rewriting a multitude of policies that were in force before the statute was passed. The estimated cost to insurers is some $140,000,000.00. If this is not a "substantial impairment" of contractual rights, the words have lost all meaning.

The freeze and rollback provisions of Section 66 will also deprive insurers of rights established by preexisting contracts, in cases where those contracts would permit premiums higher than those authorized by Section 66. Finally, the compulsory continuance of coverage provision deprives insurers of their contractual right to terminate, or refuse to renew, insurance policies in order to avoid the special credit or freeze requirements of the statute. Thus insurers are forced to continue in contractual relationships even where the contracts themselves give the insurer the option of withdrawing.

It is true that the extent of prior regulation in a particular industry is often considered in determining whether contracts have been substantially impaired. United States Fidelity & Guaranty Co., 453 So.2d at 1361. But that factor does not upset the conclusion that the impairment caused by Section 66 is substantial. Although the

Florida legislature has regulated the insurance industry over the years, its involvement in ratemaking was extremely limited until 1986. This is evident from a comparison of Section 9 of the Act, which sets forth detailed rate-setting guidelines, with the succinct predecessor statute which permits interference with rates set by the marketplace only where "a reasonable degree of competition" does not exist. See Fla. Stat. Section 627.062(2)(a). Thus Section 66, along with other provisions of the Act, injects heavy regulation into an area largely untouched by prior law.

Nor may Appellees successfully argue that Appellants were put on notice, prior to the passage of the Act, that their contractual rights were in danger. This case is unlike United States Fidelity & Guaranty, where the Court held that a previous statute that had required insurance companies to issue refunds -- and which was held unconstitutional because of its retroactive application -- had served notice on the companies that profits from previous years might be subject to refund. 453 So.2d at 1361. The Tort Reform and Insurance Act of 1986 has no predecessor, and the substantial, retroactive impairment effected by Section 66 comes entirely without prior notice. As the United States Supreme Court stated in finding a violation of the federal contract clause in Allied Structural Steel Co. v. Spannaus, "the statute in question here nullifies express terms of the company's contractual obligations and imposes a completely unexpected liability in potentially disabling amounts." 438 U.S. 234, 247 (1978).

Finally, the "escape clauses" included in Section 66 do not substantially lessen the impact of the impairment. Section 66(3), the main "escape clause" for the special credit provision, is largely illusory, as demonstrated above. Any insurer wishing to take advantage of the clause must, among other things, prove that its rates are "clearly inadequate" -- that is, that it is losing money on the policies -- after application of the special credit, and must risk having its contractually agreed-on rates reduced even

further than the special credit created by Section 66 would require. As to the freeze, there is no escape clause; as to the rollback, the escape clause is inadequate, as more fully explained below.

More to the point, Section 66 would substantially impair existing contracts even if it contained reasonable provisions to assure that rates were in some sense "fair." The contracts' clauses protect the rates that insurance companies agreed on with their policyholders; an insurer who is compelled to accept a lower rate has suffered a substantial impairment of his contractual rights even if he cannot prove that the rate imposed by law is "unfair." The "fact that a law is just and equitable does not authorize its enactment in the face of a constitutional prohibition". State v. Edward M. Chadbourne, Inc., 382 So.2d 293, 297 (Fla. 1980) (holding retroactive application of price-adjustment statute unconstitutional).

Section 66, without any doubt, substantially impairs existing contracts.

(2) The Substantial Impairment Caused by Section 66 is Not Justified.

Since Section 66 clearly works a substantial impairment of plaintiffs' rights, the Court must go on to determine whether the purpose of the statute justifies that impairment and whether the terms of the challenged provisions are reasonable means of achieving the purported legislative goals. This analysis will show that Section 66 is not justified and, therefore, cannot stand.

Section 2 describes the purpose of the Act as follows:

> Section 2. The Legislature finds and declares that a solution to the current crisis in liability insurance has created an overpowering public necessity for a comprehensive combination of reforms to both the tort system and the insurance regulatory system. This act is a remedial measure and is intended to cure the current crisis and to prevent the recurrence of such a crisis. It is the purpose of this act to ensure the widest possible availability of liability insurance at reasonable rates, to ensure a stable market for liability insurers, to ensure that injured persons

recover reasonable damages, and to encourage the settlement of civil actions prior to trial.

