IN THE SUPREME COURT OF THE
STATE OF FLORIDA

DEPARTMENT OF INSURANCE and
BILL GUNTER, in his official
capacity as Insurance Commis-
sioner,

Appellants,

vs. Case No. 66,178

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

Appellees.

BRIEF OF FLORIDA ASSOCIATION OF INSURANCE AGENTS, Amicus Curiae

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PRELIMINARY STATEMENT

The appellants, the DEPARTMENT OF INSURANCE and BILL GUNTER, in his official capacity as Insurance Commissioner, will be referred to by name or as appellants. The appellees, DADE COUNTY CONSUMER ADVOCATE'S OFFICE and WALTER T. DARTLAND, will be referred to by name or as the appellees. All other participants in this appeal shall be referred to by name.

Appellees have challenged two statutes as unconstitutional: Section 626.9541(8)(a) and 626.611(11), Florida Statutes (1981). The former statute has been renumbered by the legislature and will be referred to in this brief by its new section number: Section 626.9541(1)(h), Florida Statutes (1983).

STATEMENT OF THE CASE AND FACTS

The FLORIDA ASSOCIATION OF INSURANCE AGENTS hereby adopts and incorporates by reference the statement of the case and facts made in the brief filed on behalf of the DEPARTMENT OF INSURANCE.

ISSUE

PURSUANT TO ITS POLICE POWER TO REGULATE THE INSURANCE INDUSTRY, MAY THE STATE OF FLORIDA PROPERLY PROHIBIT INSURANCE AGENTS FROM REBATING A PORTION OF THEIR COMMISSIONS TO THEIR CUSTOMERS BECAUSE SUCH PROHIBITION BEARS A REASONABLE RELATIONSHIP TO THE HEALTH, SAFETY AND WELFARE OF THE GENERAL PUBLIC?

ARGUMENT

THE STATE OF FLORIDA, PURSUANT TO ITS POLICE POWER TO REGULATE THE INSURANCE INDUSTRY, MAY PROPERLY PROHIBIT INSURANCE AGENTS FROM REBATING A PORTION OF THEIR COMMISSIONS TO THEIR CUSTOMERS BECAUSE SUCH PROHIBITION BEARS A REASONABLE RELATIONSHIP TO THE HEALTH, SAFETY AND WELFARE OF THE GENERAL PUBLIC.

Appellees allege that the following sections of the Florida Insurance Code, collectively referred to as the "anti-rebate" statutes, are unconstitutional.

> §626.9541(1)(h), Fla. Stat.(1983)
> The following are defined as unfair methods of competition and unfair or deceptive acts or practices:
>
> * * *
>
> Paying, allowing, or giving, or offering to pay, allow or give, directly or indirectly, as inducement [to purchase an insurance policy], 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 . . .
>
> §626.611(11), Fla. Stat.(1973)
> The Department shall deny, suspend, revoke, or refuse to renew or continue the license of any agent . . . if it finds that . . . one or more of the following applicable grounds exist:
>
> * * *
>
> Rebating, or attempt thereat, or unlawfully dividing or offering to divide his commission with another.

According to appellees, enforcement of the anti-rebate statutes deprives insurance consumers of the right to bargin

with insurance agents over the amount of commission which the agents receive in connection with the sale of an insurance policy. Apparently, this argument proved persuasive to the Florida First District Court of Appeal which held that the anti-rebate statutes constitute an unreasonable and unjustified exercise of the police power of the state and are therefore unconstitutional. Dade County Consumer Advocate's Office v. Department of Insurance, 457 So.2d 495,499 (Fla. 1st DCA 1984).

The first district court's decision rejecting the constitutional validity of the anti-rebate statutes is incorrect for numerous reasons. Among these are those reasons which will be discussed in detail in this brief: (1) the court's application of the wrong standard of judicial review; (2) the court's unsupported rejection of a long line of persuasive case law recognizing the uniqueness of the insurance industry and upholding the validity of such statutes; and (3) the fact that the elimination of the anti-rebate statutes will encourage discrimination among insureds of the same actuarial class. Additional flaws are ably revealed by the appellant and other amicus curiae in their respective briefs.

In reaching its decision, the first district court stated that the applicable standard of review is whether the challenged statutes reasonably and substantially promote the public health safety or welfare, apparently relying on the concurring opinion of Justice Barnes in Liquor Store, Inc. v.

Continental Distilling Corporation, 40 So.2d 371 (Fla.1949). The Liquor Store majority opinion, however, clearly states that the appropriate standard is considerably less stringent: "Throughout 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." 40 So.2d at 375.

