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SUPREME COURT OF FLORIDA

No. 66,178

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DEPARTMENT OF INSURANCE, et al.,

Appellants,

v.

DADE COUNTY CONSUMER ADVOCATE'S OFFICE, et al.,

Appellees.

Appeal From the District Court of Appeal,
First District

BRIEF OF APPELLEES

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BRIEF OF APPELLEES

In this action, the Dade County Consumer Advocate's Office and Walter Dartland (hereinafter "Dade County Consumers") challenge the Florida statutory provisions which prevent consumers from bargaining with insurance agents over the amount of the commission which the agent receives in connection with the sale of an insurance policy. The statutes, known as "anti-rebate laws," make it illegal for an insurance agent to accept a fee which is lower than the commission set by the insurer. The effect, therefore, is to injure consumers by requiring them to pay the full commission for insurance policies, whereas they might otherwise be able to bargain for a lower price. Dade County Consumers contend that these laws violate the due process clause of the Florida Constitution because they unreasonably promote the interests of a limited group of individuals, insurance agents, to the detriment of purchasers of insurance.

After reviewing the arguments in support of the statutes made by the Department of Insurance (the "Department") and the

amici curiae representing insurance companies and agents, the First District Court of Appeal found an "absence of any apparent rational relation between the prohibition on rebates and some legitimate state purpose in safeguarding the public welfare." Dade County Consumer Advocate's Office v. Department of Insurance, 457 So.2d 495, 498 (1984). Following numerous precedents of this Court, the lower court then held that the anti-rebate laws constitute "an unjustified exercise of the police power of this state, and are therefore violative of the due process clause, Article 1, Section 9, Florida Constitution." Because the District Court correctly concluded that the anti-rebate laws do not promote any legitimate state purpose, its decision should be affirmed.

STATEMENT OF THE CASE

A. The Sale of Insurance in Florida and the Statutory Scheme

Insurance is a consumer product which provides financial protection against accidents, illness, and death. It differs from other consumer products in two important ways. First, the consumer often does not obtain the service he is purchasing until a substantial period of time after he pays his money. Second, the insurance company's ability to provide that service depends on whether it has retained sufficient assets to pay future claims. In recognition of the need to assure that insurance companies are sufficiently solvent to fulfill their obligations, Florida and all other states have enacted comprehensive statutory schemes regulating the sale of insurance. § 624.01, et seq., Fla. Stat. (1984).

As part of the regulation of the insurance business, Florida requires insurance agents to be licensed to ensure that they are qualified to advise clients and that they deal fairly with them. § 626.121, Fla. Stat. (1984). One of the reasons that regulations are necessary is that the insurance agent has two, sometimes conflicting, allegiances. First, the agent is an adviser, counseling each purchaser about the options available and the policy which best suits that purchaser's needs. In this role his obligation is to his client. See U.S. Department of Justice, The Pricing and Marketing of Insurance (1977), pp. 298-301 ("Justice Department Report") (R. 53-56)[1] On the other hand, the agent is also a salesman. In this capaity, like a car or shoe salesman, his loyalty is to himself and to his principal, the insurance company from which he receives his commission.

The purchaser does not pay separately for the life insurance policy and the advice given by the agent. Rather, he pays the insurance company a single fee called the "premium," from which the company pays the agent a "commission," which is the agent's compensation for the services rendered to the insurance company and the customer. The company applies the money which remains after paying the agent's commission (the "net premium") toward its expenses, including fulfilling its commitments under the insurance policy. But the money paid to the agent as a commission is never available for that purpose.

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[1] "R. ___" refers to the record on appeal.

Florida has also adopted a number of statutes which prohibit various false and deceptive practices in the insurance industry. § 626.951, et seq., Fla. Stat. (1984). One of these, section 626.9541(1)(g) of the Florida Statutes, prohibits "unfair discrimination between individuals of the same actuarially supportable class," and would prohibit an insurance company from selectively rebating a portion of the net premium to individuals who are identically situated. If rebating were otherwise permitted, this provision would also prohibit an agent from charging different customers different prices for the same policy and service.

In addition to these admittedly valid regulatory provisions, the legislature has also enacted the statutes challenged in this action, which prohibit agents from reducing the cost of insurance by charging a smaller fee and returning a portion of the commission to their customers. Thus, section 626.9541(1)(h) of the Florida Statutes declares that "any rebate of premiums payable on the contract" is an unfair and deceptive practice, and section 626.611(11) directs the Department of Insurance to suspend the license of any agent found to have engaged in "rebating" or "unlawfully dividing or offering to divide his commission with another." The admitted purpose and effect of these statutes, which apply to all lines of insurance, is to

prohibit price competition or discounting by agents who might otherwise charge their customers a smaller fee for their services.2/

B. Related Proceedings and Proceedings Below

In 1977, Joseph Blumenthal, a licensed Florida insurance agent, brought a lawsuit challenging the constitutionality of the two Florida statutes at issue in this action. Mr. Blumenthal desired to rebate a portion of his commissions in order to attract customers, but was prevented from doing so by the anti-rebating statutes. Blumenthal v. Department of Insurance, Case No. 77-355 (Cir. Ct. Leon County). In a one-page order, the Circuit Court held that the statutes were constitutional. Mr. Blumenthal appealed directly to this Court, but then died, and a divided Court dismissed the appeal as moot. Blumenthal v. Department of Insurance, 375 So.2d 910 (1979).

Approximately two years later, the Dade County Consumer Advocate's Office, which was established by the Board of County Commissioners pursuant to Article VIII, section 6 of the Florida Constitution to "represent and protect the public interest in proceedings on hearings of any nature," see Dade

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2/ A third statute, not specifically identified in appellees' complaint, also prohibits persons in charge of insurance agencies from rebating. § 626.6215(5)(b), Fla. Stat. (1984). Since its constitutional foundation is no different from the other two statutes, a ruling that sections 626.9541(1)(h) and 626.611(11) are unconstitutional would as a practical matter apply to section 626.6215(5)(b) also.

