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LEGISLATION AND ADMINISTRATION

CONSTITUTIONAL LAW — FEDERAL TRADE COMMISSION ASSERTS JURISDICTION OVER INSURANCE ADVERTISING IN INTERSTATE COMMERCE. — *In the Matter of The American Hospital and Life Insurance Company,* F.T.C. No. 6237, April 24, 1956. The Federal Trade Commission issued a complaint against the American Hospital and Life Insurance Company, alleging false and misleading advertising in the solicitation and sale of insurance in interstate commerce. Respondent, a Texas corporation, is licensed to conduct an insurance business in Texas and thirteen other states. The policies are sold exclusively through agents in each state. The complaint charged that the advertising brochures, sent from the home office in Texas to the agents in these thirteen states, excluding Texas, contained false, misleading and deceptive representations in violation of the Federal Trade Commission Ace, 38 STAT. 717 (1914), 15 U.S.C. §§ 41-58 (1951). These brochures were never sent directly to the public but were only shown by the agents to prospective customers. Each of these thirteen states, except Mississippi, has laws forbidding the distribution of false insurance advertising within the state. The hearing examiner dismissed the complaint for lack of jurisdiction, as regards all the states except Mississippi, on the ground that these states fully regulated the business of insurance concerning the distribution of false insurance advertising within its borders, and consequently the jurisdiction of the FTC had been withdrawn by the McCarran-Ferguson Act. 59 STAT. 33 (1945), 15 U.S.C. §§ 1011-1015 (1952). On appeal the FTC reversed this finding by a three to two vote and asserted jurisdiction. Held, the McCarran Act did not withdraw FTC jurisdiction over allegedly false advertising sent across state lines as part of an insurance transaction, though the state into which this advertising was sent had laws forbidding distribution of such advertising within its borders.

For over seventy-five years, since *Paul v. Virginia,* 75 U.S. (8 Wall.) 168 (1868), the Supreme Court had consistently held that transactions of insurance did not constitute interstate commerce. See *New York Life Ins. Co. v. Deer Lodge County,* 231 *U.S.* 495 (1913). In 1944 the Supreme Court in *United States v. South-Eastern Underwriters Ass'n.,* 322 U.S. 533 (1944), held for the first time that insurance transactions conducted across state lines did constitute interstate commerce, thus bringing to bear the paramount power of Congress under the commerce clause. A great deal of confusion followed. Five months later Congress passed the McCarran-Ferguson Act, *supra.* The act was entitled: "An Act to express the intent of Congress with reference to the

regulation of the business of insurance." The act provided in part, 59 Stat. 33-34 (1945), 15 U.S.C. §§ 1011-12 (1952):

> . . . That the Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.
>
> Sec. 2. (a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.
>
> Sec. 2. (b) . . . [A]fter January 1, 1948, the . . . Sherman Act, and . . . the Clayton Act, and . . . 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.* (Emphasis added.)

The act also suspended the application of these laws entirely until January 1, 1948, except as they concerned boycotts, coercion and intimidation under the Sherman Act. In 1947 the act was amended, extending the moratorium period in section 2 (b) to June 30, 1948.

The FTC members disagreed in the instant decision as to the act's effect upon the jurisdiction of the FTC over insurance transactions conducted in interstate commerce. This divergence turned upon the construction of section 2 (b) of the act.

The majority found that insurance transactions across state lines, being in interstate commerce, necessarily involved some purely interstate aspects, which only Congress can regulate. They reasoned from this that the intent of Congress must have been that the "extent" to which the states regulate the business of insurance, provided in section 2 (b), is restricted to the limit of the states' constitutional power. Since the states have no power to regulate purely interstate aspects, Congress by making the Federal Trade Commission Act applicable to the insurance business, must have intended that the FTC should have jurisdiction over these purely interstate aspects, necessarily superseding state laws which covered the same matter in a different and local phase of the transaction, since the federal commerce power is paramount when exerted. They held that the F.T.C.A. and the state laws supplement each other to provide the fullest protection to the public, as the F.T.C.A. can govern interstate aspects which the states would be powerless to cope with. The majority leave all intrastate aspects to the states to the extent that the states regulate them, even though interstate commerce might be affected, as long as the states' exertion of jurisdiction does not conflict with the exertion of jurisdiction by the FTC over purely interstate aspects. *In the Matter of the American Hospital and Life Ins. Co., supra,* Opinion of the Commission at 6-7.

