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FILED
SID J. WHITE
JAN 15 1985
CLERK, SUPREME COURT
By _____ Chief Deputy Clerk

IN THE SUPREME COURT OF THE STATE OF FLORIDA

DEPARTMENT OF INSURANCE, and BILL GUNTER, in his official capacity as Insurance Commissioner,	)	
Appellants	)	
vs.	)	CASE NO. 66,178
DADE COUNTY CONSUMER ADVOCATE'S OFFICE and WALTER T. DARTLAND, DADE COUNTY CONSUMER ADVOCATE,	)	
Appellees.	)	

BRIEF OF AMICUS CURIAE AMERICAN COUNCIL OF LIFE INSURANCE

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The American Council of Life Insurance which appears in this appeal as an amicus curiae on behalf of Appellants Department of Insurance and Bill Gunter will be referred to as "ACLI".

This Brief of Amicus Curiae American Council of Life Insurance will be referred to as "ACLI's Brief, Pg. _____".

The Appendix which accompanies this Brief will be referred to by the use of the letter "A" followed by the appropriate page number(s) as follows "(A:_____)".

The Record on Appeal before this Court will be referred to by the use of the letter "R" followed by the appropriate volume and page number(s) as follows "(R: Vol. _____, Pg. _____)".

Sections 626.9541(8)(a)[1] and 626.611(11) of the Florida Statutes, the constitutionality of which is challenged by Appellees, will sometimes be referred to collectively as the "Anti-Rebate Statutes".

The Circuit Court of the Second Judicial Circuit, in and for Leon County, Florida in Case No. 83-1053 which upheld the constitutionality of the Anti-Rebate Statutes and from which an appeal was initially taken by Appellees to the First District Court of Appeals will be referred to as the "Circuit Court".

The decision of the First District Court of Appeals in Dade Cty. Consumer Advocate's v. Dept. of Ins., 457 So.2d 495

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

(Fla. 1st D.C.A. 1984) from which this appeal has been taken by Appellants will sometimes be referred to as the "decision".

STATEMENT OF THE CASE AND STATEMENT OF THE FACTS

ACLI hereby adopts the Statement of the Case and Statement of the Facts as set forth in the Brief of Appellants Department of Insurance and Bill Gunter.

BRIEF OF AMICUS CURIAE ACLI

ISSUES PRESENTED FOR APPEAL

I. WHETHER THE ANTI-REBATE STATUTES BEAR A REASONABLE RELATIONSHIP TO THE PUBLIC WELFARE.

II. WHETHER ANY CHANGE TO, OR ELIMINATION OF, THE ANTI-REBATE STATUTES IS A LEGISLATIVE, NOT JUDICIAL, FUNCTION.

PRELIMINARY STATEMENT

The American Council of Life Insurance ("ACLI") represents the interests of 615 member life insurance companies including most of the major life insurers in the country. The ACLI members account for approximately 95 percent of the life insurance in force in the United States, with 461 such members being licensed to do business in Florida and accounting for a corresponding percentage of the life insurance in force in the State of Florida.

The ACLI is keenly interested in the stability of state requlation of insurance. Because the opinion below endangers this stability by authorizing the rebating of insurance agents' commissions, ACLI members are seriously concerned that such authorization will lead to unfair discrimination among insureds, increase the cost of insurance, provide a lesser quality of service to the insurance buying public, make meaningful cost disclosure of similar policies difficult and possibly threaten the solvency of some insurance companies. For these reasons, ACLI strongly feels that this Court should uphold the constitutionality of the Anti-Rebate Statutes.

INTRODUCTION

As part of a comprehensive legislative scheme which is designed to aid the welfare of the general public, the Florida Legislature has determined that the following "unfair methods of competition" and "deceptive acts" should be prohibited in the insurance industry:

> "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." Fla. Stat., Section 626.9541(8)(a) (1982), renumbered Fla. Stat., Section 626.9541(1)(h)(1) (1983) (emphasis added).

In addition, Florida provides for the suspension, revocation or refusal to renew the license of an insurance agent for:

> "Rebating, or attempt thereat, or unlawfully dividing or offering to divide his commission with another." Fla. Stat., Section 626.611(11) (1983).

In challenging the constitutionality of the foregoing Anti-Rebate Statutes, Appellees have argued below that the

statutes constitute an unlawful taking of property in the form of an insured's or insurance agent's "right to contract" for, and negotiate the "size" of, the commission of the insurance agent in violation of the substantive due process clause of the Florida Constitution.

The Circuit Court rejected Appellees' arguments and entered a Summary Final Judgment which held that the Anti-Rebate Statutes "are a valid exercise of the police power of the State of Florida. . . to protect the public from discrimination" and are "constitutional and valid." (R: Vol. II, Pg. 85). However, the First District Court of Appeal has reversed the decision of the Circuit Court and incorrectly held that the Anti-Rebate Statutes "constitute an unjustified exercise of the police power . . . and are therefore violative of the due process clause . . . ." Dade Cty. Consumer Advocate's v. Dept. of Ins., 457 So.2d 495, 498-499 (Fla. 1st DCA 1984); (A:55-56).

The basis of the decision of the First District Court of Appeal is its determination that the Anti-Rebate Statutes do not "reasonably and substantially promote the public . . . welfare as required by the due process clause . . . ." Id. at 497 (emphasis added). However, the foregoing standard of review adopted by the First District Court of Appeal is improper in that it requires the statutes to "substantially" promote the general welfare in order to comply with substantive due process. There is no such standard of review under Florida law. (See Department of Insurance Brief, Argument I).

