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IN THE SUPREME COURT OF FLORIDA

CASE NO. 66,178

DEPARTMENT OF INSURANCE and
BILL GUNTER, in his official
capacity as Insurance
Commissioner of Florida,

Appellants,

vs.

DADE COUNTY CONSUMER
ADVOCATE'S OFFICE and
WALTER T. DARTLAND, as
Director of the Dade County
Consumer Advocate's Office,

Appellees.

APPELLANTS' INITIAL BRIEF

Appeal from the District Court
of Appeal, First District
Case No. AV-400

Curtis Ashley Billingsley
Attorney
Department of Insurance
539 Larson Building
Tallahassee, Florida 32301
(904) 488-1295

Jim Smith
Attorney General

Kent A. Zaiser
Assistant Attorney General
Department of Legal Affairs
The Capitol, Suite 1501
Tallahassee, Florida 32301
(904) 488-1573

Counsel for the Appellants

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STATEMENT OF THE CASE

In 1977, Joseph Blumenthal, a licensed Florida insurance agent, brought a lawsuit challenging the constitutionality of two statutes contained in the Florida Insurance Code, Sections 626.611(11) and 626.9541(1)(h)1., Florida Statutes (1983), hereinafter referred to as the "anti-rebate statutes." Blumenthal v. Department of Insurance, Case No. 77-355 (2d Cir., Leon County). Upon reaching the merits of Mr. Blumenthal's claim, the Circuit Court held the statutes constitutional. Mr. Blumenthal appealed directly to the Supreme Court of Florida, but before the Court could decide the appeal, he died. Subsequently, the Court dismissed the appeal. Blumenthal v. Dep't of Insurance, 375 So.2d 910 (Fla. 1979).

On May 17, 1983, the Dade County Consumer Advocate's Office joined by Walter T. Dartland (hereinafter DCCA), filed a Complaint initiating the instant action in the Second Judicial Circuit, Leon County. Mr. Dartland brought this action both on his own behalf and in his capacity as director of the DCCA. The DCCA moved for Summary Judgment. The Department of Insurance and Bill Gunter (hereinafter Department) did not answer the Complaint and moved to dismiss the action. After receiving memoranda and hearing oral argument, the Honorable Ben C. Willis, Circuit Judge, entered summary judgment for the Department. No evidentiary proceeding was held before the trial court. In the order of judgment, Judge Willis held in the absence of an

evidentiary record that "Florida Statutes 626.9541(8)(a)[1] and 626.611(11) which forbid the granting of rebates by insurance agents, are a valid exercise of the police power of the State of Florida and a valid exercise of its regulatory authority to protect the public from discrimination." R. 85-86. The DCCA filed its notice of appeal to the First District Court of Appeal on October 25, 1983.

On August 17, 1984, the District Court issued its opinion finding the anti-rebate statutes unconstitutional. The District Court concluded, without benefit of an evidentiary record, that it was unable to find any legitimate state interest justifying the continued existence of the anti-rebate statutes. In response to the Department's motion for rehearing, the District Court issued a corrected opinion on October 24, 1984. Pursuant to Rules 9.030(a)(1)(A)(ii) and 9.110, Florida Rules of Appellate Procedure, the instant appeal was timely filed on November 20, 1984.

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[1]/ Section 626.9541(8)(a), Florida Statutes (1982 Supp.) has been subsequently renumbered as 626.9541(1)(h)1., Florida Statutes (1983).

STATEMENT OF THE FACTS

Because the Department filed a motion to dismiss, it did not file an answer to the DCCA's Petition. While the DCCA moved for summary judgment, the trial court granted summary judgment in favor of the Department. Accordingly, there are no facts in evidence in this case upon which to present a Statement of the Facts.

SUMMARY OF THE ARGUMENT

Sections 626.611 and 626.9541, Florida Statutes (1983), constitute part of a comprehensive regulatory scheme for review by the Department of Insurance of the business activities of Florida insurance agents.

Section 626.611 provides in pertinent part:

> Grounds for compulsory refusal, suspension or revocation of agent's, solicitor's, or adjuster's license or service representative's, supervising or managing general agent's or claims investigator's permit.-- The department shall deny, suspend, revoke, or refuse to renew or continue the license of any agent, solicitor, or adjuster or the permit of any service representative, supervising or managing general agent, or claims investigator, and it shall suspend or revoke the eligibility to hold a license or permit of any such person, if it finds that as to the applicant, licensee, or permittee any one or more of the following applicable grounds exist:
>
> * * *
>
> (11) Rebating, or attempt thereat, or unlawfully dividing or offering to divide his commission with another.

Section 626.9541 provides in part as follows:

> Unfair methods of competition and unfair or deceptive acts or practices defined.--
> (1) UNFAIR METHODS OF COMPETITION AND UNFAIR OR DECEPTIVE ACTS.-- The following are defined as unfair methods of competition and unfair or deceptive acts or practices:
>
> * * *
>
> (h) Rebates.--
> 1. Except as otherwise expressly provided by law, or in an applicable filing with the department, knowingly:
> a. Permitting, or offering to make, or making, any contract or agreement as to such contract other than as plainly expressed in the insurance contract issued thereon;

> b. Paying, allowing, or giving, or offering to pay, allow, or give, directly or indirectly, as inducement to such insurance contract, any rebate of premiums payable on the contract, any special favor or advantage in the dividends or other benefits thereon, or any valuable consideration or inducement whatever not specified in the contract;
> c. Giving, selling, or purchasing or offering to give, sell, or purchase, as inducement to such insurance contract or in connection therewith, any stocks, bonds, or other securities of any insurance company or other corporation, association, or partnership, or any dividends or profits accrued thereon, or anything of value whatsoever not specified in the insurance contract.

It is Department's position and the trial court recognized that the business of insurance is so affected with the public interest that it is subject to the regulation and control of the Legislature of this State through the exercise of the police power. The anti-rebate statutes are integral parts of the legislative exercise of police power through a statutory scheme to regulate the cost of insurance in the State of Florida to the end that the cost of insurance not be inadequate, excessive, or unfairly discriminatory. The anti-rebate statutes prevent circumvention of the Department's authority to review rates and protect the integrity of the insurance contract, pursuant to Chapter 627, Florida Statutes. Accordingly, these provisions are a constitutional exercise of the state's police power, reasonably related to a legitimate state interest: equality and fairness for all policyholders. Contrary to the standard of review applied by the District Court, a statute exercising the police

power is constitutional if the statute has a reasonable relationship to the public health, safety, or welfare. In this instance, the above-quoted anti-rebate statutes in question bear a reasonable relationship to the public welfare and are, therefore, a permissible legislative expression of the police power. If facts can be conceived that demonstrate the reasonableness of the statute, then it should be upheld. There are a number of improper practices which the Legislature intended to address by prohibiting rebating and which should properly be considered by the Court when it reviews the statutes in question. It is the DCCA's burden to clearly demonstrate that the anti-rebate statutes have no reasonable relationship to a legitimate state interest. The DCCA has failed to carry this burden.

The DCCA seeks to invalidate Section 626.9541(1)(h)1., Florida Statutes, in its entirety. This statute is not limited to the subject of an insurance agent giving a portion of his commission only to the purchaser of insurance. It also includes premiums, dividends, or any other valuable consideration offered or given to anyone. The statute also prohibits offering or permitting any alteration of the insurance contract or any inducement to the purchase of insurance whatsoever not specified in the insurance contract. Therefore, if the DCCA prevails, not only can agents rebate their commissions to anyone, but also the insurance companies they represent can modify the terms of the

insurance contract from one insured to another. The decision of the District Court, if allowed to stand, would undermine the entire statutory scheme for regulating the costs of insurance.

