

1995

Insurers Under Fire: Assessing the Constitutionality of Florida's Residential Property Insurance Moratorium After Hurricane Andrew

Jonathan Brennan Butler
j1@1.com

Follow this and additional works at: <http://ir.law.fsu.edu/lr>



Part of the [Law Commons](#)

Recommended Citation

Jonathan B. Butler, *Insurers Under Fire: Assessing the Constitutionality of Florida's Residential Property Insurance Moratorium After Hurricane Andrew*, 22 Fla. St. U. L. Rev. 731 (1995).
<http://ir.law.fsu.edu/lr/vol22/iss3/3>

This Comment is brought to you for free and open access by Scholarship Repository. It has been accepted for inclusion in Florida State University Law Review by an authorized administrator of Scholarship Repository. For more information, please contact bkaplan@law.fsu.edu.

FLORIDA STATE UNIVERSITY LAW REVIEW



INSURERS UNDER FIRE: ASSESSING THE CONSTITUTIONALITY OF
FLORIDA'S RESIDENT PROPERTY INSURANCE
MORATORIUM AFTER HURRICANE ANDREW

Jonathan Brennan Butler

VOLUME 22

WINTER 1995

NUMBER 3

Recommended citation: Jonathan Brennan Butler, Comment, *Insurers Under Fire: Assessing the Constitutionality of Florida's Resident Property Insurance Moratorium After Hurricane Andrew*, 22 FLA. ST. U. L. REV. 731 (1995).

**INSURERS UNDER FIRE: ASSESSING THE
CONSTITUTIONALITY OF FLORIDA’S RESIDENTIAL
PROPERTY INSURANCE MORATORIUM AFTER
HURRICANE ANDREW**

JONATHAN BRENNAN BUTLER

I.	INTRODUCTION AND HISTORICAL OVERVIEW	731
II.	THE MORATORIUM LAW AND ITS PROGENY	736
III.	INSURANCE ON DEMAND: THE UNCONSTITUTIONALITY OF FLORIDA’S POST-ANDREW INSURANCE REGULATION	740
	A. <i>“Going Too Far”: The Moratorium Law Takes With- out Just Compensation and Without Due Process</i>	<i>742</i>
	1. <i>Defeating Legitimate Investment-Backed Expectations</i>	<i>743</i>
	2. <i>Confiscating the Golden Twig: The Right to Control Property and Exclude Others from Its Use</i>	<i>746</i>
	3. <i>The Moratorium Law Has No Adequate Public Purpose Justifying its Confiscatory Effects</i>	<i>751</i>
	B. <i>Commandeering Contracts for Private Good: An Unconstitutional Impairment of Contracts</i>	<i>753</i>
	1. <i>The Moratorium Law Impairs Contracts Among Insurers and Policyholders.....</i>	<i>754</i>
	2. <i>The Moratorium Law Fails to Advance a Req- uisite Public Purpose</i>	<i>759</i>
	3. <i>The Moratorium Law Imposes an Unreasona- ble Restraint on Contracts.....</i>	<i>761</i>
	C. <i>The Moratorium Law Violates the Equal Protection Clause.....</i>	<i>763</i>
IV.	ALTERNATIVES FOR ENSURING AN ORDERLY MARKET FOR RESIDENTIAL PROPERTY INSURANCE	765
V.	CONCLUSION	769

I. INTRODUCTION AND HISTORICAL OVERVIEW

THE following scenario has been recreated and retold countless times, with far greater force and detail than this Comment could

hope to achieve. Suffice it to say, when Hurricane Andrew ripped through the southern tip of Florida on August 24, 1992, it wreaked physical, economic, and social havoc on an unprecedented scale. Hurricane Andrew's 150 to 180 mile-per-hour winds destroyed more than 60,000 homes and, in a matter of hours, left as many as a quarter million people homeless.¹ Andrew inflicted between \$16 to \$18 billion in property damage, making it by far the costliest natural disaster in United States history.² Miraculously, the bulk of Andrew's wrath managed to spare the greater Miami area from major damage, which insurers estimate might have tripled Andrew's already enormous price tag.³

It is a gross understatement to say that the potential destruction resulting from a hurricane of Andrew's magnitude was largely unanticipated both by the citizens of South Florida and their state and local governmental officials. After decades of relatively minimal hurricane and tropical storm activity, South Florida's coastal residents received a devastating dose of reality.⁴ The intensity and destructive power of Andrew, as well as its sustained force after making landfall, was much greater than calculated. In addition, Hurricane Andrew unearthed shoddy construction practices and significant violations of the building codes in South Florida, as numerous homes which should have remained substantially intact collapsed like matchbox houses.⁵ In the aftermath of Andrew, the displaced residents of South Florida began looking to property and casualty insurers to fund the long process of rebuilding. For the most part, the insurers answered that call, expending billions of dollars within the span of several weeks to stabilize the hardest-hit areas.⁶

However, the potential destruction of a hurricane such as Andrew was also largely underappreciated by the insurance companies operating in South Florida.⁷ Like many other businesses, insurers had capitalized for a number of years on the construction boom in South Florida by writing millions of dollars in property and casualty insur-

1. Larry Rohter, *Hurricane Andrew: Supplies Flow In for Stricken Areas, But Delivery is Slowed by Wreckage*, N.Y. TIMES, Aug. 27, 1992, at B9.

2. Thomas S. Mulligan, *Quake Payout to be Insurers' 3rd Highest*, L.A. TIMES, Feb. 7, 1994, at 1A; see also ch. 93-401 § 1, 1993 Fla. Laws 2881 (official finding by Florida Legislature that Hurricane Andrew caused more than \$16 billion of insured loss).

3. Carl Hiaasen, *Government Can't Be Trusted to Enforce Codes*, MIAMI HERALD, Dec. 30, 1993, at B1.

4. *Id.*

5. *Id.*

6. *Id.*

7. *Insurance Companies Retrench in Wake of Disasters*, L.A. TIMES, Sept. 22, 1993, at D9.

ance policies. In fact, in the race for market share many insurers underpriced their product and charged rates which were inadequate to cover potential hurricane losses.⁸ In an instant, Hurricane Andrew inflicted almost twice as much monetary loss in hurricane claims as insurers had collected in premiums in Florida over the past twenty years.⁹ For example, Allstate, one of Florida's largest property insurers, has offered insurance in the state since 1939.¹⁰ The amount of money paid out by Allstate in response to claims resulting from Hurricane Andrew exceeded the entire \$1.9 billion it had received in premiums during the *fifty-three previous years*.¹¹ Hurricane Andrew bankrupted ten of the state's insurers, meaning that the claims submitted by policyholders exceeded the capital surplus and reinsurance set aside for those claims.¹² Those insurance companies that survived quickly reanalyzed their potential risk of catastrophic loss in the event of another hurricane, using Andrew as a model in recalculating an acceptable level of exposure.¹³ The larger insurers discovered that they had simply overexposed themselves to excessive risk in the coastal regions of hurricane-prone South Florida over the years. It became clear that their level of exposure had to be cut back to reduce the risk of catastrophic loss which otherwise might also put those residential

8. See Phillip Longman, *The Politics of Wind: How Tallahassee's \$36 Billion Insurance Scheme Could Blow You Away*, FLORIDA TREND, Sept. 1994, at 33, 36 (citing a recent report by the non-partisan Congressional Budget Office which concluded that "the property and casualty industry charges too little for the risk it assumes").

9. Christina Sherry, *Florida Homeowners Feel Pinch As Insurance Companies Bail Out*, WASH. POST, June 13, 1993, at A3 (estimated \$10.8 billion collected in premiums from Florida homeowners, but \$18 billion incurred as loss).

10. Catherine Wilson, *Floridians Slap Allstate on Plan to Drop Policies*, DETROIT FREE PRESS, May 19, 1993, at A5.

11. *Id.* (emphasis added). Daunting comparisons such as this place significant doubt upon allegations that insurers who have proposed substantial cancellations and nonrenewals are acting solely out of greed and in disregard for the public's welfare.

12. Albert B. Crenshaw, *Insurance Firms Curbing Coverage for Homeowners—Coastal Areas Most Affected by Retrenchment*, WASH. POST, May 8, 1993, at E1. Some insurers were able to escape permanent insolvency as a result of capital infusions from their parent companies. For example, Prudential Property & Casualty Corp. (PRUPAC) had a capital base of \$575 million when Andrew struck, and eventually paid out claims of more than \$1.3 billion. See David Satterfield, *Prudential Sues to Drop 25,000—Insurer Challenges State's Moratorium*, MIAMI HERALD, June 30, 1993, at A1. Thus, Andrew effectively bankrupted PRUPAC not once, but twice. *Id.* Were it not for a capital infusion of \$900 million by its parent corporation, Prudential Insurance Co. of America, PRUPAC would have failed, and its policyholders would have been left empty-handed to the tune of more than \$600 million. *Id.* Note that Prudential was arguably under no legal obligation to bail out its subsidiary, and if faced with the another disaster of Andrew's magnitude, it may not be so willing to duplicate its actions.

13. *Insurance Companies Retrench in Wake of Disasters*, *supra* note 7.

property insurers out of business.¹⁴ This decision was characterized as a "survival tactic" by some insurers, citing, among other reasons, their obligations to policyholders in other states whose interests were jeopardized by the threat of insolvency to insurers in the event of another catastrophic hurricane in South Florida.¹⁵ Obviously, South Florida consumers took a more cynical view of the insurers' motives.¹⁶ Nevertheless, as a consequence of Andrew, large and small insurers alike developed plans to reduce their exposure in South Florida—plans which arguably were necessary to protect their remaining policyholders throughout the state and across the nation from a company's insolvency in the event of another catastrophic hurricane.¹⁷ Inevitably, these plans called for significant cancellations and nonrenewals of existing homeowner's policies, or in the case of some of the hardest hit insurers, withdrawal from the state's residential property and casualty insurance market altogether.¹⁸

Fully aware of the impending wave of policy cancellations and nonrenewals, the Florida Department of Insurance (DOI) began issuing emergency rules in late August 1992 to limit the number of permissible cancellations or nonrenewals of homeowner's insurance policies in certain counties such as Dade and Broward.¹⁹ Beginning in November 1992, the DOI issued several emergency rules which addressed the withdrawal by insurers from the residential property and casualty insurance market, and imposed certain terms and conditions on such withdrawals.²⁰ On May 18, 1993, in a purported attempt to ensure market stabilization for residential homeowner's insurance, the DOI issued Emergency Rule 4ER93-18, which imposed a six-month moratorium on the nonrenewal or cancellation of homeowner's insurance

14. Longman, *supra* note 8, at 36.

15. Sherry, *supra* note 9.

16. *Id.*

17. *Id.*

18. *Id.* Until the enactment of section 627.7013, *Florida Statutes* (Phaseout Statute), an insurer's right to effect cancellations and nonrenewals in connection with a formal withdrawal notice pursuant to section 624.430, *Florida Statutes* (Withdrawal Statute), was basically unaltered. However, the DOI has interpreted the Phaseout Statute as superseding section 624.430, *Florida Statutes*, thereby prohibiting an insurer's formal withdrawal from the residential property insurance market if such withdrawal is related to the risk of hurricane loss. As discussed in Part III of this Comment, this construction and application of the phaseout statute by the DOI raises a number of serious constitutional objections.

19. 4ER92-2, 18 Fla. Admin. Weekly 5371 (Sept. 11, 1992); 4ER92-3, 18 Fla. Admin. Weekly 5490 (Sept. 18, 1992); 4ER92-8, 18 Fla. Admin. Weekly 6223 (Oct. 16, 1992); 4ER92-14, 18 Fla. Admin. Weekly 6929 (Nov. 13, 1992); 4ER92-24, 18 Fla. Admin. Weekly 7517 (Dec. 4, 1992).

20. 4ER92-11, 18 Fla. Admin. Weekly 7315 (Nov. 25, 1992); 4ER93-5, 19 Fla. Admin. Weekly 969 (Feb. 26, 1993).

policies for reasons related to the risk of hurricane loss.²¹ Finally, on June 8, 1993, after prompting by Governor Lawton Chiles and the DOI, the Florida Legislature enacted chapter 93-401, *Laws of Florida* (Moratorium Law), which essentially imposed a six-month moratorium upon the cancellation or nonrenewal of homeowner's insurance policies based on the risk of hurricane claims.²² The effect of the Moratorium Law and the regulations leading up to it was to compel insurers to renew the residential property and casualty insurance policies they had in force, and to refrain from canceling any of those existing policies. This subjected the insurers' depleted resources to the risk of catastrophic loss for another twelve months, and consequently, another hurricane season.