The proper standard for review of the constitutionality of the statutes on appeal is clearly set forth in Coca-Cola Co., Ford Division v. State, Dept. of Citrus, 406 So.2d 1079 (Fla. 1981) wherein this Court held:

> "Under the police power doctrine, the State may interfere with otherwise protected areas if the interfering regulation bears 'a reasonable relationship to the public safety, health, morals, and general welfare.'" Id. at 1085; see also Stadnik v. Shell's City Inc., 140 So.2d 871, 874 (Fla. 1962).

Thus, the sole issue before this Court on appeal is whether the Anti-Rebate Statutes bear a reasonable, not substantial, relationship to the public welfare. In order to make such a determination, it is necessary for this Court to become familiar with the legislative, not merely judicial, history of anti-rebate statutes within the insurance industry.

SUMMARY OF ARGUMENT

Under Florida law, it is well established that a statute, such as each of the Anti-Rebate Statutes, is presumed to be prima facie valid and constitutional. 10 Fla. Jur. 2d, Constitutional Law, Section 77, p. 296; Knight & Wall Company v. Bryant, 178 So.2d 5, 8 (Fla. 1965). Further, Appellees as the parties challenging the Anti-Rebate Statutes have the burden of establishing the invalidity of such statutes beyond reasonable doubt. Peoples Bank, Etc. v. State, Dept. of B. & F, 395 So.2d 521, 524 (Fla. 1981); A.B.A. Industries v. City of Pinellas Park, 366 So.2d 761, 763 (Fla. 1979); Knight & Wall Co. v. Bryant, 178 So.2d 5 (Fla, 1965), cert. denied, 383 U.S. 958, 86 S.Ct. 1223 (1966); Davis v. State, 146 So.2d 892, 895 (Fla. 1962). Appellees have simply failed to meet their burden in this appeal.

The State of Florida has properly exercised its police power to adopt the Anti-Rebate Statutes which bear a reasonable relationship to the public welfare to prevent unfair discrimination (both direct and indirect), assure the solvency of insurance companies, help reduce the cost of insurance, provide a better quality of service to the public and help provide meaningful cost comparison and disclosure of competing insurance products. Accordingly, this Court should uphold the constitutionality of the Anti-Rebate Statutes and reverse the decision of the First District Court of Appeal with instructions for it to affirm the Summary Final Judgment of the Circuit Court.

I. THE ANTI-REBATE STATUTES BEAR A REASONABLE RELATIONSHIP TO THE PUBLIC WELFARE

The issue of insurance commission rebates is a familiar one to all state legislatures. It is an area heavily regulated against by all fifty states. Every state has prohibited the practice of rebating, and these states have acted within their constitutional prerogatives in doing so. The State of Florida is no exception.

A. The Unique Nature Of A Life Insurance Transaction Bears A Reasonable Relationship To The Public Welfare.

Unlike the salesmen of tangible goods who can emphasize the physical features of their product (design, color, weight and size), the salesmen of life insurance have a substantially more difficult job in helping a purchaser understand and appreciate the intangible benefits contained in a life insurance contract. Early in the life of the insurance industry, business pressures created certain methods of attempting to sell life insurance "which were, from the earliest days, stamped as undesirable." (A:39). These methods involved some sort of an extra-contractual grant or promise of money or property by the insurance company, or indirectly through its insurance agent, to the prospect to induce him to purchase insurance. (A:39) This bait has come to be known as the "rebate".

Also, unlike the purchase of tangible goods where the purchaser generally completes his transaction and simultaneously

receives the goods and a sales slip showing the price paid, "life insurance is the purchase of a benefit to be realized in the future." (A:50) Life insurance requires ongoing payments by the purchaser for contracts that "may run through many years, and mature only, as a rule, at . . . [the purchaser's] death." People v. Formosa, 20 N.E. 492, 493 (N.Y. Crim. 1892). Despite the uniqueness and importance of life insurance to an individual, it has long been recognized that:

> "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. . . ." Id.

Given the intangible nature of insurance contracts and the purchaser's recognized inability "to investigate the condition and solvency" of insurance companies, the average purchaser would easily fall prey to an insurance salesman who is allowed to engage in practices such as rebating.

B. The Legislative History of Anti-Rebate Statutes Reveals A Reasonable Relationship To The Public Welfare.

The anti-rebate statutes were enacted by the states because of the actual, adverse experience of the insurance industry and public between 1885 and 1905, a time when rebating was widespread. At that time, the New York State Senate and Assembly, prompted by alleged improprieties, appointed a joint committee headed by New York State Senator William W. Armstrong (which has become known as the "Armstrong Committee") to

investigate the practices of life insurance companies, including rebating.

During the investigation by the Armstrong Committee, the National Association of Insurance Commissioners ("NAIC") representing the insurance commissioners of each of the states unanimously condemned rebating at its 1904 Convention "as one of the most pernicious evils connected with the business of insurance" (A: 4) and noted that:

> ". . . rebating is . . . unfair to the man who pays the full premium, by discriminating in favor of the man who secures the rebate . . . . Some companies, in their anxiety to increase their business, pay such large commissions that their first year's business is a loss. Upon the permanent policy holder, the weight of this charge must fall." (A:6).

In addition, rebating caused substantial public concern for the stability and solvency of the insurance industry which had an adverse effect on the industry itself. The public view of rebating was that it "cheapens the public estimate of insurance indemnity and does harm to the agency field" (A:6)

> "Life insurance always claimed to be an exact science that the premiums and costs were ciphered out to a nicety and that great promptness of premium payment was vital to its success. But when these loose and unbusiness-like practices, brought about by the rebate evil, became so apparent, the public began to see a great inconsistency, and to look with suspicion upon the companies themselves; for, in spite of their vast resources and the enormous aggregations of property held by them, there was everywhere an increasing uneasiness and lack of confidence in the stability and perpetuity of any system which was conducted in such uncertain and irregular ways." (A:41, n.5).