Appellants of course do not deny that recent increases in liability insurance rates are a legitimate subject of public concern. But, obviously, this does not end the inquiry. The Legislature is not free to rewrite contracts at will every time it decides that the service contracted for is getting too expensive. The contract clauses would provide virtually no protection at all if this "justification" of contract-impairing legislation were acceptable.

To be justified under the contracts clauses, an impairment of contract must be rationally designed to meet definite legislative objectives. See Pomponio, 378 So.2d at 781 (specific objectives of the challenged section "neither expressly articulated nor plainly evident from a reading of the statute"). Here, Section 66 is plainly not designed to meet any objective more specific than that of saving the legislators' constituents some money.

(3) Section 66 Imposes Unreasonable Conditions.

It is not apparent, and nothing in the statute gives any clue, why a 40% special credit (rather than 10%, 20% or 30%) was thought necessary. Similarly, the perceived need for a freeze, and a rollback to 1984 premium rates, is left unexplained. Under these circumstances, it cannot possibly be said that the terms of Section 66 impose "reasonable conditions . . . of a character appropriate to the public purpose justifying" the legislation. United States Fidelity & Guaranty Co., 453 So. 2d at 1361.

The United States Supreme Court has pointed out that the "extent of impairment is certainly a relevant factor in determining its reasonableness." United States Trust Co. v. New Jersey, 431 U.S. at 27. The "extent of impairment" resulting from Section 66 is very large. The statute modifies the central term of the contracts at issue -- the

premium level -- and modifies it drastically, initially slashing the agreed-on premiums by 40 percent. The Florida Supreme Court has not been reluctant to hold similarly radical reorderings of preexisting contractual obligations unconstitutional. See Rebholz v. Metrocare, Inc., 397 So. 2d 677, 679 (Fla. 1981) (statute requiring that condominimum maintenance agreements have certain provisions would invalidate many existing agreements and is, therefore, unconstitutional); Fleeman v. Case, 342 So. 2d 815, 818 (Fla. 1976) (applied retroactively, statute prohibiting rental escalation clauses in leases unconstitutional). See also United States Trust Co., 431 U.S. at 31, ("[A] state is not free to impose a drastic impairment when an evident and more moderate course would serve its purposes equally well.").

The compulsory continuance of coverage also deprives insurers of one of the most basic of contractual freedoms - the right to terminate a contract in accordance with its terms or to refuse to renew it. Numerous courts have struck down similar statutes under the federal contracts clause and the parallel state constitutional clauses. Yamaha Parts Distributors, Inc. v. Ehrman, 316 So.2d 557, 559 (Fla. 1975) (franchise agreement); Insurance Financial Services, Inc. v. South Carolina Insurance Co., 318 S.E.2d 10, 11 (S.C. 1984) (contracts between insurers and local agents); Smith Insurance Co. v. Grievance Committee, 424 A.2d 816, 820 (N.H. 1980) (insurer-agent agreements); Opinion of the Justices, 283 A.2d 832, 834 (Del. 1971) (insurance agency contracts); O'Connor v. Hartford Accident & Indemnity Co., 115 A. 484, 486 (Conn. 1921) (insurance policy).

The offensiveness of Section 66 under the contracts clauses may be demonstrated by comparing it to the statute at issue in Pomponio v. Claridge of Pompano Condominiums, Inc., 378 So. 2d 774 (Fla. 1979). In Pomponio, the challenged provision allowed for the retention in court of landlords' rent moneys, potentially for the entire term of a litigation. The impairment there, which the Court held impermissible, was the "potential erosion of value (at least in our persistently inflationary economy) which goes beyond mere inconvenience." 378 So. 2d at 781. In comparison, the special credit is many times worse: it effects not simply an "erosion of value" but a total loss of a substantial portion of the premiums for which plaintiffs bargained prior to the passage of the Act.

* * *

In sum, Section 66 substantially impairs plaintiffs' contractual obligations and fails entirely to meet the conditions necessary to pass constitutional muster. As the Florida Supreme Court held in Pomponio:

> [T]he balance between the state's probable objectives and its method of implementation, on the one hand, and the degree of contract impairment inflicted in furtherance of its policy, on the other, favors preservation of the contract over this exercise of the police power.