To be sure, these drastic measures were prompted by Hurricane Andrew, and one might argue persuasively that they were justified to a certain extent by the need to protect the economic and social stability of the state and its citizens, particularly those in South Florida and along coastal regions. It is critical to note that the issues raised by the Moratorium Law do not exist in a vacuum. Anyone who owns, or hopes to own, residential property is affected at least indirectly by the regulations discussed in this Comment. The author's goal is not to diminish the significant interests of Florida's residential property and casualty insurance consumers, but rather to present a countervailing argument that Florida's recent insurance regulations unduly infringe upon the constitutional rights of insurers, and in truth benefit a discrete, identifiable class of homeowners at the expense of the rest of the residential insurance consumers throughout the state. Indeed, a close analysis of the legislation arising out of Hurricane Andrew reveals that insurers operating in Florida are being compelled by the state to subject their property and resources to an enormous risk of loss for the benefit of a discrete, identifiable class. The Legislature and the DOI have ignored or sacrificed insurers' constitutional rights in their quest to reestablish and maintain an orderly and affordable insurance market for property and casualty insurance in Florida.

This Comment will discuss the social and legal implications of Florida's Moratorium Law and subsequent legislation, as they affect both the citizens of the state (as the purported beneficiaries of the moratorium) and the insurers who must conduct business under them. The Comment will discuss recent developments in Florida concerning residential property and casualty insurance regulation after Hurricane

21. 4ER93-18, 19 Fla. Admin. Weekly 3079 (June 4, 1993). However, by virtue of section 120.54(9)(c), *Florida Statutes*, this rule, like all emergency rules, was valid for only 90 days.

22. The preamble to chapter 93-401, *Laws of Florida*, provides as its justification that "the enormous monetary impact to insurers of Hurricane Andrew claims has prompted insurers to propose substantial cancellation or nonrenewal of their homeowner's [policies]."

Andrew, and will analyze constitutional objections to these developments. The Comment will conclude that much of Florida's recent property and casualty insurance regulation borders on, and in many respects surpasses, the permissible level of constitutional infringement, and will recommend ways in which the state's insurance regulators can protect the public welfare without unduly infringing upon the constitutional rights of insurers.

II. THE MORATORIUM LAW AND ITS PROGENY

The central component of Florida's barrage of insurance regulation in response to Hurricane Andrew was the Moratorium Law.²³ The Moratorium Law contained an exception to the application of the moratorium for insurers who could establish that its proposed cancellations or nonrenewals were necessary for the insurer to avoid an unreasonable risk of insolvency.²⁴ However, the DOI interpreted this exception narrowly, and in effect took the position that chapter 93-401 banned any cancellation or nonrenewal of homeowner's policies.²⁵

23. Chapter 93-401, *Laws of Florida*, provides in relevant part:

(3) MORATORIUM IMPOSED. — Effective May 19, 1993, no insurer authorized to transact insurance in this state shall, until the expiration of this section pursuant to subsection (6), cancel or nonrenew any personal lines property insurance policy in this state, or issue any notice of cancellation or nonrenewal, on the basis of risk of hurricane claims. All cancellations or nonrenewals must be substantiated by underwriting rules filed with and accepted for use by the Department of Insurance, unless inconsistent with the provisions of this section. The Department of Insurance is hereby granted all necessary power to carry out the provisions of this section.

...

(5) PENALTY. — Any violation of this section constitutes a violation of the Insurance Code. Each cancellation or nonrenewal of a policy in violation of this section shall be considered a separate action.

(6) REPEAL. — This section is repealed on November 14, 1993.

24. This section shall not apply if the insurer can affirmatively demonstrate to the . . . [DOI] that the proposed cancellation or nonrenewal is necessary for the insurer to avoid an unreasonable risk of insolvency. In reaching this determination the . . . [DOI] shall consider the insurer's size, its market concentration, its general financial condition, the degree to which personal lines residential property insurance comprises its insurance business in this state, and the way in which these factors impact on the risk to the insurer's solvency in relation to its probable maximum loss in the event of a hurricane. *In no event shall any insurer be required to risk more than its total surplus to any objectively defined probable maximum loss resulting from one Florida hurricane loss event.* In the event that the . . . [DOI] determines that the moratorium does not apply in whole or in part and the . . . [DOI] further determines that the exception affects more than 1 percent of any class of business within the personal lines residential property insurance market in this state, the . . . [DOI] shall in order set forth a nonrenewal, cancellation, or withdrawal schedule that avoids unnecessary market disruption or exposure to the insured statewide or in any locale.

Ch. 93-401, § 4, 1993 Fla. Laws 2881 (emphasis added).

25. One insurer, Prudential Property & Casualty Insurance Co. of Indiana (PRUPAC) re-

Realizing that the Moratorium Law was merely a Band-Aid for the extensive wounds inflicted by Hurricane Andrew, the Legislature took further steps to protect the state's beleaguered homeowner's insurance market—steps which this Comment refers to as the Moratorium Law's "progeny."²⁶ In November 1993, when the initial moratorium was scheduled to expire, the Legislature met in a special session and approved a three year extension and subsequent phaseout of the moratorium.²⁷ Section 627.7013, *Florida Statutes* (Phaseout Statute), which was simultaneously created and amended by chapters 93-410 and 93-411, *Laws of Florida*, places a restriction upon the number of homeowner's policies an insurer may cancel or nonrenew annually for the purpose of reducing the insurer's risk of loss from hurricane exposure.²⁸ However, section 627.7013 provides that the statute does not prohibit any cancellation or nonrenewal of homeowner's policies for "any lawful reason *unrelated to the risk of loss from hurricane exposure*."²⁹ Although the Phaseout Statute appears on its face to provide some limited relief from the Moratorium Law for insurers seeking to reduce their exposure in South Florida, the DOI has interpreted the statute in such a liberal manner that virtually any reason given by an insurer for canceling or nonrenewing a particular homeowner's policy

quested an exemption under the Moratorium Law which was denied by the DOI. See *Prudential Property & Casualty Ins. Co. v. Department of Ins.*, 626 So. 2d 994 (Fla. 1st DCA 1993). Having gone bankrupt twice by Hurricane Andrew, PRUPAC offered two computer simulations which estimated its probable maximum losses from a single hurricane event at approximately \$1.5 billion (far in excess of its available surplus) if PRUPAC was prevented under the Moratorium Law from reducing its exposure. *Id.* at 995. Regardless, the DOI rejected its request for an exemption, and PRUPAC sought an expedited hearing in the First District Court of Appeal, as well as declaratory and injunctive relief in federal district court challenging the constitutionality of the Moratorium Law. *Id.* at 996-97. Although PRUPAC lost its action for injunctive relief and never had the opportunity to reach the merits of its constitutional challenge to the Moratorium Law, the First District Court of Appeal reversed the DOI's denial of a partial exemption to PRUPAC. *Id.* at 1000-10.

26. The use of the term "progeny" in this Comment is distinguishable from its use in the context of judicial case law, in which it refers to a line of decisions evolving from a single precedential case. However, the term as used in this Comment fairly characterizes the regulations which were promulgated subsequent to the Moratorium Law. These regulations were in essence extensions of, or complements to, the Moratorium Law and its basic objectives.

27. Ch. 93-410, 1993 Fla. Laws 7; ch. 93-411, 1993 Fla. Laws. 46.

28. FLA. STAT. § 627.7013 (1993). The Phaseout Statute provides that in any 12-month period, an insurer may not cancel or nonrenew more than five percent of its homeowner's policies, mobile home owner's policies, or personal lines residential policies within the state, or more than ten percent of its homeowner's policies, mobile home owner's policies, or personal lines residential policies within a given county, to reduce the insurer's exposure to hurricane claims. *Id.* Insurers seeking to exceed these limits on cancellations or nonrenewals within a given year must file a phaseout plan with the DOI and obtain the DOI's approval before implementing such a plan. *Id.*

29. FLA. STAT. § 627.7013 (1993) (emphasis added).

can be deemed related to the risk of hurricane loss.³⁰ Most significantly, the DOI also has construed the Phaseout Statute as superseding an insurer's right to surrender its certificate of authority and withdraw its business from the state's residential property insurance market pursuant to section 624.430, *Florida Statutes* (Withdrawal Statute).³¹ The Withdrawal Statute authorizes insurers to surrender their certificates of authority and withdraw from the state or from a specific line of insurance upon proper notice.³² Until enactment of the Phaseout Statute, and arguably even after its enactment, an insurer's right to seek cancellations and nonrenewals in connection with formal withdrawal was basically untouched by the Moratorium Law.³³ Yet, the DOI's interpretation of the Phaseout Statute effectively subjects all cancellations and nonrenewals, even those connected with an insurer's formal withdrawal from the market, to the restrictions set forth in the Phaseout Statute, and thus places an insurer's fundamental right to cease conducting business in the state at the mercy of the DOI.

30. In Proposed Rules 4-141.020(9)(a) and 4-141.021(3)(a)(3), the DOI asserts that the statutory word "unrelated" must be construed in a "liberal, wide-reaching" manner. Consequently, to be exempted from the Phaseout Statute's moratorium limits, a nonrenewal of a residential policy "must be *completely unrelated, directly and indirectly*, to reduction of risk of loss from hurricane exposure." 20 Fla. Admin. Weekly 531 (Feb. 4, 1994) (emphasis added).

31. See 20 Fla. Admin. Weekly 531, 534 (Feb. 4, 1994). A critical distinction must be made between an insurer who wishes to retain its certificate of authority and continue doing business in a given insurance market, but at a lesser volume via cancellations and nonrenewals, and an insurer who surrenders its license under section 624.430, *Florida Statutes*, and withdraws from a specific market entirely by canceling or nonrenewing policies. Section 624.430, *Florida Statutes*, authorizes insurers to surrender their certificates of authority and withdraw from a specific line of insurance upon giving the DOI proper notice. The Moratorium Law, on its face, only applied to insurers who choose to remain in the residential property insurance market and *did not* affect an insurer's right to cancel or nonrenew such policies in connection with its formal withdrawal from the market, regardless of whether that withdrawal and resulting cancellations or nonrenewals were related to the risk of hurricane loss. See ch. 93-401, 1993 Fla. Laws 2881. The Phaseout Statute, as amended by chapter 93-411, *Laws of Florida*, contains the Legislature's first reference to the Withdrawal Statute: "[n]otwithstanding any provisions of this section to the contrary, this section does not apply to any insurer who, before August 24, 1992, filed notice of its intent to discontinue its writings in this state under s. 624.430." Ch. 93-411, 1993 Fla. Laws 46. The DOI, however, has by negative inference interpreted this language as an attempt by the Legislature to preempt the Withdrawal Statute with the Phaseout Statute, thereby prohibiting withdrawing insurers from canceling or nonrenewing homeowner's policies for reasons related to the risk of hurricane loss if the insurers' notice of withdrawal was filed after August 24, 1992. See 20 Fla. Admin. Weekly 531, 534 (Feb. 4, 1994). In addition to a number of objections based on the fundamental rules of statutory construction, this blanket restriction upon an insurer's statutory right to cease doing business and withdraw its assets raises substantial constitutional objections. See *infra*, Part III. Not surprisingly, these rules have been challenged in a section 120.54, *Florida Statutes*, proceeding by several insurers, and, in fact a hearing officer from the Division of Administrative Hearings (DOAH) issued a final order on April 7, 1995 finding that a majority of DOI's proposed rule 4-141.020 constituted an invalid exercise of delegated legislative authority and was arbitrary and capricious. See *United States Fidelity & Guar. Co. v. Department of Ins.*, No. 94-1003-RP (Final Order, Apr. 7, 1995, Div. of Admin. Hearings).

