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State v. Edward M. Chadbourne, Inc., 382 So. 2d 293 (Fla. 1980)

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Constitutional Law—IMPAIRMENT OF CONTRACT—RETROACTIVE APPLICATION OF STATUTE IS AN UNCONSTITUTIONAL IMPAIRMENT OF A ROAD CONSTRUCTION CONTRACT—*State v. Edward M. Chadbourne, Inc.*, 382 So. 2d 293 (Fla. 1980).

The 1973 OPEC (Organization of Petroleum Exporting Countries) embargo on oil shipments to the United States resulted in a dramatic increase in the price of petroleum and petroleum-based products. The economic repercussions of the embargo were widespread and acutely experienced by the road construction industry.[1] In response to the potential economic harm to road contractors, the 1974 Florida Legislature enacted a law allowing contract price adjustments related to asphalt costs.[2] This law allowed the Florida

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1. State v. Edward M. Chadbourne, Inc., 382 So. 2d 293, 294 (Fla. 1980).

2. *Id.* at 294. Ch. 74-262, § 1, 1974 Fla. Laws 708 (current version at FLA. STAT. § 337.143 (1979)), provides in part:

> WHEREAS, the price of bituminous material has substantially increased during the past months due partly to the worldwide energy crisis, and the situation now and in the future appears to be very volatile and unstable, and
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> WHEREAS, a contractor has no control over the rapidly increasing prices of bituminous material after he has successfully bid on a road construction project with the Department of Transportation, and after entering into binding contracts for the supply of bituminous material, ...
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> . . . .
>
> Section 1. The State of Florida Department of Transportation shall adjust the contract unit price for bituminous material included in any contract for roadway construction for which bids were received by the Department of Transportation prior to April 1, 1974, in accordance with the following.
>
> A. The adjustment shall be calculated separately for each month during which bituminous material is incorporated into a project using the following formula:
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> Pa = Id + 5 cents where:
>
> Pa = Adjusted unit price for bituminous material.
>
> Id = Department's Asphalt Price Index in effect during the month in which the material is incorporated into the project.
>
> The Department of Transportation shall determine the Asphalt Price Index by averaging quotations in effect on the first day of each month at terminals which could reasonably be expected to furnish bituminous materials to road construction projects in the State of Florida.
>
> B. No adjustment shall be made for bituminous material used prior to December 1, 1973.
>
> C. No price adjustment reflecting any further increases in the cost of bituminous material shall be made for any month after expiration of the allowable contract time, including any extensions that may be granted.
>
> D. The Department shall adopt rules to implement payment of this adjustment.
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> E. No adjustment shall be made to the contract unit price for bituminous material on any applicable contract unless a contractor agrees to the application of this adjustment for all applicable contracts he holds with the department. The department shall notify each contractor in writing by registered mail of his right to have this act apply to his contracts with the

Department of Transportation (the department) to adjust the contract unit price for bituminous materials used in roadway construction. If the contractor's bid was received by the department before April 1, 1974, he had the option of choosing to be compensated under the established contract price or of submitting all of his contracts to the department for recalculation under a monthly price index.[3] On recalculation the department would compensate the contractor based on the average price of bituminous materials at terminals which supply road contractors (Asphalt Price Index) plux five cents for each month bituminous materials were incorporated into the project.[4]

Soon after the implementation of the 1974 statute it became apparent that some contractors were receiving windfall profits because of the statute. These contractors were requiring their suppliers to provide asphalt at the pre-embargo prices, but were being paid by the department at the higher post-embargo prices.[5] In order to correct this unforeseen consequence of the original law, the department enacted an emergency rule. This rule, adopted by the 1976 legislature, had the effect of amending the 1974 law to require that contractors document the actual price paid for asphalt in order to qualify for a price adjustment based on the lesser result obtained from one of three formulas: (1) actual cost plus five cents; (2) bid price plus the difference between the asphalt index at the time of the bid and at the time the materials were used; (3) or the asphalt price index plus five cents.[6]

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department. If a contractor fails to respond within 15 calendar days of such notice, no adjustment provided for in this act shall be made to any applicable contract.

Ch. 74-262, § 1A-E, 1974 Fla. Laws 708 (current version at FLA. STAT. § 337.143(2)-(8) (1979)).

3. Ch. 74-262, § 1E, 1974 Fla. Laws 708 (current version at FLA. STAT. § 337.143(2), (8) (1979)). *See* note 2 *supra*.

4. Ch. 74-262, § 1A, 1974 Fla. Laws 708 (current version at FLA. STAT. § 337.143(3) (1979)). *See* note 2 *supra*.

5. State v. Edward M. Chadbourne, Inc., 382 So. 2d 293, 295 (Fla. 1980).

6. Ch. 76-174, § 1, 1976 Fla. Laws 316 (current version at FLA. STAT. § 337.143 (1979)). FLA. STAT. § 337.143(1)-(4)(b) (1979) provides:

Adjustment of contract price for bituminous material; providing legislative intent.

