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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.	)	

JOINT REPLY BRIEF OF AMICUS CURIAE AMERICAN COUNCIL OF LIFE INSURANCE, FLORIDA ASSOCIATION OF INSURANCE AGENTS, FLORIDA ASSOCIATION OF LIFE UNDERWRITERS, NATIONAL ASSOCIATION OF LIFE UNDERWRITERS AND NATIONAL FRATERNAL CONGRESS OF AMERICA

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MISCELLANEOUS

DESIGNATION OF PARTIES AND ABBREVIATIONS

The following amicus curiae which appear in this appeal on behalf of Appellants Department of Insurance and Bill Gunter will be referred to as follows:

American Council of Life Insurance ("ACLI")

Florida Association of Insurance Agents ("FAIA")

Florida Association of Life Underwriters ("FALU")

National Association of Life Underwriters ("NALU")

National Fraternal Congress of America ("NFCA")

The American Council of Life Insurance, Florida Association of Insurance Agents, Florida Association of Life Underwriters, National Association of Life Underwriters and National Fraternal Congress of America shall sometimes be referred to collectively as "Amicus Curiae".

The Answer Brief of Appellees will be referred to as "Appellees Brief, Pg. ____".

This Joint Reply Brief of Amicus Curiae will be referred to as "Jt. Reply Brief, Pg. _____".

Any Appendix which accompanied the initial Brief of any Amicus Curiae will be referred to by the use of the appropriate acronym to identify the amicus curiae and the letter "A" followed by the appropriate page number(s). For example, "(ACLI Brief, A:_____)".

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

Sections 626.9541(8)(a)[1] and 626.611(11) of the Florida Statutes, the constitutionality of which is challenged by Appellees[2], 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 Appeal, will be referred to as the "Circuit Court".

The First District Court of Appeal will be referred to as the "Appellate Court".

The decision of the First District Court of Appeal in Dade Cty. Consumer Advocate's v. Dept. of Ins., 457 So.2d 495 (Fla. 1st D.C.A. 1984) from which this appeal has been taken by Appellants will sometimes be referred to as the "decision".

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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).

[2] Appellees also improperly argue for the first time on appeal that a third statute, Section 626.6215(5)(b) of the Florida Statutes which "prohibits persons in charge of insurance agencies from rebating", is also unconstitutional. Appellees Brief, Pg.5, n.2. It is untenable to believe that the public will receive any benefit from a transaction in which the general manager of an insurance company and one of his employee/agents are allowed to rebate commissions.

JOINT REPLY BRIEF OF AMICUS CURIAE
ISSUES ON REVIEW

I. WHETHER THE APPELLATE COURT APPLIED SEVERAL ERRONEOUS STANDARDS OF JUDICIAL REVIEW

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

PREFACE

For the convenience of the Court and in an effort to avoid redundancy and thereby save judicial labor, the five (5) Amicus Curiae (each of which would otherwise be entitled to file separate fifteen [15] page Reply Briefs) hereby file this Joint Reply Brief in support of Appellants.

STATEMENT OF THE CASE AND STATEMENT OF THE FACTS

Amicus Curiae hereby adopt the Statement of the Case and Statement of the Facts as set forth in the Brief of Appellants Department of Insurance and Bill Gunter as supplemented by each Amicus Curiae and as follows.

Though the ramifications of whether to prohibit the rebating of commissions by insurance agents are complex, the issues properly within the scope of judicial review by this Court are quite simple. There has been no trial, no discovery. More importantly, no evidence was introduced by Appellees or accepted by the Circuit Court[3] to support, much less prove, the argument of Appellees that the Anti-Rebate Statutes violate the substantive due process clause of the Florida Constitution because such statutes do not bear a reasonable relationship to the public welfare.

Before the Circuit Court, Appellees only filed an unverified complaint (R:1-6), as to which no answer was filed, and a Motion for Summary Judgment without any relevant supporting affidavit[4] (R:17-69). Further, Appellees' Motion for Summary Judgment included a memorandum of law which only cited as

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[3] The Summary Final Judgment of the Circuit Court upheld the constitutionality of the Anti-Rebate Statutes "without reliance on the affidavits filed by the parties. . . ." (R: 85).

