OA 10-6-97

SUPREME COURT OF FLORIDA

ADVISORY OPINION TO THE
ATTORNEY GENERAL

RE: RIGHT OF CITIZENS TO CHOOSE HEALTH CARE PROVIDERS

CASE NO. 90,160

ANSWER BRIEF OF FLORIDIANS FOR HEALTH CARE CHOICE

RANDY D. ELLISON, ESQ.
1645 Palm Beach Lakes Blvd.
Suite 350
West Palm Beach, FL 33401-2289
(561)478-2500
Fla. Bar No. - 0759449

TABLE OF CONTENTS

TABLE OF CITATIONS

TABLE OF CITATIONS CONTINUED

TABLE OF CITATIONS CONTINUED

PREFACE

This proceeding arises from the Florida Attorney General's Petition seeking review of an initiative proposed by Floridians for Health Care Choice, The initiative under review would amend the Florida Constitution to establish the right of citizens to choose their health care providers.

SUMMARY OF THE ARGUMENT

The health care choice ballot title and summary fairly notifies the prospective voter of the substance of the measure the voter is being asked to approve. After informing the voter of the health care choice right, the summary goes on to accurately describe the complimentary obligation to provide choice which will necessarily, implicitly arise through both executive and judicial enforcement mechanisms.

Managed care will not be destroyed through this measure, although HMO profits may be reduced. Regardless, debates over economics have no place in a ballot summary. The balance of the opponents' arguments directed at the ballot summary either assume the absence of the most basic knowledge and rationality by Florida voters, assume over-blown and extreme judicial interpretations of the Amendment in fashions plainly never intended by its proponents, or seek exhaustive treatment of every detail of the plan in a fashion wholly inconsistent with the 75-word ballot summary limit.

The proposed Amendment encompasses but a single subject -- health care choice. The notion that the Florida voters cannot express the fundamental nature of this right in its Constitution except through five or more separate ballot initiatives, is both facially absurd and a transparent, anti-democratic attempt to prevent Florida's voters from expressing their will in this area altogether.

LEGAL ARGUMENT

POINT I

THE BALLOT TITLE AND SUMMARY PROVIDE FAIR NOTICE.

A. The Choice Requirement

At page 14 of its Brief, Floridians for Quality Patient Care correctly recognize the primary, inherent enforcement mechanism of the new right to choose health care providers:

> Since no future contract limiting a natural person's "absolute" right to select any licensed health care provider would be lawful under the proposed amendment, the Insurance Department will be prohibited from approving health insurance contracts which call for closed provider networks as a means to lower health insurance premiums for individual and group policies, whether for workers' compensation insurance, group health insurance, or individual health insurance.

See, Initial Brief of Floridians for Quality Patient Care, at 14, 15. Additionally, beyond this primary enforcement mechanism lies the **legal** principle that agreements in violation of the Florida Constitution are illegal and void. Local No. 234 of the United Ass'n. of Journevmen and Apprentices of Plumbing and Pipefitting Industry v. Henley & Beckwith, Inc., 66 So.2d 818, 821 (Fla. 1953) (applying right-to-work section of Florida Constitution to invalidate labor agreement).

Thus, when the instant ballot summary states that the subject Amendment requires "provision for choice of health **care** providers in future contracts providing care . . .", that statement is completely accurate, notwithstanding the absence of that language

in the Amendment itself.

The ballot summary's description of this necessary, implicit effect is in addition to its direct description of the right, itself:

BALLOT TITLE

RIGHT OF CITIZENS TO CHOOSE HEALTH CARE PROVIDERS

BALLOT SUMMARY

Establishes the right of citizens to choose health care providers. This provision prevents insurance companies, managed care personnel, employers, and other such third parties from controlling a citizen's selection of health care providers; requiring provision for choice of health care providers in future contracts providing care under programs such as those organized under Chapter 440, Chapter 627, Chapter 636 and Chapter 641, Florida Statutes

Clearly, no rational voter could reasonably be misled by the inclusion of the additional language in the latter section of the summary describing the implicit obligation (i.e., to provide choice) which arises as **a** complement to the just-described ~~right~~ (i.e., the right of choice). Since no rational voter could reasonably be misled by this accurate statement, the summary is appropriate notwithstanding the divergence in language from the Amendment itself. See, Advisory Opinion to the Attorney General Re: Florida Locally Approved Gaming, 656 So.2d 1259, 1263 (Fla. **1995).**

