IN THE SUPREME COURT OF FLORIDA

CASE NO. 95,312
1ST DCA CASE NO. 1999-938

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

vs.

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

ANSWER BRIEF OF APPELLEES/CROSS-APPELLANTS TO INITIAL BRIEF OF APPELLANTS/CROSS-APPELLEES

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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I. STATEMENT OF THE CASE

A. Order Appealed From.

Appellees agree with Appellants' statement except that it omits relevant parts of the trial court's judgment. In declaring the challenged statutes unconstitutional, the court found no significant differences between title insurance agents and life insurance agents, and thus, *Department of Insurance v. Dade County Consumer Advocate's Office*, 492 So. 2d 1032 (Fla. 1986), was applicable. (R _____).

B. Procedural History of Action.

Appellees accept Appellants' description of the procedural history except as to the following omissions. First, the Department of Insurance ("Department"), Defendant below, did not appeal the trial court's summary judgment and is not an appellant. Second, Appellees, S. Clark Butler, Florida Home Builders Association and National Title Insurance Company, filed a notice of cross-appeal as to the trial court's Summary Final Judgment dated December 23, 1997, holding section 626.572, Florida Statutes (1997), inapplicable to title insurance. Appellees have dismissed the cross-appeal based upon mootness because of the 1999 legislative amendments.[1]

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[1] Appellees and the Department argued before the trial court that the insertion of "unlawful rebating" in section 626.9541(1)(h)3.a., Florida Statutes, in the 1990 legislative amendments and in the provisions pertaining to title insurance contracts, *see* § 627.776(1)(k), Fla. Stat., and the reference to "unlawful rebating" in statutes pertaining to title insurance agents, *see* § 626.8437(8), Fla. Stat., made it clear that the rebating sections of section 626.572 applied to title insurance agents. The trial court disagreed. Nevertheless, the trial court's summary judgment finding section 626.572 inapplicable

Finally, Appellants' description of this Court's ruling on Appellants' motion to remand is incorrect. Appellants requested that this Court remand with directions to vacate the trial court's judgment. *See* Report to the Court and Motion for Vacation of Order and Remand to Trial Court with Instructions of Dismissal on Grounds of Mootness. This relief was denied. *See* Order of this Court dated July 14, 1999.

C. Challenged Statutory Scheme.

Appellees challenged the following sections of the 1997 Florida Statutes: sections 626.611(11) and 626.8437 (disciplinary proceedings revocation of license for rebating); section 626.9541(1)(h)3.a. (prohibition of rebating); section 627.780(1) (agent may not charge premium other than risk premium); section 627.782 (establishment of rates); and section 627.783 (rate deviations). Appellees' Motion for Summary Judgment (R VI, 745-787). The trial court held unconstitutional "only those portions of the statutes that prohibit an agent from rebating any portion of his or her commission. The term "commission" in this context means the agent's share of the risk premium." Order on Motion for Rehearing, Reconsideration and Clarification, dated 3/8/99 (R VIII, 1421).

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to title agents is now moot because the 1999 Legislature amended the relevant statutory sections. *See* Ch. 99-286, §§ 4, 5, Laws of Fla.

II. STATEMENT OF THE FACTS

Appellants' factual presentation contains substantial argument and therefore is not in accordance with the rules of this Court. Additionally, Appellants omit significant facts. In particular, Appellants completely ignore the statutes and rules addressing "related title services" which distinguish title insurance from other forms of insurance. Appellants also mischaracterize the legislative history of the 1992 amendments. Finally, Appellants' descriptions of title insurance and the role of a title agent are incomplete. Appellees address these subjects both in their statement of facts and argument as appropriate.

A. Facts Giving Rise to Challenge by Butler.

This lawsuit began when Clark Butler asked his title insurance agent why the cost of title insurance had significantly increased. He learned that in addition to a statutory premium, title agents were required to charge separately for performing a title search and examination, preparing documents such as deeds and mortgages, and handling the closing. Further, he learned that while the insurer receives 30% of the premium for assuming the risk of loss in the title policy, the title agent receives 70% of the premium for what is openly acknowledged to be a sales commission or referral fee for referring him as a

customer. Butler Aff., 12/3/97, ¶ 4 (App. 9, ¶ 4).[2] This arrangement was dramatically different from the negotiable commissions (10-15% of the premium) he paid for property and casualty and other forms of insurance. Butler Aff., 10/23/98, ¶ 6 (App. 12, ¶ 6).

B. Appellants Omit Statutes Pertaining to the Critical Function of "Searching and Examining Title to Determine Insurability."

Appellants state that "[t]he determination of insurability requires a carefully performed title search and examination of title . . . to detect defects in title and eliminate them before the policy issues." Appellants' Initial Brief at 7-8. While this is accurate, Appellants fail to explain that the title search and examination as well as other services such as preparing documents and closing the transaction are "related title services" for which an agent must charge separately from the premium. *See* § 627.7711(1), Fla. Stat. (1997). Charges for a related title service may not be included in the risk premium. Fla. Admin. Code R. 4-186.003(13)(a).

Section 627.7711(1) defines "related title services" to include "services . . . including, but not limited to, preparing or obtaining title information, preparing documents necessary to close the transaction, conducting the closing or handling the

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[2] Where appropriate, citation will refer to the appendix. Citations to the record are found in the Index to Appendix to Answer Briefs of Appellees/Cross-Appellants. Appellees have contemporaneously filed with this brief a Motion to Correct the Record on Appeal. Citations to these depositions will be to excerpted portions of the depositions which are included in the Appendix.

disbursing of funds. . . ." Preparing or obtaining title information is the title search and examination. Fla. Admin. Code R. 4-186.003(13)(b). "[T]he thoroughness of that examination, and the skill by which it is conducted, are the critical actions taken in the process" that eliminate risk. Appellants' Initial Brief at 28; Andrews Aff., 11/9/98, ¶¶ 7, 8 (App. 15, ¶¶ 7,8); Randol Aff., ¶ 4.C (App. 13, ¶ 4.C); Senter Dep. at 245 (App. 245); Cox Dep. at 159-60, 171-72 (App. 159-60, 171-72). The Department does not regulate charges for performing "related title services" other than to require that actual cost be charged. Fla. Admin. Code. R. 4-186.003(13)(a). Charges for "related title services"must be separately charged to the customer, they may not be included in the risk premium. § 627.7711(2), Fla. Stat. (1997); Fla. Admin. Code R. 4-186.003(13)(a), (b). An attorney may negotiate and rebate fees for legal services. Ch. 99-286, § 5 at 6-7, Laws of Fla. (App. 6).

C. Title Insurance Premiums Sufficient to Maintain Insurer Solvency are Determined on an Actuarial Basis.

In determining title insurance premiums adequate to maintain insurer solvency, the Department engages in an actuarial analysis similar to other lines of insurance. § 627.782(2), Fla. Stat. (1997). In 1994, the Department retained David B. Cox, a consulting actuary, who determined that the 30% of the premium retained by title insurers was sufficient to maintain the solvency of title insurers. Cox Dep. at 70 (App. 16 at 70); McCarty Dep. at 154 (App. 17 at 154). He utilized sound actuarial principles for rate

making, data quality, profit, expenses, trending and loss development. Cox Dep. at 16-18 (App. 16-18.) Title insurance agents do not bear significant risk for any of the services they provide. McCarty Dep. at 44-45 (App. 17 at 44-45); Cox Dep. at 48-49 (App. 16 at 48-49). The portion of the premium paid to an agent does not impact on the solvency of an insurer. Senter Dep. at 117-18 (App. 18 at 117-18). To the extent an agent receives a commission, it does not impact on the actuarial soundness of an insurer. *Id.*

D. Role of Title Agent.

In many instances, the agent does not actually perform the search and examination but rather purchases a "title certificate" or "title report" from the insurer or title plant. Andrews Aff., 10/22/98, ¶¶ 5, 6 (App. 11, ¶¶ 5,6); Andrews Supp. Aff., 11/9/98, ¶ 6 (App. 15, ¶ 6). The agent acquires the report for a nominal charge and charges the policyholder. Andrews Aff., 10/22/98, ¶ 11 (App. 11, ¶ 11). The title certificate or report discloses the status of the title, *i.e.*, whether any encumbrances or defects appeared on the record. Agents rely upon the abstractors and examiners who prepare the report to ensure an adequate and accurate research and review of the record for any defects or exceptions. *Id.*, ¶ 8 (App. 11, ¶ 8). An agent can then examine the report or certificate and determine whether the title complies with the underwriting guidelines provided by the insurer for issuance of policies. *Id.*, ¶¶ 5, 10 (App. 11, ¶¶ 5, 10). In the event that a defect is identified or the policy is above a certain amount, an agent is not authorized to

issue a commitment unless the insurer specifically approves the policy. *Id.*, ¶¶ 10, 11 (App. 11, ¶¶ 10, 11). If the agent reviews or prepares documents, closes the transaction or considers or resolves any title defect, he performs related title services or legal services which must be charged separately from the premium. *Id.*, ¶ 10 (App. 11, ¶ 10).