(1) Recognizing that the unprecedented increase in the cost of petroleum products seriously affects a vital segment of the construction industry, legislative intent was, and is, to protect, by this act, said industry from irreparable economic harm and injury. It was not, and is not, legislative intent that any single contractor or groups of contractors should receive excess or windfall profits to the detriment of the taxpayers, and the department shall take immediate steps to recoup

The actions of the department and the legislature prompted litigation challenging the constitutionality of section 337.143 and the 1976 amendment.[7] In *State v. Edward M. Chadbourne, Inc.*,[8] the Florida Supreme Court held that section 337.143 as originally enacted and amended was not a prohibited use of the state taxing power to aid private individuals in violation of the pledging credit clause of the Florida Constitution. The supreme court did find, however, that the retroactive application of the 1976 amendment was an unconstitutional impairment of contract in violation of both the Florida and United States Constitutions.[9]

This note will examine the Florida Supreme Court's holding in the *Chadbourne* case from the perspective of federal and Florida

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any excess payments made since July 1, 1974.

(2) The Department of Transportation shall adjust the contract unit price for bituminous material included in any contract for roadway construction for which bids were received by the department prior to April 1, 1974, in accordance with the following:

(3)(a) The adjustment shall be calculated separately for each month during which bituminous material is incorporated into a project, using the following formula: Pa = Id plus 5 cents, where:

1. Pa = The adjusted unit price for bituminous material; and

2. Id = The department's Asphalt Price Index in effect during the month in which the material is incorporated into the project.

(b) The department shall determine the Asphalt Price Index by averaging quotations in effect on the first day of each month at terminals which could reasonably be expected to furnish bituminous materials to road construction projects in the state. However, the department shall require documentation of actual costs paid prior to making any adjustments.

(4) The department shall not make any adjustment under subsection (3)(a) when "Pa" exceeds:

(a) The actual unit price paid by the contractor plus 5 cents; or

(b) The bid price plus the difference in the Asphalt Price Index on December 1, 1973, and the Asphalt Price Index at the time of application. The department shall use the lesser of subsection (4)(a) or (b) as the basis for adjustment if the provision of subsection (3)(a) does not apply.

7. *See* Cone Bros. Contracting v. State, 384 So. 2d 154 (Fla. 1980) (per curiam); State v. Craggs & Phelan Constr. Co., 384 So. 2d 1261 (Fla. 1980) (per curiam); State v. W. L. Cobb Constr. Co., 384 So. 2d 151 (Fla. 1980) (per curiam); State v. Dickerson, Inc., 382 So. 2d 298 (Fla. 1980) (per curiam); State v. Edward M. Chadbourne, Inc., 382 So. 2d 298 (Fla. 1980) (per curiam).

8. 382 So. 2d 293, 296 (Fla. 1980). FLA. CONST. art. VII, § 10, provides in pertinent part: "**Pledging credit.** Neither the state nor any county, school district, municipality, special district, or agency of any of them, shall become a joint owner with, or stockholder of, or give, lend or use its taxing power or credit to aid any corporation, association, partnership, or person . . . ."

9. 382 So. 2d at 293. U.S. CONST. art. I, § 10, cl. 1, provides: "No State shall . . . pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts . . . ." FLA. CONST. art. I, § 10, provides: "**Prohibited laws.** No bill of attainder, ex post facto law or law impairing the obligation of contracts shall be passed."

contract clause law. In addition, alternative applications of the legal concepts underlying the Florida Constitution's pledging credit clause will be considered. Finally, issues related to the retroactive application of remedial legislation will be explored. The author contends that each of these concepts supports a resolution of *Chadbourne* opposite to that reached by Florida's Supreme Court.

Edward M. Chadbourne, an asphalt contractor, entered into four contracts with the department for the pavement of certain state roads. Following the adoption of the 1974 act, Chadbourne elected to submit all of his bids to the department for recomputation.[10] In accordance with the act, the department paid Chadbourne $142,755.82 in addition to the bid price for two contracts, and deducted $2,635.43 from the third contract's original bid price due to a drop in the Asphalt Price Index.[11] However, payment of the statutory adjustment of $31,255.38 for the fourth contract was withheld by the Department of Transportation.[12]

In 1975, Chadbourne filed suit in the Circuit Court of Escambia County seeking $31,255, plus interest, under the 1974 statute. The department answered and counterclaimed, pleading the 1976 statute as a defense and demanding reimbursement by Chadbourne of the additional sums paid under the 1974 act.[13] The trial court granted Chadbourne's motion for summary judgment and entered judgment against the department for $34,926.25.[14] The court reasoned that the legislature could not force contractors to accept the terms of the original statute or its amendment, for to do so would have been an unconstitutional impairment of contract. The legislature had merely provided the contractors with the choice of partic-

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10. 382 So. 2d at 295-96.