The Armstrong Committee thoroughly examined rebates and concluded that rebating should be prohibited:

> "The illegal and wasteful practice of rebating has its source in undue competition and has thriven upon the excessive commissions and advances allowed to agents. The limitation upon the amount of new business and the curtailment of the amount available for expenses in obtaining business, together with the prohibition of discrimination in the amount of competition paid for different plans of insurance and of special rewards . . . will, it is believed, prove an effective remedy for this evil." (A:20).

The Armstrong Committee also concluded that, in addition to prohibiting rebates, it was necessary to prohibit discrimination among prospective insureds in the amount of the premium paid for life insurance in order effectively to remedy the problems that were brought to its attention.

An important outgrowth of the investigations by the Armstrong Committee was that, in the next five to ten years, most state legislatures incorporated the recommendations of the Armstrong Committee against rebates into their own insurance statutes. Similar to the anti-rebate statutes of most states, Florida's Anti-Rebate Statutes consist of three parts which prohibit three different types of practices. The first part condemns the making of any contract of insurance or related agreement with the insured other than as plainly expressed in the policy issued. The second part specifically concerns rebating and prohibits the paying or allowing as an insurance sales inducement practice any rebate of premium, any special

favor or advantage or any valuable consideration or inducement not specified in the policy. Originally, the third part of the anti-rebate statutes of most states prohibited unfair discrimination between insureds of the same class of risk and equal life expectancy. However, most states, including Florida, have physically separated the anti-rebate provisions from the unfair discrimination provisions and amended the original third part of their anti-rebate statutes to prohibit the offering of stock in connection with the purchase of insurance. By 1904, a majority of the states had enacted similar anti-rebate statutes. (A: 12).

> ". . .In most of the States, laws are on the statute books against rebating and these laws usually denominate the offense a misdemeanor punishable by fine and imprisonment. These statutes are based on the broad public policy that one citizen shall not be discriminated against in favor of another citizen similarly circumstanced. . . ." (A:3).

Appellees argue that life insurance companies are engaging in "price-fixing" by establishing agent's commissions thereby depriving the life insurance purchaser of his "right" to negotiate the same. However, such "price fixing" is not unlawful and has been determined by Congress and the state legislatures to be necessary for the public welfare. For example, on March 9, 1945, Congress passed the McCarran-Ferguson Act which provided an exemption for state regulation of the insurance industry from the otherwise applicable price fixing and antitrust federal laws:

> "(a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.
>
> (b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance . . . unless such Act specifically relates to the business of insurance; Provided, That . . . the Sherman Act, . . . the Clayton Act, and . . . The Federal Trade Commission Act . . . shall be applicable to the business of insurance to the extent that such business is not regulated by State law." 15 U.S.C. §1012 (1945) (emphasis added).

In enacting the McCarran-Ferguson Act, Congress specifically found that:

> ". . . the continued regulation . . . by the several States of the business of insurance is in the public interest. . . ." 15 U.S.C. §1011 (1945).

Contrary to Appellees' argument below that the State of Florida cannot regulate negotiations concerning "the size of the agents commission", it has been specifically held under the McCarran-Ferguson Act, that the business of insurance which is clearly subject to state regulation does:

> ". . . include the size of commissions paid by companies to agents, because commissions were a vital factor in the companies' ratemaking structure. . . ." Travelers Ins. Co. v. Blue Cross of West Pennsylvania, 481 F.2d 80, 83 (3rd Cir. 1973), cert. denied, 414 U.S. 1093, 94 S.Ct. 724 (1973) (emphasis added); see also, California League of Independent Insurance Producers v. Aetna Casualty & Surety Co., 175 F.Supp. 857, 860 (N.D. Cal. 1959).

In response to the McCarran-Ferguson Act, the National Association of Insurance Commissioners ("NAIC") developed in 1946 its Model Unfair Trade Practices Act (the "Model Act") (A:21-28), as amended (A:29-38), which prohibits rebates (A: 23-24; 31-32). The Model Act has been adopted, with minor variations, in all fifty states. (A:43) The legislatures of most states have consistently re-enacted the anti-rebate statutes, both in recent recodifications of insurance codes (as did Florida in 1982, see pgs. 20-22, infra) and through the adoption of the original and subsequent versions of the Model Act. These approving reviews made by the NAIC and the various state legislatures are impressive reaffirmations of the principles underlying the public need for the anti-rebate statutes.

C. The Anti-Rebate Statutes Prevent Discrimination Among Policyholders.

Traditionally, discriminatory practices and preferential treatment in the insurance industry have generated loud cries for greater state regulation. As a result, state legislatures have enacted, and federal and state courts have consistently upheld the constitutionality of statutes similar to the Anti-Rebate Statutes as a valid exercise of the state's police power which bears a reasonable relationship to the public welfare by the prevention of public discrimination.

One of the basic premises of anti-rebate legislation is that all persons of the same risk should pay the same amount for their insurance protection. (A:40). The removal of the

anti-rebate statutes would violate this basic premise and cause discrimination among policyholders. Without these statutes, similarly classified policyholders of an insurer with identical coverages would have to pay varying amounts for the same policies. The premiums paid by such insureds would no longer be determined solely by the characteristics of the risk presented and the particular policy purchased, but would instead be subject to the unknown variable of the amount rebated by the agent.