The basic premise recognized by the Liquor Store majority opinion and ignored by the first district below is that statutes are presumed constitutional. Although some are not, one who attacks the constitutionality of a statute has the burden of establishing its invalidity and showing that beyond all reasonable doubt the statute conflicts with the designated provisions of the constitution. Biscayne Kennel Club v. Florida State Racing Commission, 165 So.2d 762 (Fla.1965) The existence of a reasonable doubt as to the alleged constitutional infringement requires that a presumption of validity be indulged in deference to the legislature. Golden v. McCarty, 337 So.2d 388 (Fla.1976)

Judicial deference to the legislative judgment is particularly pronounced in the well-regulated insurance industry. The Florida Supreme Court has stated that the business of insurance is affected with the public interest and is therefore subject to reasonable regulation under the state's police power. Feller v. Equitable Life Assurance Society, 57 So.2d

581 (Fla.1952); Springer v. Colburn, 162 So.2d 513 (Fla.1964). The power of the state to regulate the business of insurance includes the power to license and regulate the agents through whom the business is conducted. State ex.rel. Kennedy v. Knox, 166 So. 835 (Fla.1936). Statutes, including Section 626.611, which provide grounds for denial suspension or refusal to renew insurance licenses are designed to protect the public interest and have been recently upheld against a challenge of unconstitutionality. Brewer v. Insurance Commissioner and Treasurer, 392 So.2d 593 (Fla. 1st DCA 1981).

Courts are not called upon "to explore the wisdom or advisability of the enactment." Adams v. Sutton, 212 So.2d 1 (Fla.1968). As Justice Terrell noted over forty years ago, "Courts are never permitted to strike down an act of the Legislature because it fails to square with their individual societal or economic theories or what they deem to be sound public policy." Ball v. Branch, 16 So.2d 524,525 (Fla.1944).

Unfortunately that is precisely what has happened in this case. Characterizing the anti-rebate statutes as "paternalistic," the first district court (while acknowledging the danger to the insurance consumer of the unscrupulous agent) opines that the "competitive forces at work in the marketplace should generally serve to protect consumers against unfairly discriminatory prices . . ." 457 So.2d at 498. The legislature's judgment that anti-rebate statutes are needed to protect the public is supplanted by the court's determination

that marketplace competition will be sufficient for the public's protection.

The only way in which the first district can justify such judicial activism is to warp the traditional standard of judicial review for constitutional challenges, expanding considerably the scope of their own review while sharply curtailing the broad discretion the legislature possesses in determining what measures are necessary for the public's protection. The effect is that the burden of proof has shifted to the state to establish the constitutional validity of the anti-rebate statutes. The appellees are not required to prove that the anti-rebate statutes are essentially arbitrary and without a rational basis. Hamilton v. State, 366 So.2d 8, 10 (Fla. 1979). Instead the state is required to prove that the challenged statutes "substantially" promote the public good. Had the court foregone the temptation to legislate, it would not have needed to create, essentially from whole cloth, an enhanced standard of judicial review to apply to this case. Had the appropriate standard been applied, the appellees would have failed in proving that the anti-rebate statutes are arbitrary and unreasonable.

The reasonableness of the anti-rebate statutes is seen when evaluated in light of the well-recognized uniqueness of the insurance industry. The purpose of insurance is to compensate a victim for a loss that might occur in the future with respect to a specific risk. Brock v. Hardie, 154 So. 690

(Fla.1934) The cost of insurance to insurers depends on the occurrence or non-occurrence of future events. Consequently, unlike in other industries where most products are priced before their sale and with full knowledge of the costs of manufacture and delivery, the cost of insurance must be estimated and is often not actually determined until insured losses are incurred and paid. And, unlike doctors, lawyers and accountants, who have stringent educational requirements which they must fulfill before obtaining their licenses and often charge an hourly fee for their services, an individual need not even have a high school education to become a general lines insurance agent so long as he or she meets other experience or course requirements (see: §626.731 and 626.732, Florida Statutes). Nor do insurance agents charge an hourly fee for their services. Thus, insurance agents are unlike most other professionals and salespersons, just as insurance is unlike any other product sold in the marketplace.[1]

The United States Supreme Court has also recognized the

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[1]The distinction between insurance agents and most other professionals and salespersons provides a rational basis for distinguishing the cases cited by the first district in striking the anti-rebate statutes. See, e.g., Virginia Pharmacy Board v. Virginia Consumer Council, 425 U.S. 748 (1976) (pharmacists); Bates v. State Bar of Arizona, 433 U.S. 350 (1977) (attorneys); Liquor Store, Inc. v. Continental Distilling Corporation, 40 So.2d 371 (Fla.1949) (alcohol sales); The Florida Bar v. Brumbaugh, 355 So.2d 1186 (Fla.1978) (attorneys); and Stadnick v. Shell's City, Inc., 140 So.2d 871 (Fla.1962) (pharmacists).

unique qualities of the insurance business and the authority of the various states to regulate that industry. German Alliance Insurance Company v. Lewis, 233 U.S. 389 (1914); Osborn v. Ozlin, 310 U.S. 53 (1940). These cases stand for the proposition that a state can regulate the business of insurance even to the point of denying competition altogether and preempting the field of insurance for itself. 310 U.S. at 66.

