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Insurance-Regulation Under the McCarran-Ferguson Act-FTC Jurisdiction Not Ousted by a State Statute Proporting to Control Deceptive Advertising Mailed to Other States

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INSURANCE—REGULATION UNDER THE MCCARRAN-FERGUSON ACT—FTC JURISDICTION NOT OUSTED BY A STATE STATUTE PURPORTING TO CONTROL DECEPTIVE ADVERTISING MAILED TO OTHER STATES—Petitioner issued a cease-and-desist order prohibiting respondent from making statements in its advertising materials which violated the Federal Trade Commission Act.[1]

[1] Federal Trade Commission Act, 38 Stat. 717 (1914), as amended, 15 U.S.C. §§ 41-58 (1958). The power to regulate advertising practices is derived from that part of the FTCA which directs the FTC to prevent persons subject to the act from using "unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce."

Respondent, a Nebraska health insurance company, mailed its circulars to residents of every state. The McCarran-Ferguson Act provides that "the Federal Trade Commission Act . . . shall be applicable to the business of insurance to the extent that such business is not regulated by State law."[2] A Nebraska statute prohibits an insurer domiciled there from engaging in unfair business practices in any state.[3] In an action to set aside the FTC cease-and-desist order, the Court of Appeals for the Eighth Circuit accepted respondent's argument that its business was regulated by Nebraska law and thus insulated from FTC authority.[4] On certiorari to the United States Supreme Court, *held,* judgment vacated, and case remanded for further proceedings, three Justices dissenting. Congress did not intend extraterritorial regulation by the state of domicile to displace FTC jurisdiction. *FTC v. Travelers Health Ass'n,* 362 U.S. 293 (1960).

The problem of interpreting what Congress intended by the phrase "regulated by State law"[5] has been intensified by the substantial growth of mail-order insurance business which has occurred since the enactment in 1945 of the McCarran-Ferguson Act.[6] In *FTC v. National Cas. Co.,*[7] insurance companies which were licensed to do business in the receiving states circulated misleading brochures through local agents. The Court concluded that FTC jurisdiction was ousted in those states which were regulating such advertising.[8] However, the majority in the principal case did not consider the *National Casualty* decision controlling with respect to Nebraska's attempt to protect the people of other states from deceptive circulars mailed by its domiciliary.[9] According to the Court, Congress en-

[2] McCarran-Ferguson Insurance Regulation Act, 59 Stat. 33 (1945), as amended, 15 U.S.C. §§ 1011-15 (1958).

[3] NEB. REV. STAT. §§ 44-1501 to -1521 (Supp. 1959). Section 44-1503 states: "No person domiciled in or resident of this state shall engage in unfair methods of competition or in unfair or deceptive acts and practices in the conduct of the business of insurance in any other state, territory, possession, province, country, or district." Section 44-1506 authorizes the Director of Insurance to prefer charges against a violating insurer, and 44-1509 authorizes the issuance of a cease-and-desist order.

[4] Travelers Health Ass'n v. FTC, 262 F.2d 241 (8th Cir. 1959). The court felt that with every activity of respondent in the conduct of its business subject to the supervision of the Director of Insurance of Nebraska, respondent's solicitation practices could not realistically be held to be unregulated by Nebraska law.

[5] A decision that the business of insurance was not commerce had served to usher in seventy-five years of state regulation. Paul v. Virginia, 75 U.S. (8 Wall.) 168 (1869). Then the Supreme Court reversed itself and subjected the insurance business to potential federal control. United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533 (1944). This latter decision initiated legislation culminating in the McCarran-Ferguson Act. See generally SAWYER, INSURANCE AS INTERSTATE COMMERCE 1-82 (1944); Kimball & Boyce, *The Adequacy of State Insurance Rate Regulation: The McCarran-Ferguson Act in Historical Perspective,* 56 MICH. L. REV. 545 (1958).

[6] McCarter, *Recent Misleading and Deceptive Mail Order Accident and Health Insurance Policies and Advertising,* 1956 INS. L.J. 247, 251.

[7] 357 U.S. 560 (1958). Here, the Supreme Court reviewed two decisions which had set aside orders of the FTC: American Hospital & Life Ins. Co. v. FTC, 243 F.2d 719 (5th Cir. 1957); National Cas. Co. v. FTC, 245 F.2d 883 (6th Cir. 1957). See generally Chellberg, *Regulation of Insurance — the State-Federal Controversy,* 7 DE PAUL L. REV. 25 (1957).