County Code § 2-25.2(a), filed a similar challenge to the anti-rebate statutes in Dade County. Dade County Consumer Advocate's Office v. Department of Insurance, No. 81-5943 (Cir. Ct. Dade County 1981). Shortly after the complaint was filed, the Department of Insurance filed a motion to dismiss on various procedural grounds, including improper venue. After that motion had been pending for almost two years, the appellees filed the instant action in Leon County, where the Department had conceded that venue was proper. Subsequently, the Dade County action was dismissed by agreement of the parties, without prejudice to Dade County Consumers' rights to pursue the instant case.

Shortly thereafter, defendants filed a motion to dismiss, and plaintiffs filed a motion for summary judgment. After each party had filed an opposition to the other party's motion, the Circuit Court Judge, the Hon. Ben C. Willis, issued an order denying the motions filed by both parties. However, without objection from defendants, Judge Willis granted "summary final judgment" in defendants' favor and held that the anti-rebate statutes are constitutional. (R. 85-86).3/

Plaintiffs appealed from that decision, and on August 17, 1984, the District Court of Appeal for the First District unanimously reversed. Dade County Consumer Advocate's Office

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3/ At the time of Judge Willis' opinion, Florida Statute section 626.9541(1)(h) was codified as section 626.9541(8).

v. Department of Insurance, supra. In an opinion by Chief Judge Ervin, the court held that the standard of review is whether the statutes "reasonably and substantially promote public health, safety or welfare as required by the due process clause of the Florida Constitution." Id. at 497 (emphasis supplied). However, the Court found that the statutes fell far below that standard, concluding that there was no "legitimate state interest justifying the continued existence of the anti-rebate statutes." Id.

In reaching this conclusion, the court evaluated each of the justifications offered by the Department and its amici. Thus, the court concluded that it could not "perceive any relation" between the statute and a legitimate state interest in maintaining the future solvency of insurance companies since "the net premium paid to the insurer . . . remains constant throughout the actuarial class regardless of variable commission rebates offered by agents to individual class members." Id. (emphasis in original). As the court pointed out, "[s]uch price differences have historically been considered fair in every other segment of our economy." Id.

In addition, the court evaluated the Department's argument that allowing negotiations over insurance commissions could mean that insurance agents who are paid a lower commission "will not spend the requisite time counseling [their] clients." However, the court rejected this argument, relying on Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council,

425 U.S. 748, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1976). Id. at 497-98. In reaching this conclusion, the court found that the possibility of some abuse by some agents in dealing with their customers "cannot serve to suppress bargaining or information which might otherwise lead to an informed choice, [and that] competitive forces at work in the marketplace should generally serve to protect consumers." Id. at 498.

Subsequently, the Department moved for rehearing and rehearing en banc, principally on the ground that the court's decision would permit agents to engage in unauthorized practices other than rebating, including skimming by owners of insurance agencies, kick-backs from agents to insurers, and splitting commissions with employers purchasing insurance on behalf of their employees. On October 24, 1984, the court denied both these motions, but amended its opinion to make it clear that these prohibited practices were not affected by its decision. Id. at 499.[4/]

[4/] As an alternative to reversal of the District Court, the Department urges this Court to remand the case to the trial court "so that the Department may submit evidence and argument controverting the allegations appearing in the Justice Department report relied upon by the District Court." Insurance Dept. Br. at 28, 48. This request should be rejected for several reasons. First, having failed to object below to introduction of the Justice Department Report, the Department has waived its right to raise evidentiary objections in this court. Florida Evidence Code, § 90.104(1)(a), Fla. Stat. (1984); Williams v. State, 386 So.2d 538, 541 n.6 (Fla. 1980) (Supreme Court will not consider any grounds of objections to admission of evidence unless specifically made to trial court); Lineberger v. Domino Canning Co., 68 So.2d 357, 359 (Fla. 1953)(same). Second, the Department had more than adequate opportunity to submit evidence to rebut the Report's findings. Although it filed two pleadings in opposition to Dade County (footnote continued)

ARGUMENT

THE ANTI-REBATE STATUTES ARE UNCONSTITUTIONAL.

In this action, Dade County Consumers do not challenge the State of Florida's constitutional power to regulate insurance premiums in order to prevent them from being excessive, inadequate, or unfairly discriminatory. Nor have they challenged the State's power to regulate insurance companies by overseeing their rates and requiring them to maintain financial stability. However, and this is the key to Dade County Consumers' argument, the Department cannot use the rationale

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(footnote continued)

Consumers' motion for summary judgment, including an affidavit (R. 70-72, 76-82), the Department did not inform the trial court of its desire to submit additional evidence. Moreover, the Department did not submit additional evidence on several previous occasions in the prior cases when it had the opportunity to do so. Blumenthal v. Department of Insurance, supra; Dade County Consumer Advocate's Office v. Department of Insurance, supra, No. 81-5943. Third, the Department has not identified any material facts which it believes are at issue.

In any event, the District Court did not rely on the Justice Department Report for its decision. Instead it simply cited that Report to support its description of how the industry operates, and, by way of example, for an argument concerning the effect of rebating on the quality of the agent's service. 457 So.2d at 497 nn. 3 & 4. Even if it had not been submitted in the record, the Report is a public document, and the District Court could have considered it on that basis. Florida Evidence Code, § 90.202(5), Fla. Stat. (1984). Indeed, as persuasive authority, it has the same status as the Armstrong Committee Report which was not even cited to the trial court, but which the Department relies on in its brief in this Court. Dept. Br. at 40.

of protecting policy holders to justify the provisions at issue here because the anti-rebate statutes only apply to the commission portion of the premium, none of which is available to pay future claims by the company. While the Department suggests that allowing rebates will lead to a parade of horribles that will undermine the stability of Florida's insurance industry, that suggestion is founded on wild speculation and assumes that the Department would neglect its duty to prevent improper practices under other admittedly valid provisions in the Insurance Code. Because there is no basis for such speculation, it cannot provide the rationale for sustaining these statutes.

