No. 013849

IN THE SUPREME COURT OF ILLINOIS

SUN LIFE ASSURANCE COMPANY OF CANADA, Plaintiff-Appellant, v. DEIDRE K. MANNA, Acting Director of Insurance for the State of Illinois, and the DIVISION OF INSURANCE of the Illinois Department of Financial and Professional Regulation, Defendants-Appellees.	On Appeal from the Appellate Court of Illinois, First Judicial District, Third Division, No. 05-1323, Affirming the Circuit Court of Cook County, Chancery Division, No. 04 CH 10905, The Honorable Anthony L. Young.

BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS IN SUPPORT OF DEFENDANTS-APPELLEES

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IDENTITY AND INTEREST OF *AMICUS CURIAE*

The National Association of Insurance Commissioners ("NAIC") is a non-profit corporation whose membership consists of the principal insurance regulatory officials of the fifty States, the District of Columbia, and the territories and insular possessions of the United States. Founded in 1871, it is the nation's oldest association of state government officials. The NAIC represents the coordinated and considered views of the 50 state government officials that regulate and enforce the insurance laws of the country. As such, the NAIC is uniquely positioned to discuss the nationwide implications of a constitutional challenge to a state retaliatory tax law.

The mission of the NAIC is:

> [t]o assist state insurance regulators, individually and collectively, in serving the public interest and achieving the following fundamental insurance regulatory goals in a responsive, efficient and cost-effective manner, consistent with the wishes of its members: ***protect the public interest; promote competitive markets; facilitate the fair and equitable treatment of insurance consumers; promote the reliability, solvency and financial solidity of insurance institutions; and support and improve state regulation of insurance.***

National Association of Insurance Commissioners, Mission Statement, *http://www.naic.org/index_about.htm* (last visited July 3, 2007).

The NAIC performs numerous crucial services on behalf of state government, including: the development and publication of model laws, regulations, bulletins and financial and accounting standards; the coordination of quarterly national meetings and

interim meetings of various NAIC committees, task forces and working groups; the creation and publication of white papers, consumer guides, handbooks, periodicals and the *Proceedings of the NAIC*; the management of accreditation standards for, and coordination of, the review of state insurance departments; the maintenance of financial and regulatory databases and regulatory analysis of insurance company financial data; the offering of education and training programs for state, federal and international insurance financial regulators; and the operation of the Securities Valuation Office.

Hundreds of state and federal laws assign duties to the NAIC and make reference to and incorporate NAIC standards, models and publications. Of the 37 Illinois statutes that reference the NAIC, the topics vary from required annual statements (215 ILCS 5/123B-3, 215 ILCS 5/136), to valuation of investments (215 ILCS 5/126.7), and financial examinations (215 ILCS 5/132.3 to 5/132.5). On the federal level, the NAIC is recognized as a resource for the collective action by state insurance regulators as it is assigned duties as part of the Gramm-Leach-Bliley Act, Pub. L. No. 106-102, 113 Stat. 1338 (Nov. 12, 1999).

Any member of the NAIC may request the preparation of an amicus brief. Such request requires approval by the Executive Committee of the NAIC. The members of the NAIC seek to appear as amicus to assist this Court with the pending appeal by addressing the regulatory, consumer protection and public policy concerns presented by the constitutional challenge to the authority of the states to impose retaliatory taxes on alien insurers. This Court has previously granted the NAIC leave to file amicus briefs in cases concerning distribution of proceeds from a liquidated insurer and a $1 billion jury verdict in a class action regarding the use of aftermarket automobile parts in vehicle repairs. *See*

In re Liquidation of Sec. Cas. Co., 127 Ill.2d 434 (1989), and *Avery v. State Farm Mut. Auto. Ins. Co.*, 216 Ill.2d 100 (2005). The members of the NAIC—commissioners, directors and superintendents of the insurance departments of various States—are charged with the responsibility of regulating the business of insurance within their jurisdictions pursuant to the McCarran-Ferguson Act, 15 U.S.C. § 1011, *et seq.*, and state insurance laws. The NAIC has extensive experience with the interpretation and application of the McCarran-Ferguson Act. The Supreme Court has stated that "[t]he views of the NAIC are particularly significant, because the Act ultimately passed was based in large part on the NAIC bill." *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 221 (1979).