[4] The four (4) line "affidavit" of Mr. Walter T. Dartland (R:38) does not offer a scintilla of evidence to establish any violation of substantive due process.

authority, and did not offer or introduce as evidence (R:6), an uncertified copy of an anonymous eight year old report by the Task Group On Antitrust Immunities, U.S. Department of Justice, The Pricing and Marketing of Insurance (1977) (the "Anti-Trust Report"). [5]

Thus, Appellees clearly failed to meet their burden of demonstrating the absence of any material issue of law or fact so as to be entitled to summary judgment (R:70-72; 76-77). Therefore, that portion of the Summary Final Judgment of the Circuit Court which denied Appellees' Motion for Summary Judgment should clearly be affirmed (R:85, para. 2). Appellees have not argued otherwise.

The foregoing statement of this case is uncontroverted. Accordingly, this Court should ask:

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[5] The probative value of the Anti-Trust Report as authority in this appeal is very limited, if not nil (See FALU Brief, Pgs. 4-9; NALU Brief, Pgs. 11-12). Appellees fail to mention that the Report has not been acted upon and that its recommendations are in direct conflict with the present valid exceptions to the anti-trust and price-fixing laws which provide that "continued state regulation of the business of insurance is in the public interest", 15 U.S.C. §1011 (1945), including state regulation of:

> ". . . 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 (3d 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).

> "If Appellees are not entitled to summary judgment, then how are they now entitled to the decision of the Appellate Court which holds that the Anti-Rebate Statutes are unconstitutional, without the benefit of any evidence?"

The answer is simple. The Appellate Court has committed clear reversible error. The effect of the decision of the Appellate Court is to shift erroneously the burden from Appellees on their motion for summary judgment to <u>negate</u> the existence of any issue of law or fact concerning the <u>unconstitutionality</u> of the Anti-Rebate Statutes to Appellants to affirmatively establish the <u>constitutionality</u> of the Anti-Rebate Statutes.

This unprecedented shift in burden of proof by the Appellate Court has fostered a "trial de novo on appeal", with parties referencing any writing on the subject of rebates as if it were evidence of, rather than mere authority for, their position. Under applicable Florida law concerning appellate procedure, this "shift" in burden of proof is not only unprecedented, it constitutes reversible error for the reasons discussed below.

I. THE APPELLATE COURT APPLIED SEVERAL ERRONEOUS STANDARDS OF JUDICIAL REVIEW

A. The Appellate Court Failed to Apply The Presumption That The Anti-Rebate Statutes Are Constitutional

Under Florida law, it is well established that the Anti-Rebate Statutes are presumed to be valid and constitutional, with all doubts being resolved in favor of their constitutionality. Knight & Wall Company v. Bryant, 178 So.2d 5, 8 (Fla. 1965); 10 Fla. Jur. 2d, Constitutional Law, Section 77, p. 296.

In addition, "if any state of facts can be reasonably conceived which would sustain the exercise of the police power, the existence of that state of facts will be assumed by the courts." 10 Fla. Jur 2d, Constitutional Law, Section 72, p. 292 (emphasis added); Ex parte Lewis, 135 So. 147, 150 (Fla. 1931); Spencer v. Hunt, 147 So. 282, 287 (Fla. 1933); Hunter v. Owens, 86 So. 839, 844 (Fla. 1920).

Even though the Appellate Court has held the statutes to be unconstitutional, the foregoing presumptions as to the constitutionality of the Anti-Rebate Statutes and the existence of any conceivable state of facts which would sustain such statutes continue to be alive and well before this Court. In re Estate of Caldwell, 247 So.2d 1, 3 (Fla. 1971).

The decision of the Appellate Court erroneously holds that the foregoing presumptions have been rebutted without any evidence by Appellees that the statutes are unconstitutional.

Accordingly, the instant decision violates the foregoing well-established presumptions of statutory validity and should be reversed.

B. The Appellate Court Failed to Require Appellees To Meet Their Burden of Establishing The Invalidity Of The Anti-Rebate Statutes Beyond Reasonable Doubt

As the parties challenging the Anti-Rebate Statutes, Appellees 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.

There is absolutely no evidence before this Court to establish beyond a reasonable doubt that the Anti-Rebate Statutes do not bear a reasonable relationship to the public welfare and, therefore, violate substantive due process.

In fact, the only evidence before this Court - namely, the affidavit of James C. Fogarty (R: 78-82) - clearly establishes that the Anti-Rebate Statutes bear a reasonable relationship to the public welfare by assuring the solvency of insurance companies (R: 80, para. 4 and 6), preventing unfair discrimination (R: 80-81, para. 7), providing a better quality service to the

public (R: 81, para. 9) and helping to reduce and keep down the cost of insurance (R: 80, para. 5, and 81, para. 9). Such evidence is not controverted by any other evidence in the record. Appellees filed no affidavit concerning such matters which are determinative of the issue on appeal.