In addition, there is no dispute among the parties as to whether the State has the power to regulate insurance agents by requiring that they be licensed or by prohibiting discrimination through secret rebates or other unfair practices. The sole issue in this case is whether, in addition to the regulation of insurance companies and agents that is within the legislature's power, the State may also prohibit agents from giving a portion of their commission to their customers as a method of reducing the cost of life insurance and attracting new business. And in answering that question, the anti-rebate statutes must be tested against this background and against the constitutional requirements in this State that all legislation bear a reasonable and substantial relationship to the public health, safety, and welfare.

A. This Court Has Carefully Reviewed Economic Protection Statutes Such As These And Required That They Substantially And Reasonably Promote The Public Welfare.

Article I, Section 9 of the Florida Constitution declares that "[n]o person shall be deprived of life, liberty or property without due process of law . . .." Before determining whether the anti-rebate statutes violate this provision, the preliminary inquiry is what standard of review should be applied. Although the decisions of this Court involving the due process clause of the Florida Constitution have not always dealt explicitly with this question, or always used the same terminology in describing the appropriate standard of review, it is apparent that this Court has applied a far more searching inquiry than the highest courts in many other states when assessing the validity of state statutes. Most importantly, the approach used is wholly different from that taken by the United States Supreme Court when it has reviewed substantive due process challenges under the federal Constitution.

Over thirty years ago, this Court recognized explicitly the different standard in Florida, declaring that "perhaps more so than many others, [it] has been alert to any trespass on citizens' constitutional rights," Liquor Store v. Continental Distilling Corp., 40 So.2d 371, 374 (Fla. 1949). During the years following the Liquor Store case, in which this Court declared Florida's Fair Trade Act unconstitutional even though several other jurisdictions had previously reached the opposite

conclusion under their respective constitutions, this Court has evaluated the constitutionality of a wide variety of statutes. A review of those cases demonstrates both that it has carefully scrutinized economic protection laws such as those at issue here and that in the instant case the District Court correctly identified the appropriate standard as being whether the statutes being challenged "reasonably and substantially promote the public health, safety or welfare." Dade County Consumer Advocate's Office v. Dept. of Insurance, supra, 457 So.2d at 497.

For example, in Horsemen's Benev. Ass'n v. Division of Pari-Mutuel Wagering, 397 So.2d 692 (Fla. 1981), this Court recently evaluated a statute which required certain racetracks to pay 1% of the purse to a Florida horsemen's trade association to promote the racing and tourist industries in Florida. Although it held that the purpose for which the statute was enacted was legitimate, the Court found that the statute was unconstitutional, since there was no provision requiring that the funds be spent to promote racing. Id. at 695.

The careful scrutiny of state laws to ensure that they do not sacrifice the public welfare to special interests extends to other areas as well. For example, in 1962, the Court declared unconstitutional a law prohibiting druggists from advertising the price of prescription drugs as an "intrusion on private rights" which was "completely lacking in public

benefit." Stadnik v. Shell's City, Inc., 140 So.2d 871, 875 (Fla. 1962).[5] In another case dealing with regulation of drugs, the Court declared unconstitutional a statute requiring that all operations of a drug store be supervised by a licensed pharmacist. State v. Leone, 118 So.2d 781 (Fla. 1960). Although the legislature clearly has the power to require that all controlled drugs and medical supplies be prepared and dispensed only by licensed pharmacists, this Court ruled that it could not accomplish that legitimate goal by a broad statute which extended the requirement to non-pharmaceutical aspects of a drug store. To do so would "discriminate against the owners and operators of such establishments without valid reason therefor." Id. at 785. In Coca-Cola, Food Division v. State, Dep't of Citrus, 406 S.2d 1079, 1086 (Fla 1981), this Court reiterated that the legislature "must elect that course which will infringe the least on the rights of the individual," although in that case it found that the statute met the standard.

The Court has extended the principle that all statutes must bear a substantial and reasonable relationship to the public welfare to a variety of occupations. For example, in Larson v. Lesser, 106 So.2d 188 (Fla. 1958), it declared unconstitutional a statute prohibiting public adjusters from soliciting business. A public adjuster is one who, for a fee, estimates

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[5] The Court renewed that ruling in Florida Board of Pharmacy v. Webb's City, Inc., 219 So.2d 681 (Fla. 1969).

the value of property lost through fire or other casualty and undertakes to settle claims with insurance companies. This Court declared the statute unconstitutional because it found no sound basis in the public welfare that justified the restriction on how adjusters obtained customers.

The Court has even extended the requirement that statutes not unduly infringe on the rights of individuals to pursue their chosen occupation in their chosen manner to regulations governing auctions, Perry Trading Co. v. City of Tallahassee, 174 So. 854 (1937), and to a law which limited the amount of celery which could be sold in Florida by awarding allotments only to farmers who had grown the crop between 1960 and 1962, Rabin v. Conner, 174 So.2d 721 (1965). In the latter decision, the Court noted that the legislature had made extensive findings documenting the problems facing celery producers, but it nevertheless held that the statute unjustly discriminated between those who were producers between 1960 and 1962 and those who were not.

In Castlewood International Corporation v. Wynne, 294 So.2d 321, 324 (1974)(per curiam), the Court declared unconstitutional a statute requiring sales of beer and wine by retail establishments to be for cash only because the statute imposed "invidious discrimination" on wine and beer retailers since it did not apply to hard liquors, and also because it was not "rationally related to the legitimate purpose at issue." The clear message of these cases is that this Court will review legislation regulating economic activity with considerable care,

and will not simply rubber stamp legislative judgments in this field.

