015

FILED
SID J. WHITE
SEP 13 1995
CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

ALBERTSON'S INC., et al.,

Petitioners,

vs.

CASE NO. 86,247
(DCA NO. 94-1592)

THE FLORIDA DEPARTMENT
OF PROFESSIONAL REGULATION,
et al.,

Respondents,
_____/

RESPONDENTS' BRIEF ON JURISDICTION

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

STEPHANIE A. DANIEL
ASSISTANT ATTORNEY GENERAL
Fla. Bar No. 332305

Attorney General's Office
General Civil Litigation
The Capitol, Room PL01
Tallahassee, FL 32399-1050

ATTORNEY FOR RESPONDENTS

TABLE OF CONTENTS

TABLE OF CITATIONS AND AUTHORITIES

Cases

Constitution

Statutes

Rules

PRELIMINARY STATEMENT

In this brief, Petitioners will be referred to as "Petitioners" or by their proper names. The Florida Department of Professional Regulation, Agency for Health Care Administration will be referred to as "Respondent" or as the "State."

Reference to the Appendix filed by Petitioners shall be made by use of the abbreviation "A" followed by the document number in the Appendix, and, where applicable, the page number (e.g., A-3-2) References to the record below shall be made by use of the abbreviation "R" followed by the volume number and appropriate page number in the record. (e.g., R-I, pg. 33)

References to Petitioners' Jurisdiction Brief shall be made by the use of the abbreviation "JB" followed by the applicable page number (e.g., JB-5)

STATEMENT OF THE CASE AND FACTS

Plaintiffs' statement of the case and facts is inadequate to apprise this Honorable Court of the facts necessary to determine jurisdiction in this case (and more specifically, to determine whether conflict exists between the decisions of the First District Court of Appeal and the United States Supreme Court). Accordingly, the following additional matters or facts are noted:

First of all, it should be noted that, by their initial complaint, Plaintiffs presented a facial challenge to Section 408.706(10), Florida Statutes (1993), only. (R. I, pp. 1-12) No evidence was presented below to demonstrate the actual effect that Section 408.706(10), Florida Statutes (1993), has had on interstate commerce. No evidence was presented to establish that the provision has even been applied to Petitioners. (Record)

Petitioners correctly note, that in enacting the Act [the Florida Health Care and Insurance Reform Act of 1993, Chap. 93-129, Laws of Florida; Fla. Stat. §§408.70 through 408.706 (1993)], the Florida Legislature adopted a "structured health care competition model" to provide health care benefits to State and small business employees and Medicaid recipients. (JB-1) Petitioners do not note, however, that this Act dramatically restructured the market for delivery of health care services to these persons.

Pursuant to the Act, AHPs (Accountable Health Partnerships) provide health care services to CHPA members.

Fla. Stat. §408.706 (1993). AHPs contract with health care providers who actually provide the services. Before an AHP can offer health care services to a CHPA, the AHP must first obtain designation from the Agency for Health Care Administration. The criteria for designation is set forth in Section 408.706, Florida Statutes (1993). Among the criteria to be considered in determining whether designation is appropriate, is whether an AHP has the ability to ensure enrollees adequate access to providers of health care (like pharmacy facilities). To meet this "access" requirement, an AHP must show that it has health care providers which are geographically accessible, and that there are adequate numbers and types of providers to serve the CHPA members. Fla. Stat. §408.706(2)(f) (1993).

It has been conceded by Petitioners that, but for the independent pharmacy exemption, the small independent "mom and pop" style pharmacies would have great difficulty in providing pharmacy services to alliance members under the provisions of Sections 408.70 through 408.706, Florida Statutes (1993), because of the provisions of Section 408.706(2)(f), Florida Statutes (1993). (R. I, pp. 95-96)

Without the independent pharmacy exemption, only those pharmacy chains, like Plaintiffs, would be in a position to compete for contracts with AHPs to provide health services to alliance members. Only these large pharmacy chains would be in the advantageous position of being able to offer both geographical and numerical access.

Fla. Stat. 408.706(2)(f) (1993). This is so not because of natural market forces, but because of the Legislature's actions in restructuring the market for delivery of health care services in Florida. Fla. Stat. §§408.70 through 408.706 (1993).