In many instances, the insurer actually prepares the policy commitment and final policy so that the agent's role is limited to the ministerial functions of signing and delivering the commitment or policy to the policyholder. *Id.* Agents, such as William C. Andrews, consider the 70% allocation of the premium to be little more than a "commission for referral of the title insurance customer to the insurer." *Id.*, ¶¶ 10, 16 (App. 11, ¶¶ 10, 16). Throughout the history of the industry, the agent's retention for policyholder solicitation has been referred to as a "commission." Senter Dep. at 208-09 (App. 18 at 208-09); Cox Dep. at 32-34, 132 (App. 16 at 32-34, 132). If allowed to negotiate the premium, Andrews would do so in the same way that he currently does for related title services and legal fees–deliver the highest quality services at a fair price. Andrews Aff., 10/22/98, ¶¶ 10, 14 (App. 11, ¶¶ 10, 14).

III. SUMMARY OF ARGUMENT

The challenged statutes prohibit consumers from negotiating a discount or reduction in the portion of the premium received by title insurance agents as a commission. *See* § 1.C., *supra.* These statutes (commonly referred to as "anti-rebate" statutes), were declared facially unconstitutional under Article 1, section 9 of the Florida Constitution by the trial court below on the basis of this Court's decision in *Department of Insurance v. Dade County Consumer Advocate's Office*, 492 So.2d 1032 (Fla. 1986).

In *Dade County,* this Court invalidated similar anti-rebate statutes as violative of due process in light of the absence of any legitimate state interest justifying the continued existence of the anti-rebate statutes. Although *Dade County* did not pertain to title insurance agents, the trial court, finding no discernible difference between title agents and other insurance agents sufficient to render this Court's analysis in *Dade County* inapposite to the instant action, invalidated the anti-rebate statutes pertaining to title insurance agents as an unconstitutional deprivation of the Appellees' property interest in negotiating and contracting for the commission paid for title insurance.

Even though this Court's review is *de novo*, the order should be affirmed based on the lack of any reasonable relationship between the statutes at issue and the furtherance of a valid governmental objective. Contrary to the Appellants' claim, title

insurance is not unique and the commissions paid to title agents should not be entitled to heightened governmental protection under the guise of the State's police power. Such protection is not afforded to performance of related title services or other insurance agents and was not sustainable under *Dade County*. Finally, the statutes fail to achieve the purposes advocated by Appellants.

IV. ARGUMENT

A. ISSUING A TITLE INSURANCE POLICY IS NOT UNIQUE AND DOES NOT WARRANT PAYMENT OF GUARANTEED PROFIT TO A TITLE AGENT.

1. Nature of Title Insurance.

In an effort to escape the outcome required by *Dade County*, Appellants contend that title insurance is unique because title agents perform a title search and examination. Appellants' Initial Brief at 7. While a title search and examination must be performed before issuing a policy, they are not functions of insurance. § 627.7845, Fla. Stat. (1997). Rather, title insurance is just like other forms of insurance–it seeks to protect against covered risks and distributes the risks among a pool of policyholders. Like other types of insurance, premiums charged in title insurance are determined based upon a review of historical losses and projected future losses. Cox Dep. at 16-18 (App. 16 at 16-18). Similarly, as in other lines of insurance, title insurers and other insurers employ agents to issue policies in accordance with established underwriting criteria. In short, title

insurance performs the same function as other types of insurance, albeit for a different risk.

a. Title Search and Examination are Not Title Insurance.

Appellants intentionally combine performing a title search and examination with issuing a title insurance policy. This confuses the analysis. They are separate activities and serve different purposes. A title search and examination includes a review of the public record (and other available documents) for any identifiable defects or encumbrances on a property's title. Gay Aff., ¶¶ 11-13 (R VII, 1209-11). Based on the results of the examination, an insurer, or an agent following an insurer's guidelines, either remedies the defects or excepts them from coverage, thus reducing the insurer's risk under the policy. Andrews Supp. Aff., 11/9/98, ¶ 5, 7 (App. 15, ¶¶ 5, 7). Just as a health or life insurer may require a physical examination by a skilled physician in order to limit its risk, a title examination performs the same role.[3] However, neither examination is insurance.

Title insurance is insurance. Insurance is "a contract whereby one undertakes to indemnify another or pay or allow a specified amount or a determinable benefit upon

[3] Appellants make much ado about loss minimization and elimination. Loss minimization and elimination are goals of all insurers. For example, health insurers seek to minimize losses by requiring extensive physical examinations. Although title insurers are able to eliminate most of the risks to title by either curing the defect or excepting it from coverage, risks still exist. Otherwise, the title policy would be unnecessary.

determinable contingencies." § 624.02, Fla. Stat. (1997). Admittedly, each type of insurance is unique in the risk that it covers, for example: life insurance insures against loss due to death; health insurance insures against expense due to illness; fire insurance insures against loss due to fire; property insurance insures against loss due to property damage; and title insurance insures against loss due to title defects. Despite these inherent and obvious differences, the purpose of any insurance, including a title policy, is to protect the policyholder from the financial impact of an unknown loss which may surface during the term of the policy. *See* JOYCE D. PALOMAR, TITLE INSURANCE LAW § 1.03[3] at 1-18 (1996). Like liability, casualty and property insurance, title insurance achieves this goal by relying upon principles of risk assumption and distribution. *See id.*, § 1.03[4] at 1-16; McCarty Dep. at 100-01 (App. 17 at 100-01).

Specifically, title insurance insures against losses arising from the discovery of unknown or undiscovered liens, encumbrances, grounds for invalidity, adverse claims and other defects in title during the policy period. § 624.608, Fla. Stat. (1997). A title search and examination or evaluation can only identify these potential title defects. They can be insured against, remedied or excepted. Andrews Aff., 11/9/98, ¶ 7 (App. 15, ¶ 7). Curing and excepting defects are not insuring against an unknown loss, they merely minimize risk.

Countless defects or circumstances, undiscoverable through even the most skilled and thorough title search and examination of the record, may create a claim against a title.[4] Furthermore, in some instances a title policy will cover the risk of events occurring subsequent to issuance of the policy.[5] The risk created by these unknown and undiscovered defects is precisely the reason title insurance is necessary:

> [T]here is a casualty element to all title insurance. Title insurance routinely insures against many encumbrances and defects that cannot be uncovered in a standard search of the real property records. Title insurance also covers on a casualty basis losses from defects that are discoverable, but are not found in the title examination because of human error or an incorrect interpretation of a legal instrument or proceeding. It is, in fact, title insurance's offer to cover these types of defects on a casualty basis that has caused many

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[4] Numerous title defects may exist that a search of the public record would not disclose, for example: fraud, forgery or duress in the execution of instruments affecting title; false impersonations of the owner; deeds appearing to convey title that are actually mortgages; execution by a minor or an incompetent; heirs not disclosed in the public record; wills not discovered at the time of owner's death; improper notice of judicial proceedings to those with interests in the property; executed but undelivered deeds; deeds delivered under invalid powers of attorney; undisclosed marriages that result in marital property claims; misindexing or misfiling of a document in the record; adverse possession claim that ripens in the future; encroachments by neighbors, etc. *See* PALOMAR, *supra* § 1.05 at 1-30; D. BARLOW BURKE, JR., LAW OF TITLE INSURANCE § 2.1.2 at 2:9-2:10 (2d ed. 1993).