Since their inception in the late 1800s, the anti-rebate laws were designed to assure equality of terms to all persons of the same class of risk and equal life expectancy. In this respect, such statutes have served to prevent evasion of the requirement of equal treatment of insureds by the expedient of granting rebates of a part of the premium either by the company or its agent.

The uncontroverted evidence in the record before this Court shows that the Anti-Rebate Statutes prevent discrimination among policyholders in that without such statutes similarly classified policyholders of an insurer will pay different prices for the same policies:

> "The Legislature has determined in all 50 states that in this complex area . . . that all persons in the same actuarially supportable class must be treated in the same manner. If the insurer were to do otherwise, it would be unfairly discriminating and would be subject to losing its certificate of authority." (R: Vol. II, Pg. 80-81).

Only the sophisticated purchaser of large amounts of insurance might initially stand to gain from the practice of rebating. This gain, however, would be at the expense of less sophisticated purchasers of smaller amounts of insurance who would not have the economic leverage to demand and receive a rebate from an agent. In fact, the insurance costs of the smaller purchasers would be driven up to subsidize the sale to the larger purchasers. Such unfair discrimination against the smaller policyholder is undoubtedly one of the evils that the Florida legislature has sought to prevent.

If rebating were allowed, the cost of insurance in the State of Florida would depend more on who a person is, who he knows, and how well he can negotiate, than his actual insurance needs. The cost of life insurance to persons of the same class and equal life expectancies would be based upon the bargaining power of the insured or the generousity, or lack thereof, of the insurance agent. The more affluent customers and insureds who control larger insurable interests would be in a better position to demand higher rebates than less wealthy customers or insureds. The obvious result would be widespread discrimination. In fact, the cost of life insurance to an insured would depend in large part on the amount, if any, the insurance agent thought the rebate ought to be. The cost of insurance could just as well "be made to turn on the state of . . . . [the] liver or digestion" of the insurance agent. Ball v. Branch, 16 So.2d 524, 525 (Fla. 1944).

Appellees argue that Florida's separate "unfair discrimination" statute - Section 626.9541(1)(g) - renders unnecessary the Anti-Rebate Statutes. Section 626.9541(1)(g) prohibits an insurance company or agent from:

> ". . . knowingly making or permitting any unfair discrimination between individuals of the same actuarially supportable class and equal expectation of life, in the rates charged for any life insurance or annuity contract, and the dividends or other dividends payable thereon, or any other of the terms and conditions of such contract."

However, the foregoing "unfair discrimination" statute has been interpreted to prevent discrimination by the insurance company only in connection with its internal ratemaking decisions affecting the "rates charged" or "the terms and conditions" of the insurance contract. It does not regulate actions or promises of agents in the field, such as rebating, which are not a part of the written terms of the insurance contract.[2]

In any event, the retention of only the foregoing "unfair discrimination" statute and the elimination of the Anti-Rebate Statutes to allow rebating will allow insurance companies to do indirectly through their agents that which they cannot do directly - namely, engage in unfair discrimination between in-

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[2] The concept of the rebate is difficult to disassociate from discrimination. Although both practices were originally condemned in the same statute, discrimination technically involves the making by the Company in its rate making process of a distinction in the amount of premiums to be paid or benefits received between individuals of the same class which are not associated with the risk, while rebating is the giving or offering to give any valuable consideration as an inducement to insurance which is not specified in the policy. (A:40)

dividuals of the same actuarially supportable class and equal life expectancy. Everyone, even Appellees, would have to agree that a rebate by an insurance company would constitute unfair discrimination and that the State of Florida can regulate to prevent the same. By the same logic, the State of Florida can regulate to prevent rebating by the agents of such insurance companies.

For example, in People v. Formosa, 20 N.E. 492 (N.Y. Crim. 1892), the Court upheld the constitutionality of New York's anti-rebate statute stating:

> "As all the [insurance] 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 . . . ." Id. at 493-494.

Unless the State of Florida can prevent agents from rebating, the door will be open for each insurance company to simply increase the commissions it now pays agents. The amount of this "increased" commission could be made with the "implicit" understanding between the insurance company and its agents that such increased commission would be a "rebate" to go to potential customers in order to induce them to purchase the insurance company's product.

Thus, an exception under the Florida Insurance Code, which would allow rebating by agents would create a loophole to the separate "unfair discrimination" statute so large that unfair discrimination through indirect rebating by insurance companies through their agents would become the general rule. Without the Anti-Rebate Statutes, the intent of the Florida legislature in prohibiting unfair discrimination would be abrogated because each insurance company through its agent presumably could offer a different rebate to each insured. From a regulatory enforcement point of view, a dollar rebate from the agent is the same as a dollar rebate from the insurance company. You cannot separate the two types of rebates and adequately enforce a statute which would allow one, but not the other. Thus, any repeal of the Anti-Rebate Statutes will make the remaining, separate "unfair discrimination" statute virtually impossible to enforce and recreate the same evil which the Armstrong Committee sought to, and did, eliminate over seventy (70) years ago.

1. Decisions Of The United States Supreme Court.

The United States Supreme Court has consistently held that the anti-rebate statutes bear a reasonable relationship to the public welfare by preventing unfair discrimination to policy-holders:

> ". . . Moreover, lack of a uniform scale of commissions allowed local agents for the same service may encourage unfair discrimination among policy holders by facilitating the forbidden practice of rebating. In the field of life insurance, such evils led long ago to

> legislative limitations of agents' commissions." O'Gorman Young v. Hartford Fire Insurance Co., 282 U.S. 251, 51 S.Ct. 130, 131-132 (1931).

