OA 12-9-99

IN THE SUPREME COURT
STATE OF FLORIDA

CHICAGO TITLE INSURANCE CO.; AMERICAN PIONEER TITLE INSURANCE CO.; FLORIDA LAND TITLE ASSOCIATION; ATTORNEYS' TITLE INSURANCE FUND, INC.; FLORIDA ASSOCIATION OF INDEPENDENT TITLE AGENTS, INC.; STEWART TITLE GUARANTY CO.; COMMONWEALTH LAND TITLE INSURANCE CO.; LAWYERS TITLE INSURANCE CORP.; and FIRST AMERICAN TITLE INSURANCE CO., Appellants/Cross-Appellees,	CASE NO. 95,312
vs.	
S. CLARK BUTLER; FLORIDA HOME BUILDERS ASSOCIATION; and NATIONAL TITLE INSURANCE CO., Appellees/Cross-Appellants.	

APPELLANTS' INITIAL BRIEF

On Review Of A Final Judgment In The Second Judicial Circuit, Leon County, Florida, As Certified By The District Court of Appeal, First District, To Require Immediate Resolution

Robert Pass, Esquire, Mark A. Brown, Esquire and Davisson Dunlap, Jr., Esquire, CARLTON, FIELDS, WARD, EMMANUEL, SMITH & CUTLER, P.A., Post Office Drawer 190, Tallahassee, Florida 32302, ATTORNEYS FOR ATTORNEYS' TITLE INSURANCE FUND, INC., LAWYERS TITLE INSURANCE COMPANY AND STEWART TITLE GUARANTY COMPANY

William H. Hughes, III, Esquire and Kevin X. Crowley, Esquire, PENNINGTON, MOORE, WILKINSON, BELL AND DUNBAR, P.A., 215 S. Monroe, 2nd Floor, Tallahassee, Florida 32301, ATTORNEYS FOR AMERICAN PIONEER TITLE INSURANCE COMPANY

George P. Daniels, Esquire, AMERICAN PIONEER TITLE INSURANCE COMPANY, 493 East Semoran Boulevard, Casselberry, Florida 32707

Lee Huszagh, Esquire, FLORIDA LAND TITLE ASSOCIATION, 249 East Virginia Street, Tallahassee, Florida 32301

Zollie M. Maynard, Esquire and William C. Owen, Esquire, PANZA, MAURER, MAYNARD & NEEL, P.A., 215 South Monroe Street, Suite 310, Tallahassee, Florida 32301, ATTORNEYS FOR CHICAGO TITLE INSURANCE CO.

Douglas A. Mang, Esquire and Wendy Russell Wiener, Esquire, MANG LAW FIRM, P.A., 6t0 East Jefferson Street, Post Office Box 11127, Tallahassee, Florida 32302-3127, ATTORNEYS FOR FIRST AMERICAN TITLE INSURANCE CO.

Michael E. Marder, Esquire and Stephanie A. Yelenosky, Esquire, GREENSPOON, MARDER, HIRSCHFELD RAFKIN, ROSS & BERGER, P.A., 135 W. Central Blvd., Suite 1100, Orlando, Florida 32801, ATTORNEYS FOR COMMONWEALTH LAND TITLE INSURANCE CO.

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STATEMENT OF THE CASE AND FACTS

1. The Case

A. The Order Appealed From

This is an appeal from a Final Judgment of the Circuit Court of Leon County granting Appellees' Motion for Summary Judgment and denying Appellants' Motion for Summary Judgment. App. 1.[1] (R VIII, 1393-99, 1422-24). The Judgment declared unconstitutional §§626.611(11), 626.8437, 626.9541(1)(h)3a, 627.780(1), 627.782, and 627.783, *Florida Statutes* (1997), and DOI Rule 4-186.003(13)(a), *Florida Administrative Code* (App. 1, 4, and 7) to the extent they prohibit title insurance agents from "rebating" to buyers of title insurance any portion of the agent's share of the title insurance risk premium.[2] These statutes and rule comprise the framework by which title insurance rates were established by the DOI using legislatively established criteria, and having established such rates, prohibited agents from circumventing them by "rebating."

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[1] All references to the Appendix of materials filed with Appellants' Initial Brief are in the form "App. __".

[2] Following the rendition of the Judgment, the Legislature amended various portions of Chapters 626 and 627 central to this case. See Ch. 99-286, Laws of Florida. App. 5. Those amendments, which took effect July 1, 1999, are discussed at the relevant parts of this brief.

While granting *Appellees'* Motion for Summary Judgment, the Circuit Court nonetheless announced that it was "inclined to find [that] the State's interest in maintaining a 'viable and orderly private sector market for property insurance in this state,' justifies the regulation of rates and rebates as set forth in the challenged provisions." The Court felt compelled, however, to reach the opposite result because it felt bound by this Court's closely divided (4 to 3) decision in *Department of Ins. v. Dade County Consumer Advocate's Office*, 492 So.2d 1032 (Fla. 1986), in which this Court held unconstitutional certain "anti-rebating" statutes affecting life insurance commissions, but *not* dealing with title insurance.

B. Procedural History of the Action

S. Clark Butler, a developer and builder, filed this action against the Department of Insurance seeking a declaratory judgment that §§626.9541(1) (h)3a, 626.572, and 626.611(11), and DOI Rule 4-186.003(13) were unconstitutional as a violation of substantive due process. (R I, 01-02, 42-44). Those statutes and rule prohibited title insurance agents from "rebating" any portion of the title insurance risk premium set by the DOI as part of its regulatory rate making function under §627.782. Butler claimed the prohibition against rebating infringed his purported due process and other "rights" under Article I, §2 and §9 of the Florida Constitution to negotiate for a lower rate with title insurance agents. *Id.*

Although the Complaint only sought to invalidate statutes and a rule prohibiting title *agents* from rebating their share of the risk premium, not the comparable prohibition against *insurers* rebating their portion, all of Florida's major title insurers intervened to defend the constitutionality of the statutes. (R I, 13, 14-15, 17-19, 24-29, 116-18, 123-26, 179-80; II, 243-46; VII, 1250-51). Specifically, the title insurers intervened on the grounds that the anti-rebating framework protected the solvency of title *insurers*. They contended that absent such prohibition, cutthroat competitive pressures among agents would impair the underwriting functions performed by title agents, on which title insurers rely to identify and eliminate title risks, and such degradation in underwriting would threaten the solvency of title insurers as well as ultimately drive up the net insurance premiums to consumers.[3] (R V, 810-43; VII, 1237-43).

The Circuit Court initially dismissed the Complaint, finding that Butler had failed to exhaust available administrative remedies. The First DCA reversed, however. *Butler v. State, Department of Ins.*, 680 So.2d 1103 (Fla. 1st DCA 1996). The First District concluded that because Butler's pleaded claim was limited to a

[3] The Florida Home Builders Association, Inc., a 14,000 member not-for-profit trade organization ("FHBA"), was permitted to intervene as a plaintiff to join in the challenge to the statutes, as was National Title Insurance Co., a Dade County title insurer.

facial constitutional challenge to the statutory provisions, his claim was not subject to the exhaustion doctrine. *Id.*

After remand, Butler sought partial summary judgment to establish that §626.572 (1997) applied to title agents, in order to then move to declare it unconstitutional. (R II, 229-42). Appellants cross-moved for partial summary judgment to establish that §626.572 did not apply to title agents.[4] (R II, 319-78).