32. FLA. STAT. § 624.430 (1993).

33. See ch. 93-401, 1993 Fla. Laws 2881.

Finally, after much debate and discussion between Florida's property and casualty insurers and the state regulators, the Legislature created section 215.555, *Florida Statutes*, which provided for the Florida Hurricane Catastrophe Trust Fund.³⁴ Section 215.555 imposes a mandatory assessment upon all insurers to capitalize the fund, which theoretically will act as a buffer for hurricane catastrophes which inflict damages in excess of the insurers' collective ability to pay.³⁵ Once again, the law at first glance appears to aid insurers by creating a state mandated "reinsurance fund," thereby reducing the insolvency risks that insurers have emphasized in seeking cancellations or nonrenewals.³⁶ However, when one considers that each insurer is required to pay millions of dollars as an annual assessment (depending on the size of the insurer),³⁷ necessarily leading to increased rates for consumers, it becomes apparent that section 215.555 is simply another consumer protection mechanism implemented by the Legislature at an increased cost to insurance companies and consumers alike.³⁸ While the additional cost will affect insurers and consumers statewide, the funds collected will theoretically be used primarily for the benefit of a minority of homeowners in high-risk areas of the state. Moreover, while the DOI's interpretation and application of the Phaseout Statute denies property and casualty insurers their statutory right to cease doing business in Florida—effectively chaining them to the state—the Legislature now imposes even more assessments and taxes upon the captive insurers by requiring them to capitalize the Florida Hurricane Catastrophe Trust Fund. The constitutional validity of such a regulatory scheme is suspect at best.³⁹

34. Ch. 93-409, 1993 Fla. Laws 1. The newly created section 215.555(4)(b), *Florida Statutes*, requires the fund to "reimburse the insurer for 75 percent of their losses from covered losses in excess of two times the insurer's gross direct written premium from covered policies." This state-mandated and state-owned insurance fund is the first of its kind in the United States.

35. *Id.* A number of insurers have challenged the constitutionality of section 215.555, as well as the manner in which the fund is operated and the formula, or lack thereof, used in determining the amount of the assessment each insurer is required to pay under the fund. See *Service Ins. Co. v. State Bd. of Admin.*, No. 94-3630 (filed July 29, 1994, Cir. Ct. in Leon County).

36. Ch. 93-409, 1993 Fla. Laws 1.

37. The assessments for this state-owned and state-mandated reinsurance fund are in addition to the individual reinsurance policies carried by all property and casualty insurers and the substantial premiums paid by insurers under those policies.

38. Former Insurance Commissioner Tom Gallagher revealed this exact point when he noted that "this catastrophe fund gave the [L]egislature the opportunity to get some great consumer protections in the law." David Satterfield, *South Florida Insurance Still in Crisis*, MIAMI HERALD, Nov. 13, 1993, at A1.

39. In fact, a pending lawsuit has challenged this regulatory scheme on a number of the grounds discussed in this Comment. See *Vesta Fire Ins. Co. v. State of Fla.*, No. 94-1311 (filed June 30, 1994, S.D. Fla.).

In sum, the recent flood of new insurance regulation in response to Hurricane Andrew has reshaped the landscape of residential property and casualty insurance in Florida. The state's far-reaching insurance regulations have manipulated the critical supply and demand mechanisms of the property and casualty insurance market. They have done so in a manner which violates the constitutional rights of the insurers and which places the financial stability and solvency of insurers (and consequently the financial stability and solvency of their policyholders) in a precarious position that depends entirely upon the unpredictable and unforgiving forces of nature.

III. INSURANCE ON DEMAND: THE UNCONSTITUTIONALITY OF FLORIDA'S POST-ANDREW INSURANCE REGULATION

The business of insurance strongly affects the public interest and is therefore "subject to comprehensive regulation in protecting the public welfare."⁴⁰ Insurance in its many forms has played an integral role in the development of our country and provides elements of stability and security which are necessary to some degree in any market-oriented society.⁴¹ The modern business world could not have thrived and prospered as it has in the past century without a significant insurance industry. Much like tort law, insurance acts as a mechanism for resolving disputes and providing necessary remedies so that individuals are not faced with devastating loss as a result of life's frequent misfortunes. In light of its particular status in our society, the insurance industry is arguably one of the most complex in the world.⁴² Given the pervasive impact that insurance has on our society, it is clear that both the federal and state governments have a compelling interest in ensuring the existence of an orderly market for health, life, professional liability, property and casualty, and other types of insurance. Recognizing that the complex nature of insurance lends itself to the more individualized and flexible method of regulation found at the state level, Congress passed the McCarran-Ferguson Act of 1945,⁴³ which

40. Sheeran v. Nationwide Mut. Ins. Co., 404 A.2d 625, 631 (N.J. 1979).

41. Spencer L. Kimball, *The Purpose of Insurance Regulation: A Preliminary Inquiry in the Theory of Insurance Law*, 45 MINN. L. REV. 471, 480 (1961).

42. JOHN G. DAY, U.S. DEP'T OF TRANSPORTATION, ECONOMIC REGULATION OF INSURANCE IN THE UNITED STATES iii (1970) ("[F]ew fields match in complexity that of the regulation of insurance.").

43. 15 U.S.C. §§ 1011-1015 (1988). The McCarran-Ferguson Act provides, in relevant part, that "continued regulation and taxation by the several States of the business of insurance is in the public interest." 15 U.S.C. § 1011 (1988). Although a detailed discussion of the McCarran-Ferguson Act is beyond the scope of this Comment, suffice it to say that the intended meaning of the words "business of insurance" contained in the Act has been a fertile source of litigation and scholarly comment since its enactment. See, e.g., David G. Stebing, *Insurance Regulation in Alaska: Healthy Exercise of a State Prerogative*, 10 ALASKA L. REV. 279, 284 (1993).

formally recognized state power to regulate insurance and exempted insurers from certain provisions of the federal antitrust laws.⁴⁴ As a result, the vast majority of insurance regulation has been enacted at the state level because of state interests in protecting consumers from perceived predatory practices by insurers and in ensuring consumer access to affordable insurance.⁴⁵ Indeed, the insurance industry has evolved into one of the most highly regulated industries in the country.⁴⁶

In light of the above, the right to conduct the business of insurance is arguably a privilege granted by the state, and an insurer therefore submits itself to the regulatory power of the state and agrees to conduct its business in the manner prescribed by state law.⁴⁷ However, while the right to engage in the business of insurance has traditionally been (and will likely continue to be) viewed as a privilege bestowed by the state, there is growing sentiment in almost every state that a citizen's access to various forms of insurance is no longer to be deemed a benefit or privilege, but rather an entitlement.⁴⁸ Consumers and regulators alike have increasingly looked to insurers to provide these entitlements, regardless of the cost or risk of doing so. This particularly has been true in the area of automobile insurance⁴⁹ and, as this Comment will discuss, most recently in the realm of residential property insurance. The state's right to intensely regulate the business of insurance does not, however, afford a state free reign to arbitrarily impose unduly burdensome or confiscatory requirements upon its insurers.

44. 15 U.S.C. §§ 1012-1014 (1988).

45. See, e.g., *Burstein v. State Bar of Cal.*, 693 F.2d 511, 522 (5th Cir. 1982) ("Insurance is, of course, an industry traditionally highly regulated by the state."). For example, California passed Proposition 103 in November 1988 in an attempt to fundamentally alter the state's insurance industry. See *Calfarm Ins. Co. v. Deukmejian*, 771 P.2d 1247 (Cal. 1989). In its statement of findings and purpose, Proposition 103 declared that "[e]normous increases in the cost of insurance have made it both unaffordable and unavailable to millions of Californians," and that "existing laws inadequately protect[ed] consumers and allow[ed] insurance companies to charge excessive, unjustified and arbitrary rates." *Id.* at 1250 (quoting CAL. INS. CODE § 1861.01 (West 1992)).

46. Stebing, *supra* note 43, at 284-85.

47. See, e.g., *People ex rel. Lewis v. Safeco Ins. Co. of Am.*, 414 N.Y.S.2d 823 (N.Y. Sup. Ct. 1978).

48. The recent debate over health care reform provides an excellent example. In fact, President Clinton's demand for universal coverage is somewhat analogous to the moratorium on canceling or nonrenewing residential property and casualty insurance in that it is seemingly made without regard to the tremendous costs it imposes upon the private sector, and in particular upon the millions of Americans who already have quality health care plans. Under such a scheme of regulation, the supply and demand mechanisms of the insurance industry—and of our market economy in general—give way to socialist principles and ideals.

49. See Stebing, *supra* note 43. In Florida, as in most other states, financial responsibility for motor vehicle liability is mandated by law.

Indeed, the regulations which are the focus of this Comment—the Moratorium Law and its progeny—give rise to a number of constitutional objections. Several of these objections have significant force, such as arguments that the Moratorium Law and its progeny violate the Takings Clause of the *United States Constitution*,⁵⁰ the Due Process Clause of the Fourteenth Amendment to the *United States Constitution*,⁵¹ the Impairment of Contracts Clause of the *United States Constitution*,⁵² and the Equal Protection Clause of the Fourteenth Amendment to the *United States Constitution*.⁵³ This Comment will briefly consider each of these constitutional arguments in turn.

A. *“Going Too Far”: The Moratorium Law Takes Without Just Compensation and Without Due Process*

The Moratorium Law and its recent progeny constitute an impermissible regulatory taking by the state without just compensation and violate the Fourteenth Amendment’s due process protection of property.⁵⁴ The United States Supreme Court and numerous other courts repeatedly have determined that assets and capital fall within the concept of “property” protected by the Fifth and Fourteenth Amendments to the *United States Constitution*.⁵⁵ Although the state may reasonably regulate private property (such as an insurer’s capital and assets) for the benefit of the public health, safety or welfare without infringing upon the Fifth and Fourteenth Amendments, such regula-

50. The Fifth Amendment to the *United States Constitution* provides in relevant part, “nor shall private property be taken for public use, without just compensation.” Similarly, article X, section 6 of the *Florida Constitution* provides that “[n]o private property shall be taken except for a public purpose and with full compensation.”

51. Section I of the Fourteenth Amendment to the *United States Constitution* provides in relevant part, “nor shall any State deprive any person of life, liberty, or property, without due process of law.” Article I, section 9 of the *Florida Constitution* sets forth an identical guarantee.

52. Article I, section 10 of the *United States Constitution* provides that “[n]o State shall . . . pass any . . . Law impairing the Obligation of Contracts.” Article I, section 10 of the *Florida Constitution* likewise provides that “[n]o . . . law impairing the obligation of contracts shall be passed.”

53. Section I of the Fourteenth Amendment to the *United States Constitution* provides that “[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws.”

54. It is well settled that corporations are “persons” within the meaning of the Fourteenth Amendment and thus enjoy the protections of the Due Process Clause. *E.g.*, *Grosjean v. American Press Co.*, 297 U.S. 233, 244 (1936).

55. *E.g.*, *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1002-04 (1984) (finding even intangible rights in trade secrets to be protected property); *Medical Malpractice Joint Underwriting Ass’n v. Paradis*, 756 F. Supp. 669, 675-76 (D.R.I. 1991) (finding that insurers’ capital and interest thereon are protected property).

tion may not rise to a level which unduly deprives property owners of the fundamental use, benefit, and control of their property without providing just compensation in return.⁵⁶ However, this is arguably the intent and effect of the Moratorium Law and its progeny. Indeed, these laws and regulations: (1) unconstitutionally infringe upon the legitimate investment-backed expectations of the insurers; (2) place an embargo upon insurers' capital and assets, thereby usurping the insurers' fundamental rights to control their property and exclude others from the benefit of that property; and (3) lack a proper public purpose in that they primarily benefit a discrete and identifiable class rather than the general public.

The power of the state to regulate insurance companies is not absolute, as an insurer is still entitled to due process of law.⁵⁷ An insurer's right to due process entails two important concepts. First, the Fifth Amendment to the *United States Constitution*, as applied to the states through the Fourteenth Amendment,⁵⁸ prohibits the taking of private property for public use without just compensation.⁵⁹ The taking need not be direct or de jure, but may be de facto in that it results from "a regulatory scheme so onerous and burdensome as to substantially diminish the value of the property . . . or convert the property to a public use by denying the owner of private control."⁶⁰ Second, the Fourteenth Amendment guarantees that no person shall be deprived of property without due process of law.⁶¹ Again, the deprivation need not be direct, but may consist of regulations or legislation which arbitrarily, unreasonably, and without sufficient public purpose deprive the owner of the benefits of his property.⁶² The Moratorium Law and its progeny arguably run afoul of both of these constitutional principles.