B. The Destruction of Managed Care

Conversely, the opponents of the Amendment claim that the summary contains insufficient information in failing to inform the

voter that passage of the Amendment would "eradicate" managed care organizations through the operation of allegedly ironclad principles of health care economics. See, Initial Brief of Floridians for Quality Patient Care, at page 10. The problem with this argument is two-fold, First, it is simply untrue that managed care organizations are unable to survive in an open access environment. See, Miller, HMO's Moving Back Toward Fee for Service; Patient Demand for More Choice Drives Move Away from Capitation, Orlando Business Journal, July 11, 1997 (Appendix to the Brief) . Second, even if it were true that "eradication" of HMO-type organizations were the ultimate goal of this Amendment, this Court's prior authorities have held that the ballot summary:

> . . . is no place for subjective evaluation of special impact. The ballot summary should tell the voter the legal effect of the amendment, and no more. The political motivation behind a given change must be propounded outside the voting booth.

Evans v. Firestone, 457 So.2d 1351, 1355 (Fla. 1984). Clearly, speculation as to the potential economic ramifications upon such organizations has no place in the ballot summary and omission of such speculation cannot render it misleading.

This Court's rebuke in Grose v. Firestone, 422 So.2d 303 (Fla. 1982), answers not only this specific point, but the vast majority of the myriad claims of "omission" alleged by the opponents of this instant proposal:

> Appellants effectually seek an exhaustive explanation reflecting their interpretation of the amendment and its possible future effects. To satisfy their request would require a lengthy history and analysis . . . .

> Inclusion of all possible effects, however, is not required in the ballot summary.

Id. at 305. See also, Advisory Opinion to the Attorney General re Limited Casinos, 644 So.2d 71, 75 (Fla. 1994) (75-word limit does not lend itself to an explanation of all of the proposed Amendments details, many of which could not be known until amendment is adopted); Carroll v. Firestone, 497 So.2d 1204, 1206 (Fla. 1986) (accord).

C. **Constitutional Supremacy**

Constitutional amendments need not assert their supremacy over existing or future legislative action, as that supremacy is inherent and implicitly understood from the very nature and function of a Constitution. This fact is evidenced by the absence of such language in both the Federal and Florida Constitutions,

The "summary" of a proposed Amendment need contain no such language for the very same reason, as the voter is assumed to understand that, by their very nature, constitutional provisions bind all State officers (including legislators) and invalidate all contrary laws. In any event, the final section of the instant ballot summary goes beyond the norm, actually referring to a non-inclusive list of existing legislative programs affected by the constitutional amendment, thereby making express and utterly clear this normally implicit principle of Constitution supremacy.[1]

[1] In a footnote at page 13 of its Brief, Blue Cross and Blue Shield of Florida, Inc., suggests that the ballot summary's reference to particular Chapters of Florida law somehow implies that "they are the only ones affected by the new right being inserted in the Constitution". Such a reading simply ignores the non-inclusive "such as" language contained in that final clause.

D. **Corporations and Aliens**

Opponents of the Amendment assert that use of the term "citizens" in the summary is misleading, inasmuch as the Amendment actually would grant the new right to "every natural person". Clearly, given the context, these terms are sufficiently synonymous as to not be misleading notwithstanding any slight technical variance in meaning. See, In re Advisory Opinion Atty. Gen. English-The Official Lansuase of Florida, 520 So.2d 11, 13 (Fla. 1988) (approving summary despite divergence in language).

While the opponents correctly point out that corporations are "citizens" but are not natural persons, corporations are also incorporeal beings inherently beyond the ministrations of "health care providers". See, American States Insur. Co. v. Kelley, 446 So.2d 1085, 1086 (Fla. 4th DCA 1984) (corporations are separate and distinct from the persons comprising them). Surely, any Florida voter sufficiently astute to appreciate a corporation's "citizenship", would necessarily understand that these same corporations are bloodless legal fictions beyond the aid of medical treatment. See, Smith v. American Airlines, Inc., 606 So.2d 618, 621 (Fla. 1992) (voters may be presumed to have the ability to reason and to draw logical conclusions).

The converse argument that the term "citizens" is slightly too narrow in excluding the subclass of "natural persons" consisting of aliens, is similarly a non-sequitur in the current context. Since

---

Compare, In Re Advisory Opinion to the Attorney General, Limitation of Non-Economic Damages in Civil Actions, 520 So.2d 284, 287 (Fla. 1988) (non-inclusive language approved).

no HMO or other managed care plan exists for aliens and such a plan is virtually unimaginable, the technical divergence between the terms "citizen" and "natural person" is utterly meaningless and hence not misleading.

