

**IN THE SUPREME COURT
FOR THE STATE OF FLORIDA**

**CASE NO.: SC04-1606
Fourth DCA Case Nos.: 4D03-2880; 4D03-3298 (Consolidated)**

**DAVID H. KLIGFELD; DHALCO FINANCIAL SERVICES, INC.;
DAVID KLIGFELD,**

Petitioners,

v.

**STATE OF FLORIDA, OFFICE OF FINANCIAL INSTITUTIONS AND
SECURITIES REGULATION,**

Respondent,

**ON APPEAL FROM THE FOURTH
DISTRICT COURT OF APPEAL**

**ON PETITION FOR DISCRETIONARY REVIEW FROM FOURTH
DISTRICT COURT OF APPEAL**

AMENDED JURISDICTIONAL BRIEF OF PETITIONERS

**Counsel For Petitioners
Barry S. Mittelberg
MITTELBERG & NICOSIA P.A.
8100 N. University Dr. Suite 102**

Ft. Lauderdale, FL 33321
(954) 752-1213
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Florida Senate Floor Debate on CSCSSB 2994

Conformed Copy Opinion Filed June 2, 2004

STATEMENT OF CASE AND THE FACTS

On June 2, 2004, the Fourth District Court of Appeals (“DCA”) affirmed two final orders of the Florida Office of Financial Regulation finding that the Petitioners were unregistered sales persons who sold unregistered securities in the State of Florida in violation of the Florida Securities and Investors Protection Act, Chapter 517, Florida Statutes (“Securities Act”). *See* Kligfeld v. Office of Fin. Regulation, 876 So.2d 36 (Fla. 4th DCA 2004). In so affirming, the DCA rejected the Petitioners’ argument that Chapter 626 preempts the application of the Florida Security Act. *See id.*

Petitioners seek discretionary review of the DCA opinion on the basis that the decision of the DCA directly conflicts with the Florida Viatical Settlement Act, Chapter 626, Part X, Florida Statutes, and that the opinion expressly declared valid the right to enforce viatical settlement contracts as securities pursuant to Chapter 517, Florida Statutes.

SUMMARY OF THE ARGUMENT

The Florida Rules of Appellant Procedure vest the Supreme Court with discretionary view of the District Court of Appeals decisions. The Court has jurisdiction. *See* §5, §3(b)(3) Florida Constitution and Rule 9.120, Florida Rules of Appellate Procedure.

At issue is the construction and the application of the Florida Securities and Investors Protection Act (Securities Act), Chapter 517, Florida Statutes and the Florida Viatical Settlement Act, Chapter 626, Part X. The Viatical Settlement Act, the legislative history and Florida Statute 626.99245 directly conflict with the decision of the District Court of Appeals rendered on June 2, 2004.

The Court has discretionary review jurisdiction pursuant to Art. V, §(3)(b), Florida Constitution. Petitioners would argue to the Court that the Fourth District Court of Appeals had made an declaration as to the validity of pursuing viatical settlement agreements pursuant to Florida Chapter 517, Florida Statutes, rather than Chapter 626, Part X of the Florida Statutes. Additionally, the decision of the District Court of Appeal impliedly rejects the case of SEC v. Life Partners, Inc., which was decided in the U.S. Court of Appeals for the District Court of Columbia, 87 Fed. 3d 536 (DCA Cir. 1996) in which the Court held that the sale of fractionalized interest in viatical settlements do not constitute a security. Life

Partners has been upheld in the State of Florida. *See Decker v. Mutual Benefits Corp.*, Case No.: 00-0451-CA-17 (Fla. 19th Cir. Court May 17, 2001). Therefore, there exists an declaration as to the validity of a Florida Statute and direct conflict with the decision of another Court. The Supreme Court has discretionary jurisdiction to hear this matter.

ARGUMENT

The DCA Opinion declares that a Viatical Settlement Purchase Agreement may be enforced under Chapter 517, Florida Statutes. The Opinion rendered by the DCA on June 2, 2004 clearly allows the OFSR to exercise jurisdiction based upon the Petitioners sale of Viatical Settlement Purchase Agreements.