The dissenting members of the Commission protested strongly that the majority holding reduces the McCarran Act to the point of having no effect whatever. They believe that the clear wording of the act, as well as the express congressional policy and legislative history, clearly show that the intent of Congress was to have the states continue to regulate the business of insurance as they had for seventy-five years on the intrastate level and to condition application of the F.T.C.A. on whether the states did so regulate. They contended that, when a state adequately regulated an insurance transaction on the intrastate level and thereby sufficiently protected its citizens, the F.T.C.A. would not apply to even the purely interstate aspects involved, because Congress had expressly recognized that the insurance business was better regulated by state laws. *In the Matter of the American Hospital and Life Ins. Co., supra* dissenting opinion at 6, 14.

This jurisdictional question has not arisen in any reported case. Only one case has dealt directly with section 2(b) of the act. In *North Little Rock Transportation Co. v. Casualty Reciprocal Exchange,* 85 F. Supp. 961 (1949), *aff'd,* 181 F.2d 174 (8th Cir.), *cert. denied,* 340 U.S. 823 (1950), the state had passed a statute making insurance rating agencies lawful. The National Bureau of Casualty Underwriters was licensed and authorized by Arkansas to act as a rating agency in that state. Such rating agencies violate the Sherman Act. Although there appeared to be purely interstate aspects in the operations of this bureau, the court held that the Sherman Act did not apply because this state statute constituted proper regulation within the meaning of section 2(b) of the McCarran Act.

The Supreme Court, as well as various federal and state courts, has interpreted the general intent of Congress in the McCarran Act. They all agree that this intent was to permit the states to continue to tax and regulate the business of insurance; however, they always limit this general statement by adding words similar to those of the Supreme Court, when it said "except as otherwise expressly provided in the Act itself or in future legislation." *Prudential Ins. Co. v. Benjamin,* 328 U.S. 408, 429-30 (1946); see *Panhandle Eastern Pipe Line Co. v. Public Serv. Comm'n.,* 332 U.S. 507, 521 (1947). With the exception of the *North Little Rock* case, *supra,* none of the cases involved a conflict between a state insurance law and any of the three federal laws in section 2(b).

The majority opinion relied heavily upon the decision in *United States v. Sylvanus,* 192 F.2d 96 (7th Cir. 1951), *cert. denied,* 342 U.S. 943 (1952). However, this case is clearly not relevant, because it involved only the postal power of Congress and not the commerce power.

The majority of the FTC impliedly reason that, once Congress exerts its commerce power generally in a particular area of interstate commerce, in order to withdraw the force of the federal laws it must withdraw their application completely. Yet they seem to overlook the fact that, while Congress cannot delegate its commerce power to the states, it may exercise this power in its own discretion and may according to established doctrine occupy a limited field and, upon matters in interstate commerce which do not demand uniform federal regulation, may consent to state legislation. See *Panhandle Eastern Pipe Line Co. v. Public Serv. Comm'n., supra; Southern Pacific Co. v. Arizona,* 325 U.S. 761 (1945); *Southern Ry. Co. v. R.R. Comm'n.,* 236 U.S. 439 (1915); *In re Rahrer,* 140 U.S. 545 (1891). The court in *State v. Prudential Ins. Co.,* 224 Ind. 17, 64 N.E.2d 150 (1945), *aff'd per curiam,* 328 U.S. 823 (1946), decided that Congress had so exercised its power, saying, 64 N.E.2d at 158:

> In our opinion, the McCarran-Ferguson Act is an exercise of the right of Congress to regulate *interstate phases and aspects* of the insurance business, by authorizing the states to continue their regulation and taxation of such business in the manner developed over 75 years of experience. (Emphasis added.)

The Supreme Court has also pointed out that Congress by the McCarran Act had exercised "its power to consent to state legislation." *Prudential Ins. Co. v. Benjamin, supra,* at 438 n.51. Moreover, the court in *Prudential Ins. Co. v. Barnett,* 200 Miss. 233, 27 So. 2d 60 (1946), indicated that Congress had withheld federal power by direct enactment.

However, these cases do not settle clearly the is ue at hand. It is possible that Congress decided that federal uniform regulation of interstate aspects was desirable, even though state jurisdiction in some instances would be thwarted; on the other hand, Congress could have decided that a policy of non-interference with state regulation was desirable due to the states' experience and well developed laws specially geared to insurance.