[5] *See* 9 APPLEMAN, INSURANCE LAW AND PRACTICE § 5209 at 17 (Supp. 1999); *American Sav. & Loan Ass'n v. Lawyers Title Ins. Corp*., 793 F.2d 780 (6th Cir. 1986) (applying Tennessee law to hold that title policy covered mechanic's lien that arose subsequent to the issuance of the policy).

> purchasers and mortgagees to opt for title insurance over the title examination of an abstractor and attorney.

See PALOMAR, *supra* § 1.03[4] at 1-24 and 25 (recognizing that most jurisdictions prohibit issuance of title insurance on a casualty basis, like Florida, *see* § 627.784, Fla. Stat. (1997), but conceding that in reality title insurance includes a casualty element).

Real estate purchasers obtain title insurance to protect not only against "on-record" defects in title which may surface because of a poorly performed title search and examination or evaluation, but also against "off-record" defects not discoverable by even the most thorough and competent search. *See* BURKE, *supra* § 2.1.2 at 2:9. The very purpose of title insurance, like any other insurance, is to protect against these unknown or uncertain future losses.

b. Other Types of Insurers Issue Policies Through Agents Based upon Underwriting Criteria.

Just like other types of insurers, title insurers employ agents in many transactions to issue policies based upon specified underwriting criteria. Like other insurance agents, title agents are authorized to bind insurers by issuing policies. Randol Aff., ¶ 4.a (App. 13, ¶ 4.a); Andrews Supp. Aff., 11/9/98, ¶¶ 4, 5 (App. 15, ¶¶ 4, 5). Title insurers provide specific criteria which reflect insurer underwriting decisions and dictate when policies may be issued. Randol Aff., ¶4.a (App. 13, ¶ 4.a); Andrews Aff., 10/22/98, ¶¶ 10, 11

(App. 11, ¶¶ 10, 11); Andrews Supp. Aff., 11/9/98, ¶ 3 (App. 15, ¶ 3). Likewise, in other lines of insurance insurers routinely authorize their agents to issue binders pursuant to specific insurer underwriting parameters and criteria as provided in their contracts. Bourassa Aff., ¶ 4.b (App. 10, ¶ 4.b).

Once the title search and examination functions are viewed in their proper context as steps to minimize risks, Appellants' attempt to distinguish title insurance fails. Simply put, title insurance resembles other lines of insurance in that it insures against unknown risks and is issued and bound by authorized agents just like insurers in other lines.

Appellants rely on the affidavits of Charles Birmingham and Norwood Gay to describe functions of a title insurance agent which purportedly justify payment of a premium containing a guaranteed profit. However, their affidavits principally describe the related title services which agents perform, but fail to identify them as such. *See* Gay Aff. Gay, ¶ 13 (R VII, 1213-14); Gay Supp. Aff., ¶¶ 3, 6, 7, 8 (R VII, 1223-28); Birmingham Aff., ¶¶ 11, 12 (R II, 381). Appellees do not dispute that agents may perform important activities involving related title services. However, these services are not policy issuance functions and are not compensated by the agent's share of the risk premium.

Further, neither Mr. Gay's nor Mr. Birmingham's description of services fundamentally differs from Mr. Andrews'. For example, Appellants argue that agents

perform "underwriting" functions which they describe as the delegation of authority to "issue title insurance under the insurer's policy forms based upon a skilled evaluation performed by the agent of the state of the record title. . . ." Birmingham Aff., ¶¶ 11 and 13 (R II, 381); Gay Aff., ¶ 13 (R VII, 1213). This is precisely how Mr. Andrews described policy issuance. Andrews Aff., 11/9/98, ¶¶ 5, 6 (App. 15 ¶¶ 5,6). When the testimony is distilled to its essence, it becomes clear that a title agent may perform a skilled examination to determine the status of title and existence of defects. *But,* this is a related title service. An agent may also remedy defects of title, but again, this is a related title service or a legal service. For performing these services, it is undisputed that an agent must be compensated separately and apart from the premium.

2. A Title Agent is Not Necessary In Many Transactions.

A title agent is frequently not even involved in the issuance of a title insurance policy. In many instances, the title insurer itself obtains the title search, performs the examination and issues the policy. Randol Aff., ¶ 5 (App. 13, ¶ 5). In these instances, the insurer charges the policyholder separately for the title search and examination, document preparation and closing as related title services. *Id.*, ¶ 6 (App. 13, ¶ 6). However, the insurer must retain 70% of the premium normally paid to the agent as well as the 30% retention for assumption of the risk. In these circumstances, the insurer views the 70% of the premium as profit. *Id.* Since title agents are often not involved in issuing

a policy, Appellants' argument that their continued existence is critical to the solvency and stability of the industry loses force.

3. The Actual Functions Performed by Title Agents Do Not Differ from Casualty Agents.

When related title services are excluded from consideration, it is apparent that title agents perform the same functions as casualty and other agents do for their share of an insurance premium. These functions include policy issuance, solicitation and premium collection.

Casualty agents solicit potential customers and refer them to insurers. Bourassa Aff., ¶4 (App. 10, ¶ 4). They also participate in the underwriting process by obtaining detailed information from insureds relating to risk management topics including loss experience, nature of the enterprise to be insured and potential risks. *Id.* Like a title agent, a casualty agent often has specific authority from the insurer to issue binders of insurance coverage pursuant to specific contractual parameters addressing the types, amount and conditions related to coverage. *Id.*; Butler Aff., 10/23/98, ¶ 6 (App. 12, ¶ 6); Andrews Supp. Aff., 11/9/98, ¶ 5 (App. 15, ¶ 5). A casualty agent reviews the policy and delivers it to the insured. Bourassa Aff., ¶ 4 (App. 10, ¶ 4). For performing these functions, a casualty agent receives either a management fee or a share of the premium

(typically 20%) paid on the policy, but both are negotiable. *Id.*, ¶ 5 (App. 10, ¶ 5); Cox Dep. at 46 (App. 16 at 46).[6]

Likewise, a title agent who is compensated separately for all related title services and/or legal services, receives the risk premium for soliciting business, preparing the commitment, issuing the policy and collecting the premium. Cox. Dep. at 21-22 (App. 16 at 21-22). Solicitation includes those efforts necessary to attract and obtain title insurance customers including advertising, customer relations and referral of business. Cox Dep. at 32-33 (App. 16 at 32-33); Andrews Aff., 11/9/98, ¶¶ 9, 10, 11 (App. 15, ¶¶ 9, 10, 11). Preparation of a title insurance commitment is essentially a binder as found in other forms of insurance, Cox Dep. at 34, 37 (App. 16 at 34, 37); Bourassa Aff., ¶ 4 (App. 10, ¶ 4), and is generally considered a ministerial function involving the transfer of any exceptions in the title report to commitment schedules. Andrews Aff., 11/9/98, ¶¶ 6, 8, 10, 11 (App. 15, ¶¶ 6, 8, 10, 11); Senter Dep. at 52-53 (App. 18 at 52-53); Randol Aff., ¶ 4 (App. 10, ¶ 4). Issuance of a policy includes collection of the premium, maintenance of records and remittance of the premium to the insurer. Cox Dep. at 35 (App. 16 at 35).

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[6] These functions are not dissimilar to those described by Marshall as discussed in Appellants' Initial Brief. Marshall notes that life insurance agents solicit customers and have limited authority to bind insurers. Marshall Aff., ¶¶ 9, 11, 12, 14 (R VII, 1232-4).