The purpose of the independent pharmacy exemption is to allow these "mom and pop" style independent pharmacies to continue to provide pharmacy services to alliance members, under the new statutory framework. Fla. Stat. 408.706(10) (1993).

In the dissent below, Judge Miner suggests that there is nothing written in the statute which would prohibit an AHP from contracting with a number of pharmacy facilities, big and small, to provide pharmacy services. (A-1, pg. 18) It is true that nothing in Chapter 408, Florida Statutes, expressly prohibits such an action. However, as noted by the majority below:

> Common sense reflects that greater volume of business will allow costs to be spread over a greater number of services, resulting in an overall cost savings. This is often referred to as "economies of scale."

(A-1, pg. 9 n. 3)

In enacting Sections 408.70 through 408.706, Florida Statutes, the Legislature expressly indicated its intent to improve the efficiency of the health care markets in the state. The Legislature sought to secure the highest quality of health care, based on current standards, at the lowest possible prices. Fla. Stat. § 408.70(2) and (3) (1993).

These goals are best achieved through AHP contracts with a single or perhaps two large chain providers of pharmacy services, using economies of scale. These goals are not likely to be achieved by entering into multiple contracts with small and large providers, as suggested by Judge Miner.

SUMMARY OF ARGUMENT

Pursuant to Rule 9.030(2), Florida Rules of Appellate Procedure, this Court has the discretion to review cases which expressly declare valid a state statute. In the instant case, the State asserts that this Court should decline to exercise such jurisdiction, because the order below was legally correct.

To the extent that Petitioners argue that jurisdiction in this case may be predicated on a conflict with a decision of this or another court, this Court should also decline to exercise such jurisdiction. There is no conflict between the opinion of the First District Court of Appeal below and any opinion of this Court or the United States Supreme Court.

ARGUMENT

Rule 9.030(2), Florida Rules of Appellate Procedure, authorizes this Court, in its discretion, to exercise its jurisdiction to consider, among other matters, decisions of the district courts of appeal that expressly declare valid a state statute; and decisions of the district courts of appeal that expressly and directly conflict with a decision of the supreme court on the same question of law.

In the instant case, Petitioners argue that this Court should exercise its discretionary jurisdiction because the decision of the court below expressly declared valid a state statute. To the extent that Petitioners predicate their request for review on this provision, the State asserts that the request should be denied. A review of the opinion entered by the Court below reflects that the Court correctly found Section 408.706(10), Florida Statutes (1993), to be valid.

With respect to the second basis argued for jurisdiction, that the decision below *expressly and directly* conflicts with a decision of this Court and decisions of the United States Supreme Court, no conflict exists. Accordingly, this Court should decline to exercise its discretionary jurisdiction.

With respect to the issue of conflict, the State wishes to respond specifically to the arguments raised regarding conflict with Division of Alcoholic Beverages and Tobacco v. McKesson Corp., 524 So.2d 1000 (Fla. 1988), *rev'd on other grounds*, McKesson Corp. v. Division of Alcoholic Beverages, 496 U.S. 18 (1990); and Associated Industries of Missouri v. Lohman, ___ U.S. ___, 114 S.Ct. 1815 (1995).

The opinion of the Court below does not conflict with McKesson. In fact, the opinion at pages 7 through 8 discusses the very principles set forth in McKesson (although McKesson is not expressly mentioned). As noted below:

. . . The Court stated:

> "Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities." (citations omitted)

(A-1, pg. 7)

The same language may be found in the McKesson opinion. Id., 524 So.2d, at 1003.

Petitioners appear to argue that the decision of the Court below conflicts with the following statement which may be found in McKesson: "the mere fact that not all out-of-state competitors are disadvantaged by a state statute does not preclude a finding that the statute places a discriminatory burden on interstate commerce." Id., at 1007. However, a review of the opinion issued below will reflect that the District Court **did not conclude** that it was necessary to find that all of the out-state competitors would have to be disadvantaged by a state statute in order to find a discriminatory burden on interstate commerce. Rather, the court found that the statutory scheme, as a whole, regulates evenhandedly, with only "incidental" effects on interstate commerce. (A-1, pp. 7-8)

In this case, Petitioners also argue that it was error to consider the provisions of Sections 408.70 through 408.706, Florida Statutes (1993), as a whole, in analyzing the impact that Section 408.706(10), Florida Statutes (1993), had on interstate commerce. Petitioners argue that such action is in direct conflict with Lohman. Petitioners argue that Lohman precludes consideration of the statutory scheme as a whole in this case. In Lohman, the United States Supreme Court actually stated:

> We have never suggested, however, that patent discrimination in part of the operation of a tax scheme, not directly justified under any theory such as the compensatory tax doctrine, can be rendered inconsequential for Commerce Clause purposes by advantages given to interstate commerce in other facets of a tax plan or in other regions of a State. (emphasis supplied)

Id., 114 S.Ct., at 1822.