378 So. 2d at 781. Under the general rule in Florida finding substantial and unreasonable impairments abhorrent to the state and federal Constitutions, id. at 780, the special credit and cancellation provisions of the Act must be struck down.

The trial court correctly ruled that the special credit provisions unconstitutionally impair contracts, to the extent those provisions apply to policies in force prior to the effective date of the Act. It erred, however, in otherwise approving the special credit,

and in finding that the rate freeze, rate rollback and restrictions on cancellation and nonrenewal do not violate the contract clause.

B. Section 66 Violates Due Process.

Under the Fourteenth Amendment to the United States Constitution and Article 1, Section 9 of the Florida Constitution, the State may not deprive plaintiffs of "life, liberty or property without due process of law." The Supreme Court of Florida, in addressing an argument that parts of Florida's no-fault insurance law violated the two due process clauses, described the standard to be used as follows:

> The test to be used in determining whether an act is violative of the due process clause is whether the statute bears a reasonable relation to a permissible legislative objective and is not discriminatory, arbitrary or oppressive. It therefore becomes necessary for us to examine the objectives of the Legislature in enacting this statute in order to determine whether the provisions of the act bear a reasonable relation to them . . . .

Lasky v. State Farm Insurance Co., 296 So.2d 9, 15-16 (Fla. 1974) (footnote omitted); United Yacht Brokers, Inc. v. Gillespie, 377 So.2d 668, 671 (Fla. 1979); Thus, the courts require not only that there be a legitimate state interest behind the challenged statute, but that the operation of the statute be rationally related to that interest. Dade County Consumer Advocate's Office v. Department of Insurance, 457 So. 2d 495, 497 (Fla. App. 1st DCA 1984), aff'd, 11 F.L.W. 240 (1986) (rehearing pending) (striking down anti-rebate insurance statute as violative of due process). Section 66 cannot meet this requirement.

The lack of any rational relationship between Section 66 and any specific, legitimate legislative objective has already been discussed. As we have noted, an immediate 40% cut in premium rates, a rate freeze and a rollback of rates to 1984 levels are not justified by any objective other than the generalized one of saving

policyholders money. The statute is a raw example of arbitrary legislative action in taking money from one group and putting it into the pockets of another group with more votes. There is not any evidence that these particular measures were rationally chosen with relation to legitimate legislative goals.

The unconstitutional oppressiveness of Section 66 is best seen in the legislative scheme described in the special credit provision of Section 66 (1)-(3). Standing alone, arbitrary rebates of 40% of premiums charged for 1/4 of the year, without regard to what financial devastation it could cause, would be unconscionable and indefensable. Recognizing the need to provide some type of escape mechanism for those insurers that could not remain solvent after implementing the special credit program, the Legislature inserted Section 66 (2). But what of the companies that will be deprived of a fair rate of return to which they are constitutionally and statutorily entitled? They have no relief.

Section 66(3) appears to have been fashioned with those companies in mind, but it fails in that purpose. There is no relief for a company unless it can contend that implementation of the special credit "will result in a rate which is clearly inadequate under the provisions of Section 627.062, Florida Statutes . . .." A company is not entitled to make a Section 66(3) filing if the special credit wipes out every cent of its profits and contingencies. It cannot even petition for relief if after implementing the special credit it is left with a nominal profit or a profit that falls short of a lawful, fair rate of return. This impermissible and oppressive result taken from the test for clearly "inadequate" rates in the referenced Section 627.062, Fla. Stat. and provides:

> (e)(3) Rates shall be deemed inadequate if they are clearly insufficient, together with the investment income attributable to them, to sustain projected losses and expenses in the class of business to which they apply. (emphasis supplied)

No mention is made of profits, contingencies, or fair rate of return. Under this test, so long as the rebate will not result in an insufficient amount to pay losses and expenses, a company may not seek relief.

The only other test for adequacy in the referenced section is in Section (e)(5) which provides:

> A rate shall be deemed inadequate as to the premium charged to a risk or group of risks if discounts or credits are allowed which exceed a reasonable reflection of expenses, savings and reasonably expected loss experience from the risk or group of risks. (emphasis supplied)

Again, there is no mention of profits or reasonable rate of return which companies are entitled to earn.