ARGUMENT

I. THE ANTI-REBATE STATUTES DO NOT VIOLATE THE DUE PROCESS CLAUSE OF THE FLORIDA CONSTITUTION SINCE THEY ARE RATIONALLY RELATED TO THE LEGITIMATE STATE INTEREST OF REGULATING THE PRICE OF INSURANCE IN THE STATE OF FLORIDA.

A. The Standard For Review Is A Reasonable Basis Test.

The standard for review in this case is whether the party challenging the statute has demonstrated that the provision is wholly arbitrary and capricious, and bears no relationship to any demonstrated or conceivable public interest. If, in fact, any reasonable basis exists for believing that the statute will accomplish a legitimate legislative purpose, it must be upheld.

In Lasky v. State Farm Ins. Co., 296 So.2d 9 (Fla. 1974), this Court described the reasonable basis test as follows:

> The test to be used in determining whether an act is violative of the due process clause is whether the statute bears a reasonable relation to a permissible legislative objective and is not discriminatory, arbitrary or oppressive. . . In [examining this relationship], we do not concern ourselves with the wisdom of the Legislature in choosing the means to be used, or even with whether the means chosen will in fact accomplish the intended goals; our only concern is with the constitutionality of the means chosen.

Id. at 15 and 16.

In United States Fidelity & Guaranty Co. v. Dep't of Ins., 453 So.2d 1355, 1362 (Fla. 1984), this Court reaffirmed the reasonable basis test as the applicable standard in reviewing the Florida Insurance Code. In that decision, this Court stated:

> Next appellants argue that section 627.066 is not reasonably related to the legislative goal of protecting policyholders from exorbitantly high rates. They contend that the statute may actually cause higher rates by encouraging inefficient management and discouraging competition. The fact that a statute may not actually accomplish its intended goals is not a sufficient reason for declaring the statute unconstitutional. The test is whether the legislature at the time it enacts the statute has a reasonable basis for believing that the statute will accomplish a legitimate legislative purpose. (Citations omitted.)

In matters of social and economic welfare, a party challenging the constitutionality of a statute on due process grounds must allege and prove that the statute is wholly arbitrary and capricious and that the statute bears no relationship to any demonstrated or conceivable public interest. Woods v. Holy Cross Hosp., 591 F.2d 1164 (5th Cir. 1979). It is clear that the regulation of the business of insurance and the cost of insurance contracts have been recognized by Florida courts as involving legitimate social and economic state interests which require special deference to legislative and administrative acts. See, Department of Ins. v. Teachers Ins. Co., 404 So.2d 735 (Fla. 1981); Williams v. Hartford Accident & Indemnity Co., 245 So.2d 64 (Fla. 1971); United States Fidelity & Guaranty Co. v. Dep't of Ins., supra; and Department of Ins. v. Southeast Volusia Hosp. District, 438 So.2d 815 (Fla. 1983). There are two limited exceptions to this general principle; arbitrary or oppressive exercise of the police power or the existence of a "fundamental right" as the object of

the regulation. Neither exception has been presented as an issue in this case.

B. The DCCA Has A Substantial Legal Burden Placed Upon It Under The Reasonable Basis Test.

In matters of economic and social welfare, such as here, the deference due the Legislature is especially great and the burden of proof on any party challenging a legislative judgment is heavy. That burden requires the challenging party to allege and prove that the statute is wholly arbitrary and has no reasonable relationship to any demonstrated or conceivable public interest. Pinillos v. Cedars of Lebanon Hosp. Corp., 403 So.2d 365 (Fla. 1981); In Re Estate of Greenberg, 390 So.2d 40 (Fla. 1980); and Woods v. Holy Cross Hosp., 591 F.2d 1164 (5th Cir. 1979). The difficulty in meeting this burden was summarized accurately by the First District Court in Sasso v. Ram Property Management, 431 So.2d 204 (Fla. 1st DCA 1983). In discussing the rational basis test in an equal protection context, the Court held:

> Generally, as long as the classificatory scheme chosen by the legislature rationally advances a legitimate governmental objective, courts will disregard the methods used in achieving the objective, and the challenged enactment will be upheld. (Citations omitted.) The test, like that used in McGowan v. Maryland is still highly deferential toward actions taken by the state - perhaps unduly so. It is moreover virtually insurmountable, because the burden of showing the state action is without any rational basis is placed on the individual assailing the classificatory scheme. (Footnote omitted.)

431 So.2d at 216 and 217.

These comments are equally applicable to the due process clause rational basis test. Expecially since no factual record exists in this case, the DCCA certainly has not met its burden of demonstrating that no reasonable basis exists for the enactment of the anti-rebate statutes.

C. Under The Correct Standard of Review, The Anti-Rebate Statutes Are Constitutional.

The anti-rebate statutes are integral parts of a statutory scheme to regulate the cost of insurance in the State of Florida to establish that for all insureds, the rate paid is adequate and not excessive or unfairly discriminatory. A review of the anti-rebate statutes clearly indicates that the Legislature intended to provide regulation and protection to consumers as a class rather than narrowly focusing upon an individual transaction. This is an important point to consider in analyzing the constitutionality of these provisions. The Legislature intended to provide regulation and consumer protection in a much broader fashion than the narrow issue of a single rebate focused upon by the DCCA and the District Court in its opinion.

The Florida Insurance Code sets forth complex procedures for evaluating and reviewing rates to be utilized by insurers in Florida. The express purpose of these provisions is to prevent the use of rates which are excessive, inadequate, or unfairly discriminatory. Section 627.031(1)(a), Florida Statutes. Insurance rates must be filed with the Department and may only be deviated from in accordance with prescribed statutory procedures.

A significant portion of most rates is the commission paid to agents. The commission is based on a percentage of a rate which is actuarially established to provide the appropriate premium or rate for each class of consumer based on factors like age, experience and territory. Actuarial differentials in rates which are designed to promote fairness, and bring precision to ratemaking can be totally undermined by manipulation of the commission charged. The anti-rebate statutes serve a legitimate state interest by preventing circumvention of the Florida rating law and the underlying premise that rates are established utilizing reasonable actuarial principles.

When this Court reviews the anti-rebate statutes under the previously discussed standard of review, federal case law should be considered because the requirements of due process under the United States and Florida Constitutions are indistinguishable. The Second District Court in Florida Canners Ass'n v. State, Dep't of Citrus, 371 So.2d 503, 513 (Fla. 2d DCA 1979), stated:

> Both the 14th Amendment to the United States Constitution and Article I, Section 9, of the Florida Constitution prohibit the taking of property without due process of law. We consider the federal and Florida constitutional guarantees as imposing the same standard and will discuss them as one. Florida High School Activities Association v. Bradshaw, 369 So.2d 398 (Fla. 2d DCA 1978).

The Second District's Opinion was affirmed by the Florida Supreme Court in Coca-Cola Co., Food Division v. State, Dep't of Citrus, 406 So.2d 1079 (Fla. 1981). Therefore, the United States Supreme

Court's decisions concerning rebating, if not controlling, carry great weight in the issue at bar.