E. Federal Preemption

At the threshold, Floridians for Health Care Choice maintains that no portion of the instant Amendment would be preempted by the Federal ERISA statute, because of the saving provision of 29 U.S.C.S. § 1144(b)(2)(a) -- the so-called "insurance exception" ("nothing in this Title shall be construed to exempt or relieve any person from **any** law of any State which regulates insurance, banking or securities"). See, Texas Pharmacy Ass'n. v. Prudential Insur. co. of America, 105 F.3d 1035, 1039-1040 (5th Cir., March 17, 1997) ; Stuart Circle Hospital Corp. v. Aetna Health Management, 995 F.2d 500 (4th Cir. 1993). However, even recognizing that this preemption question remains open to future legislative and/or judicial action at the Federal level, a potentially partial preemptive effect is not a basis for invalidating an initiative proposal. As this Court stated in Dade County v. Dade County League of Municipalities, 104 So.2d 512, 515 (Fla. 1958) in the context of a potential partial invalidity on Constitutional grounds:

> When a proposal of the nature here involved is assaulted on the ground that it violates the Constitution, the courts will not interfere if upon ultimate approval by the electorate such proposal can have a valid field of operation even though segments of the proposal or its subsequent applicability to particular situations might result in

> contravening the organic law. In other words, if an examination of the proposed amendment reveals that if adopted it would be legally operative in part, even though it might ultimately become necessary to determine that particular aspects violate the Constitution, then the submission of such a proposal to the electorate for approval or disapproval will not be restrained.

Id., citing, Grav v. Moss, 115 Fla. 701, 156 So. 262 (1934); Gray v. Winthrop, 115 Fla. 721, 156 So. 270 (1934). See also, Advisory Opinion to the Attorney General -- Limited Political Terms in Certain Elective Offices, 592 So.2d 225, 227 (Fla. 1991) (Court lacks authority to judge federal Constitutional validity in advisory opinion proceedings). Speculation as to the ultimate course of the federal preemption issue is improper for the same reasons and would, in any event, be a virtually impossible subject for ballot summary discussion.

F. The State Treasury

Blue Cross/Blue Shield claims that the Florida voter is being deprived of ballot summary information as to the financial savings the State of Florida has allegedly procured through the use of managed care and the increased cost to the State which would allegedly result from adoption of the initiative proposal. However, because HMO premium rates have now risen to the point that they approach, or in some cases are higher than, indemnity programs - this cost-saving argument is factually specious. See, HMO's Moving Back Toward Fee for Service, supra. Regardless, this is an argument properly carried on outside the voting booth -- not a proper matter for debate and discussion in a ballot summary. See,

Evans, supra.

G. **Prisoners, Suicide, etc.**

The opponents' repeated references to managed care for "prison inmates" requires special mention. Prisoners have never had any say over the identity of their health care providers, not because the State's prisons are part of some giant managed care network but rather because security concerns and the prisoners' concomitant loss of civil rights warrants loss of the right to chose the identity of health care providers irrespective of the ability or willingness of the prisoner to pay for **a** particular provider. By contrast, the instant right to chose health care providers is directed solely at third-party payor's financial control over doctor selection and hence does not affect prisoners' medical care rights, even facially. In any event, lawful incarceration limits many privileges and rights, a "retraction justified by the considerations underlying our penal system." Pell v. Procunier, 417 U.S. 817, 822, 94 S.Ct. 2800, 2804, 41 L.Ed.2d 495, 501 (1974); Delancv v. Booth, 400 So.2d 1268 (Fla. 5th DCA 1981). Thus, even if this measure facially applied to prisoners, doctor choice would clearly be a restricted right, inapplicable to prisoners for the same reasons prisoners **may** not select their doctors now.

Claims that the instant Amendment could somehow affect assisted-suicide laws or the ability of hospitals to control staff privileges are similarly fanciful, over-blown constructions of the plainly unintended -- ignoring that the financial control exercised by third-parties through medical payment arrangements constitutes

the exclusive subject of this Amendment.

H. **Effects on Other Constitutional Provisions**

The Amendment's opponents have speciously attempted to hammer Florida's Constitutional right-to-privacy into a heretofore unrecognized constitutional right to a managed care "gatekeeper". Plainly, the current ballot summary cannot be faulted for failing to discuss the Amendment's "interplay" with the non-existent.