The Department, on the other hand, argues for a more relaxed or "rational relationship" test, but its cases do not support its contention for one reason: each of them involves statutes which in fact met a higher standard. For example, in Lasky v. State Farm Insurance Co., 296 So.2d 9, 16-17 (Fla. 1974), this Court found that Florida automobile no-fault statutes achieved numerous legitimate state objectives, including less congestion in the courts, fewer delays in payments to victims, and more assurance that victims will be compensated. Similarly, in United States Fidelity & Guarantee Corp. v. Department of Insurance, 453 So.2d 1353 (1984), this Court upheld a statute requiring insurance companies to refund excess profits on the grounds that elimination of windfall profits is a legitimate state purpose, which the legislature had a basis for concluding the statute would accomplish. The other Florida cases relied on by the Department also concerned statutes for which there was a reasonable and substantial connection to the public welfare. Carroll v. State, 361 So.2d 144 (Fla. 1978) (prohibition on lotteries); Belk-James, Inc. v. Nuzum, 358 So.2d 174 (Fla. 1978)(requirement that manufacturer print "Florida" on back of beer sold in State justified by State's interest in insuring freshness of beer and in policing collection of excise taxes); Coca-Cola Co., Food Division v. State, Dep't of Citrus, 406 So.2d 1079 (Fla. 1981)(requirement

that Florida grapefruit identify "Florida" on label linked to state interest in encouraging consumers to purchase Florida fruit).

This Court's approach to substantive due process under the Florida constitution differs markedly from that adopted by the United States Supreme Court in evaluating cases under the due process clause of the federal Constitution. Since United States v. Carolene Products Co., 304 U.S. 144, 58 S.Ct. 778, 82 L.Ed. 1234 (1936) (cited in Dept. Br. at 19), that Court has only once declared a statute unconstitutional on substantive due process grounds, Morey v. Doud, 354 U.S. 457, 77 S.Ct. 1344, 1 L.Ed.2d 1485 (1957), but it overruled that decision in City of New Orleans v. Dukes, 427 U.S. 297, 306, 96 S.Ct. 2513, 44 L.Ed.2d 511 (1976). Although the United States Supreme Court describes the test it applies in these cases as a "rational relationship test," according to one commentator, the message of these cases is "virtually complete judicial abdication" by the Supreme Court in scrutinizing statutes under the substantive due process clause. L. Tribe, American Constitutional Law, § 8-7, at 450 (1978).6/

6/ For similar reasons, equal protection cases such as Sasso v. Ram Property Management, 431 So.2d 204 (Fla., 1st DCA 1983) have no application, since in evaluating equal protection challenges the Florida courts have applied the "highly deferential standard adopted by the U.S. Supreme Court." Id. at 216-17. Applying this standard, the Court also rejected two other cases relied on by the Department on the ground that there was no violation of the equal protection clause. Carroll v. State, supra, (state may prohibit the operation of lotteries, except by veterans organizations); Pinillos v. Cedars of Lebanon Hospital Corp., 403 So.2d 365 (Fla. 1981)(limitations on medical malpractice awards justified by medical malpractice insurance rates).

Thus, the Court has been willing to uphold legislation on the basis of "purely hypothetical facts" or "for virtually no substantive reason at all." Id.

Whereas the United States Supreme Court has upheld statutes where any legitimate state purpose "can be conceived," see Dept. Br. at 6, cases such as Horsemen's Benev. Ass'n demonstrate that this Court has adopted a far more searching standard. Thus, in that case the Court could have sustained the statute if it had been willing to assume that the private association would have used the money raised from the tax to promote racing, as intended by the legislature. Such a justification would have plainly been sufficient under the standard of review adopted by the United States Supreme Court. However, the mere possibility that the money would be used for other purposes was a sufficient basis for this Court to find the tax unconstitutional. Horsemen's Benev. Ass'n v. Division of Pari-Mutuel Wagering, supra, 397 So.2d at 695.

While categorical statements can not be made about the approach to substantive due process taken by other states, the cases on which the Department relies demonstrate that those states have not engaged in the searching analysis of economic regulation required by the decisions of this Court. The Department is correct that on occasion this Court, like the U.S. Supreme Court, has described the test it employs in substantive due process cases as a "rational relationship test." However, in urging the Court to follow cases of the U.S. Supreme Court, the Department overlooks the fact that

this Court has on at least two recent occasions applied this standard to declare statutes unconstitutional. Horsemen's Benev. Ass'n v. Division of Pari-Mutuel Wagering, supra, 397 So. 2d at 694; Castlewood International Corporation v. Wynne, supra, 294 So.2d at 324; see also Stadnik v. Shell's City Inc., supra, 140 So.2d at 874-75 ("reasonable relationship" test employed to declare statute unconstitutional). On numerous other occasions it has voided economic regulations under the due process clause in the Florida Constitution without specifically discussing the standard of review. See pp. 12-15, supra. In short, while the Court has not always used the same terms to describe its standard of review, its actions in setting aside numerous statutes similar to those at issue here speak louder than any verbal formulations contained in its opinions.

Perhaps the most surprising aspect of the Department's efforts to obtain a very minimal review of the anti-rebate laws is that its approach is directly contradicted by the views of its own lawyer, the Attorney General of Florida. Thus, in a recent opinion, the Attorney General examined the question of the appropriate standard for evaluating the constitutionality of Florida statutes under the due process clause, and he used almost precisely the same formulation as the First District Court of Appeal did here to describe the standard of review applicable in cases such as this. In summarizing the applicable legal standard, the Attorney General stated that the power of a municipality in that case

to regulate the hours of business establishments depends on "whether the regulation is required for the public health, morals, peace, safety, or welfare and whether the regulation is reasonably and substantially connected with the public interest to be served." 1977 Op. Att'y Gen. Fla. 077-139 (December 30, 1977)(emphasis added). This interpretation, we submit, is entirely correct and consistent with the rigorous standard that this Court has applied in cases such as this.

