OIA 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

INITIAL BRIEF OF FLORIDIANS FOR HEALTH CARE CHOICE

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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.

STATEMENT OF THE CASE AND FACTS

A. Historical Background

Traditionally, Florida citizens received health insurance protection through "indemnity"-type plans, most typically as a form of non-cash compensation in employment. Under the traditional indemnity plans, each individual could select their own physician or other health care provider so long as that physician or provider was qualified and licensed. This allowed the individual to choose the provider best suited to a particular health problem at hand.

Gradually, over the course of the last decade, many employers have switched to (or added as an option) managed care arrangements. By definition, managed care implies a central authority managing the location, quality and/or price of the health care being delivered. Such plans typically "manage" the identities of the doctors who may be chosen as primary physician, the amounts those doctors will be paid, the specialist referrals which are available, and even the hospitals to which the patient may be admitted under the plan. See, Forman, Care in the World: Patients Face Choices, Ft. Lauderdale Sun-Sentinel, May 2, 1994, at 6; WL5414216.

Under health maintenance organization (HMO) plans the individual is typically assigned a primary care physician which must be selected from a limited list approved by the HMO, and generally is prohibited from seeing other physicians without permission of that primary care physician (excluding emergencies and a few other exceptions). Even then, the patient is generally

limited to seeing only physicians who have agreed to accept patients from the plan and, hence, have agreed to the plan's pay scale. Reda, HMOs, Insurance Ideas Misleading, Florida Today, Apr. 23, 1997, at 4A; WL10721120.

Physicians contractually agree with HMOs to limited fees for the treatment of HMO patients and may also agree to limited ranges of treatments or tests for which reimbursement will be provided. Physician contracts with HMOs may also limit the physician to prescribing certain medications for certain illnesses and may contractually prohibit expensive treatment options. In rare cases, "gag clauses" are included in these contracts, prohibiting the physician from even telling the patient the full range of treatment options (i.e., limiting the physician to telling the patient about treatment options covered by the insurer). Glass, Doctors Yield Reluctantly to Changes in Health Care, Tampa Tribune, Feb. 24, 1997, at 7; WL7036568.

HMOs also cut costs (and bolster profits) by employing physicians as "gate-keepers" to reduce the number of referrals to specialists. The income of the "gate-keeper" physician is often indexed to the number of specialty referrals, such that the fewer the specialty referrals, the larger the bonus paid to the physician. Babbit, Lifting the Veil of Secrecy on HMO Deals and Physicians' Records, Ft. Lauderdale Sun Sentinel, July 16, 1996, at 7A; WL10674958.

According to a recent Lou Harris poll commissioned for the privately endowed Commonwealth Fund, more than eight in ten

physicians in managed care plans report "somewhat serious" or "very serious" problems in their ability to refer patients to specialists of their choice and fully one-third **say** they have been denied referrals for potentially long-term (and hence costly) treatment for mental illness, substance abuse and physical therapy. Glass, Doctors Yield Reluctantly to Changes in Health Care, Tampa Tribune Feb. 24, 1997, at 7; WL7036568.

B. Legislative Background

In Fla. Stat. § 641.18(2) (1995), the Florida Legislature recognized that:

> Health maintenance organizations, consisting of pre-paid health care plans, hereinafter referred to **as** "plans," are developing rapidly in many communities. Through these organizations, structured in various forms, health care services are provided directly to a group of people who make regular premium payments.

The Legislature defined the basic "health maintenance contract", as:

> . . . any contract entered into by a health maintenance organization with a subscriber or group of subscribers to provide comprehensive health services in exchange for a pre-paid per capita or pre-paid aggregate fixed sum.

Fla. Stat. § 641.19(6) (1995) .

Through Chapter 641, the Florida Legislature has largely exempted HMOs from the provisions of the Florida Insurance Code, Fla. Stat. § 641.201 (1995), but has required certification by the Department of Insurance as a predicate for HMO operation. See, Fla. Stat. § 641.21, 641.30 (1995).

By adoption of Fla. Stat. § 627.6472 (1995), the Legislature has separately recognized and commenced regulation of "exclusive provider" provisions in insurance contracts, defined to include any insurance contract provision which conditions the payment of benefits, in whole or in **part, on** the use of exclusive providers. Regulation of such insurance contracts is vested with the Agency for Health Care Administration and the offering of such provisions in insurance contracts in the State of Florida is illegal absent approval by the Agency. Fla. Stat. § 627.6472(2), (3) (1995).

