IN THE SUPREME COURT 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, et al.,

Appellees.
_____/

AMICUS BRIEF OF
NATIONAL ASSOCIATION OF LIFE UNDERWRITERS

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TABLE OF CONTENTS

CITATION OF AUTHORITIES

PRELIMINARY STATEMENT

The National Association of Life Underwriters ("NALU"), appearing as amicus in this cause, adopts the statement of the case and facts as set forth in the Initial Brief of the Appellants, Department of Insurance and Bill Gunter.

ARGUMENT

I. THE CASES CITED IN SUPPORT OF THE DECISION OF THE FIRST DISTRICT COURT OF APPEAL IN FACT ARGUE IN FAVOR OF THE CONSTITUTIONALITY OF THE STATUTES AT ISSUE, RATHER THAN AGAINST THEIR CONSTITUTIONALITY.

The First District Court of Appeal in its decision cited two cases to substantiate its finding that Sections 626.611(11) and 626.9541(1)(h)1; Florida Statutes (1983) are unconstitutional. The cases are Liquor Store, Inc. v. Continental Distilling Corp., 40 So.2d 371 (Fla.1949) and Virginia Pharmacy Board v. Virginia Consumer Council, 425 U.S. 748, 48 L.Ed.2d 346, 96 S.Ct. 1817 (1976). The Florida case was used by the court to establish the "applicable standard of review" in determining whether the challenged anti-rebate statutes are a legitimate exercise of the state's police power as required by Article I, Section 9, the due process clause of the Florida Constitution. The Virginia case was cited to support the proposition that statutes protecting the public from "low-cost, low-quality service" are insufficient to validate laws purporting to promote the public health, safety or welfare as required by the due process clause of the Florida Constitution.

Both of these citations, when properly interpreted, enhance the argument that the Florida anti-rebate statutes are a legitimate exercise of the police powers.

Liquor Store Inc. v. Continental Distilling Corp. does not establish the applicable standard of review which the court admittedly employed to determine whether the anti-rebate statutes meet the due process requirements of the Florida Constitution. The court said the test is that the challenged statutes must reasonably and substantially promote the public health, safety or welfare to meet the constitutional requirements. This is not the standard enunciated by the majority opinion in Liquor Store, nor has such a standard been adopted subsequently by the Florida courts in similar cases.

The Liquor Store decision specifically stated that for the statute in question to be upheld, "there must be some semblance of a public necessity and it must have some relationship to the public health, morals or safety." Liquor Store, Inc. v. Continental Distilling Corp., supra, at 375. [Emphasis added] Nowhere in the majority opinion was a standard of "substantially" mentioned. The word "substantial" did appear in a concurring opinion but this standard has not been followed in any other Florida decision and indeed originally referred to equal protection and not due process, cf. State ex rel. Vars v. Knott, 135 Fla. 206, 184 So. 752 (Fla. 1938).

Since there is no criterion in Florida law that a statute must "substantially promote" the public health, safety or welfare in order to meet the due process clause of the Florida Constitution, the Court of Appeal erred in attempting to apply such a standard. Indeed, the court

specifically acknowledged that the argument that the anti-rebate statutes advance a legitimate public interest is "not without merit." Certainly, if there is any meritorious reason for the statutes, that would be sufficient to meet "some semblance" of a public necessity. The court's finding is, therefore, self-contradictory to its reasoning.

Additionally, the court has failed to perceive the impact of the other citation it claimed supported the finding of unconstitutionality. The Virginia Pharmacy Board case dealt with the First Amendment fundamental right of free speech and not so-called "consumer rights". The two are in no manner comparable. But this is not all. The court seemingly did not read its own quoted section of the opinion carefully enough for it appears to have overlooked a critical fact. The U.S. Supreme Court stated:

> There is, of course, an alternative to this highly paternalistic approach. That alternative is to assume that this information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them. If they are truly open, nothing prevents the "professional" pharmacist from marketing his own assertedly superior product, and contrasting it with that of the low-cost, high-volume prescription drug retailer. But the choice among these alternative approaches is not ours to make or the Virginia General Assembly's. It is precisely this kind of choice, between the dangers of supressing information, and the dangers of misuse if it is freely available, that the First Amendment makes for us. Virginia is free to require whatever professional standards it wishes of its pharmacists; it may subsidize them or protect them from competition in other ways. cf. Parker v. Brown, 317 U.S. 341, 87 L.Ed. 315, 63 S.Ct. 307 (1943). But it may not do so by keeping the public in ignorance of the entirely lawful terms that competing

