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IN THE SUPREME COURT OF FLORIDA
CASE NO. 66,178

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

Appellants,

vs.

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

Appellees.

REPLY BRIEF OF APPELLANTS AND AMICUS CURIAE NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS

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

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PRELIMINARY STATEMENT

Rule 9.210(c), Florida Rules of Appellate Procedure, indicates that the statement of the case shall be omitted from the answer brief unless there are areas of disagreement which should be clearly specified. The DCCA's answer brief contains a statement of the case which is over eight pages long. Nowhere in that statement is any area of disagreement with the Department's statement of the case clearly specified. As discussed herein, the DCCA's statement contains argument that reflects a misunderstanding of the case, the anti-rebate statutes and the Insurance Code in general.

On page 1 of their answer brief, the DCCA states the issue as follows: "Dade County Consumers contend that these laws violate the due process clause of the Florida Constitution because they unreasonably promote the interests of a limited group of individuals, insurance agents, to the detriment of purchasers of insurance." Then on page 10 of the answer brief the issue is cast somewhat differently: "The sole issue in this case is whether, in addition to the regulation of insurance companies and agents that is within the legislature's power, the State may also prohibit agents from giving a portion of their commission to their customers as a method of reducing the cost of life insurance and attracting new business." (emphasis added) This second casting of the issue may be what the DCCA would like

this Court to consider but it is a trap for the unwary that grossly understates the true nature and scope of both the issue before this Court and the District Court's opinion. Nowhere in the anti-rebate statutes is there language that limits its provisions to life insurance. Nowhere in the District Court's opinion is there language limiting its applicability to life insurance. The statutes and the opinion apply to all types of insurance and the invalidation of the statutes could result in increased rather than reduced premiums, would open the door to discrimination and would adversely affect the financial stability of the industry to the detriment of the public welfare.

ARGUMENT

I. THE DCCA HAS FAILED TO MEET THEIR BURDEN OF DEMONSTRATING THAT THE ANTI-REBATE STATUTES ARE UNCONSTITUTIONAL.

As the party challenging a police power statute as violative of constitutional due process, the DCCA has a substantial burden to prove that the anti-rebate statutes are wholly arbitrary and have no reasonable relationship to any demonstrated or conceivable public interest. Pinillos v. Cedars of Lebanon Hosp. Corp., 403 So.2d 365 (Fla. 1981). The DCCA has totally failed to sustain that burden. Normally one who challenges the constitutionality of a statute would attempt to sustain his burden through the introduction of evidence at trial. Here, however, the DCCA has willingly through their own Motion for Summary Judgment and without objection relinquished their opportunity to present evidence. Instead, the DCCA attempts to fabricate an evidentiary record through their answer brief to this Court. Beginning at page 29 of their answer brief, the DCCA presents four pages of material as "facts" which in reality are nothing more than opinions, hearsay, double hearsay and references to an amicus brief plus the Justice Department (anti-trust) Report. The Department moved to strike the objectionable material but the motion was denied. (Appendix A). As the DCCA admits in its opposition to the Department's motion to strike their answer brief, "With the exception of the Justice Department

[anti-trust] Report, appellees [DCCA] have relied on each of these publications as persuasive authority, and not to demonstrate facts which must be proved by evidence."

Accordingly, this Court is urged to recognize that even though the DCCA's allegations are couched in terms that appear to be statements of "fact," those allegations are nothing more than mere opinions of unknown authority and should be given no consideration whatsoever when determining if the DCCA has satisfied their burden of proving by evidence that there is no reasonable basis for the anti-rebate statutes.

The evidentiary infirmities of the anti-trust report have been previously discussed by the Department and its amicus in their briefs and in the Department's motion to strike appellee's brief. Accordingly, discussion in this brief is limited to the allegations raised in the DCCA's answer brief regarding the anti-trust report as evidence. The DCCA's allegations are found at footnote 4 in their statement of the case.

