OA 10-6-97

FILED
SID J. WHITE
APR 14 1997
CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

ADVISORY OPINION TO THE
ATTORNEY GENERAL

CASE NO. 90,160

RE: RIGHT OF CITIZENS TO
CHOOSE HEALTH CARE
PROVIDERS

BRIEF ON BEHALF OF THE ALLIANCE OF AMERICAN INSURERS IN OPPOSITION TO PROPOSED CONSTITUTIONAL AMENDMENT

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The Alliance is a national trade association comprising a membership of approximately 270 insurance companies, which provide property and casualty insurance, including workers' compensation insurance. The Alliance has an interest in the proposed amendment because, if adopted, it will affect -- and potentially invalidate -- numerous statutes that govern the business of Alliance members and their policyholders.

Summary of the Argument

The proposed amendment should not be allowed to appear on the ballot. It violates virtually all principles of Florida law governing citizens' initiatives, including the single-subject rule of Article XI, § 3 of the Florida Constitution, and the requirements of Florida Statutes § 101.161 that the ballot title and summary properly inform the voters of the amendment's true and complete meaning. In short, the proposed amendment is fatally vague and overbroad, and fails completely to advise the voters of the impact that it will have on existing laws, the Florida Constitution, and critical aspects of Florida government.

The Alliance is aware that other interested parties, including the Florida Coalition for Quality Patient Care and the Florida Workers' Compensation Joint Underwriting Association, will submit briefs to the Court opposing the proposed amendment. Those briefs will comprehensively canvass the legal principles governing citizens' initiatives in Florida and describe completely how the proposed

amendment violates those principles.' The Alliance will not repeat those points here. Instead, it will focus its argument on the proposed amendment's potential impact on the ability of Florida government to create and maintain, legislatively and otherwise, programs of managed health care; on the right of Florida's citizens to participate voluntarily in managed health care programs; and on the continued viability of recent legislation that created an affordable workers' compensation managed care plan. See § 440.134, Fla. Stat.

Argument

It is firmly established that this Court's analysis of the proposed amendment is limited to two legal issues:

> (1) whetherthe proposed amendment's title and summary are "printed in clear and unambiguous language," . . .; and (2) whether the proposed amendment addresses a single subject . . . .

Advisory Opinion to the Attorney General Re Casino Authorization, Taxationand Regulation, 656 So. 2d 466, 468 (Fla. 1995) (hereinafter Casino Amendment) (quoting § 101.161, Fla. Stat.) (internal citations omitted).

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[2] Included among the issues to be so addressed are how the proposed amendment improperly (a) fails to disclose its effect upon myriad other constitutional provisions; (b) would limit the powers of both the state and local governments; (c) would limit the regulatory authority of the legislative and executive branches of state government; (d) would affect existing constitutional rights of collective bargaining; and (e) would affect existing privacy rights concerning medical care and the power to contract concerning such care.

With respect to the first issue, this Court has held that Florida Statutes § 101.161(1) requires that:

> [The] title and summary . . . are "accurate and informative," and that "[t]he summary must give voters sufficient notice of what they are asked to decide to enable them to intelligently cast their ballots."

Casino Amendment, 656 So. 2d at 468 (quoting Smith v. American Airlines, Inc., 606 So. 2d 618, 620-21 (Fla. 1992)).

As to the second issue, "the proposed amendment must manifest a 'logical and natural oneness of purpose.'" In Re Advisory Opinion to the Attornev General - Restricts Laws Related to Discrimination, 632 So. 2d 1018, 1020 (Fla. 1994) (hereinafter Laws Related To Discrimination) (quoting Fine v. Firestone, 448 So. 2d 984, 990 (Fla. 1984)). This Court has emphasized:

> " [Elnfolding disparate subjects within the cloak ofbroadgeneralitydoes not satisfy the single-subject requirement."

Id. (quoting Evans v. Firestone, 457 So. 2d 1351, 1353 (Fla. 1984)).

As this Court found in Laws Related To Discrimination, supra, a summary and text do not pass constitutional muster when they "omit any mention of the myriad of laws, rules, and regulations that may be affected" by the amendment. 632 So. 2d0 at 1021. Moreover, the "critical issue" is "whether the public has 'fair notice' of the meaning and effect of the proposed amendment." Id.

In his concurring opinion in Laws Related To Discrimination, Justice Koganconcludedthattheproposedamendmentwas objectionable

because of "the extremely broad collateral impact this initiative may have, if enacted." 632 So. 2d at 1022. He continued:

> I do not accept all of the arguments raised by the opponents, but the latter nevertheless have raised serious and substantial claims that this initiativewilldothings that are not explained to the people and that deal with subjects far afield of the initiative's purported subject matter.[3]
>
> * * *
>
> [T]his [initiative] is too broadly worded and has too many possible collateral effects that are not and probably could not be adequately explained to the people within existing constraints. . . . This initiative, in other words, tries to do too much and reflects draftsmanship that has not adequately considered all the collateral effects, which could seriously disrupt other important aspects of Florida government and law. Voters relying on the initiative's text and the ballot summary clearly would be misled in this sense.

