IN THE SUPREME COURT
STATE OF FLORIDA

CASE NO. 90,160

IN RE: ADVISORY OPINION TO THE ATTORNEY GENERAL --
RIGHT OF CITIZENS TO CHOOSE HEALTH CARE PROVIDERS

ANSWER BRIEF
OF
BLUE CROSS AND BLUE SHIELD OF FLORIDA, INC.

(Filed in Opposition to the Initiative Petition)

ORIGINAL PROCEEDING

Arthur J. England, Jr., Esq.
Florida Bar No. 022730
Jerold I. Budney, Esq.
Florida Bar No. 283444
Greenberg Traurig Hoffman
Lipoff Rosen & Quentel, P.A.
122 1 Brickell Avenue
Miami, Florida 33 13 1
Telephone: (305) 579-0500

Counsel for Blue Cross and Blue Shield of Florida, Inc.

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INTRODUCTION

The brief tiled by Floridians for Health Care Choice, proponent of this health care choice initiative petition, was framed without reference to the initial brief filed by Blue Cross and Blue Shield of Florida, Inc. ("Blue Cross") or to those filed by other opponents of the proposal,[1] This brief responds to the arguments made by the petition's proponent, incorporating into the response by reference the points previously made by Blue Cross which demonstrate the infirmities of the proposal.

STATEMENT OF THE CASE AND FACTS

In a subsection of its Statement of the Case and Facts entitled "Historical Background," proponent references and relies entirely on five newspaper articles. This subsection of proponent's brief cannot be accepted by the Court. It is neither an accurate summary of the course of this proceeding, nor a factual background for evaluating the initiative petition.[2]

Proponent's Statement of the Case and Facts also contains a subsection purporting to describe the "Legislative Background" of managed health care, The Court cannot accept this recitation at face value either, as it is highly selective and grossly incomplete.[3]

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1 Counsel for Blue Cross was asked for and supplied to counsel for the proponent, after receipt of proponent's initial brief, copies of all opposition briefs that were filed on the Court's original deadline of April 14.

2 The referenced articles reflect nothing but the viewpoints of four reporters about the history and status of managed health care in this state. These opinions are not "facts" in any sense of the word. They would not be admissible as evidence in a trial court proceeding, ***see generally, Dollar v. State, 685 So.*** 2d 901 (Fla. 5th DCA 1997), ***review denied,*** 695 So. 2d 701 (Fla. 1977) (hearsay in newspaper article is inadmissible), and they are certainly not appropriate for first time introduction at the appellate level. ***Thornber v. City*** of ***Ft. Walton Beach,*** 534 So. 2d 754 (Fla. 1st DCA 1988). Worse, proponent's use of these articles is not just inappropriate but inaccurate. For example, proponent's assertion about "gag clauses" (proponent's brief on page 3) is nowhere supported by the Tampa Tribune article cited as a source.

3 Proponent's limited identification of legislation in Florida dating back to 1995 ignores managed health care legislation going back at least 25 years. For example, in 1973 Congress enacted legislation encouraging the formation of health maintenance organizations (HMOs) through grants and loans that provided, in part, that any state law

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The combined effect of the two subsections in proponent's Statement of the Case and Facts is to depict the proposed amendment as an innocuous measure which would merely restore an historic right of choice to health care providers, and reverse a recent trend towards managed health care. Even if that predicate theme were accurate, though, the proposed amendment must be evaluated by the Court as an initiative proposal that seeks to place an absolute, unabridgeable right of health care choice for all natural persons into Florida's Constitution. For purposes of the Court's review of the proposal, there are no relevant "facts" other than those which generically frame the issues before the Court — that managed health care means limiting the choice of providers, that the establishment of a constitutional right of choice for all natural persons sounds the death knell for managed health care, and that the abolition of managed health care carries a very significant short and long term cost to the state and its citizens which is nowhere identified for voters by the ballot summary.

SUMMARY OF ARGUMENT

The ballot summary misleads the electorate. It contains political rhetoric by promising to curb the "control" over health care providers by employers and other third parties, and by purporting to limit the reach of the proposal to "citizens." Yet the rhetoric of "control" cannot be fulfilled in light of federal preemption, and the appeal of limiting health care choice only to "citizens" is at odds with the extension of choice by the text of the proposed amendment to all natural persons.

