

IN THE SUPREME COURT OF
THE STATE OF FLORIDA

FILED
S. D. WHITE

DEPARTMENT OF INSURANCE and)
BILL GUNTER, in his official capacity)
as Insurance Commissioner,)
Appellants,)
v.)
DADE COUNTY CONSUMER ADVOCATE'S OFFICE,)
Appellees.)

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Case No. 66,178

On Appeal From The District Court of Appeal
First District
State of Florida

BRIEF FOR THE NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS AS
AMICUS CURIAE IN SUPPORT OF THE APPELLANTS

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PRELIMINARY STATEMENT

The National Association of Insurance Commissioners (NAIC) is an unincorporated association whose members are the principal insurance regulatory officials who are charged by law with the responsibility of supervising the business of insurance within each state, territory and insular possession of the United States. The Appellant in the case at bar, the Commissioner of Insurance of the State of Florida, is a member of this association.

The business of insurance is conducted in this country on a national basis, but the federal government has deferred the regulation and oversight of this large industry to the individual states [See 15 U.S.C., Sec. 1011, et seq., McCarran-Ferguson Act]. The states provide the necessary regulation within their own borders and, with the assistance of the NAIC, monitor the national scene and maintain uniformity among the states. The major function of the NAIC and its members is to protect the insurance-consuming public. As stated in the NAIC Constitution:

"The objective of this body is to serve the public by assisting the several State insurance supervisory officials, individually and collectively, in achieving the following fundamental insurance regulatory objectives:

- (1) Maintenance and improvement of State regulation of insurance in a responsive and efficient manner;
- (2) Reliability of the insurance institution as to financial solidity and guaranty against loss;
- (3) Fair, just and equitable treatment of policyholders and claimants."¹

¹ 1984 NAIC PROCEEDINGS, Vol. I, p.viii, Article II. Objective

The NAIC believes that the experience of its membership in regulating the insurance industry can provide this Court with the needed insight to provide for a proper resolution of the controversy before the Court. Moreover, as an organization of state government officials charged by law with regulating the business of insurance in the public interest, the NAIC believes that it stands in a unique position to advise this Court of the actual and potential harms to the public interest that would result if the appellate court's decision is not reversed. Additionally, the NAIC believes that the ability of its members to regulate the business of insurance on behalf of the insurance-consuming public would be seriously impaired if the appellate court's reasoning is upheld by this Court.

STATEMENT OF THE CASE AND FACTS

The NAIC adopts the Statement of the Case and the Statement of Facts set forth by the Appellants in their brief.

QUESTIONS PRESENTED

- I. WHETHER THE JUDICIARY SHOULD ENCROACH ON THE PREROGATIVE OF THE FLORIDA LEGISLATURE IN MAKING AN INFORMED DECISION THAT ANTI-REBATE STATUTES PROTECT THE INSURANCE-CONSUMING PUBLIC?

- II. WHETHER SECTIONS 626.9541(1)(H)(1) AND 626.611(11), OF THE FLORIDA STATUTES, ARE VALID EXPRESSIONS OF THE POLICE POWER OF THE STATE?

ARGUMENTS

I. WHETHER THE JUDICIARY SHOULD ENCROACH ON THE PREROGATIVE OF THE FLORIDA LEGISLATURE IN MAKING AN INFORMED DECISION THAT ANTI-REBATE STATUTES PROTECT THE INSURANCE-CONSUMING PUBLIC?

The First District Court of Appeal of Florida held in its August 17, 1984, opinion in the above-captioned matter that the Florida anti-rebate statutes were not a proper exercise of the state's police power and violated the due process clause of the Florida Constitution. The court stated that there was an "absence of any apparent rational relationship between the prohibition of rebates and some legitimate state purpose in safeguarding the public welfare."²

The NAIC contends, however, that the Florida anti-rebate statutes are a justified exercise of the state's police power and, thus, are constitutional. Without comment as to the wisdom of the laws, the NAIC believes that any change or abolition of the anti-rebate statutes should be done by the legislature after careful study and consideration of the overall scheme of insurance regulation in Florida. The courts should not and cannot judicially void an otherwise valid statutory scheme merely because the court believes the scheme is not the most appropriate or desirable method of regulation. Holley v. Adams, 238 So.2d 401 (Fla. 1970)

The statutes being challenged in the case at bar are a part of a complex and integrated system of regulation of an industry that has an

² Dade County Consumer Advocate's Office v. Department of Insurance and Bill Gunter, Florida First District Court of Appeal, Case No. AV-400, Opinion filed August 17, 1984, rehearing denied October 24, 1984.

acute effect on the welfare of the citizens of Florida. The State of Florida, as have all the states in the Union, determined long ago that there needed to be an extensive oversight of the insurance industry. Part of that oversight is the prohibition of rebates in connection with the sale of insurance. It is these anti-rebate laws that are being challenged in the case today.