Thus, the ability of state government to regulate and control the activities of the insurance business and the agents who process that business greatly exceeds the authority of the state with respect to the regulation of other professions and businesses.[2]

Although the uniqueness of the insurance industry has been acknowledged repeatedly by the Florida courts, no constituional challenge to the anti-rebate statutes has been made

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[2]The unique characteristics of the insurance industry were recognized by Congress in its enactment of the McCarren-Fergueson Act in 1945 to permit state regulation and taxation of the insurance business. 15 U.S.C.A. §1011-15 (1976). At the heart of the McCarren-Fergueson Act is the declaration that the continued regulation and taxation of the insurance business by the states is in the public interest. In order for state regulation to operate free of federal interference, Section 2(b) of the Act provides two things: first, that no act of Congress shall be construed to invalidate, impair or supercede any state law unless that federal law specifically relates to the business of insurance; and, second, that the federal antitrust laws and Federal Trade Commission Act shall not apply to the business of insurance to the extent that the business is regulated by state law.

since their initial enactment in 1915. Therefore, no Florida case law is directly on point. Numerous courts from other jurisdictions, however, have repeatedly upheld statutes prohibiting discrimination and rebating.[3]

For example, in O'Gorman & Young, Inc. v. Hartford Fire Insurance Company, 282 U.S. 251 (1931), Justice Brandeis' opinion revealed the court's concern about the practice of rebating and its approval of regulations designed to halt rebating:

> "The business of insurance is so far affected with 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 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 commission may result in an unreasonable high rate level or an impairment of the financial stability of the insurer. . . . Moreover, each of a uniform scale of commissions allowed local agents for the same service may encourage unfair discrimination among policyholders by

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[3]See, e.g., Commonwealth v. Morningstar, 22 A.867 (Pa. 1891); Metropolitan Life Ins. Co. v. People, 70 N.E. 643 (Ill.1904); Leonard v. American Life & Annuity Co., 77 S.E. 41 (Ga.1913); Calvin Phillips & Co. v. Fishback, 146 P. 181 (Wash.1915); Utah Assn. of Life Underwriters v. Mountain State Life Ins. Co., 200 P. 673 (Utah 1921); Short Ridge v. Hipolito Co., 300 P. 467 (Cal. 2nd DCA 1931); Metropolitan Life Ins. Co. v. Lillard, 248 P. 841 (Okla.1926); Green v. Aaetna Life Ins. Co., 142 So. 393 (Ala.1932); Smathers v. Bankers Life Ins. Co., 65 S.E. 746 (N.C.1909); French v. Columbia Life & Property Co., 157 P. 1042 (Ore.1916); and Ringstad v. Metropolitan Life Ins. Co., 47 P.2d 1045 (Wash.1935).

> facilitating the forbidden practice of rebating. In the insurance field of insurance, such evils led long ago to legislative limitation of agents' commissions."

282 U.S. at 257 (citations omitted) (emphasis supplied)

The state of Mississippi upheld its anti-rebate statute in the case of Rideout v. Mars, 54 So. 801 (Miss.1911), stating:

> "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 these persons 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 on the face of the application and policy. No reduction or rebate is to be allowed on any premiums. The public interest is made paramount to that of the individual."

(Emphasis supplied)

The appellant in People v. Formosa, 30 N.E. 492 (N.Y. Crim. 1982) argued, as do the plaintiffs in this case, that New York's anti-rebate statute had no relation to the public's safety or welfare so that it could not be enacted under the police powers of the legislature. In rejecting this argument, the court stated:

> "The nature of insurance contracts is such that each person effecting 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 result, 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. . . ."

30 N.E. at 493.

Finally, in the case of People v. Hartford Life Insurance Company, 96 N.E. 1049 (Ill.1911), the party challenging the validity of Illinois' anti-rebate statute argued that the real purpose of the statute was to stifle competition between insurance companies and to compel the companies to all charge the same price for similar policies to the insurance consumer's detriment. In rejecting this argument, 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. 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."

(Citations omitted).

Each of the preceding cases (as well as those cited in Footnote 3) demonstrates that those jurisdictions which have considered the authority of the legislatures to regulate the insurance industry by passing anti-rebate statutes have uniformly upheld such statutes as valid expressions of the state's police power. These decisions also demonstrate the continuing wisdom of Solomon's proverb that "there is no new thing under the sun"[4] for the same arguments raised by appellees in this appeal (that the anti-rebate statutes abridge personal and property rights of the individual while stifling competition between insurance companies) were raised and rejected by the courts in numerous other states.