The summary contains material omissions. It conceals from voters the fact that existing managed care programs will be eradicated, and that in the future neither laws nor contracts will be able to contain costs by limiting provider choice.

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which required that all or a percentage of physicians participate in providing health care services could not be applied to a federally-qualified HMO. 42 U.S.C. § 300e-10.

The summary misleads voters by utilizing language which has a very different meaning than the words used in the text of the proposed amendment. 'Citizens" in the summary is not a synonym for "natural persons" in the text. The constitutional "right" to a choice of health care providers is not equivalent to a total ban on legislative or contractual limitations on choice.

The summary misleads by promising that future contracts of private parties will contain a provision for a choice of providers, while the reality is that private party managed care organizations will simply not be in existence to write health care contracts at all.

The single subject requirement of the Constitution is abridged. The proposed amendment wraps into one proposal two distinct and antagonistic subjects, and requires voters to accept both. On the one hand the initiative seeks to attract Floridians to whom freedom from governmental interference with private decision-making is paramount. But the initiative also requires those same voters to agree to a constitutional ban on private contracts that make health care affordable by establishing provider limitations. This, of course, is prohibited logrolling.

The proposed amendment also alters the function of an array of executive branch agencies intimately involved in the purchase and delivery of health care, in addition to shackling the legislative branch. The Court has repeatedly, and again quite recently, condemned the use of an initiative proposal to alter functions within the separate branches of state government. *Advisory Opinion to the Attorney General re: People's Property Rights Amendments*, *22* Fla. L. Weekly 5271 (Fla. May 15, 1997). In that same recent opinion, the Court condemned as well a proposal that substantially affected authority in local, as well as in the state levels of government. This proposed amendment has that same deleterious effect.

ARGUMENT

The text of the amendment, contrary to any information contained in the required ballot summary and through the joinder of dual subjects packaged for one required vote, will have the effect of eradicating the wide variety of state-created and privately-crafted managed care

programs that have long existed to control access to and the cost of health care.[4] One of the more dramatic (and apparently intended) effects is the reversal of recent legislative efforts to control the burgeoning cost to Florida taxpayers of funding health care for the state's employees, indigents and prison population The proposed amendment fails to inform voters of that consequence.

The proposed amendment also fails to inform voters, and in some cases actually misleads them, as to a number of other effects that will give them a Hobson's choice of having to choose between less government control over health care costs, on the one hand, and the continuation of private contractual management of health care costs, on the other, Proponent makes no plausible claim that the proposed amendment meets either the ballot summary requirement of section 101.161, or the single subject requirement of the Constitution.

I. The initiative petition violates section 101.161, Florida Statutes (1995).

A ballot summary must identify the "chief purpose" of the proposed constitutional amendment. Section 101.161, Florida Statutes (1995). Proponent declares that this proposed amendment has as its chief purpose the establishment of citizens' absolute "*right*" to choose health care providers.[5] Based on an intent to enshrine that right in the Constitution, proponent makes four arguments in support of the proposal's ballot summary: that the summary is devoid of political rhetoric; that it does not omit any material information; that it uses inconsequential terminology different from that in the text of the amendment; and that it identifies existing laws that will be affected by the new constitutional text appropriately.[6] Blue Cross does not agree with

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4 See, Blue Cross initial brief at pages 9-11 and 23-24, and the initial brief filed by Floridians for Quality Patient Care at pages 11-12.

5 Proponent's brief at 10. Blue Cross had identified that objective as the chief purpose of the proposal (Blue Cross initial brief at 8), and as the direct source of its defects under section 101.161.

6 Proponent's brief at 1 l-l 3. Proponent also asserts that the ballot summary simply gives more information about the amendment than its text, and that all such additional information is harmless because it is accurate and not misleading. (Proponent's brief at

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these rationales in support of the validity of the ballot summary, and respectfully submits that they do not accurately reflect the proposal that is under review,

A. The ballot summary contains political rhetoric.

Proponent contends that the summary contains no political rhetoric of the type that would warrant removing the proposal from the ballot. That is certainly debatable.