One of the challenged laws in Florida, Section 626.9541(1)(h)(1), is based on a model law adopted by the NAIC and enacted in identical or similar form in all fifty states and the District of Columbia [see Appendix, A-1]. The NAIC adopted a resolution in 1891 calling for the states to enact statutes prohibiting the payments of rebates.³ A model law prohibiting rebating was first adopted by the NAIC in July 1912.⁴ The model anti-rebate statute was amended and incorporated in its present form into the Model Unfair Trade Practices Act of the NAIC in January 1947 [see Appendix, A-4].⁵ The challenged Florida statute is substantially similar to the present NAIC model [see Section 4(8) in Appendix, A-6 to A-7]. The anti-rebate laws in this country, which are generally based on the NAIC model, have a long history and have withstood both legislative and judicial challenges in the past.

The history of the anti-rebate laws began in the late 1800's as a reaction and a solution to severe abuses that were occurring in the insurance industry. As insurance companies vied for a portion of the expanding market, the companies offered agents larger and larger

³ 1891 NAIC PROCEEDINGS, p.67

⁴ 1912 NAIC PROCEEDINGS, p.84

⁵ 1947 NAIC PROCEEDINGS, p.392-400

commissions to allow the agents to attract more business by sharing the excessive commissions with applicants in the form of rebates. These rebating practices led to unfair discrimination among policyholders and increasing prices, all to the detriment of the insurance-consuming public.

A full-scale investigation into the country's life insurance industry was conducted in 1905 by a joint commission of the New York Senate and Assembly. The hearings conducted by the commission, known as the Armstrong Investigation, led to several conclusions including the recommendation that anti-rebate laws were appropriate and necessary.⁶ By the early 1900's every state had enacted some form of unfair discrimination or anti-rebate laws.

Thus it is evident that, after careful and extensive study, the legislatures in all fifty states found the anti-rebate laws an appropriate manner in which to address what they found to be a serious abuse in the insurance industry. Whether the laws as enacted are effective and appropriate in light of today's marketplace and consumers is an issue for the legislatures of each state to address and should not be done judicially. As this Court stated in Carroll v. State, 361 So.2d 144, 146 (1978):

"It is generally accepted that the state is the primary judge of, and may by statute or other appropriate means, regulate any enterprise, trade, occupation, or profession if necessary to protect the public health, welfare, or morals, and a great deal of discretion is vested in the legislature to determine public interest and measures for its protection. Burnsed v. Seaboard Coastline Railroad Company, 290 So.2d 13, 18 (Fla. 1974)."

⁶ Report of the Joint Committee of the Senate and Assembly of the State of New York to Investigate and Examine into the Business and Affairs of Life Insurance Companies, Vol. VII, 318 (1906)

As noted earlier, it is not for the courts to judge whether the means chosen by the state are the most appropriate way to accomplish its objectives. Holley, 238 So.2d at 401. The court must only determine whether the means utilized bears a rational or reasonable objective to a legitimate state objective. Belk-James, Inc. v. Nozum, 358 So.2d 177 (Fla. 1978).

Florida's anti-rebate laws are a part of the state's integral network of regulation that as a whole was designed to protect the insurance-consuming citizens of Florida. Specifically, the anti-rebate statutes prevent unfair discrimination among the citizens of Florida and help to assure the solvency of the insurance industry. The need for the anti-rebate laws is discussed further in Argument II and in the Conclusion. The anti-rebate statutes in question here serve a legitimate state purpose and are sound constitutionally. If the laws are viewed as unwise in light of today's marketplace and economic climate, that is for the legislature to address and not the courts.

II. WHETHER SECTIONS 626.9541(1)(h)(1) AND 626.611(11), OF THE FLORIDA STATUTES, ARE VALID EXPRESSIONS OF THE POLICE POWER OF THE STATE?

Acts of the legislature are presumed valid in Florida and all reasonable doubts must be resolved in favor of their validity. Carroll, 361 So.2d at 145. As this Court stated in Carroll:

"Statutes are presumed to be constitutional until the contrary is shown; and it is only when they manifestly infringe some provision of the Constitution that they can be declared void for that reason." 361 So.2d at 145.

