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RECENT COURT DECISIONS

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Permissible Insurance Related Activities of Banks

Independent Insurance Agents of America v. Ludwig, 997 F.2d 958 (D.C. Cir. 1993)

Insurance trade associations sued for a declaratory judgment challenging an interpretation of the National Bank Act by the Comptroller of the Currency. The Office of the Comptroller of the Currency had been asked by the United States National Bank of Oregon whether there was a geographic limitation on the sale of insurance from the branch of a national bank that was located in a town whose population was less than 5,000. The Comptroller determined that § 92 of the National Bank Act (NBA) did not impose a geographic limit on the insurance market so that as long as the bank is located in a small town, the bank is free to solicit and serve insurance customers everywhere.

The plaintiffs in the suit alleged that the Comptroller had exceeded his statutory authority. The Federal district court granted summary judgment upholding the Comptroller's opinion. The District of Columbia Circuit Court reversed the district court and found that the pertinent section of the Bank-holding Company Act (§ 92) had been repealed. The United States Supreme Court subsequently reversed the D.C. Circuit Court finding that § 92 had not been repealed and remanded the case back to the District of Columbia Circuit Court, which then rendered its opinion upholding the Comptroller's prior interpretations of § 92 of the National Bank Act.

Section 92 of the National Bank Act specifically provides that a national bank may act as an agent for the sale of insurance in towns with fewer than 5,000 people. The Circuit Court for the District of Columbia, in upholding the Comptroller's determination that the bank need not be chartered in a small town and that the insurance sales activities were not limited to towns of 5,000, wrote that they found no specific Congressional intent to restrict the geographical reach of the insurance sales authorized by § 92 of the NBA.

The court then addressed the issue of whether the Comptroller's interpretation of the statute was a "permissible construction." The court wrote that, to overturn the Comptroller's construction of the statute, the court would have to conclude that the Comptroller's opinion is "so inconsistent with a sufficiently clear statutory policy as to demonstrate that Congress' clear intent has been violated." The court declined to do so.

The court also found 1982 amendments to the Bankholding Company Act not controlling. Those amendments permitted a subsidiary of a bankholding company to sell insurance in a place with a population of 5,000 or under. The Federal Reserve Board has interpreted this act as limiting the insurance activities to areas with fewer than 5,000 people and areas of less than 5,000 people adjacent to them. The court held that the interpretation of the Federal Reserve Board of the Bankholding Company Act did not have to be considered by the Comptroller because the Comptroller has no authority under the Bankholding Company Act.

It should be noted that this case applies to national banks and not to state banks. The court found no geographic limitations to the sale of insurance under § 92, thus from a town of 5,000 or less banks could engage in mass mailings and telemarketing. This construction was not adopted by the Fifth Circuit in a subsequent case discussed below. Furthermore, questions regarding compliance with licensure requirements imposed by states remain unanswered. A review of this case will most certainly be sought in the Supreme Court.

Variable Annuity Life Insurance Company v. Robert L. Clark, U.S. Court of Appeals 5th Cir., Case No. 92-2010 (August 26, 1993)

This case is inconsistent with the *Ludwig* holding. Once again the issue concerned an opinion letter issued by the Comptroller of the Currency on March 21, 1990. In that letter the Comptroller of the Currency determined that § 24(7) of the National Bank Act authorized national banks to sell annuity contracts. The Comptroller also concluded that § 92, which allows national banks to act as insurance agents in towns with less than 5,000 inhabitants, did not limit a national bank's power to sell insurance in towns with a population of over 5,000. The Comptroller further held that, in any event, annuities are not a form of insurance. The district (trial) court deferred to the Comptroller's interpretation of § 92 and § 24(7) of the National Bank Act. The Court of Appeals reversed, finding that under § 92 of the National Bank Act, national banks may not sell annuities in cities with more than 5,000 inhabitants. The appellate court also determined that annuities were a form of insurance.

The question before the court was whether § 92 of the National Bank Act prohibited banks from selling annuities in cities with more than 5,000 inhabitants. The court found that § 92 explicitly authorizes national banks in towns with a population smaller than 5,000 to act as insurance agents and "impliedly prohibits national banks in towns with a population larger than 5,000 from acting as insurance agents." The Court of Appeals cited a decision of a sister court in writing, "In interpreting the intended scope of § 92, the Second Circuit cogently deduced that 'had Congress intended to grant national banks located in towns with a large population the authority to sell insurance, it would never have limited the grant of authority in § 92 to national banks in locations with under 5,000 inhabitants.'"

The Fifth Circuit, in this case, reviewed the same legislative history as the D.C. Circuit Court in the *Ludwig* case. However, the courts reached different conclusions. In determining whether deference should be given to the Comptroller's opinion, both the *Ludwig* court and the *VALIC* court applied the two-step analysis outlined by the Supreme Court in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). The Fifth Circuit in *VALIC* indicated that it did not need to follow or defer to an administrative interpretation (of the Comptroller) if that interpretation frustrates the clear intent of congress. The Fifth Circuit found that it was plain from the language of the statute and from its legislative history that § 92 prohibited national banks from selling insurance products in towns with a population greater than 5,000. The court also found that annuities are insurance, both historically and functionally.