11. *Id.* at 293. The following were the contracts that the supreme court considered in *Chadbourne* and their 1974 adjustments:

STATE JOB 48040-8522: contract price plus $62,102.00
STATE JOB 60090-3502: contract price plus $80,653.82
STATE JOB 61560-3603: contract price *less* $2,635.43

Initial Brief for Appellant at 4, State v. Edward M. Chadbourne, Inc., 382 So. 2d 293 (Fla. 1980).

12. State v. Edward M. Chadbourne, Inc., 358 So. 2d 605, 606 (Fla. 1st Dist. Ct. App. 1978), *aff'd*, 382 So. 2d 293 (Fla. 1980). All further payments were withheld pursuant to a memo on conditions of moratorium placed on retroactive bituminous payments from Jay W. Brown, Director of Road Operations, Department of Transportation to R. F. Langford, Comptroller, Department of Transportation, Tallahassee, Fla. (April 29, 1975).

13. A trial on the merits was delayed due to a question of venue. This appeal was unsuccessful and the defendant subsequently pleaded the 1976 statute as a defense. State v. Edward M. Chadbourne, Inc., 358 So. 2d 605, 606 (Fla. 1st Dist. Ct. App. 1978), *aff'd*, 382 So. 2d 293 (Fla. 1980).

14. *Id.*

ipating under the 1974 law, the 1976 amendment, or proceeding under their existing contracts. Chadbourne had elected to participate under the 1974 act, and the subsequent legislation would not affect those contracts, unless he chose to participate under the 1976 statute.[15]

On appeal, the First District Court of Appeal affirmed the decision of the trial court and rejected the department's contention that the 1974 act violated the constitutional prohibition of the pledging credit clause which prevents the use of the state taxing power to aid private corporations and individuals.[16] The department appealed the adverse ruling to the Florida Supreme Court which upheld the rulings of the lower courts in a four to three per curiam decision.[17]

The initial issue addressed by the supreme court was whether section 337.143 was a constitutional use of state taxing powers.[18] Essential to a determination that such legislation is constitutional is a finding that the act serves primarily a public purpose.[19] To determine if a public purpose exists the courts will generally defer to the legislative intent on the face of the statute, unless a showing is made that the action is clearly beyond the power vested in the legislature.[20] In the absence of an express public purpose the courts have had to make this subjective determination on a case-by-case basis.[21] The courts attempt to follow the basic principle that legislation will be upheld if it serves a public purpose, although there may be some incidental private benefit.[22] The decisions have failed, however, to establish specific criteria for determining whether the public purpose is the overriding objective of

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15. *Id.*

16. *Id.* at 607-08.

17. 382 So. 2d at 293.

18. *Id.* at 296.

19. *Id. See* Bannon v. Port of Palm Beach Dist., 246 So. 2d 737, 741 (Fla. 1971) (FLA. CONST. art. VII, § 10 protects public funds from being used to promote private enterprises when only an incidental benefit to the public exists); Adams v. Housing Auth., 60 So. 2d 663, 669 (Fla. 1952) (incidental benefits to the public from establishment of a private enterprise will not satisfy the public benefit requirement). *See generally* Levinson, *Florida Constitutional Law,* 28 U. MIAMI L. REV. 551, 642-650 (1974).

20. State v. Sunrise Lakes Phase II Special Recreation Dist., 383 So. 2d 631, 633 (Fla. 1980).

21. *See* State v. Jacksonville Port Auth., 204 So. 2d 881, 883 (Fla. 1967). *See generally* State v. City of Miami, 379 So. 2d 651 (Fla. 1980); Baycol, Inc. v. Downtown Dev. Auth., 315 So. 2d 451 (Fla. 1975); City of Naples v. Moon, 269 So. 2d 355 (Fla. 1972); Nohrr v. Brevard County Educ. Facilities Auth., 247 So. 2d 304 (Fla. 1971); State v. Jacksonville Port Auth., 204 So. 2d 881 (Fla. 1967).