[8] FTC v. National Cas. Co., *supra* note 7, at 564.

[9] Principal case at 297.

acted the McCarran-Ferguson Act to remove any commerce clause obstacles to continued insurance regulation by the states.[10] Because of their proximity to the business, states were considered better able than the federal government to provide effective regulation.[11] In applying this rationale to the principal case, the Court apparently assumed that the FTC would be considered by Congress to be closer than Nebraska to affected parties in other states. When one considers the uniform acts in the field[12] and the cooperation of insurance commissioners,[13] it can be doubted that the FTC is in fact closer to the targets of the insurer's misrepresentations. Nevertheless, the legislative history[14] convinced the majority that the FTC could be displaced only through regulation by states in which the deceptive circulars were received.[15] Finally, the majority had doubts about the constitutionality of the Nebraska statute when applied to misrepresentations disseminated in other states.[16]

The principal case leaves open the question whether regulation by the states receiving respondent's advertising would divest the FTC of jurisdiction when the ties between these states and respondent are slender in comparison to the contacts present in *National Casualty*.[17] Under the circumstances of the principal case, effective regulation by a recipient state depends upon that state's ability to obtain jurisdiction over the insurance company to issue an effective cease-and-desist order.[18] In light of two

[10] The decision in the South-Eastern Underwriters case had jeopardized the entire existing state regulatory structure.

[11] See *Joint Hearings on S. 1362, H.R. 3269, H.R. 3270 Before the Subcommittees of the Committees on the Judiciary,* 78th Cong., 1st Sess. 17, 37, 117, 238-39, 242-43, 244, 252 (1945); 90 CONG. REC. 6532 (1944); 91 CONG. REC. 1087 (1945).

[12] See MODEL FAIR TRADE PRACTICES ACT which was drafted by the National Association of Insurance Commissioners. NATIONAL ASS'N OF INSURANCE COMMISSIONERS PROCEEDINGS 392-400 (1947).

[13] See generally Layne, *Multiple State Regulation of Mail Order Insurance,* 39 GEO. L.J. 422 (1951); Note, 45 GEO. L.J. 85 (1956).

[14] See 91 CONG. REC. 1442-44, 1477-89 (1945). The following are samples of statements made on the Senate floor by members of the Conference Committee on the McCarran Act: By Senator O'Mahoney at 1483, "State regulation must be for the state and not for the United States," and at 1483, "Nothing in the proposed law would authorize a State to try to regulate for other States. . . ." By Senator Ferguson at 1484, "If the Senator's statement was that the proposed act would permit a State to regulate interstate commerce — insurance is interstate commerce — in the various States, the State could not do it." See generally Comment, 23 CHI.-KENT L. REV. 317 (1945).

[15] But this is subject to question as some excerpts from the legislative history indicate that a state could rely on another state's controlling the interstate advertising of its domiciliary. See 91 CONG. REC. 1442, 1481 (1945).

[16] Principal case at 302 citing Alaska Packers Ass'n v. Industrial Accident Comm'n, 294 U.S. 532 (1935); Sligh v. Kirkwood, 237 U.S. 52 (1915); Western Union Tel. Co. v. Brown, 234 U.S. 542 (1914). This attitude was not shared by the three dissenting Justices who in support of their position cited Hammond Packing Co. v. Arkansas, 212 U.S. 322 (1909). Principal case at 305.

[17] The court of appeals did not consider regulation by any state other than Nebraska, and the Supreme Court accordingly did not consider this issue but extended the invitation to respondent to raise the question in a subsequent proceeding, principal case at 298 n. 4.

[18] McCarter, *supra* note 6, at 256.

decisions of the past decade,[19] it appears certain that contracting by mail to provide insurance is sufficient contact to enable a state to exercise jurisdiction. A valid cease-and-desist order could be issued,[20] and upon failure to comply the state could obtain a judgment against the insurer. A major problem, however, arises concerning the usefulness of this judgment. Under the doctrine that a state has no obligation to award full faith and credit to a judgment obtained in a proceeding to enforce the penal laws of a sister state,[21] a state in which the insurance company has assets would not be required to give credit to the judgment of a recipient state. This exception to full faith and credit is based upon a respect for state sovereignty[22] and a policy that an individual state is alone concerned with the enforcement of its rules of public order and discipline.[23] However, a state is required to extend full faith and credit to a foreign judgment recovered in a civil suit which could not have been maintained under local law because of a contrary public policy.[24] Some writers have concluded that no reason exists for not applying the same rule to penal claims which have been reduced to judgment.[25] Furthermore, in *Milwaukee County v. M. E. White Co.*,[26] the Court held that a judgment for taxes is not penal. It was stressed that the obligation to pay taxes is a form of quasi-contractual liability enforceable by a common law debt action.[27] On the other hand, recovery of a pecuniary penalty by a recipient state cannot be distinguished from enforcement of traditional criminal law.[28] It has also been argued that the *Milwaukee County* decision was grounded on reasoning that no state could have a policy against the payment of another state's taxes and that this reasoning should be extended to the fair trade practices area where there is also a unity of public policy among the states.[29] There is, however, virtually complete agreement on public policy in the area of traditional criminal law. Therefore, if judgments for violation of unfair trade