Patently, Section 66 (1)-(3) denies both procedural and substantive due process in that it arbitrarily and oppresively deprives insurers of their property and provides no recourse for those who thereby are deprived of the opportunity to earn a fair rate of return.

The irrationality of Section 66 perhaps appears most dramatically in the rollback provision, which specifically requires insurers to compute their rates without taking any account of their loss experience since January 1, 1984. To require an insurer to set premiums without considering the last 2 1/2 years of loss experience is rather like requiring a merchant to set his prices without considering the cost to him of the goods he sells. It simply does not make sense.

The state may argue that the irrational rollback provision of Section 66(5) is saved from unconstitutionality by the "escape clause" of Section 66(6). But the test of rationality is not met by requiring insurers to calculate premiums in a totally irrational fashion, and then permitting them to demonstrate if they can to a government agency

that the resulting premium is inadequate. The legislature plainly intended that the rate calculated under Section 66(5) should be the rate charged in all but exceptional cases. It explicitly provided that "[i]t shall be the insurer's burden to "justify" any deviation from that rate.

Insurers should not have the "burden" of justifying deviations from a rate which is irrationally calculated in the first place. Moreover, in the normal case this "burden" could only be met by relying on the loss experience of the last 2 1/2 years, an approach which the statute does not appear to permit. The rollback of Section 66(5) would be largely meaningless if insurers could obtain exceptions to it under Section 66(6) by relying on the very information that Section 66(5) forbids them to rely on.

Section 66 is lacking in any rational basis, and therefore violates the due process clause.

THIRD ISSUE

SECTION 9 VIOLATES THE DUE PROCESS AND EQUAL PROTECTION PROVISIONS OF THE CONSTITUTION

For many years insurance companies authorized to transact insurance business in Florida have had their commercial lines rates reviewed and regulated under the provisions of a law that is popularly known as an open competition rating law. Inherent in that law is the notion that when there is a high degree of competition in the insurance market place the market will fix the rate, and that the Department of

Insurance should not disturb those rates without a finding that there is an insufficient amount of competition or that the rates are so low that the company will become insolvent.

This traditional approach to commercial lines ratemaking actually works. In times of high interest rates when there are opportunities for high yields on investments, the competition intensifies and rates are reduced. When those opportunities diminish and loss costs are rising, the companies are not as eager to provide coverage at discount prices and rates tend to rise. Certain critics of the insurance industry advocate restraints on ratemaking so that the rates will not react so directly to factors in the market place and will be more stable and predictable. They prevailed in the legislative halls in 1986.

Section 9 is a radical departure from existing law and will subject complex commercial lines rates to a new law that emulates the more simplistic personal lines rating law. Appellants do not here question the Legislature's wisdom in moving in this direction. Neither do we here make an "as applied" challenge to Section 9. The issue before the Court at this juncture is the issue of whether Section 9 can facially pass the due process and equal protection tests.

Due process of law is required by Article I, Section 9, Florida Constitution.

> DUE PROCESS. No person shall be deprived of life, liberty or property without due process of law, or be twice put in jeopardy for the same offense, or be compelled in any criminal matter to be a witness against himself.

The Court has held that a statute must bear a reasonable relation to a permissible legislative object, and must not be discriminatory, Johns v. May, 402 So.2d 116 (Fla. 1981), and Dade County Consumer Advocate's Office v. Department of Insurance, 1st

DCA, 457 So.2d 495 (Fla. 1984), (affirmed by Supreme Court, rehearing pending); it may not be arbitrary or oppressive, United Yacht Brokers v. Gillespie 377 So.2d 668 (Fla. 1979); it cannot be vague or ambiguous; State Ex rel. Gas Kwick, Inc. v. Conner, 453 So.2d 864 (Fla 1st DCA 1984); and D'Alemberte v. Anderson, 349 So.2d 164 (Fla. 1977).

Equal protection of the law is guaranteed to all citizens by Article I, Section 2, Florida Constitution.