The only real difference between title and casualty agents with regard to their respective share of an insurance premium is that a casualty agents may negotiate their share of the premium.

4. Historical Background of Statutes.

Appellants misstate the history and content of the 1992 amendments. The actual impetus for the 1992 amendments was the need to protect title insurers from agents who were demanding up to 90% of the premium as a commission or referral fee. Senter Dep. at 28 (App. 18 at 28). Appellants also ignore the historical reference to the agent's share of the premium as a "commission" and argue that the Legislature's removal of the term substantively changes what the agent does to receive his share of the premium. The legislative history provides no support for Appellants' arguments.

a. The 1992 Amendments.

Prior to 1992, title insurers and agents negotiated the amount of the risk premium payable to the title agent. Because the agents were the "windows" to most transactions, the portion of premium being paid to agents soared. As Wallace Senter, the Department's Title Insurance Coordinator, noted, prior to 1989, in many instances, agents received 80% to 90% of the premium as payment for referral of business and producing customers. Senter Dep. at 28-30 (App.18 at 28-30). Agents were hired primarily for marketing and production of business. Senter Dep. at 38-39 (App. 18 at 38-39). This

caused concerns as to title insurer solvency. *Id.* at 28 (App. 18 at 28). In 1992, the Legislature responded by amending section 627.782(1), Florida Statutes (1991), to require title insurers retain no less than 30% of the statutory risk premium. *See* Ch. 92-318, § 95 at 3164, Laws of Fla. As expressly found by the Legislature, "[t]his requirement [that insurers retain 30%] which is currently in a department rule, effectively caps the commission that may be paid to a title agent at 70% of risk premium." *See* Staff of Fla. H.R. Comm. on Insurance, SB 170-H (1992) Bill Analysis 7 (final July 8, 1992) (Fla. State Archives) [hereinafter referred to as "Staff Analysis]. (App. 7 at 7). (Emphasis added.)

Contrary to Appellants' characterization of 1992 amendments, the financial losses suffered by title insurers did not result from "the competitive pressures that the market placed on agents." Appellants' Initial Brief at 35. Rather, as explicitly stated in the Staff Analysis, insurers' loss ratios increased due to: (1) the increased reliance on freelance title searchers with higher error rates (a related title service under the current scheme); (2) the real estate slump which increased construction lien filings; and (3) the discovery of hazardous wastes which made titles unmarketable. *See* Staff Analysis at 33 (App. 7 at 33).

The Staff Analysis also noted that insurers operated at a loss during the late 1980s due to their own practice of selling title information "to agents for 60% below the costs

incurred in producing the information." *See* Staff Analysis at 33-34. (App. 7 at 33-34). This was to induce agents to refer business. Senter Dep. at 45-47 (App. 18 at 45-47). The only financial concern regarding agents ever noted by the Legislature was their loss of money caused by their failure to charge the full cost for closing services. *See* Staff Analysis at 34 (App. 7 at 34). Subsequently, the Legislature addressed both these concerns by creating related title services. Ch. 92-318, § 88 at 3161, Laws of Fla. In turn, the Department promulgated a rule which required all entities to charge at least cost for title information and closings. Fla. Admin. Code R. 4-186.003(13)(a).

In 1992, the Legislature also charged the Department with considering various factors in "adopting premium rates" Ch. 92-318, § 95 at 3165, Laws of Fla.; § 627.782(2), Fla. Stat. (1997). One of the rating factors added by the 1992 amendments requires the Department to take into account "[a] reasonable margin for underwriting profit and contingencies, including contingent liability under s. 627.7865, sufficient to allow insurers and agents to earn a rate of return on their capital that will attract and retain adequate capital investment in the title insurance business." § 627.782(2)(b), Fla. Stat. (1997) (emphasis added). As discussed more fully below, this reference can only relate to agents' capital and return on capital in the context of related title services because title insurance agents do not maintain capital or surplus in order to provide for payment of

insured claims on policies which they issue. § 627.778(2), Fla. Stat. (1997); Senter Dep. at 64-65, 151 (App.18 at 64-65); Cox Dep. at 91-98 (App. 16 at 91-98).

b. Historical Use of "Commission."

Historically, a portion of the title insurance premium paid to the title agent has always been considered a "sales commission" for soliciting and referring policyholders to insurers. In *Merritt v. Williams*, the Department interpreted section 627.0956, Fla. Stat. (1965), (now codified as section 627.782), to encompass the commissions or acquisition costs paid to title agents. *See* Petition to Intervene in *Merritt v. Williams*, Case No. 67-268 (Fla. 2d Cir. Ct. April 4, 1967) (App. 19). Certain insurers (including some who are parties in this action) contended that the commission paid to an agent was not an incidental charge with respect to title policies, "but [was] paid and collected partially as a commission for the placing of such policy, partially for administrative expenses of the insurer in preparing and transmitting binders, policies and premiums, and partially for the investigation and handling of risks and claims and for the payment of several other factors. . . ." (App. 19 at 3).

Twenty-five years later, the term "commission" is still being used as evidenced by the Legislature's reference to the 1992 Staff Analysis to a title agent's share of the premium as a "commission." There, it was stated expressly found that requiring insurers to retain at least 30% of the premium " effectively caps the commission that may be paid

to a title agent at 70% of risk premium." Staff Analysis at 7 (App. 7 at 7) (emphasis added). Numerous witnesses below testified that the agent's share of the premium is a commission. Andrews Aff., 10/22/98, ¶¶ 8, 9, 10 (App. 11, ¶¶ 8,9, 10); Cox Dep. at 33-34 (App. 16 at 33-34); Senter Dep. at 208-09 (App. 18 at 208-09). Even the trial court found that an agent's share of the risk premium is a commission. (R VIII, 1421, ¶1) (App. 2, ¶ 1).

Notwithstanding that the weight of history is against them, in an attempt to distinguish *Dade County*, Appellants now argue that the title agent does not receive a "commission." Appellants' Initial Brief at 39-41. Irrespective of whether this Court calls the portion retained by the title agent a commission or compensation for policy issuance, it is a distinction without a difference. The trial court was presented with no testimony to indicate that solicitation and marketing are no longer occurring in the title insurance industry, and no evidence was offered to even suggest that agents who were receiving up to 90% of the premium as a solicitation or referral fee prior to 1992, now receive no portion of the premium for the same functions.

B. THE STANDARD FOR CONSTITUTIONAL CHALLENGES TO REGULATIONS ENACTED PURSUANT TO THE POLICE POWER OF THE STATE.

As the parties bringing this challenge based on article I, sections 2 and 9 of the Florida Constitution, Appellees have the burden to show that the statutory provisions that

protect the "financial well-being" of title agents by prohibiting the negotiation of a title agent's share of the risk premium bear no reasonable relationship to any legitimate state interest in safeguarding the public health, safety or general welfare. *Dade County*, 492 So. 2d at 1034. As evidenced by the trial court's decision and the numerous opinions of this Court declaring economic regulation unconstitutional, this is not an insurmountable task. Where the statutes under attack amount to economic regulation that advances the financial well-being of a private interest at the expense of the public or another group, this Court has repeatedly struck down the statutes as an invalid exercise of the state's police power.

This Court, as did the trial court, must review the legislation to ensure there is a "reasonable relationship between the act and the furtherance of a valid governmental objective." *Lane v. Chiles*, 698 So. 2d 260, 262 (Fla. 1997) (quoting and approving the trial court's rational basis analysis). The proper standard was set by this Court in *Dade County*:

> In considering the validity of a legislative enactment, this Court may overturn an act on due process grounds only when it is clear that it is not in any way designed to promote the people's health, safety or welfare, or that the statute has no reasonable relationship to the statute's avowed purpose.

492 So. 2d at 1034. Although, the wisdom of legislation is typically considered within the realm of the Legislature, a court must override the Legislature's enactment where

there is a violation of due process or a specific constitutional guarantee. *See Trianon Park Condominium Ass'n, Inc. v. City of Hialeah*, 468 So. 2d 912, 918 (Fla. 1985); *Askew v. Schuster*, 331 So. 2d 297, 300 (Fla. 1976).