In O'Gorman & Young v. Hartford Fire Ins. Co., 282 U.S. 251, 257 & 258, 51 S.Ct. 130, 75 L.Ed. 324 (1931), the Supreme Court unequivocably recognized the integral relationship between rates and commissions when it said in an opinion authored by Justice Brandeis:

> The business of insurance is so far affected with a public interest that the state may regulate the rates. . . and likewise the relations of those engaged in the business. . . The agent's compensation, being a percentage of the premium, bears a direct relation to the rate charged to the insured. The percentage commonly allowed is so large that it is a vital element in the rate structure and may seriously affect the adequacy of the rate. Excessive commissions may result in an unreasonably high rate level or in impairment of the financial stability of the insurer. It was stated at the bar that the commission on some classes of insurance is as high as 35 percent. Moreover, lack of a uniform scale of commissions allowed local agents for the same service may encourage unfair discrimination among policyholders by facilitating the forbidden practice of rebating. In the field of life insurance, such evils led long ago to legislative limitations of agents' commissions. (Citations omitted, emphasis added.)

The Supreme Court's ruling in O'Gorman regarding the regulation of agent's commission was reaffirmed in Osborn v. Ozlin, 310 U.S. 53, 60 S.Ct. 758, 84 L.Ed. 1074 (1940).

Recognition that commission manipulation can disrupt rate fairness has a long history. In 1914, the Supreme Court in German Alliance Ins. Co. v. Lewis, 233 U.S. 389, 34 S.Ct. 612, 58

L.Ed. 1011 (1914), recognized the legitimate state interest in regulating rates and the Court's role in reviewing legislative implementation of that interest through rate regulation. The Court said:

> We have summarized the provisions of the Kansas statute, and it will be observed from them that they attempt to systematize the control of insurance. The statute seeks to secure rates which shall be reasonable both to the insurer and the insured, and as a means to this end it prescribes equality of charges, forbids initial discrimination or subsequently by the refund of a portion of the rates, or the extension to the insured of any privilege; to this end it requires publicity in the basic schedules and of all the conditions which affect the rates or the value of the insurance to the insured, and also adherence to the rates as published. Whether the requirements are necessary to the purpose, or--to confine ourselves to that which is under review--whether rate regulation is necessary to the purpose, is a matter for legislative judgment, not judicial. Our function is only to determine the existence of [the] power. (Emphasis added.)

233 U.S. at 417.

Upon the basis of the foregoing, 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 police power.

The District Court's opinion failed to distinguish these cases. It simply stated that it was unimpressed by these cases as a result of the revolution in consumers rights which has occurred since the turn of the century. The economic interests of consumers are not fundamental rights worthy of any

exception of the due process standards for the exercise of police power. The Legislature has not chosen to ignore the consumer. Rather, as a matter of policy, it selected a method of regulation which protects the consumer as a group. In this regard, the District Court substituted its judgment for that of the Legislature. Further, the mere passage of time does not justify ignoring United States Supreme Court cases directly on point to the issue in this case as the O'Gorman, Osborn and German Alliance cases are.

When this Court determines the reasonableness of the anti-rebate statutes, it should consider that the Legislature has made the basic policy decision that the cost of insurance should be based upon actuarial considerations and not the bargaining strength of certain groups or individuals. This legislative determination results in every individual paying a fair price for their insurance. The alternative would allow influential or sophisticated purchasers of insurance to demand that they be subsidized by those in a weaker bargaining position. Generally, rebating would favor large commercial establishments to the detriment of single consumers who purchase auto, life and health insurance. This subsidization, based on whim and persuasion, not actuarial support, is unfair discrimination prohibited by the anti-rebate statutes. However, it would be meaningless to prevent companies themselves from engaging in this discrimination if the same can be accomplished by agents rebating a portion of the premium to certain preferred customers.

The State clearly has a legitimate interest in establishing uniform rates among members of the same actuarial class. The product, the insurance policy, is the same regardless of which agent it is purchased from. Special price advantages based only on a party's ability to negotiate with an agent reduces ratemaking to highly subjective factors, not subject to any state review. Vulnerable groups unable to negotiate successfully for rebates or special favors would ultimately pay a premium with a built-in cost attributable to the rebates obtained by others. This result is repugnant given the essential role of insurance in today's society. Clearly, the State has a legitimate interest in assuring that a heavily regulated product like insurance is made available to all consumers in the same actuarial class at the same price.

If the correct standard for review is applied and if the United States Supreme Court decisions concerning that standard are given their appropriate precedential value, then clearly the anti-rebate statutes are a constitutional exercise of the police power by the Legislature and are not in any way violative of the due process clause Article I, Section 9 of the Florida Constitution.

D. The District Court Employed The Incorrect Legal Standard Of Review In Finding The Anti-Rebate Statutes Unconstitutional.

In reviewing the constitutionality of the anti-rebate statutes, the District Court held, "the applicable standard of

review is whether the challenged anti-rebate statutes reasonably and substantially promote the public health, safety or welfare as required by the due process clause of the Florida Constitution." (Emphasis added.) The Court supported that statement with citations to Liquor Store, Inc. v. Continental Dist. Corp., 40 So.2d 371 (Fla. 1949); and 10 Fla.Jur.2d Constitutional Law §§211 & 214 (1979 & Supp. 1983). Nowhere in those cited references does the word "substantially" appear. The majority opinion in Liquor Store, supra at 375, stated, "[t]hroughout all our holdings we have recognized as basic that for a statute such as this 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." (Emphasis added.) Therefore, the applicable standard for review is a less exacting standard than that which was employed by the District Court when it reviewed the anti-rebate statutes.

The word "substantial" appears only in the concurring opinion by Justice Barns in Liquor Store at page 385. This concurring opinion has not been cited as the applicable standard for review by any other Florida Court subsequent to Liquor Store. Accordingly, the more stringent requirement of a "substantial" relationship has not been previously recognized by the courts in Florida.

Since the majority opinion in Liquor Store enunciated the standard for review, it has been echoed by several Florida

appellate and federal trial courts. United States Fidelity & Guaranty Co. v. Dep't of Ins., supra; Lasky v. State Farm Ins. Co., supra; Florida Canners Ass'n, supra; Coca-Cola Co., Food Div. v. State, Dep't of Citrus, supra; Stadnik v. Shell's City, Inc., 140 So.2d 871, 874 (Fla. 1962) and Patch Enterprises, Inc. v. McCall, 447 F. Supp. 1075 (M.D. Fla. 1978).

If the District Court had applied the correct standard of review, it would have found the anti-rebate statutes constitutional. In its opinion at page 3, the Court stated:

> Perhaps the department's and amicis' strongest argument is that the agent who is permitted to rebate will do so at the expense of his customers, in that they will not be provided with the quality of information regarding the best type of insurance suited to their needs because the agent, having negotiated his commission, will not spend the requisite time counseling his clients. Accordingly, the argument goes, the public must be protected from low-cost, low-quality service, and the statutes banning rebating therefore advance a legitimate public interest. We recognize that this argument is not without merit but we are not convinced that it validates the exercise of the police powers of the state. (Footnote omitted, emphasis added.)

Thus the District Court recognized a reasonable relationship between the proper exercise of the police power and the anti-rebate statutes but, due to review under a more rigorous and inappropriate standard, failed to uphold those statutes.

In reaching its decision, the First District Court cited Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 96 S.Ct. 1817, 48 L.Ed.2d 346

(1976), in which the United States Supreme Court struck down a law prohibiting druggists from advertising the prices of their drugs. That case involved a "fundamental" right, freedom of speech. Upon careful review of that opinion it becomes clear that the issue before the Supreme Court there was a First Amendment issue and not an issue of due process as to economic rights. Since Virginia State Bd. of Pharmacy involved a "fundamental" right in a First Amendment setting, it is inapplicable to this case which concerns a non-fundamental or ordinary right in a due process setting. Because no exception to the general standard for review is applicable to this case, the general standard of review should be applied.