Before the McCarran Act was passed, the original bills of the House and Senate differed in some respects and were sent to a conference committee, which agreed upon the compromise in the present act. It is interesting to note that both the original bills, passed by the House and Senate and unanimously approved by the Committee on the Judiciary, contained a section which provided that nothing in the F.T.C.A. would apply to the business of insurance. Only the Sherman and Clayton Acts were to apply after the moratorium. 91 CONG. REC. 488, 1027, 1085 (1945). During the Senate debate Senator Ferguson, co-author of the bill, gave the reason for this section which excluded the F.T.C.A. completely, explaining that:

> The purpose of that provision is very clear, that Congress did not want at the present time to take upon itself the responsibility of interfering with the taxation of insurance or the regulation of insurance by the States. We were able to single out and to indicate that we had in mind . . . acts of which we wanted to make exceptions, because they did not relate to insurance. *Id.* at 481.

Representative Gwynne added that:

> When we passed those acts, Congress did not have in mind insurance . . . The methods of control exercised by the States and by the Federal Government are conflicting, and the sole purpose of this bill is to take out as much of that conflict as possible until we can determine whether Congress will regulate insurance, or whether it will permit the States to regulate it. *Id.* at 1089-90.

In the conference bill the F.T.C.A. appeared in the moratorium clause with the Sherman and Clayton Acts for the first time. The House passed it without further debate. Senator Ferguson, a member of the conference committee, explained the intent of the committee, saying: ". . . if the States were specifically to legislate upon a particular point, and that legislation were contrary to the Sherman Act, the Clayton Act, or the Federal Trade Commission Act, then the State law would be binding. . . ." *Id.* at 1481.

On the other hand, Senator O'Mahoney, also a committee member, pointed out that after the moratorium the F.T.C.A. and the other acts would "come to life again in the field of interstate commerce and in the field of interstate regulation" and that one state could not regulate for other states. *Id.* at 1483. Senator McCarran admitted that there would always exist two jurisdictions, and that these federal laws would apply throughout the whole field beyond the activity of the states. Yet he added that if "the states themselves had regulated the business of insurance" these federal acts *"would not become effective."* (Emphasis added.) *Id.* at 1443.

It must be noted that in the instant case the exertion of jurisdiction by the FTC over only the interstate aspects resulted in taking the whole matter from the states. Thus, if the Supreme Court is faced with this problem, it appears that final decision must rest solely upon the congressional intent. The power of Congress would not be in issue.

The difficulty apparent in the majority position lies in its effect. The F.T.C.A. would apply to interstate aspects regardless of the extent to which the states regulated. Thus the states, although encouraged by Congress to legislate, would lose jurisdiction over any insurance transaction which had purely interstate aspects and which violated the F.T.C.A., the Sherman Act or the Clayton Act. In view of the extensive manner in

which insurance companies operate today, there appear to be countless transactions that have some purely interstate aspects. The inevitable effect would be that the states would lose jurisdiction, apparently frustrating the expressed intent of Congress not to interfere and to allow the states to continue regulating insurance.

It is submitted the sounder view is that Congress intended to withhold the applicability of the F.T.C.A. and the Sherman and Clayton Acts over purely interstate aspects of insurance transactions, on the condition that the states adequately handle the situation on the intrastate level by legislation. The dissenting members seem to be giving sound advice when they warn that the majority view frustrates the clear intent of Congress and destroys rather than complements state regulation.

William J. Ragan

UNEMPLOYMENT INSURANCE—OHIO UNEMPLOYMENT COMPENSATION ACT—SUPPLEMENTARY BENEFITS UNDER EATON GUARANTEED ANNUAL WAGE PLAN. On July 13, 1956, the Ohio Bureau of Unemployment Compensation considered the guaranteed annual wage contract of the Eaton Manufacturing Company of Cleveland, Ohio, and ruled that the payment of unemployment benefits under the firm's contract would not bar concurrent payment of state unemployment benefits to the employee. Ohio Bureau of Unemployment, Press Release, July 15, 1956. Under the Eaton "Individual Income Security Plan" the company set up an individual account for each employee, crediting to it three and a half cents for each hour worked. EATON MANUFACTURING COMPANY INCOME SECURITY PLAN, Art. III, §§ 3, 4. The employee may draw from his fund during a period of unemployment and at the termination of his employment. At his death the balance is paid to his beneficiaries. EATON MANUFACTURING COMPANY INCOME SECURITY PLAN, Arts. V, VI.