> SECTION 2. Basic rights. All natural persons are equal before the law and have inalienable rights, among which are the right to enjoy and defend life and liberty, to pursue happiness, to be rewarded for industry, and to acquire, possess and protect property; except that the ownership, inheritance, disposition and pos-session of real property by aliens ineligible for citizenship may be regulated or prohibited by law. No person shall be deprived of any right because of race, religion or physical handicap.

The Supreme Court has held that all persons similarly situated must be treated similarly, Richey v. Wells, 166 So. 817 (Fla. 1936); there must be no unjust discrimination, Cahon v. Smith, 128 So.632 (Fla. 1930) and State ex rel. Hoadley v. Insurance Commissioner, 20 So. 772 (Fla. 1896); all persons within a class must be treated the same and the division into classes must bear some rational relationship to a legitimate state objective, Harber v. State, 396 So.2d 707 (Fla. 1981) citing; Sonerio v. State, 356 So.2d 269 (Fla. 1978), and Davis v. Florida Power Corp., 60 So. 759 (Fla. 1913); and the execution of a statute must not be dependent on the unbridled discretion of an individual or an unduly limited group of individuals, Dickinson v. State, 227 So.2d 36 (Fla. 1969).

Writing for the Court in Mahon v. County of Sarasota, 177 So.2d 665 (Fla. 1965), a case often cited in later decisions, Mr. Justice Roberts stated:

> The Legislature may invest administrative bodies with the power to determine facts as to which the legislative policy is to apply, provided that in doing so it "announces adequate standards to guide the ministerial agency in the execution of the powers

> delegated." Delta Truck Brokers, Inc. v. King, 142 So.2d 273 (Fla. 1962). It cannot, however, consistent with Section 1 of Article III, Fla. Const., "delegate the power to enact a law." Lewis v. Florida State Board of Health, supra, 143 So.2d 867. Here, as in Husband v. Cassell, 130 So.2d 69 (Fla. 1961), we must conclude that the statute in question is unconstitutional "in that it fails to sufficiently fix the standards to be applied and in effect delegates the application of the statute without sufficient limitations on the discretion of the (administrative body)". See, Barrow v. Holland, 125 So.2d 749 (Fla. 1960) and City of West Palm Beach v. State ex rel. Duffey, 30 So.2d 491, (Fla. 1947)

In a later case, Dickinson v. State, supra, wherein a statute was declared invalid, Mr. Justice Adkins wrote:

> The exact meaning of the requirement of a standard has never been fixed. The exigencies of modern government have increasingly dictated the use of general rather than minutely detailed standards in regulating enactments under the police power. However, when statutes delegate power with inadequate protection against unfairness or favoritism, and when such protection could easily have been provided, the reviewing court should invalidate the legislation. In other words, the legislative exercise of the police power should be so clearly defined, so limited in scope, that nothing is left to the unbridled discretion or whim of the administrative agency charged with the responsibility of enforcing the act. Mahon v. County of Sarasota, 177 So.2d 665 (Fla. 1965). (emphasis supplied)

Section 9 simply cannot pass those tests. A facial examination in the light of existing precedent leads to the conclusion that the Legislature has enacted a rating law that may have legitimate objections, but cannot reach its goals because of the failure to provide mandatory constitutional safeguards.

A. Section 9 Unlawfully Discriminates.

Discrimination is impermissible under both due process and equal protection tests. Section 9 discriminates.

First, Section 9 discriminates against those companies that provide classes of insurance that are in no way involved in any real or perceived crisis in liability

insurance. By its terms it applies to all classes of insurance except workers' compensation and employer's liability insurance and motor vehicle insurance. Also excluded from most of Section 9 are individually rated risks. This makes it applicable to property insurance, windstorm insurance, and all other classes outside the exceptions.

The Legislature very carefully crafted a statement of its purpose and defined its legitimate legislative use of police power. Then in Section 9 it went beyond its own parameters and discrimination against those outside its target.

Secondly, it discriminates against those companies providing coverages included in Section 9, by failing to impose the stringent requirements on (a) individually rated risks; (b) commercial motor vehicle risks; (c) all related classes of insurance written by surplus lines companies; and (d) self insurance groups that do not provide insurance, but nevertheless compete with authorized companies and transact business with members of the public.