1. *Defeating Legitimate Investment-Backed Expectations*

As early as 1922, the Supreme Court recognized that state regulation which "goes too far" in affecting an owner's property interests may be unconstitutional under the Fifth Amendment.⁶³ The Court

56. See, e.g., *People ex rel. Lewis v. Safeco Ins. Co. of Am.*, 414 N.Y.S.2d 823 (N.Y. Sup. Ct. 1978).

57. *E.g.*, *Munn v. Illinois*, 94 U.S. 113 (1876).

58. See *Duncan v. Louisiana*, 391 U.S. 145, 148 (1968) (citing *Chicago, Burlington & Quincy R.R. v. Chicago*, 166 U.S. 226 (1887)).

59. *People ex rel. Lewis*, 414 N.Y.S.2d at 828.

60. *Id.*

61. U.S. CONST. amend. XIV, § 1.

62. *People ex rel. Lewis*, 414 N.Y.S.2d at 828.

63. See *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

subsequently developed this analysis in *Penn Central Transportation Co. v. City of New York*,⁶⁴ in which Justice Brennan crafted the modern standard for determining whether a governmental regulation rises to the level of a taking which must be compensated under the Fifth Amendment.⁶⁵ The Court in *Penn Central* held that if the regulation in question: (1) involves a legitimate state interest; which is, (2) reasonably advanced by the chosen means; and (3) does not result in a total diminution of value in the property (e.g., does not "go too far"), then there is no unconstitutional taking without just compensation.⁶⁶ However, the rather permissive, pro-government test set forth in *Penn Central* has been significantly constricted by the Supreme Court in several recent decisions, most notably in opinions by Justice Scalia.⁶⁷

A significant element of the Court's regulatory taking analysis is the effect a regulation has on the property owner's "distinct investment-backed expectations."⁶⁸ The Supreme Court repeatedly has held that a regulatory measure which effectively destroys investment-backed expectations constitutes a taking requiring just compensation.⁶⁹ For example, in *Ruckelshaus v. Monsanto Co.*,⁷⁰ a pesticide manufacturer challenged certain data-disclosure provisions of the Federal Insecticide, Fungicide and Rodenticide Act.⁷¹ The manufacturer asserted that those provisions constituted a taking of its trade secrets by allowing the disclosure of its pesticide's components.⁷² In assessing the manufacturer's investment-backed expectations, the Court found that the manufacturer had submitted information to the government concerning its products under the legitimate expectation of confidentiality for a period of approximately six years.⁷³ In light of the established pattern of confidentiality and cooperation that existed between the manufacturer and the government, the Court concluded that the disclosure

64. 438 U.S. 104 (1978).

65. *Id.* at 127.

66. *Id.*

67. See *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987) (requiring a tighter nexus between the governmental interest of conferring a public good and the regulation restricting use of private property); *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886 (1992) (finding the state's proffered public purpose did not justify eliminating the owner's distinct investment-backed expectations, and that the state's prohibitions on land use must instead be based upon common law nuisance which existed at the time the owner purchased the property).

68. *Penn Central*, 438 U.S. at 124; see also *Lucas*, 112 S. Ct. at 2895.

69. See *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984); see also *Medical Malpractice Joint Underwriting Ass'n v. Paradis*, 756 F. Supp. 669 (D.R.I. 1991).

70. 467 U.S. 986 (1984).

71. 7 U.S.C. § 136 (1994).

72. *Ruckelshaus*, 467 U.S. at 998.

73. *Id.* at 1011.

of the contents of those submissions was a taking of the manufacturer's property which required compensation.⁷⁴

A similar result was reached in *Medical Malpractice Joint Underwriting Ass'n v. Paradis*,⁷⁵ where members of an insurance joint underwriting association (JUA) were required to pay capital to fund operation of the JUA in the event of a deficit. At the time the insurers made these contributions, state law directed that the JUA's premium rates were to be set on an actuarially sound basis to assure a reasonable rate of return.⁷⁶ However, the state subsequently froze the JUA's rates at levels which were inadequate to cover claims and repay the member insurers' assessments. The member insurers brought suit alleging that the rate freeze constituted an unconstitutional taking of their property.⁷⁷ The *Paradis* court agreed, finding that the rate freeze unreasonably interfered with the JUA members' investment-backed expectations concerning both the return of their capital and a reasonable return of profit on that capital.⁷⁸ The court held that because no assurance was made for a fair, reasonable, and adequate compensation, the taking was unconstitutional.⁷⁹

The Moratorium Law and its progeny have an even more egregious effect on property insurers' legitimate investment-backed expectations than did the laws invalidated in *Ruckelshaus* and *Paradis*. Before the enactment of the Moratorium Law and the Phaseout Statute, insurers diverted their capital to the Florida residential property market, where policies were issued based upon the insurers' clear entitlement to non-renew those policies if the risk exposure became unacceptable, or alternatively, to withdraw from the market if need be. This was the indisputable status of the law pursuant to section 627.4133, *Florida Statutes*,⁸⁰ and section 624.430, *Florida Statutes*.⁸¹ Insurers reasonably expected that these laws would apply to their investments within the

74. *Id.* at 1013.

75. 756 F. Supp. 669 (D.R.I. 1991).

76. *Id.* at 672.

77. *Id.* at 673.

78. *Id.* at 676.

79. *Id.* at 677.

80. Section 627.4133, *Florida Statutes*, provides in relevant part:

(1) An insurer issuing a policy providing coverage for property . . . shall give the named insured at least 45 days' advance written notice of nonrenewal or of the renewal premium. If the policy is not to be renewed, the written notice shall state the reason or reasons as to why the policy is not to be renewed. . . .

(2) An insurer issuing a policy providing coverage for property, casualty . . . shall give the named insured written notice of cancellation or termination other than nonrenewal at least 45 days prior to the effective date of the cancellation or termination, including in the written notice the reason or reasons for the cancellation or termination. . . .

81. *See supra* notes 31-33 and accompanying text.

state. Thus, insurers expected their investment (and its corresponding risk) to be time-limited according to the terms of their policies, and they entered the market under the express assumption that they could withdraw from it upon compliance with certain statutory requirements.⁸² The fact that these investment-backed expectations are not only legitimate, but also critical, is best demonstrated by Hurricane Andrew itself. Post-Andrew studies assessing the risk of catastrophic loss in light of new information gained as a result of Hurricane Andrew demonstrate that the reallocation of capital by insurers is absolutely necessary to assure both their continued solvency and a profitable return.⁸³ However, at a time when insurers most need the freedom to exercise these fundamental rights, the legislature has effectively abrogated those rights by enacting the Moratorium Law and its progeny.

By abolishing property insurers' contractual and statutory rights to nonrenew policies or withdraw from the market, thereby preventing reallocation and efficient management of capital, the Moratorium Law and the Phaseout Statute have destroyed the distinct investment-backed expectations upon which insurers reasonably relied when initially making their investments. Insurers have in effect been compelled to surrender control over the use of a significant portion of their capital, and with it, the expectation of being able to reallocate that capital upon the expiration of the policies. Most significantly, the Moratorium Law and the Phaseout Statute prohibit insurers from allocating their capital resources to avoid the risk of catastrophic loss and resulting insolvency. In light of such a regulatory scheme, the destructive effect which the Moratorium Law and its progeny have upon the investment-backed expectations of the state's property insurers is readily apparent.

2. *Confiscating the Golden Twig: The Right to Control Property and Exclude Others from its Use*

The Moratorium Law and its progeny also effect a taking by abrogating an insurer's right to control its capital resources and to exclude others from the use and benefit of that property. Indeed, the U.S. Supreme Court has recognized that "one of the most essential sticks in the bundle of rights that are commonly characterized as property

82. See, e.g., *United States Trust Co. v. New Jersey*, 431 U.S. 1, 17-18 n.14 (1977); *Weldon v. All Am. Life Ins. Co.*, 605 So. 2d 911 (Fla. 2d DCA 1992) (Existing law is incorporated into a contract; thus, when issuing policies, insurers expected the existing law to apply to those policies in the future.).

83. See Satterfield, *supra* note 12.

. . . [is] *the right to exclude others.*"⁸⁴ On numerous occasions, the Supreme Court has held that the denial of this fundamental property right amounts to a taking which must be compensated.⁸⁵ For example, in *Kaiser Aetna v. United States*,⁸⁶ the Court emphasized that the "right to exclude, so universally held to be a fundamental element of the property right, falls within this category of interests that the Government cannot take without compensation."⁸⁷ In *Kaiser Aetna*, the petitioners opened a privately owned and formerly landlocked pond to the waters of the United States, thereby making the pond "navigable waters" subject to Congress' regulatory authority under the Commerce Clause.⁸⁸ The Supreme Court rejected the government's attempt to impose a navigational servitude allowing public access to the pond, and found that the imposition of such a navigational servitude, without compensation, violated the Fifth Amendment. Although the Court noted that the government had a strong interest in assuring access to and use of navigable waters, and that the public intrusion at issue was simply an access easement,⁸⁹ it nevertheless held that "the Government's attempt to create a public right of access to the improved pond goes so far beyond ordinary regulation or improvement for navigation as to amount to a taking."⁹⁰

A case more analogous to the subject matter of this Comment is *Seawall Associates v. City of New York*,⁹¹ in which the Court of Appeals of New York struck down a New York City ordinance which was intended to preserve low rent, or "single room occupancy" (SRO) housing. Believing that SRO housing was rapidly being destroyed and that there would be a shortage of housing for the poor and homeless, the city enacted ordinances which imposed a moratorium on the alteration or demolition of all SRO housing and required SRO housing owners to rehabilitate all of their units and rent them to tenants.⁹² The ordinances further provided for a "buy-out" provision allowing SRO owners to purchase an exemption from the moratorium for \$45,000 per unit, and for penalties to be imposed for non-compliance with the

84. See, e.g., *Hodel v. Irving*, 481 U.S. 704, 716 (1987) (emphasis added) (citation omitted).

85. *Hodel*, 481 U.S. at 716. See also *Kaiser Aetna v. United States*, 444 U.S. 164 (1979); *Seawall Assoc. v. City of New York*, 542 N.E.2d 1059 (N.Y.), cert. denied, 493 U.S. 976 (1989).

86. 444 U.S. 164 (1979).

87. *Id.* at 179-80.

88. *Id.* at 176-80.

89. *Id.* at 178.

90. *Id.*

91. 542 N.E.2d 1059 (N.Y.), cert. denied, 493 U.S. 976 (1989).

92. *Id.* at 1060.

moratorium.⁹³ Recognizing that “the most important of the various rights of an owner is the right of possession,”⁹⁴ the court stated that:

The question here, as in any case where government action is challenged as violative of the right to just compensation, is whether the uncompensated obligations and restrictions imposed by the governmental action forces individual property owners to bear more than a just share of obligations which are rightfully those of society at large.⁹⁵

The court held that because the SRO housing ordinance effectively *required* owners to rent their properties to individual strangers, it drastically interfered with the property owners’ rights to possess and exclude, thus constituting a physical taking under both the federal and New York Constitutions.⁹⁶ The court in *Seawall Associates* also struck the New York SRO ordinance as a regulatory taking based on the same analysis employed in *Kaiser Aetna*,⁹⁷ finding that “[e]ven if [the SRO ordinance] were not held to effect a physical taking, it would still be facially invalid as a regulatory taking.”⁹⁸ Thus, even though the SRO ordinance in *Seawall Associates* destroyed only one stick in the owner’s bundle of property rights—the right to possess and use the property—the court found a sufficiently severe deprivation of “economically viable use” to also strike the ordinance as a regulatory taking.⁹⁹ The court in *Seawall Associates* concluded that “[t]he rights to use and to possess have been abolished and, without regard to the value of the owners’ remaining interests in their buildings, that would be sufficient [to constitute a taking].”¹⁰⁰

The Moratorium Law and its progeny are functionally equivalent to the New York SRO ordinance invalidated in *Seawall Associates*. The Moratorium Law and the DOI’s construction of the Phaseout Statute completely deprive Florida’s property insurers of the right to exert control over their property. Because insurers are not free to exclude potential policyholders from coverage, the Moratorium Law prohibits insurers from using and allocating their property according to market forces. Indeed, the Moratorium Law and its progeny not only deprive

93. *Id.* at 1062.