B. The Anti-Rebate Statutes Have No Relationship To The Public Welfare.

Although the First District Court of Appeal concluded that the standard of review is whether the anti-rebate statutes reasonably and substantially promote public welfare, it also found that the statutes did not meet a lower level of scrutiny because of the "absence of any apparent rational relationship between the prohibition of rebates and some legitimate state purpose in safeguarding the public welfare." Dade County Consumer Advocate's Office v. Dept. of Insurance, supra, 457 So.2d at 498. We submit that a review of the justifications advanced by the Department demonstrates that the District Court correctly concluded that the anti-rebate statutes serve no public purpose, and that in fact those provisions injure consumers by artificially raising the prices of insurance. Before examining the specific justifications offered, it may be useful to review this Court's decision in Liquor Store, Inc. v. Continental Distilling Corp., 40 So.2d 371 (Fla. 1949).

In Liquor Store, this Court declared unconstitutional Florida's Fair Trade Act, which allowed manufacturers to set the price which retailers must charge customers because, as a price fixing statute, it "serve[d] a private rather than a public purpose." 40 So.2d at 375. The operation of the statute in the Liquor Store case is precisely the same as the operation of the anti-rebate statutes at issue here. Just as the Fair Trade Act required the retailer to charge the price set by the liquor manufacturer, the anti-rebate statutes require the agent to charge the commission set by the insurer, and preclude the consumer and the agent from bargaining over the fee for the agent's services. Thus, while the Fair Trade Act may have served the interests of liquor manufacturers, and even some retailers, the Court nonetheless set it aside: "For a statute . . . to be upheld there must be some semblance of a public necessity for the act and it must have some relation to the public health, morals or safety." 40 So.2d at 375.7/ Similarly, as we now demonstrate, the anti-rebate statutes serve only the interest of some segments of the insurance industry, and not the welfare of the public.

1. The Department of Insurance Has Not Identified Any Purpose of the Anti-Rebate Statutes Which Serves the Public Welfare.

In the court below, the Department's principal argument was that the anti-rebate statutes promote the solvency of

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7/ The Court renewed its ruling in Seagram-Distillers Corp. v. Ben Greene, Inc., 54 So.2d 235 (Fla. 1951), and Mills Laboratories, Inc. v. Eckerd, 73 So.2d 680 (Fla. 1954).

insurance companies. The flaw in this argument is that the statutes only regulate the portion of the premium retained by insurance agents, not the insurance company, and therefore are unrelated to the actuarial soundness of the policy. Thus, as explained at page 3, supra, insurance premiums have two components -- the portion paid to the company for insurance, and the portion paid to the agent for advising the customer and selling the policy. Permitting rebating would have no effect on the part of the premium retained by the company; it would only decrease the price paid for the agent's services. For this reason, the First District correctly observed that it was "unable to perceive any relation between an agent's freedom to rebate a portion of the agent's commission earned on sale of a policy and the future solvency of the policy carrier." 457 So.2d at 497.

The second argument made by the Department is that rebating could lead to discrimination among purchasers since it could create a difference in the ultimate price paid for insurance by consumers. While it is true that not all consumers would pay the same total premium, because it is likely that only some agents would offer rebates, they would all continue to pay the same net premium. The District Court explained that the rebate affects only the commission, whereas the net amount paid to the company "remains constant throughout an actuarial class regardless of variable commission rebates offered by agents to individual classmembers." Id. As the Court below correctly observed, this can hardly be characterized as "undesirable discrimination in a free market economy" since the effect is to lower insurance prices for at least some consumers. Id.

Moreover, another statute, which appellees have agreed is valid, provides complete protection against any unfair discrimination. Section 626.9541(1)(g), Florida Statutes (1984), prohibits "any unfair discrimination between individuals of the same actuarially supportable class" in the sale of insurance. This statute flatly prohibits price differences both in the net premium which the company receives (for customers in the same actuarial class receiving the same policy), and in the agent's commission when the agent performs identical services. Even if rebating were permitted, this statute would require an agent to charge the same fee (i.e., give equal rebates) unless he performed different services, in which case the difference in charges would not be "unfair." Thus, a decision that the anti-rebating statutes are unconstitutional would only end the protected status of insurance agents and make them equivalent to lawyers, doctors, stockbrokers, plumbers and car repairmen, who must be responsive to market forces and competitive pressures, and who may bargain with consumers over their fees. Moreover, insurance purchasers would still receive a protection not given other consumers since an agent would still be prohibited from charging a different commission to two customers receiving precisely the same policy and service.8/

8/ The Department (Br. at 42) argues that the anti-discrimination statute would require all agents representing the same company to give identical rebates. This issue is not (footnote continued)

In the lower courts, the Department argued that agents would no longer provide consumers with the same quality of information if rebating were permitted, because they would presumably attempt to compensate for lower commissions by selling more policies and spending less time with each customer. The problem with this argument is that it runs contrary to the principle that consumers are the best judges of their own interests. Thus, it may be true that some agents will charge low prices and will not provide consumers the same quality of information as that provided by agents charging the full commission. But the idea that the state ought to "protect" consumers from lower-price insurance simply because in some cases it may be accompanied by less service is nothing short of the "highly paternalistic approach" which has been rejected again and again by courts in this state and elsewhere when called on to evaluate laws regulating the professions. Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 770, 96 S.Ct. 1817, 1829, 48 L.Ed.2d 346, 363 (1976); see The Florida Bar v. Brumbaugh, 355 So.2d 1186 (Fla. 1978). This was the First District Court's conclusion as well. 457 So.2d at 498.

There is no legislative history which identifies the actual

(footnote continued)

presented in this case, but in our view variations in rebates among agents could reflect differences in services and therefore would not be discriminatory. As the District Court pointed out, even if identically situated consumers negotiated rebates which differed in amount, this would not constitute "undesirable discrimination." 457 So.2d at 497. Nor is there support in the statutory language for the argument of the American Council of Life Insurance Agents (Br. at 14) that the anti-discrimination statute applies only to insurance companies. To the contrary, the provision applies equally to "any person" involved in the sale of insurance. §§ 626.9521, 626.9541(1)(g), Fla Stat. (1984).

legislative purpose of the Florida anti-rebate statutes. Nevertheless, the American Council of Life Insurers ("ACLI") argues that this Court can discern the purpose from hearings which occurred in New York in 1905. ACLI Br. at 6-9. Those hearings were conducted by the Armstrong Committee, whose conclusions appear in the Armstrong Report relied on by the Department and its amici. See ACLI Br., Appendix at 1-20.