E. The Department Was Entitled To A Legal Presumption Regarding The Factual Supportability Of The Statutes In Question.

The validity of the use of the police power to regulate business, professions, or trades and for other economic regulatory purposes is well-established and has been recognized, approved and defended against due process attack in numerous federal and state court cases. In a 1938 landmark decision on economic regulation, United States v. Carolene Products Co., 304 U.S. 144, 82 L.Ed. 1234 (1938), the Supreme Court examined the federal statute forbidding the shipment of "filled milk" in interstate commerce which was challenged as violative of the due process clause in that it deprived the plaintiff of its right to earn a living by transporting "filled milk." The Supreme Court

found that the federal law was a legitimate constitutional exercise of the police power to regulate interstate commerce. While it was stated that even if there was no explicit legislative finding that transportation of "filled milk" was injurious to the public, "the existence of facts supporting the legislative judgment is to be presumed, for regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators." 304 U.S. at 152, 82 L.Ed. at 1241. (Emphasis added.)

Similarly, this State affords the defenders of a statute against constitutional challenge the same presumption. The case relied upon by the District Court in reaching its opinion, Liquor Store v. Continental Dist. Corp., supra, quoted favorably from the United States Supreme Court case of Borden's Farm Products Co. v. Baldwin, 293 U.S. 194, 209-210, 55 S.Ct. 187, 192, 79 L.Ed. 281, 288 (1934), which stated:

> When the classification made by the legislature is called in question, if any state of facts reasonably can be conceived that would sustain it, there is a presumption of the existence of that state of facts, and one who assails the classification must carry the burden of showing by a resort to common knowledge or other matters which may be judicially noticed, or to other legitimate proof, that the action is arbitrary. (Emphasis added.)

Specifically, this Court found the presumption applicable to insurance in Lasky v. State Farm Ins. Co., supra at 17, when it held:

> It may seem from the above discussion that we are ascribing consequences to our no-fault insurance law which have yet to be demonstrated, and which may turn out to be non-existent. What we are actually doing is presuming the existence of circumstances supporting the validity of the Legislature's action, in the absence of any evidence to the contrary. This is the course we must follow pursuant to Munn v. Illinois, 94 U.S. 113, 24 L.Ed. 77 (1877); State ex rel. Adams v. Lee, 122 Fla. 639, 166 So. 249 (1935); and Ex Parte Lewis, 101 Fla. 624, 135 So. 147 (1931).

Rather than afford the Department this presumption, the District Court has employed phrases such as "we are unable to perceive" a reasonable basis and "in the absence of any apparent or rational relation" in its opinion. The Department respectfully submits that there exists a plethora of facts which may be presumed to justify the anti-rebate statutes.

Specifically, in the absence of these laws, discrimination among policyholders would result in that similarly classified policyholders of the same insurer would pay different prices for the same policies. Efforts by consumers to compare costs of similar policies would be thwarted and consumers would be more likely to focus on the size of the rebate offered rather than the quality of the insurance. Insurance premiums would increase as a result of pressures by agents for larger commissions to enable them to offer larger rebates in order to effectively compete and

due to the compensation structure of the life insurance industry, many policies would lapse as consumers replaced their policies each year with new policies sold by different agents who could offer larger rebates due to the prevailing higher first year commission structures.[2] Lapsed policies add substantially to the cost of doing business and in the aggregate will therefore tend to result in higher insurance premiums.

Insurance company solvency would also be adversely affected if the anti-rebate statutes were not in force. As described above, administrative costs to insurers would increase. In addition, companies would be pressured by their agents to pay higher commissions. To the extent that companies did not raise premiums to offset the administrative costs, the solvency of those companies could be jeopardized. Further, a large increase in the lapse rate of policies, occasioned by consumers replacing their policies each year in response to larger rebates being offered on new policies, would also do great harm to the solvency of insurers. The specter of numerous insurer solvency problems would inevitably cause consumers to lose faith in the integrity

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[2]/ Generally, in the life insurance industry the greatest commissions are afforded the agents in the first year of policies. Thus, it follows that the most significant rebates would be offered with the first year of a policy. Rebating would encourage lapsing of policies as consumers attempt each year to obtain the largest discount for their policies. If the anti-rebate laws were repealed, policyholders would be encouraged not to renew their existing policies, but rather to find an agent who will give them bigger discounts from the new first-year commissions.

of the insurance marketplace and would also lead to loss of faith in the State's ability to adequately regulate the insurance business.

A primary and unchallenged purpose for the exercise of police power in insurance premium or rate control is the public's need for solvent insurance companies. Unlike most other goods and services sold, the purchase of insurance involves the present payment for <u>future</u> services. In order to assure the future solvency of insurers for the benefit of the public, it is necessary to regulate the price at which insurance agents today sell their services and the insurance products. Without anti-rebate laws, insurance premiums paid by the insureds to a given insurer would no longer be determined solely by the characteristics and coverages of the policyholders, but would instead be subject to the unknown variable of the amount rebated by the agent.

Not only would rebating upset the establishment of a proper premium based on legitimate factors, it would also promote unfair discrimination among policyholders of the same actuarial class. Under the current statutory scheme, the consumer has been protected through an orderly pricing structure. Without this system, the more sophisticated purchaser would obtain the best deal. Larger volume buyers would use leverage to demand bigger rebates not available to smaller, less sophisticated buyers. Eventually, smaller buyers would end up subsidizing the larger buyers.

Thus, if rebating were allowed, similarly classified policyholders of an insurer with identical coverages would, in essence, be charged different premiums for the same policies. Premiums paid by insureds might not be governed solely by the characteristics of the risk and the type of policy purchased, but instead would be subject to the amount of rebate offered by an agent. This is one of the inequities which existed at the time the laws were enacted and which the laws were intended to correct.

Voiding the anti-rebate laws will eliminate the small, insurance agencies and put the larger, well-established agents in a superior position. Newer agents will be driven out of the business leading to an eventual decline in competition and a monopolistic domination by a few large agencies. A large company or agency could target a market area in a state, come in, offer large rebates, and then raise the prices once the competition is destroyed. In the meantime, it would eliminate the small agents who could not compete.

As agencies are forced to consolidate to survive, the trend would be toward monopolization and fewer agents. Less agents would serve more people, thereby considerably reducing the quality and amount of service and counseling offered by the agents.

Life insurance agents also note that a traditional theme in the industry is that a consumer is entitled to "lifetime" service

on his policy. Permitting rebates and other inducements might attract unscrupulous agents who would sell policies quickly and not be available for the service needed later. At best it would create a situation where an unregulated and variable fee would be charged for each and every service.

Under a system of rebating, a customer could not meaningfully utilize the cost disclosure and comparison systems developed by the National Association of Insurance Commissioners and the industry to help consumers shop intelligently for life insurance policies. The buyer would be likely to base his decision on the size of the rebate instead of the merits of the policy. The consumer would be apt to purchase the policy based on the amount of the initial rebate rather than on the long-term cost and value of the policy.

As previously discussed, commission rates would inevitably increase as agents rebate part of their commissions to customers. Increased insurance costs would result because all expenses, including commissions, are considered when insurance premiums and dividend scales are determined. Also, as consumers lapse their policies to obtain higher rebates, the cost to the public will increase. The recovery of acquisition expenses, which are calculated to be recovered over a longer policy life, would have to be made up in some other manner.