In 1993, the Florida Legislature authorized insurers to utilize managed care for the provision of workers' compensation coverage and provided that effective January 1, 1997, employers would be required to furnish employee care solely through managed care arrangements (subject to certain **limitations).** See, Fla. Stat. § 440.134(2) **(a),** (b) (1995).[1]

C. The Initiative Proposal

Against this factual and legislative back-drop, Floridians for Health Care Choice (FHCC) has sponsored the instant initiative petition titled "Right of Citizens to Choose Health Care Providers". The full text of that amendment is as follows:

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[1]In 1993, the Florida Legislature also adopted Chapter 636, the "Pre-paid Limited Health Service Organization Act of Florida", which provides for the creation and regulation (through the Department of Insurance) of pre-paid limited health service insurance plans for the coverage of "secondary" health care services (i.e., ambulance, dental care, vision care, mental health, substance abuse, chiropractic services, podiatric care and pharmaceutical services). See, Fla. Stat. § 636.003(7) (1995).

Article I of the Constitution of the State of Florida is hereby amended to add the following:

1) "SECTION 24. **Right to Select Health Care Providers.**

(a) The right of every natural person to the free, full and absolute choice in the selection of health care providers, licensed in accordance with state **law,** shall not be denied or limited by law or contract.

(b) This section shall not be construed to limit the authority of the state to regulate health care providers to ensure the preservation of the health, safety and welfare of the public."

2) This amendment shall take effect on the date it is approved by the electorate, however, this section shall not be applied to impair the obligations of contracts existing and in force at the time this section takes effect.

The ballot title and summary for this initiative proposal, states:

BALLOT TITLE

RIGHT OF CITIZENS TO CHOOSE HEALTH CARE PROVIDERS

BALLOT S-Y

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

On February 27, 1997, Florida's Secretary of State submitted this initiative petition to Florida's Attorney General pursuant to Fla. Stat. § 15.21 (1995), certifying FHCC's success in obtaining

ten-percent of the required signatures for ballot access in one-fourth of Florida's Congressional Districts, as required by Art. XI of the Florida Constitution.

On March 21, 1997, the Attorney General of Florida, acting in accordance with his constitutional and statutory responsibilities, petitioned this Court for an Advisory Opinion concerning the validity of the initiative petition circulated by FHCC. The Attorney General's Petition asks this Court for an Advisory Opinion as to whether the ballot title and summary gives fair notice of the proposed revision and whether the amendment violates the single subject requirement of Art. XI, Sec. 3, Florida Constitution.

SUMMARY OF THE ARGUMENT

A ballot summary need only summarize the chief purpose of the proposed amendment. The instant summary clearly satisfies this obligation, accurately indicating that the chief purpose of the proposed amendment is to establish the right of citizens to choose health care providers.

The summary in this case gives more information than the text of the amendment, specifically as to the effects the amendment will have on existing legislative programs. Since the description of such legislative effects is clearly proper as a part of a summary, but has no place in the text of the amendment itself, divergence in language is virtually required if the voter is to be apprised of the legislation which will be affected by a proposed initiative. The divergence between the language used in the text of the amendment and the ballot summary could not reasonably mislead voters and as such is not a proper basis for objection. As a whole, the instant summary fairly reflects the chief purpose of the amendment and thus should be approved for inclusion on the ballot.

A proposed amendment meets the "single subject" test where it displays a unity of object and plan. The instant amendment clearly satisfies this universal test. The mere fact that the amendment may have broad impact is immaterial, so long as it deals with one subject.

The right to choose health care providers does not conflict with any other constitutional right or provision. This section implements a public policy decision of statewide significance and

thus performs an almost exclusively legislative function. The mere fact that the petition, if passed, could affect multiple areas of government in some tangential fashion is immaterial.

This is simply not a case where several separate issues have been rolled into a single initiative for "log-rolling" purposes. The subject amendment may have broad ramifications, yet it deals with only one subject. It thus satisfies the constitutional single-subject requirement.

LEGAL ARGUMENT

POINT I

THE BALLOT TITLE AND SUMMARY PROVIDE FAIR NOTICE.

In passing upon the validity of a particular initiative proposal, the burden is upon the opponent of the proposal to establish that the initiative proposal "is clearly and conclusively defective". Floridians Against Casino Takeover v. Lets Help Florida, **363** So.2d 337, 340 (Fla. 1978), quoting, Weber v. Smathers, **338** So.2d 819, **823** (Fla. 1978) (England, J. concurring).