That footnote found at pages 8 and 9 of the answer brief is repugnant in its entirety. Because the anti-trust report was <u>never</u> even offered as evidence (the DCCA's allegations notwithstanding), the Department has never waived its right to raise evidentiary objections. Further, due to the posture of the case before the trial court, the Department was <u>never</u> at any time under a duty to come forward with evidence to dispute the DCCA's

claims. Accordingly, it was not necessary to inform the court of a desire to submit additional evidence or even file an answer to the complaint. The Department did submit an affidavit in opposition to the DCCA's motion for summary judgment which supported the constitutionality of the anti-rebate statutes. (R. Vol. I, pgs. 76-82) However, the trial court granted summary judgment for the Department without relying upon the affidavit. (R. Vol. I, pgs. 85-86)

In footnote 4, the DCCA alleges, "In any event, the District Court did not rely on the Justice Department [anti-trust] Report for its decision." However, the DCCA states the contrary in their opposition to the Department's Motion to Strike their answer brief by stating that the District Court opinion "relied on the Justice Department [anti-trust] Report." Apparently, it depends upon what point is being argued as to which statement the DCCA embraces.

The DCCA's footnote also alleges that the anti-trust report is subject to judicial notice under Section 90.202(5), Florida Statutes, and that the Department has engaged in a similar tactic by citing the Armstrong Report. First, to be subject of judicial notice under Section 90.202(5), the matter must be an <u>official action</u> of the agency and not a report of admittedly "tentative views." (R. Vol. I, p. 42) Second, the Department cites the

Armstrong Report as part of a background explanation demonstrating how the anti-rebate statutes are integral to the overall statutory scheme. The Armstrong Report is not cited as factual authority, in marked contrast to the attempts at manufacturing evidence by the DCCA in citing the anti-trust report in its answer brief. (See Motion to Strike, Appendix A) Further, it has been shown that the Armstrong Report was the catalyst for action in all 50 states (Appendix A of Appellants' initial brief) while there is no evidence that the anti-trust report has been the basis for any action beyond its inappropriate utilization in this case.

II. THE STANDARD FOR REVIEW IS A REASONABLE BASIS TEST.

As supported by applicable case law, the Department in its initial brief at page 8 demonstrated that the applicable standard for review is a "reasonable basis" test. Rather than concede the point or present case law which is contradictory, the DCCA attempts to cloud the issue by combining it with the issues raised by the Department concerning burden of proof and federal case law precedent. In so doing, the DCCA in contrast to its own admission that equal protection cases are inapplicable in this case,[1] relies upon equal protection cases that apply the same

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[1] Answer brief p. 16, f.6.

standard for review urged by the Department.[2] Other cases relied upon by the DCCA struck down statutes because they were "completely lacking in public benefit"[3] or the court could not find "any reasonable basis to uphold the statute."[4] The holding in these cases is entirely consistent with the "reasonable basis" test. Review under that test is not superficial, and if there is no reasonable basis to uphold the statute it will be stricken. In the instant case, even the District Court recognized some reasonable basis for the anti-rebate statutes. (R. VOL. II, p. 3)

The opinion written by Justice O'Connell in State v. Leone, 118 So.2d 781 (Fla. 1960), and relied upon by the DCCA, is consistent with this analysis. The different outcome in that case is a result of the scope of the statute. In Leone, the Court ruled that the Legislature could not in its attempt to

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[2] Liquor Store v. Continental Distilling Corp., 40 So.2d 371 (Fla. 1949) some semblance of public necessity; Rabin v. Conner, 174 So.2d 721 (1965), Castlewood International Corp. v. Wynne, 294 So.2d 321 (Fla. 1974), and Perry Trading Co. v. City of Tallahassee, 174 So. 854 (Fla. 1937). While the DCCA is critical of the Department's use of equal protection cases as being inapplicable to this due process case, they exercise no similar restraint on their own behalf. When the Department cited equal protection cases, in contrast to the DCCA, the cases were identified as such and were cited for the principle regarding the burden placed on one who attacks the constitutionality of a statute, which is equally applicable authority in a due process context.