In contrast to this long list of reasonably conceivable facts, the DCCA does not carry its burden of clearly

demonstrating the unconstitutionality of these statutes as required. There is no evidence in the record below which rebuts the existence of any of the facts described above. Instead the DCCA relies upon a Justice Department report. The Justice Department report in turn was relied upon by the District Court and cited in its opinion at footnotes 3. and 4. The report characterizes itself as "the [Justice] Department's tentative views at this time to stimulate comment by all interested parties in consideration of the issues by regulatory and legislative bodies at both the state and federal levels." (R. 42) (Emphasis added.) It is incomplete, unverified and silent as to its value for judicial purposes. The report provides only weak rhetoric of general principles that have no evidentiary value here. The report contains nothing more than broad opinions regarding unrelated insurance topics to be considered, if at all, by policy making authorities such as the Florida Legislature.[3] In a constitutional challenge like this, the report is not dispositive or even helpful when considering the merits of the issue before this Court. Accordingly, the Justice Department report is a totally inappropriate foundation upon which to rest an argument.

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[3]/ If, as a matter of policy, the Florida Legislature believed that anti-rebate statutes were no longer desirable, it could have repealed the challenged provisions during its 1982 "sunset" review of the entire Insurance Code. However, those provisions were re-enacted intact by Ch. 82-243, Laws of Florida.

The District Court has failed to apply the presumption discussed above and disregarded the facts that are reasonably conceivable concerning insurer solvency, discrimination and other matters. It has also elevated inadmissible opinionated hearsay to the status of evidence which it relied on to implement its opinion as policy. This is not a proper function of the courts. The court's function in this matter is to determine if a reasonable relationship exists between the statute and the exercise of the police power. The actual question raised by the DCCA is directed more toward the wisdom of the statute and not its relationship to the proper exercise of police power. That inquiry is inappropriate to the judicial function. The exercise of the State's police power in the area of economic regulation does not have to be the best means of regulating an activity for promoting the public welfare in order to withstand a due process challenge. This Court in Belk-James, Inc. v. Nuzum, 358 So.2d 174, 175 (Fla. 1978), held that the standard for evaluating a legislative "exercise of the police power in the area of economic regulation is whether the means utilized bear a rational or reasonable relationship to a legitimate state objective."

> The arguments advanced by Belk-James, which essentially question whether the best means of regulation has been chosen, can be seen as directed more to the wisdom of the legislation than to its asserted rationality. This inquiry, of course, is inappropriate for our judicial function. Id. at 177.

This Court also stated in that opinion that there is a "presumption that acts of the Legislature are constitutional, and that all reasonable doubts are to be resolved in favor of their validity. . ." Id. at 177.

Upon the basis of the foregoing, it is clear that the DCCA has not satisfied its burden of proving as a matter of fact or law that the anti-rebate statutes are constitutionally invalid. In addition, its arguments have been presented to the inappropriate forum. If today's trend is more toward open competition and less regulation throughout the country's economy as suggested by the District Court and the DCCA, then that trend and its related issues are properly addressed by the Florida Legislature.

Based upon the foregoing argument it is clear that the District Court relied upon material not properly in evidence before it and concerning which the Department has had no opportunity to controvert any of the factual allegations contained therein. Accordingly, if this Court is unable to find the anti-rebate statutes constitutional upon the basis of the record before it, the Department requests a remand of the case to the trial court for further factual consideration so that the Department may submit evidence and argument controverting the allegations appearing in the Justice Department report relied upon by the District Court.

F. All Other Jurisdictions Addressing The Constitutionality Of Anti-Rebate Statutes Have Upheld Them.

The legislative authority to enact anti-rebate insurance statutes and their constitutionality have been addressed by several courts in other jurisdictions. In Rideout v. Mars, 99 Miss. 199, 54 So. 801, 802 (1911), the Mississippi Supreme Court reviewed the legislative purpose in enacting the Mississippi anti-rebate statute, and stated:

> The Legislature, in passing this statute, recognized that a large and increasing proportion of the people of the state carry insurance on their lives, and that the companies engaged in the business of life insurance had been, and would probably continue, discriminating in favor of some of their patrons as against others. The purpose of the statute, as plainly expressed by its terms, is to secure to all persons equality in the burdens of, as well as in the benefits to be derived from, life insurance. The paramount object is to conserve the public welfare. All persons of the same class and equal life expectancy are to be treated exactly alike. Their contracts of insurance are to be the same. There is to be no difference, either in their premiums or in their dividends or other benefits. There is to be no contract except that expressed in the face of the application and policy. No reduction or rebate is to be allowed on any premium. The public interest is made paramount to that of the individual. (Emphasis added.)

The Pennsylvania Supreme Court in Commonwealth v. Morningstar, 144 Pa. 103, 22 A. 867 (1891), held that the insurance anti-rebate statute was constitutional and passed under the valid police powers of the Legislature. It said:

> The scope and purpose of the act is clearly within the police powers of the state, and its terms are not in conflict with any rights guaranteed by fundamental law. (Emphasis added.)

22 A. at 867.

In New York, the Court of Appeals in People v. Formosa, 30 N.E. 492, 493 (N.Y. Crim. 1892), was faced with the appellant's arguments that New York's insurance anti-rebate statute "arbitrarily and unjustly abridged his natural rights and personal liberty in the conduct of his business." There the appellant also contended that the anti-rebate statute has no relation to the public safety or welfare, so that it could not be enacted under the police powers of the Legislature. These arguments are even more comprehensive than those in this case.

In the Formosa case, the appellant was appealing his indictment and conviction of paying a rebate back to a policyholder. The court reflecting a judicial wisdom and understanding of the unique nature of insurance affirmed the judgment and held the anti-rebate statute constitutional, stating:

> The nature of insurance contracts is such that each person effecting the insurance cannot thoroughly protect himself. He is not competent to investigate the condition and solvency of the company in which he insures, and his contracts may run through many years, and mature only, as a rule, at his death. Under such circumstances, it is competent for the legislature in the interest of the people, and to promote the general welfare, to regulate insurance companies, and the management of their affairs, and to provide by

> law for that protection to policyholders which they could not secure for themselves. Under such conditions, there should be a wide range of legislative power to promote the public welfare in the exercise of the police power, and the true boundaries of that power, it would be difficult in such a case to prescribe. We have no occasion now to specify to what extent it might reach, or in any way to place upon it its proper limitations, because, in order to justify the act in question, it is not necessary to resort to that power. (Emphasis added.)

Id. at 493.

Accordingly, this type of regulation, described by the District Court as "paternalistic," is necessary and proper to protect future solvency where a "promise" is sold, especially when considering the insured's inability to determine for himself the financial stability of the insurer. The Court in Formosa went on to cite the general principles that the state may regulate the terms and conditions that companies must adhere to as prerequisite for the sale of insurance in the state, and concluded:

> As all these corporations must act through agents, it [the state] has the same power and authority to regulate the conduct of their agents as it has to regulate the corporations themselves. It would be quite preposterous to say that while the legislature could, in the exercise of its legitimate authority, regulate these corporations, and prescribe the terms under which they may exist and do business, and yet could not by similar laws regulate and control the conduct of their agents. When these corporations seek the benefits and privileges of the laws creating and authorizing them, they must conform to the law enacted for their conduct, and, if they are unwilling to do so, they must go out of

> existence. So, too, all persons who seek to act as agents of such corporations must conform to the laws regulating the business of such corporations or cease to act for them. We have not here the question as to what a private individual may do in the conduct of his private business; but the question here is as to power of the legislature over corporations and their agents. The power exercised over these insurance companies and their agents is similar to that exercised by the legislature over banks and railway corporations; and it has never been doubted that such power exists, and the legislative power to regulate them and their agents in the minutest particular in the interest of the public has never been questioned. (Emphasis added.)

Id. at 493-494.

In Illinois, the constitutionality of the state insurance anti-rebate statute has been upheld on several occasions. In Metropolitan Life Ins. Co. v. People, 209 Ill. 42, 70 N.E. 643 (1904), the Illinois Supreme Court stated that the nature of the insurance business subjects it to state regulation under the police power and the state insurance anti-rebate statute was a valid exercise of that power.