The Armstrong Committee investigated a variety of unregulated financial practices which jeopardized the solvency of insurance companies. At the time of those investigations, New York had an anti-rebate statute, but did not have many other laws which Florida and other states have today to protect consumers from companies with insufficient assets to pay claims. Thus, those hearings did not assess the merits of an anti-rebate statute when the financial practices of insurance companies are otherwise regulated to assure solvency. In fact, the discussion of rebating in the Armstrong Report covers less than a single page and, except for a reference to "undue competition," does not identify the state interest which is promoted by the anti-rebating provision. Report of the Joint Committee of the Senate and Assembly of the State of New York to Investigate and Examine Into the Business and Affairs of Life Insurance Companies Doing Business in the State of New York, Vol. VII, at 318 (1906), reprinted in ACLI Br., Appendix at 20. Thus, there is nothing in the Armstrong Committee Report which provides a justification for Florida's anti-rebating statute.

The Department (Br. at 22) also argues that rebating could result in a practice known as "churning," in which consumers would purchase new policies yearly in order to obtain rebates. See also ACLI Br. at 27-29. Churning occurs when companies offer commissions which represent a large percentage of the fixed annual premium during the first year of the policy as an inducement to agents to promote their policy to new customers. Hearings on Insurance Agent Commission Deregulation, Before the Subcommittee on General Oversight of the House Committee on Small Business, 97th Cong., 1st Sess. ("Commission Deregulation Hearings")(1981), at 6 (testimony of Wisconsin Insurance Commissioner Susan Mitchell), 53 (testimony of G. Bowers). Churning does not, and would not, occur with respect to the sale of automobile and property insurance because the commission rates are flat, and agents have no incentive to turn over policies after the first year, since the commission remains constant in subsequent years.

The Department's argument apparently is that, if rebates were allowed, customers might switch policies every year in an effort to obtain a larger rebate from the agent's larger commission than would be obtainable from the smaller commission paid in the subsequent renewal years. There are several reasons why this argument cannot justify upholding the anti-rebate statutes. First, it is the commission structure and not rebating which would be the cause of churning. In fact, that structure currently gives agents an incentive to turn life insurance policies

over yearly, and thus churning currently occurs despite the anti-rebate laws. Commission Deregulation Hearings at 6, 53. Second, although churning could in theory still occur if rebating were permitted, the likely outcome is that it would be prevented by the free market forces which would be unleashed. Thus, insurance companies might pay more nearly level commissions, require customers to agree to multi-year policies, or refuse to insure customers who regularly permit their policies to lapse. In short, the companies have more than ample power to deal with any problem regarding churning which might remain after invalidation of the anti-rebate statutes, and the result could well be beneficial measures to eliminate churning altogether. In any event, there is no basis for the Department's speculation that allowing negotiation over agents' commissions would result in an increase in churning. Consequently, this argument is not a sufficient basis for sustaining the anti-rebate statutes.

At pages 6-7 and 21-25 of its brief, the Department uses a scatter gun approach to advance numerous justifications for the anti-rebate statutes. Some of these arguments are variations of those discussed above and rejected by the District Court. 457 So.2d at 499. As for the others, they are best answered by the testimony of Wisconsin's Insurance Commissioner Susan Mitchell in hearings held in 1981 in the U.S. House of Representatives:

> First. If agents are permitted to rebate, unscrupulous companies and agents will take advantage of unsuspecting buyers by offering large rebates.

The insurance industry is the only business I know where the word "rebate" has a nasty connotation. Most industries consider rebates competitive sales tools.

People who buy commodities or services rarely buy based on price alone. People who buy insurance will consider a premium discount but they will also consider service, reputation of the company and agent and the characteristics of the product.

Second. Rebates will give the sophisticated buyer an advantage over the uninformed buyer and will result in unfair discrimination.

In any marketplace, the sophisticated buyer has an advantage over the uninformed buyer. Under insurance law, price discrimination is prohibited when it is not based on the nature and degree of risk or expenses. Consequently, agents who offer discounts must do so in a manner that treats consumers fairly.

Third. These proposals will drive the small agent out of business and hurt the new agent by giving an unfair advantage to larger agents.

Current regulations may be artificially supporting more agents than are needed. If there is an oversupply of agents, there may be some reduction. However, if there is enough business to go around at the rates being charged, new agents and small agencies will have no problem.

Fourth. Agents will become less professional if they are forced to compete with rebates.

Remember, elimination of these laws opens the door to new methods of pricing. Many professionals charge hourly fees. Some charge specific fees for specific services; the customer chooses the service he or she wants.

Fifth. Agents will demand higher commissions from companies so that they can offer higher rebates. The price of insurance will go up because people will buy from the agent who offers the highest rebate.

> This argument lacks logic. Let's say that a Cadillac dealer selling a $25,000 car offers a $5,000 rebate; the net cost of the Cadillac is $20,000.
>
> Let's say that a Ford dealer selling a $12,000 car offers a $2,000 rebate; the net cost of the Ford is $10,000.
>
> Does anyone seriously believe that a car buyer will purchase a $20,000 Cadillac instead of a $10,000 Ford simply because the rebate is larger? A buyer will look at the bottom line.
>
> The people who argue that these laws should be retained will offer these and other arguments. Buyers may be misled and may make unwise buying decisions under a competitive pricing system. That is true whether we are buying new tires or choosing a stockbroker, or buying insurance.
>
> The current system puts insurance buyers at a greater disadvantage: The high commission policies that benefit the agent are not necessarily the policies of greatest value to the buyer.