Particularly where the challenged legislation addresses competing economic interests, as here, this Court has always "carefully reviewed laws that curtail the economic bargaining power of the public." *Dade County*, 492 So. 2d at 1034 (emphasis added). If the statutes attempt to curtail the economic bargaining power of the public or encroach on private rights, they must be supported by some "reasonable justification." *Stadnik v. Shell's City, Inc.*, 140 So. 2d 871, 875 (Fla. 1962) (striking down an administrative rule that prohibited pharmacies from advertising); *Larson v. Lesser*, 106 So. 2d 188, 192 (Fla. 1958) (failing to find any reasonable basis for a statute that prohibited the appellee from engaging in a lawful business). Because the statutory provisions under attack essentially protect the financial well-being of title agents by prohibiting the public's economic bargaining power, there must be: (a) a legitimate purpose served by the prohibiting the public from negotiating any portion of the premium allocated to title agents, and (b) the statutes must reasonably achieve that purpose.

Based on the above standard and the requisite careful review, this challenge should be analyzed by determining whether the statutory scheme which prohibits the negotiation of a title agent's portion of the risk premium falls within the scope of the State's police

power. It is well established that where "the advantage sought is personal as distinguished from the general public then the police power may not be invoked." *Liquor Store v. Continental Distilling Corp.*, 40 So. 2d 371, 374 (Fla. 1949) (emphasis in original). As this Court explained in *Liquor Store*:

> The police power has been wisely restricted to those things which of necessity affect the public morals, public health or public safety. When a statute is brought into question resting upon the police power the courts have the power and duty to inquire whether it is within constitutional limits. To be valid it must apply to the general public as distinguished from a particular group or class. The idea of general welfare should banish the thought that the state may subordinate the right of one group of citizens to advance the welfare of another. (Emphasis added.) The legislature is the judge of the wisdom of the regulation but the court may say whether the act is within constitutional limits. It is particularly a judicial question whether the legislative act is for a private or public purpose. The right to own, hold and enjoy property is nearly absolute. The statute cannot be the means of leveling unequal fortunes, neither can it favor one segment of the people at the expense of another. (Emphasis added.) These principles are fundamental. If the stronger and more influential may impose their wills upon minorities where the general welfare does not require such legislation then the weaker and less fortunate will soon be vanquished. Constitutional law never sanctions the granting of sovereign power to one group of citizens to be exercised against another unless the general welfare is served. (Emphasis in original.)

Id. (citations omitted). Furthermore, "[t]he employment of the police power will not be upheld when its exercise imposes an unreasonable restriction on private business on the pretense of promoting the community interest." *Eskind v. City of Vero Beach*, 159 So. 2d 209, 212 (Fla. 1963).

In this case, the proper inquiry is whether prohibiting title insurance agents from negotiating a reduction, discount, abatement or rebate of any portion of the premium they receive in exchange for procuring the customer serves any public purpose. Appellants contend that no agent should be allowed to negotiate with a consumer such as Mr. Butler because it would lead to competition which would result in price reductions and thus poor quality services and increased claims. Appellants further contend argue that title insurance agents should be assured of their financial well-being by guaranteeing them an unknown level of profit at the expense of consumers like Mr. Butler.[7] However, because this is a classic example of legislation invoked for purely private purposes as opposed to a public purpose, it is unconstitutional as an invalid use of the state's police power under well-established precedent. *See, e.g.*, *Dade County*, 492 So. 2d 1032; *Horsemen's Benevolent and Protective Ass'n v. Division of Pari-Mutuel Wagering*, 397 So. 2d 692 (Fla. 1981) (statute requiring payment of money to a private association constitutes an unlawful exercise of the police power); *Moore v. Thompson*, 126 So. 2d 543 (Fla. 1960) (prohibition on sales of automobiles on Sunday invalid exercise of police power where law operates only on certain class of business and does not serve general welfare);

[7] The level of profit is unknown because neither agents nor attorneys can be compelled to provide information regarding their receipt of premium or operational expenses or losses. *Keys Title and Abstract Co., Inc. v. Department of Ins.*, Case No. 96-4497 (Fla. 2d Cir. Ct. June 4, 1998).

Larson, 106 So. 2d 188 (Fla. 1958) (statute prohibiting public adjustor from soliciting business while not prohibiting other adjustors from doing same is invalid exercise of police power); *Miles Labs., Inc. v. Eckerd*, 73 So. 2d 680 (Fla. 1954) (non-signer clause of Fair Trade Act is unconstitutional and void as invalid use of police power for private, not public, purpose); *Liquor Store*, 40 So. 2d 371 (Fla. 1949) (statute providing advantage to certain class where advantage furthers personal as opposed to public purpose constitutes invalid exercise of police power). As held in *Dade County* with respect to life insurance agents, legislation preserving a private profit to a title insurance agent serves no identifiable public interest.

In analyzing the purported explanations for the challenged statutory scheme, the Court must consider whether the arguments or explanations advanced provide "reasonable justification" for prohibiting Mr. Butler's and agents' from negotiating a reduction, discount, abatement or rebate of the title agent's share of the premium. *See Stadnik* 140 So. 2d at 875. The Court must consider whether this statutory scheme benefits Appellees and the public or whether it simply protects the financial well-being of title insurance agents, a purely private interest. *See Liquor Store*, 40 So. 2d at 374. Finally, the Court must consider whether the statutory scheme advanced by Appellants actually achieves the avowed purpose. *See Dade County*, 492 So. 2d at 1034. Appellees submit that the challenged statutory scheme fails each of these considerations.

C. THE STATUTORY SCHEME IS NOT RELATED TO ANY LEGITIMATE STATE INTEREST.

In its well-reasoned opinion, the First District Court of Appeal concluded and this Court affirmed that commissions earned by insurance agents for soliciting business or other incidental services in connection with the sale of the insurance policies are not subject to protection under the State's police powers. *See Dade County Consumer Advocate's Office v. Department of Ins.*, 457 So. 2d 495, 497 (Fla. 1st DCA 1984), *aff'd* 492 So. 2d 1032 (Fla. 1986) [hereinafter *Dade County I*]. The circumstances before this Court compel the same result.

1. The Statutes Do Not Recognize the Financial Well-being of Title Agents as a Legitimate Public Interest.

The overriding purpose behind the title insurance statutes (indeed all insurance statutes) is to assure the ability of insurers to pay insureds' claims as they arise. Section 624.22, Florida Statutes (1997), describes that the purpose of the chapter is "to protect the interests of insureds, claimants, . . . assuming insurers and the public." Under the title insurance statutes, many provisions exist to protect the payment of insureds' loss claims by insurers. *See* § 627.778, Fla. Stat. (1997) (relating to surplus requirements); § 627.7865, Fla. Stat. (1997) (regarding assessments to guaranty associations to insure payment of losses of insolvent insurers); § 624.407, .408, Fla. Stat. (1997) (regarding premium reserves). No similar requirements are imposed on agents.

Section 627.031, Florida Statutes (1997), describes the broad purposes of the regulation of insurance:

> (1) The purposes of this part are:
>
> (a) To promote the public welfare by regulating insurance rates as herein provided to the end that they shall not be excessive, inadequate, or unfairly discriminatory;
>
> (b) To encourage independent action by, and reasonable price competition among, insurers;[8]
>
> * * *
>
> (2) It is the purpose of this part to protect policyholders and the public against the adverse effects of excessive, inadequate, or unfairly discriminatory insurance rates, . . . (Emphasis added.)

Once again, the objective of preserving the financial well-being of agents is noticeably absent. While title insurance agents are required to be licensed, *see* § 626.8418, Fla. Stat. (1997), as are other insurance agents and professionals, this hardly demonstrates a public purpose in maintaining their financial well-being.[9]

2. No Legitimate State Interest Exists in Connection with Maintaining Agent Capital or a Return on Capital.

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[8] It is worth noting that the anti-competitive price maintenance of the risk premium mandated by statute is directly contrary to this avowed purpose.