Kligfeld and Torchia (Petitioners) collected money from individuals for the purposes of purchasing viaticated life insurance policies, the benefits of which were to be assigned to a trust. By virtue of the contracts, the individuals were to receive a share of the trust income purporting to the amount of money they had placed with American Benefit Corporation. The OFSR attempts to exercise jurisdiction in this case based upon the Petitioners sale of investment contracts. The Court determined that investment contracts are expressly defined as securities under Florida Statutes 517.021(2)(q), that the OFSR has jurisdiction. The DCA further ruled that Chapter 626, Part X does not expressly preempt the Securities

Act. The Act itself, the legislative history, and Florida Statutes 626.99245 directly conflicts with the decision of the District Court of Appeals rendered on June 2, 2004.

A thoughtful reading of the decision rendered by the DCA would clearly indicate that the Court is allowing jurisdiction for Viatical Settlement Purchase Agreements under §517.021(20)(q), Florida Statutes and is expressly declaring the OFSR's right to pursue original jurisdiction of a VSPA as an investment in contravention of the Viatical Settlement Purchase Act.

Art. V, §(3)(b) provides discretionary jurisdiction based upon a DCA's declaration as to the validity of a state statute. The DCA opinion makes an express declaration as to the validity of pursuing viatical settlement agreements pursuant to Chapter 517, Florida Statute and ignores the mandates of Chapter 626, Part X entitled, "The Viatical Settlement Act".

Discretionary jurisdiction exists in this case because the District Court of Appeals inherently declared valid the right to pursue viatical settlement purchase agreements as a security pursuant to Chapter 517, Florida Statutes. *See Kligfeld*, 876 So.2d. 36. The Constitution does not require a statement to the effect that a specific statute is valid or enforceable is necessary to result in discretionary jurisdiction being granted. *See Gerald Kogan & Robert Craig Waters, The*

Operation and Jurisdiction of the Florida Supreme Court, 18 NOVA L. REV. 1151, 1218 (1994). The Florida Supreme Court has indicated that the term “decision” as used in the Constitution’s jurisdictional sections, encompasses not merely the result, but also the entire opinion. *See Seaboard Airline R.R. v. Branham*, 104 So.2d 356, 358 (Fla. 1958), Kogan & Waters, *supra*.

The injustice that has resulted by the decision of the District Court of Appeal was quickly remedied by the Florida legislature. Florida Statute 626.99245 entitled, “Conflict of Regulation of Viatical”, provides:

(4) The offer, sale, and purchase of viatical settlement contracts, and the regulation of viatical settlement providers shall be within the exclusive jurisdiction of the Office of Insurance Regulation under the provisions of Part X, Chapter 626.

The legislative history, the Act itself, and Florida Statute 626.99245 mandate that the decision of the Appellate Court was made in error and should be reversed. To ignore these facts constitutes a travesty of justice to both Kligfeld and Torchia who were duly licensed insurance sales agents entitled to sell VSPA’s pursuant to the Viatical Settlement Act.

CONCLUSION

There exists jurisdiction for the Supreme Court to exercise discretionary jurisdiction in this case and there are compelling reasons to exercise such jurisdiction. Kligfeld and Torchia face immense fines for selling Viatical Settlement Agreements in which they were duly licensed to sell. The DCA interpretation of the statutory framework of both Chapter 517 and Chapter 626, Part X constitutes an expressed finding as to the validity of pursuing Viatical Settlement Purchase Agreements under Chapter 517. This Court should take jurisdiction of this case and follow the Florida Legislature which enacted Florida Statute 626.99245 to protect other agents such as Torchia and Kligfeld from conflicting jurisdictional frameworks.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy was furnished to: ***Peter G. Fisher, Esq.***, Office of Financial Institutions and Securities Regulation, 200 E. Gaines Street, Fletcher Bldg., Room 256, Tallahassee, FL, 32399-0379, this 10th day of September, 2004.

CERTIFICATE OF COMPLIANCE

I, Barry S. Mittelberg, hereby certify that this Brief on the Supreme Courts Jurisdiction is in compliance with the Florida Rules of Appellate Procedure as to

font requirements and is submitted in Times New Roman 14 point font.

MITTELBERG & NICOSIA, P.A.
Attorneys for Petitioners
8100 N. University Dr., Suite 102
Ft. Lauderdale, Florida 33321-1717
Tel: (954) 752 -1213
Fax: (954) 752-5299

By: _____
BARRY S. MITTELBERG
Florida Bar No.: 396567