[3] Stadnik v. Shell's City, Inc., 140 So.2d 871, 875 (Fla. 1962).

[4] Larson v. Lesser, 106 So.2d 188, 192 (Fla. 1958).

regulate prescription drugs require that non-pharmaceutical operations of a drug store be supervised by a licensed pharmacist. This is a much broader regulation than the one before this Court. The anti-rebate statutes do not attempt to extend control beyond the object of regulation, i.e., insurance, insurance companies and their agents. The legislature's power to regulate in this regard is unchallenged.

The DCCA, in urging their "substantial" basis test at page 13 of their answer brief, quotes from Coca Cola, Food Division v. State Dep't of Citrus, 406 So.2d 1079, 1086 (Fla. 1981), that the legislature, "must elect that course which will infringe the least on the rights of the individual." That is a partial quote from the Coca Cola opinion which quoted from Justice O'Connell in State v. Leone. The full quotation quickly demonstrates its inapplicability when selecting a standard for review: "If there is a choice of ways in which the government can reasonably attain a valid goal necessary to the public interest, it must elect that course which will infringe the least on the rights of the individual." State v. Leone, supra at 785. (emphasis added) The record in this case indicates no choice of ways other than the anti-rebate statutes to achieve the desired result. Further, the Court in Coca-Cola at p. 1084-5 expressly applied a reasonable relationship test and did not impose any requirement regarding substantiality. The case simply does not support the DCCA's position.

The remaining cases cited by the DCCA concern a legislative drafting error[5] or expressly apply the "reasonable basis" test to facts which the DCCA alleges meet their standard as well. The only case cited by the DCCA creating a "substantially promote" standard is the instant case under review by this Court. However, it would appear that reliance upon the District Court opinion is misplaced as it too has receded from the "substantial" standard. Judge Ervin (who authored the instant opinion under review), in John Deere Insurance Co. v. State, Dept. of Ins., ___So.2d___, 7 FALR 1013 (Fla. 1st DCA, 1985), quoted favorably from this Court's opinion in United States Fidelity and Guaranty Company v. Department of Insurance, 453 So.2d 1355, 1362 (Fla. 1984), regarding the due process standard of review: "The test is whether the legislature at the time it enacts the statue has a reasonable basis for believing that the statute will accomplish a legitimate legislative purpose." ___So.2d___ at ___, 7 FALR 1013 at 1016-1017. Judge Ervin also presents a detailed discussion of the reasonable basis test in Sasso v. Ram Property Management, 431 So.2d 204 (Fla. 1st DCA 1983). Accordingly, there is no doubt that the correct standard for review is the "reasonable basis" test.

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[5] Horsemen's Benev. Ass'n v. Division of Pari-Mutuel Wagering, 397 So.2d 692 (Fla. 1981).

III. UNDER THE CORRECT STANDARD OF REVIEW AND THE APPLICABLE LEGAL PRESUMPTION, THE ANTI-REBATE STATUTES ARE CONSTITUTIONAL.

The DCCA has failed to establish by necessary evidentiary facts that the anti-rebate statutes have no reasonable basis. In contrast, the Department demonstrated in its initial brief at pages 11-28 that the anti-rebate statutes are constitutional under the reasonable basis test, and under the applicable rule of law that if any facts reasonably can be conceived to uphold the statute then those facts are presumed to exist. The DCCA has ridiculed the reasonably conceivable examples provided by the Department as "wild speculation." The examples cited by the Department are not wild speculation but are conceivable facts which should be assumed. These examples are not only conceivable but existed in fact prior to the Armstrong Report and would reoccur today. (R. Vol. I, pgs. 76-82)

The DCCA does not contest the legal authority underlying the Department's suggestion of various conceivable benefits attributable to the prohibition of rebates. As the agency charged with the duty and responsibility of regulating the insurance industry and implementing the Florida Insurance Code, the Department's argument regarding the impact of voiding the anti-rebate statutes upon the consumer, the insurance industry, the regulator and the statutory scheme is based upon reasoned and extensive experience with the goals and provisions of the

Insurance Code and its objects of regulation. Accordingly, the Department's examples are reasonably conceivable, based upon expert agency opinion, and entitled to great weight from this Court in considering this case. Green v. Stuckey's of Fanning Springs, Inc., 99 So.2d 867 (Fla. 1957).