NAIC proceedings also establish that its proposed legislation, the basis for the McCarran-Ferguson Act, survived the adoption process largely intact:

> A comparison of the bill as it was finally enacted with the text of the original Commissioner's proposal of November, 1944, as well as reference to the Congressional debates, establishes clearly that the Commissioners' draft was used as a foundation for the bill. In drafting the bill Congress used almost verbatim those portions of the Commissioners' proposal relating to the doctrine of Congressional silence and the affirmative expression of the Congressional will in so far as they affect state regulation and taxation.

1945 NAIC Proceedings, at 157-158.

The members of the NAIC believe that, in order to preserve a level competitive playing field for U.S. insurers and to protect the rights of consumers, this Court should

affirm the holding of the Appellate Court.

ARGUMENT

I. The McCarran-Ferguson Act

The Plaintiff's argument that the Illinois retaliatory statute violates the Foreign Commerce Clause is soundly defeated by judicial interpretation of the McCarran-Ferguson Act. The McCarran-Ferguson Act was enacted in 1945, the year after a U.S. Supreme Court decision put in jeopardy the states' right to regulate insurance. In *United States v. South-Eastern Underwriters*, the high court held that the interstate business of insurance is subject to Congressional regulatory power under the Commerce Clause and that the Sherman Act applied to insurance, although the Act contained general language and no specific mention of insurance. *See United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533, 560 (1944). Congress enacted the McCarran-Ferguson Act to communicate its intent that, in the absence of federal laws specifically applicable to the business of insurance, state laws take precedence:

> 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 the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.

15 U.S.C. § 1011 (1945).

> No act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of

> insurance . . . unless such Act specifically relates to the business of insurance.

15 U.S.C. § 1012 (1945).

The U.S. Supreme Court has noted that the McCarran-Ferguson Act was a quick move by Congress "to restore the supremacy of the States in the realm of insurance regulation." *United States Dep't. of Treasury v. Fabe*, 508 U.S. 491, 500 (1993). The Act's reverse-preemption function described in § 1012 "transformed the legal landscape by overturning the normal rules of preemption." *Id.* at 507. Furthermore, the Supreme Court held that Congress "clearly put the full weight of its power behind existing and future state legislation to sustain it from any attack under the commerce clause." *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 431 (1946). The court found the Act's reference to "continued regulation" to be significant:

> Moreover, in taking this action Congress must have had full knowledge of the nation-wide existence of state systems of regulation and taxation; of the fact that they differ greatly in the scope and character of the regulations imposed and of the taxes exacted . . . . Congress could not have been unacquainted with these facts and its purpose was evidently to throw the whole weight of its power behind the state systems.

Id.

Congress would certainly have been aware of retaliatory taxation by states when it enacted the McCarran-Ferguson Act. The court in *Prudential* noted that, as of the effective date of the McCarran-Ferguson Act, sixteen states had imposed premium taxes on insurers from foreign states that were substantially similar to the South Carolina tax in

question. *See id.* at n. 40. A similar analysis applies in this case. Twenty-two states have retaliatory statutes that were enacted prior to 1950.[1] Georgia, Kansas, Massachusetts, Michigan and Rhode Island enacted their retaliatory statutes prior to 1900. Indeed, Illinois first approved its retaliatory tax in 1879.[2] The Supreme Court remarked in 1981 that retaliatory taxes had been "a common feature of insurance taxation for over a century." *Western & Southern Life Ins. Co. v. State Bd. of Equalization of Calif.*, 451 U.S. 648, 668 (1981). If Congress had believed the practice of retaliatory taxation to be unconstitutional, it would not have put its stamp of approval on the states' continued regulation of the insurance business by enacting the McCarran-Ferguson Act.

At present, there are 49 states that apply retaliatory taxes to even the playing field for their domestic insurers. *See* 2006 NAIC Retaliation Guide, Vol. I. Of those, 48