22. State v. City of Miami, 379 So. 2d 651, 653 (Fla. 1980).

the legislation.[23]

In *Chadbourne* the Florida Supreme Court found that section 337.143 was a valid exercise of legislative authority because the law facilitated the construction of public roads which was manifestly a public purpose.[24] In addition, the statute served to benefit the state by allowing the department to pay a contractor at a rate lower than the bid price when the Asphalt Price Index declined. The court stated that this benefit was evidenced by Chadbourne having received $2,600 less on one of his contracts.[25]

The second issue the supreme court addressed was whether the retroactive application of the 1976 amendment would be an unconstitutional impairment of a valid contract in violation of both the Florida and United States Constitutions.[26] Both the United States Supreme Court and the Florida Supreme Court have interpreted the contract clause as prohibiting virtually any impairment of contracts, both those between private parties and those to which the state was a party.[27] The United States Supreme Court, however, began to move from this absolute prohibition with the adoption of

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23. *Compare* State v. City of Miami, 379 So. 2d 651 (Fla. 1980) *with* Baycol, Inc. v. Downtown Dev. Auth., 315 So. 2d 451 (Fla. 1975). In *City of Miami* the city issued revenue bonds to finance a convention center garage which would also be used by a private university and a private developer. The court found that the facility would provide a forum for educational, civic, and commercial activities, and therefore serve a valid public purpose. The incidental private benefits were not so substantial as to undermine the public character of the garage. 379 So. 2d at 653. However, in *Baycol* revenue bonds were to be issued to finance a public parking facility, and the municipality used its power of eminent domain to acquire land and permit the private development of a shopping center. The court found that the need for the parking facility would only arise after completion of the shopping center. The city could not " 'create' a public necessity by taking property and applying it to a private interest which subsequently gives rise to the asserted 'public need.' " 315 So. 2d at 458. *See also* City of Naples v. Moon, 269 So. 2d 355 (Fla. 1972) (redevelopment of downtown areas with the aid of improved parking facility serves a public purpose); Nohrr v. Brevard County Educ. Facilities Auth., 247 So. 2d 304 (Fla. 1971) (issuance of bonds by county for construction of dormitory cafeteria at a private college aided education which was a valid public purpose); State v. Jacksonville Port Auth., 204 So. 2d 881 (Fla. 1967) (no public purpose where port authority issued bonds for private construction of shipyard, and only public purpose was increased payroll and employment).

24. 382 So. 2d at 296.

25. *Id.*

26. *Id.* For text of constitutional provisions see note 9 *supra*.

27. Sturges v. Crowninshield, 17 U.S. (4 Wheat.) 122, 205-06 (1819). *See* Yamaha Parts Distribs. v. Ehrman, 316 So. 2d 557, 559 (Fla. 1975) ("Virtually no degree of contract impairment has been tolerated in this state."); Mahood v. Bessemer Properties, 18 So. 2d 775, 780 (Fla. 1944) (applies the old remedy-obligation test: "A state may by legislative enactment modify existing *remedies* and substitute others without impairing the *obligation* of contracts . . . ." (emphasis added)). *See* Note, *Revival of the Contract Clause: Allied Structural Steel Co. v. Spannaus and United States Trust Co. v. New Jersey*, 65 VA. L. REV. 377-78 (1979).

the remedy-obligation test. Under this rationale the state could indirectly impair a contractual obligation by altering a remedy, provided no substantial rights of the parties were impaired.[28]

The second major change in the Court's approach to the contract clause was the reserved powers doctrine which allowed the states to alter public and private contracts when it was necessary to protect the public health, safety, and morals.[29] In the landmark case of *Home Building & Loan Association v. Blaisdell*[30] the police power doctrine was enlarged to include economic interests, but only if the action was designed to protect the economic welfare of the entire community for a limited time during an emergency, and the measures taken were reasonable and appropriate to a legitimate end. The Court determined the reasonableness of the legislation by balancing the state's interest against the nature of the private rights and the extent of the contract impairment.[31]

This approach was refined by the Supreme Court in *United States Trust Co. v. New Jersey*,[32] which established a two-pronged test to determine the validity of a state law that interferes with a public contract. The first inquiry is whether the state is acting under its reserved police powers which cannot be contracted away.[33] The second prong is whether the legislation is reasonable and necessary to serve an important public purpose.[34] Legislation is deemed reasonable if the circumstances giving rise to the state's action were unforeseen or unintended.[35] The law can be justified as necessary if the action is essential to achieve a legitimate purpose and the means used are the least restrictive available.[36]

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28. *See* Note, *supra* note 27, at 379-81. This test is no longer critical. Reasonableness has replaced the remedy-obligation distinction as the critical focus. United States Trust Co. v. New Jersey, 431 U.S. 1, 19 n.17 (1977).

29. *See* Note, *supra* note 27, at 381-87. *See also* Stone v. Mississippi, 101 U.S. 814, 817-19 (1879).

30. 290 U.S. 398, 438-39 (1934).

31. *Id. See* Comment, *Revival of the Contract Clause*, 39 OHIO ST. L. J., 195, 199 (1978). *See also* City of El Paso v. Simmons, 379 U.S. 497 (1965).