Florida Stat. § 101.161 (1995) requires that the ballot title and summary for a proposed constitutional amendment state in clear and unambiguous language the chief purpose of the measure. Askew v. Firestone, 421 So.2d **151,** 154-155 (Fla. 1982). The ballot summary for FHCC's proposed amendment properly summarizes the chief purpose of the proposed amendment, which is to establish the right of citizens to choose health care providers:

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

The instant ballot summary is devoid of "political rhetoric", cf., In re Advisory Opinion to the Attorney General -- Save Our Everglades, 636 So.2d 1336, 1341 (Fla. 1994), and does not omit any material information. The only specific ballot summary issue raised by the Attorney General relates to a divergence in language between the summary and the text of the amendment[2]:

> . . . the ballot summary does not track the language of the amendment; rather it suggests applications not contained in the text of the proposed amendment. The Court, therefore, may wish to consider whether the ballot title and summary adequately reflect the language of the proposed amendment such that the voter is given fair notice of the decision he must make.

However, this Court has held that the use of differing terminology between summary and text is immaterial, so long as the divergence could not reasonably mislead the voters. See, In re Advisory Opinion Atty. Gen. Enslish-The Official Lanquase of Florida, 520 So.2d 11, 13 (Fla. 1988).

The Attorney General's "tracking" objection is highly analogous to the objection raised by the Attorney General and

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[2]The Attorney General's Petition also states broadly:

> It is questionable whether the ballot title and summary provide fair notice of the true meaning of the proposed revision to the Florida Constitution.

This broad "question", without specific content, appears pro forma in nature and obviously cannot be meaningfully addressed absent more specific objection. Accordingly, FHCC will reserve further response on this point to its Answer Brief, awaiting further specific objection, if any, by interested parties.

rejected by this Court in Advisory Opinion to the Atty. Gen. re: Florida Locally Approved Gaming, 656 So.2d 1259, 1262-63 (Fla. 1995). There, the Attorney General argued that the Locally Approved Gaming Amendment text (authorizing 20 casinos) was inconsistent with the language of the summary (which went beyond that express language, to indicate that gaming would not be authorized beyond the 20 casinos expressly provided for). Thus, in both cases the Attorney General has seen fit to point out ballot summary language which serves merely to explain effects necessarily implicit in the text of the proposed amendment.

The fact that a summary gives more information regarding the amendments effects than the text of the amendment is no valid basis for objection, so long as that information is accurate and not misleading. See, id. To the contrary, this Court has gone out of its way to commend drafters of initiative petition who have taken such extraordinary steps in an attempt to make clear the intent of a constitutional provisions. See, Carol1 v. Firestone, 497 So.2d 1204, 1206 (Fla. 1986). By contrast, in Advisory Opinion to the Attorney General -- Restricts Laws Related to Discrimination, 632 So.2d 1018, 1021 (Fla. 1994), this Court rejected a ballot initiative, in part, because the summary failed to point out the effects that the amendment would have on existing law.

Any references to specific existing legislation to be affected by a proposed amendment must be noted, if at all, in the summary, since such language clearly has no place in the text of the Constitution, itself. To that extent, the divergence present in

the instant case is virtually required if the voter is to be apprised of the existing areas of legislation which will be affected by a proposed amendment.

As a whole, the instant ballot summary fairly reflects the chief purpose of the proposed amendment and thus should be approved for inclusion on the ballot.

POINT II

THE PROPOSED AMENDMENT DOES NOT VIOLATE THE SINGLE SUBJECT REQUIREMENT.

Article XI, Sec. 3, of the Florida Constitution provides in relevant part:

> The power to propose the revision or amendment of any portion or portions of this Constitution by initiative is reserved to the people, provided that, any such revision or amendment . . . shall embrace but one subject and matter directly connected therewith.

A proposed amendment meets the test when it "may be logically viewed as having a natural relation and connection as component parts or aspects of a single dominant plan or scheme. Unity of object and plan is the universal test." Advisory Opinion re Florida Locally Approved Gaming, supra at 1263.

In his Petition, the Attorney General points out that the instant initiative:

> . . . does not elaborate on the effect or breadth of "free, full, and absolute choice." No other articles of the Constitution are identified as being substantially effected. The Court may wish to consider whether the proposed amendment may be so broad as to violate the single subject requirement of Article XI, Section 3, Florida Constitution.

However, the mere fact that an amendment could have broad ramifications is immaterial so long as, on its face, the amendment deals with only one subject. In Re Advisory Opinion English-The Official Language of Florida, supra at 13. Similarly, the mere fact that an amendment may be capable of separation into two or more propositions concerning which diversity of opinion might arise

is not alone sufficient to condemn the proposed amendment, provided the elements of the proposition may be viewed as having a natural relation and connection as component parts of a single dominant plan or scheme. Floridians Against Casino Takeover, supra at 339, cyuoting, City of Coral Gables v. Gray, 154 Fla. 881, 19 So.2d 318, 320 (1944).