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[1] *Alabama,* ALA. CODE § 27-3-29; *Arizona,* ARIZ. REV. STAT. ANN. § 20-230; *Colorado,* COLO. REV. STAT. § 10-3-209; *Connecticut,* CONN. GEN. STAT. § 12-211; *District of Columbia,* D.C. CODE § 47-2610; *Georgia,* GA. CODE ANN. § 33-8-2; *Illinois,* 215 ILCS 5/444; *Indiana,* IND. CODE § 27-1-20-12; *Kansas,* KAN. STAT. ANN. § 40-253; *Kentucky,* KY. REV. STAT. ANN. § 304.3-270; *Louisiana,* LA. REV. STAT. ANN. § 22:1079; *Massachusetts,* MASS. GEN. LAWS ch. 63 § 21; *Michigan,* MICH. COMP. LAWS § 500.476; *Minnesota,* MINN. STAT. § 60A.14; *Mississippi,* MISS. CODE ANN. § 27-15-123; *Missouri,* MO. REV. STAT. § 375.916; *Montana,* MONT. CODE ANN. § 33-2-709; *North Carolina,* N.C. GEN. STAT. § 105-228.8; *Pennsylvania,* 40 PA. STAT. ANN. § 50; *Rhode Island,* R.I. GEN. LAWS § 27-2-17; *Tennessee,* TENN. CODE ANN. § 56-4-218; *Washington,* WASH. REV. CODE § 48.14.040.

[2] Ill Rev. Stat. § 29, Chap. 73, approved June 4, 1879.

states' laws specifically apply retaliatory taxes to alien insurers organized under the laws of a foreign country. *See id.* A ruling that states do not have authority to levy retaliatory taxes on alien insurers would dismantle a key regulatory tool in the state-based insurance system expressly authorized by Congress in the McCarran-Ferguson Act.

Legislative history demonstrates that much thought went into the Commerce Clause aspects of the legislation that would become the McCarran-Ferguson Act. In the NAIC's legislative proposal, submitted on August 29, 1944, the Commissioners noted that the U.S. Supreme Court held many times that no state can require a license as a prerequisite for transacting interstate business. 1944 NAIC Proceedings, at 35. This line of cases created a problem for insurance regulation once the *South-Eastern Underwriters* case established that insurance was, in fact, commerce. The Commissioners noted:

> It is to be hoped at least, that a declaration of Congressional policy and will, combined with the fact that the licensing system has been in use in the field of state insurance regulation since its inception several decades ago, will result in a determination by the United States Supreme Court, if the subject is ever reviewed, that the rule followed in the cases cited will not be applied to the insurance business and that licensing be continued. We do not believe that it is undue optimism to expect the Supreme Court to sustain state licensing under such a Congressional enactment.

Id.

As the Commissioners hoped, the Supreme Court has interpreted the legislation in that manner. The Court has held that "Congress removed all Commerce Clause limitations on the authority of the States to regulate and tax the business of insurance

when it passed the McCarran-Ferguson Act." *Western & Southern,* 451 U.S. at 653. This clear authority ends the argument; it is not necessary to conduct further validity analysis when Congressional intent is manifest in the Act.

The Plaintiff seeks to distinguish its claim in the face of powerful precedent favoring the Defendants by invoking the "foreign" element of the Commerce Clause, which grants Congress the power "to regulate commerce with Foreign Nations." U.S. CONST., art. I, § 8. The fact that the *Western & Southern* case involved interstate commerce does not diminish the Supreme Court's sweeping statement that Congress removed all Commerce Clause limitations by enacting McCarran-Ferguson. Likewise, the Plaintiff's litany of preemption cases is not relevant, as there is no direct conflict of laws in the present case; there is no federal law at odds with retaliatory taxes. Congress had the opportunity to restrict state regulation of the international business of insurance when enacting the McCarran-Ferguson Act, but it chose not to do so. The broad authority conveyed to states reflects Congressional intent that states not be subjected to limitations under any aspect of the Commerce Clause.

The Plaintiff cites *American Ins. Assoc. v. Garamendi*, 539 U.S. 396 (2003), but in that case the Supreme Court ruled that a California statute was preempted by the foreign affairs power of the Executive. *Id.* at 413. The Court did not reach the issue of whether the statute violated the foreign commerce clause. *See id.*

II. Purpose of Retaliatory Tax Laws

Plaintiff asserts that the Illinois tax attempts to influence foreign affairs and to pressure foreign countries to change their laws. The documented history of retaliatory tax laws in the U.S. clearly refutes this position. For purposes of retaliatory taxation,

there is no distinction between alien insurers and insurers from foreign states. Both are taxed in Illinois (and 47 other states) for the same reason: to provide a level playing field for domestic insurers. The tax achieves basic fairness by placing all insurers who do business in Illinois on equal footing. Retaliatory tax laws "burden an out-of-state insurance company in exactly the same way and to precisely the same extent that the out of state company's state of domicile burdens the companies of the state imposing the retaliatory tax." 2004 NAIC Proceedings, 3rd Qtr, Vol. I, at 648. The reciprocal nature of the statutes achieves uniformity and protects all insurers from burdensome assessments:

> Thus, retaliatory statutes not only protect domestic insurers when they do business in another state, but also indirectly protect foreign insurers from any increase in burdens. If the statutes worked completely, the result would be an equal level of burdens imposed in each state on foreign insurers, probably resulting in a uniform rate of taxation, as this is the largest single exaction or burden. Indeed, the statutes may be the reason why the tax on premiums has stayed close to two per cent in most states.

George A. Pelletier, *Insurance Retaliatory Laws*, 39 NOTRE DAME L. REV. 243, 247 (1964).

Retaliatory taxes work as a uniform system to foster the reduction of tax barriers. The purpose of these laws is to improve interstate and foreign commerce for all insurers by inducing the states and foreign nations with higher tax burdens to lower those barriers. This goal of reducing tax barriers serves to promote interstate and international commerce, not to hinder it as the Plaintiff maintains.

When Illinois' retaliatory tax is considered in the context of this national statutory framework, it is clear that alien insurers are not treated unfairly. State retaliatory tax laws view alien insurers just as they view insurers from foreign states; as non-domestic entities seeking to do business in the home state. This uniform treatment is evident from the Illinois statute, which calculates retaliatory tax based on the U.S. state the alien insurer chooses as its "port of entry." Plaintiff characterizes this simple means of achieving competitive equality as a coercive attempt to influence foreign affairs. This Court should reject such a far-fetched interpretation. Illinois seeks only to enhance interstate commerce by fostering the growth of its domestic insurers by shielding them from an out-of-state competitive advantage, whether from a foreign state or foreign nation.

A ruling by this Court that the retaliatory tax may not be assessed against alien insurers would give alien insurers a competitive advantage over U.S. companies. Such a decision would allow the alien insurers' cost of doing business in the U.S. to be lower than the cost to the U.S. insurers that compete with them. The fact that Canada does not impose premium taxes on its own insurers does nothing to improve U.S. insurers' disadvantaged position.

Furthermore, the ruling would only be a first strike against the several states' right to regulate alien insurers. A gradual dismantling of the state power to regulate alien insurers could begin with a decision in favor of Plaintiff in this case. If the retaliatory tax is found to be in violation of the Foreign Commerce Clause, alien insurers would be free to make the same argument against various other consumer protection provisions. It is imperative that the state departments of insurance retain authority to balance the interests of industry competitiveness, solvency and consumer protection according to the specific

needs of that state.

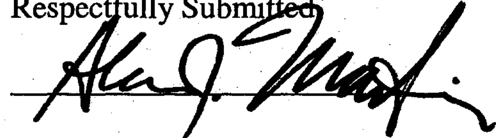
If Illinois' authority is not upheld in this case, the consequences could be far-reaching. State-based regulation has effectively managed the business of insurance for 135 years. The retaliatory tax laws reflect an established practice of state regulation of alien insurers—a practice that was endorsed by Congress when it enacted the McCarran-Ferguson Act. If the states are no longer allowed to assess retaliatory taxes against alien insurers, such entities may ultimately escape regulation altogether.

CONCLUSION

For all of the above reasons, the NAIC respectfully urges the Court to affirm the decision of the Appellate Court.

Dated: July 11, 2007

Respectfully Submitted,



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I, the undersigned, Alan J. Martin, certify that a true and correct copy of the above and foregoing Amicus Brief was mailed to the Clerk of the Illinois Supreme Court and to each of the following, postage prepaid, by 5 p.m. on this 11th day of July, 2007:

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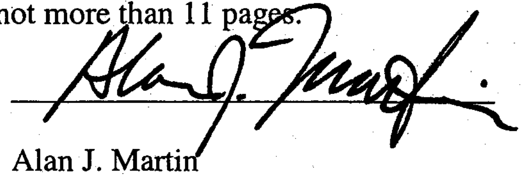
CERTIFICATE OF COMPLIANCE WITH SUPREME COURT RULE 341

I, Alan J. Martin, an attorney, certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief is not more than 11 pages.



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