In German Alliance Ins. Co. vs. Lewis, 233 U.S. 389, 34 S.Ct. 612 (1914), the Supreme Court of the United States upheld the constitutionality of the Kansas anti-rebate statute stating:

> ". . . 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". Id. at 621.

(a) The Foregoing Decisions of the United States Supreme Court Should Be Decisive of the Issue on Appeal.

Appellees challenge the constitutionality of the Anti-Rebate Statutes as violating the due process clause of the Florida Constitution which provides:

> "No person shall be deprived of . . . property without due process of law . . . ." Fla. Constit., Art. 1, §9.

The Constitution of the United States identically provides that "nor shall any State deprive any person . . . of property without due process of law . . . ." U.S. Const., Amend. XIV, §1.

In view of the fact that the Florida and United States Constitutions contain identical due process clauses, the Florida courts consider such "federal and Florida constitutional guarantees as imposing the same standard and

will discuss them as one." Florida Canners Association vs. State, Dept. of Citrus, 371 So.2d 503, 513 (Fla. 2d D.C.A. 1979); Florida High School Activities Association vs. Bradshaw, 369 So.2d 398, 402 (Fla. 2d D.C.A. 1979). Accordingly, the foregoing decisions of the United States Supreme Court, which have upheld the constitutionality of anti-rebate statutes similar to the Anti-Rebate Statutes because they prevent unfair discrimination to policy holders, should be decisive of the issue on appeal before this Court.

2. Decisions Of The Supreme Courts Of Other States.

Consistent with the foregoing United States Supreme Court decisions, the supreme courts of other states also have held that the anti-rebate statutes bear a reasonable relationship to the public welfare by preventing public discrimination. For example, in Rideout v. Mars, 99 Miss. 199, 54 So. 801 (1911), the Supreme Court of Mississippi upheld the constitutionality of the Mississippi anti-rebate statute, stating:

> "The Legislature, in passing this statute, recognized 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 . . . 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 premiums. The public interest is made paramount to that of the individual." Id. at 801-802 (emphasis added).

3. Decisions Of Florida Courts.

Echoing the wisdom of federal and state court decisions too numerous to mention, this Court has determined that the State of Florida may exercise its police power to regulate the insurance industry in order to promote the public welfare, especially as to state regulation of policy rates and the related commissions of insurance agents. For example, in Williams v. Hartford Accident and Indemnity Co., 245 So.2d 64 (Fla. 1970), this Court held:

> "The insurance industry and the public recognize that the State of Florida has the right to exercise control over the insurance industry, a right extensively exercised in the past in regulating, among other things, the rate charged policy holders." Id. at 67 (emphasis added).

In its decision, the First District Court of Appeal has essentially held that the Anti-Rebate Statutes, which have been held constitutional consistently for over 70 years, are now somehow unconstitutional because of "the impact of the revolution in consumer's rights which has occurred since the turn of the century." Dade Cty. Consumer Advocate's v. Dept. of Ins., supra, at 498. However, there is no testimony in the record of any benefit to purchasers if rebating were

allowed.[3] The First District Court of Appeal apparently fails to recognize that since "the turn of the century" the substantive due process clauses of the Florida and United States Constitutions have not changed. Thus, the Anti-Rebate Statutes are as constitutional today as they were at "the turn of the century."

4. Recent Florida Legislative and Judicial Determinations That the Anti-Rebate Statutes Promote the Public Welfare.

Additional evidence that the Anti-Rebate Statutes are enacted pursuant to a legitimate exercise of the police power of the State of Florida and bear a reasonable relationship to the public welfare can be found under Florida's Regulatory Sunset Act. On October 1, 1982, the Florida Legislature reviewed and reenacted without modification one of the Anti-Rebate Statutes - namely, Section 626.611. Laws, 1982, c. 82-243, Section 204, effective October 1, 1982; Laws, 1982, c. 82-386, Section 28, effective October 1, 1982. In the Sunset Act, the Florida Legislature has expressly stated that its intent is to assure:

> "2. (a) That no profession, occupation, business, industry, or other endeavor be subject to regulation by the state unless such regulation is necessary to protect the public health, safety, or welfare from significant

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[3] The Summary Final Judgment of the Circuit Court was not based upon any evidentiary hearing or "reliance on affidavits". (R: Vol. II, Pg. 85).

and discernible harm or damage and that the police power of the state be exercised only to the extent necessary for that purpose.

(b) That the state not regulate a profession, occupation, business, industry, or other endeavor in a manner which will unreasonably and adversely affect the competitive market.

(c) That the Legislature conduct a periodic and systematic review of the need for, and the benefits derived from, a program or function which licenses or otherwise regulates a profession, occupation, business, industry, or other endeavor and, pursuant to such review, terminate, modify, or reestablish the program or function . . . ." Fla. Stat., Section 11.61(2)(a)-(c) (1983) (emphasis added).

In making its decision in 1982 to reestablish the Anti-Rebate Statutes, the Florida Legislature considered the following criteria specifically set forth in the Sunset Act:

(a) Would the absence of regulation significantly harm or endanger the public health, safety, or welfare?

(b) Is there a reasonable relationship between the exercise of the police power of the state and the protection of the public health, safety, or welfare?

(c) Is there a less restrictive method of regulation available which would adequately protect the public?

(d) Does the regulation have the effect of directly or indirectly increasing the costs of any goods or services involved, and, if so, to what degree?

(e) Is the increase in cost more harmful to the public than the harm which could result from the absence of regulation?