In Weber v. Smathers, supra, the Sunshine Amendment was found to pass muster under Art. XI, Sec. 3 of the Florida Constitution notwithstanding that the amendment affected eight categories of individuals, including elected constitutional officers, candidates, statewide elected officers, public employees, legislators and former legislators, former statewide elected officers and all other persons and entities who might induce a breach of the public trust. The amendment also referred to two types of financial disclosure and authorized two distinct penalties -- pension forfeiture and civil damages. Nonetheless, this Court concluded that these myriad provisions came within the ambit of a single subject -- ethics in government -- rendering the initiative petition valid under the Art. XI, Sec. 3 single-subject requirement. See, Floridians Against Casino Takeover, supra at 340.

In content, the current initiative largely tracks the language used by the Florida Legislature in guaranteeing the right of pharmacy selection to workers' compensation claimants under Fla. Stat. § 440.13(3)(j) (1995). That section states in pertinent part:

> Notwithstanding anything in this chapter to the contrary, a sick or injured employee

> shall be entitled, at all times, to free, full, and absolute choice in the selection of the pharmacy or pharmacist dispensing and filling prescriptions for medicines required under this chapter. . . .

More fundamentally, at the structural level, this proposed amendment appears most analogous to Florida's "Right to Work" guarantee, Fla. Const. Art. I, Sec. 6 (1995), inasmuch as both provisions extend beyond the delineation of government powers and duties to prohibit particular substantive content in purely private contracts. If passed, the "right to choose health care providers" would take its place alongside the "right to work", functioning as a basic right in a parallel fashion (hence the drafter's indication that the instant amendment is to be a part of Art. I, the "Declaration of Rights" article of the Florida Constitution) .[3]

The single-subject provision is a rule of restraint designed to insulate Florida's organic law from precipitous and cataclysmic change. Advisory Opinion to the Attorney General re Tax Limitation, 644 So.2d 486, 490 (Fla. 1994). The right of physician choice was virtually universal until a decade ago. Even now, limitations on choice primarily exist in the private sector. The changes in Florida's organic law under this amendment would clearly be minimal, given the almost non-existent way in which existing law addresses the issue of patient choice among health care providers.

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[3]In primarily focusing on the limitation of private conduct, the instant amendment also bears some resemblance to the limited marine-net fishing initiative Advisorv Opinion to Attorney General -- Limited Marine Net Fishing, 620 So.2d 997 (Fla. 1993), approved by this Court and ultimately adopted by the electorate. See, Fla. Const. Art. X, Sec. 16 (1997 Supp.).

As such, no reasonable argument can be made that cataclysmic change in Florida's organic law would be effected by this amendment.

The right to health care choice does not conflict with any other constitutional right or provision. While the health care choice right would serve (the same as any substantive right) to limit potential government actions in derogation thereof, such tangential effect is not recognized as a basis for invalidating an initiative petition. As this Court explained in Advisory Opinion to the Attornev General re Limited Casinos, 644 So.2d 71, 74 (Fla. 1994) :

> . . . we find it difficult to conceive of a constitutional amendment that would not affect other aspects of government to some extent. However, this Court has held that a proposed amendment can meet the single subject requirement even though it affects multiple branches of government. Advisorv Opinion to the Attorney General -- Limited Political Terms and Certain Elective Offices, 592 So.2d 225, 227 (Fla. 1991). Further, this Court has held that the possibility that an amendment might interact with other parts of the Florida Constitution is not sufficient reason to invalidate the proposed amendment. English-The Official Lansuase of Florida, 520 So.2d at 12, 13.

The proposed amendment would implement a public policy decision of statewide significance, performing an overwhelmingly legislative function. While the amendment may derivatively effect the executive and judicial branches (the same as any legislative enactment of public policy) nothing in the initiative exercises or alters executive or judicial powers. See, Advisory Opinion to Attorney General -- Limited Political Terms in Certain Elective Offices, 592 So.2d 225, 227 (Fla. 1991) (approving term limits

initiative affecting office holders in all three branches of government); compare, In re Advisory Opinion -- Save Our Everglades, supra at 1340.

Finally, this is simply not a case where several separate issues have been rolled into a single initiative in order to aggregate votes or secure approval of an otherwise unpopular issue. See, In re Advisory Opinion -- Save Our Everglades, supra.

It is obvious that the instant amendment may have broad ramifications, yet it is equally obvious that on its face it deals with only one subject and thus meets the single subject requirement.

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).

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