32. 431 U.S. 1 (1977). *See* Note, *supra* note 27, at 390-392.

33. 431 U.S. at 23-25: "[T]he police power and the power of eminent domain were among those [powers] that could not be 'contracted away,' but the State could bind itself in the future exercise of the taxing and spending powers." *Id.* at 23-24.

34. *Id.* at 25. The Court's standard of review is similar to that applied in due process and equal protection challenges. *Id.* at 22-23; *see* Comment, *supra* note 31, at 198 n.30. However, the Court stated that applications of this standard to public contracts, as opposed to private contracts, would not permit as great a degree of deference to legislative determinations of necessity and reasonableness since the state's own interests are at stake. 431 U.S. at 25-26.

35. *Id.* at 31-32.

36. *Id.* at 29-31.

Florida courts, on the other hand, have been reluctant to recede from the rigid prohibition against all forms of contract impairment.[37] Under Florida law, retroactive legislation will be deemed an unconstitutional impairment of contract if it adversely affects or destroys vested rights, or if it creates or imposes a new duty or obligation in connection with transactions previously entered into.[38] There is, however, a recognized exception to this prohibition—a curative or remedial statute. Remedial statutes are those which do not create or take away vested rights, but which remedy defects or abuses that exist in previous legislation.[39]

In the 1979 decision in *Pomponio v. Claridge Condominium, Inc.*,[40] the Florida Supreme Court re-examined its approach to the contract clause and determined that some degree of impairment would be tolerated. Noting that it was not bound by the federal approach on this issue, the court adopted a rationale similar to that of the Supreme Court's reasonable and necessary test, but one, which in its view, is more compatible with the prohibition against the impairment of contracts.[41] Under this approach the degree of permissible impairment is determined by balancing the state's objectives and its methods of implementation against the extent of the impact on the contracting parties' vested rights.[42] The court reasoned that this approach would probably not permit impairment to the same degree as the Supreme Court's reasonable and necessary test.[43]

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37. *See* cases cited note 21 *supra; see also* Comment, *The Contract Clause Reemerges: A New Attitude Toward Judicial Scrutiny of Economic Legislation*, 1978 S. ILL. L. J. 258, 260-61 (1978).

38. McCord v. Smith, 43 So. 2d 704, 708-09 (Fla. 1949). Under Florida law, legislation is presumed to apply prospectively in the absence of a facially clear expression of retroactive intent. Yamaha Parts Distribs. v. Ehrman, 316 So. 2d 557, 559 (Fla. 1975). *See generally* Levinson, *supra* note 19, at 601-02.

39. *See* Metropolitan Dade County v. Leslie Enterprises, Inc., 257 So. 2d 29, 30 (Fla. 1972).

40. 378 So. 2d 774, 779-80 (Fla. 1979).

41. *Id.*

42. *Id.* at 780. The supreme court formulated a test to determine the degree of contract impairment that would be tolerated:

> [W]e must weigh the degree to which a party's contract rights are statutorily impaired against both the source of the authority under which the state purports to alter the contractual relationship and the evil it seeks to remedy. . . . [T]his becomes a balancing process to determine whether the nature and extent of the impairment is constitutionally tolerable in light of the importance of the state's objective, or whether it unreasonably intrudes into the parties' bargain to a degree greater than is necessary to achieve that objective.

Id.

43. *Id.*

Failing to employ the newly established balancing test, the supreme court in *Chadbourne* held that the retroactive application of the 1976 amendment, which clearly affected existing contract rights, was an unconstitutional impairment of contract.[44] Noting the express legislative intent to avoid the unforeseen consequence of windfall profits, the court nevertheless held that a "noble and just" motive will not validate constitutionally prohibited legislation.[45]

Merely citing the recent review of contract clause issues in *Pomponio* and *State v. Cone Brothers Contracting Co.*[46] as settled law, the court declined to analyze the facts of *Chadbourne* to any greater degree.[47] It failed to apply either the balancing test from *Pomponio* or the recognized remedial exception to retroactive legislation, and adopted, instead, the dissenting opinion in *Cone Brothers.*[48] The effect of the *Chadbourne* decision is to shroud Florida contract clause law in a fog of confusion. Since the *Cone Brothers* dissent was written before *Pomponio* and without benefit of its newly adopted balancing test, the holding in *Chadbourne* appears to have reversed the more liberal approach to contract impairment established in *Pomponio.* Even though the court does not expressly reject the approach in *Pomponio,* the fact that *Pomponio* is ignored in favor of a rationale based on the more rigid prohibition against contract impairment seriously undermines the force of that decision.