94. *Id.* at 1063.

95. *Id.* at 1062.

96. *Id.* at 1069.

97. See *supra* notes 86-90 and accompanying text.

98. *Seawall Assoc. v. City of New York*, 542 N.E.2d 1059, 1065 (N.Y.), *cert. denied*, 493 U.S. 976 (1989).

99. *Id.* at 1066.

100. *Id.* at 1067-68.

insurers of the use and control of their property, but they do so to a degree which places an insurer's solvency at risk. In short, the Moratorium Law, much like the ordinance invalidated in *Seawall Associates*, compels an insurer, against its will, to surrender its capital resources for the pre-determined use of a discrete and identifiable class of private beneficiaries.

The United States Supreme Court recently warned that laws effecting such an unapproved surrender of property constitute a taking.¹⁰¹ In *Yee v. City of Escondido*, a California mobile home park owner challenged a rent control ordinance on the basis that, when combined with the mandates of state regulations on mobile home parks, the ordinance constituted an uncompensated taking.¹⁰² The Supreme Court held that the ordinance did not result in a taking because the park owners had voluntarily offered their property to the tenants, and could cease offering the use of its property upon proper notice. In so holding, the Court noted that:

[A]t least on the face of the regulatory scheme, neither the City nor the State compels petitioners, once they have rented their property to tenants, to continue doing so. To the contrary, the Mobilehome Residency Law provides that a park owner who wishes to change the use of his land may evict his tenants.¹⁰³

Although the Court in *Yee* rejected the physical takings claim, it acknowledged that the challenged laws could fall "within the scope of our regulatory taking cases," and opined that, "a different case would be presented were the statute, on its face or as applied, to compel a landowner to rent his property or to refrain in perpetuity from terminating a tenancy."¹⁰⁴

The Moratorium Law and its progeny present the equivalent of that hypothetical case. The regulations compel insurers to renew all outstanding policies, thereby subjecting their capital resources to the risk of continued loss against their will for the benefit of individual policyholders. As the Supreme Court in *Yee* implicitly forewarned, the mere fact that an insurer once volunteered its capital by entering the residential property insurance market does not entitle the state to place an embargo upon that capital for the benefit of private parties.¹⁰⁵ Yet, the Moratorium Law and its progeny have this effect. Indeed, the in-

101. *Yee v. City of Escondido*, 112 S. Ct. 1522 (1992).

102. *Id.* at 1526.

103. *Id.* at 1528.

104. *Id.* at 1529.

105. *See id.*

vidious nature of these confiscatory laws is best illustrated by the DOI's present interpretation of the Phaseout Statute as a superseding barrier to an insurer's statutory right of withdrawal.¹⁰⁶ Adding insult to injury, the Legislature now imposes Hurricane Catastrophe Fund assessments upon these captive insurers as "a condition of doing business in this state,"¹⁰⁷ thereby exacting an even greater regulatory taking without compensation.

However, at least one court has expressly rejected such an attempt by a state regulator to compel an insurer to continue doing business against its will. In *People ex rel. Lewis v. Safeco Insurance Co. of America*,¹⁰⁸ the New York insurance superintendent prohibited several insurers from surrendering their licenses and withdrawing from the state's automobile insurance market. The superintendent asserted that the companies' withdrawal and resulting nonrenewals would violate the state's mandatory renewal law.¹⁰⁹ The court found that this interpretation compelled the insurers to do business in the state in violation of their due process rights under the Fourteenth Amendment, and expressly held that:

Absent the most severe and grave public emergency, the State may not compel a corporation to conduct a business against its choosing. Even in the highly regulated business of insurance, the insurer must retain some choice as to how it will conduct its business. When the state controls the terms of the coverage, while denying the right to terminate or raise premiums, that choice becomes illusory [T]he fact that the defendants once submitted to government control, by applying for licenses which gave them the privilege of engaging in the insurance business in this State, does not mean that they must forever be in bondage, subject to such control.¹¹⁰

The Moratorium Law and its progeny similarly render an insurer's property interests illusory, in that they abrogate an insurer's fundamental right to cease doing business in the state and then impose new assessments against the captive insurer as a "condition" of doing business in the state. In sum, the regulatory scheme implemented by the Moratorium Law and its progeny abolishes an insurer's investment-backed expectations and infringes upon its ability to use and control its capital to such a degree as to clearly constitute an uncompensated taking under the Fifth and Fourteenth Amendments.

106. See *supra* notes 31-33 and accompanying text.

107. Ch. 93-409, § 4(a), 1993 Fla. Laws 3.

108. 414 N.Y.S.2d 823 (N.Y. App. Div. 1978).

109. *Id.*

110. *Id.* at 830 (citations omitted).

3. *The Moratorium Law Has No Public Purpose Justifying its Confiscatory Effects*

A party who suffers even a "temporary taking" is entitled to just compensation for damages incurred as a result of the seizure.¹¹¹ If the state pays just compensation, it has the authority to condemn private property and permit its use by others, provided that the taking furthers an overriding public purpose.¹¹² The requirement that the taking predominately serve a "public purpose" is the sine qua non of the constitutional exercise of this "harsh" sovereign power.¹¹³

The taking effected by the Moratorium Law and its progeny fails to meet this constitutional mandate, in that the laws make no provision for the just compensation of insurers, and are predominately for private, rather than public, benefit. The avowed purpose of the Moratorium Law is to maintain "an orderly market for property insurance" and to assure availability of coverage to Florida residents.¹¹⁴ In reality, however, the Moratorium Law forces insurers to surrender their rights to manage, invest, and reallocate their capital and surplus for the benefit of a discrete, identifiable, and closed group of individuals—their current policyholders. Furthermore, the taking of an insurer's property is not confined to the benefit of only those policyholders who would have had their coverage canceled or who are unable to find replacement coverage. Rather, the Moratorium Law presses an insurer's capital into the service of *all* of its existing policyholders, thereby benefiting a specific group of individuals regardless of whether they are truly in danger of losing their residential property insurance through cancellation or nonrenewal. Thus, the Moratorium Law not only guarantees policyholders the entitlement of having residential property insurance, but it also gives them the right to receive that insurance from the insurer of their choice—their present carriers—for a pre-established rate and time period.

The fact that the Moratorium Law fails to implement a valid public purpose is further evidenced by the existence of another mechanism which accomplishes the same objective as that of the Moratorium Law. Pursuant to chapter 92-345, *Laws of Florida*, the Legislature has provided for residential property insurance to all Florida homeowners

111. *E.g.*, *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987). As with permanent takings, temporary takings are constitutionally prohibited unless the seizure is both compensated and for a public purpose. *Id.*

112. *See Baycol, Inc. v. Downtown Dev. Auth.*, 315 So. 2d 451, 455 (Fla. 1975).

113. *See id.*

114. Ch. 93-401 § 1, 1993 Fla. Laws 2881.

unable to secure coverage in the voluntary market. The law created the Residential Property and Casualty Joint Underwriting Association (Residential JUA), which is comprised of almost all of the insurers licensed to transact residential insurance in the state.¹¹⁵ Through the Residential JUA, the state's regulators already compel the vast majority of insurers to write policies to high risk homeowners and thereby bear a proportionate share of the heightened risks and increased costs of those policies as a condition of doing business in Florida's residential property insurance market.

The existence of chapter 92-345, *Laws of Florida*, demonstrates that the Moratorium Law does not adequately rest upon the public purpose of providing all Florida residents with property insurance coverage, as the state is already fulfilling this avowed public need, albeit in a rather haphazard manner (as discussed *infra*, at Part IV). Indeed, the Moratorium Law and its progeny fail to provide a benefit to any Floridian who was uninsured before their enactment. In short, legislation which seeks to provide an entitlement to a discrete, identifiable class of private citizens at the sole expense of another discrete class of private entities lacks the public purpose necessary to support an uncompensated taking. The Moratorium Law and its progeny fall within this category of legislation.

In essence, the Moratorium Law and its progeny clearly fail to meet any of the criteria of a valid taking. The Law absolutely defeats the insurers' investment-backed expectations and effectively prohibits them from exercising their right to control and manage their capital resources efficiently and prudently. Moreover, the Moratorium Law is designed to benefit a discrete and identifiable class of individuals, and thus requires insurers to continually subject their capital and assets to the risk of catastrophic loss for the benefit of a discrete few. As such, the Moratorium Law and its progeny constitute an impermissible reg-

115. Ch. 92-345 § 6, 1993 Fla. Laws 1. The JUA law provides in relevant part:

(a) There is created a joint underwriting association for equitable apportionment or sharing among insurers of property and casualty insurance covering residential property, for applicants who are in good faith entitled, but are unable, to procure insurance through the admitted voluntary market. . . .

(b) All insurers authorized to write such insurance in this state must participate in and be members of the Residential Property and Casualty Joint Underwriting Association. Each member's portion of losses and expenses incurred must be in the proportion that the direct premiums of the member written on residential property in this state during the preceding calendar year bears to the aggregate direct premiums of all members of the association written on residential property in this state during the preceding calendar year.

The law provides for limited participation or a total exemption for the smallest of the state's residential property insurers who lack the capital resources to take on even a minimal proportion of the JUA's risk. *Id.*

ulatory taking by the state without just compensation, and violate the Fourteenth Amendment's due process protection of property.

B. Commandeering Contracts for Private Good: An Unconstitutional Impairment of Contracts

The constitutional right to enter into contracts and receive the expected benefits from those contracts without undue interference from the state is a central feature of our society.¹¹⁶ Indeed, the *United States Constitution* provides that "[n]o State shall . . . pass any . . . Law impairing the Obligation of Contracts."¹¹⁷ Acknowledging the fundamental role which contractual rights play in our market economy, the *Florida Constitution* likewise prohibits the Legislature from passing laws which impair the obligation of contracts.¹¹⁸ As a general rule under both state and federal law, the statutory rights and regulations in force at the time a contract is made are incorporated into the terms of the contract.¹¹⁹ Thus, the law as it exists at the time the contract is created controls the parties' rights in any subsequent dispute.

Before the enactment of the Moratorium Law and its progeny, insurers had a clear and indisputable right to cancel or nonrenew homeowner's property insurance pursuant to section 627.4133, *Florida Statutes*.¹²⁰ This section provides that upon giving proper notice and stating the grounds for cancellation or nonrenewal, an insurer can cancel or nonrenew any policy, thereby reducing its risk in a given line of insurance and enabling it to reallocate its capital resources to other areas.¹²¹ This fundamental contractual right is, without question, the most important right of insurers regarding their ability to manage their capital resources. At its most basic level, the Moratorium Law

116. U.S. CONST. art. I, § 10.

117. *Id.*

118. FLA. CONST. art. I, § 10. Although the language is almost identical in the Florida and federal contracts clauses, the Supreme Court of Florida has expressed its intent not to allow as much impairment under the Florida clause as would be allowed under the federal analysis. *See, e.g., Pomponio v. Claridge of Pompano Condominium, Inc.*, 378 So. 2d 774 (Fla. 1979).

119. *United States Trust Co. v. New Jersey*, 431 U.S. 1, 17-18 n.14 (1977); *Weldon v. All Am. Life Ins. Co.*, 605 So. 2d 911 (Fla. 2d DCA 1992).

120. Section 627.4133, *Florida Statutes*, provides in relevant part:

(1) An insurer issuing a policy providing coverage for property . . . shall give the named insured at least 45 days' advance written notice of nonrenewal or of the renewal premium. If the policy is not to be renewed, the written notice shall state the reason or reasons as to why the policy is not to be renewed

(2) An insurer issuing a policy providing coverage for property, casualty . . . shall give the named insured written notice of cancellation or termination other than nonrenewal at least 45 days prior to the effective date of the cancellation or termination, including in the written notice the reason or reasons for the cancellation or termination

121. *Id.*

retroactively imposes a new obligation upon insurers, one which requires the insurer to remain in a contractual relationship for a period beyond that agreed upon by the parties to the contract. In addition, it subjects the insurer's resources to continued risk of loss, all for the benefit of the policyholder. As such, the Moratorium Law impairs an insurer's rights and obligations under its contracts, and fails to do so in a constitutionally permissible manner.