Finding that §626.572 did not apply to title agents, the Court granted Appellants' Cross-Motion for Partial Summary Judgment and denied Butler's motion. (R III, 499). The Court also found that the statutory prohibition on "rebating" was §627.780(1). (R III, 499).[5]

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[4] As a part of that motion, Appellants also asked the Court to find that the section of the Insurance Code that prohibited "rebating" was §627.780(1), which prohibits any person from charging any amount of risk premium other than that established by the DOI. The specific statutes Butler had challenged did not themselves prohibit rebating, but rather provided penalties for "illegal" rebates. What rebates are "illegal" are defined elsewhere. That "elsewhere" is §627.780(1).

[5] The Court never addressed the constitutionality of §626.572, which permits insurance "agents" to rebate their "commissions" under certain circumstances, because it found that statute inapplicable to title insurance agents. The correctness of the Court's perception of the Legislature's intent as to §626.572 was confirmed (and the issue mooted for appellate purposes) by the 1999 Legislature's unequivocal explication of its intent. Specifically, Ch. 99-286, Laws of Florida, amended §626.8411(2)(c) to make explicit that §626.572 "do[es] not apply to title insurance agents or agencies."

Plaintiffs filed a Second Amended Complaint adding a constitutional challenge to §§626.8437, 627.780, 627.782 and 627.783 (1997). (R III, 532-48). All parties then moved for summary judgment on the constitutional issues. On February 26, 1999, the Court issued its Final Judgment and Declaration holding the challenged statutes and rule unconstitutional under *Dade County.* (R VIII, 1393-99).

Appellants filed a Motion For Rehearing, Reconsideration and Clarification. (R VIII, 1411-19). That motion did not ask the Court to reconsider the constitutional issue itself, but argued that while the Judgment referred to title agents' "commissions" as what could be rebated or discounted, the statutory scheme that had been facially challenged made no provision for any "commission." The motion also asked, alternatively, that the Court clarify its order by specifying what portion of the risk premium the Court was describing as a "commission".

The Court clarified its order by announcing that "The term 'commission' in this context simply means the agent's share of the risk premium." (R VIII, 1421, ¶ 1).

Appellants filed their Notice of Appeal to the First District Court of Appeal. (R VIII, 1447-82). Appellants and Appellees each moved the First DCA to certify the appeal to this Court as one of great public importance requiring immediate

resolution. The First DCA granted those motions and on April 13, 1999, this Court accepted jurisdiction.

C. Post-Judgment Action of the Legislature, and Proceedings in This Court

Following this Court's acceptance of jurisdiction, the Legislature passed CS/HB 403 by a combined vote of 146 to 5.[6] That bill amended various statutory sections that were challenged in this action or which were directly material to that challenge. The legislation also made express findings as to the policies and purposes underlying the Legislature's actions.

Upon the passage of CS/HB 403, Appellants moved this Court to suspend its previously established briefing schedule until it was known whether the legislation would become law. This Court granted that motion. On June 8, 1999, the Governor signed CS/HB 403 into law.

CS/HB 403 became Chapter 99-286, Laws of Florida, and took effect on July 1, 1999. Appellants then moved the Court to dismiss the appeal as moot or, alternatively, to remand it to the Circuit Court for further consideration of the constitutional issues in light of the statutory amendments. Appellees opposed that Motion and on July 14, 1999, this Court denied it and established a new briefing schedule.

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[6] CS/HB 403, which became Ch. 99-286, Laws of Florida, passed by a vote of 107 to 5 in the House of Representatives and by a vote of 39 to 0 in the Senate. (Fla. H.R. Jour. 759 (Reg. Sess. 1999); Fla. S. Jour. 1184-85 (Reg. Sess. 1999).

2. The Facts

A. Nature Of Title Insurance

Title insurance is a unique form of insurance. Unlike life insurance, it does not attempt to predict when an event that is *certain* to eventually happen to every insured (death) will occur. Unlike property and casualty insurance (e.g., car insurance, fire insurance), it does not attempt to predict *how often* events that are not certain to occur (fires, car accidents) will occur. That is, it does not attempt to predict the likelihood of *future* events. Rather, it insures an existing state of title based upon the examination of an existing public record and related materials. Aff. of Birmingham, ¶ 9-10 (R VII, 1217-18).

Unlike any other form of insurance, the underwriting process that leads to the issuance of title insurance is intended to *eliminate* the risk insured against. *Id.*, ¶ 10-11 (R VII, 1218); Senter Dep. at 276-78 (R V, 930-32). Indeed, the issuance of "casualty title insurance" (i.e., insuring against a known risk, or in disregard of whether a risk exists, rather than ensuring that all reasonably determinable risks have been eliminated or do not exist) is statutorily prohibited. §627.784, *Florida Statutes*. The determination of insurability requires a carefully performed title search and an examination of title and other necessary information by a skilled and knowledgable title agent to detect defects in title and eliminate them before the

policy issues. *Id.* Consequently, for example, while purchasing health insurance has no impact on whether one will become ill, purchasing title insurance directly affects whether the buyer will, in fact, lose his or her property to a dispute over title.

The buyer of title insurance therefore not only obtains the promise of the insurer to pay *money* to compensate the buyer for a claim (which is common to all insurance), but, unlike all other forms of insurance, the actions of the agent in determining insurability actually minimize or eliminate the chance that the insured will ever have to *make a claim.*

B. Role Of The Title Insurance Agent

Unlike the life insurance agents from whom the plaintiff in *Dade County* had been unable to obtain a rebate of premium, title insurance agents perform a key role in the underwriting of title insurance.[7] Because a title insurance policy issues only after the examination of often complex legal records, and after the making of skilled judgments concerning any title issues raised by that examination, the care and thoroughness of that examination, and the skill by which the determination of

[7] The undisputed evidence below is that life insurance agents do not perform any "underwriting" or risk evaluation function in connection with the issuance of life insurance. Aff. of Marshall, ¶ 8 (R VII, 1231-32). Life insurance agents gather information (such as answers to a health questionnaire) and forward them to the insurers. The insurers do the underwriting and decide whether to issue the policy and at what rates. *Id.*, ¶ 13 (R VII, 1233).

insurability is made, are critical to the risk insured. Aff. of Gay, ¶ 12-14 (R VII, 1210-11); Aff. of Birmingham, ¶ 12 (R VII, 1218); Senter Dep. at 278-79 (R V, 932-33).

That work is almost always performed by the title insurance agent. It is the agent who determines whether a policy will be issued, and if so, what limitations (if any) will be placed on that policy. Aff. of Gay, ¶ 11-13 (R VII, 1209-11); Aff. of Birmingham, ¶ 11 (R VII, 1218); Cox Dep. at 159-165 (R V, 975-81); Senter Dep. at 276-279 (R V, 930-33); McCarty Dep. at 123-124 (R V, 900-01). Indeed, the vast majority of all title insurance in the state of Florida is issued based on an examination and skilled analysis performed *not* by title *insurers*, but by title *agents*. Senter Dep. at 276 (R V, 930); Aff. of Gay, ¶ 11-13 (R VII, 1209-11).[8]

The agent typically examines an "abstract" of title, which reflects instruments (e.g., deeds, mortgages, probate orders, judgments, trust agreements, etc.) filed as public records relating to a parcel of property to be insured, as well as surveys, affidavits, and other information not in the public record. Aff. of Gay, ¶ 11-13 (R VII, 1209-11).