Individually rated risks are those that are not rated in accordance with insurer's rates, rating schedules, rating manuals, and underwriting rules. These are big risks who do not fit neatly into the Section 9 restrictive mold. However, the insurance coverage is basically no different; the events insured against are substantially the same; and these risks are entitled to the same protection and the same regulatory oversight as other like risks. They are specifically excluded.

The exclusion of all motor vehicle insurance will predictably be labeled a mistake. Perhaps the Legislature intended to exclude only personal motor vehicle insurance which is governed by a separate rating law, but that is not the plain language used. By excluding all motor vehicle insurance, Section 9 is rendered impotent as to commercial motor vehicle insurance which is provided, in part, through commercial liability coverages. Commercial motor vehicle insurance rates would properly be

regulated but for the exclusion. The exclusion makes for illogical classifications and discriminates against the others.

Surplus lines are governed by a separate set of statutes that permit insurance companies that are not authorized to transact business in Florida to write insurance on risks that are "exportable." If an agent complies with the surplus lines law and cannot place the coverage with an authorized carrier (normally three attempts) the business is exportable and can be placed with an unauthorized carrier. The significance here is that there are two sets of classes of companies providing the same kinds of insurance in Florida. The first class consists of companies that are admitted to the state and submit to all regulation. They must submit to the provisions of Section 9. The other class is the surplus lines companies that are not governed by Section 9, and can charge what ever the traffic will bear.

Various sections of the Act authorize group self-insurance arrangements. This is not insurance because the members theoretically insure themselves. But, they do provide services to members, including administrative services and, where appropriate, reinsurance. In fact, they relate directly to the public and pose at least as great a threat to the public as authorized insurance companies. They are not, however, governed by Section 9.

B. Section 9 Delegates Unbridled Discretion.

As the Court mentioned in Dickinson, supra, statutes must not delegate unbridled discretion to an administrative agency. There must be protection against unfairness and favoritism when such protection could have been provided. Section 9 is a manifestation of the situation that concerned the Court. It provides that upon receiving a rate filing it shall review it to determine whether it provides a rate that is excessive, inadequate, or unfairly discriminatory. In making that determination the Department shall consider among other things:

1. Past and prospective loss experience within and without the state. How should it be considered? Must "prospective loss experience" be based upon past experience or may it be calculated on some other basis?

2. The degree of competition among insurers for the risk insured. What degree of competition is enough? How is the degree of competition among insurers (not self insurance funds) to be used in the administrative decision?

3. The reasonableness of the judgment reflected in filing. What is the test of reasonableness? By what standards will reasonableness be used in the administrative decision?

4. The adequacy of loss reserves. What is adequate? Is it the discounted amount necessary to pay predicted losses? Does it consider tort reform?

5. Trend factors -- what is happening to lost costs and what is likely to happen. What criteria are to be used?

6. Other relevant factors which impact upon the frequency or severity of claims or upon expenses. What other factors? Are there limits to what factors can be considered? Are there guidelines on how to consider them?

Section 9 is replete with such broad delegations of non specific powers, the net result of which is to vest in the Department of Insurance the absolute ability to pick and choose among insurance companies, giving some higher or lower rates than others and allowing some a greater or lesser profit than others.

It is not enough to argue that laws like this exist in other jurisdictions or that the incumbent Insurance Commissioner has a track record of integrity and evenhandedness. The test is whether the terms of the section are so ambiguous and so full of opportunities for subject judgment that it could be used to discriminate and treat people and companies that are similarly situated in a dissimilar manner. Any fair reading of Section 9 should convince the reader that within the broad range between

inadequate rates (less than enough to pay losses and expenses) and excessive rates (higher than required to provide a fair rate of return) there is the very real opportunity to hold some companies close to the lower or adequacy level while allowing others to drift up to the threshold of excessiveness. There is no equal protection of the law when such is possible.

For the foregoing, and other reasons, Section 9 is unconstitutional.

FOURTH ISSUE

SECTION 10 VIOLATES THE DUE PROCESS AND EQUAL PROTECTION PROVISIONS OF THE CONSTITUTION

A. Section 10 Constitutes an Improper Use of the Police Power of the State.

The Supreme Court of Florida has explicitly held that "[t]he state's police power cannot be invoked to distribute collected funds arbitrarily and discriminatorily to a special limited class of private individuals." State v. Lee, 356 So.2d 276, 279 (Fla. 1978). Yet the Florida Legislature has committed precisely such an abuse of power in enacting Section 10. Thus, Section 10 should be declared invalid, just as the comparable statute in State v. Lee was struck down.