The Fifth Circuit also rejected the argument that, even if national banks were prohibited from selling insurance products in towns with populations greater than 5,000, the prohibition should not apply because annuities are not insurance. The court wrote "annuities are an insurance product, both historically and functionally." The court also rejected the argument that § 24(7) of the National Bank Act authorized banks to sell annuities. That section grants national banks "all such incidental powers as shall be necessary to carry on the business of banking." The Fifth Circuit suggested that banks look to Congress rather than the Comptroller or the courts for more authority to sell insurance.

Mary Carter Agreements

Dosdourian v. Carsten, 18 FLW S459 (Fla. August 26, 1993).

A Florida Appellate Court certified to the Florida Supreme Court the following question as being of great public importance: "Is a non-settling defendant entitled to have the jury informed of a settlement agreement between the plaintiff and another defendant whereby the settling defendant's obligation is fixed but the settling defendant is required to continue in the lawsuit?"

In this case an injured plaintiff brought suit against two defendants, Dosdourian and DeMario, alleging that each of them had negligently operated their automobiles so as to cause him injuries. Prior to trial, the plaintiff had settled with defendant DeMario for $100,000 (her liability insurance policy limit) and the requirement that she continue to participate in the litigation through the trial and judgment. The trial judge ruled that the settlement should not be made known to the jury.

The jury subsequently awarded damages of over $2,000,000 and apportioned negligence 10 percent to the plaintiff, 35 percent to defendant Dosdourian and 55 percent to defendant DeMario. Dosdourian argued on appeal that the jury should have been apprised of the settlement agreement with the other defendant, the so called Mary Carter Agreement. The Florida Supreme Court had previously defined a Mary Carter Agreement as "basically a contract by which one co-defendant secretly agrees with the plaintiff that, if such defendant will proceed to defend himself in court, his own maximum liability will be diminished proportionately by increasing the liability of the other co-defendant. Secrecy is the essence of such an arrangement, because the court or jury a trier of facts, if apprised of this, would likely weigh differently the testimony and conduct of the signing defendant as related to the non-signing defendants. By painting a gruesome testimonial picture of the other defendant's misconduct or, in some cases, by admissions against himself and the other defendants, he could diminish or eliminate his own liability by use of the secret 'Mary Carter Agreement.'" In that case, the Florida Supreme Court held that such agreements must be produced for examination prior to trial and should, under appropriate rules of procedure, be admitted into evidence upon the request of another defendant.

In this particular case, the agreement did not provide that the defendant who entered in the Mary Carter Agreement had the opportunity to diminish her liability, and thus the District Court of Appeal felt constrained and affirmed the judgment of the trial court.

The Florida Supreme Court, agreeing with the Texas Supreme Court, held that Mary Carter Agreements present the jury a sham of adversity between the plaintiff and one co-defendant while, in fact, the parties are allied for the purpose of securing a substantial judgment for the plaintiff. The Florida Supreme Court declared Mary Carter Agreements entered into after the date of its opinion to be void as against public policy. Mary Carter Agreements entered into prior to the date of the opinion are to be admitted into evidence so as to inform the jury of their existence.

Comparative Negligence, Joint and Several Liability

Fabre v. Marin, 18 FLW 455 (Fla. August 26, 1993)
Allied-Signal Inc. v. Fox, 18 FLW 455 (Fla. August 26, 1993)

In two separate decisions, the Florida Supreme Court found that the negligence of an individual who was not a party to a lawsuit should nevertheless be considered by the jury in determining the amount of the defendant's liability for the plaintiff's non-economic damages. Section 768.81(3) Florida Statutes provides for the entry of a judgment against each liable party on the basis of that party's percentage of fault. In the *Fabre* case, the Florida Supreme Court held that, by the clear terms of the statute, judgment should be entered against each party liable on the basis of that party's percentage of fault and that the only means of determining the party's percentage of fault is to compare that party's percentage to all of the other entities who contributed to the accident regardless of whether they have been or could have been joined as defendants. The plaintiff had been riding as a passenger in a vehicle being driven by her husband. The jury found that the defendant was 50 percent at fault and the plaintiff's husband was 50 percent at fault in causing the accident. Even though the husband was not a party to the lawsuit, the court ruled that the judgment against the defendant for non-economic damages should be reduced by 50 percent. The court noted that other states have interpreted similar statutes in a similar fashion and cited *DaFonte v. Up-Right, Inc.*, 828 P.2d 140 (Cal. 1992), *Brown v. Keill,* 580 P.2d 867 (Can. 1978), *Bartlett v. New Mexico Welding Supply, Inc.*, 646 P.2d 579 (N.M. Ct. App.) cert. denied, 648 P.2d 794 (N.M. 1982), *Nance v. Gulf Oil Corp.*, 817 F.2d 1176 (5th Cir. 1987), *Johnson v. Niagara Mach. & Tool Works,* 666 F.2d 1223 (8th Cir. 1981), *Connar v. West Shore Equip.*, 227 N.W.2d 660 (Wis. 1975), *Paul v. N.L. Indus., Inc.*, 624 P.2d 68, 70 (Okla. 1980).

In a companion case, *Allied-Signal,* the plaintiff was injured while in the scope of his employment. His employer was immune from suit because of the workers' compensation law; nevertheless, the court held that it was necessary to consider the percentage of fault of the plaintiff's employer in order to determine the other defendant's liability. The above case clearly has a significant impact on insurers in Florida. The trial bar will most likely seek relief in the legislative arena.