632 So. 2d at 1022.

Justice Kogan explained further:

> Aproposedamendment obviouslyhasmorethanone subject and violates the ballot-summary requirement if it may have one or more unstated effects on the operation of Florida law or government either internally or in the context of the American federal system or existing Florida law, beyond the obvious subject matter of the amendment.

632 So. 2d at 1023.

Thus, the Florida Constitution requires that citizens' initiatives:

> . . . must be narrowly framed, must not involve undisclosed collateral effects, and must not

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[3] All emphasis in quoted material in this brief is supplied unless noted otherwise.

> have the potential to disrupt other aspects of Florida law or government beyond the subject of the amendment itself.

632 So. 2d at 1024.

The instant proposed amendment violates each of these principles. For example, it covers both (a) government's legislative and rulemaking authority, at all levels and in all contexts, regarding choice of health care providers; and (b) private parties' continued ability to choose voluntarily to participate in managed care health programs. Likewise, it would impact several other constitutional provisions, including Article I, § 23 (right of privacy), and Article I, § 6 (right of employees to bargain collectively).

In Advisory Opinion to the Attorney General Re Tax Limitation, 644 So. 2d 486 (Fla. 1994), this Court struck down a proposed amendment where it had a "substantial effect on the executive, legislative, and local branches of government," in violation of the single-subject requirement. 644 So. 2d at 495. Thus, the "ballot, title and summary must advise the electorate of the true meaning and ramifications of the amendment and, in particular, must be accurate and informative." Id. Because the tax limitation amendment would have resulted "in a major change in the function of government" and "the police powers affected by [the] initiative [would have been] broad," the Court struck the measure on grounds that "[t]he ballot title and summary [were] devoid of any mention of these consequences." 644 So. 2d at 495.

The proposed amendment at issue here would have, among other consequences, serious and sweeping impacts on the existing scheme of insurance and health care regulation in Florida. Yet, none of those serious and sweeping changes is acknowledged, much less discussed, in the text of the proposed amendment or in the ballot summary. In short, the proposed amendment is fatally vague and overbroad, Its true meaning, impacts, and effects are unstated. The voters of Florida should not -- in fact, cannot -- be asked to pass on this proposed amendment without a full and fair explanation of those consequences.

Of particular concern to the Alliance is the proposed amendment's detrimental effect on closed-panel health maintenance organizations and other managed health care programs, and the attendant potential invalidation of Florida Statutes § 440.134, which provides formanagedcare in Florida's workers' compensation system. That is, because § 440.134 places certain limits on an injured worker's choice of health care providers, it most likely could not survive the proposed amendment.[4]

Meeting in Special Session in November 1993 -- and to address specific economic and social ills -- the Florida Legislature adopted

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[4] For instance, one subsection of § 440.134 provides:

> Effective January 1, 1997, the employer shall subject to the limitations specified elsewhere in this chapter, furnish to the employee solely throushmanased care arrangements such medically necessary remedial treatment, care, and attendance for such period as the nature of the injury or the process of recovery requires.

§ 440.134(2)(b), Fla. Stat.

a workers' compensation managed care system to relieve a "financial crisis in the workers' compensation insurance industry, causing severe economic problems for Florida's business community and adversely impacting Florida's ability to attract new business development to the state[.]" 1993 Fla. Sess. Law Serv. 2572 (West).

The Legislature cited evidence demonstrating "dramatic increases in the cost of workers' compensation insurance coverage despite recent legislative reforms," and determined that "Florida employers are currently paying the second highest overall rates for workers' compensation coverage in the country." Without reforms tailored to abate the crisis, the Legislature feared that many businesses would cease operating, which "could cripple the employment market in the state[.]" Id. at 2572. Ultimately, the Legislature found:

> [T]here is an overpowering public necessity for reform of the current workers' compensation system in order to reduce the cost of workers' compensation insurance while protecting the rights of employees tobenefits for on-the-job injuries, and . . . . [T]he reforms contained in this act are the only alternative available that will meet the public necessity of maintaining a workers' compensation system that provides adequate coverage to injured employees at a cost that is affordable to employers . . . . [T]he masnitude of these compelling economic problems demands immediate, dramatic, and comprehensive lesislative action.

Id. at 2573.