The summary declares without qualification that the amendment prevents "'employers, and other such third parties from controlling a citizen's selection of health care providers." That rhetoric constitutes an attractive political pronouncement, but a false promise in the non-political realm of constitutional doctrine. The Supremacy Clause of the United States Constitution, and ERISA, preempt restrictions on employee benefit plans.[7] If this text in the summary is not prohibited political rhetoric, it certainly runs afoul of the equally-prohibited initiative defect of offering a proposed amendment that "will not deliver to the voters of Florida what [the summary] says it will." ***Advisory Opinion to the Attorney General Re: Stop Early Release*** *of* ***Prisoners, 642*** So. 2d 724,727 (Fla. 1994).

Then, too, the summary appeals to voter prejudice in favor of "citizens," while surreptitiously extending the constitutional benefits of health care choice to all natural persons.

B. The ballot summary has material omissions.

Proponent says that the proposed amendment does not omit any material information. It does though, and the omissions are quite misleading to the voting public because they affirmatively convey information that is inaccurate.

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12). Inasmuch as proponent does not identify what statements in the summary it believes provide more information than appear in the text, it is impossible to respond to this assertion other than through a discussion of the defects which Blue Cross has otherwise addressed.

[7] Blue Cross initial brief at 15-18.

The summary omits any indication that the most likely consequence of the proposal's "free choice" mandate is the *elimination* of PPOs, EPOs and HMOs altogether,[8] along with the erection of a bar to the legislature's ability to enact limited-provider mechanisms and the private sector's ability to contract for any such arrangements.[9] The summary omits any indication that all natural persons are being given the right to choose health care providers, and in fact asserts something else by affirmatively indicating that free choice is being extended only to "citizens."[10] The summary omits any indication that the proposed amendment will invalidate the legislature's attempt to salvage the state's workers compensation system with cost savings through mandatory managed health care, effective as of January 1 of this year." The summary omits any reference to the amendment's invalidation of existing and future local government provisions which limit the choice of health care providers.[12]

C. **The ballot summary has different terminology than the text of the proposed amendment.**

Proponent contends that any divergence between the text of the amendment and the language of the ballot summary is immaterial because it does not mislead the voters. There are distinct areas of material divergence, however, which are calculated to mislead voters. The first, noted above, is the vastly different legal meaning of the terms '"natural persons" and "'citizens."

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8 Blue Cross initial brief at 9-12.

9 Blue Cross initial brief at 12- 13.

10 Blue Cross initial brief at 13-15.

11 Blue Cross initial brief at 9, n. 11. The fact that the summary mentions "chapter 440" in a string of statutes, as one of the group of laws that in the future will require health care choice provisions in implementing contracts, is hardly equivalent to advising employers and employees in the state that the proposal derails a determination by the legislature that the salvation of the workers compensation system as it now exists was to mandate *limitations on* that *very* choice.

12 Blue Cross initial brief at 12- 13.

A key divergence also exists between terminology that establishes an absolute, affirmative declaration of the "right" of choice given to natural persons in the text of the amendment, on the one hand, and the ban on contractual opportunities for private health care providers that is described in the summary, on the other.[13] The summary declares affirmatively that the amendment requires "provision for choice of health care providers in future contracts," but the text of the amendment says nothing of the sort, The amendment, in contrast, prohibits any legislative or contractual limitation on the right of choice. These are not opposite sides of the same coin, and they are not synonymous. [14] As Blue Cross has pointed out,[15] section 10 1.16 1 categorically prohibits recasting "language of *limitation* in the amendment to language of *affirmation in* the ballot summary." *Evans* v. *Firestone*, 457 So. 2d 1351, 1355 (Fla. 1984) (emphasis supplied).

D. The ballot summary contains misleading references to affected laws.

Proponents assert that the summary appropriately references affected existing legislation. There are indeed references in the ballot summary, but they are anything but appropriate. They are distinctly misleading,

The ballot summary would lead a reasonable voter to conclude that the private sector of health care — described in the summary as "insurance companies, managed care personnel, employers and other such third parties" — will continue to provide managed care programs under the statutory chapters that are identified, but that in the future their contracts will always contain a

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13 Blue Cross initial brief at 8-9.

14 Proponent's reliance on *In re Advisory Opinion to the Attorney General English - The Official Language of Florida*, 520 So. 2d 1 1 (Fla. 1988) (proponent's brief at 1 1), is misplaced. In that case, the Court held that the phrase "implement this article" in the text of the amendment was synonymous with the words "enforce this section" in the summary. 520 So. 2d at 13. There is no parallel between that difference in verbiage and text that in one place *directs* the inclusion in contracts of a provision for choice and in the other *prohibits* all legislation that limits choice.