In People v. Hartford Life Ins. Co., 252 Ill. 398, 96 N.E. 1049 (1911), Hartford Life Insurance Company challenged the validity of the insurance anti-rebate statute contending that the real purpose of the law was to stifle competition between life insurance companies and to compel them to have only one price for their policies and make a policyholder in a similar class pay that price, which it contended could not be claimed to promote the public welfare. In affirming the lower court's judgment and

dismissing the Hartford's constitutional claims, the Court stated:

> The policies of life insurance companies run for comparatively long periods of time, and are mainly for the benefit of a class of dependents entitled to protection against the insolvency which might follow reckless and ruinous competition. The right to contract is a property right, but, like all other rights, its exercise, is subject to the police power, and may be limited and restricted for the preservation of the public health, morals, safety, or welfare or to prevent a well-known evil and wrong. Ritchie v. Wayman, 244 Ill. 509. 91 N.E. 695, 27 L.R.A. (N.S.) 994. A regulation designed to secure equality between those contributing to the funds and resources of life insurance companies and to secure financial ability to meet obligations which may mature in the distant future and adapted to that end does not violate any prohibition of the Constitution. (Emphasis added.)

96 N.E. at 1050.

The Georgia Supreme Court in Leonard v. American Life & Annuity Co., 139 Ga. 274, 77 S.E. 41 (1913), held that the state insurance anti-rebate statute did not violate the state and federal constitutional prohibitions against the deprivation of life, liberty, or property without due process of law.

The Supreme Court of Washington in Calvin Phillips & Co. v. Fishback, 84 W. 124, 146 P. 181 (1915), held that the purpose of the state insurance anti-rebate statute was to establish uniform rates of insurance and to maintain an absolute standard of insurance rates.

In Shortridge v. Hipolito Co., 114 Ca. 682, 300 P. 467 (Cal. 2d DCA 1931), the Court upheld the constitutionality of a

section of the California Code which prohibited insurers from issuing a policy at a rate less than that approved by the insurance commission. The Court quoted with approval from German Alliance Ins. Co. v. Lewis, supra, to the effect that the financial soundness of an insurance company is a proper matter for consideration by an insurance commissioner in setting a higher rate if he determines any rate was inadequate to safety or soundness of the company.

The Utah Supreme Court in Utah Ass'n of Life Underwriters v. Mountain States Life Ins. Co., 58 Ut. 579, 200 P. 673 (1921), stated that the purpose and intent of the Legislature in enacting the anti-rebate statute was for the protection of the public, and to ensure the life insurance business would be conducted free and independent of any other matter, and so that the person who is solicited to enter into an insurance contract, may do so entirely on the merits of the insurance contract and not for an inducement.

Most recently, the Oregon Supreme Court in Western Wood Moulding & Millwork Producers, Inc. v. Argonaut Ins. Co., 280 Or. 623, 572 P.2d 1004 (1977), decided a contract action involving a California insurer and California law. The Court stated at page 1005 that the purpose of the California anti-rebate statute is to protect the financial status of California insurers, and thus the interests of their insureds as a class.

The above citations lead to the obvious conclusion that, without exception in the jurisdictions which have considered the authority of the state legislature to regulate the insurance industry by passing insurance anti-rebate statutes the courts have uniformly decided that the statutes were valid expressions of the police power of the state legislature, and were therefore constitutional. The courts in the above-cited cases faced the same or similar constitutional arguments made by the DCCA in the case at bar. These contentions that the insurance anti-rebate statutes abridged consumer rights in the conduct of business, and stifled competition between insurance companies, were rejected in the courts in favor of the states' overriding authority to regulate the insurance industry to protect the welfare of the people. Applying the courts' reasoning in the above-cited cases to this case, the Department submits that this Court can reach no conclusion but that the statutes under attack are constitutional as being enacted pursuant the police power of the State.

The public welfare or benefit for which this police power was exercised by the Florida Legislature is clear. The prohibition against rebating set forth in Sections 626.611(11) and 626.9541(1)(h)1., Florida Statutes, prevents discrimination by assuring that similarly situated Florida residents insured by the same company will pay the same premium for their insurance coverage. The statutes in question also promote insurer solvency for the benefit of the consumer by preventing ruinous

competition. Courts in numerous other jurisdictions have determined that the enactment of legislation designed to accomplish these goals is a legitimate and constitutional exercise of the states' police power.

This case is one of first impression for the Florida Supreme Court. However, this Court has addressed the issue of the constitutional validity of another state statute prohibiting rebating in another field of business. The constitutionality of Section 561.42, Florida Statutes (1949, as amended)(Florida's "Tied-House Evil" statute), was considered by the Supreme Court 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). A provision of Section 561.42, Florida Statutes (1949, as amended), prohibited manufacturers and distributors of alcoholic beverages from rebating any money to a vendor licensed to sell spirits. There the appellants challenged the constitutionality of the statute on grounds, among others, that the statutory prohibition of certain sales violated the right to engage in business and was not a reasonable restraint in the public interest, and therefore was not a reasonable exercise of the police power. The Court stated, at page 719, that the purpose of the statute was to prevent, by regulation, an evil which existed, and the Legislature determined that this regulation was in the public interest. The Court found it a proper exercise of the police power and not an abuse of legislative discretion.

The insurance industry, like the liquor industry, is deemed to be so affected with interest of the general public as to require regulation by the State. In Pickerill v. Schott, supra, the Florida Supreme Court reaffirmed the Legislature's authority to enact legislation under its police powers to promote the welfare of the general public by prohibiting rebates in the liquor industry. Similarly, the State Legislature has deemed that the welfare of the citizens of the State also requires the regulation of the insurance industry by prohibiting rebating anything of value by the agent to anyone, and this regulation should likewise be upheld.

II. THE ANTI-REBATE STATUTES UNDER ATTACK ARE PART OF THE OVERALL STATUTORY SCHEME TO REGULATE INSURANCE.

A. The Method Of Implementing Constitutionally Reasonable Regulation Is A Legislative Policy Determination.

In discussing police power and the manner in which courts should determine the reasonableness of a statute in question, this Court held in Carroll v. State, 361 So.2d 144, 146 (Fla. 1978), that:

> Police power is the sovereign right of the state to enact laws for the protection of lives, health, morals, comfort, and general welfare. . . It is generally accepted that the state is the primary judge of, and may by statute or other appropriate means, regulate any enterprise, trade, occupation, or profession if necessary to protect the public health, welfare, or morals, and a great deal of discretion is vested in the legislature to determine public interest and measures for its

> protection. . . When a particular attempted exercise of the police power by a state, or under its authority, passes the bounds of reason and assumes the character of a merely arbitrary fiat, it will be stricken down and declared void. . . However, every reasonable doubt must be indulged in favor of the act. If it can be rationally interpreted to harmonize with the Constitution, it is the duty of the court to adopt that construction and sustain the act. (Citations omitted, emphasis added.)

With specific reference to the subject of insurance, the Florida Supreme Court has ruled that the Legislature has liberal discretion in determining whether legislation is in the interest of the public welfare and has held that questions regarding the effect of specific insurance laws upon the cost of insurance present policy issues for the Legislature to consider and with which the courts are not concerned.