Further, none of the conceivable examples urged by the Department assumes it will neglect its duty under law as suggested by the DCCA. If the anti-rebate statutes are stricken, the Department simply would be unable to prevent abuses. Without the anti-rebate statutes, there is nothing in the Insurance Code to prevent an agent from giving a kickback or a business bribe to an employer group policyholder whose employees are insured. The DCCA seems to think that the anti-discrimination provisions of Section 626.9541(1)(g), Florida Statutes, will cure all evils associated with striking the anti-rebate laws. However, statutes which are penal in nature are to be strictly construed and it is clear that the anti-discrimination statute applies only to life and health insurance and not property and casualty insurance.

The prevention of discrimination by the anti-rebate statutes is reasonably related to the promotion of public welfare. In view of the many economic and social benefits of insurance coverage, the legislature has determined it is in the public interest to encourage people to purchase insurance by providing for uniformity of premiums. If premiums differ for

identical risks and a citizen cannot get as good a deal as his neighbor, he may opt not to purchase needed life or health insurance or the legally required auto insurance. If the anti-discrimination statute were to apply as the DCCA suggests, then the agent, by establishing a uniform rebate, sets the rate for the insurance policy in derogation of Sections 627.011-627.381, Florida Statutes, wherein the rates are set by the insurer and filed with or approved by the Department. Rate setting through rebating is contrary to the statutory scheme and, as a practical matter, would be difficult if not impossible to regulate.

The DCCA further attempts to rebut the Department's reasonably conceivable facts with some "wild speculation" and misinterpretations of their own. From page 20 through 29 of their answer brief, the DCCA again attempts to establish "facts" by utilizing allegations that are nothing more than mere opinions of unknown authority cast in terms such as "There is one additional fact"[6] or "In fact."[7] It is emphasized that the DCCA is not entitled to the same legal presumption as the Department regarding the existence of facts because the DCCA is attacking the constitutionality of the statutes rather than defending them. The DCCA is entitled to no presumptions. The DCCA must

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[6] Answer brief p. 29.

[7] Answer brief p. 25.

prove its allegations with evidence. It has voluntarily declined to do so and relies on its answer brief to sustain its position. However, no authority relied upon by the DCCA in its answer brief has any evidentiary value in this case.

Further, the DCCA's attempted rebuttal makes several misrepresentations and reflects a misunderstanding of the insurance industry. Alleging that consumers do not get service on their policy until a substantial period of time after the money has been paid ignores the fact that the purchaser receives immediate protection and continuous service upon purchase of the coverage.

At pages 3 and 4 of the statement of the case, the DCCA presents argument utilizing the term "net premium." Basing any argument on the concept of "net" premium flies in the face of the Insurance Code. The term is not defined and has no legal significance under the code. Regulation is based upon "premium" and "rate." Sections 627.041(1) & (2) and 627.403, Florida Statutes.

At pages 4 and 5 it is alleged that the "admitted purpose and effect of the statutes, which apply to all lines of insurance, is to prohibit price competition or discounting by agents. . . ." While the DCCA may take that position, the Department clearly does not. The alleged "admission" is contrary to many facets of the Insurance Code that address competition and

allow agents to compete by offering policies from various insurers with diffeent rates.

At pages 10 and 21, the DCCA alleges a flaw in the Department's argument concerning solvency because the anti-rebate statutes apply only to commissions. This view is incorrect because one anti-rebate statute, Section 626.9541(1)(h)1.b., Florida Statutes, refers to "any rebate of premiums" . . . "or any valuable consideration" (emphasis added). Clearly the scope of this statute is broader than the agents' commission.

The DCCA alleges rebating would have no effect on the the premium retained by the company.[8] This fails to consider the additional acquisition and administrative costs associated with an increase in policy lapsation or "churning" which will occur as consumers trade in old policies to get rebates on new ones.

