IN THE COURT OF APPEALS
OF THE STATE OF NEW MEXICO

CHARLES G. BERRY,
for himself and all others similarly situated,

Appellee/Plaintiff,

v.

FEDERAL KEMPER LIFE ASSURANCE CO.,

Appellant/Defendant.

Appeal No. 23186

Santa Fe County
Cause No. D0101-CV-2000-2602

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* MEMORANDUM BY NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS

COMES NOW the National Association of Insurance Commissioners (NAIC) and moves for leave to file as *amicus curiae* its Memorandum in this cause regarding the Order for Class Certification, a copy of the proposed Amicus Memorandum is attached hereto as Exhibit A. In support of this Motion, the NAIC states as follows:

1. The National Association of Insurance Commissioners (NAIC) is a non-profit corporation whose membership consists solely of the Commissioners, Directors, Superintendents or other individuals who by law are charged with the principal responsibility of supervising the business of insurance within each State, territory or insular possession of the United States. Started in 1871, it is the nation's oldest association of state government officials. In submitting this brief, the NAIC seeks to demonstrate its interest in this proceeding and to fulfill the purpose of the NAIC, as set out in its Certificate of Incorporation:

... to 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:

1. Protect the public interest, promote competitive markets and facilitate the fair and equitable treatment of insurance consumers;
2. Promote, in the public interest, the reliability, solvency, and financial solidity of insurance institutions; and
3. Support and improve state regulation of insurance.

2. The members of the NAIC believe that the nationwide certification of class action lawsuits that base the class members' recovery solely on the law of the forum do grave damage to the efforts of state legislators and state insurance regulators in other states to regulate the businesses of insurance in their respective states in accordance with the public policy dictated by their own citizens.

3. The members of the NAIC further believe that the imposition of the law of the forum on participants in the business of insurance in other states with no reasonable connection to the forum state violate prior holdings of the U.S. Supreme Court and conflict with the due process and full faith and credit clauses of the U.S. Constitution.

4. The filing of the accompanying Memorandum by *amicus curiae*, if granted, will not unduly prolong the proceedings or otherwise prejudice the rights of the existing parties. *Amicus curiae* seeks only to file its Memorandum to aid the court in considering the nationwide consequences of certifying a multi-state class in this cause without due consideration for the statutes, regulations, case law and public policy of other states where potential class members are citizens and have no connection to New Mexico.

WHEREFORE, the NAIC prays it be granted leave to file its Memorandum as *amicus curiae* in this cause.

Respectfully submitted,

SIMONE, ROBERTS & WEISS, P.A.

By:_____
Randal W. Roberts
Attorney for the National Association of Insurance Commissioners As Amicus Curiae in Support of Defendant-Appellant
8102 Menaul Blvd. N.E.
Albuquerque, NM 87110
(505) 298-9400

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing was served upon the following person(s) via U.S. Mail, with first-class postage prepaid, on this 12th day of June, 2002:

John M. Eaves
6400 Uptown Boulevard, N.E.
Suite 110-W
Albuquerque, New Mexico 87110

Dennis M. McCarey
6707 Academy Road, N.E.
Albuquerque, New Mexico 87109

Alan K. Konrad
#172 PMB 571
901 Rio Grande Boulevard, N.W.
Albuquerque, New Mexico 87104

J. Kevin McCall
One IBM Plaza
Chicago, Illinois 60611

David F. Cunningham
P. O. Box 787
Santa Fe, New Mexico 87501-0787

Cynthia A. Braun
P. O. Box 1190
Albuquerque, New Mexico 87103-1190

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MEMORANDUM OF NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS AS *AMICUS CURIAE*

The National Association of Insurance Commissioners (NAIC) respectfully submits this Memorandum to assist this Honorable Court in making a considered decision concerning the Class Certification Order of the District Court Judge in this case.

INTRODUCTION

This lawsuit alleges violations of New Mexico statutory law (the New Mexico Unfair Practices Act and the New Mexico Unfair Insurance Practices Act) and a common law duty to make full disclosure of material facts. The case principally concerns whether Federal Kemper Life Assurance Co. (Federal Kemper) had a duty to disclose information to policyholders about the cost of paying life insurance premiums on a modal basis. Modal premiums are those premiums paid on a more frequent basis than once a year, i.e., monthly, quarterly or semi-annually.

The Plaintiff asserts that a life insurance company has a duty to disclose modal premium costs as an annual percentage rate of interest, or APR, even though no debt

is involved and no interest is charged to the consumer. The NAIC is unaware of any other state requiring the disclosure of an annual percentage rate of interest in insurance policies. If a nationwide class certification is affirmed, a final order in this case could affect Federal Kemper in many other states. Therefore, this litigation has the potential to reach far beyond the borders of New Mexico in what the members of the NAIC believe is contravention of established principles of constitutional and regulatory law.

The critical issue for the members of the NAIC is the potential application of New Mexico law to the life insurance policies of Defendant's policyholders in other states. This may result in the judgment of the trial court replacing the prudent judgment of regulators and legislators in other states. Due to the potential nationwide reach of this litigation, the ability of state regulators and legislators to protect their residents in this and other areas of insurance regulation could be adversely affected.