> pharmacists are offering. In this sense, the justifications Virginia has offered for supressing the flow of prescription drug price information, far from persuading us that the flow is not protected by the First Amendment, have reinforced our view that it is.
> 425 U.S. at 770. [Emphasis added]

Note the emphasized sentence, "Virginia is free to require whatever professional standards it wishes of its pharmacists; it may subsidize them or protect them from competition in other ways." This is significant for it is exactly what the Appellants in the District Court of Appeal, First District conceded in their Breif, i.e. that the anti-rebate statutes "benefit life insurance agents as a group by insulating them from competition" and have no "other justification which bears a reasonable relationship to the public welfare." (Appellants' Brief, pg. 2). What the Court of Appeal failed to state, was that dicta in the opinion it cited to support its position on the unconstitutionality of the anti-rebate statutes specifically allows a state to legitimately and constitutionally do what the Appellants below claim was actually done, i.e. enact legislation which protects life agents from competition. Although we do not concede that this is the only reason for enacting the statutes, nor a primary one, or even a reason at all, the Appellants below have subscribed to it and by relying upon the Virginia Pharmacy Board opinion as precedent, the District Court of Appeal agrees with the proposition that legislation protecting competitors from competition passes constitutional scrutiny.

Therefore, the First District Court of Appeal, in relying upon the Virginia Pharmacy Board opinion, has reinforced the legitimacy of the anti-rebate statutes by citing a circumstance which is a proper exercise of the state's police power and which the Appellants below admit is what actually exists concerning the anti-rebate statutes at issue in this case.

II. COURTS CANNOT SUBSTITUTE THEIR SOCIAL AND ECONOMIC BELIEFS FOR THE JUDGMENT OF LEGISLATIVE BODIES WHICH ARE ELECTED TO ENACT LAWS AND WHICH HAVE BROAD DISCRETION TO EXPERIMENT WITH ECONOMIC PROBLEMS.

There was a time when the Due Process Clause was used by the U.S. Supreme Court to strike down laws which were thought unreasonable, i.e. unwise or incompatible with some particular economic or social philosophy. A wide variety of laws were nullified, ranging from prescribing maximum hours for work in bakeries, Lochner v. New York, 198 U.S. 45,49 L.Ed. 937, 25 S.Ct. 539 (1905), to outlawing "yellow dog" contracts, which called for prospective employees to sign agreements that they would not join unions, Coppage v. Kansas, 236 U.S. 1, 59 L.Ed. 441, 35 S.Ct. 240 (1915).

Gradually, however, objections voiced by Mr. Justice Holmes and Mr. Justice Brandeis to this judicial proclivity began to take hold. By a dissenting opinion in Tyson & Bro. - United Theatre Ticket Office v. Banton, 273 U.S. 418, 445, 71 L.Ed. 718, 47 S.Ct. 426, 58 ALR 1236 (1927), Mr. Justice Holmes said, "I think the proper course is to recognize that a state legislature can do whatever it sees fit to do unless it is restrained by some express prohibition in the Constitution of the United States or of the State, and that Courts should be careful not to extend such prohibitions beyond their obvious meaning by reading into them conceptions of public policy that the particular Court may happen to entertain."

In an earlier case, Adkins v. Childrens' Hospital, 261 U.S. 525, 567, 67 L.Ed. 785, 800, 43 S.Ct. 394, 24 ALR 1238 (1923), Mr. Justice Holmes observed that, "The criterion of constitutionality is not whether we believe the law to be for the public good."

Consequently, since the demise of the concept of "substantive due process" in the area of economic regulation, the U.S. Supreme Court has recognized that, "[l]egislative bodies have broad scope to experiment with economic problems...." New Motor Vehicle Bd. v. Orrin W. Fox Co., 439 U.S. 96, 106, 107, 58 L.Ed.2d 361, 374, 99 S.Ct. 403 (1978); Ferguson v. Skrupa, 372 U.S. 726, 730, 10 L.Ed.2d 93, 83 S.Ct. 1028, 95 ALR 2d 1347 (1963).

In New Motor Vehicle Bd., a California statute required a motor vehicle manufacturer to secure the approval of the California New Motor Vehicle Board before opening a retail motor vehicle dealership within the market area of an existing franchisee, if and only if that existing franchisee protested the establishment of the competing dealership.