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[8] Title agents must either be attorneys or licensed by DOI following an application, examination and testing process. *See* Ch. 626, Part V, *Florida Statutes*, §626.841 *et. seq.*

From that examination various questions or issues may arise as to whether the state of title is sufficiently clear and complete and, even if clear and complete, whether it reveals defects in title. Aff. of Gay, ¶ 11-13 (R VII, 1209-11); Aff. of Birmingham, ¶ 11 (R VII 1218). Applying experience and a knowledge of title insurance principles, including legal principles, the agent then makes the skilled judgments necessary to determine such things as (a) whether there are clouds or defects in title; (b) if so, how, if at all, they may be cured (which itself includes such judgment as the interpretation of sometimes ambiguous instruments, the status of estate, inheritance and tax laws, a knowledge of title standards and judicial decisions, and a determination of what corrective or additional instruments, legal proceedings, new surveys, or other means may be used to effect such curative acts); (c) if they are not curable, whether a policy can be issued and, if so (d) what "exceptions" or exclusions from coverage are necessary to protect the insurer and comply with the statutory prohibition on the issuance of "casualty" title insurance. Aff. of Gay, ¶ 13 (R VII, 1210-11); Aff. of Birmingham, ¶ 11 (R VII, 1218).[9]

[9] This agent role is necessitated by the enormous volume of title insurance written in the state annually *and* the skill intensive nature of the underwriting process that must occur before a policy issues. There being over 6000 title agents in the state, (August 26, 1991 National Title Insurance Co. Letter to DOI's Director of Legislative Affairs (R VII, 1205)), insurers cannot, and historically have not, undertaken this role themselves. Aff. of Gay, ¶ 12 (R VII, 1210).

The title agent performs most of the functions normally performed in house by *insurer* "underwriters" in other forms of insurance. The title *agent*, not the insurer, thus makes the judgments that will ultimately expose the title insurance company to greater risks or lesser risks. This has long been recognized by the Legislature, and was expressly so found by the Legislature in connection with the 1992 amendments to the statutory framework (discussed in more detail, *infra*):

> 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.

Florida House of Representatives, Committee on Insurance, *Final Bill Analysis & Economic Impact Statement* (SB 170-H), July 8, 1992, p. 9 (hereafter "1992 Final Bill Analysis").[10] App. 6. (R V, 854).

In other words what the title agent does in carrying out this skilled, judgment-based function is the determination of insurability itself. In the context of title insurance, where the issuance of insurance without eliminating known or knowable risks is prohibited, the determination of insurability is synonymous with eliminating the risk that the title insurer then insures against. In its 1999 revisions

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[10] All emphasis in quoted material is added unless otherwise noted.

to the title insurance provisions of Chapter 627, the Legislature denoted these as "Primary Title Services," consisting of :

> *determining insurability in accordance with sound underwriting practices* based upon evaluation of a reasonable search and examination of the title, *determination and clearance of underwriting objections and requirements to eliminate risk*, preparation and issuance of a title insurance commitment setting forth the requirements to insure, and preparation and issuance of the policy.

Ch. 99-286, §6 (amending §627.7711(1)(b), *Florida Statutes*).

Consequently, the risk assumed by the title *insurer* depends on the skill and adequacy of the title *agent's* work. If the title insurance agent does not carefully and correctly perform his or her work, including particularly the determination of insurability, what is intended to be a minimal, if any, risk assumed by the title insurance company can become a substantial loss.[11]

C. The Statutory Title Insurance Rate Framework

The care with which the title insurance agent performs his or her work, particularly the determination of insurability, directly impacts the *adequacy of title insurance rates* to accomplish their purpose of, among other things, sustaining title *insurers'* continued solvency and ability to pay claims. Senter Dep. at 278 (R V,

[11] When a title agent fails in his or her underwriting function, the title insurer is exposed to the near certainty of loss, unlike, for example, with health insurance. That is because title insurance insures against the existence of a cloud or defect in title at a precise point in time. If a defect or cloud exists, it is an existing fact at the time of the policy's issuance and becomes essentially an embedded loss.

932); Aff. of Gay, ¶¶ 14-15, 20-21, (R VII, 1211-13). Title insurance rates have historically been established by taking into account, *inter alia*, the insurers' past loss experience and predicting future losses. Thus, §627.782(2) (1997) required the DOI to establish the risk premium by considering (among other things) the insurers' "loss experience and prospective loss experience under . . . policy liabilities." §627.782(2)(a).[12]

The 1999 Legislature explicitly recognized the connection between the care with which agents perform their "underwriting" functions and the adequacy of title insurance rates to protect title insurers:

> WHEREAS, the Legislature finds that . . . [the] 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, Preamble, Laws of Florida.

In addition, the Legislature has recognized in recent years that the dependence of title insurers on a solvent, efficient and sustainable title insurance agency force is vital to insurers and to the public interest. It is not possible for the

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[12] The Legislature in the 1999 Amendments used this same loss experience to directly set rates. Ch. 99-286, § 12, Laws of Florida.

title insurers in this state to perform the labor intensive and skill intensive underwriting functions necessary to issue title insurance absent a stable and reliable agency system. Aff. of Gay ¶ 12 (R VII, 1210).

Beginning in 1992, the Legislature turned its attention to the stability of the entire title insurance industry, including both agents and insurers, out of a concern for its future. Based upon evidence of increasing loss ratios in the title insurance industry, and thus out of concerns over "the financial stability of the title insurance industry," 1992 Final Bill Analysis, p. 33, an independent study of the industry was commissioned by title insurers and agents and was presented to the Legislature. That study identified problems with the Florida title insurance rates and statutory structure.

It 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. 1992 Final Bill Analysis, p. 33. It identified severe competitive pressures as the cause of those losses, including insurers selling title information (e.g., title "abstracts") to agents at a loss (as much as 60% below cost). *Id.* at p. 34. It also stated that title agents reported similar competitive pressures, claiming they were often unable to charge even their actual cost for "closing costs." The study found that "competitive conditions often render it impossible" for the

title agents to charge enough for closings to avoid "los[ing] money on each closing." *Id.* Indeed, in seeking legislative redress with respect to this issue at the time, Appellee National Title Insurance Co. itself expressed the situation as follows:

> Since the early 1980's, the number of commercial and attorney agents has grown tremendously . . . . This has led to a ruinous competition among agents for retail business and amongst underwriters for agents. Despite two substantial increases in the promulgated rate in the last ten years nearly all underwriters and a majority of agents are operating at a loss.

August 26, 1991 National Title Insurance Co. Letter to DOI's Director of Legislative Affairs (R VII, 1205).

D. The 1992 Legislative Response

The DOI first reacted to these circumstances, within its regulatory ambit, by increasing title insurance rates by approximately 56% in 1990. The 1992 Legislature described the DOI's rate increase as "what is generally regarded as an effort to protect the solvency of the title industry." 1992 Final Bill Analysis, p. 34. However, concerned that a broader cure was necessary, and that the DOI had to receive further legislative direction to ensure the stability and solvency of the industry, the 1992 Legislature modified the rate setting structure contained in §627.782. Those amendments:

1. Required title insurers to retain at least 30% of the risk premium, §627.782(1), App. 3; previously there was no specific statutory restriction on this;

2. Directed that DOI set the risk premium at a level that provided a reasonable return on capital for *both* title insurers *and* title agents, §627.782(2)(b), App. 3; previously there was no provision for DOI to consider the financial solvency and stability of title insurance *agents* in setting rates; and

3. Directed DOI to periodically review title insurance rates and to revise them as indicated by that review, taking into account the financial condition and experience of *both* title insurers and title agents, §627.782(7),(8), App. 3.