State v. Lee involved a provision of the Florida Insurance and Tort Reform Act of 1977 that established a "Good Drivers' Incentive Fund" for the purpose of "encouraging safe driving and discouraging the abuse of driving privileges." 356 So.2d at 278. The section imposed additional fines for particular traffic violations, and provided that those moneys be deposited in the fund and then distributed to a limited class of "good drivers" who met the statutory qualifications. The class of "good," or "safe," drivers was to be composed of individuals who had "received no convictions for moving traffic

violations and who maintain[ed] bodily injury liability insurance or an acceptable substitute." Id. at 280. Those who did not meet this test fell into the class of "bad drivers," and, consequently, were considered unsafe and therefore ineligible to receive benefits from the fund.

The Florida Supreme Court found this distribution of funds to a special limited class of private individuals offensive and, accordingly, struck down the statute. In doing so, it declared:

> The state's police powers . . . are not absolute and any legislation resting on the police power, to be valid, must serve the public welfare as distinguished from the welfare of a particular group or class. United Gas Pipe Line Co. v. Bevis, 336 So.2d 560 (Fla. 1976); Liquor Store, Inc. v. Continental Distilling Corporation. 40 So.2d 371 (Fla. 1949).

Id. at 279. The Court found that no possible public purpose could justify this specialized distribution of the collected penalties, as the requirements for membership in the class of good drivers did not, in fact, reward good driving. Id. at 279, 280-81. Thus, the statute could not stand.

The distribution of "excessive" profits to a select group of policyholders called for by Section 10 of the Act suffers from the exact defects of the legislation challenged in Lee. Here is a provision that creates a specialized, limited group of "safe" policyholders: those who have participated in "risk management plans" and have been

lucky enough to have a relatively low rate of loss from accidents. Fla. Stat. Section 627.0625 (11)(a). The statute then provides that group alone with the substantial sums it arbitrarily extracts from insurers on the ground that they represent "excessive profits."

In addition to liability insurance, property insurance is included within the excess profits law. Participation in "risk management plans" will have no impact on the frequency or severity of many losses, e.g. windstorm damage from hurricanes.

As in Lee, this facially specialized legislation "is not saved by any public purpose which may have prompted the enactment." 336 So.2d at 279. See also Horsemen's Benevolent and Protective Association v. Division of Pari-Mutuel Wagering Department of Business Regulations, 397 So.2d 692 (Fla. 1981) (invalidating statute requiring payment by horsetracks to private horsemen's association because it would not further objective of benefiting the public generally). Section 10 of the Act is but another transparent attempt by the Legislature to reduce insurer earnings that it decides are too high. It does not offer a rationalization for so penalizing insurers. Nor does it justify the arbitrary qualifications that make only a select group of policyholders worthy of the benefits of the fund; the benefits of the statute depend on the number of dollars in loss a policyholder has incurred, whether the loss rate results from safety precautions or from sheer luck.

In short, this provision cannot achieve the broad public good that is necessary to save the statute. It is thus as plainly invalid as the "Good Drivers' Incentive Fund" of Lee.

B. Section 10 Violates Equal Protection.

Section 10 is defective as well because it creates statutory classifications that violate the equal protection requirements of Article 1, Section 2 of the Florida

Constitution and the Fourteenth Amendment to the United States Constitution. The test for evaluating violations of the clauses has been articulated by the Florida Supreme Court as whether the statute "bears some reasonable relationship to a legitimate state purpose ." In Re Estate of Greenberg, 390 So.2d 40, 42 (Fla. 1980), appeal dismissed, 450 U.S. 961 (1981) (federal clause); Gluesenkamp v. State, 391 So.2d 192, 200 (Fla. 1980), cert. denied, 454 U.S. 818 (1981) (same "rational basis" test applies to federal and state provisions).