The more obvious effect of *Chadbourne* is to provide excess profits to contractors who have performed no additional work.[49] It is difficult to perceive how the public is benefiting by the payment

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44. 382 So. 2d at 297.

45. *Id.* at 296-97.

46. 364 So. 2d 482 (Fla. 2d Dist. Ct. App. 1978).

47. 382 So. 2d at 297.

48. *Id. See* Metropolitan Dade County v. Leslie Enterprises, Inc., 257 So. 2d 29 (Fla. 1972):

> Remedial statutes are exceptions to the rule that statutes are addressed to the future, not the past. One of the purposes of such a statute is to give effect to acts and contracts of individuals according to the intention thereof. . . . Remedial statutes do not come within the legal conception of a retrospective law, or the general rule against the retrospective operation of statutes.

Id. at 30. (quoting Grammer v. Roman, 174 So. 2d 443, 446 (Fla. 2d Dist. Ct. App. 1965) (citations omitted)). *See also* State v. Cone Bros. Contracting Co., 364 So. 2d 482, 486 (Fla. 2d Dist. Ct. App. 1978): "A curative or remedial statute is necessarily retrospective in character and may be enacted to cure or validate errors or irregularities in legal or administrative proceedings, except such as are jurisdictional or affect vested *substantive* rights." (emphasis added).

49. 382 So. 2d at 297-98 (Overton, J., dissenting).

of 3.8 million tax dollars above contract prices to road contractors unharmed by the embargo.[50] The 1976 amendment's requirement of documentation as a restriction upon the price adjustment does not substantially impair a contractor's legitimate rights under a statutory option that was never bargained for in the first place.

The supreme court in *Chadbourne* had several available alternatives which would have supported a decision more equitable to the citizens of the state. The first of these alternatives was argued by Justice Overton, in a well-reasoned dissent. He contended that the pledging credit clause of the Florida Constitution should have controlled the outcome of this case.[51] Originally, the 1974 statute was passed to prevent the potential bankruptcy of contractors due to increased oil prices, and thereby to ensure the continued construction of public roads.[52] But the 1974 legislation had an unintended result. Contractors, unharmed by the oil embargo and capable of continuing their contracts, are receiving additional payments that amount to windfall profits. In this situation the paramount public purpose required by the pledging credit clause does not exist since the continued construction of roads is not in jeopardy.[53]

Justice Overton identified the "catch-22" aspect of this issue by explaining that unless the 1976 amendment requiring documented losses is applied retroactively, the 1974 statute alone is unconstitutional for failure to serve a public purpose. Without documented losses to the contractor, road construction is not jeopardized and the public purpose of the law becomes incidental to the private contractor's gain.[54]

The majority justified its finding of a public purpose by characterizing the 1974 statute as one that could benefit the state or the contractor. The state benefit occurs when contract prices are reduced because of a decline in the Asphalt Price Index.[55] Although theoretically valid, this reasoning flies in the face of economic realities. It was an extremely remote possibility that the oil prices would drop during the period in question thereby enabling the state to derive any significant benefit from reduced contract

50. Telephone interview with H. Reynolds Sampson, General Counsel, Florida Department of Transportation, in Tallahassee, Fla. (June 25, 1980).

51. 382 So. 2d at 297.

52. *Id.*

53. *Id.* at 297-98.

54. *Id.*

55. *Id.* at 296.

prices.[56] Although Chadbourne did receive $2,635 less on one of his contracts, he received almost $143,000 more on two other contracts, plus an additional $35,000 on the contract in the instant case.[57] It can be assumed that few contractors would have accepted the index formula if they believed their compensation would be less than their original contract price. Furthermore, if the legislature had contemplated a price decrease, it is unlikely that section 337.143 would have been enacted.[58]

In addition to this more logical analysis of the state taxing power issue, the court could have upheld the 1976 amendment as a valid impairment of contract by applying the Supreme Court's reasonable and necessary test as developed in *United States Trust Co.* Under this approach the state cannot validly contract away either its police powers or powers of eminent domain, since these are essential attributes of sovereignty. If the state has violated this prohibition, the Supreme Court has determined that the contract clause does not require the state to adhere to its contract.[59]

If the state has not violated this prohibition, the next inquiry focuses on the state's objectives and the available means to reach them. If the legislation is reasonable and necessary to serve an important public purpose it will be valid even if it incidentally results in the impairment of contract.[60] The reasonableness of the legislation will depend on the foreseeability of the circumstances which the law seeks to address. If the events giving rise to the legislation

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56. State v. Edward M. Chadbourne, Inc., 358 So. 2d 605, 608 (Fla. 1st Dist. Ct. App. 1978) (Ervin, J., dissenting), *aff'd*, 382 So. 2d 293 (Fla. 1980). Asphalt Price Index from December, 1973 through July, 1975:

Month	Index	Month	Index
December, 1973	0.1591	January, 1975	0.2928
January, 1974	0.1958	February, 1975	0.2929
February, 1974	0.2192	March, 1975	0.2933
March, 1974	0.2590	April, 1975	0.2988
April, 1974	0.2650	May, 1975	0.2969
May, 1974	0.2776	June, 1975	0.2980
June, 1974	0.2787	July, 1975	0.3029
July, 1974	0.2875		
August, 1974	0.2875		
September, 1974	0.2889		

364 So. 2d at 484.

57. *See* note 12 and accompanying text *supra*.