15 Blue Cross initial brief at 7-9.

provision for a patient's choice of providers. This is misleading in the extreme, because state laws that direct managed care, and private party contracts that aspire to cost-controlled care, cannot be maintained at all once citizens are given the "free, full and absolute choice" of selecting their own health care providers. That right of choice will act to prevent precisely what the legislature and private parties have sought to provide — "managed" health care which depends for its very existence on limiting participant choice.[16] The references to existing legislative chapters in the ballot summary, therefore, mislead both by commission (stating affirmatively what cannot be) and by omission (failing to mention what will be), as was the situation ***in Advisory Opinion to the Attorney General Re: Stop Early Release of Prisoners, 642 S .*** 2d 724,727 (Fla. 1994).

II. The proposed amendment violates the one subject limitation of the Constitution.

Proponent asserts that the proposed amendment meets the one subject requirement of Article XI, section 3 of the Constitution. Proponent argues that the proposal largely tracks the right of pharmacy selection given to workers compensation claims by state law and the right of collective bargaining given by the Constitution; that the proposed amendment will effect minimal change in Florida's organic law since limitations on choice exist "primarily" in the private sector and are virtually "non-existent" in present legislative enactments; that it does not conflict with any other constitutional provision; that it performs an overwhelmingly legislative function with only minor and derivative impact on executive or judicial powers; and that it does not constitute logrolling.[17]

These contentions of the proponent are totally generic and non-specific, providing no reference to the text of the amendment or offering any context for the generalizations being asserted. Blue Cross disagrees with proponent's superficial declarations of this proposal's one-subject rectitude, having already noted that the proposed amendment constitutes classic

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16 Blue Cross initial brief at 10- 12.

17 Proponent's brief at 15- 18.

logrolling, encroaches on multiple levels of governmental authority within the state, impacts not only the legislative branch of government but simultaneously all executive branch agencies that endeavor to administer the state's health care responsibilities within manageable financial boundaries, and has an undisclosed and substantial effect on the constitutional right of employees to bargain collectively.'*

The proposed initiative overtly combines two subjects: a limitation on legislative enactments that endeavor to establish managed health care; and a limitation on private contractual arrangements that have no legislative impetus." By its terms, this "expansive generality" of the health care choice initiative alone violates the one subject requirement of the Constitution. *In re Advisory Opinion to Attorney General - Restricts Laws Related to Discrimination, 632 So.* 2d 1018, 1020 (Fla. 1994).

The evil of logrolling unquestionably lurks in the proposed amendment. Its stated limit on governmental enactments — the prohibition on "Yaws" that restrict freedom of choice — may well appeal to the voter who is generally disaffected with excessive governmental interference in private affairs. Antagonistically, a constitutional bar on all contractual endeavors to control the health care costs of employers and insurers may be totally offensive to that same, cost-conscious voter. A voter must decide which goal is the more favored, and swallow the consequences of the less desirable other.[20]

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18 Blue Cross initial brief at 21-25. It is interesting that proponent finds the constitutional right of collective bargaining to be "most analogous" to the present proposal (proponent's brief at 16), since the constitutional right to bargain collectively is drastically abridged by the proposed amendment without any disclosed mention of that consequence. (Blue Cross initial brief at 24-25).

19 Blue Cross initial brief at 20-23.

20 No such inherent philosophical tension existed in the two cases identified by proponent: *Floridians Against Casino Takeover v. Let's Help Florida, 363 So.* 2d 337 (Fla. 1978), where an authorization for casino gambling was coupled with the collection of tax revenue from activity; and *Weber v. Smathers*, 338 So. 2d 8 19 (Fla. 1976), where financial disclosure was associated with a loss of pension benefits as a penalty for its breach. See, *Floridians Against Casino Takeover,* 363 So. 2d at 340. Similarly, there was no

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If there were any doubt as to this proposal's abridgement of the one subject requirement when Blue Cross filed its initial brief, there is certainly none now in light of the Court's most recent reiteration of the principle that the single subject provision requires the Court "'to consider whether the proposal affects separate functions of government and how the proposal affects other provisions of the constitution." *Advisory Opinion to the Attorney General Re: People's Property Rights Amendments,* 22 Fla. L. Weekly. S271 (Fla. May 15, 1997) *("Property Rights").* There, the Court struck a proposed amendment as violative of single subject because it "'affects not just legislative appropriations and statutory enactments but executive enforcement and decision-making." *Id.* at S272. The proposal for health care provider choice is indistinguishable in defect from the one found invalid in that decision.