In Lohman, which is a taxation case, the Court addressed sales and use taxes. The Court noted that "equality of treatment" for in-state and out-of-state taxpayers similarly situated is a valid basis for a use tax on goods imported from out-of-state. Id., at 1821.

In Lohman, the Court addressed the actual effect of a sales/use tax scheme on interstate commerce. Evidence had been presented of the actual effect of the tax, on a county by county basis. In some counties, the burden of the sales tax was greater than the burden of the use tax. In other counties, however, the burden of the use tax was greater than the burden of the sales tax. The Court held that, in

those areas where the use tax exceeded the sales tax, the Commerce Clause was violated. In Lohman, the State argued that, rather than evaluating the impact of the use tax county by county, the Court should look at the impact of the use tax as a whole across the State, as compared to the sales tax. The Court declined to accept the State's argument, and made the statement which has already been discussed above.

In the instant case, several factors dictate that this Court find no clear conflict with Lohman. First, as noted by the First District Court of Appeal below, at page 1825, Judge Thomas' comments in Lohman suggest that it is appropriate to look at different statutes and even statutes promulgated at different levels in determining the burden on interstate commerce of a particular taxing scheme (or a particular statutory scheme). Therefore, Plaintiffs' arguments, that the Court below improperly reviewed the statute as a whole in determining whether Section 408.706(10), Florida Statutes (1993), impermissibly burdened interstate commerce, are in error.

Second, the instant case is not the same as Lohman. We can only speculate as to the impact that Section 408.706(10), Florida Statutes (1993), will have on interstate commerce. It is possible that the statute will effect no shift toward intrastate commerce at all, but will only retain the status quo. It is also possible that, the provisions of Section 408.706(10), Florida Statutes (1993),

notwithstanding, the entire statutory scheme will result in a shift from intrastate commerce to interstate commerce. It is also probable that there will be some shift from one interstate commerce provider to another, depending on which interstate provider(s) obtains the contract with the AHP (and which interstate providers don't obtain the contract).

None of the information presented by Petitioners establishes what the actual or even probable impact of Section 408.706(10), Florida Statutes (1993), will be. This case was a facial challenge only, and not an "as-applied" challenge. Accordingly, there is no evidence of "patent discrimination" in this case. To the extent that Section 408.706(10), Florida Statutes (1993), may favor intrastate commerce, the justification for the statute may be found in the opinion of the Court below. (A-1, pp. 8-10)

As noted in Lohman, "[w]e have never deemed a hypothetical possibility of favoritism to constitute discrimination that transgresses constitutional commands." Id., at 1824. In the instant case, Petitioners seek an order which finds a Commerce Clause violation based on the hypothetical possibility that the provisions of Section 408.706(10), Florida Statutes (1993), will effect a shift from interstate providers to intrastate providers. When the statute is viewed as a whole, such a conclusion cannot be drawn on the presently available facts. Accordingly, Respondents respectfully urge this Court to deny Petitioners' Petition to Invoke Discretionary Review.

CONCLUSION

For the reasons discussed above, the State asserts that this Honorable Court should decline jurisdiction in this cause, and deny Petitioner's petition for discretionary review.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

STEPHANIE A. DANIEL
Assistant Attorney General
Fla. Bar No. 332305

Attorney General's Office
The Capitol - Room PL01
Tallahassee, FL 32399-1050
(904)488-1573

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been sent by United States Mail to **ALAN C. SUNDBERG, ESQUIRE, SYLVIA H. WALBOLT, ESQUIRE,** and **J. MICHAEL WALLS, ESQUIRE,** at Carlton, Fields, Ward, Emmanuel, Smith & Cutler, P.A., Post Office Box 190, Tallahassee, Florida 32302, this 11th day of September, 1995.

Stephanie A. Daniel
Assistant Attorney General

brief.SAD/pl