The statutory scheme continued, as before, to require that all such rates be neither excessive, inadequate, nor discriminatory. §627.782(4).

The 1992 legislative action is unique in the Florida Insurance Code. The Legislature has not deemed it necessary to set the rates for any other type of insurance based on considering the financial well-being of agents. By requiring DOI to set title insurance rates to provide a reasonable return on capital for title agents and title insurers, the Legislature sought to protect not only the continued

existence of the title agency industry, but also recognized the direct jeopardy posed to the solvency of title insurers by a financially pressured network of title agents.

E. The Prohibition On "Rebating"

"Rebating" of the DOI established title insurance premium has long been prohibited,[13] and has never previously been challenged, much less invalidated. The statutes involved in *Dade County* did not apply to title insurance agents.[14] Indeed, no court anywhere has invalidated a statutory prohibition against rebating in the title insurance context.

The Legislature has never regarded *Dade County* as indicating any constitutional infirmities with the title insurance framework. Thus, even though the anti-rebating laws for other forms of insurance were modified by the

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[13] The prohibition against rebating title insurance premiums goes back at least to 1965. *See* §§627.0954 and 627.0956, *Florida Statutes* (1965).

[14] *Dade County* invalidated §§626.611(11) and 626.9541(1)(h)1, *Florida Statutes*, (1983). App. 2. Neither applied to title insurance agents. Section 626.611(11) appeared in Part I of Ch. 626. It made no express mention of title insurance agents; rather, it applied to "agents" which were defined in §626.031 as only "general lines agent, life agent, or health agent . . . ." App. 2. In addition, §626.022(1)(a)1, *Florida Statutes* (1983) specified that Part I of Ch. 626 did not apply to title insurance. App. 2. While §626.9541 was not in Part I of Ch. 626, the specific statutory subparagraphs challenged in *Dade County* made no mention of title insurance agents. That was because §626.9541(1)(h)3a – a section not involved in *Dade County* – specifically addressed rebating by title insurance agents.

Legislature after *Dade County* by the enactment of §626.572, the Legislature excluded title insurance agents from §626.572.[15]

F. The 1999 Legislative Response

The legislative concern over the financial stability of the title industry and the link between title agent underwriting functions and insurer solvency was reemphasized in 1999. In enacting Ch. 99-286, Laws of Florida, two months after the Judgment in this action and with awareness of it, the Legislature even more explicitly announced its concern for the need to protect the solvency of the entire title insurance industry by, among other things:

(a) Expressly "finding" that there is a direct relationship between the determination of insurability performed by title agents and the solvency and soundness of title insurers, and thus the public interest (Ch. 99-286, Preamble);

(b) Reaffirming that title insurance agents are prohibited from rebating their share of the premium (Ch. 99-286, §5 (amending §626.9541(1)(h)3a, *Florida Statutes*)), and that title agents are not permitted

[15] In light of *Dade County*, the Legislature enacted §626.572, which imposed various conditions on when "agents" can rebate their "commissions," in order to prohibit discriminatory rebating among insureds. As discussed *supra*, the Court below held that the Legislature did not intend §626.572 to apply to title agents. And as also discussed *supra*, the 1999 Legislature confirmed the accuracy of this finding by expressly stating that §626.572 does not apply to title agents.

to "rebate" under §627.572 (Ch. 99-286, §4 (amending §626.8411(2)(c), *Florida Statutes*));

(c) Clarifying and expressly finding that for a title insurance agent to obtain a share of the premium charged by the insurer, the agent must perform "primary title services," including "determining insurability in accordance with sound underwriting practices," (Ch. 99-286, §6 (amending §627.7711(1)(b) and (2), *Florida Statutes*));

(d) Confirming that title insurance agents "incur[ ] the risks incident to" issuing a policy of title insurance (*Id.* (amending §627.7711(2))); and

(e) Expressly confirming that there is no "commission" in the premium charged by the title insurer, including the portion retained by title agents. (*Id.*)

The statutory scheme challenged in this proceeding and which was the subject of the Judgment has been amended in these and other respects. It is the position of Appellants that the statutory framework was constitutional at the time of the Judgment and that it is, of course, constitutional now, in light of the 1999 amendments. This brief therefore addresses the statute both as it now exists and as it existed at the time of the Judgment.

SUMMARY OF ARGUMENT

In the last seven years the title insurance industry has twice been the object of legislative scrutiny and carefully tailored legislative action. In 1992 and again in 1999 the Legislature amended and clarified the statutory framework affecting title insurance rates in a manner that clearly avoids any constitutional infirmities and which rationally addressed the clear connection between title insurance agents, insurers, and the public interest. On each occasion, the Legislature acted out of a rationally based concern over the financial well-being of the title insurance industry, an industry affected with the public interest. The Legislature enjoys broad discretion to make policy choices that it believes serve the public interest, so long as those choices are rational. The wisdom of the legislative decisions, of course, are not subject to judicial review, as recognized by over a century of this Court's decisions.

Appellees' claims are substantive due process challenges to laws regulating purely economic matters and which do not infringe on fundamental constitutional interests. As such, the challenged statutes enjoy a strong presumption of validity. Although the Court below reluctantly held the statutes unconstitutional because of *Dade County*, the presumption of constitutionality persists unabated in this Court, where review is *de novo*. Appellants bear no burden to show that the statutes are constitutional. Rather, it is Appellees' burden to demonstrate that no state of facts

can be conceived that would provide a mere rational basis for the legislation. Appellees have made no such showing, nor can they.

The statutes have a readily discernible rational basis. The Legislature rationally perceived the title insurance industry –insurers and agents – to be financially threatened by, in part, the very sort of "competitive" pressures that Appellees claim a constitutional "right" to exert for their own, parochial financial benefit. It is rational for the Legislature to conclude that because title insurance agents perform the vital underwriting function normally performed by *insurers* in other types of insurance, the substitution of fair, just and reasonable rates set by the State in place of the forces that threatened the industry as recently as 1990 is a permissible means of (a) removing agents from demands that could adversely impact the care with which their vital underwriting functions are performed, while (b) ensuring that the public (i) pays only reasonable rates and (ii) receives soundly underwritten title insurance.

Simply put, it is rational for the Legislature to believe that subjecting agents to pressures to rebate (such as pressure brought by the 14,000 corporate member FHBA), and thus to make less per policy than the fair rate set by the State, will force title agents to cut corners and drive them to "make up in volume" the revenues that they would otherwise earn from a regulatory rate that affords them the time to perform the careful work that the determination of insurability requires.

It is rational for the Legislature to conclude that if such pressures are not excluded, the agents' underwriting function will be degraded and the risks in fact assumed by title *insurers* will be greater – *indeed unpredictably so* -- than the risk assumptions that underlie the title insurance rates on which insurers depend for their continued solvency and ability to pay the public's claims.

This case is not controlled by *Dade County*. Even if *Dade County* was correctly decided on its facts, itself a premise subject to dispute in this Court, it should not be extended to title insurance, a unique form of insurance, and especially to these specific, carefully tailored legislative responses to rationally perceived threats to the financial well being of the title insurance industry. *Dade County* did not consider any statute involving title insurance, and no court anywhere has ever invalidated such a statute. To the contrary, numerous courts have upheld anti-rebating laws, including those applicable to title insurance, even in the absence of the carefully tailored Florida statutory structure.