[9] Attorneys, although authorized to issue policies and to receive the insurance premium, are exempted from licensure and all regulation by the Department. *See* § 626.8417(4)(a), Fla. Stat(1997).

Appellants point to section 627.782(2)(b),Florida Statutes (1997), as evincing an intent to assure agents a profit. Presumably, the public interest is to assure capital and investment in the title insurance business.

Section 627.782(2)(b), Florida Statutes (1997), states that the Department must give due consideration to "[a] reasonable margin for underwriting profit and contingency . . . sufficient to allow insurers and agents to earn a rate of return on their capital that will attract and retain adequate capital investment in the title insurance business." Ironically though, the statutes do not require agents to maintain any capital. While insurers are required to maintain statutory surplus capital premium reserves to pay policyholder claims, agents are not. § 627.778(2), Fla. Stat. (1997); Cox Dep. at 91-98 (App. 16 at 91-98); Senter Dep. at 64-65 (App. 18 at 64-65). Statutory capital, surplus requirements and premium reserves achieve an important public purpose by establishing minimum levels of capitalization which ensure insurer solvency to respond to claims. Cox Dep. at 98 (App. 16 at 98). In fact, insurers may not issue policies unless they comply with statutory requirements regarding surplus and premium reserves. *See* § 627.778(1), (2), Fla. Stat. (1997).

Unlike insurers, title insurance agents are not required to maintain any level of capital, surplus or premium reserves. Cox Dep. at 98 (App. 16 at 98); Andrews Aff.,

10/22/98 ¶ 15 (App. 11, ¶ 15). It is undisputed that agents are not required to maintain reserves to pay claims to policyholders. Cox Dep. at 94 (App. 16 at 94); Senter Dep. at 65 (App. 18 at 65); Andrews Aff., 10/22/98, ¶ 15 (App. 11, ¶ 15). Moreover, the Department does not obtain or maintain information from agents as to capital maintained by title insurance agents or as to an agent's reasonable return on capital for the simple reason that agents do not maintain surplus or capital. Senter Dep. at 64-65 (App. 18 at 64-65); Andrews Aff., 10/22/98, ¶ 15 (App. 11, ¶ 15).[10] Since agents do not maintain capital or surplus to pay policyholder claims, no public purpose is served.

In the context of title agents, "capital" can thus only refer to routine business assets maintained by all businesses. Most agents have no assets which are related to title insurance. Cox Dep. at 96-98 (App. 16 at 96-98); Andrews Aff., 10/22/98, ¶ 15 (App. 11, ¶ 15). Most agents, who are lawyers, do not maintain assets separate and apart from their law practice which could be considered an asset of the title insurance business. Cox Dep. at 96 (App. 16 at 96); Andrews Aff., 10/22/98, ¶ 15 (App. 11, ¶ 15). The only

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[10] The Department acknowledges that it has no information as to the existence of capital for a title insurance agent nor does it have any means of acquiring it. This is because, as Mr. Senter observes, title agents are not required to maintain surplus, thus, it would be impossible to obtain that type of information. Senter Dep. at 65 (App. 18 at 65). Furthermore, the Department has no practical way to obtain this information because most agents are lawyers who are not subject to Department reporting requirements. *Id.* at 23 (App. 18 at 23). Additionally, non-lawyer agents recently won a constitutional challenge holding that they cannot be required to submit this information because lawyer/agents are exempt. *See Keys Title*, *supra* note 7.

conceivable asset which could be considered related to title insurance is a title plant or production service. Cox Dep. at 95 (App. 16 at 95). However, a title plant which performs search and examination services performs a related title service, and therefore, the premium cannot be used to assure a return on capital.

Given these facts, the only conceivable meaning which can be attributed to "agent capital and return on capital" is in connection with related title services. Pursuant to section 627.782(2), (7), Fla. Stat., the Department is authorized to adopt a rate for related title services. In establishing such a rate, the Department could review operating expenses which would include automobiles, office equipment, buildings, etc. These items could be considered as capital items in the agent's business, but again, they are no different than for any other insurance agent, and since they pertain to "related title services," could not serve as a rational basis for prohibiting the negotiation of the agent's commission.

3. The Premium Paid to Agents Does Not Affect Insurer Solvency or Maintain Insurer Stability.

Appellants also argue that preserving agent commissions guarantees insurer stability and solvency. In *Dade County I*, the district court specifically rejected this argument holding that no relationship whatsoever exists between "an agent's freedom to rebate a portion of the agent's commission earned on the sale of a policy and the future solvency of the policy carrier." 457 So. 2d at 497 (footnote omitted). On review, this

Court affirmed holding that preserving a private profit to an insurance agent serves no identifiable public interest. *Dade County*, 492 So. 2d at 1035. The same reasoning applies here because the premium received by title agents bears no relationship to the solvency or stability of title insurers.

In the first place, the insurer need not even use a title agent in issuing a title insurance policy. Accordingly, in these transactions, the financial well-being of an agent is not related to insurer solvency. More importantly, the Department and its actuarial consultant established unequivocally that the portion of the risk premium paid to an agent has no impact on insurer solvency. Senter Dep. at 117-18 (App. 18 at 117-18). In fact, the Department concluded that the insurer's retention of 30% of the risk premium is sufficient to cover all past and prospective losses and expenses including errors of agents[11] and defalcations. McCarty Dep. at 108-10 (App. 17 at 108-10); Cox Dep. at 77 (App. 16 at 77). Finally, to the extent that insurer solvency is the objective, the 1992 Legislature adequately addressed this concern by amending section 627.782(1) to require insurers to retain at least 30% of the risk premium.[12]

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[11] Most agent errors occur in the title search and examination and closing functions which are not compensated by the statutory premium. Cox Dep. at 51 (App. 16 at 51).

[12] Significantly, Appellees did not challenge the portion of section 627.782 which allows a 30% retention by the insurers.

Appellants have yet to cogently explained how statutorily guaranteeing the financial well-being may be an agent "stabilizes" the industry. The only argument advanced is that if an agent's profit is guaranteed by law, the agent will render higher quality services and less claims will result. Besides the fact that the district court flatly rejected this "low cost, low quality service" argument, *see Dade County I*, 457 So. 2d at 497-98, economic theory and logic suggest that guaranteeing financial well-being is destabilizing because it rewards inefficiency, laziness and poor performance equally with efficiency, hard work and superior performance. Indeed, guaranteeing an agent or attorney who may know nothing about title search and examinations, property transactions or title insurance, but who could produce a big premium policyholder would appear to be encouraged by the existing scheme. Certainly, such a situation could lead to increased claims. Therefore, no relationship, much less a rational one, exists between insurer solvency and stability and the statutory guarantee of a title agent's share of the premium.

4. Protecting the Financial Well-Being or Solvency of Agents is Not a Legitimate Public Interest.

Guaranteeing the financial well-being of title agents and lawyers who issue title insurance policies benefits only those individuals and does not further a valid public purpose. It is unconstitutional for the State to exercise its police powers to enact legislation that furthers a purely private purpose as opposed to any public purpose. *See*

Liquor Store, 40 So. 2d at 374. Indeed, in most cases where the legislature has attempted to use its police power to further the interests of a private group over the welfare of the general public, the courts have invalidated those legislative efforts as an unconstitutional exercise of the police power. *See Miles Labs.*, 73 So. 2d 680, and the cases cited *supra* at 27.

As early as 1936, this Court struck down legislation which sought to ensure a private profit. In *State ex rel. Fulton*, 167 So. 394, 123 Fla. 401 (Fla. 1936), this Court invalidated a statute which vested authority in the State Board of Barber Examiners to promulgate price fixing orders to ensure that barbers "receive [a] fair return for their work" and which provided a "sufficient income to properly maintain and nourish [their] famil[ies]." 167 So. at 397, 123 Fla. at 408. Significantly, the Court found no support, directly or indirectly, for the exercise of the state's police power to ensure the prosperity of the barber class.