(f) Are any facets of the regulatory process designed for the purpose of benefiting, and do they have as their primary effect the

benefit of, the regulated entity? . . . ." Fla. Stat., §11.61(6)(a)-(f) (1983).

In deciding to reaffirm the Anti-Rebate Statutes without modification on October 1, 1982, the Florida Legislature has impliedly, if not expressly, determined again that the prohibition against rebates by insurance agents constitutes a reasonable exercise of the police power for the protection of the public welfare.

In addition, the constitutionality of the Anti-Rebate Statutes has been upheld by another Florida court in a similar case. In Blumenthal v. Department of Insurance, et al., Case No. 77-355 (Leon Co. Cir. Ct. 1977), appeal dismissed, Case No. 53,933 (Fla. (1979), counsel for Appellees, using virtually the identical brief filed in this appeal, litigated and lost a similar action which challenged the constitutionality of the Anti-Rebate Statutes on substantially the same facts and grounds raised in this appeal.

In the Blumenthal case, Joseph Blumenthal, a licensed Florida insurance agent, also brought an action identical to the present action which challenged the Anti-Rebate Statutes on the ground that the statutes did not promote, or bear a reasonable relationship to, the public welfare and, therefore, constituted a taking of property without substantive due process in violation of the Florida Constitution. In Blumenthal, Judge Cawthon entered a Final Judgment On The Pleadings on April 4, 1978, which specifically found that the Anti-Rebate Statutes "forbidding the granting of rebates by

insurance agents are constitutional and valid." (A:57-58). In Blumenthal, the Circuit Court further found such statutes did not "deprive Plaintiff of any constitutional rights" or otherwise deprive him of any property without substantive due process of law. (A:57-58).

Thus, in the Blumenthal case, a Florida court previously has upheld the validity and constitutionality of the Anti-Rebate Statutes on substantially the same, if not identical, facts and grounds raised by Appellees herein.

D. The Anti-Rebate Statutes Are Integrally Related To The Total Scheme Of Insurance Regulation For The Public Welfare.

The Anti-Rebate Statutes are part of a comprehensive statutory scheme for the regulation of the insurance industry as a whole. Each statute under the Florida Insurance Code, including the Anti-Rebate Statutes, is part of an interwoven statutory fabric, a tear in which may ruin the entire regulatory garment.

Under Section 626.9541(1)(g) of the Florida Statutes, insurance companies are prohibited in their internal rate making process from unfairly discriminating in the amount of "rates charged" or benefits received under "the terms and conditions" of the insurance contract. As previously discussed, the elimination of the Anti-Rebate Statutes will allow insurance companies to do indirectly, by rebating through their agents, that which they are not allowed to do directly under the "unfair discrimination" statute. (ACLI's Brief, pgs. 14-16, supra).

Another effect of permitting rebating would be to invalidate any effective insurance cost comparison by prospective purchasers. As part of the comprehensive structure of insurance regulation enacted by the Florida legislature, life insurance companies are required to provide information to the buyers of insurance that permits cost disclosure and comparison of competing policies. In 1981, the Florida Legislature enacted into law Section 626.99 of the Florida Statutes which is a detailed system of disclosure information required to be furnished to all buyers of life insurance in this state. To enable consumers to compare the relative costs of various life insurance policies, Section 626.99 requires the furnishing of a cost index and sets forth the manner in which the cost index is to be calculated.

Without the protection of the Anti-Rebate Statutes, the calculation of that index would be frustrated by the inability of the insurance company to know the precise consideration paid by the buyer for his insurance - an essential element in the cost index. In addition, if the agent had rebated a part of this commission, the purpose of the index and the Buyer's Guide required to be delivered to the purchaser would be thwarted. Rather than shopping for his best insurance protection, the buyer would be more influenced by the size of the rebate being offered. Thus, the legislative intent of encouraging consumers to shop for the best life insurance coverage and to compare relative costs of similar policies would be frustrated by allowing agents to rebate part or all of their commissions.

E. The Anti-Rebate Statutes Help Assure The Solvency Of Life Insurance Companies.

In addition to helping prevent unfair discrimination (both direct and indirect) to policyholders, numerous federal and state supreme courts have upheld the constitutionality of such statutes upon the independent basis that they bear a reasonable relationship to the public welfare by helping assure the solvency of insurance companies.

The protection of the public against the insolvency of insurance companies has been a paramount interest of state regulation of the insurance industry. In People v. Formosa, supra, the Court upheld New York's anti-rebate statutes 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. . . ." Id. at 493.

Under such police power, the Supreme Court of the United States in O'Gorman Young v. Hartford Fire Insurance Co., supra, held:

> "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 effect the adequacy of the rate. Excessive commissions may result in an unreasonably high rate level or an impairment of the financial stability of the insurer. . . ." Id. at 131.

In People v. Hartford Life Insurance Co., 252 Ill. 398, 96 N.E. 1049 (1911), the Court upheld the constitutionality of anti-rebate statutes holding:

> "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. . . . 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." Id. at 1050.

1. Churning Caused By Rebating Will Adversely Affect The Solvency Of Insurance Companies.

Appellees have argued below that allowing an agent to rebate his commission, which does not belong to the insurance company, cannot have an adverse impact on the solvency of insurance companies. Appellees may be correct to the extent they are referring to the immediate transaction involving the purchase of insurance between the agent and the insured. However, Appellees are wrong when one considers how numerous

"rebating" transactions will affect the insurance industry as a whole in the long run. In effect, Appellees cannot see the forest for the trees.