The United States Supreme Court has formulated the following criteria for determining whether a state law unconstitutionally impairs contracts:

- (1) Whether the state law operates as a substantial impairment of a contractual relationship.
- (2) If so, whether the state has a significant and legitimate public purpose for the regulation, such as the remedying of a broad and general social or economic problem.
- (3) If so, whether the adjustments of the rights and responsibilities of contracting parties are based upon reasonable conditions and are of a character appropriate to the public purpose justifying the legislation's adoption.¹²²

The Supreme Court thus has adopted a rather subjective balancing test to determine when an individual's contractual obligations have been unconstitutionally impaired by the state.

Although the Florida Supreme Court has employed a similar analysis interpreting the scope of Florida's Impairment of Contract Clause, the court has stated on numerous occasions that it will not allow the degree of impairment which the federal analysis permits.¹²³ Yet, as demonstrated in the discussion *infra*, even under the Supreme Court's more restrictive analysis, the Moratorium Law and its progeny act as a substantial and irreparable impairment of an insurer's contractual rights and obligations.

1. The Moratorium Law Impairs Contracts Among Insurers and Policyholders

The Moratorium Law fails the first prong of the U.S. Supreme Court's impairment analysis, as the moratorium fundamentally alters

122. *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 411-12 (1983) (citations omitted).

123. *Pomponio v. Claridge of Pompano Condominium*, 378 So. 2d 774, 780 (Fla. 1979); see also *Geary Distributing Co. v. All Brand Importers, Inc.*, 931 F.2d 1431, 1435 (11th Cir. 1991) (recognizing earlier Florida cases holding that "[v]irtually no degree of contract impairment has been tolerated in [Florida]"), *cert. denied*, 112 S. Ct. 971 (1992).

the contracts between insurers and their policyholders. Under the terms of a residential property insurance policy, an insurer subjects its capital, for a specific premium and time period, and in an amount far greater than the premium it receives, to the risk of loss upon certain contingencies. In light of the complex nature of the insurance business, insurers must choose which risks to insure, decide what types of insurance to market, determine the proper premium to charge, manage and invest premium funds, share risks through reinsurance, establish adequate reserves, handle claims, and provide quality customer service.¹²⁴ An insurer makes these critical decisions based on its expectation that any risk it assumes can be eliminated and its capital reallocated upon expiration of the policy. This contractual right is even more critical where recent catastrophes, such as Hurricane Andrew, have altered an insurer's predictions concerning the level of risk to which its resources are being subjected. The Moratorium Law's express terms prohibit insurers from exercising this fundamental right; thus, the law acts as a substantial impairment of contracts.

This conclusion is supported by the decisions of the courts. For example, in *Treigle v. Acme Homestead Ass'n*,¹²⁵ the United States Supreme Court recognized that a contract is significantly impaired when legislation abrogates contractual rights concerning the allocation of capital. There, Louisiana law had previously required domestic building and loan associations to dedicate fifty percent of their receipts toward the payment of withdrawing members' claims whenever the association's proceeds were inadequate to pay the claims of those members within sixty days.¹²⁶ In response to the tremendous pressures of the Great Depression, the Louisiana Legislature passed a law prescribing a different scheme which was less favorable to withdrawing members.¹²⁷ The Court held this was an unconstitutional impairment of the withdrawing members' contractual rights.¹²⁸

Further support is found in *Allied Structural Steel Co. v. Spannaus*,¹²⁹ where an employer challenged a Minnesota act requiring private employers with 100 or more employees who chose to fund

124. Stebing, *supra* note 43, at 283.

125. 297 U.S. 189 (1936).

126. *Id.* at 191.

127. *Id.* at 191-92. Arguably, the stress placed upon Florida's property insurance market has not had a greater adverse effect upon societal interests than that of the Great Depression, and yet the Court in *Treigle* found this impairment impermissible even in light of the compelling interests supporting the legislation at issue in that case.

128. *Id.* at 194.

129. 438 U.S. 234 (1978).

pension plans to pay a "pension funding charge" to the state upon either terminating the plan or closing a Minnesota office. In finding that the legislation substantially impaired the employer's contractual rights, the Supreme Court emphasized the law's effect upon the employer's prior contractual freedom to reallocate capital and risk:

Here, the company's contracts of employment with its employees included as a fringe benefit or additional form of compensation, the pension plan. The company's maximum obligation was to set aside each year an amount based on the plan's requirements for vesting. The plan satisfied the current federal income tax code and was subject to no other legislative requirements. And, of course, the company was free to amend or terminate the pension plan at any time. The company thus had no reason to anticipate that its employees' pension rights could become vested except in accordance with the terms of the plan. It relied heavily, and reasonably, on this legitimate contractual expectation in calculating its annual contributions to the pension fund.¹³⁰

The *Allied* Court emphasized its prior decision in *City of Los Angeles Department of Water & Power v. Manhart*,¹³¹ which recognized an insurer's special interest in being able to manage its risk exposure and capital allocations, and found that "[t]he occurrence of major unforeseen contingencies . . . jeopardizes the insurer's solvency and, ultimately, the insureds' benefits. Drastic changes in the legal rules governing pension and insurance funds, like other unforeseen events, can have this effect."¹³² Thus, the Supreme Court has expressly noted that legislation which significantly increases the potential insolvency of an insurer by altering its obligations constitutes a substantial impairment of contracts. The Moratorium Law and its progeny impose this exact result.

The Moratorium Law also retroactively defeats the fundamental expectations of insurers under their policies. Both federal and state courts have recognized that laws retrospectively affecting a party's contractual termination or nonrenewal rights are an unconstitutional impairment of contracts.¹³³ The courts have also recognized that the retrospective imposition of new burdens upon a contracting party is

130. *Id.* at 245-46.

131. 435 U.S. 702 (1978).

132. *Id.* at 721.

133. See, e.g., *Garris v. Hanover Ins. Co.*, 630 F.2d 1001 (4th Cir. 1980) (South Carolina law abrogating an insurance company's rights to unilaterally terminate agency contracts); *Globe Liquor Co. v. Four Roses Distillers Co.*, 281 A.2d 19 (Del.), *cert. denied*, 404 U.S. 873 (1971).

an unconstitutional impairment of contracts.¹³⁴ For instance, in *Health Insurance Ass'n of America v. Harnett*,¹³⁵ the New York Court of Appeals rejected a state law requiring insurers to add maternity coverage to existing policies. Surely a regulatory scheme which abrogates an insurer's clear entitlement to cancel or nonrenew an existing policy likewise constitutes an unconstitutional impairment.

Notwithstanding the compelling logic of the foregoing authorities, advocates of the Moratorium Law will no doubt point to the few cases in which mandatory renewal laws have been upheld. For instance, in *Sheeran v. Nationwide Mutual Insurance Co.*,¹³⁶ the New Jersey Supreme Court upheld the state's "No-Fault Act," which required insurers to renew automobile insurance policies as a condition of conducting business in the state. The California Supreme Court reached a similar conclusion in *Calfarm Insurance Co. v. Deukmejian*.¹³⁷ However, a close inspection of these decisions and the circumstances upon which they were based reveals fundamental distinctions between the laws upheld in those cases and Florida's Moratorium Law and its progeny.

First, the context of these decisions was automobile insurance policies, where the primary impairment caused by the mandatory renewal laws was the imposition of a new monetary obligation that required insurers to operate at a lesser profit for the benefit of the overall public good.¹³⁸ The courts in these cases found that the impairments placed upon insurers' contracts were not substantial when balanced against the public need to have insurers carry a fair share of automobile coverage.¹³⁹ Most significantly, the insurers in these cases were not faced with the potential catastrophic loss which could occur from a major hurricane and result in an insurer's immediate insolvency. In contrast, the impairment caused by the Moratorium Law is overwhelmingly more substantial in the context of property insurance, where an insurer is not merely being required to operate at a loss or a lesser profit, but rather is being compelled to subject its entire capital resources to the risk of catastrophic loss.

134. See, e.g., *Northshore Cycles, Inc. v. Yamaha Motor Corp., U.S.A.*, 919 F.2d 1041 (5th Cir. 1990) (Louisiana law requiring motorcycle manufacturers to repurchase inventory from dealers under certain conditions); *Davenport Osteopathic Hosp. Ass'n v. Hospital Serv., Inc.*, 154 N.W.2d 153 (Iowa 1967) (modification of the cost formula by which hospitals were reimbursed by Blue Cross).

135. 376 N.E.2d 1280, 1286-87 (N.Y. 1978).

136. 404 A.2d 625 (N.J. 1979).

137. 771 P.2d 1247 (Cal. 1989).

138. See *Sheeran*, 404 A.2d at 628; *Calfarm*, 771 P.2d at 1249.

139. *Sheeran*, 404 A.2d at 631; *Calfarm*, 771 P.2d at 1262-63.

Second, and more importantly, the cases upholding the contractual impairments did not disturb the insurer's ability to withdraw its business from the state entirely if it found the nonrenewal law oppressive or unbearable. For example, in finding no unconstitutional impairment in *Calfarm Insurance Co. v. Deukmejian*, the court expressly noted that:

Proposition 103 [the renewal law] does not prevent an insurer from discontinuing its California business The initiative did not repeal [the state's statutory withdrawal provisions], and indeed recognizes the possibility that insurers may withdraw from some insurance markets by authorizing the commissioner to establish a joint underwriting authority to serve such markets.¹⁴⁰

The *Calfarm* court thus made clear that the mandatory nonrenewal law was not an unconstitutional impairment of an insurer's contractual rights, primarily because the insurer could still avoid the impairment by exercising its right to withdraw as allowed by the state insurance code.¹⁴¹

However, as previously discussed, the DOI's interpretation of the Phaseout Statute effectively forecloses this option to Florida's insurers.¹⁴² Not only has Florida passed legislation which compels insurers to participate in the Residential JUA,¹⁴³ but the DOI, by its proposed rules, now seeks to force insurers to remain in the voluntary residential property market and to continue renewing policies, regardless of the insurer's desire or need to withdraw from the market. Thus, an insurer in Florida no longer possesses even its contractual right to cancel or nonrenew policies in connection with formal statutory withdrawal—a right clearly incorporated into existing policies pursuant to section 624.430, *Florida Statutes*.¹⁴⁴ As such, the Moratorium Law and Phaseout Statute alter the regulatory landscape in a manner which enslaves an insurer's capital resources within its existing policies. Insurers neither expected nor agreed to such a condition when entering into those contracts. Consequently, the Moratorium Law and

140. *Calfarm*, 771 P.2d at 1262.

141. In fact, the California Supreme Court subsequently held that Proposition 103, the state's mandatory renewal law, did not apply to insurers seeking to perfect their statutory withdrawal from the state's insurance market. See *Travelers Indem. Co. v. Gillespie*, 785 P.2d 500, 501-02 (Cal. 1990).

142. See 20 Fla. Admin. Weekly 531, 533 (Feb. 4, 1994).

143. See ch. 92-345, 1993 Fla. Laws 1.

144. Neither the Moratorium Law nor the Phaseout Statute expressly amended or altered an insurer's right to withdraw from a particular insurance market. See ch. 93-401, 1993 Fla Laws 2881; FLA. STAT. § 627.7013 (1993).

its progeny, as interpreted and applied by the DOI, act as a substantial impairment of an insurer's contracts.