The Fogarty affidavit was filed by Appellants in opposition to the Motion for Summary Judgment of Appellees. Even though the Circuit Court did not rely upon such affidavit (R: 85), there is nothing to prevent this Court from relying upon it as an independent basis for reversing the decision of the Appellate Court and affirming the Summary Final Judgment of the Circuit Court.

It is a well recognized principle of appellate procedure that:

> ". . .if a trial judge's . . . judgment . . . can be sustained under any theory revealed by the record on appeal, notwithstanding the fact that the trial judge's . . . judgment . . . may have been bottomed on an erroneous theory, the . . . judgment . . . will be affirmed." Berkman v. Miami National Bank, 143 So.2d 535 (Fla. 3d D.C.A 1962).

Specifically, it has also been held that this Court may affirm the Summary Final Judgment entered by the Circuit Court for any reason appearing in the record, even though not relied upon by the trial judge. Stone v. Rosen, 348 So.2d 387 (Fla. 3d D.C.A 1977). For example, in Hester v. Gatlin, 332 So.2d 660 (Fla. 2d D.C.A. 1976), the Court affirmed the entry of a summary judgment by the trial court holding:

> "This court is not bound by the erroneous rationale or reasoning of a trial court if the record reveals an alternative basis upon which to uphold the order or judgment." Id. at 663.

Accordingly, Appellees have failed to meet their burden of proof. As a result, those portions of the Summary Final Judgment of the Circuit Court which uphold the constitutionality of the Anti-Rebate Statutes and grant a summary judgment in favor of Appellants (R: 85-86) should be affirmed. Thus, without any need for this Court to consider the substantive issue of the merits of rebating, the decision of the Appellate Court should be reversed for failure to follow any one of the foregoing well-established standards of judicial review.

C. The Appellate Court Applied An Erroneous Substantive Due Process Test

This Court should also reverse the decision of the Appellate Court for using an erroneous test to determine substantive due process. In its decision, the Appellate Court improperly held that:

> "The applicable standard of review is whether the challenged anti-rebate statutes reasonably and substantially promote the public health, safety or welfare as required by the due process clause of the Florida Constitution . . . ." Dade Cty. Consumer Advocate's v. Dept. of Ins., 457 So.2d 495, 497 (Fla. 1st D.C.A. 1984) (emphasis added).

The application by the Appellate Court of a "reasonable and substantial relation test" to determine whether the Anti-Rebate

Statutes comply with substantive due process "creates" a rigorous standard of review that cannot be found in any other Florida decision.[6]

Contrary to the decision on appeal, the proper standard of appellate review is a "reasonable relation test". For example, in Lasky v. State Farm Ins. Co., 296 So.2d 9 (Fla. 1974), this Court held:

> "The test to be used in determining whether an act is violative of the due process clause is whether the statute bears a reasonable relation to a permissible legislative objective . . . ." Id. at 15.

For the purpose of judicial review of Florida insurance legislation such as the Anti-Rebate Statutes, this Court has consistently held that:

> ". . . The test is whether the legislature at the time it enacts the statute has a reasonable basis for believing that the statute will accomplish a legitimate legislative purpose." U.S. Fidelity & Guar. Co. v. Dept. of Ins., 453 So.2d 1355, 1362 (Fla. 1984).

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[6] Appellees are able to find only one quotation from a 1977 attorney general opinion citing law from other states to support an alleged "reasonable and substantial relation test". Appellees' Brief, Pg. 19. Even if there were no Florida decision to which this Court could look for guidance, such an attorney general opinion would "not [be] legally binding . . . ." Beverly v. Division of Bev. of Dept. of Business Reg., 282 So.2d 657, 660 (Fla. 1st D.C.A. 1973); Miller v. Carson, 392 F.Supp. 515, 522 (M.D. Fla. 1975).

In its recent decision of John Deere Ins. Co. v. Dept. of Ins., 7 FALR 1013 (Fla. 1st D.C.A. Jan. 24, 1985), the Appellate Court adopted verbatim the "reasonable relation test" applied by this Court in the foregoing U.S. Fidelity case, id. at 1016-1017, and went on to hold that the proper test to determine whether a statute "violates due process is whether it bears a reasonable relationship to the statute's objectives . . . ." Id. at 1018.