In the life insurance industry, the commission which an agent earns during the first year on his sale of a whole life insurance policy is generally fifty-five percent (55%) of the amount of the first year premium. Generally, the agent receives such commission from the insurance company in advance before the insurance company collects sufficient monthly premium payments from the insured to cover such commission. However, the commission earned by the agent on such a policy drops substantially after the first year to only five percent (5%) of the amount of the annual premium for years two through ten. The agent generally receives no commission after the tenth year. It is, therefore, likely that the second year cost to the insured would increase substantially and there would consequently be a strong tendency for the insured to lapse the first policy and replace the first policy with a second policy obtained from the agent of a second insurance company in order to obtain a larger rebate from the larger first year commission on the second policy.

If a policy lapses on its first anniversary and a second policy is sold to provide a larger commission, the insurance company is prevented from recovering acquisition expenses which

are calculated to be recovered over a longer policy life.[4] In addition, the increase in policy lapses related to rebating will also cause insurance companies to lose the profit after the first year that they otherwise would earn. This additional loss of revenue caused by increased policy lapses will result in an adverse effect on the financial welfare of insurance companies, or, alternatively, increased insurance costs to the public.

The best way to illustrate how "churning" will adversely affect the financial welfare of insurance companies is by a comparison of the same insurance purchase without rebating[5] and

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[4] For example, if an individual purchases a policy with a yearly premium of $1,000.00 as to which the agent earns a 55% commission, a majority of life insurance companies pay the $550 commission to the agent in advance even though the insured makes a first monthly payment of only $83.33 to the insurance company. If the policy is cancelled within six months, the insurance company would not recover all of the agent's commission or any other acquisition costs.

[5] If an individual purchases a policy to be in force ten years or longer, with a yearly premium of $1,000 (including a 55% agent commission), the insurance agent would receive $550 (55%) of the first year premium and the insurance company would receive $450. In years two through ten, each year the agent will receive only $50 (5% of $1000) of the premium and the insurance company will receive $950. Over the first ten years of the policy, the agent will receive a total commission of $1,000 ($550 + 9 x $50). The insurance company would receive $9,000 ($450 + 9 x 950) over the ten year period, which would presumably cover its costs and adequate profit.

with rebating.[6] In the example without rebating, the insurance company collected for itself $9,000 over the ten year period. In the example with rebating, the insurance company collected for itself only $450, a loss of revenue of $8,550. Even if under the rebating example the insurance company was fortunate enough to resell a "different second" policy to the same churning purchaser or a new policy to another churning purchaser who churned every year, the company would receive only $450 a year, or $4,500 over a ten year period, a loss of revenue of $4,500. "Churning" results not only in lower earnings for insurance companies but also in increased insurance costs to the public because the costs of issuing the policy other than the commission generally consume the remainder of the first year premium. Ultimately, insurance companies will become insolvent or have to raise the policy premiums in order to make up for lost revenue.

The uncontroverted evidence in the record on appeal clearly establishes that the Anti-Rebate Statutes are necessary in order to help assure the solvency of insurance companies:

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[6] An agent might offer to split equally his first year 55% commission with the purchaser. This would mean that the total cost to the purchaser would be $725 the first year ($1000 - 1/2($550)). However, during the second year of the policy, the agent would only be able to offer the policyholder a $25 discount (50% of his $50 second year commission), so the second year cost to the consumer would be $975 - a $250 increase! To avoid paying the increased cost, the policyholder would allow his original policy to lapse, and purchase a new "second" policy from a second insurance company so that he could again take advantage of the larger first year commission.

> "Rebating of commissions would cause buyers to seek the highest rebate they could get. Since the first year commission is usually the highest, the buyer could not get a rebate on his second year and he would lapse the policy to buy a new one so he could get another rebate. The solvency of companies depends on policies staying in force. The absolutely unmeasureable increase in lapse ratios could very well affect the solvency of companies." (R:80).

"Churning" which will result from rebating will also adversely affect the quality of the insurance protection provided to the public. By churning policies every year, policyholders will not build up any cash surrender value benefits, will pay higher premiums each year based on their increasing age rather than locking in a lower premium rate at an early age and may become uninsurable. In addition, for age and health reasons, some individuals would not be able to replace their policies every year. These people will end up paying much higher costs because they won't be able to continually take advantage of large first year rebates and will essentially be subsidizing those who can.

F. The Anti-Rebate Statutes Help Reduce The Cost Of Insurance.

As recognized by the First District Court of Appeal, the main objective of Florida insurance law is "the protection of the public as well as the protection of insurers. . . ." Collignon v. Larson, 145 So.2d 246, 250 (Fla. 1st D.C.A. 1962). In addition to preventing unfair discrimination (both

direct and indirect) and helping assure the solvency of insurance companies, the Anti-Rebate Statutes provide a myriad of additional safeguards within the insurance industry necessary to protect the public welfare.

Appellees would have this Court believe that the elimination of the Anti-Rebate Statutes will decrease the cost of insurance to the consuming public. The opposite is true.

During the Armstrong investigation, the National Association of Insurance Commissioners ("NAIC") at its 1904 Convention noted that as a result of rebating:

> ". . . Some companies, in their anxiety to increase their business, pay such large commissions that their first year's business is a loss. Upon the permanent policy holder the weight of this charge must fall." (A:6).

As discussed above, the effect of permitting rebating will cause "churning" which, in turn, will increase the cost of insurance. However, even without "churning", the cost of insurance will increase simply because rebating will cause commission rates to increase. To the extent that part of the agents' incomes are rebated to customers, history has shown that the agents will demand increased commissions from insurance companies in order to maintain their same standard of living. An increase in agents' commissions result in increased insurance costs.