As discussed above, there can be no legislative objective to justify the mysterious classifications set out in Section 10. A statute that takes substantial sums from insurers to benefit a small group of policyholders certainly is not rationally related to the goal of protecting the public from high rates. Thus, the second holding of State v. Lee, which found the drivers' fund statute invalid on equal protection grounds, applies to the instant case as well.

Furthermore, legislative classifications may be upheld only if "the distinction drawn rests on some real and practical basis in relation to the purpose of the legislation." Gluesenkamp, 391 So.2d at 200. The classes described in Section 10 lack entirely that "real and practical basis." This is not a case where the Legislature has imposed only a simple requirement to make the administration of the fund feasible -- such as one making all policyholders as of a certain date eligible for benefits. Nevertheless, the statute provides no basis for concluding that the policyholders who have a lower rate of dollar loss from accidents are deserving of special benefits, while others with a higher rate of dollar loss from accidents are not. There simply is no reasonable ground for deciding that the latter group is "safer" than the former. Faced with the identical situation in State v. Lee, the Florida Supreme Court rejected the notion that the drivers meeting the statutory qualifications were "good" and "safe"

while all other drivers were not. 336 So.2d at 280. Likewise, Section 10 violates the constitutional mandate that persons similarly situated be afforded the equal protection of the law.

CONCLUSION

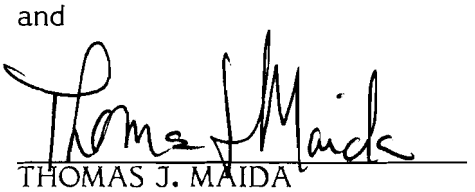
Chapter 86-160 violates Florida's constitutional proscription against laws which embrace more than one subject and matter properly connected therewith. Individual sections of the Act violate federal and state guarantees of equal protection, due process and freedom from impairment of contracts.

Appellants therefore request that the Supreme Court affirm the judgment of the trial court insofar as it invalidated part of the Act, but reverse the remainder of the judgment, and hold Chapter 86-160 unconstitutional.

Respectfully submitted,

FREDERICK B. KARL

and



THOMAS J. MAIDA
KARL, McCONNAUGHHAY, ROLAND,
MAIDA & BEAL, P.A.
Post Office Drawer 229
Tallahassee, Florida 32302
(904) 222-8121

Attorneys for Appellants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by United States Mail this 15th day of December, 1986 to the following:

Alan C. Sundberg, Esquire
George N. Meros, Esquire
F. Townsend Hawkes, Esquire
Ms. Cynthia S. Tunnicliff
Post Office Drawer 190
Tallahassee, Florida 32302

David A. Yon, Esquire
Donald A. Dowdell, Esquire
Office of Legal Services
Department of Insurance
413-B Larson Building
Tallahassee, Florida 32301

Thomas M. Ervin, Jr., Esquire
Robert K. High, Esquire
Post Office Box 1170
Tallahassee, Florida 32302

W. Donald Cox, Esquire
Post Office Box 1438
Tampa, Florida 33601

DuBose Ausley, Esquire
William Smith, Esquire
Post Office Box 391
Tallahassee, Florida 32302

William H. Adams, III, Esquire
Robert J. Winicki, Esquire
Post Office Box 4099
Jacksonville, Florida 32201

Donald Weidner, Esquire
Post Office Box 2411
Jacksonville, Florida 32203

Vincent J. Rio, Esquire
121 West Forsyth Street
Jacksonville, Florida 32202

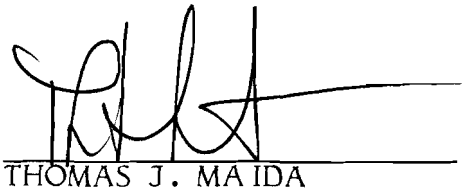
Arthur J. England, Esquire
2401 Douglas Road
Miami, Florida 33134

Robert P. Smith, Jr.
420 First Florida Bank Bldg.
Post Office Box 6526
Tallahassee, Florida 32314

Douglas A. Mang, Esquire
Post Office Box 1019
Tallahassee, Florida 32302

Dominic M. Caparello, Esquire
Post Office Box 1876
Tallahassee, Florida 32301

Francis X. Sexton, Jr., Esquire
801 Brickell Avenue, Suite 1100
Miami, Florida 33131



THOMAS J. MAIDA