2. The Moratorium Law Fails to Advance a Requisite Public Purpose

Turning to the second prong of the Supreme Court's impairment analysis, the Moratorium Law and its progeny fail to advance a significant and legitimate public purpose. A central element in deciding if such a purpose exists is determining whether the law addresses broad societal interests, rather than favoring certain private interests over others.¹⁴⁵ For a law to pass this prong of the federal impairment analysis, the legislation must not be for the mere advantage of particular individuals, but rather for the protection of a basic interest of society.¹⁴⁶

The Moratorium Law fails to meet this challenge as it does not remedy a broad and general social or economic problem. Rather, the Moratorium favors the interests of particular individuals—those Florida property insurance policyholders who have been or may be targeted for cancellation or nonrenewal because of their choice to live in high-risk areas—over the interests of the rest of Florida's homeowners. The Moratorium Law in essence holds the capital resources of insurers hostage to the individual interests of Florida policyholders, and thus significantly reduces the capital that would otherwise be available for investment or for backing the issuance of policies to other prospective policyholders. This is especially true with regard to insurers facing the prospect of insolvency, who must reduce their overall exposure to risk in hurricane prone areas to protect the interests of both their remaining customers and their shareholders. The Moratorium Law's protection of individual interests comes at a rather high price to the majority of Florida's residential property insurance consumers, whose coverage is not targeted for nonrenewal or cancellation and who must now bear the increased risk of their insurance carrier becoming insolvent because it is unable to reduce its risk to excessive exposure.¹⁴⁷ Clearly, an insolvent insurer is of little use to its policyholders.

145. See *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 411-12 (1983).

146. See *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 242 (1978) (citing *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 445 (1934)).

147. Even those insurers who have proposed the greatest number of cancellations or nonrenewals, such as Allstate (proposed reduction of 25% of existing policies through nonrenewal) and PRUPAC (proposed reduction of approximately 33% of existing policies), will continue to

Another factor which reveals the Moratorium Law's lack of a compelling public purpose is the issue of skyrocketing insurance premiums. Given insurers' excessive exposure to nationwide catastrophic loss, they recently have sought significant rate increases.¹⁴⁸ However, the DOI's resistance to rate increases, coupled with the Moratorium Law's prohibition on cancellations and nonrenewals, aggravated the problem. Most insurers were undoubtedly compelled to some extent to seek rate increases in the aftermath of Hurricane Andrew regardless of the Moratorium Law. However, it is naive to argue that the frequency and quantity of the proposed rate increases are not connected to the Moratorium Law's prohibition on cancellations and nonrenewal. In short, because insurers are unable to get to the root of the problem by reducing their excessive risk exposure, they must seek their only other option—raising premiums substantially in hopes of quickly generating the surplus necessary to weather the next disaster.

Furthermore, insurers are not wholly to blame for the hefty rate increases they have sought, as "reinsurance [costs] ha[ve] jumped as much as 300% due to a string of disasters worldwide."¹⁴⁹ An insurer is compelled to carry a certain amount of reinsurance to protect the solvency of the insurance company, and the excess risk an insurer must carry due to the Moratorium Law drives up those reinsurance costs.

In addition, the tremendous amount of insurance fraud which occurred in the aftermath of Hurricane Andrew and other recent natural disasters has substantially affected insurers. In fact, falsified and inflated damage claims are expected to cost the insurance industry more than \$20 billion in 1994.¹⁵⁰ It is a basic principle of the marketplace that insurance companies must pass these types of costs on to the customer. Therefore, a good portion of the increased costs imposed by the Moratorium Law also fall upon the vast majority of the state's homeowners, although they receive absolutely no benefit from the moratorium, and would not have lost their coverage otherwise. In sum, the Moratorium Law, which was promulgated under the guise of the public's health, safety, and welfare, instead benefits a specific class of homeowners in certain high-risk coastal areas of the state.

insure the majority of their current policyholders. See Crenshaw, *supra* note 12. Thus, the benefit to the minority comes at the expense of the majority of policyholders who face a greater risk of having an insolvent insurance carrier if insurers are prohibited from reducing their exposure to a reasonable level.

148. See Crenshaw, *supra* note 12. Some insurers, such as Allstate, have sought rate increases of up to 60%. Note, however, that the DOI has resisted and, for the most part, denied these requests.

149. See *Insurance Companies Retrench in Wake of Disasters*, *supra* note 7.

150. Janet L. Fix, *Insurers Fear \$20 Billion Fraud Toll*, USA TODAY, June 14, 1994, at B1.

This minimal benefit to a discrete minority comes at the overall expense of the collective majority of homeowner's insurance consumers throughout the rest of the state. Consequently, the Moratorium Law and its progeny fail to pass the second prong of the federal impairment analysis.

3. *The Moratorium Law Imposes an Unreasonable Restraint on Contracts*

Even assuming arguendo that the Moratorium Law passes the first two prongs, it nevertheless fails the requirement that it be imposed with reasonable conditions and be of a character appropriate to the asserted legislative purpose. To meet this third prong of the contractual impairment test, a state law must be reasonable and necessary to the accomplishment of an important public purpose.¹⁵¹ If the asserted public purpose could have been achieved by means less intrusive upon contractual rights, the law unconstitutionally impairs those rights.¹⁵²

The Moratorium Law's asserted purpose is the maintenance of an orderly property insurance market in Florida,¹⁵³ which presumably entails the continued availability of property insurance for Florida residents. However, the Legislature has already provided for the accomplishment of this objective by enacting chapter 92-345, *Laws of Florida*, which created the Residential JUA. The Residential JUA provides coverage to high-risk homeowners who cannot secure coverage in the voluntary market, and requires all property insurers to bear part of the risk and expense of this coverage. Thus, the Residential JUA provides another means to assure residential property coverage to Florida residents. This mechanism is far less intrusive upon insurers' contractual nonrenewal and withdrawal rights than the Moratorium Law and its progeny, although it carries inherent dangers in its own right.¹⁵⁴ Granted, JUAs are not the most desirable source of residential property insurance, as they generally provide less complete coverage at a greater rate than that found in the voluntary market.¹⁵⁵ However, despite the apparent position of the Florida Legislature and DOI, there is no constitutional or statutory guarantee which entitles

151. *United States Trust Co. v. New Jersey*, 431 U.S. 1, 25 (1977).

152. *See, e.g., Ross v. City of Berkeley*, 655 F. Supp. 820, 835 (N.D. Cal. 1987).

153. Ch. 93-401, 1993 Fla. Laws 2881.

154. *See discussion infra*, Part IV.

155. This is so because coverage which must be placed in a JUA is an "involuntary risk," meaning that private insurers generally will not write a policy on the property because of an unacceptable probability of loss or damage to the property (i.e., beach-front homes located in South Florida). Theoretically, a JUA is an insurer of "last resort," and the coverage provided

Florida residents to the optimal or most affordable property insurance. Rather, a Residential JUA, if structured and operated properly, provides a workable framework for ensuring that high-risk homeowners—who are the true beneficiaries of the Moratorium Law—can secure adequate property insurance until the voluntary market stabilizes.

The Residential JUA allocates its expenses and losses among all Florida residential property insurers in proportion to market share, and therefore provides availability of coverage without the Moratorium Law's disproportionate impact upon certain insurers who have excessive exposure to risk from catastrophic losses. More significantly, insurers have prior notice that they must participate in the JUA as a condition of doing business in the state, unlike the retroactive impairment of the insurers' contractual obligations caused by the Moratorium Law and its progeny. Although Florida's Residential JUA (as operated by the DOI) is increasingly becoming more of a disease than a cure, it offers an adequate, if not ideal, mechanism by which to ease the state's property insurance woes without unnecessarily intruding upon the contractual rights of insurers. Alternative mechanisms such as the JUA and other potential regulatory schemes already meet the Legislature's goals, and are far less intrusive and oppressive than the Moratorium Law and the Phaseout Statute. In essence, the Moratorium Law and its progeny eliminate an insurer's contractual rights of nonrenewal and withdrawal simply to achieve the same ends as the Residential JUA. Thus, the Moratorium Law and its progeny fail to satisfy the third prong of the federal impairment analysis.

In sum, both the Moratorium Law and the Phaseout Statute, as interpreted and applied by the DOI, substantially (if not irreparably) impair an insurer's contractual rights of nonrenewal and withdrawal by subjecting its capital resources to continued catastrophic loss. The retrospective imposition of this onerous obligation upon insurers primarily serves the interests of a particular class of individuals—current policyholders faced with nonrenewal or cancellation—at the significant expense of other homeowners throughout the state, and thus fails to serve a broad social purpose. The asserted purposes of the Moratorium Law and its progeny can be achieved more fairly and with far less disruption to the contractual rights of insurers by the Residential

by the JUA is not intended to compete with the private insurance market. Because insurers are forced by law to carry a proportionate share of the increased risk and expense of underwriting JUA risks, the coverage must necessarily be at a higher rate and with less complete coverage in an attempt to contain the risk of loss assumed by insurers.

JUA, or improved variations thereof. When balanced against the actual underlying interests it proposes to protect, the Moratorium Law fails to qualify as a reasonable regulation or impairment of property insurers' contractual rights, and is therefore unconstitutional under the federal Contract Clause. Since Florida courts are even less tolerant of contractual intrusion than are the federal courts, the Moratorium Law and its progeny also violate Florida's Contract Clause.¹⁵⁶

C. *The Moratorium Law Violates the Equal Protection Clause*

A final constitutional objection to the Moratorium Law is presented by the Equal Protection Clause of the Fourteenth Amendment, which provides that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws."¹⁵⁷ In essence, the Moratorium Law and its progeny compel property insurers doing business in the state to commit capital to Florida and its resident policyholders, thereby restricting the amount of capital available to write insurance coverage in other states. This embargo of capital by the state of Florida has the economic effect of both restricting the supply of insurance and raising the price of insurance in other states. This in turn causes injury to non-Florida residents attempting to purchase insurance from insurers subjected to the Moratorium Law. Moreover, the increased risk of insolvency faced by insurers under the Moratorium Law not only unduly prejudices existing policyholders in Florida, but also prejudices policyholders in other states whose interests in having a healthy, solvent insurance carrier are thereby jeopardized. The effect of the Moratorium Law and the Phaseout Statute is to control the allocation of an insurer's capital resources, and to prohibit the removal of those resources from the state at the expense of existing and potential policyholders in other states. Such a regulatory scheme discriminates against citizens of other states on the basis of their residency, and thus offends the Equal Protection Clause.

A state law which discriminates on the basis of residence violates the Equal Protection Clause unless the statute has a legitimate state purpose and is rationally related to the achievement of that purpose.¹⁵⁸ In making this determination, a court must analyze two issues: (1) whether the challenged legislation has a legitimate state purpose, and (2) whether it is reasonable for lawmakers to believe that the use of the challenged legislation would promote that purpose (i.e., whether

156. *Pomponio v. Claridge of Pompano Condominium*, 378 So. 2d 774 (Fla. 1979).

157. U.S. CONST. amend. XIV, § 1.

158. *Western & S. Life Ins. Co. v. State Bd. of Equalization*, 451 U.S. 648, 666-67 (1981).

the means are rationally related to the purpose of the legislation).¹⁵⁹ As this Comment will demonstrate, the Moratorium Law and its progeny fail to support a legitimate state purpose. The author concedes that assuming *arguendo* that the Moratorium Law and its progeny were to pass the first prong of the equal protection analysis, it presumably also would pass the second prong of the analysis in light of the Supreme Court's traditionally liberal "rationally related" test.¹⁶⁰

An application of the Equal Protection analysis to the Moratorium Law is controlled by two decisions of the Supreme Court which set forth the parameters for determining whether a statute which discriminates on the basis of residence promotes a legitimate state purpose. In *Metropolitan Life Insurance Co. v. Ward*,¹⁶¹ the Supreme Court struck down an insurance regulatory scheme which was based on the state's interest in promoting domestic business and encouraging capital investment in the state. The Court found that these purposes were not legitimate when furthered by a statute that discriminated against non-resident insurers, and held that the Equal Protection Clause prohibits a state from favoring its own residents "by taxing foreign corporations at a higher rate solely because of their residence."¹⁶² The central premise of *Ward* is that, to pass constitutional muster under the Equal Protection Clause, the purpose of a discriminatory statute such as the Moratorium law must be other than to protect a state's own citizens or industry.¹⁶³ Simply put, a statute which discriminates based on residence for the purpose of protecting a state's own residents lacks a legitimate state purpose.

Under the reasoning in *Ward*, the Moratorium Law and its progeny lack the requisite legitimate state purpose. As previously noted, the Moratorium Law's embargo upon an insurer's capital resources protects a subset of Florida homeowners in disregard for the adverse effects such an embargo has on an insurer's existing and potential policyholders in other states. Consider the severe adverse effect which would befall Florida's residents if other states passed moratorium laws which prevented insurers from managing and reallocating their resources. Most insurers would not and could not conduct the business of property insurance under such a uniform confiscatory regulation scheme.