The Court distinguished between procedural and substantive due process and noted that even if the right to franchise had constituted a protected interest, California's Legislature was still "[c]onstitutionally empowered to enact a general scheme of business regulation that imposed reasonable restrictions upon the exercise of that right." New Motor Vehicle Bd., supra, at 374.

It appears fairly obvious that courts have abandoned

the use of vague due process concepts to nullify laws which they might personally perceive as being economically outdated or unwise as a result of court-perceived revolutions in "consumer rights". Florida courts have followed a more reasonable approach to determine the validity of legislation enacted for the protection of the public health, safety, welfare or morals.

All legislation will be presumed constitutional if there is any reasonable theory to that end, Hamilton v. State, 366 So.2d 8 (Fla. 1978). Where the police power is exercised in the area of economic regulation, it is valid if the means utilized bear a rational or reasonable relationship to a legitimate state objective, Belk-James, Inc. v. Nuzum, 358 So.2d 174, 175 (Fla. 1978). Therefore, a court may not substitute its judgment as to the wisdom and policy of the law for that of the legislative body, Holley v. Adams, 238 So.2d 401 (Fla. 1970).

Police power is the sovereign right of a state to enact laws for the protection of lives, health, morals, comfort and general welfare, Newman v. Carson, 280 So.2d 426, 428 (Fla. 1973). Thus, it appears to be a fairly well-settled principle of law that the state legislature is vested with a great deal of discretion to determine the public interest in and measures for its protection, Holley v. Adams, supra, at 407.

In Jones v. Gray & Sons, 430 So.2d 8 (Fla. 3d DCA 1983) the trial court had doubted that a county ordinance, requiring

persons who deal in secondhand goods containing precious metals hold them for 15 days before resale or other distribution, was necessary. The trial court, however, upheld the constitutionality of the other provisions of the ordinance and thereby upheld the constitutionality of substantially all of its regulatory scheme.

The Jones court found that, while the trial court obviously doubted the 15-day holding period was necessary, it was not for it to say, as it did, that a 72-hour holding period was sufficient to accomplish the objective of the ordinance. That is a legislative prerogative and a court's role is limited to deciding whether the means utilized bear a rational or reasonable relationship to the objective and not to substitute its judgment for that of the legislature, Jones v. Gray & Sons, supra, at 11.

This is not without parallel to the instant case since here the District Court of Appeal has specifically upheld all other sections of the regulatory scheme involving rebates by its amended opinion which resulted from the various motions filed after its decision but has chosen to narrowly permit rebates in very limited and circumscribed circumstances.

The District Court of Appeal in this case obviously feels that the other evils inherent in rebating such as discrimination, commission splitting with unlicenses persons, kickbacks and misrepresentation are adequately controlled by other segments of the regulatory scheme and the slender carve-out for an agent's customers is, in its opinion, an appropriate substitute for the legislature's judgment regarding

all aspects of rebating life insurance agents' commissions. Somewhat like substituting 72 hours for 15 days. This, however, is not the law.

If, therefore such a revolution in "consumer rights" has in fact occurred since the turn of the century, it is properly the prerogative of the state legislature and not the courts to bring the law up to date by repealing an offending statute. Even if these particular laws are outdated, it must be remembered that obsolescence is not a litmus test for unconstitutionality.

III. THE DISTRICT COURT ERRED IN CONSIDERING AND RELYING ON "A REPORT OF THE U.S. DEPARTMENT OF JUSTICE TO THE TASK GROUP ON ANTI-TRUST IMMUNITIES."

Under Rule 1.510(c) FRCP, (1984), on motion for summary judgment the only matters which the trial court is authorized to consider are the pleadings, depositions, and admissions on file, together with the affidavits, if any, filed in support of and in opposition to the motion. Fish Carburetor Corporation v. Great American Insurance Company, 125 So.2d 889,892 (Fla. 1st DCA 1961).

On review an appellate court is obviously limited to consideration of the same matters as proper to be considered by the trial court.

In the instant case the only matters properly before the trial court and the District Court were the following: (1) the complaint; (2) an affidavit of the Plaintiff Dartland in which he stated only he had purchased life insurance in Dade County, he had requested negotiation of the life insurance agent's commission, and was informed by the agent that it was illegal to do so; and (3) affidavit of James C. Fogarty, filed on behalf of the Defendants, Department of Insurance and Bill Gunter, which related in detail the public purpose served by the questioned statutes.