Seemingly, this decision is contrary to a previous Bureau ruling of May 15, 1956, denying the payment of supplementary unemployment benefits under the Ford plan. Ohio Bureau of Unemployment, Press Release, May 15, 1956. The Ford plan consisted of one fund to be established in trust for all employees. It could be drawn from only during periods of unemployment. In striking down the Ford plan the Bureau had ruled that receipt by the employee of annual wage benefits under the Ford contract constituted "remuneration" as that term is used in the Ohio Unemployment Compensation Act, OHIO REV. CODE ANN. §4141.01(h) (Page 1953), and therefore barred con-

current state unemployment benefits since the Act provides that benefits payable for any week shall be reduced by any amount of remuneration received for that week. OHIO REV. CODE ANN. § 4141.31 (Page 1953). The Bureau concluded in relation to the Ford plan:

> . . . private supplemental benefits must be deemed compensation for personal services within the meaning of the Ohio unemployment compensation law and a claimant's benefits would be reduced by the amount of any supplementation benefits he received under the plan. 38 Lab. Rel. Rep. 88 (1956).

The Ohio Senate, on June 14, 1955, had rejected by a vote of 21 to 12 a proposed amendment of the Unemployment Compensation Act which would have allowed the payment of supplementary unemployment benefits (SUB) and the Ohio voters, on November 8, 1955, by nearly a two to one majority, rejected a proposed initiated law which would have allowed supplementation. In rendering its decision on the Ford plan the Bureau took these previous defeats into consideration, stating:

> In view of the action of the legislature on the question of supplementation and the defeat at the polls of the proposal to amend our law specifically authorizing supplementation, we are convinced that unless we can find a clear intention in the present law to permit such supplementation, we cannot rule that private supplemental benefits could be paid for the same week with respect to which state unemployment benefits are payable, without reduction of the amount of such state unemployment benefits. We have been unable to find any such clear intention which would permit such a ruling by the Bureau. Ohio Bureau of Unemployment Compensation, Press Release, May 15, 1956.

The Bureau's broad interpretation of "remuneration" which outlawed the payment of supplemental benefits under the Ford plan stands contrary to the decisions of most other states that have ruled on the plan. The following jurisdictions have approved SUB under the Ford plan, finding that such benefits did not constitute "remuneration" or "wages": Alabama, 38 L.R.R.M. 68 (1956); Arizona, 39 L.R.R.M. 63 (1956-57); Arkansas, 37 L.R.R.M. 16 (1955-56); California, 38 L.R.R.M. 70 (1956); Colorado, 39 L.R.R.M. 63 (1956-57); Connecticut, 36 L.R.R.M. 215 (1955); Delaware, 36 L.R.R.M. 216 (1955); Washington, D.C., 38 L.R.R.M. 70 (1956); Florida, 38 L.R.R.M. 72 (1956); Illinois, 38 L.R.R.M. 73 (1956); Iowa, 38 L.R.R.M. 80 (1956); Kansas, 38 L.R.R.M. 81 (1956); Kentucky, 37 L.R.R.M. 20 (1955-56); Louisiana, 38 L.R.R.M. 82 (1956); Massachusetts, 36 L.R.R.M. 218 (1955); Michigan, 37 L.R.R.M. 20 (1955-56); Minnesota, 38 L.R.R.M. 83 (1956); Missouri, 38 L.R.R.M. 86 (1956); New Jersey, 36 L.R.R.M. 222 (1955); New York, 36 L.R.R.M. 224

(1955); North Dakota, 39 L.R.R.M. 63 (1956-57); Oklahoma, 38 L.R.R.M. 92 (1956); Pennsylvania, 37 L.R.R.M. 23 (1955-56); Tennessee, 38 L.R.R.M. 95 (1956); Washington, 37 L.R.R.M. 25 (1955-56); West Virginia, 39 L.R.R.M. 81 (1956-57); Wisconsin, 38 L.R.R.M. 96 (1956). Also, in a ruling of October 6, 1956, the Ford plan was approved in Canada. 39 Lab. Rel. Rep. 4 (1956).