The effect of the application by the Appellate Court of the more stringent "reasonable and substantial relation test" was to shift erroneously the burden of proof from Appellees who must establish the invalidity of the statutes "beyond reasonable doubt". Biscayne Kennel Club v. Florida State Racing Commission, 165 So.2d 762 (Fla. 1965). As a result of such shift, Appellants were somehow required to prove on appeal that the statutes bear a substantial relationship to the public welfare. For the foregoing reason, the decision on appeal should be reversed.

In an unsuccessful attempt to distinguish citations to numerous U. S. Supreme Court and other federal and state supreme court decisions upholding the constitutionality of anti-rebate statutes,[7] Appellees argue that the test used by this Court to determine substantive due process "differs markedly" and is

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[7] See Department's Brief, Pgs. 13-16 and 29-37; ACLI Brief, Pgs. 16-23, NALU Brief, Pgs. 1-5.

"wholly different" from the test used by such other courts. Appellees Brief, Pgs. 11 and 16. To the contrary, the test used by this Court and the United States Supreme Court to determine substantive due process is exactly the same.[8] As a result, the Florida courts consider such "federal and Florida constitutional guarantees as imposing the same standard and will discuss them as one." Florida Canners Association v. State, Dept. of Citrus, 371 So.2d 503 (Fla. 2d D.C.A. 1979); Florida High School Activities Association v. Bradshaw, 369 So.2d 398, 402 (Fla. 2d D.C.A. 1979).

As admitted by Appellees, the test applied by the United States Supreme Court is a "rational relationship test" under which legislation is upheld "where any legitimate state purpose can be conceived" and "on the basis of purely hypothetical facts." Appellees Brief, Pgs. 16-17. The same test is applied by this Court[9] which has consistently held that a statute will not be held unconstitutional:

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[8] The Florida and United States Constitutions contain identical due process clauses. The Florida Constitution provides: "No person shall be deprived of . . . property without due process of law. . . ." Fla. Const., 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.

[9] See Department's Brief, Pgs. 8-9 and 12-22; NALU Brief, Pgs. 6-10.

> ". . . where circumstances are conceivable within which the law may validly operate. . . . [T]he statute stands unless it conclusively appears that there are or can be no conceivable circumstances upon which it can validly operate . . . ." Hunter v. Owens, 86 So. 839, 844 (Fla. 1920).

Thus, the decision on appeal should be reversed because the Appellate Court applied an erroneous "reasonable and substantial relation test", rather than the correct "reasonable relation test" used by both this Court and the United States Supreme Court to determine substantive due process.

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

The uncontroverted evidence in this case establishes that the State of Florida has properly exercised its police power to adopt the Anti-Rebate Statutes. These statutes bear a reasonable relationship to the public welfare to assure the solvency of insurance companies, prevent unfair discrimination (both directly by insurance companies and indirectly through insurance agents), reduce the cost of insurance, provide a better quality of service to the public and provide meaningful cost comparison and disclosure of competing insurance products (R: 80-81). Appellees cavalierly attempt to dismiss such examples as mere "wild speculation". Appellees' Brief, Pg.10. However, one need only take a cursory review of the briefs filed herein to determine that it is the position of Appellees, not Appellants, that is based upon mere speculation. The arguments of the Department and supporting

the position of Appellees, not Appellants, that is based upon mere speculation. The arguments of the Department and supporting Amicus Curiae are based upon legislative, judicial and regulatory wisdom as well as federal and state case precedent involving the exact issue on appeal. However, Appellees, who have the burden in this appeal, not only have no supporting evidence but also have cited not one rebate case on point in their favor.

Appellees admit that the Anti-Rebate Statutes are part of "comprehensive statutory schemes regulating the sale of insurance." Appellees Brief, Pg.2. This comprehensive statutory scheme, commonly known as the Florida Insurance Code, is a framework of carefully interwoven, interdependent statutes that have been determined repeatedly by the Florida Legislature (including review under the Sunset Law in 1982) and Florida courts (including the Appellate Court) to be necessary to regulate the insurance industry as a whole "to aid the health, safety and public welfare." Brewer v. Ins. Comm'r Treasurer, 392 So.2d 593, 596 (Fla. 1st D.C.A. 1981); Williams v. Hartford Accident and Indemnity Co., 245 So.2d 64 (Fla.1970); Laws 1982, c.82-243, Sec.204 (eff. Oct. 1, 1982); Laws 1982, c.82-386, Sec.28 (eff. Oct. 1, 1982). The Anti-Rebate Statutes are an integral part of this comprehensive statutory framework[10] and are necessary to maintain stability in the insurance industry by protecting two