Commission Deregulation Hearings at 8-9 (emphasis added and format altered).

Beginning at page 41 of its brief, the Department includes a laundry list of reasons to support its claims that declaring the anti-rebate laws unconstitutional would "adversely impact the insurance code." Some of these arguments were made by the Department in its petition for rehearing en banc and were rejected by the District Court in the revised opinion which it issued in conjunction with its denial of the petition for rehearing. 457 So.2d at 499. The remaining arguments, concerning calculation of premium refunds and taxes (Dept. Br. at 44-47), do not justify the anti-rebate statutes because at most they would require insurance companies to adopt different accounting procedures if the decision of the District Court is affirmed.

There is one additional fact that makes the anti-rebating statutes particularly difficult to justify, and that is the double standard that is applied to commercial insurance policies. Although the anti-rebate laws prevent negotiations over the agent's commission, agents routinely engage in such negotiations with commercial customers. Justice Department Report at 293 (R. 48); Commission Deregulation Hearings at 41 (testimony of J. Regan), 65 (testimony of Professor W. Scheel); C. Kulp and J. Hall, Casualty Insurance at 875-86 (4th ed. 1968). In those cases, the company, the agent, and the customer negotiate a specially tailored package which provides for the desired insurance at an agreed-upon price. As part of the negotiation, the agent and the customer agree on the commission to be paid. Because the premium includes the negotiated commission, no rebate is necessary, and thus there is no violation of the anti-rebate statutes. However, the end result is the same as if a rebate had been given, and this makes the anti-rebate statutes particularly unfair to individuals and especially difficult to justify in terms of the public welfare.

2. The Anti-Rebate Statutes Are Detrimental to the Welfare of the Public.

Not only has the Department failed to show that the anti-rebate statutes promote a legitimate public purpose, but the record demonstrates that they are actually detrimental to consumers in Florida. Thus, in the report introduced in support of Dade County Consumers' motion for summary judgment,

the United States Department of Justice concluded that it would be in the best interests of the public to allow customers to bargain with agents over the commission. The Justice Department Report concludes that, among other things, rigid state regulation of insurance has "discouraged rate reductions." Id. at 340 (R. 59). Specifically, the Report states that rebating of insurance commissions "provides each individual agent with the opportunity to reduce the level of commissions based on competitive pressures and cost incentives." Id. at 295 (R. 50). But, under the current system, the insurance company sets the standard commission for each type of policy in its filings with the Department of Insurance, and all agents must charge their customers this standard commission. If discounting were allowed, the agent could not increase his commission above the standard rate filed with the Department, but he could reduce his fee by returning part of his commission to the consumer. Id. It is for this reason that the Justice Department Report concluded that the only possible result of allowing agents to rebate a portion of their fees would be a reduction of insurance agents' commissions. Id. at 295-96 (R. 50-51).

The savings to consumers from rebating would be enormous. In Congressional hearings, Congressman La Falce estimated that the nationwide cost of the anti-rebate laws to consumers is $5 to $6 billion. Commission Deregulation Hearings at 3. Consumers Union in its amicus curiae brief (at 5) estimates that the cost to Florida consumers is $325 million a year.

It is also relevant that every other profession operates without laws requiring price fixing. Attorneys and doctors are permitted to bargain with clients and patients as to the fee to be charged, without interference by the State. Even stockbrokers, whose fees were fixed until 1975, have been deregulated with no apparent ill effects on the profession or the public. See Justice Department Report at 298 (R. 53); Commission Deregulation Hearings at 74. As Consumers Union points out in its brief (at 3-4), consumers have saved hundreds of millions of dollars as a consequence of laws permitting stockbrokers to negotiate their fees. In light of the favorable experience of other professions, it is particularly significant that the Department has failed to identify any legitimate reason that the insurance industry requires this special protection.

In addition to causing higher prices, there is a more subtle, and possibly serious, detriment to the anti-rebate statutes: they reinforce the inherent conflict of interest between the agent and his customer. Since insurance companies pay agents different commissions for different types of insurance, it is to the agent's financial advantage to sell his customer the policy carrying the highest commission. However, the size of the commission may bear no relationship to the appropriateness of that policy to the particular customer. To the extent that agents respond to their instincts of self-enrichment, the public is injured since customers' interests in

receiving the least expensive and/or most appropriate policy may take second place to the agent's desire to sell a policy yielding a higher commission. Justice Department Report at 298-301 (R. 53-56); Commission Deregulation Hearings at 11-12 (testimony of Commissioner Mitchell), 61 (testimony of Professor Scheel). One survey indicated that 48% of agents chose policies for new clients on the basis of the agent's commission, whereas 17% chose the policy with the lowest price. Id. at 72 & n.2. However, if the anti-rebate laws were set aside, then the size of the commission would be determined by negotiation. The competetive pressure to increase the rebates as the commissions increase would make high commission policies less profitable, and would alleviate this conflict of interest.

Thus, any arguable benefit of these statutes must be weighed against the harm to the public caused by the excessive prices, which the statutes require, and the agent's inherent conflict of interest, which they foster. Based on the balances struck in cases previously decided by this Court, in which it declared other, analogous statutes unconstitutional, this Court should rule that the anti-rebate statutes also violate the due process requirements of the Florida Constitution.

C. The Authorities Relied On By The Department And Its Amici Are Inapposite.

The Department relies principally on three cases to argue that "it is clear that the United States Supreme Court ruled long ago that statutes such as the anti-rebate statutes are

a proper exercise of a state's policing power." Dept. Br. at 14, citing O'Gorman & Young v. Hartford Fire Insurance Co., 282 U.S. 251, 51 S.Ct. 130, 75 L.Ed. 324 (1931); German Alliance Insurance Co. v. Lewis, 233 U.S. 389, 34 S.Ct. 612, 58 L.Ed. 1011 (1914); Osborn v. Ozlin, 310 U.S. 53, 60 S.Ct. 758, 84 L.Ed. 1074 (1940). However, for two reasons those cases are wholly irrelevant to the issues presented here.