Two states, Georgia and Maryland, have enacted specific legislation allowing supplementation, MD. ANN. CODE, Art. 95A, § 19 (n) (9) (Supp. 1956); GA. CODE ANN. § 54-657 (n) (2) (Supp. 1955), and two other states, Virginia and Oregon, have passed statutes denying supplementation, VA. CODE ANN. § 60-22 (Supp. 1956); ORE. REV. STAT. § 657.205 (a) (1955).

The Ohio Bureau in the Eaton decision reaffirmed its previous stand on the Ford plan, and sought to distinguish the two situations. The chief distinction is that under the Eaton Plan, an individual account was set up for each employee, while under the Ford Plan only one fund was set up in trust for all employees as a unit. Both plans are essentially employer-financed trust programs, and the distinctions between them do not appear significant enough to warrant the different conclusions reached by the Ohio Bureau.

According to a letter of November 20, 1956, from the administrator of the Bureau to the writer:

> The Bureau's only consideration in arriving at this opinion was the fact that the worker obtained a vested right to the money immediately upon its being deposited in the individual trust account. The money was therefore considered to be wages at that time and, therefore, taxable under the Ohio law.

This "vested right" approach is not a unique analysis of the problem. The attorney general of West Virginia earlier had rested a similar decision regarding the Pittsburg Plate Glass Company plan upon the same grounds. 37 L.R.R.M. 28 (1956). In the course of his ruling the attorney general pointed out the similarity between the income security program and an individual banking account and explained that withdrawals from such a banking account could not be considered "wages." The Pittsburg income security plan was analogized to a profit sharing trust set up by an employer, which had been held not to constitute "earnings" when the employee drew from the fund during a period of unemployment. *Kerr v. Director of Employment Security,* 332 Mass. 78, 123 N.E.2d 229 (1954). The attorney general further explained that while such contributions were not "wages" at the time of withdrawal, they were "wages" at the time of contribution by the employer, and thus required tax contributions upon them by the employer to the state

unemployment compensation fund. 37 L.R.R.M. 28 (1956).

Despite the validity of the Bureau's "only consideration" and its West Virginia precedent, the real basis for the Eaton ruling would seem to lie elsewhere. Perhaps public opinion, since the 1955 vote, had swung in favor of supplementation as it became more familiar to the public. Possibly the Bureau felt that the referendum vote did not reflect true opinion in the first place, because grouped with the supplementation proposal on the same ballot were proposals to raise the maximum unemployment compensation payment from $39 to $59 and to extend the period of payment from twenty-six to thirty-nine weeks. It is possible that had the voters been given only the supplementation proposal they would have approved it. The Bureau may have felt that some sort of supplementation was necessary to give greater effect to the social security purposes of the unemployment compensation law. Also, the favorable rulings on supplementation handed down contemporaneously with the Ohio ruling on the Ford plan by Ohio's border states of Pennsylvania, Kentucky, and Michigan, may have caused the Bureau to fear a movement of marginal, cyclical workers from Ohio to those states for new jobs. In fact, such marginal workers could continue their jobs in Ohio while moving their residence to one of the above neighboring states. In this manner they could receive private benefits by mail and, by registering with the employment security agency of the new state, also receive unemployment compensation benefits accrued in Ohio. See Masson and Krislov, *Supplemental Unemployment Benefits and Public Policy in Ohio,* 7 WESTERN RES. L. REV. 436 (1956).

In any event the stated reasons for the Bureau's ruling hardly justify such a complete reversal regarding supplementation in so short a time. By its second ruling the Bureau has called in question its first ruling, despite its reaffirmance in the Eaton decision of its prior Ford opinion. The establishment of this halfway house has beclouded the entire question of supplementation in Ohio.

Perhaps the best solution to the problem is that proposed by the Bureau itself in its Ford decision: "This is such an important issue, affecting the future administration of the Ohio Unemployment Law that it should be resolved by the legislature, by specific legislation either permitting the right to supplementation or denying it." Ohio Bureau of Unemployment Compensation, Press Release, May 15, 1956.*

John P. Callahan

* Subsequent to the completion of this article, the Ohio Legislative Service Commission has reported its findings regarding the current status of SUB in Ohio, and has reached substantially the same conclusions as the writer. OHIO LEGISLATIVE SERVICE COMM'N, STAFF RESEARCH REPORT No. 22 (1957).