The Florida appellate court has declared the anti-rebate laws unconstitutional under the due process clause of the Florida Constitution. The test applied to determine the constitutionality of the laws was stated by this Court in Johns v. May, 402 So.2d 1166 (Fla. 1981):

"The test to be applied to determine if a particular statute is in violation of the due process clause is whether it bears a reasonable relation to a permissible legislative objective and is not discriminatory, arbitrary, or oppressive. Laskey v. State Farm Insurance Co., 296 So.2d 9 (Fla. 1974)."

Although the First District Court stated that the "applicable standard of review is whether the challenged anti-rebate statutes reasonably and substantially promote the public health, safety or welfare as required by the due process clause of the Florida Constitution" (emphasis added), the NAIC does not believe that is the proper standard. The references cited by the Court do not require that the laws "substantially" promote the public welfare, but only reasonably. Thus, the courts must uphold a law unless it is shown to be without any reasonable relationship to the police power of the State. This Court reiterated in Carroll that:

"...every reasonable doubt must be indulged in favor of the act. If it can be rationally interpreted to harmonize with the Constitution, it is the duty of the Court to adopt that construction and sustain the act." 361 So.2d at 146.

Therefore, if the court can find a reasonable relation to a permissible legislative objective, the statute should be upheld.

Furthermore, the party challenging the constitutionality of a statute must demonstrate that the law is unconstitutional. Peoples Bank, Etc. v. State, Dept. of B & F, 395 So.2d 521, 524 (Fla. 1981); A.B.A. Industries v. City of Pinellas Park, 366 So.2d 761, 763 (Fla. 1979); Knight & Wall Co. v. Bryant, 178 So.2d 5 (Fla. 1965), cert. denied, 383 U.S. 958, 86 S.Ct. 1223 (1966); Davis v. State, 146 So.2d 892, 895 (Fla. 1962). In the case at bar, however, the First District Court of Appeal appears to have improperly put the burden on the Florida Insurance Department to prove the validity of the anti-rebate statutes. The state has demonstrated the constitutionality of the anti-rebate statutes. Conversely, the Appellee, which clearly has the burden to show that the laws violate the constitution, has failed to do so.

This Court has held that the regulation of the business of insurance is within the state's authority under its police power. Feller v. Equitable Life Assurance Society, 57 So.2d 581 (Fla. 1952). That authority includes the regulation and licensing of insurance agents and the oversight of premium rates. State ex rel. Kennedy v. Knott, 123 Fla. 295, 166 So. 835 (Fla. 1936), Williams v. Hartford Accident and Indemnity Co., 245 So.2d 64 (Fla. 1970).

A previous Florida trial court in an almost identical case found that the anti-rebate laws were a legitimate exercise of the state's authority. Blumenthal v. Department of Insurance, et al., Case No. 77-355 (Leon Co. Cir. Ct. 1977), appeal dismissed, 375 So.2d 910(Fla. 1979). Even the First District Court of Appeal in this case found that the state's objective in protecting its citizens was served somewhat by the anti-rebate laws. The First District Court of Appeal stated:

"Perhaps the department's and amicus' strongest argument is that the agent who is permitted to rebate will do so at the expense of his customers, in that they will not be provided with the quality of information regarding the best type of insurance suited to their needs because the agent, having negotiated his commission, will not spend the requisite time counseling his clients . . . We recognize that this argument is not without merit but we are not convinced that it validates the exercise of the police powers of the state."

The anti-rebate laws provide even more protection to the Florida citizens than what the First District Court of Appeal acknowledged.

As described in more detail in the State's brief, the anti-rebate laws are designed to protect the citizens of Florida. The laws prohibit unfair discrimination among consumers of insurance products and protect the solvency of the insurance industry, and for the benefit of the insurance consuming public. Unlike other goods and services purchased, insurance products are bought today for services in the future and, thus, the future solvency of the insurance industry is even more critical than in other industries of our economy. The anti-rebate laws do not merely protect the insurance agents of Florida, but are for the benefit and protection of all the state's citizens who purchase insurance.

Although the challenge here is brought under the due process clause of the Florida Constitution, the due process guarantee under the U. S. Constitution is substantially similar. At least one Florida court has held that the requirements of due process under the Federal and Florida constitutions were indistinguishable. Florida Cannery Association v. State, Department of Citrus, 371 So.2d 503,513 (Fla. 2d DCA, 1979).