The legislative changes have achieved the desired results. For example, on October 4, 1996, Florida Insurance Commissioner Bill Nelson ordered an 11.2% average reduction in Florida's workers' compensation rates. In a written statement accompanying that Order, Commissioner Nelson attributed the reduction largely to the savings that were to occur "when worker's [compensation] companies begin

offering managed care at the start of [1997]."[5] The Commissioner continued:

> In the end, these savings should be passed onto consumers . . . Along with payroll and rent, insurance is a large part of operating any business, and that includes worker's compensation. Consumers can take heart that we have these costs under control.

Those same consumers presumablywillvote on the proposed amendment, andwillhave no idea that their vote maywellundothose significant savings.

Likewise, in 1994 the National Conference of State Legislators Task Force on Worker's Compensation reported on Florida's Managed Care Pilot Program, which preceded the 1993 legislative enactments mandating worker's compensation managed care.[6] The first part of that program involved 17,000 state government employees in south Florida, with medical care provided by a health maintenance organization called "CAC-Ramsay, Inc." The report noted:

> It is estimated that the Ramsay managed care program reduced total worker's compensation claim costs bv 38.5%.
>
> * * *
>
> The results from these analyses found that the Ramsay managed care program handled workers' compensation claims with fewer treatments, received lower prices and treated claimants with a less complex, and therefore less costly, mix of services.
>
> * * *

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[5] Media Release, The Treasurer of the State of Florida, Bill Nelson, Nelson Slashes Rates Employers Must Pay for Insurance to Cover On-The-Job Injuries (Oct. 4, 1996).

[6] See National Conference of State Legislators Task Force on Workers' Compensation, Managed Care Applied to Workers' Compensation 27 (1994).

> Participants in both managed care programs were satisfied with the overall quality of care, satisfied that the treatmentwas appropriate, satisfiedwiththe explanations given by healthcare providers and satisfied that they had control over the treatment decisions.

Nowhere does the text or summary of the proposed amendment advise Florida voters that this very carefully created -- and effective -- plan would be invalidated. Nowhere are the voters advised that the Legislature's considered solutions to the serious issues that it studied in 1993 are about to be invalidated. Nowhere are the voters advised that the State will be forbidden from using demonstrably effective programs of managed care to address those serious issues, In short, nowhere are the voters advised that the "choice" suggested by the proposed amendment is actually a severe limitation on Florida's ability to address the critical issue of escalating health care costs.

Thepotentialinvalidationof the workers' compensationmanaged care scheme is but one example of the immediate, severe -- and undisclosed -- effects of the proposed amendment. The text and summary simply do not explain these far-reaching repercussions. Accordingly, this Court should not allow the proposed amendment to be placed on the ballot.

The proposed amendment is equally likely to mislead the voters by its suggestion that it is nothing more than a simple, straightforward guarantee of "choice," an arguably laudable prerogative. Moreover, it presents this "right to choose" as though such a right does not yet exist, and without advising voters that

aconstitutionalstatementofthe "right" maydrasticallylimitother rights and choices that citizens presently enjoy.

For instance, currentlyapersonparticipatinginamanagedcare plan may choose to be treated by any physician -- even a physician not included on the plan's provider list -- so long as that person is willing to pay the physician's charges. Thus, participation in a managed care program is relevant not to the choice of provider but, rather, to who must pay for that provider's services. Accordingly, if the objective of the proposed amendment is merely to create a "right to choose" a physician, it is completely superfluous, and thereby misleading. See In re Guardianship of Browning, 568 So. 2d 4, 10 (Fla. 1990) (recognizing the individual's "inherent right to make choices about medical treatment"); see also Harrell v. St. Mary's Hoswital, Inc., 678 So. 2d 455 (Fla. 4th DCA 1996).

Alternatively, the proposed amendment may be interpreted to require that an insured individual be reimbursed by an insurance provider, regardless ofthephysicianthat the insuredchooses. That reading would prohibit citizens from agreeing with an insurance provider, even voluntarily, to be treated by a panel of approved or preferred physicians who have contracted to provide specified services for specified charges. Under that view, managed care systems would be destroyed immediately and completely if the Constitution were amended as proposed.

Thus, instead of creating a new right of choice, the amendment actually would limit citizens' right to choose managed care to address today's rising health care costs. Most important, those

citizens would not know -- before casting their votes -- that this limitation would obtain if the amendment is approved. Once again, because this radical result is not disclosed in the text of the proposed amendment or in the ballot summary, the true meaning of the amendment is hidden from Florida's voters.

Conclusion

For the foregoing reasons, the Alliance respectfully requests that the Court not permit the proposed amendment to appear on the ballot.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by ~~mail~~ HAND DELIVERY this 14th day of April, 1997, to the Honorable Robert A. Butterworth, Attorney General, State of Florida, The Capitol, Tallahassee, FL 32399-1050.

Attorney