[19] McGee v. Int'l Life Ins. Co., 355 U.S. 220 (1957); Travelers Health Ass'n v. Virginia, 339 U.S. 643 (1950).

[20] Travelers Health Ass'n v. Virginia, *supra* note 19.

[21] Wisconsin v. Pelican Ins. Co., 127 U.S. 265, 289-90 (1888). See Huntington v. Attrcill, 146 U.S. 657 (1892) (dictum); The Antelope, 23 U.S. (10 Wheat.) 66 (1825); RESTATEMENT, CONFLICT OF LAWS § 611 (1934), § 443 (1948 Supp.). See generally GOODRICH, CONFLICT OF LAWS 24-29, 623-25 (3d ed. 1949); STUMBERG, CONFLICT OF LAWS 118-120 (2d ed. 1951).

[22] Leflar, *Extrastate Enforcement of Penal and Government Claims*, 46 HARV. L. REV. 193 (1932).

[23] GOODRICH, CONFLICT OF LAWS 25 (3d ed. 1949).

[24] Morris v. Jones, 329 U.S. 545 (1947); Titus v. Wollick, 306 U.S. 282 (1939); Fauntleroy v. Lum, 210 U.S. 230 (1908).

[25] McCarter, *supra* note 6, at 256-60; Notes, 20 MINN. L. REV. 431 (1936) and 84 U. PA. L. REV. 526 (1936).

[26] 296 U.S. 268, 271 (1935).

[27] *Ibid.*

[28] It has been argued that the exception should be limited to those penal claims by which enforcement of traditional criminal law is sought. Leflar, *supra* note 22.

[29] See Brief for Appellant, p. 7, Travelers Health Ass'n v. FTC, Civil No. 15743 (8th Cir. 1960).

laws were considered non-penal or if the unity-of-policy argument were accepted, the penal judgment exception could be circumvented. The position that both civil and penal judgments should receive similar treatment under full faith and credit meets the problem directly while avoiding tenuous extensions of *Milwaukee County.* However, even if it is conceded that full faith and credit need not be awarded to a penal judgment, there is no constitutional prohibition to such credit being extended. In accord with a declared public policy against misleading advertising practices, the domiciliary state could entertain such an action as a matter of comity,[30] although it is doubtful that Congress intended effective regulation to depend upon such a voluntary extension of full faith and credit. Thus if the Court avoids extending *Milwaukee County* but is unwilling to overrule the penal judgment exception, it seems likely that despite the existence of recipient state regulation,[31] its ineffectiveness will result in upholding FTC authority on facts similar to those in the principal case.

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30 Brief for the Health Insurance Ass'n of America as Amicus Curiae, p. 26, Travelers Health Ass'n v. FTC, Civil No. 15743 (8th Cir. 1960). This argument is supported by the fact that the MODEL FAIR TRADE PRACTICES ACT has now been enacted in all fifty states and Puerto Rico and the UNIFORM UNAUTHORIZED INSURERS SERVICE OF PROCESS ACT has been enacted in forty-five states, the District of Columbia, and Puerto Rico.

31 Involved in this entire discussion is the question whether "regulated" requires the mere existence of state laws or the existence of effective regulation. See National Cas. Co. v. FTC, 357 U.S. 560 (1958); Kimball & Boyce, *supra* note 5, at 568; Orfield, *Improving State Regulation of Insurance,* 32 MINN. L. REV. 219 (1948). To the extent, as urged by the dissent in the principal case, that the *National Casualty* decision indicates that mere existence of state laws is enough, FTC jurisdicion may be ousted in the principal case regardless of penal judgment problems. The result would be the complete absence of any regulation which is certainly not what Congress intended.