In State ex rel. Vars v. Knott, 135 Fla. 206, 184 So. 752 (Fla. 1938), an insurance agent attacked a provision of the Insurance Code which required that agents be paid on the basis of commissions rather than salary. In that case, it was alleged that the statute "requires the business of writing insurance to be conducted in a less efficient and more expensive manner without in any way protecting the public safety, welfare, morals, or health of those affected." 184 So. 755 In that case, the Court responded to the arguments of the agent by indicating:

> [I]t may be that the cost of insurance will run higher under the system proposed, but these are questions of policy with which the courts are not concerned. Relator is certainly not excluded from writing insurance

> under the terms of the act nor is the impediment imposed, such as will unduly hamper him in writing insurance. . . . Unless it be conclusively shown that the act is in derogation of some clear constitutional guaranty, the question of whether it is in the interest of the public welfare is one for the legislature to determine and in the determination of which it has a liberal discretion. (Emphasis added.)

Id. at 755.

In Collignon v. Larson, 145 So.2d 246, 250 (Fla. 1st DCA 1962), the Court upheld the predecessor to Part VIII, Chapter 626, Florida Statutes (1983), the Unfair Insurance Trade Practices Act (including the anti-rebate provisions of Section 626.9541), and said:

> The statute was enacted pursuant to the police power of the state, and has as its ultimate objective the protection of the public as well as the protection of the insurers engaged in this particular type of business. We must consider the evidence before us as a whole for the purpose of determining whether the questioned memorandum prepared by appellant constitutes an evil sought to be prevented by the statute. (Emphasis added.)

In Brewer v. Ins. Comm'r & Treasurer, 392 So.2d 593, 596 (Fla. 1st DCA 1981), the Court upheld the second statute under attack, Section 626.611, as part of a statutory scheme, stating that:

> Sections 626.611 and 626.621 are part of a legislative scheme for determining whether applicants are qualified and remain qualified and fit to be insurance agents. This scheme is designed to aid the health, safety and welfare of the general public. Accordingly, we find these statutes fall within the line of delegation cases enumerated above and that they are not constitutionally defective. (Emphasis added.)

This legislative scheme referred to in Brewer is essentially the result of the 1905 Armstrong Report wherein New York's Senator William Armstrong conducted an extensive investigation on behalf of the New York's Senate and Assembly concerning the practices of the insurance industry, especially in life insurance. As a result of the Armstrong Report, most of the states which did not already have anti-discrimination statutes passed them within the next few years. The laws throughout the states are basically identical (Appendix A.) and consist of three parts. The first part prohibits discrimination in favor of individuals and between insureds of the same actuarial class and equal life expectancy. The second part condemns the making of any contract of insurance or agreement other than that which is plainly expressed in the policy issued. The final part deals with rebating and the language is generally similar to the model law adopted by the National Association of Insurance Commissioners (NAIC) in 1912. Later, following passage of the McCarran-Ferguson Act by the United States Congress on March 9, 1945, the states that did not have unfair insurance trade practices acts adopted one in some form. Most of the unfair trade practices acts were based upon the model unfair trade practices act adopted by the NAIC on January 24, 1947. That model act deals specifically with rebates and incorporates much of the 1912 model. The model section (8)(a) entitled "Rebates" reads as follows:

> Except as otherwise expressly provided by law, knowingly permitting or offering to make or making any contract of life insurance, life annuity or accident and health insurance, or agreement as to such contract other than as plainly expressed in the insurance contract issued thereon, or paying or allowing, or giving or offering to pay, allow, or give, directly or indirectly, as inducement to such insurance or annuity, any rebate of premiums payable on the contract, or any special favor or advantage in the dividends or other benefits thereon, or any valuable consideration or inducement whatever not specified in the contract.

This model section is indistinguishable from Section 626.9541(1)(h)1., one of the anti-rebate statutes under review in this case.

Section 626.9541(1)(h)1., Florida Statutes, is part of the Florida Insurance Code entitled the "Unfair Insurance Trade Practices Act" whose purpose as stated by Section 626.951:

> . . .is to regulate trade practices relating to the business of insurance in accordance with the intent of Congress as expressed in the Act of Congress of March 9, 1945 (Pub. L. No. 15, 79th Congress), by defining, or providing for the determination of all such practices in this state which constitute unfair methods of competition or unfair or deceptive acts or practices and by prohibiting the trade practices so defined or determined.

B. Voiding The Anti-Rebate Statutes Will Adversely Impact The Insurance Code.

If the anti-rebate statutes are declared unconstitutional, this statutory scheme will be upset. It will be difficult if not impossible to enforce the anti-discrimination and misrepresentation prohibitions of the Florida Statutes. Sections 626.611(5)

and 626.9541(1)(a),(b),(e) and (g), Florida Statutes (1983). The prohibition against making any contract of insurance other than that which is plainly expressed in the policy would be lost as it is part of the anti-rebate statute.

While the District Court attempted to address some of these problems in its revised opinion, it is submitted that discrimination by a company or its agents against policyholders within the same actuarial class as to the rate or premium charged for life as well as other forms of insurance would still occur. Section 627.043 defines "premium" to be the "consideration paid for insurance by whatever name called." (Emphasis added.) Consequently, the rate and premium referred to in Section 626.9541(1)(g) includes the agent's commission and a violation of Section 626.9541(1)(g) would be presented if, as a result of different rebates of commissions by two different agents representing the same company, two insureds in the same actuarial class paid different premiums for identical policies. As this Court stated in Afro American Ins. Co. v. La Berth, 186 So. 241, 246 (Fla. 1939), "such discrimination is deemed opposed to public policy."

There is only one way to avoid the discriminatory activity outlined above; all agents representing the same insurer would have to offer the exact same rebate to every proposed insured. In effect, the agent would be setting the rate for the insurer. The tail would be wagging the dog in violation of the statutory

scheme wherein the rates are set by the insurer and then filed with and approved by the Department. Sections 627.011-627.381, Florida Statutues (1983). As stated in Section 627.031, the purpose of regulating rates is to protect policyholders and the public against the adverse effects of excessive, inadequate, or unfairly discriminatory insurance rates and to authorize the Department to regulate those rates. The agent has no legally recognized rights or responsibilities in this regard and rebating only serves to muddy the presently clear and interwoven regulatory waters.[4]

The District Court appears to misunderstand this regulatory scheme when at page 3 of its opinion it discusses solvency, discrimination and "net premium." Section 627.041(2), Florida Statutes, defines "premium" as "the consideration paid or to be paid to an insurer for the insurance and delivery of any binder or policy of insurance." (Emphasis added.) Section 627.403, Florida Statutes, defines "premium" as "the consideration for insurance, by by whatever name called. Any 'assessment', or any 'membership,' 'policy,' 'survey,' 'inspection,' 'service' or similar fee or charge in consideration for an insurance contract

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[4]/ If the purchaser's premium is subject to a variable commission as a result of rebating, then rates are no longer regulated as required by the legislature. Insurance pricing will be caveat emptor. Consumers having equal hazard or risk will pay unequal premiums resulting in unfairly discriminatory rates to some and a regulatory inability to prevent excessive or inadequate rates for the risk involved.

is deemed part of the premium." (Emphasis added.) Section 627.413(1)(e), Florida Statutes, requires every insurance policy to specify the premium as well as the names of the parties and other requirements. Upon the basis of the foregoing, it is clear there is only one premium, to be paid by the purchaser to the insurer and specified in the policy. The agent is not a separate party to the contract, he does not purchase the insurance and re-sell it. He does not pay a "premium." The law does not contemplate a "net" premium nor is it defined in the Insurance Code.

It is clear that premiums include commissions or any other agent's fees. If rebating is allowed, insurers could not comply with the requirements of Section 627.413(1)(e) as the amount of the premium would be unknown or illusory. Further, a term undefined and alien to the Insurance Code would have legal significance; i.e., "net premium."