In the early days, under the usual rebate situation where the agent granted a rebate out of his commission the agent's

"net" commission after rebate was obviously less. This in turn had the effect of forcing the insurance companies to increase the agent's initial commission "so much in excess of expense loading of the year . . . that this excess (had) to be borrowed from the funds of older members, and, in case of lapse before subsequent premiums shall have made up the advance, such loan becomes a dead loss to the funds." (A:40) The result was unnecessarily high costs of insurance for those who did not receive rebates. (A:40)

Based upon the uncontroverted affidavit in the record of James C. Fogarty, the Anti-Rebate Statutes create honest competition in which an insurance product is selected by a purchaser "based on the merits of the [insurance] product" not the size of any rebate. As a result of such intense product competition, "life insurance premiums . . . have consistently decreased over the past 35 years." (R:79). If rebating were allowed, this trend would reverse.

Under its police power, Florida has the right to regulate insurance to prevent "an unreasonably high rate level" to the public. O'Gorman Young v. Hartford Fire Insurance Co., supra at 131. The Anti-Rebate Statutes help keep the cost of insurance down in a stable market where competition is based upon the quality and merits of the insurance product as opposed to the size of a rebate which would be based upon factors which are unrelated to the insurance business.

The repeal of the Anti-Rebate Statutes will cause the consuming public to turn away from an examination of the merits of an insurance contract and to be more influenced by the size of the rebate rather than the best insurance protection. In turn, the size of the rebate will depend upon factors inimical to the healthy competitive market that has kept the cost of life insurance down to date. For example, larger, more affluent agents will be able to afford larger rebates until smaller agents are driven out of business leaving a monopolistic environment conducive to higher insurance costs (lower rebates) at the whim of larger, surviving agents.

G. The Anti-Rebate Statutes Protect The Public From Low Quality Service.

In the decision on appeal, the First District Court of Appeal recognized that the Anti-Rebate Statutes did bear a reasonable relationship to the public welfare stating:

> "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 . . . ." Dade Cty. Consumer Advocate's v. Dept. of Ins., supra, at 497; (A:54) (emphasis added).

The foregoing finding of the First District Court of Appeal alone is sufficient to validate the constitutionality of the Anti-Rebate Statutes which under the appropriate tests for the determination of compliance with substantive due process are only required to be reasonably, not substantially, related to the public welfare.

II. ANY CHANGE TO, OR ELIMINATION OF, THE ANTI-REBATE STATUTES IS A LEGISLATIVE, NOT JUDICIAL, FUNCTION

The foregoing statutory authority, case precedent and industry-related concerns clearly reveal that the question raised by Appellees goes more toward the wisdom of the Anti-Rebate Statutes which is a matter for the Florida legislature to consider. The First District Court of Appeal has already found that the Anti-Rebate Statutes protect the public from "low quality service", judicial inquiry need go no further. The consideration by the First District Court of Appeal as to the effects of the consumer rights movement and related public policy considerations concerning the propriety of the Anti-Rebate Statutes is a legislative, not judicial, function.

In German Alliance Ins. Co. v. Lewis, 233 U.S. 389, 24 S.Ct. 612 (1914), the United States Supreme Court upheld the constitutionality of the Kansas anti-rebate statutes as part of the rate making function of insurance companies subject to state regulations, stating:

> ". . . What makes for the general welfare is necessarily in the first instance a matter of legislative judgment, and a judicial review of such judgment is limited. 'The scope of judicial inquiry in deciding the question of power is not to be confused with the scope of legislative considerations in dealing with the matter of policy. Whether the enactment is wise or unwise, whether it is based on sound economic theory, whether it is the best means to achieve the desired result, whether, in short, the legislative discretion within its

> prescribed limits should be exercised in a particular manner, are matters for the judgment of the legislature, and the earnest conflict of serious opinion does not suffice to bring them within the range of judicial cognizance." Id. at 620.

The United States Supreme Court went on to hold:

> ". . . Whether the requirements are necessary to the purpose . . . is a matter for legislative judgment, not judicial. Our function is only to determine the existence of the power." Id. at 621 (emphasis added).

Similarly, this Court has followed the United States Supreme Court and held that an exercise of Florida's police power, especially in the area of economic regulation such as the Anti-Rebate Statutes, does not have to be the best means of regulating an activity for promoting the public welfare in order to withstand a substantive due process challenge. In Belk-James, Inc. v. Nuzum, 358 So.2d 174 (Fla. 1978), this Court held:

> ". . . 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.

It is clear that Appellees have presented their arguments to the wrong forum. If the consumer rights movement since the turn of the century favors open competition and less regulation, such movement should be given proper investigation and consideration by the Florida legislature, not the Florida courts.

No other state has eliminated its anti-rebating legislation. Thus, there is no experience to draw upon except the experience of the insurance industry prior to 1905 which resulted in all fifty states enacting legislation similar to the Florida Anti-Rebate Statutes. As indicated from the recent breakup of the telephone industry, well intentioned deregulation can have unanticipated negative consequences for the general public. In essence, the elimination of the Anti-Rebate Statutes would be an unresearched experiment on the citizens of the State of Florida. ACLI strongly feels that the prudent and proper course of action is for this Court to uphold the constitutionality of the Anti-Rebate Statutes to allow such study and investigation of this matter as the Florida legislature may deem appropriate.

III. CONCLUSION

For the reasons set forth above and for the additional reasons advanced in the Brief for the Appellants, the decision on appeal should be reversed.

Respectfully submitted,

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