In determining whether or not Florida's anti-rebate statutes pass constitutional muster, the tendency to view the challenged statutes in isolation must be avoided. These statutes are an integral part of a comprehensive statutory scheme devised by the legislature to regulate the insurance industry. When viewed in their entirety, the legislature's detailed set of regulations governing the insurance industry are clearly designed to insure company solvency; to regulate business

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[4]Eccles. 1:9

ethics through licensing and examinations; to promote fair dealing at all levels of the industry; to prevent ruinois competition, including kickbacks in the form of rebates, which corrupt normal business decisions; and to add stability to the insurance contract.

The first district court apparently believes that sufficient safeguards will remain in effect after the anti-rebate statutes are stricken. For example, the court states that Section 626.9541(1)(g) would require that any consideration or inducement offered to prospective policy purchases must be the same for all individuals of the same actuarially supportable class and risk. No doubt the language of Section 626.9541(1)(g)[5] evidences the legislative intention that all insurance companies doing business in the state of Florida give equal treatment to all persons in the same risk class, but this section will not operate to make uniform the rebates offered to the same risk class. Without the equalizing influence of the anti-rebate statutes, rebates to members of the same risk class will vary according to the vagaries of the marketplace.

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[5]This section provides in part that unfair methods of competition or deceptive acts include: "knowlingly making or permitting unfair discrimination between individuals of the same actuarially supportable class and essentially the same hazard, in the amount of premium, policy fees or rates charged for any policy . . ."

Thus, members of the same risk class may receive different size rebates because of the time of year they make their purchase, the economic pressure on their local agents to offer rebates, the place where they live and the amount of business they transact with their agent. Obviously, an insurance agent acting in response to the competitive atmosphere of the marketplace will offer larger rebates to customers who purchase more or larger policies. What is lost in price per unit will be made up in volume. The rich customers will benefit most from the rebates while poorer customers in the same risk class will receive fewer and smaller rebates. Nor will the state be able to prohibit such practices even if the rather ambiguous terms of Section 626.9541(1)(g) were deemed to cover such situations. Enforcement would be a nightmare because rebates need not be advertized and need not be monetary.

The anti-rebate statutes give teeth to the more general provisions of the insurance code prohibiting discrimination. Remove these teeth and the remaining statutes will be "all bark, no bite." The anti-rebate provisions were enacted to prevent companies or agents from evading the requirement of equal treatment of insureds. Remove this protection and the granting of rebates by insurance agents as a means of competition will make it impossible to insure equal treatment of all persons insured by the same carrier. Insurance premiums 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.

The first district court adopted appellees' response to the argument that rebating would lead to discrimination among similarly situated insureds by stating that the amount paid to the insurance company will remain unchanged if rebating is permitted; only the amount paid to the agent will vary. 457 So.2d at 499. This response merely begs the question, however, and ignores the fact that similarly situated insureds will pay different amounts for the same coverage from the same company. It is no answer to say that the net premium retained by the company will be the same in each case because the purpose of the statute is to guarantee that the public receives equal treatment. The public cannot and will not receive equal treatment if each agent is free to negotiate with each purchaser the amount of rebate.

In summary, the legislature has the authority to regulate the insurance industry in general and insurance agents' fees in particular. The anti-rebate statutes passed by the Florida Legislature are designed to ensure that similarly situated insureds of the same company are treated equally. That similarly situated insureds of the same company be treated equally is a matter bearing directly upon the health, safety and welfare of the general public, and the legislature has therefore properly evoked its police power in passing the

anti-rebate provisions.

The first district court exceeded its proper judicial function. Instead of asking whether there is a reasonable basis for enacting the anti-rebate statutes which serves to protect the public interest, the court asked whether there are good reasons to permit rebating. The court focused on the merits of permitting rebates instead of the merits of prohibiting rebates. The function of the judiciary, however, is not to weigh the one against the other--the legislature has already done that. Rather, the courts should confine themselves to determining whether or not the challenged statutes reasonably promote the health, safety and welfare of the general public. If so, then the statutes should be upheld. The appellees have completely failed to demonstrate that Florida's anti-rebate statutes are arbitrary and not reasonably suited for achieving the desired effect of promoting equal treatment of insurance consumers.

CONCLUSION

For the foregoing reasons, the decision of the First District Court of Appeals declaring unconstitutional Sections 626.611(11) and 626.9541(1)(h), Florida Statutes (1983), should be reversed. The decision of the circuit court upholding the constitutionality of the challenged provisions should be reinstated.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U. S. Mail this 15th day of January, 1985, to the following:

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