In fact, this case falls squarely within the precise principle that *Dade County* itself indicated would warrant *upholding* an anti-rebating law. The basis for the finding of unconstitutionality in *Dade County* was that non-title "[i]nsurance agents' commissions do not affect the net insurance premium and are *unrelated to the actuarial soundness of insurance policies*." 492 So.2d at 1033. Yet that is exactly what title insurance agents' so-called "commissions" do.

Under Florida's unique statutory scheme, title insurance agents' share of the risk premium (which Appellees term a "commission") is at least rationally (if not undeniably) related to the soundness of title insurance policies. Since title agents perform the underwriting of the policies and are responsible for eliminating the risks the insurers assume, and since the total premium is set based on considerations involving the loss history of insurers and agents, (a) the soundness of the risk underwritten and (b) the adequacy of the agents' compensation are, in the words of *Dade County*, clearly "related," to say the least.

ARGUMENT

1. THE PROHIBITION ON REBATING IS RATIONALLY RELATED TO A LEGITIMATE STATE INTEREST IN PROTECTING THE SOUNDNESS AND SOLVENCY OF TITLE INSURERS TO ENSURE THE CONTINUED STABILITY OF THE TITLE INSURANCE INDUSTRY

Appellees bring a facial, substantive due process challenge to the statutes that embody the Legislature's virtually unanimous policy choices as to how to ensure a solvent, stable, and efficient title insurance industry for the people of this State. Dismissing the Legislature's careful and deliberate choices as essentially frivolous and irrational, Appellees claim that §§626.611(11), 626.8437, 626.9541(1)(h)3a, 627.780, 627.782 and 627.783, *Florida Statutes* (1997) -- and presumably as amended by Ch. 99-286 -- violate their claimed constitutional right to "negotiate" with title insurance agents over what Appellees will pay for title insurance. Specifically, Appellees claim a constitutional right to negotiate over the portion of the title insurance premium that is paid to title insurance agents.

A. Governing Constitutional Standards

In asserting such a "substantive due process" challenge, Appellees face an exceedingly difficult burden. Statutes are, of course, presumed constitutional. *Lane v. Chiles*, 698 So.2d 260, 262 (Fla. 1997); *Florida Department of Education v. Glasser*, 622 So.2d 944, 946 (Fla. 1993). Indeed, an unbroken line of decisions also requires that:

> *Every reasonable doubt should be resolved in favor of the constitutionality of a legislative act,* since the presumption of constitutionality continues until the contrary is proven *beyond all reasonable doubt.*

Felts v. State, 537 So.2d 995, 1000 & n.16 (Fla. 1st DCA 1988). As this Court has pointed out, in addition to "all legislative enactments [being] presumed to be valid," "a party challenging the constitutionality of an enactment has a heavy burden to show that it is invalid." *Lane v. Chiles*, *supra,* at 262; *Bridge of North Palm Beach v. Mason,* 167 So.2d 721, 726 (Fla. 1964).

A substantive due process challenge such as this must be approached with considerable sensitivity to the doctrine of Separation of Powers because such challenges are often merely disguised challenges to the wisdom of legislative acts, and "the propriety and wisdom of legislation are exclusively matters for legislative determination." *Askew v. Schuster*, 331 So.2d 297, 300 (Fla. 1976); *see also City of Jacksonville v. Bowden*, 67 Fla. 181, 186-88, 64 So. 769, 772 (Fla. 1914).

The test is simply whether a rational basis exists for the law. In considering whether a rational basis exists for legislative policy decisions, it is not even necessary for the Court to determine that the Legislature *actually* considered certain policies in adopting the statute. Rather, the only question is whether "*any* statement of facts can reasonably be *conceived* to exist that will sustain legislation or classifications attempted by the Legislature...." *Northridge General Hospital Inc. v. City of Oakland Park*, 374 So.2d 461, 464 (Fla. 1979); *see Sasso v. Ram*

Property Mgt., 431 So.2d 204, 220 (Fla. 1st DCA 1983), *approved*, 452 So.2d 932 (Fla. 1984) (per curiam) ("While the apparent primary reason for the statute fails the rational basis test, other potential objectives of the statute survive it. Where, as here, there are plausible reasons for the legislature's action, our inquiry is at an end .... All that is required is that the statute have some reasonable basis.")

Finally, Appellees' burden is even greater where the statute regulates an activity that is itself "affected with a public interest":

> [T]he Legislature can regulate and limit the terms upon which persons may conduct a certain business, if it is *affected with public interest*, in the sense that the *economic policies adopted are designed to promote the public welfare* and the means shown are reasonably related to the purpose. A person seeking to challenge a statute on this basis has a very heavy burden to carry.

State v. Sobieck, 701 So.2d 96, 103 (Fla. 5th DCA 1997) (citing *Nebbia v. New York*, 291 U.S. 502 (1934)).

It is beyond question that the business of title insurance - - indeed insurance generally - - is "affected with the public interest." "It would be difficult to find a business that more vitally affects the public interest than the insurance business...." *Florida Department of Ins. v. Bankers Insurance Co.*, 694 So.2d 70, 74 (Fla. 1st DCA 1997); *see also Gallagher v. Motors Ins. Corp.*, 605 So.2d 62, 72 (Fla. 1992) (noting a Congressional determination that the "continued regulation and taxation by the several states of the business of insurance is in the public interest...."). This

power includes the power to regulate insurance agents. *State ex. rel. Kennedy v. Knott*, 123 Fla. 295, 301, 166 So. 835, 837 (Fla. 1936):

> It is no longer open to dispute that the business of insurance so directly affects the public that it is generally conceded to be affected with a public interest, and, being so, is subject to regulation and control by the Legislature, which includes the power to license and regulate the agents through whom such business is conducted.

It is also well established that the state has a legitimate interest in regulating the rates charged for insurance. *Smith v. Department of Ins.*, 507 So.2d 1080, 1093 (Fla. 1987) ("We find a legitimate state interest in regulating . . . insurance rates."); 1 *Couch on Insurance* §2:31 at 2-63 to 2-66 (3d ed. 1996)(constitutional power of states to regulate insurance rates is "well established"). Indeed, every state does so. The Florida Insurance Code is replete with extensive rate regulation of insurance premiums, and even Appellees concede, as they must, that regulation of title insurance rates in general is a constitutional exercise of the state's power.

B. The Rationally Perceived Threat To Insurer Solvency By The Rebating of the Agents' Share of the Premium

As discussed in the Statement of Facts, title insurance is a unique form of insurance. Other forms of insurance (e.g., fire insurance, automobile insurance, life insurance, health insurance) attempt to predict the likelihood of a *future* event occurring (e.g., a fire, an accident, an illness). Title insurance, however, does not seek to predict future events. Rather, it is an indemnity contract concerning the

current state of title based upon the examination of an *existing* public record and other necessary information. Thus,

> [A] title policy is unique in that it is retrospective, not prospective. It is designed to protect against past events, not possible future encumbrances.