The conceivable additional administrative expenses associated with churning will jeopardize the solvency of many insurers which are presently only marginally solvent. The DCCA alleges churning is a result of the commission structure rather than rebating.[9] However, there is no evidence of churning under the status quo of the current commission structure with rebating outlawed.

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[8] Answer brief p. 21.

[9] Answer brief p. 25.

To combat churning if rebating is allowed, the DCCA suggests that insurance companies should refuse to insure customers who permit their policies to lapse.[10] The Department cannot see how this suggested "blacklisting" practice would benefit consumers. This harsh and insensitive suggestion is clearly contrary to public policy.

The DCCA argues rebating will only decrease the price paid the agent. This fails to consider what would happen if the insurance company raises its rates in order to "build in" the rebate cash necessary to fund the competition by its agents. While the DCCA discounts this possibility, in reality agents who control large blocks of business can exert considerable influence on insurers and can to some extent dictate the size of the commission.

The DCCA also alleges a double standard regarding rebates for commercial customers. The distinction between individual commercial casualty coverage and a mass produced life, health or casualty policy available to the general public is that in a commercial setting the casualty policy is custom designed to cover a unique and specific risk for a premium specific to that exposure to risk. But even in this situation, as the DCCA

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[10] Answer brief p. 26.

admits, rebating does not occur. Negotiations occur only with regard to the type of risk involved and the premium to cover that risk.

The DCCA's arguments are erroneous, simplistic and blind to the complex and far reaching effects of striking the anti-rebate statutes set forth in the Departments' initial brief. The DCCA inappropriately dismisses these conceivable, adverse effects of invalidation of the anti-rebate statutes as "wild speculation" without any evidence to support their position.

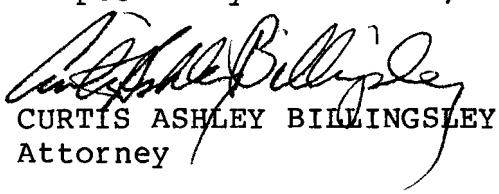
IV. CONCLUSION

The Circuit Court upheld the constitutionality of the anti-rebate statutes upon the presumption of their validity and applicable case law. That Court specifically found the statutes to be a valid exercise of police power to protect the public from discrimination. (R. Vol. I, p. 85-86) In so doing, the Circuit Court followed this Court's finding in Afro American Ins. Co. v. LaBerth, 186 So. 241, 246 (Fla. 1939), that "such discrimination is deemed opposed to public policy."

The anti-rebate statutes are not facially unconstitutional. Therefore, factual evidence must be presented proving the invalidity of the statutes. In this case, there are no facts proving any invalidity. Accordingly, the District Court should have either affirmed the anti-rebate statutes' constitutionality

on the basis of case precedent or remanded the case for development of a record. It was error for the District Court to apply a stricter standard of review and deny the Department the presumptions of validity and the existence of facts to support the statutes' validity. The Department established the statutes' validity and has demonstrated a wealth of reasonably conceivable facts based upon its expertise to show that the prohibition of rebates is necessary to prevent discrimination and to protect insurer solvency by preventing continual churning. The DCCA has completely failed to prove with evidence that the anti-rebate statutes bear no reasonable relationship to the public welfare. Accordingly, this Court should find the anti-rebate statutes constitutional. If it cannot do so upon the record before it, the case should be remanded to the Circuit Court for the development of a factual record.

Respectfully submitted,



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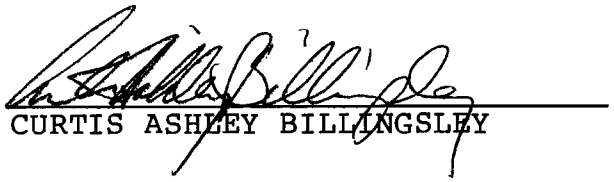
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the Appellants' Reply Brief has been served by U.S. Mail to the following this 29th day of April, 1985.



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