RECENT COURT DECISIONS

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U.S. Supreme Court Says Banks Can Sell Annuities

NationsBank of North Carolina v. Variable Annuity Life Ins. Co., 1195 WL 15048 (U.S. January 18, 1995). The U.S. Supreme Court has ruled that national banks are authorized to sell annuities. The decision holds that the Comptroller of the Currency's determination that national banks may serve as agents in the sale of annuities is a reasonable construction of the National Bank Act and therefore is entitled to judicial deference. The Court overturned a decision by the Fifth U.S. Circuit Court of Appeals. The lower court had characterized annuities as insurance products and, therefore, found that national banks are not authorized to sell annuities except in towns with no more than 5,000 residents.

In upholding the Comptroller of the Currency's opinion letter, the Supreme Court agreed that "annuities are properly classified as investments, not 'insurance.'" Additionally, the Court noted that "annuities serve an important investment purpose and are functionally similar to other investments that banks typically sell." The Court also found the Comptroller's classification of fixed and variable amounts as investments to be reasonable, even though fixed amounts more closely resemble insurance.

The Court also addressed the question of whether 12 USC § 92 (which allows national banks to sell insurance in towns of less than 5,000 people) by negative implication precluded banks in towns of more than 5,000 from selling insurance. The Court wrote that its finding that annuities were not insurance made it unnecessary to reach the issue of allowable activities by banks in towns of more than 5,000.

Federal Court Rules States Can Regulate Insurance Sales by Banks

In *Barnett Bank of Marion County v. Gallagher,* 1995 WL 12117 (11th Cir. January 30, 1995), the 11th U.S. Circuit Court of Appeals has ruled that states have the power to regulate sales of insurance by national banks, dealing a blow to Barnett Banks' attempt to buy a small insurer in the town of Belleview, Florida, and sell insurance products inside the bank.

Barnett argued that federal law, which allows national banks to act as insurance agents in localities with fewer than 5,000 people, controlled the question of whether insurance could be sold in the bank's Belleview branch (12 U.S.C. § 92).

The 11th Circuit disagreed, ruling that Florida law regulates the business of insurance because it protects policyholders, and that under the terms of the McCarran-Ferguson Act, federal law must yield to the state statute. The court found that section 92 neither specifically relates to the business of insurance, nor specifically requires that apparently conflicting state laws be preempted.

However, the 6th U.S. Circuit Court of Appeals has reached a contrary conclusion on the preemption issue in *The Owensboro National Bank v. Stephens*, 63 U.S.L. Weekly 2417 (December 29, 1994). This may lead to a resolution of the question by the U.S. Supreme Court.

Barnett Bank of Marion County, a national bank subsidiary of Barnett Banks, Inc., wanted to use its Belleview branch office to market insurance to existing and potential customers, regardless of where the insurance customers were located.

The Florida Department of Insurance, however, issued an Immediate Final Order within days of the bank's purchase of the insurer that prohibited the sale of all insurance agency activities by the bank-owned company except the sale of credit life and credit disability insurance.

The U.S. Supreme Court recently affirmed banks' right to sell annuities, holding that annuities aren't insurance under federal banking law. However, the high court did not address whether annuities are insurance under state insurance law, so states may still try to prohibit national banks from selling annuities.

Retroactive Application of Uninsured Motorist Statute Impairs Contracts

The Florida Second District Court of Appeal has determined that section 627.727(6), Florida Statutes (1992 Supp.), cannot be applied retroactively without violating the Florida Constitution's contracts clause and access to courts provision, as well as due process principles under both the state and federal constitutions. *State Farm Mutual Auto. Ins. Co. v. Hassen*, 20 Fla. L. Weekly D318 (Fla. 2d DCA February 1, 1995).

The statute was amended in 1992 to provide that an uninsured motorist insurer that wishes to preserve its subrogation rights by refusing to grant permission for its insured to settle with an underinsured motorist's liability carrier must pay to the insured the amount of the offer from the liability carrier.

The court held that the amendment is not remedial in nature, but alters substantive uninsured motorist law. Even if the amendment were construed as a procedural change that could be applied to a pending claim, the court found that application of the statute would deprive the carrier of constitutional rights of due process and access to courts.

Noting that the constitutional issues posed in the case are of great public importance, the district court certified the following two-part question to the Florida Supreme Court:

> Is section 627.727(6), Florida Statutes (Supp. 1992) constitutional? If so, is it a substantive statute, as opposed to a remedial statute, such that its terms cannot be applied constitutionally to a pending claim brought under the uninsured motorist provisions of an automobile insurance policy issued prior to its effective date?

Florida Supreme Court's Latest Uninsured Motorist Pronouncement

The Florida Supreme Court has held that an automobile insurance policy provided an insured with uninsured motorist coverage even though the particular vehicle involved in the accident was not covered by the uninsured motorist policy or even a liability policy. *Government Employees Ins. Co. v. Douglas*, 20 Fla. L. Weekly S113 (Fla. March 9, 1995).

The court said that the coverage was required because the insurer failed to comply with statutory requirements for notice and knowing acceptance of limited uninsured motorist coverage.

Until 1988, the insured owned three motor vehicles insured by GEICO for both liability and uninsured motorist coverage. In 1988, the insured did not renew his GEICO policy on one of the three vehicles. Instead, he purchased a personal injury protection–only policy issued by another company and expressly rejected uninsured motorist coverage. It was this latter vehicle that was involved in a 1989 accident. The basis of the insured's claim against GEICO for uninsured motorist benefits was the policies covering his other vehicles.

In the majority opinion by Justice Wells, the court receded from its decision last year to quash *Nationwide Mutual Fire Ins. Co. v. Phillips*, 609 So. 2d 1385 (Fla. 5th DCA 1992), quashed, 640 So. 2d 53 (Fla. 1994). Additionally, the Court receded from a statement it made in previous cases that "courts have consistently tied uninsured motorist coverage to the applicability of liability coverage for a particular accident." Instead, the court adopted the reasoning from a footnote in Justice Shaw's dissenting opinion in *Valiant Ins. Co. v. Webster*, 567 So. 2d 408 (Fla. 1990). Justice Shaw reasoned in that dissent that the controlling cases apply an analysis that focuses exclusively on the injured individual rather than the accident.

The court acknowledged that section 627.727(9)(d), Florida Statutes, states that uninsured motorist coverage provided by a policy does not apply to the insured or family members who are injured when occupying any vehicle owned by the insured for which uninsured motorist coverage was not purchased. However, to validly limit coverage, the insurer must satisfy the statutorily-mandated requirement of notice to the insured and obtain a knowing acceptance of the limited coverage, the court stated. Additionally, an insurer who provides coverage with the section 627.727(9)(d) limitation is statutorily required to file revised, decreased premium rates for such policies. These requirements were not met in this case, the court stated.

The court reasoned, "It is our opinion that these requirements were the *quid pro quo* given by the legislature to insurers for the right to limit uninsured motorist coverage by this exclusion."

Justice Overton wrote a sharply-worded dissent that was joined by two other members of the court. "The majority opinion permits the claimant automobile owner...to cheat on this State's clearly established policy of financial responsibility for motor vehicle owners by allowing him to protect himself with uninsured motorist coverage but provide no liability insurance protection to those who may be injured by his negligent driving."

Justice Overton requested that the legislature "immediately address this issue by explaining in clear statutory terms that a *vehicle owner* has never been authorized by statutory law to protect himself with uninsured motorist coverage without first obtaining liability coverage to protect others."

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