First, and most important, this case turns on the application of the due process provisions of the Florida Constitution, whereas those cases were decided solely under the United States Constitution, which, as we demonstrated at pages 16-17, supra, has no practical function in the substantive due process area. Thus, in O'Gorman & Young, an agent who had a contract with an insurance company for a 25% commission challenged a Kansas law which restricted his commission to a reasonable rate, 20% in that case. The Supreme Court upheld the constitutionality of the Kansas law because it protected consumers from excessive insurance rates. Even less relevant to the issue in the instant case are the German Alliance and Osborn cases. In German Alliance the Court held that the state may play a role in setting insurance rates because of the state's interest in promoting the solvency of insurance companies, 233 U.S. at 413, and Osborn held that the state may limit the sale of insurance to resident agents who are entitled to at least half the commission.9/

9/ The Court would apparently reach a different result today in Osborn in light of Supreme Court of New Hampshire v. Piper, 53 U.S.L.W. 4186 (U.S. Feb. 26, 1985)(striking down residency requirements for lawyers).

Second, while all of the state cases involved insurance regulation, none purported to decide the constitutionality of an anti-rebating statute. In fact, their only relevance to the issues in this case is that they demonstrate that the state may lawfully regulate insurance companies and license insurance agents, a proposition which Dade County Consumers have conceded since the inception of this litigation.10/

The Department has also cited ten cases from other states, suggesting that they uphold the constitutionality of laws similar to the Florida statutes challenged in this action. However, eight of these cases are wholly irrelevant to the constitutional issues raised in this case. Five of them do not even concern a constitutional question,11/ and three concern statutes outlawing rebating by a life insurance company and not by an agent, a prohibition which appellees

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10/ For the same reason, Collignon v. Larson, 145 So.2d 246 (Fla. 1st DCA 1962); Brewer v. Insurance Commissioner and Treasurer, 392 So.2d 593 (Fla. 1st DCA 1981), are inapposite and were properly rejected by the District Court when it denied the Department's motion for rehearing.

11/ Western Wood M. & M. Prod. v. Argonaut Ins. Co., 280 Or. 623, 572 P.2d 1004 (1977); Calvin Phillips & Co. v. Fishback, 84 Wash. 124, 146 P. 181 (1915); Utah Ass'n of Life Underwriters v. Mountain S.L. Inc. Co., 58 Utah 579, 200 P. 673 (1921); Rideout v. Mars, 99 Miss. 199, 54 So. 801 (1911); Metropolitan Life Ins. Co. v. People, 209 Ill. 42, 70 N.E. 643 (1904).

specifically have not challenged in this action.[12/]

In fact, the Department has cited only two state cases which involve a constitutional challenge to a statute prohibiting rebating by agents. People v. Formosa, 30 N.E. 492 (N.Y. 1892); Commonwealth v. Morningstar, 144 Pa. 102, 22 A. 867 (1891). Aside from the fact that these cases were decided at the turn of the century, neither court explained the basis for its conclusion that the anti-rebate statutes promote the public welfare. More importantly, this Court differs markedly from other courts in its willingness to review with considerable skepticism economic protection legislation such as the anti-rebate laws, and therefore cases from other jurisdictions are entitled to little if any weight.

The Florida cases cited by the Department also do not support their argument that the anti-rebate statutes are constitutional. One of these, State ex rel. Vars v. Knott, 135 Fla. 206, 184 So. 752 (1938), was a challenge to a statute which required that insurance agents be paid by commission, rather than by salary. Because of the differences between that statute and the ones at issue here, because the Court treated the Knott case primarily as one raising equal protection issues, and because this Court has never in the last thirty years cited

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[12/] Shortridge v. Hipolito Co., 114 Ca. 682, 300 P. 467 (Dist. Ct. App. 1931)(challenge to statute requiring insurance companies to abide by rates filed with state); Leonard v. American Life & Annuity Co., 139 Ga. 274, 77 S.E. 41 (1913) (challenge to practice of discounting by insurance company); People v. Hartford Life Ins. Co., 252 Ill. 398, 96 N.E. 1049, 1051 (1911)(constitutionality of prohibition against rebating by agents specifically not decided).

Knott to uphold a statute against a claim that it violated the due process clause of the Florida Constitution, Knott simply does not shed light on the constitutional issues raised in the case at bar.

Similarly, in Pickerill v. Schott, 55 So.2d 716 (Fla. 1951), cert. denied, 344 U.S. 815, 97 L.Ed. 634, 73 S.Ct. 9 (1952), this Court upheld a law prohibiting liquor manufacturers from having an interest in or granting extensive credit to retail liquor establishments on the grounds that the law both reduced the monopoly power of manufacturers and the volume of retail liquor sales. In Pickerill, the Court found that the legislature properly concluded that those objectives were in the public interest and that the law had the desired effect. Here, by contrast, there is no public interest in keeping insurance commissions high, and the legitimate goals for the anti-rebate laws which the Department advances are achieved by other provisions of the Florida Insurance Code.

Thus, the authorities relied on by all the parties demonstrate that the anti-rebating provisions are an anomaly in Florida. Salesmen of all other types are permitted to bargain with consumers over the price of their products and services. Car dealers frequently offer rebates as large as several hundred dollars to attract new car buyers. Even banks offer gifts to customers who open new accounts. In the face of the prevalence of competition and rebating throughout the Florida economy, the Court must find a substantial justification in order to sustain the statutory provisions which prohibit insurance

agents from negotiating with consumers over the size of their commissions. Because the State has not identified such a justification, the anti-rebating statutes violate the due process protections in Article I, section 9 of the Florida Constitution.

CONCLUSION

For the foregoing reasons, the decision of the First District Court of Appeal should be affirmed.

Respectfully submitted,

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March 12, 1985

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