Marine Midland Bank, N.A. v. Virginia Woods Ltd., 574 N.Y.S.2d 485, 488 (Sup. Ct. 1991); *see also Firstland Village Associates v. Lawyers Title Insurance Co.*, 284 S.E.2d 582, 583 (S.C. 1981):

> Title insurance is unique in that it is retrospective, not prospective .... the risks of title insurance end where the risks of other kinds [of insurance] begin. Title insurance, instead of protecting the insured against matters that may arise during a stated period after the issuance of the policy, is designed to save him harmless from any loss through defects, liens, or encumbrances that may affect or burden his title when he takes it.

Accord 9 Appleman, *Insurance Law and Practice* §5209 at 61 (1981); 13A *Couch on Insurance* §48:111 at 106 (2d ed. 1996).

Because title insurance insures against a present, ascertainable state of title based on the examination of often complex legal records, the thoroughness of that examination, and the skill by which it is conducted, are the critical actions taken in the process. In the title insurance industry, both historically and presently, this crucial work is generally performed by the title agent, who determines whether a policy will be issued, and if so, what limitations will be placed on that policy. Indeed, the vast majority of all title insurance in the state of Florida is issued based

on an examination and skilled analysis performed *not* by title *insurers*, but by title *agents*.

Thus, as discussed in the Statement of Facts, the title agent performs functions normally performed by the insurers' "underwriter" in other forms of insurance. And, it is the title *agent,* not the insurer, who makes the underwriting judgments that will expose the insurer to losses.

These judgments require considerable skill and care. Errors can result in potentially huge claims both individually and in the aggregate. As the Court is aware, virtually all sales of real property (be they residential homes, land, or office buildings) involve title insurance. While an individual policy may be relatively small (e.g., for a residential home), when multiplied by hundreds of thousands of such policies annually, the exposure to the insurer is vast. Individual commercial policies carrying loss exposure in the millions, even hundreds of millions of dollars, are also regularly issued.

Moreover, unlike other forms of insurance, the defect(s) against which the policy insures are either present or not present, *as a matter of fact,* at the time the policy issues. Unlike life insurance or health insurance, for example, the title insurance policy issues on the assumption that there is *no* defect. Title insurance rates are therefore set – to use a life insurance analogue – on the primary assumption that the insured *will never die.* While there are a few defects in title

that cannot be detected and therefore potentially exist on every policy (the primary example being forged instruments), ***the principal factor in what losses the insurer will suffer – indeed the greatest practical "risk" borne by the insurer -- is whether the title agent has done his or her underwriting job thoroughly and carefully.***

As discussed *supra*, the title agent assesses the state of title and makes the key judgments as to (a) what the status of title is; (b) what steps, if any, should be taken to remedy apparent defects or ambiguities in title; (c) whether a policy will be issued; (d) if so, what exclusions, if any, must be made; and (e) closing issues which will affect the final policy. All these decisions have a direct bearing on whether any claims will ultimately be made under a policy, and consequently how much loss, if any, the insurer will ultimately suffer.

This allocation of "underwriting" functions from the insurer to the agent distinguishes the title insurance industry in general, and the relationship of the title insurer and the title agent in particular, from most other insurer-agent relationships. The legislative history of the 1992 amendments quoted *supra,* reflects a legislative appreciation of this unique situation. It bears repeating:

> 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.

1992 Final Bill Analysis, p. 9.

As the Legislature recognized, most other kinds of insurance are not issued based on such extensive underwriting judgment exercised *by the agent.* As explained by Professor Marshall, it is unheard of, for example, for a life insurance agent to evaluate the life expectancy of a prospective insured, or for a health insurance agent to evaluate the health of a potential insured. Aff. of Marshall, ¶ 8, 9, 11 (R VII, 1231-33). Those risks to the insurer are evaluated by the insurer. The agents merely collect the relevant information and pass it on to the insurer for *its* assessment of the risk. *Id.*, ¶ 12-13 (R VII, 1233).

In contrast, the skill, thoroughness and judgment of the *title agent* has a dramatic and direct causal effect on the risk borne by, and the ultimate solvency of, the title insurer. A less than thorough and less than skillful title analysis can lead to the issuance of title policies without appropriate exceptions, or a policy that should not issue at all, resulting in substantial losses to the insurer. As David Cox, an actuarial expert, testified:

> Q The risk of a title insurer having to pay on a claim is directly dependent upon how well the agent performs his or her search and examination function; is that correct?
>
> A In my opinion it's primarily the quality of the agent's search. Most claims come from agent error, oversight and not from unforeseeable events.

Q If the agent does his or her job well, the agent can substantially lessen the possibility and in many instances completely eliminate the possibility that a claim will ever be made under a policy; is that correct?

A The agent's duty is to provide a reasonable search and exam in order to identify title defects; and to the extent that the defects are identified, then the probability of loss are reduced.

. . . . . .

Q If an insurer ends up assuming too many risks which lead to claims which have to be paid, then the insurer runs the risk of going insolvent; isn't that true?

A That's correct.

Cox Dep. at 159-62 (R V, 975-78).

Mr. Wallace M. Senter, DOI's title insurance coordinator for the last eleven years, similarly testified:

Q And the quality of the underwriting done by the title agent directly affects the level of risk that is borne by the insurer who is on the policy.

A Yes.

Q And as a result, the quality of the underwriting done by the agent has a potentially significant impact on the solvency of title insurers?

A Yes, as it relates to losses.

Q And title insurance policies are policies that essentially go on forever in perpetuity; isn't that true?

A Yes.

Q So whatever risk, if any, has not been successfully eliminated and which is assumed by the insurer remains forever.

A Yes.

Q It doesn't go away if you don't pay a premium next year because you only pay once.

A Yes.

Senter Dep. at 278-79 (R V, 932-33).

The agent's key role in eliminating insurer risk and concomitant losses, explains why the care with which title insurance agents perform their functions directly impacts the premiums that consumers ultimately pay for title insurance and the actuarial soundness of consumers' title insurance policies. Simply put, because the judgments made by title agents essentially dictate the losses that title insurers will suffer, the agent's care therefore directly impacts the solvency of the title insurers.

These things are carefully considered and taken into account in the statutory scheme by which title insurance "rates" are set. Under the comprehensive rate provisions of Chapter 627, insurers *other than title insurers* generally propose rates for DOI review, and DOI can typically permit most rates to become effective by not objecting to them (so-called "file and use" rates). §§627.062(2)(a); 627.0651.

In the case of title insurance, however, the Legislature has prohibited such procedures. §627.776(2)(f). Instead, it directed that the DOI *itself* set the risk premium charged for title insurance, and that DOI do so by a rule adopted under the APA. §627.782. And, while the adequacy of most insurance rates is

determined solely with reference to the financial needs and capitalization of *insurers*, in the case of title insurance, the Legislature recognized the unique dependency of title insurers on the work performed by title agents. Thus, in establishing the criteria by which title insurance risk premiums were set, the Legislature mandated that the risk premium be established by DOI with "due consideration" to providing a reasonable margin for underwriting profit to both the title insurer *and the title agent* so as to attract and retain adequate capital investment by *both* insurers and agents. Specifically, §627.782(2)(b), adopted in 1992, added the requirement that DOI set the risk premium to provide:

> [a] reasonable margin for underwriting profit . . . . sufficient to allow [title] insurers *and [title] agents* to earn a rate of return on their capital that will attract and retain adequate capital investment in the title insurance business.

The legislative history to the 1992 amendments reflects that the Legislature was greatly troubled by huge losses being experienced in the title insurance industry. Faced with title insurers having suffered pretax operating losses of a combined total of over $80 million between 1988 and 1990, a negative overall average rate of return of 4.5% after taxes, and finding, among other things, that competitive conditions were forcing agents to perform closings at a loss, 1992 Final Bill Analysis, p. 33-34, the Legislature made a policy choice.