Appellants gloss over the rationale for guaranteeing title agents a profit as if it were self-evident. It is not. If the purported logic is that title agents will not remain in business unless guaranteed a profit, it is contradicted by the fact that agents continue to perform related title services, the "critical actions," without the guarantee of a profit. Rather, title agents are free to compete and negotiate a price with the policyholders.

Additionally, if agents are not even necessary to issue a policy, it is hard to understand how guaranteeing them a profit to stay in business serves a legitimate public purpose.

The most frequent argument raised by Appellants is that if agents are not guaranteed a profit, they will cut corners and do a sloppy job in performing a title examination and closing transactions. Gay Aff., ¶¶ 20, 21 (R VII, 1215, 1216); Birmingham Aff., ¶ 12 (R II, 381). Presumably, this will result in higher claims and losses to insurers. This argument fails for the simple reason that title agents are compensated for these services separately as related title services. Thus, there is no connection between guaranteeing them a profit in the premium and the quality of the related title service performed.

Moreover, as the Court in *Dade County I* noted, there is no causal connection between guaranteeing a profit and quality of service. 457 So. 2d at 497-98. No other industry or profession employs such a scheme. If guaranteed profit were directly linked to quality, it would surely be applied to such critical tasks as those performed by physicians, surgeons and hospitals, as well as other industries affected with the public interest. However, society relies upon mechanisms such as licensure, competition and standards of practice to maintain quality, not guaranteed profits.

As previously discussed, the functions and services provided by title insurance agents fall into two categories. The first category is related title services which, as noted

elsewhere, must be charged for separately from the risk premium.[13] § 627.7711(2), Fla. Stat. (1997); Fla. Admin. Code R. 4-186.003(13)(b). Agents may compete as to the amount which they charge for related title services earning whatever level of profit they determine appropriate.[14] Senter Dep. at 81, 301 (App. 18 at 81, 301); Cox Dep. at 80-81 (App. 16 at 80-81). Thus, the agent receives its portion of the insurance premium for performing solicitation of business and issuing the policy. Cox Dep. at 32-33 (App. 16 at 32-33).

Under the statutory scheme invalidated below, an agent may not negotiate any portion of the premium received for these services. As this Court concluded in *Dade County*, payment for an insurance agent's solicitation functions serves no public interest whatsoever. *See Dade County*, 492 So. 2d at 1035. Moreover, paying a title insurance agent for the tasks of issuing the commitment, preparing the policy, delivery of the policy

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[13] The fact that related title services, which include the so-called "critical functions" of title search and examination, are freely negotiable under the current scheme completely contradicts Appellants' arguments. Agents are free to compete in the marketplace on these "critical functions," yet no crisis exists regarding insurer or agent solvency, claims are not rampant, and loss ratios are not skyrocketing.

[14] The Department is aware of the fact that some agents utilize the risk premium received to subsidize related title services. Senter Dep. at 182 (App. 18 at 182); Cox Dep. at 106-07 (App.16 at 106-07). Although this is unlawful, the Department states that it is powerless to prevent it. Senter Dep. at 183-86 (App. 18 at 183-86). The Department acknowledges that if it could prevent subsidization, the risk premium could be reduced because of competition and efficiency of operations, thus reducing cost. Senter Dep. at 188 (App. 18 at 188).

and collecting the premium are essentially ministerial tasks no different than those performed by other agents. Bourassa Aff., ¶ 4 (App. 10, ¶ 4). Perhaps the clearest evidence of why issuance functions performed by a title agent are not critical and do not warrant a guaranteed profit is the simple fact that many title insurance transactions do not involve or require an agent. In many instances, the insurer issues the policy directly to the consumer. Randol Aff., ¶ 5 (App. 13, ¶ 5). In addition, as with solicitation and marketing, a title agent's performance of policy issuance functions are not unique activities and do not warrant a guaranteed profit. They do not reduce insurer risk or promote insurer solvency. Thus, they do not promote a public purpose and cannot validate the statutory scheme under attack.

D. THE STATUTORY SCHEME DOES NOT ACHIEVE THE PUBLIC INTEREST ASSERTED BY THE APPELLANTS.

The most compelling reason for finding that the statutory scheme is an invalid exercise of the State's police powers is that it does not achieve the purported public interests. In *Horsemen's Benevolent and Protective Ass'n v. Division of Pari-Mutuel Wagering*, 397 So. 2d 692 (Fla. 1981), this Court invalidated a statute which required licensed horse racetracks to deduct one percent (1%) of the total purse pool paid to thoroughbred owners for the purpose of paying a horsemen's association consisting of owners and trainers of thoroughbred horses stabled in Florida for a continuous twelve-

month period. *See id.* at 695. The asserted justifiable purpose of the statute was the enhancement of racing and tourist industries in Florida by encouraging the development in Florida of a year-round quality racing program which would enhance state revenues thereby benefitting the public generally. *See id.*

Although the Court found this justification to be a constitutionally permissible objective, the Court declared the statute invalid as an unlawful exercise of the state's police power because the statute effectively required the payment of money to a private association to do with it as it chose. *See id.* Significantly, the statutes placed no standards on the association to ensure that the funds would be spent in furtherance of the legitimate state interest and the association could use the money for purely private purposes. *See id.*

In the case at bar, unlike the Division in the *Horsemen's Benevolent* case, there has been no showing by the Appellants or the Department as to how the public benefits from a statutory scheme that ensures the financial well-being of title insurance agents and attorneys. Assuming arguendo, however, that the public did somehow benefit from the state's decision to ensure a flow of profits to title insurance agents, the statutory scheme still must fail because like the statute at issue in *Horsemen's Benevolent*, there are no statutory provisions which require title insurance agents or attorneys to preserve any portion of the commissions they receive to ensure their own solvency, much less insurer

solvency or industry stability. Simply stated, agents can (and do) spend title insurance premiums any way they want to. They are not required to utilize the premium they are paid to maintain capital or surplus, premium reserves, contribute to assessment funds or apply their profits in other ways to accomplish any legitimate public purpose, much less those advanced by Appellants. Consequently, the statutory scheme does not pass constitutional muster under the standard imposed by this Court in *Horsemen's Benevolent.*

This is far different than the treatment of insurers upon whom significant requirements are imposed, including a minimum level of capital surplus; maintaining premium reserves to assure payment of policyholder claims; payment of assessments to corporate policyholders if an insurer becomes insolvent; and reporting requirements for loss experience or business expense. *See* discussion, *supra* at 31. Significantly, not a single statutory provision requires that an agent or lawyer direct any portion of his share of the risk premium to these items all of which are designed to protect the public interest.[15]

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[15] Although agents may suggest that provisions which require that they deposit with the Department securities or a surety bond, *see* § 626.8418(2), Fla. Stat. (1997), obtain a fidelity bond and purchase errors and omission insurance, *see* § 626.8419, Fla. Stat. (1997), are designed to protect the public, they do not achieve that purpose. First, none of these provisions apply to lawyers who compromise the majority of agents in Florida. Additionally, these provisions are intended to fulfill responsibilities the agent (continued...)

Finally, even if it were constitutionally permissible to guarantee a profit for title insurance agents, the statutes do not further the state's interest in fostering the attraction of "capital to the industry," because as in the *Horsemen's Benevolent* case there are no statutory provisions which require agents to utilize any portion of the premium that they receive in the furtherance of "attracting capital to the industry."

Consequently, like the association in *Horsemen's Benevolent*, title insurance agents are free to use the portion of the premium they receive in any way they choose. In fact, they use it for a variety of purposes, including soliciting customers through marketing and advertising. Senter Dep. at 74-75, 298-99 (App. 18 at 74-75, 298-99); Cox Dep. at 32-33 (App. 16 at 32-33). Therefore, under *Horsemen's Benevolent*, the statutory scheme must fail as an invalid exercise of police power given the complete lack of standards that assure the furtherance of the purported public interest of agent solvency.