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[10] This statutory scheme is treated clearly in FALU Brief, Pgs. 19-26.

essential cornerstones of insurance regulation: the solvency of insurance companies and the prevention of unfair discrimination.[11]

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

Appellees admit that, as a consumer product, insurance "differs from other consumer products in two important ways":

> "First, the consumer often does not obtain the service he is purchasing until a substantial period of time after he pays his money. Second, the insurance company's ability to provide that service depends on whether it has retained sufficient assets to pay future claims. In recognition of the need to assure that insurance companies are sufficiently solvent to fulfill their obligations, Florida and all other states have enacted comprehensive statutory schemes regulating the sale of insurance." Appellees Brief, Pg.2 (emphasis added).

In recognition of the foregoing solvency concern, numerous federal and state authorities have upheld statutes similar to the Anti-Rebate Statutes on the basis that they promote the solvency of the insurance companies. ACLI Brief, Pgs.25-26. Rather than attempting to distinguish such well-established case precedent, Appellees argue that a "flaw" in this solvency argument is that allowing an agent to rebate his portion of the premium, which does not belong to the insurance company, is "unrelated to the actuarial soundness of the policy". Appellees Brief, Pg.21.

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[11] In addition to protecting the solvency of insurance companies and preventing unfair discrimination, the Anti-Rebate Statutes also help to reduce and keep down the cost of insurance, provide a better quality service to the public and provide meaningful cost comparison and disclosure of competing insurance products. (R. 80, Para. 5 and 81, Para. 9).

In addition to being wrong, Appellees' "flaw" argument is not supported by, and is contrary to, the evidence. (R: 80, Para.6) As a result of rebating and "churning", [12] the number of policies that will prematurely lapse after the first year will greatly increase. As a result, insurance companies will not recover their acquisition expenses in obtaining such policies which are calculated to be recovered over a normal policy life. (ACLI Brief, Pgs.27-28, especially n.4). The obvious result of rebating and churning will be increased administration costs and, therefore, reduced income to the insurance companies. In addition, increased policy lapses due to rebating and churning will cause insurance companies to lose the profit after the first year that they would otherwise earn. The end result will be an adverse effect on the solvency of insurance companies or, alternatively, increased insurance costs to the public.

In addition to having no controverting evidence, Appellees have no response to the foregoing solvency arguments. Appellees miss the entire point by discussing the incentive of the insurance agent to churn or turn over policies. Appellees Brief, Pg. 25. It is the incentive of the buying public, not the agent, to churn policies caused by rebating that will adversely affect the insurance industry.

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12 "Churning" is a practice under which buyers would purchase new life insurance policies each year to obtain the higher rebate resulting from larger first year agents' commissions. The Department and its Amici have argued extensively that churning would substantially and adversely affect the solvency of the insurance industry. ACLI Brief, Pgs. 26-30.

In recognition of the "churning" problem, Appellees suggest that the entire insurance system be rewritten[13] to require insurance companies to:

> ". . . pay more nearly level commissions, require customers to agree to multi-year policies, or refuse to insure customers who regularly permit their policies to lapse. . . ."[14] Appellees Brief, Pg. 26 (emphasis added).

Such a refusal by companies to insure customers will surely lead to trouble. At best, it is not very public spirited, especially coming from a so-called consumer advocate. At worst, it is a radical economic theory and an extremist remedy. Contrary to Appellee's claim that the Anti-Discrimination Statute provides "complete protection", such a refusal to provide insurance will create the potential for unfair discrimination to the public that is not prevented by the Anti-Discrimination Statute.

Furthermore, as parties challenging these statutes, Appellees are not allowed to speculate and conceive of a state of facts under which the statutes may be unconstitutional. To the contrary, it is Appellants who are entitled to the benefit of

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[13] While Appellees concede that rebating should certainly not be allowed as to the "net premium" that goes to the insurance company, Appellees Brief, Pgs. 10 and 34-35, they fail to point out that there is absolutely no definition of "net premium" in the Florida Insurance Code. See Section 627.041(2), Fla. Stat. (1983); Section 627.403, Fla. Stat. (1983).

[14] The issues raised by, and suggested solutions of, Appellees clearly go toward the wisdom of the Anti-Rebate Statutes which is a matter for the Florida Legislature to consider. ACLI Brief, Pgs. 35-37.

"any state of facts [that] can be reasonably conceived which would sustain" these statutes. Jt. Reply Brief, supra at 1.