Specifically, it elected to include a reasonable margin for underwriting profit to the title agent in the risk premium. It did so recognizing three key factors: (1)

the work by title agents has a direct causal relationship to the financial condition of the insurer, (2) title insurers were experiencing significant losses in Florida, and (3) unless agents were assured a reasonable underwriting profit from the risk premium, there was a very real risk that there would be inadequate incentive to attract and retain sufficient capital investment in the title insurance business, which could threaten the solvency of the title industry in Florida.

It was rational, to say the least, for the Legislature under these circumstances to conclude that the financial condition of the title insurance industry and the competitive pressures that the market placed on agents posed a threat to the solvency of title insurers themselves. It was reasonable for the Legislature to assume that title agents who are forced by competitive pressures to cut their rates below the merely "adequate" rates required by §627.782(4), are likely to then be forced to cut corners in performing their labor intensive, skilled and care-dependent underwriting functions, simply to generate a "reasonable" rate of return.

The Legislature had at least a rational basis to conclude that such pressures would continue to occur and that such results were probable. Having a rational basis for concluding that agents might be forced, absent a rebating prohibition, to do more work in less time, or to hire less trained personnel to cut costs, it was equally rational to then conclude -- indeed it was only logical -- that such pressures posed a threat to the maintenance of the same level of skill and care on which the

adequacy of the risk premium to maintain the solvency of title *insurers* is based. Indeed, a degradation in the quality of agent underwriting would introduce into the carefully orchestrated rate structure something utterly foreign to title insurance: future potential losses of a wholly unpredictable magnitude and frequency.

Because of the unique nature of title insurance, the true risk that the insurer bears as a practical matter is the risk of poor agent underwriting. It was within the province of the Legislature to choose, as a matter of policy, not to inject potentially cutthroat competitive pressures into the rate making function. Such considerations, which are historically foreign to title insurance, bear no logical relationship to the state of the title insured yet could necessitate material increases in rates. Indeed, it was rational for the Legislature to conclude that there is simply no reliable or satisfactory means of setting meaningful rates in such an environment and that to permit the injection of such forces - manifesting themselves principally in unpredictable volumes of agent negligence - would effectively convert title insurance into a form of casualty insurance.

Moreover, it was rational for the Legislature to conclude that the risk posed to the solvency of title insurers by introducing such a situation may not even be known until catastrophic losses have already become embedded in the claims "pipeline." By its nature title insurance is potentially "perpetual." There are no periodic premiums, the absence of which might cause a policy to lapse. A defect

in title may be discovered years, even decades, after the policy issues since a defect may be first discovered only when the property is sold. Given the enormous volume of liability exposure assumed by the title industry every year, the potentially disastrous effects of a degradation of agent underwriting might not become known for years.

Although it is unnecessary to demonstrate that the Legislature in fact considered these precise issues in detail, these very concerns are well within those articulated in the Legislature's recent enactment of Ch. 99-286, Laws of Florida, which began by finding:

> that the 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 to title to real property prior to insuring such property is essential to the maintenance of the solvency and soundness of title insurers; and that 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, Preamble.

C. The Rationally Perceived Relation Between A Stable and Essential Agent Industry and The Public Interest

Moreover, wholly apart from the need to protect insurers, it was rational for the Legislature to believe that the establishment of a statutory rate setting mechanism for title agents was appropriate to stabilize the financial soundness of the title *agency* industry. As noted in the Legislative history, the financial

condition of title agents was rationally perceived to be jeopardized by intense competitive pressures.

It is facially apparent, and certainly rational to perceive, that the public's need for title insurance is dependent upon a stable, efficient, and viable agent system because the sheer volume of title insurance in Florida cannot possibly be underwitten all by insurers. It was at least a rational decision for the Legislature to make, given the state of the title industry, and Appellees have not shown otherwise. Indeed, it is the burden of Appellees to prove otherwise, or the "strong presumption of validity" that must be applied to this statute is itself sufficient to sustain its constitutionality.

D. The Rationally Perceived Relation Between Title Insurer Solvency And The Agents' Ability To Honor Their Indemnification Obligations

It was also rational for the Legislature to act to preserve the financial soundness of the title agent industry because title agents themselves assume a risk in connection with the issuance of title insurance. Title agents have a contractual indemnification liability to the title insurers, on whom they write, for any negligent underwriting. Aff. of Gay, ¶ 16 (R VII, 1211); Aff. of Birmingham, ¶ 14 (R VII, 1219); August 26, 1991 National Title Insurance Co. Letter to DOI's Director of Legislative Affairs (R VII, 1205-06). Indeed, §626.8419(1)(b) requires licensed title agencies to carry errors and omissions insurance in the minimum amount of $250,000 for just that purpose.

As a consequence, title agents are responsible to title insurers for their poor underwriting. The financial well-being of title insurers is therefore related to the financial condition of title agents to the extent that a financially sound title agent industry is able to respond under their indemnification obligations, at least to mitigate the losses suffered by insurers. It was therefore rational for the Legislature to conclude that the financial well-being of title insurers is related to the financial well-being of title agents in this fashion as well.

E. The "Commission" Red Herring

Appellees incorrectly use the term "commission" to describe the title agent's share of the risk premium. The term is a historic convention of language, used inartfully to describe the agent's share of that premium. Appellees use it, however, to attempt to cast the agent's share of the title insurance risk premium in a distorted light. Specifically, Appellees use the term because *Dade County* used that term in the life insurance context. Appellees use it, however, to denote the amount which they claim is paid to the title agent simply for producing a customer for title insurance.

In analyzing the statutory scheme, nomenclature cannot substitute for substance. Whatever may have been the case prior to the 1992 amendments, since the Legislature's decision in that year to set the risk premium in §627.782(2) with specific reference to statutory criteria relating to title agents – *which criteria did*

not include any "commission" for "producing" a customer – any comparison to non-title agent commissions is simply wrong. Appellees' facial challenge to the statute must, of course, accept the statute as written. Appellees may not bring a facial challenge based on the contention that the statute says something different than what it plainly says.

Nowhere in §626.782(2), which specifies the factors DOI is to consider when setting the risk premium, is there any reference to any "commission." Nor does that term appear in Rule 4-186.003(13)(a). More importantly, nowhere does the statute authorize title insurance rates to contain any amount for the act of producing a customer. And, of course, since the time the Circuit Court's Judgment was entered, the Legislature has now made absolutely explicit that the premium for title insurance "does not include a commission." Ch. 99-286, §6, Laws of Florida (amending §627.7711(2)). This clarifies the Legislative intent that the responsibility title agents undertake to earn their portion of the premium is not comparable to the sales efforts leading to a "commission" received by other agents, such as life agents.

Perhaps most importantly, however, the entire issue of whether the risk premium includes a "commission" is a red herring. The only issue of constitutional significance is whether the Legislature had a conceivable, rational basis for adopting a rate framework that establishes title insurance rates for both

insurers and agents. As long as such a rational basis exists, as it does, that is the end of the inquiry.