58. 364 So. 2d at 488.

59. *United States Trust Co.*, 431 U.S. at 23-25. Purely financial obligations, as those in *Chadbourne*, are not generally considered to fall within the reserved powers prohibition. *Id.* at 24.

60. *Id.* at 25.

were unforeseen and unintended then the action is presumed to be reasonable.[61] The majority in *Chadbourne* did, in fact, imply that the 1976 legislation was reasonable when it admitted that the windfall profits were an unintended result of the 1974 statute.[62]

In order to satisfy the necessity requirement the least intrusive means must be utilized by the state to reach its objective.[63] This factor was not addressed in *Chadbourne,* but if it had been, the court could have easily declared that the amendment was the least intrusive means to prevent overpayments. Under the 1976 amendment contractors actually harmed would still receive payments to alleviate the unexpected increase in the price of oil. By requiring documentation, the department could discern whether there was a genuine need for the additional payments to a contractor. When considered against the state's burden in having to pay the adjustment from the public funds the provisions of the 1976 legislation pale by comparison. Therefore, the federal test provides a fair standard upon which to balance the rights of the public and the contracting parties.

Finally, the *Chadbourne* court failed even to apply its own balancing approach to the contract clause which was established in *Pomponio. Pomponio* involved the retroactive application of a statute that required the deposit of rents into the registry of the court during litigation involving a condominium lease. The challenged statute allowed disbursement to the lessor of amounts necessary for the maintenance of the premise during litigation.[64] The law was declared an unconstitutional impairment of contract because the means adopted were not the least intrusive. The disbursement criteria ignored the validity of economic needs other than preservation of the property. Failure to provide some procedure for a showing of needs beyond maintenance expenses created an unnecessary economic deprivation.[65] The court reached this conclusion by balancing the nature and extent of the contractual impairment against the state's objectives.[66] The remediation of unforeseeable and unintended results of legislation was not an express factor in the court's analysis as it was in *United States Trust*

61. *Id.* at 31.

62. 382 So. 2d at 296-97.

63. 431 U.S. at 29-31.

64. 378 So. 2d at 780-81.

65. *Id.* at 780-82.

66. *Id.* at 780. There was no clear documentation as to what the legislature's objectives were. *Id.* at 781.

Co.

Application of this balancing test to the *Chadbourne* case would place the 1976 amendment within the permissible scope of the contract clause. The state's intention was to compensate financially burdened contractors and to eliminate the windfall profits that were being paid from state funds. Any impairment that occurred was primarily to those contractors who would not receive the "bonuses" from the loophole in the original act if the amendment was applied retroactively.

Instead of utilizing the balancing test, the *Chadbourne* majority elected to follow the views expressed by Judge Grimes in his dissent in *Cone Brothers.*[67] In *Cone Brothers,* the Second District Court of Appeal held that the 1976 amendment was a valid remedial statute and could be applied retroactively.[68] The district court found the amendment to be reasonable and necessary to prevent unintended excess profits.[69] Judge Grimes, however, argued that the law would impair existing contracts if applied retroactively. When the contractors exercised their option under the 1974 law, the price formula became part of the contract. The 1976 amendment, asserted Judge Grimes, attempted to alter this formula unconstitutionally.[70]

An oversight common to both the *Chadbourne* court and Judge Grimes in *Cone Brothers,* was the remedial aspect of the amendment. The legislature intended to remedy a defect in the original statute—the unintended windfall profits which render the 1974 law unconstitutional for lack of a public purpose.[71] The amendment does not alter the basic price index but merely requires contractors to document their actual costs. The law does restrict the additional compensation, but only to the extent that contractors would otherwise receive excess profits at public expense. The contracts still contain the basic index price, plus five cents, which covers any increased costs for bituminous material. Certainly, if the supreme court had liberally construed the desired effect of the legislation, the 1976 amendment would have been declared a valid remedial statute.[72] The legislation was designed to alter a defect and does

67. 364 So. 2d at 490 (Grimes, J., dissenting).

68. *Id.* at 486.

69. *Id.* at 487.

70. *Id.* at 491.