As a practical matter, it must be recognized that generally insurance policies are cancelable by both the insurer and the insured. When cancellation occurs the insurer must by law and by the terms of the policy return unused premium to the insured. See Sections 627.626 and 627.848(5) and Rules 4-7.03, 4-8.03 and 4-28.03, Florida Administrative Code. This return is a percentage of the premium. Obviously, if every agent varies the amount of his commission as often as he chooses, the insurer cannot possibly know what its legal obligation for return premium

might be to each individual insured or in totality for reserve purposes. Reserves for unearned premiums are required to be maintained by property and casualty insurers. Section 625.051, Florida Statutes, clearly requires reserves calculated on a gross premium basis. The District Court decision, in permitting agents to set rates and premiums by rebating a variable portion of their commission whenever they choose, pragmatically makes it impossible for an insurer to know the amount of unearned premium due on any given day. The legislative purpose of Section 625.051, Florida Statutes, is totally frustrated. In the area of property/casualty insurance, the agent collects from the insured the premium stated on the policy. He is required to do so by the provisions of 626.9541(1)(o)2., Florida Statutes, and with respect to workers' compensation insurance by Section 627.191, Florida Statutes. Accordingly, reserves for unearned premiums can be calculated and known for purposes of the Insurance Code concerning financial reporting and financial stability. When the premiums collected by agents are varying in amount, an unearned premium liability could never be known for statement purposes. As a practical matter, upon cancellation, it would be impossible for the insurer to determine and return the correct unearned premium owed to the insured.

The District Court's decision fails to consider Section 627.066(2)(c) of the motor vehicle excess profit law which requires data of an insurer's selling expenses incurred or

allocated to this State. If an insurer has allowed $100.00 commission on a policy and the agent has rebated $50.00 of this amount by not collecting it, the insurer's reporting of its selling expense would be incorrectly overstated. The insurers selling expense could never be accurately reported. Similar reporting is also required for workers' compensation coverage by Section 627.215(1)(c), Florida Statutes.

The District Court has also overlooked the matter of taxation levied by the State on insurance premiums. Annually each insurer is, pursuant to Section 624.509(1)(a), Florida Statutes, taxed an amount equal to two percent of the gross amount of insurance premiums, risk premiums for title insurance, assessments, membership fees and deposits. If the face amount of the premium is not collected by the agent, the insurer would pay taxes on portions of the premium not received. The insurer would not be advised of the rebate amounts and could only protect itself against improper taxation by allowing zero commission. Agents would then presumably change service fees and presumably this formerly taxed amount of many millions of dollars would escape taxation. Regardless of speculation, the Court's decision makes the present premium tax scheme of the Legislature unworkable.

Section 624.515, Florida Statutes, establishes assessments for Fire Marshal regulatory purposes based upon gross premiums. The District Court's decision overlooks this enactment as well as

the monies provided from excise or license taxes for firefighter's and police officer's pensions at Sections 175.091(2) and 185.08, Florida Statutes, which are based on gross receipts of premiums.

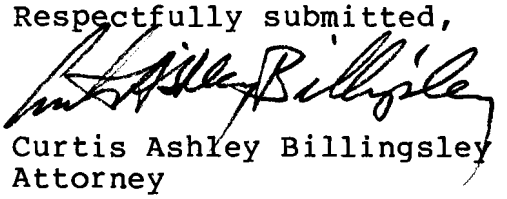
Beyond the statutory scheme relating to the Insurance Code, rebating would also impact upon the federal income tax and social security laws. Social security is withheld and income tax is paid upon the basis of full premium and commissions earned. Rebating would result in social security taxes paid for income not earned thereby illegally inflating the benefits accrued thereunder. Rebating would also require the payment of income tax for income not received resulting in an unfair tax burden upon the agent which may impact on his customers in the form of inflated fees for services.

As demonstrated above, rebating is a policy which is contrary to the established legislative scheme and has impact far beyond the Florida Insurance Code.

CONCLUSION

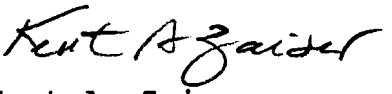
For the foregoing reasons, the Appellants, Department of Insurance and Bill Gunter, respectfully request this Court to reverse the decision of the District Court, to affirm the decision of the trial court, and to find constitutional Sections 626.611(11) and 626.9541(1)(h)1, Florida Statutes (1983), or, in the alternative, to remand this cause to the trial court for proof of the allegations in the original Complaint.

Respectfully submitted,



Curtis Ashley Billingsley
Attorney
Department of Insurance
539 Larson Building
Tallahassee, Florida 32301
(904) 488-1295

Jim Smith
Attorney General

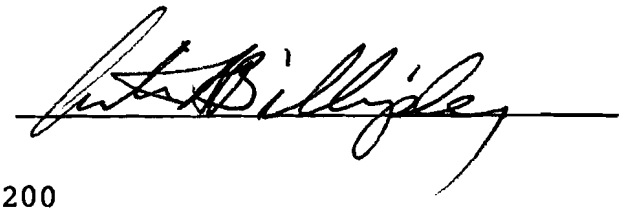


Kent A. Zaiser
Assistant Attorney General
Department of Legal Affairs
The Capitol, Suite 1501
Tallahassee, Florida 32301
(904) 488-1573

Counsel for the Appellants

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Appellants' Initial Brief has been mailed to all the following this 15th day of January, 1985.



Mary Charlotte McCall
226 West Pensacola Street, Suite 200
Post Office Box 11215
Tallahassee, Florida 32301
Co-counsel for the Appellees

William B. Schultz
Public Citizen Litigation Group
2000 P Street, N.W., Suite 700
Washington, D.C. 20036
Co-counsel for the Appellees

W. O. Birchfield
Dennis E. Hayes
Martin, Ade, Birchfield & Johnson, P.A.
2000 Independent Square
Jacksonville, Florida 32202
Attorneys for the Amicus Curiae
American Council of Life Insurance, Inc.

Arthur C. Beal, Jr.
James N. McConnaughhay
Karl, Mcconnaughhay, Roland & Maida, P.A.
Post Office Drawer 229
Tallahassee, Florida 32302
Attorneys for the Amicus Curiae
Florida Association of Insurance Agents

J. Robert McClure, Jr.
Alan C. Sundberg
Carlton, Fields, Ward, Emmanuel, Smith
& Cutler, P.A.
410 Lewis State Bank Building
Post Office Drawer 190
Tallahassee, Florida 32302
Attorneys for the Amicus Curiae
Florida Association of Life Underwriters

Donald Dowdell
General Counsel
Florida Insurance Department
The Capitol, Plaza Level 11
Tallahassee, Florida 32301
Co-counsel for the Amicus Curiae
National Association of Insurance Commissioners

Sandra L. Gilfillan
1125 Grand Avenue
Kansas City, Missouri 64106
Co-counsel for the Amicus Curiae
National Association of Insurance Commissioners

William N. Albus
1922 F Street, N.W.
Washington, D.C. 20006
Co-counsel for the Amicus Curiae
National Association of Life Underwriters

Stephen C. O'Connell
Cason & Henderson
320 Lewis State Bank Building
Tallahassee, Florida 32301
Co-counsel for the Amicus Curiae
National Association of Life Underwriters

William R. Heerman
c/o Aid Association for Lutherans
4321 N. Ballard Road
Appleton, Wisconsin 54919
Co-counsel for the Amicus Curiae
National Fraternal Congress of America

George E. Owen
2811 Waverly Road
Tallahassee, Florida 32301
Co-counsel for the Amicus Curiae
National Fraternal Congress of America