In *Property Rights,* the proposed initiative was designed to exempt from the single subject requirement those constitutional amendments that require full compensation to private property owners when government restricts the use of their land. The Court struck the proposal because the "issue of property rights clearly affects the powers of the Legislature," and "the subject of land use also substantially affects the executive branch of government" -the latter being

> charged with the responsibility of carrying out the various functions of government which in multiple ways impact the use of real property in Florida. Restriction of use of real property inherently affects multiple functions of the executive branch in executing its responsibility.

22 Fla. L. Weekly at S272. The same analysis pertains here. The executive branch is directly and pervasively charged with responsibility for carrying out the governmental function of assuring cost-effective health care, including the selection of health care providers.[21]

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logrolling-prohibited tension in the Court's recent approval of a prohibition against public funding of state political campaigns. *Advisory Opinion to the Attorney General re: Prohibiting Public Funding of Political Candidates' Campaigns, 22* Fla. L. Weekly S267 (Fla. May 15, 1997).

21 Blue Cross initial brief at 23-24.

In addition to the duality of affects on the legislative and executive branches of state government, the substantial affect of this health care choice proposal on the legislative and executive authority of *local* governments adds yet another disqualifying dimension. The selection of health care providers, including limitations on choice, is in the hands of local governments to a significant degree under Home Rule powers and through local taxing districts.[22] The Court found as a single-subject defect ***in Property Rights*** that the

> initiative would have a distinct and substantial effect on more than one level of government+ The state, special districts, and local governments have various legislative, executive and quasi-judicial functions which are applicable to [the subject of the proposal].

Id.

CONCLUSION

Proponent grossly understates the impacts of its proposed constitutional amendment, and blithely ignores the very significant ballot summary and one subject defects that it contains. For the reasons expressed here and in Blue Cross' initial brief, the Court is respectfully requested to remove this proposed amendment from the ballot,

Arthur J. England, Jr., Esq.
Florida Bar No. 022730
Jerold I. Budney, Esq.
Florida Bar No. 283444
Greenberg Traurig Hoffman
Lipoff Rosen & Quentel, P.A.
122 1 Brickell Avenue
Miami, Florida 33 13 1
Telephone: (305) 579-0500

Counsel for Blue Cross and Blue Shield of Florida, Inc.

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22 Blue Cross initial brief at 23.

CERTIFICATE OF SERVICE

I certify that a true copy of this answer brief was mailed on August 27, 1997 to:

Robert A. Butterworth, Atty. General
Peter Antonacci, Dep. Atty. General
Department of Legal Affairs
The Capitol
Tallahassee, Florida 32399-1050

Randy D. Ellison, Esq.
1645 Palm Beach Lakes Boulevard
Suite 350
West Palm Beach, Florida 33401-2289
Counsel for Floridians for Health Care Choice

Frederick B. Karl, Esq.
Christopher L. Griffin, Esq.
Pamela K. Cothran, Esq.
Annis, Mitchell, Cockey, Edwards & Roehn, P.A.
Post Office Box 3433
Tampa, Florida 3 360 1
Co-counsel for Alliance of American Insurers

James C. Massie, Esq.
Janice G. Scott, Esq.
Massie & Scott
Post Office Box 1037 1
Tallahassee, Florida 32302
Co-counsel for Alliance of American Insurers

Thomas J. Maida, Esq.
Austin B. Neal, Esq.
McConnaughhay, Maida & Cherr, P.A.
101 North Monroe Street, Suite 900
Post Office Drawer 229
Tallahassee, Florida 323020229
Counsel for The Florida Workers' Compensation Joint Underwriting Association, Inc.

Daniel C. Brown, Esq.
Paul R. Ezatoff, Esq.
Alan H. Brents, Esq.
Katz, Kutter, Haigler, Alderman, Marks, Bryant & Yon, P.A.
Highpoint Center, Suite 1200
106 East College Avenue
Tallahassee, Florida 32301
Counsel jar Floridians for Quality Patient Care, American Insurance Association, The Florida School Board Association, The Florida Association of District School Superintendents, The Florida League of Cities, Fireman's Fund Insurance Company, and Hartford Fire Insurance Company