71. *See* note 56 and accompanying text *supra.*

72. *See* State v. Stedman, 223 So. 2d 85, 86 (Fla. 3d Dist. Ct. App. 1969) (remedial statutes should be liberally construed so as to give them the beneficial effect desired).

not modify or alter substantial contractual rights.

The impact of the *Chadbourne* ruling will be most evident to contractors who will receive almost four million dollars as a result of the decision.[73] Although the supreme court declared that the primary purpose of the act was to benefit the public, it seems apparent that this was incidental in comparison to the substantial financial gain to the contractor.

The 1974 law was construed as making a "fair adjustment" to the contract price for both parties.[74] However, the fallacy of this statement can be shown by the difference in the payments under each formula. In the instant case, Chadbourne received $80,653.82 over the original bid price on one contract. Under the 1976 formula, based on the actual price paid, plus five cents, his payment would have been $13,141.71.[75] It is evident from the approximate difference of $67,500 in the two formulas that the public is not the primary beneficiary of the 1974 law.

One court has characterized the 1974 legislation as a "contractor's relief act," similar to other social welfare programs.[76] The legislation was, in effect, granting public funds to contractors in order to alleviate the perceived irreparable economic harm which might occur from the embargo. Although the continued construction of roads is vital to Florida's economy, this does not justify a law that provides excess profits in return for no additional work. This is especially true when remedial legislation was available to cure the defect in the original statute and to provide a more equitable solution.

The supreme court's holding will not only have an adverse impact on the economy of the state, but also on the vitality of decisions made before *Chadbourne* under the contract clause. In *Pomponio* the supreme court devoted a significant portion of its opinion to establishing the criteria for the balancing test and specifically applying it to the facts of the case. Less than six months

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73. Interview with Vernon Dixon, Assistant Final Estimates Engineer, Florida Department of Transportation, in Tallahassee, Fla. (June 30, 1980).

74. 382 So. 2d at 296.

75. Interview with Vernon Dixon, Assistant Final Estimates Engineer, Florida Department of Transportation, in Tallahassee, Fla. (June 30, 1980). Another example of the difference in the final adjustments under each formula was STATE JOB 46050-3105 in which Chadbourne was a subcontractor. Under the 1974 law his payment was $154,723.16 over his bid price. The 1976 formula of actual cost plus five cents would have given Chadbourne $8,411.76 in addition to his contract price. This amounts to $146,311.40 in windfall profits under the 1974 law.

76. *Cone Brothers*, 364 So. 2d at 487.

later, however, the court in *Chadbourne* merely alluded to the test in reaching its decision and failed to provide any further guidelines on when or to what degree contractual impairment will be permitted. A sense of judicial fair play would seem to dictate the necessity of fleshing out the skeleton of a newly adopted approach to a constitutional question through application to the facts of subsequent cases. Furthermore, the court's failure to carefully analyze *Chadbourne* under the *Pomponio* balancing test may indicate a lack of judicial committment to that approach in the future.

This possibility is supported to some extent by a comparison of the justices' positions in the *Pomponio* and *Chadbourne* decisions. Both decisions seem to indicate that the court is in agreement that some degree of contract impairment will be tolerated, however, consensus has apparently not yet been reached on the approach to be used in determining the scope of permissible impairment. In *Pomponio* the newly enunciated balancing test was approved by Chief Justice England and Justices Boyd, Overton, and Sundberg.[77] Justice Overton, however, concurred specially, implying that he would have allowed the contract impairment at issue on more lenient grounds than those expressed by the majority.[78] Justice Adkins concurred in the result only, which gives little indication of his stand on the newly adopted test,[79] and Justice Alderman dissented without filing an opinion.[80]

The four to three decision in *Chadbourne* found Justices Overton, Adkins, and Alderman dissenting.[81] Justice Overton, writing for the dissent, argued that the contract impairment in *Chadbourne* falls squarely within that permitted under the more liberal federal reasonable and necessary test set forth in *United States Trust Co.*[82] Impliedly, he no longer agrees with the majority in *Pomponio* which asserted that a stricter analysis was more compatible with the constitutional prohibition.[83]

The result of this apparent internal struggle is that the state, the legislature, and any contracting parties are left only with a vague idea of the degree of impairment that will be tolerated by the supreme court. The continued validity of the balancing test will only

77. 378 So. 2d at 774.
78. *Id.* at 782-83.
79. *Id.* at 782.
80. *Id.*
81. 382 So. 2d at 297.
82. *Id.*
83. 378 So. 2d at 780.

be ensured when the court resolves any internal conflicts, sets forth the new approach in clear and unambigous terms, and specifically applies it to the facts of particular cases. Perhaps then the end result will benefit the public.

ROBERTA J. KARP