The Moratorium Law's lack of a legitimate state purpose under

159. *Id.* at 668.

160. *See, e.g., Williamson v. Lee Optical*, 348 U.S. 483 (1955).

161. 470 U.S. 869 (1985).

162. *Id.* at 878 (citations omitted).

163. *Id.* at 875.

Equal Protection Clause analysis is further illustrated by *Western & Southern Life Insurance Co. v. State Board of Equalization*.¹⁶⁴ In *Western*, the Supreme Court examined California's retaliatory tax structure to determine whether a tax on insurance premiums assessed against foreign insurers violated the Equal Protection Clause.¹⁶⁵ The Court upheld the statute, finding that the *effect* of the tax structure was to *deter barriers* to interstate commerce through the promotion of interstate commerce by discouraging other states from imposing laws which burdened out-of-state companies.¹⁶⁶ Thus, the Court found that the statute had a legitimate state purpose under the Equal Protection Clause because its effect was to promote, rather than burden, the free flow of interstate commerce.¹⁶⁷

In contrast, the effect of both the Moratorium Law and the Phase-out Statute is to place an embargo upon an insurer's capital resources, thereby erecting a barrier which absolutely prevents the flow of capital resources from Florida to other states. This result effectively discriminates in favor of Florida residents, without regard to the impact or effect it has on residents in other states. As such, the Moratorium Law and its progeny lack a legitimate state purpose and therefore violate the Equal Protection Clause.

IV. ALTERNATIVES FOR ENSURING AN ORDERLY MARKET FOR RESIDENTIAL PROPERTY INSURANCE

A review of any daily newspaper reveals that Florida is not alone in its concern over the apparent disarray of its property insurance market. Almost every state in the country, particularly coastal states, is experiencing some type of crisis in its property insurance market. In states such as Hawaii, Louisiana, Delaware, Maryland, California, and Virginia, property insurance is increasingly more expensive and less available.¹⁶⁸ Surely, the temptation to follow Florida and enact moratorium laws or mandatory nonrenewal laws must be great. Nevertheless, state regulators must resist this course as it has a potentially devastating effect on the market for residential property insurance. Property insurers simply cannot be compelled to subject their capital resources to an unreasonable risk of excess exposure at the whim of state legislatures. One can imagine the long-term market disarray which will result if state legislatures throughout the nation rush to enact residential property insurance moratoriums every time a cata-

164. 451 U.S. 648 (1981).

165. *Id.* at 649-50.

166. *Id.* at 673-74.

167. *Id.*

168. See Crenshaw, *supra* note 12.

strophic hurricane, earthquake or flood occurs. Insurers cannot, and undoubtedly will not, routinely conduct business under such confiscatory conditions. The DOI's recent attempts to chain insurers to the state via the Moratorium Law and its progeny and then hold down the price of property insurance in Florida despite huge increases in its market value threaten Florida's economic future. If history is indeed the best predictor of the future, insurers can only imagine what oppressive and confiscatory regulation will be imposed the next time a catastrophic hurricane strikes the Florida coast.

The Residential JUA has the potential to fill the involuntary market equitably until the voluntary market stabilizes, as it requires insurers to contribute equally to any losses and thereby ensures that the burden of maintaining an orderly market for insurance is distributed proportionately among insurers. The Residential JUA is and should be a short-term mechanism which provides coverage to only the most deserving consumers until they can assimilate into the voluntary market. Unfortunately, former Insurance Commissioner Tom Gallagher and the Residential JUA Board of Directors he appointed allowed the Residential JUA to issue underpriced and undercapitalized insurance at a startling rate.¹⁶⁹ Moreover, the JUA's (including the Florida Property and Casualty JUA or the "Condo JUA" as it is commonly known) are so competitive that "people who don't even have a risk of losing their insurance are canceling their policies and signing up."¹⁷⁰ Former Commissioner Gallagher's willingness to allow the Residential JUA to write coverage at pre-Andrew rates to all comers threatened to transform the Residential JUA into "the disease which it was supposed to cure."¹⁷¹ The Legislature and Mr. Gallagher essentially created "the Florida Insurance Company," but it is an insurer which is not subject to the state's solvency regulation and which basically has no capital. In 1994, the Residential JUA was the second largest underwriter of homeowners' policies in the state, and its loss exposure was well over \$40 billion.¹⁷² Given that almost every insurer doing business in the state becomes directly liable for this loss exposure based on its percentage of market share, there is a overwhelming disincentive for in-

169. See Longman, *supra* note 8, at 32. Longman has noted that the JUA's are "handing out underpriced and undercapitalized insurance in a manner reminiscent of the way Boss Tweed once gave away Election Day turkeys." *Id.*

170. *Id.* (quoting state Rep. John F. Cosgrove, Dem., Miami).

171. In fact, the Residential JUA requested a 24% premium increase for homeowner's rates in the early summer of 1994. *Id.* After holding the request for several months, Mr. Gallagher finally authorized a 12% increase. *Id.* On October 10, 1994, after losing his bid for governor by finishing third in the Republican primary, Mr. Gallagher ordered the Residential JUA to raise its rates an average of 24%. *Id.*

172. *Id.*

surers to begin writing new homeowner's coverage in the state.¹⁷³ Thus, the DOI's recent regulatory actions have only exacerbated the hesitancy of insurers to begin reinvesting in Florida.

Florida's legislators must place specific restrictions upon the Residential JUA and the Condo JUA so that they can function as insurers of last resort, the role they were designed to fill in the first place. This includes strict eligibility standards and mandatory premiums which are higher than those available in the voluntary market. Residential JUA coverage should be available only to consumers whose policies have been canceled by private insurers and who cannot get a new quote in the voluntary homeowner's insurance market, and its availability must be restricted to consumers in high-risk coastal areas who cannot secure coverage otherwise. Moreover, the Residential JUA must be able to charge actuarially sound premiums so that it can build up some meaningful level of surplus to meet a portion of its obligations when the next hurricane strikes and policyholders come calling. Although the DOI has finally allowed premiums to rise to some extent,¹⁷⁴ it may be too little too late. Finally, the DOI and the Residential JUA must develop an aggressive program aimed at depopulating the JUA and assimilating its policyholders into the voluntary market. In short, the Legislature and the DOI must focus on providing new incentives, rather than new burdens and obligations, to lure existing insurers back into the market and increase the potential for new insurers filling niche areas of the market. This requires that insurers be permitted to reduce their risk exposure when experience demonstrates that it has exceeded acceptable levels.

For example, an alternative available to Florida's insurance regulators might have been to enact legislation which allowed insurers to cancel or nonrenew a significant percentage of policies (e.g., at least twenty-five to thirty percent) in critical areas over the next two or three years to allow insurers to reduce their overwhelming risk of catastrophic loss quickly in hurricane prone areas. This likely would have provided sufficient time for displaced policyholders in these areas to find replacement policies in the voluntary market or seek coverage in a properly operated Residential JUA without overburdening it. Although the Phaseout Statute authorizes insurers to reduce a minimum percentage of their risk annually, it does not provide enough immediate relief to protect insurers from the risk of insolvency in the next few hurricane seasons. Most experts agree that Florida's residential

173. *Id.*

174. See *Gallagher Raises Rates as Insurance for State*, PALM BEACH POST, Nov. 12, 1994, at A22.

property insurance market will stabilize and rebound in a few years.¹⁷⁵ In fact, Robert Hunter, former president of the National Insurance Consumer Organization and a leading proponent of the Moratorium Law, has acknowledged that companies will gradually reenter the market as prices rise and the fear of hurricanes abates.¹⁷⁶ The state's insurance regulators could have, and should have, provided for an improved Residential JUA to fill the involuntary market during this time period without resorting to legislation which runs rampant over the constitutional rights of insurers and places their continued existence in jeopardy.

At a minimum, it must be remembered that the fundamental role of state insurance regulators is to ensure the solvency of insurers and prevent fraudulent behavior.¹⁷⁷ The goals of residential property insurance availability and affordability are secondary to these critical objectives, as these goals can be equalized and provided for to a greater degree by a competitive free market for insurance.¹⁷⁸ In fact, insurance commissioners in other states have commented that Florida's insurers are prudently trying to reduce their exposure and thus protect their solvency for the benefit of their remaining policyholders.¹⁷⁹ As one insurance expert has stated, "[t]hese companies cannot have these exposures next hurricane season To lock them into these hot spots is the most ludicrous and dangerous thing you can do."¹⁸⁰

Unfortunately, the Moratorium Law and its progeny evidence the Florida Legislature's and DOI's failure to heed this advice and fulfill the primary objective of their regulatory duties. Indeed, former Insurance Commissioner Tom Gallagher himself has admitted that the Moratorium Law forces some insurance companies to carry risks they may not be able to cover.¹⁸¹ Thus, rather than pursuing steps to ensure the solvency of insurers and reach a compromise between insurers' interests and those of the public, the Legislature and the DOI have per-

175. David Satterfield, *Consumer Leader Says Time May Heal Insurance Crisis*, MIAMI HERALD, July 28, 1993, at C1.

176. *Id.*

177. Stebing, *supra* note 43, at 280 (citing R. MEHR ET AL., PRINCIPLES OF INSURANCE 714 (1980)).

178. *Id.*

179. See *Insurance Companies Retrench in Wake of Disasters*, *supra* note 7 (quoting Massachusetts Insurance Commissioner Linda Ruthardt as saying that "[i]t's much fairer than ignoring that [risk] and having companies go insolvent").

180. Mark Silva, *Insurance Cutbacks Inevitable, Expert Says*, MIAMI HERALD, May 28, 1993, at A1 (quoting John Snyder, a senior analyst at A.M. Best, a New Jersey company that rates the health of insurance companies).

181. Satterfield, *supra* note 12.

sisted in subjecting residential property and casualty insurers and the majority of their policyholders to the risk of ruin in the event of another catastrophic hurricane. One commentator has noted that

[w]hile Gallagher and other Florida policymakers have succeeded in keeping property insurance not only available but relatively cheap in the short-term, their use of government fiat to accomplish this is driving private insurance capital out of Florida and threatening to impose huge, unnecessary and inequitable costs on the future.¹⁸²

This agenda is entirely for the benefit of a discrete and identifiable class of individuals who choose to live in high-risk coastal areas. And although Florida managed to escape the assault of a catastrophic hurricane in 1994, the considerable damage inflicted by tropical storms Alberto, Beryl and Gordon during the past season serves as an ominous reminder that another hurricane of Andrew's magnitude will be lurking off Florida's coast sometime in the future. Yet, as the hurricane season approaches once again, the state's property and casualty insurers have been pushed out on a limb by the Moratorium Law and its progeny, and have been left hanging precariously in the wind.

V. CONCLUSION

As this Comment has demonstrated, the issues surrounding the Moratorium Law and its progeny are not black and white, and the interests of Florida's residential property insurers are not necessarily adverse to the majority of the state's homeowners, as the DOI would have insurance consumers believe. Rather, as one state senator has opined, "if you don't have a good, healthy insurance industry, you're not on the side of the consumer."¹⁸³ The existence of healthy, solvent residential property insurers is the key to reestablishing a stable market for homeowner's insurance in Florida. Even supporters of the Moratorium Law have admitted that the law is "no substitute for a strong, competitive insurance market."¹⁸⁴ In the final analysis, the state's enactment of oppressive and confiscatory legislation in reaction to natural disasters such as Hurricane Andrew simply will not accomplish this goal and will instead drive responsible and competent insur-

182. Longman, *supra* note 8, at 32.

183. This remark was made by state Sen. John Grant, Repub., Tampa, co-chairman of the 1993 Study Commission on Property Insurance and Reinsurance. See *Florida Insurance Rates Likely to Skyrocket*, CHICAGO TRIBUNE, Aug. 15, 1993, at T2. Unfortunately, the Legislature and the Florida DOI have failed to embrace this seemingly simple truth.

184. *More Evidence of Crisis*, MIAMI HERALD, July 26, 1993, at A10.

ers from Florida, thereby propelling the state's increasingly crisis-plagued residential property insurance market into further disarray.