IN THE SUPREME COURT OF FLORIDA

CASE NO. 95,312
1ST DCA CASE NO. 1999-938
CIRCUIT COURT CASE NO. 94-1428

. . . . . .

CHICAGO TITLE INSURANCE COMPANY, et al.,
Appellants, Cross-Appellees,

vs.

S. CLARK BUTLER, et al.,
Appellees, Cross-Appellants.

AMICUS CURIAE BRIEF OF THE REAL PROPERTY, PROBATE & TRUST LAW SECTION OF THE FLORIDA BAR

ON CERTIFIED DIRECT APPEAL CONCERNING A QUESTION OF GREAT PUBLIC IMPORTANCE FROM A FINAL JUDGMENT ENTERED IN THE SECOND JUDICIAL CIRCUIT IN AND FOR LEON COUNTY, FLORIDA

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STATEMENT REGARDING THE *AMICUS CURIAE* AND THIS BRIEF

The Real Property, Probate & Trust Law Section of The Florida Bar participates in this appeal as an *amicus curiae* with the written consent of all the parties. The Section urges the Court to reverse the trial court's order declaring unconstitutional the State's regulation of title insurance agents' share of title insurance risk premiums. Having coordinated its efforts with the appellants, the Section presents no statement of case and facts, and has focused primarily on theories within the Section's knowledge and interest that the appellants do not present.

SUMMARY OF ARGUMENT

Title insurance agents are unlike any other insurance agents. As the legislature has now expressly found, they play a substantial, liability-exposing role in the title insurance process. They determine insurability and are critical to both actuarial soundness and soundness of title. To protect the solvency and stability of the title insurance industry, the legislature passed laws barring title insurance agents from rebating to title insurance purchasers any portion of the agents' share of the premiums that purchasers pay title insurers.

The state has a legitimate interest in regulating *all* insurers, of course, but with title insurance an additional interest is present: title insurance protects property values, and property values directly impact government revenues. The rebate prohibition assures title insurance agents an adequate profit and is a rational means to the state's objective of a healthy title insurance industry for at least two reasons. First, attracting

and retaining a large body of qualified agents is critical to the survival of the industry. Second, insurer solvency is related to agent solvency. The Court should reverse the order below and direct judgment for the appellants.

ARGUMENT

The trial court held that certain state statutory provisions and an administrative rule (collectively, the Old Rebate Laws)[1] violated due process provisions of the state constitution because they prohibited title insurance agents from rebating to purchasers a portion of agents' share of risk premiums.[2] Substantive due process challenges to laws regulating purely economic matters (rather than fundamental constitutional interests) fall short, however, if the laws at issue are rationally related to *any* legitimate objective. The challenger's burden is, thus, extremely heavy, as this Court has repeatedly made clear. *See, e.g., Lane v. Chiles*, 698 So. 2d 260 (Fla. 1997);

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1 *I.e.*, §§ 627.780(1), 626.9541(1)(h)3a, 626.611(11), 626.8457, Fla. Stat. (1997), and Department of Insurance Rule 4-186.003(13)(a) of the Florida Administrative Code. After the trial court declared the Old Rebate Laws unconstitutional, the Legislature amended those portions of Chapters 626 and 627 central to this case. See Ch. 99-286, Laws of Florida. The amendments took effect July 1, 1999, and are discussed below.

2 Article I, Section 9 is the due process provision of the state constitution and states that "No person shall be deprived of life, liberty or property without due process of law . . . ." Article I, Section 2 is a related "basic rights" provision, and ensures the right to life, liberty and happiness, and to be rewarded for industry.

Northridge General Hospital Inc. v. City of Oakland Park, 374 So. 2d 464 (Fla. 1979).

Indeed, in *Northridge General Hospital*, the Court held that it would presume challenged state action had a constitutionally legitimate objective—regardless of evidence of actual objectives—as long as it was *conceivable* that such an objective could have been considered. 374 So. 2d at 464; *see also State v. Falk*, 724 So. 2d 146, 148 (Fla. 3d DCA 1998)("[W]e must uphold a classification if it rationally serves an objective which the legislature *might have had* . . . [It is] constitutionally irrelevant whether [a specific] reasoning in fact underlay[s] the legislative decision . . . . '[I]f any state of facts reasonably can be conceived that would sustain [the classification], the existence of that state of facts at the time that the law was enacted must be assumed.").

This case presents a substantive due process challenge to the Old Rebate Laws—laws concerned purely with economic matters. No fundamental constitutional principle is at issue. The trial court nonetheless declared the laws unconstitutional because, purportedly, they fail the above *de minimus* test. The trial court was mistaken.