B. The Anti-Rebate Statutes Prevent Unfair Discrimination Among Policyholders

In response to extensive arguments that the Anti-Rebate Statutes prevent discrimination,[15] Appellees incorrectly state that Section 626.9541(1)(g) of the Florida Statutes (the "Anti-Discrimination Statute") "provides complete protection against any unfair discrimination". Appellees Brief, Pg. 22. By its own terms, the Anti-Discrimination Statute does not apply to prevent discrimination as to property and casualty insurance only "life . . ., accident, disability or health insurance. . . ." By its own terms, the Anti-Discrimination Statute also applies only to the actual "terms and conditions" of the insurance contract and does not regulate the extra-contractual actions or promises of agents in the field, such as rebating and other unfair trade practices set forth in Section 626.9541(1)(h).

Furthermore, Appellees fail to respond to the "agency" argument that allowing the agents of insurance companies to rebate will simply allow insurance companies to increase commissions to agents with the understanding that the amount of such increased commission will be used by the agent as an indirect rebate by the

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[15] Department Brief, Pgs. 11-16; ACLI Brief, Pgs. 11-23; FALU Brief, Pgs. 10-14 and 26-42.

insurance company to induce customers. ACLI Brief, Pgs. 14-16. Appellees admit the constitutionality of statutes "outlawing rebating by a life insurance company. . . ." Appellees Brief, Pg. 34-35. Thus, rebating will only allow insurance companies to do indirectly that which they cannot do directly - namely, discriminate by using their agents through the guise of "increased commission rebates". If rebating is allowed, an obvious result will be that the Anti-Discrimination Statute will provide meaningless protection, not "complete" protection as argued by Appellees.

Interestingly, Appellees admit that:

> ". . . the State has the power to regulate insurance agents . . . by prohibiting discrimination through secret rebates. . . ." Appellees Brief, Pg. 10 (emphasis added).

Without the Anti-Rebate Statutes, there would be no legislation to prevent such "secret" rebates which are not separately defined in the Florida Insurance Code. Therefore, by Appellees' own admission, the Anti-Rebate Statutes bear a reasonable relationship to the public welfare to prevent secret rebates.

The "double standard...applied to commercial insurance policies" alluded to by Appellees, (Appellees Brief, Pg.29), is limited to only casualty insurance and essentially involves an inapposite factual situation where a sophisticated, commercial purchaser negotiates for a customized policy (not the commission) for a customized risk. Such situations obviously do not involve

the standard, mass-produced policy situation which is the subject matter on appeal. Furthermore, the insurance companies are required to file a deviated rate with the Insurance Commissioner for any such transaction.

In Afro-American Life Ins. Co. v. La Berth, 136 Fla. 37, 186 So. 241 (1939), this Court strongly objected to discrimination between life insurants as against public policy:

> ". . . provisions of life insurance policies which discriminate between borrowing and non-borrowing insurants, as regards options allowed, have, in most cases where the question has arisen, been held to be invalid, either in that they violate a statute prohibiting discrimination between insurants of the same class, or because such discrimination is deemed opposed to public policy." Id. at 246 (emphasis added).

Rebating, as advocated by Appellees, will also result in the same type of unfair discrimination between insurants which this Court has previously held to be against "public policy."

Furthermore, the Circuit Court specifically held as a finding of fact in its Final Summary Judgment that the Anti-Rebate Statutes:

> ". . . are a valid exercise of the police power of the State of Florida and a valid exercise of its regulatory authority to protect the public from discrimination." (R:85, para. 3).

Appellees have failed to provide any evidence that controverts the foregoing findings of fact of the Circuit Court.

In Section 626.9541(1)(h)2 of the Florida Statutes, the Florida Legislature has also equated discrimination with rebating. Seee FALU Brief, Pgs. 12-14.
Florida Legislature has also equated discrimination with rebating. See FALU Brief, Pgs. 12-14.

It becomes clear that the Afro-American case, the findings of fact of the Circuit Court and the Florida Legislature consider discrimination concerning insurance to be against public policy. In addition, the latter two equate discrimination with rebating.

III. CONCLUSION

For the reasons set forth above and for the additional reasons advanced in the Reply Brief of Appellants, this Court should reverse the decision of the Appellate Court and affirm the Final Summary Judgment of the Circuit Court. Alternatively, given the absence of any significant evidentiary record on appeal, this Court should remand this case to the Circuit Court for the taking of evidence relating to the constitutionality of the Anti-Rebate Statutes.

Respectfully submitted,

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