E. THE 1999 LEGISLATION DOES NOT CHANGE THE SCHEME.

1. New Statutory Definition of "Primary Title Services" Does Not Resolve Constitutional Infirmities.

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[15](...continued)
owes the insurer, not members of the public. *See, e.g.*, § 626.8418(2), Fla. Stat. (1997) (allowing agents to post a surety bond to a damaged *insurer*). More importantly, nothing requires that the agent utilize any portion of the risk premium to obtain these coverages. In fact, fidelity and surety bonds relate to closing and escrow functions which are related title services. Likewise, errors and omissions coverage primarily relate to performing title searches and examinations, again a related title service.

In an attempt to justify the statutory scheme which the trial court invalidated, Appellants, argue that a new term defined by the Legislature, "primary title services," clarifies the issue. "Primary title services" is defined as:

> [D]etermining insurability in accordance with sound underwriting practices based upon a reasonable search and examination of title, determination and clearance of underwriting objections and requirements to eliminate risk and issuance of a title insurance commitment . . . and preparation and issuance of the policy.

Ch. 99-286, § 6 at 7, Laws of Fla. However, this definition does not change what title agents have always done. Furthermore, the trial court considered these precise activities in rendering its judgment.[16]

The statute creates nothing new. Section 627.7845(1), Florida Statutes,[17] has long provided:

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[16] Appellants cite to the preamble in the new legislation "that the determination of insurability of title to real property . . . is essential to maintenance of the solvency and soundness of title insurers." Ch. 99-286, Preamble, Laws of Fla. According to Appellants, this preamble evinces a legitimate public interest in a guaranteed profit for title agents performing "insurability" determinations. Because the concept of determining insurability has long been a part of the title insurance code and was considered and rejected by the trial court below, the 1999 amendments do not alter the unconstitutional scheme.

[17] The 1999 amendments to this section are technical and not substantive. *See* Ch. 99-218, § 18 at 14, Laws of Fla.

> A title insurer may not issue a title insurance binder, commitment, . . .policy, . . . until the title insurer has caused to be conducted a reasonable search and examination of the title and of such other information as may be necessary, and has caused to be made a determination of insurability of title, including endorsement coverages, in accordance with sound underwriting practices.

(Emphasis added.) Additionally, the definition of title insurance agency has long codified the activity of agents in "determining insurability in accordance with underwriting rules and standards proscribed by title insurers. . . ." § 626.841(2), Fla. Stat. (1997). To the extent "insurability" refers to performance of the title search and examination, related title services, it describes no new activity. Thus, the 1999 amendments did not create new or different functions of a title insurance agent.

Prior to the 1999 amendments, the trial court considered the testimony and evidence presented to demonstrate that determining insurability is based upon use of sound underwriting rules of the insurer. Mr. Andrews described the process in which agents issue a policy:

> . . . title agents are given specific directions by the Fund as to when a policy may be issued and how exceptions are to be determined. It is therefore the underwriter that makes the underwriting decision . . .
>
> * * *
>
> First, whether a policy is to be issued is based upon the search and examination and approval of the insurer . . . Determination of exclusions, the status of title and remedy of apparent defects . . . are either related title services . . . or legal services.

Andrews Supp. Aff., 11/9/98, ¶¶ 5, 7 (App. 15, ¶¶ 5, 7). The Appellants likewise submitted several affidavits describing this process. Birmingham Aff., ¶¶ 11, 13 (R II, 381); Gay Aff., ¶ 13 (R VII, 1213). Because a determination of insurability has long been performed by agents and the trial court considered this fact in reaching its conclusions. (R VIII, 1393-99) (App. 1), the 1999 amendments did not in any way alter the scheme.

The inclusion of "primary title services" actually serves a different purpose. The 1999 amendments refer to "primary title services" in only one context. The amendments require that primary title services be performed in a residential real estate transaction subject to the Real Estate Practices Settlement Act ("RESPA") in order for an agent to be entitled to any portion of the premium. Ch. 99-286, ¶ 11 at 9, Laws of Fla.[18]

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[18] According to the United States Department of Housing and Urban Development ("HUD"), some title insurers in Florida provided their agents with pro forma title commitments which included all of the information contained in Schedule A and B of the title commitment, and that by doing so, the insurers undertook the examination work and therefore assume the risk. *See* HUD Report (App. 20 at 3); *see also* Andrews Aff., 10/22/98, ¶¶ 6, 7 (App. 11, ¶¶ 6,7). This raised serious concerns with HUD which noted that in Florida the only activity the agent performed is solicitation/procurement of business and policy issuance thus resulting in findings that Florida agents did not perform "core services" which would allow them to be compensated under requirements of the Residential Real Estate Settlement Practices Act (RESPA). Recognizing this serious problem, the 1999 Legislature prohibits payment of the premium to an agent who does not perform "primary title services." Since this applies only to residential transactions, it has no applicability to commercial transactions and agents may receive the premium whether or not such services are provided. Andrews Aff., 10/22/98, ¶¶ 6, 7 (App. 11, ¶¶ 6, 7).

2. The 1999 Amendments Still Prohibit Rebating.

Section 626.9541(1)(h)3.a., Florida Statutes, (1997), was amended to delete the reference to "unlawful" as it relates to "rebate" and to change the items for which rebating was prohibited from "charges made incident to the issuance of insurance" to "agent, agencies or title insurer's share of the premium or any charge for related title services below the cost for such services." *See* Ch. 99-286, § 5 at 6-7, Laws of Fla. While this clarifies that related title services cannot be negotiated to below cost, it does not preclude a policyholder from negotiating the cost of such services. Incongruously, attorneys' fees for legal services were exempted from prohibitions against rebating. *See id*. The other statutes at issue, sections 626.11, 626.8437 and 627.780, were not amended at all. Thus, no substantive changes were made by the 1999 amendments to the statute held unconstitutional below.

F. NO OTHER STATE GUARANTEES AN AGENT A PROFIT FOR POLICY ISSUANCE AND SOLICITATION ACTIVITIES.

The challenged scheme is inconsistent with every other States' regulation of title insurance. The overwhelming majority of states either do not regulate or provide only minimal regulation as to the amount of premium which is allocated to the title insurance agent. Cox Dep. at 74-75 (App. 16 at 74-75). In fact, twelve states have no regulation

regarding title insurance premiums at all.[19] Cox Dep. at 56 (App.16 at 56). The fact that no other state has a statutory scheme which guarantees an agent profit for soliciting and issuing a policy calls into question the legitimacy of the purported rationale that it is in the public's interest to establish a risk premium which includes as its primary component a non-negotiable guaranteed profit to an agent.

CONCLUSION

No public purpose is served by a statutory scheme that maintains title insurance agents' commissions and prohibits any abatement or rebate of that commission. No other insurance agent (or professional) receives this advantage. Mr. Butler and other Florida consumers are able to negotiate fairly with the title insurance agent for the critical services which the agent performs--*i.e.*, search, examination and closing, yet they are prohibited from negotiating an abatement of the solicitation or referral fee which is paid to the agent. They simply seek the right to negotiate a discount or reduction with the agent to the extent that the agent is being compensated for soliciting him as a customer.

[19] Only two other states have regulatory schemes which are even remotely similar to Florida's. Cox Dep. at 57 (App. 16 at 57). New Mexico, which has a promulgated rate similar to Florida's, includes within the agent's portion of the premium the performance of the search and examination functions. *Id*. at 60 (App. 16 at 60). Texas, the only other state with a promulgated rate, includes both search and examination and closing services within the portion of the premium allocated to the agent. *Id.*.

Insurer solvency is preserved by retention of 30% of the risk premium. Mandating that the agent receive up to 70% of the premium as a commission or referral fee serves no interest other than the private benefit of agents. For each of these reasons, the order entered below should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the size and style of the print used herein is 14 point proportionally spaced Times New Roman Type and that a true and correct copy of the foregoing has been furnished this 23rd day of August, 1999, regular U. S. Mail to:

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