The trial court also had before it the motion of Plaintiff for summary judgment and motion in opposition by the Defendants.

As an exhibit to its motion for summary judgment, the

Plaintiffs attached a copy of "A Report of the U.S. Department of Justice to the Task Group on Anti-trust Immunities."

Neither the motion for summary judgment or the motion in opposition are pleadings properly to be considered by the trial court or the appellate court under the applicable rule of civil procedure. Guerdon Industries, Inc. v. Durrenberger, 359 So.2d 910, (Fla. 1st DCA 1978).

Nor was it proper for the First District Court of Appeal to consider the Report of the U.S. Department of Justice as it did in deciding this cause. Its use in Footnote 4 to its opinion to counter Defendant Department of Insurance's argument of the ills the subject statutes were designed to combat clearly demonstrates the court's erroneous reliance on a document not proper to be considered either by it or the trial court.

Moreover, that report by its own terms represented only the Justice Department's tentative views and was intended only to stimulate comment by interested parties and consideration of the issues by regulatory and legislative bodies. It was not intended to be and cannot be used as evidence in court proceedings.

The District Court of Appeal erred in using it in reversing the trial court.

IV. NEITHER THE RECORD NOR THE CASE LAW SUPPORT THE DECISION OF THE FIRST DISTRICT COURT OF APPEAL.

The District Court did not reverse the trial court because there remained unsettled genuine issues of material fact. Even though this Amicus believes it would have been error for the District Court to reverse the trial court on this ground, the result would have been more defensible and just since all parties affected by the decision would then have had the opportunity at trial to offer evidence in support of the relationship between the public health, safety or welfare and the practice prohibited by the statutes. The opportunity to offer such evidence at trial is denied the parties under the court's decision.

In essence, what the District Court did was to ignore the presumption of validity of legislative action and substitute its own perception of what the regulatory policy governing the rebate of insurance commission ought to be, and it did so without any evidence whatsoever to support those perceptions and findings.

Moreover, in doing so, it refused to recognize the host of decisions, cited in the briefs of the Department of Insurance and other Amici, which all found the anti-rebate statutes to be a valid exercise of the police power. As justification for ignoring these decisions, the District Court refers to the "revolution in consumer's rights" and cites cases rejecting the paternalistic approach to consumer's ability to make decisions without government intervention.

Yet, none of the cited decisions deal with rebating or the insurance industry. There was nothing before the court to show that the revolution in consumer rights had in any way lessened the need for exercise of the police power in prohibiting rebate of insurance commissions.

Neither the record in this cause or the case law support the decision of the First District Court of Appeal.

CONCLUSION

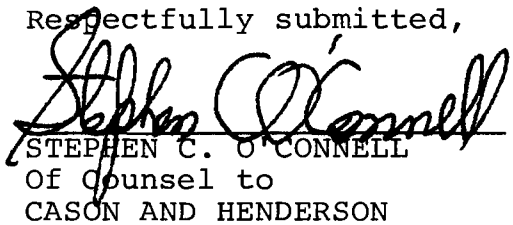
The only issue before the First District Court was whether the trial court correctly determined on the pleadings and affidavits before it that there was no genuine issue of material fact as to the constitutionality of Sections 626.611(11) and 626.9541(1)(h)1. In resolving this issue the District Court had only to determine whether, according to the act of the legislature the required presumption of validity, there was some semblance of a public necessity for the statutes and they had some relation to the public health, morals or safety.

While admitting that the argument by the Department of Insurance in support of the prohibition against rebate of commission was not without merit, and apparently conceding that the public had a legitimate interest in regulating the insurance industry, the District Court utilizing a document not proper to consider and using an erroneous standard of measurement, held the statutes to be an invalid exercise of the police power.

In doing so, the First District Court of Appeal committed reversible error requiring this Honorable Court to reverse the District Court and either affirm the judgment of the

trial court or remand the cause to the trial court for further proceedings.

Respectfully submitted,



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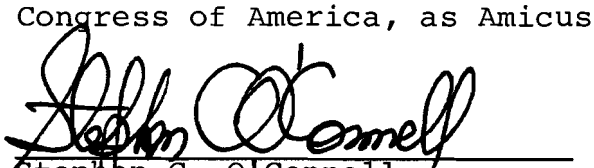

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