2. DADE COUNTY SHOULD NOT BE EXTENDED TO TITLE INSURANCE. THE TITLE INSURANCE STATUTORY SCHEME FALLS SQUARELY WITHIN THE GROUNDS THAT DADE COUNTY INDICATED WOULD PASS CONSTITUTIONAL MUSTER

Appellees rely heavily, if not entirely, on *Dade County.* Despite indicating that it was inclined to agree with Appellants' arguments that the title insurance statutory scheme is constitutional, the Circuit Court felt compelled to hold otherwise because of *Dade County.* However, *Dade County* is clearly not applicable to this case.

In that case, the Dade County Consumer Advocate's Office sued to invalidate §§626.611(11) and 626.9541(1)(h)1, *Florida Statutes* (1983), which prohibited insurance agents, *other than title insurance agents*, from rebating their commissions. *None* of those statutory sections applied to title insurance agents. In a 4 to 3 decision, accompanied by a lengthy dissent, a divided Court held that those statutes lacked a rational basis. Despite acknowledging that "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, the majority found that the state had no "legitimate interest" in preventing such

insurance agents from negotiating lower commissions. In reaching this conclusion, however, the Court emphasized that its reason for doing so was because commissions paid to such agents "do not affect the net insurance premium" paid to the insurer "and are not related to the actuarial soundness of insurance policies." *Id.* at 1035.

Dade County, therefore, clearly indicated that payments of premiums to agents that "*are* . . . . related to the actuarial soundness of insurance policies" would be constitutional. As indicated by the preceding discussion, that is precisely the case under Florida's unique statutory framework for title insurance. The solvency of title insurers and the actuarial soundness of title policies are entirely dependent on the underwriting function of agents. Indeed, the very rates set by the Legislature presume a degree of underwriting scrutiny by agents that is premised upon agents not being subjected to competitive pressures that might cause them to have to produce more policies in less time to earn the same rate of return that the DOI and the Legislature have determined is reasonable. Therefore, the compensation paid to agents for their underwriting activities is not merely rationally related to the "actuarial soundness of insurance policies," and *Dade County* not only does not require the statutes' invalidation, but the entire statutory scheme is dependent on a reasonable rate of return to agents and embraces the very principle that *Dade County* stated would cause such statutes to be upheld.

3. IF THIS COURT CONCLUDES THAT DADE COUNTY CANNOT BE DISTINGUISHED, THEN DADE COUNTY SHOULD BE OVERRULED.

Finally, although it should be unnecessary to reach this issue, should this Court conclude that *Dade County* cannot be distinguished, this Court should overrule it. It should do so for the reasons set out at some length in the dissent of the three Justices in *Dade County*.

According to the dissent, *Dade County* represents an unprecedented and unjustified judicial intrusion into policy decisions constitutionally assigned to the Legislative Branch. As the dissent in *Dade County* pointed out, the Court was substituting the judgment of four Justices for that of the Legislature on issues that did not rise to a constitutional level. Moreover, none of the decisional authorities on which the majority based its decision was analogous or involved remotely similar constitutional issues.[16]

Anti-rebating provisions have formed part of the regulatory framework in many states for decades and this Court's decision in *Dade County* stands alone in

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[16] For example, the Court relied on *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975), which held that a minimum fee schedule for attorneys violated the Sherman Antitrust Act. That case, however, relied distinctly on statutory application and was not at all based on a constitutional analysis. Similarly, the *Dade County* majority relied on *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Counsel, Inc.*, 425 U.S. 748 (1976), even though the case did not involve any state regulation of charges for services. Instead, that case held that a prohibition on *advertising* those charges violated the constitutional guaranty of *free speech*.

invalidating them. *See* 5 *Couch on Insurance* §69:34 at 69-69 to 69-70 (3d ed. 1996). Indeed, as the Michigan Court of Appeals observed in *Katt v. Ins. Bureau*, 505 N.W.2d 37, 39 (Mich. Ct. App. 1993), when upholding the constitutionality of the title insurance anti-rebating statute in that state, such matters are "exactly the type of issue[s] best resolved by the Legislature."

Whatever the Court may have thought of the wisdom of the legislative choices challenged in *Dade County*, Appellants respectfully suggest that the dissent was correct and that the Court improperly applied constitutional standards, substituting its own judgment on policy issues for that of the Legislature. If this Court determines that it cannot otherwise distinguish *Dade County*, which it most certainly can, then Appellants request that this Court overrule *Dade County*.

CONCLUSION

The Legislature made rational choices about how best to protect an identified public interest. Appellees can make no showing that the concerns manifest in the legislative history of the 1992 and 1999 amendments and as embodied in the challenged statutes are irrational. This statutory framework may not be one that satisfies Appellees, but it is one that is within the Legislature's power to adopt. Appellees' dissatisfaction is therefore properly addressed to the Legislature, not to the Courts.

For all of the foregoing reasons, the statutory scheme as set forth in §§626.611(11), 626,8437, 626.9541(1)(h)3a, 627.780(1), 627.782 and 627.783, *Florida Statutes* and DOI Rule 4-186.003(13), all as amended by Ch. 99-286, is fully consistent with all constitutional requirements. The judgment below should be reversed, and these provisions declared to be constitutional.

William H. Hughes, III
Kevin X. Crowley
PENNINGTON, MOORE, WILKINSON, BELL AND DUNBAR, P.A.
215 S. Monroe, 2nd Floor
Tallahassee, Florida 32301

and

George P. Daniels
AMERICAN PIONEER TITLE INSURANCE COMPANY
493 East Semoran Boulevard
Casselberry, Florida 32707

and

Lee Huszagh
FLORIDA LAND TITLE ASSOCIATION
249 East Virginia Street
Tallahassee, Florida 32301

and

Zollie M. Maynard
William C. Owen
PANZA, MAURER, MAYNARD
& NEEL, P.A.
215 South Monroe Street, Suite 310
Tallahassee, Florida 32301

and

Douglas A. Mang
Wendy Russell Wiener
MANG LAW FIRM, P.A.
660 East Jefferson Street
Post Office Box 11127
Tallahassee, Florida 32302-3127

and

Michael E. Marder
Stephanie A. Yelenosky
GREENSPOON, MARDER, HIRSCHFELD
RAFKIN, ROSS & BERGER, P.A.
135 W. Central Blvd., Suite 1100
Orlando, Florida 32801

and

CARLTON, FIELDS, WARD,
EMMANUEL, SMITH & CUTLER, P.A.
Post Office Drawer 190
Tallahassee, Florida 32302-0190

By: _____
Robert Pass
Florida Bar Number 183169
Mark A. Brown
Florida Bar Number 316210
Davisson Dunlap, Jr.
Florida Bar No. 0136730

CERTIFICATE OF SERVICE AND TYPE SIZE

I CERTIFY that a true and correct copy of the foregoing was furnished by hand delivery to:

Thomas Guilday, Esq.
Huey, Guilday & Tucker, P.A.
P.O. Box 1794
Tallahassee, Florida 32302

Keith Hetrick, Esq.
Florida Home Builders Association
201 East Park Avenue
Tallahassee, Florida 32301

Benjamin K. Phipps, Esq.
P.O. Box 1351
Tallahassee, Florida 32302

S. Marc Herskovitz, Esq.
Department of Insurance
Division of Legal Services
612 Larson Building
Tallahassee, Florida 32399-03333

and by U.S. mail to:

Michael L. Peterson, Esq.
Malloy, James & Peterson
218 Apollo Beach Boulevard
Apollo Beach, Florida 33572

this 3rd day of August, 1999, and that the size and style of the print used herein is 14 point proportionally spaced Times New Roman type.

_____
Attorney