Thus, at least three U. S. Supreme Court decisions might provide some assistance in the case at bar. German Alliance Ins. Co. v. Lewis, 233 U.S. 389, 34 S.Ct. 612, 58 L.Ed. 1011 (1914); O'Gorman & Young v. Hartford Fire Insurance Co., 282 U.S. 251, 51 S.Ct. 130, 75 L.Ed. 234 (1931); Osborn v. Ozlin, 310 U.S. 53, 60 S.Ct. 758, 84 L.Ed. 1074 (1940). In these three cases the U. S. Supreme Court reviewed state insurance laws regulating premium rates and agents' commissions and found that the laws were within the scope of the states' police power and did not violate the due process clause of the U. S. Constitution.

Justice Brandeis wrote in O'Gorman that:

"The business of insurance is so far affected with a public interest that the state may regulate the rates (cites omitted), and likewise the relations of those engaged in the business (cites omitted)." 282 U.S. at 257.

The Court in O'Gorman went on to state:

"The agent's compensation, being a percentage of the premium, bears a direct relation to the rate charged the insured . . . Moreover, lack of a uniform scale of commissions allowed local agents for the same service may encourage unfair discrimination among policyholders by facilitating the forbidden practice of rebating." 282 U.S. at 257.

The U. S. Supreme Court, like this Court, has held that a law is presumed to be Constitutional unless there appears to be no rational basis for the statute, United States v. Carolene Products Co., 304 U.S. 144, 58 S.Ct. 778, 82 L.ed. 1234 (1937). The Supreme Court has also

held that the party complaining of a due process violation has the burden to prove that the act is unconstitutional. Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 96 S.Ct. 2882, 49 L.ed. 2d 752 (1976). The NAIC asserts here, as it has previously, that it is not the state that has the burden to prove the validity of the statutes, but that it is the Appellee that has the burden to demonstrate how the anti-rebate laws violate the state's constitution. The Appellee has failed to do so.

Other state courts have considered the legislature's authority to enact anti-rebate laws. None have found that the statutes are not within the police power of the legislature. The Insurance Commissioner in his brief has detailed the findings of the courts in other states concerning the anti-rebate statutes. The NAIC adopts that discussion in the Appellant's brief and cites several cases from other jurisdictions for further reference. Calvin Phillips & Company v. Fishback, 146 P. 181 (Wash. 1915); Commonwealth v. Morningstar, 144 Pa. 102, 22 A. 867 (1891); Leonard v. American Life & Annuity Company, 77 S.E. 41 (Ga. 1913); Metropolitan Life Insurance Co. v. People, 70 N.E. 643 (Ill. 1904); People v. Formosa, 30 N.E. 492 (N.Y. Crim. 1892); People v. Hartford Life Insurance Company, 252 Ill. 398, 96 N.E. 1029 (1911); Rideout v. Mars, 99 Miss. 199, 54 So. 801 (1911); Short Ridge v. Hipolito Co., 14 Cal. App. 682, 300 P. 467 (1931); Utah Ass'n of Life Underwriters v. Malton S. L. Ins. Co., 200 P. 673 (Utah 1921).

It is evident by the findings in these cases that the courts in other jurisdictions have considered the authority of state legislatures to enact laws, such as anti-rebate statutes, and have found them to be properly within the legislature's authority.

The anti-rebate statutes in Florida, as well as in the other 49 states, were enacted to eliminate an abuse in the insurance industry. The laws are intended to protect the insurance-consuming citizens of the state of Florida from a practice that the legislature found to be inappropriate and harmful to consumers. The Florida anti-rebate statutes serve a legitimate objective of the state and are a valid exercise of the state's police power.

CONCLUSION

The Florida anti-rebate statutes are an integral part of the overall regulation of insurance the state. The anti-rebate statutes were enacted by Florida and the other 49 states after legislative determinations that such enactments protected the insurance-buying public. To eliminate these protections judicially, without consideration of the impact on the public, may create havoc in the marketplace. To remove the ban, and allow rebating, would put the insurance industry in a state of chaos and upheaval. The orderly and efficient regulation of insurance would be acutely disrupted by the court declaring the anti-rebate laws unconstitutional. Such a declaration would leave a void in the state's regulation and oversight of the insurance industry, which would be detrimental to consumers.

The anti-rebate laws are a legitimate exercise of the state's police power. The wisdom of the statutes is for the legislature to decide and not the courts. Should a survey of today's marketplace and a profile of today's consumers suggest modifications to the anti-rebating legislation, the legislature would be the proper branch of the government to address the issue. The legislature is in a better position to determine the most efficient and effective method to guard against the reoccurrence of the abuses that led to the original enactment of the anti-rebate laws.

Accordingly, this Court should uphold the Constitutionality of the Florida anti-rebate statutes and reverse the decision of the First District Court of Appeal.

Respectfully submitted,

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