1. The Old Rebate Laws were rationally related to legitimate <u>legislative objectives.</u>

a. *The legitimate legislative objectives and means*

"It would be difficult to find a business that more vitally affects the public interest than the insurance business . . .." *Florida Department of Insurance v. Bankers Insurance Company*, 694 So. 2d 70 (Fla. 1st DCA 1997); *see also*, *Gallagher v. Motors Insurance Corp*., 605 So. 2d 62, 72 (Fla. 1992) (noting Congressional determination that "continued regulation and taxation by the several states of the business of insurance is in the public interest . . .."). The state, of course, has a legitimate interest in regulating insurance rates. *Smith v. Department of Insurance*, 507 So. 2d 1080, 1093 (Fla. 1987).

The state also has a legitimate interest in the stability of the title insurance industry because a large portion of governmental revenue comes from *ad valorem* property taxes. Most property purchases require mortgage financing, and most mortgage financing requires title insurance. Without a secure title insurance system, property could not be reliably bought or financed, and the value of the real property would plummet. With plummeting property values would fall *ad valorem* tax revenues.

A legislative study found that Florida title insurers had suffered combined pretax operating losses of approximately $80 million between 1988 and 1990, and a negative overall rate of return of 4.5% after taxes. (R.V-854 (Florida House of Representatives, Committee on Insurance, Final Bill Analysis & Economic Impact Statement (SB 170-H), July 8, 1992 at p.33-34)). The study further reported that title insurance agents, who were facing significant competitive pressures, were frequently unable to charge their actual expenses for "closing costs." *Id.*

To ensure the stability and solvency of the title insurance industry, the 1992 legislature amended Section 627.782 to require insurers to retain at least 30% of risk premiums. While the adequacy of most insurance rates was determined solely with reference to the needs and capitalization of *insurers*, the legislature recognized a unique relationship between title insurers and their agents. Thus, the legislature required the Department of Insurance to set risk premiums with "due consideration" to providing a reasonable margin for underwriting profit to both title insurers *and* title agents in order to attract and retain adequate capital investment by both.

b. The rational relationship between the legislative objectives and means

It is the duty of the courts to "give effect to legislative enactments despite any personal opinions as to their efficacy." *Brown v. State*, 672 So. 2d 861, 863 (Fla. 3rd DCA 1996). A court may not agree with the prudence of a legislative course, but "the

propriety and wisdom of legislation are exclusively matters for legislative determination." *Lane v. Chiles*; *Askew v. Schuster*, 331 So. 2d 297, 300 (Fla. 1976). Applying these principles, the Court must determine whether the Old Rebate Laws, which assured title insurance agents reasonable profits, were rationally related to protecting the stability and solvency of Florida's title insurance industry.

Unlike other insurance agents, title insurance agents play an integral role in the substance, not just the sales, of insurance.[3] They examine complex documents to determine their legal effect on title and to verify compliance with strict execution and acknowledgment requirements. They review and interpret surveys and plats, and they examine tax and assessment records to determine the liens on the land title to be insured. Title insurance agents thus not only insure—but actually *en*sure—the stability of title to real property in Florida. By properly evaluating a search and

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[3] The legislative history of the 1992 amendments reflects an understanding of the title insurance agent's unique role in the insurance industry:

> Under current practice, the functions of a title insurance agent are considerably broader than the functions of other insurance agents. Title agents perform underwriting functions that are, with respect to other kinds of insurance, usually performed by insurer employees at the insurer's home office. The requirement of licensure of both title agents and title agencies may be viewed as an outgrowth of the high level of professional judgment and discretion required of title agents.

(R.V-854 (Committee on Insurance, Final Bill Analysis & Economic Impact Statement (SB 170-H), July 8, 1992, p. 9)).

examination, the agent not only detects, but also eliminates, defects in title. Indeed, in most cases, it is the competency of a title insurance agent that determines whether an insured will ever have to make a claim.

Unlike other insurance agents, title insurance agents are authorized by the legislature to act as fiduciaries, by receiving and disbursing escrow funds from and for consumers. §626.8473, Fla. Stat. They are required to maintain separate records on these escrow accounts and to report on the status of the accounts directly to the title insurance companies they represent.[4] Rule 4-186.009, Fla. Admin. Code and §626.8473 (5), Fla. Stat. In the process of handling closings, agents are sometimes responsible for handling millions of dollars in escrow funds.