While the right of public employees to collectively bargain under Art. I, Sec. 6 of the Florida Constitution (1995) would be tangentially affected to the extent of depriving public employees of this "subject" for bargaining, that tangential effect would similarly arise from any legislative "public-policy type" amendment. The absence of ballot summary discussion of this effect is not a basis for invalidation. See, e.g., Weber v. Smathers, 338 So.2d 819 (Fla. 1978) (Sunshine Amendment effectively precluded collective bargaining over forfeited pensions).

I. **Realistic Choice v. Technical Choice**

Finally, it is claimed that the ballot Summary is misleading because it implies that "freedom of choice" of health care providers does not currently exist. This hypertechnical objection overlooks the fact that insurance companies and other third-party payors in managed care do, in fact, practically and realistically control the patient's selection of health care providers. Of course the individual is always free to see an unapproved doctor or visit an unapproved hospital in the unlikely event that individual is willing to pay twice for a single service (foregoing the

insurance protections the individual already paid for, either directly or indirectly) -- but that much is both plainly obvious and could not be misleading to voters. Advisory Opinion to the Attorney General re Limited Casinos, supra at 75 (expressing confidence that public knows casino gambling is now prohibited).

The ballot summary states in clear and unambiguous language the chief purpose of the measure -- to establish the right of citizens to choose health care providers and prevent insurance companies and other such third-party payors from controlling that choice. That is all that is required. Askew v. Firestone, 421 So.2d 151, 154-155 (Fla. 1982).

POINT II

THE PROPOSED AMENDMENT DOES NOT VIOLATE THE SINGLE SUBJECT REQUIREMENT.

This Court has stated that:

> [T]he fact that an amendment may be capable of separation into two or more propositions concerning the value of which diversity of opinion might arise is not alone sufficient to condemn the proposed amendment; provided the proposition submitted may be logically viewed as having a natural relation and connection as component parts or aspects of a single dominant plan or scheme.

City of Coral Gables v. Gray, 154 Fla. 881, 19 So.2d 318, 320 (1944), quoted in Floridians Against Casino Takeover v. Lets Help Florida, 363 So.2d 337, 339 (Fla. 1978). The fact that one can conceive of a political philosophy which might be "torn" over various applications of a constitutional principle does not render it "multi-subject". The notion that every public rights initiative must be broken into separate "government" and "private" segments so as not to "perplex the Libertarians" (or some other group), would be an absurd constitutional doctrine, unsupported by either the facial single-subject requirement or the case law interpreting it.

Amendments may meet the single subject requirement even though such amendments affect multiple branches of government. Limited Political Terms in Certain Elective Offices, supra at 227; Weber, supra at 819. While this proposal admittedly affects several branches of government, it does not substantially alter or perform the functions of multiple branches. It creates no executive body, performing no executive functions, It decrees no wrongdoing and

imposes no liability, performing no judicial functions. Compare, In re Advisory Opinion to the Attorney General -- Save Our Everglades, 636 So.2d 1336, 1340 (Fla. 1994). This provision simply implements a broad public-policy decision of state-wide significance, performing an essentially legislative function. Id.

The Florida State Constitution reflects a consensus on the issues and values that the electorate has declared to be of fundamental importance. Advisory Opinion to the Attorney General -- Restricts Laws Related to Discrimination, 632 So.2d 1018, 1019 (Fla. 1994). The opponents of this constitutional Amendment assert that in order for the citizens of Florida to declare the subject health care choice right fundamental, no fewer than five separate ballot initiatives are required (one for each of the three branches of State government, a fourth for local government and a fifth for the private sector). This is constitutional doctrine run amok and was clearly not the purpose or intent behind the single-subject requirement. See, Weber, supra. The proposition reflects a single dominant plan and constitutes a single subject -- health care choice. That is all that Art. XI, Sec. 3 requires. Weber, supra, Floridians Against Casino Takeover, supra at 340.

CONCLUSION

This Court should hold that the proposed initiative Amendment providing for a citizens right to choose health care providers meets the requirements of Art. XI, Sec. 3 of the Florida Constitution and Sec. 101.161, Fla. Stat. (1995).

RANDY D. ELLISON, ESQ.
1645 Palm Beach Lakes Blvd.
Suite 350
West Palm Beach, FL 33401-2289
(561)478-2500

By: _____
RANDY D. ELLISON, ESQ.
Fla. Bar No. - 0759449