Title insurers, in turn, are responsible for the acts of their agents regarding the handling of escrow funds, both contractually through the issuance of insured closing service letters, Rule 4-186.010, Fla. Admin. Code, and legislatively, §627.792, Fla. Stat. While agents may be required to indemnify the insurers for whom they write the policies, they are not statutorily required to obtain any policy or bond greater than

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[4] Title agents are criminally as well as civilly liable for the safekeeping and proper disbursement of these funds. §626.8473 (7), Fla. Stat.

$250,000 to cover their indemnification obligations.[5] The financial well-being of title insurers is, thus, rationally related to the financial well-being of title insurance agents.[6]

No one, of course, is *required* to serve as a title insurance agent, but Florida agents have chosen to do so based upon the viability of an economic model forged, in substantial part, by the legislative and administrative framework of the Old Rebate Laws. Given the demands and liability exposure of their work, it is more than plausible that qualified agents would withdraw from the title insurance industry if competition under a deregulated pricing structure reduced profits from their present levels. Indeed, for agents committed to the level of quality performance required for a sound real estate market and insurance industry, profits might be impossible to achieve. *Cf.* 1990 Staff Analysis of HB 93-H, p. 32 (legislative study finding that "competitive conditions" often made it impossible for the title agents to charge enough for closings to avoid losing "money on each closing."). For such agents a

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[5] Title agents must secure their contractual obligations to insurers with a $35,000 surety bond. §626.8418 (2), Fla. Stat., secure against dishonesty within their offices with a $50,000.00 fidelity bond, §626.8419(1)(a), Fla. Stat., and provide errors and omissions coverage of $250,000 to protect their title insurers and consumers against agent negligence. §626.8419(1)(b), Fla. Stat.

[6] For this reason alone, the *Florida Department of Insurance v. Dade County Consumer Advocate's Office*, 492 So. 2d 1032 (Fla. 1986), decision (thoroughly addressed by the appellants in their initial brief) cannot invalidate the Old Rebate Laws: *Dade County* made clear that price regulations relating to actuarial soundness are constitutional. *Id*. at 1033.

predictable profit margin is essential to participation in the title insurance industry, especially since the standard closings most agents handle do not yield more than limited compensation under even a regulated model.

Given the critical position of agents in the title insurance firmament and the enormity of the title insurance market in Florida, insurers simply could not function without a large number of highly qualified agents. A loss of such agents would adversely impact consumers—directly for some (through defects in title) and indirectly for all (through escalated insurance premiums and loan costs due to an unstable title insurance market). The Old Rebate Laws, however, helped preserve the participation of an adequate body of qualified agents by ensuring agents an adequate profit margin. The laws accordingly benefited the citizens of Florida. Nothing more is required under a substantive due process analysis.

2. The New Rebate Laws extinguish any remaining argument regarding the constitutionality of Florida's regulation of title insurance fees.

Two months after the trial court declared the Old Rebate Laws unconstitutional, the Legislature responded:

> WHEREAS, the Legislature finds that regulation of insurance is in the public interest; that it promotes the public health, safety and welfare by assuring the solvency and soundness of insurers; that determination of insurability of title to real property prior to insuring such property *is essential to the maintenance of the solvency and*

> *soundness of title insurers*; and because title insurance agents or agencies determine insurability on behalf of title insurers, *there is a direct relationship between the determination of insurability performed by title agents or agencies and the public interest . . ..*

Ch. 99-286 (emphasis added). The legislature reaffirmed that title insurance agents are not permitted to rebate their share of premiums (*id*. at Sections 4-5, amending §626.8411(2)(c), §626.9541(1)(h)3.a., Fla. Stat.). It also expressly found that agents must perform "primary title services," including "determining insurability in accordance with sound underwriting practices," to obtain a share of insurers' premiums (*id*. at Section 6, amending § 627.7711(1)(b) and (2), Fla. Stat.), and confirmed that title insurance agents "incur[ ] the risks incident to" issuing a policy of title insurance (*id*., amending § 627.7711(2)).

These express legislative findings regarding the objectives and bases of Florida's title insurance rebate laws confirmed what should have been clear all along. The legislature's enactment of the Old Rebate Laws violated no constitutional right to negotiate rebates, as the appellees urge, but simply served a legitimate state interest by rational means. The new rebate laws, leavened by the legislature's express findings and refinements, rest on even more solid ground and should not be disturbed.

CONCLUSION

The Court should reverse the trial court's order granting summary judgment for the appellees and direct entry of final judgment for the appellants.

Respectfully submitted,

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