INTEREST OF THE *AMICUS CURIAE*

The National Association of Insurance Commissioners (NAIC) is a non-profit corporation whose membership consists solely of the Commissioners, Directors, Superintendents or other individuals who by law are charged with the principal responsibility of supervising the business of insurance within each State, territory or insular possession of the United States. Started in 1871, it is the nation's oldest association of state government officials. In submitting this brief, the NAIC seeks to demonstrate its interest in this proceeding and to fulfill the purpose of the NAIC, as set out in its Certificate of Incorporation:

> ... to 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:

1. Protect the public interest, promote competitive markets and facilitate the fair and equitable treatment of insurance consumers;
2. Promote, in the public interest, the reliability, solvency, and financial solidity of insurance institutions; and
3. Support and improve state regulation of insurance.

The members of the NAIC believe that each state has the obligation, the duty and the constitutional right to regulate the business of insurance within its borders in the way it determines is best for that state's citizens. A state legislature and state insurance regulator are clearly best situated to determine its citizen's desires and best interests, based on input from its citizens and knowledge of the local business conditions and legal environment within its state. Indeed, this was the reasoning behind the decision of Congress to continue the state regulation of the business of insurance by enacting the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015 (1997).

Each member of the NAIC is committed to the protection of insurance consumers within his or her jurisdiction. The NAIC acts to support regulators in achieving fundamental objectives relating to insurance regulation, of which consumer protection is paramount. The NAIC supports the use of litigation in appropriate circumstances as a means for insurance consumers to redress wrongs and abuses by insurers. However, because of the potential of nationwide class action lawsuits to erode the ability and flexibility of state insurance regulators to protect insurance consumers in their own states, the NAIC members believe their interests should be presented to this court.

In this case, Plaintiff apparently wishes to impose New Mexico law regarding disclosure requirements for insurance policies upon the citizens of other states with no significant contact with New Mexico. If a nationwide class certification is upheld, the final judgment of this trial court could find Federal Kemper liable to citizens of other states for violations of New Mexico law affecting millions of insurance transactions that occurred outside of New Mexico with no reasonable connection to New Mexico.

One of the significant underlying factors in this case is how the relationship between insurers and policyholders is regulated in the United States. For over 100 years, states have possessed the authority to regulate the language and substance of insurance policies. This authority is typically based upon the location of the property or risk insured within the regulating state. This court's final judgment well may have a significant impact on the authority of state regulators and legislators in other states and adversely affect their ability to make public policy judgments concerning disclosure requirements for life insurance premiums paid on a modal basis. State insurance commissioners, directors and superintendents, as well as state legislators, now face the dilemma of having their reasoned and considered public policy decisions overruled by court in a different state that has no minimal contact with their state and is not answerable to its citizens.

The members of the NAIC believe that protection of insurance consumers is best achieved in an environment where the relationship between the policyholder and the insurer is regulated by each state. The underlying principle of state insurance regulation is that regulatory decisions are best reached at the state level through state regulators and legislators who possess intimate knowledge of the unique circumstances and

situations of their state's residents. State regulators have acted many times through the NAIC to take a consistent approach to areas of mutual interest. Geographic and economic considerations, however, historically have led regulators to choose different regulatory policies in some areas where regional considerations are significant. There is nothing novel in this approach to insurance regulation. This has been the manner of regulation since the nineteenth century, endorsed at the federal level through the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015 (1997).

Concerning the provisions in life insurance policies regarding payment of premiums on a modal basis, regulators of the individual states generally review and approve these policies as part of their oversight of the insurance industry. Each state's department of insurance, including New Mexico's Department of Insurance, acts pursuant to the authority granted under its state statutes. In this cause, the members of the NAIC take no position with respect to these careful and considered legislative mandates. The NAIC members wish only to emphasize that the law gives the states the power to make these judgments free from interference by sister states. If the trial court's decision in this case is applied extraterritorially it would erode that power and would be in contravention of statutory law and judicial precedent.

ARGUMENT

The determination of whether there is a duty to disclose to a policyholder the particulars of modal premium payments is dependent on the policyholder's state of residence because states take different public policy approaches in regulating the business of insurance within their respective borders.

The trial court's ruling on Federal Kemper's liability, coupled with nationwide

class certification, will have the effect of applying New Mexico's consumer fraud statutes and common law extraterritorially. The result would be at war with existing law and public policy in many other states. The McCarran-Ferguson Act clearly places responsibility for insurance regulation with the states in providing "that the continued regulation and taxation by the several States of the business of insurance is in the public interest . . . ." 15 U.S.C. § 1011. Further, "[t]he business of insurance . . . shall be subject to the laws of the several States which relate to the regulation or taxation of such business." 15 U.S.C. § 1012(a). "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(b). Thus, unless Congress specifically regulates in an area of the business of insurance, regulation is within the preserve of the states. While the McCarran-Ferguson Act places responsibility for regulating the business of insurance with the states, significantly, it also has been construed to mean that a state may regulate only within its borders. In this case, the trial court's ruling may affect the relationship between insurers and policyholders in almost all other states. The U.S. Supreme Court addressed the question of extraterritorial application in a case involving a state statute that concerned unfair trade practices occurring outside that state. "[I]t is clear that Congress viewed state regulation of insurance solely in terms of regulation by the law of the State where occurred the activity sought to be regulated. There was no indication of any thought that a State could regulate activities carried on beyond its own borders." *FTC v. Travelers Health Ass'n*, 362 U.S. 293, 300 (1960).

In discussing the legislative history of the McCarran-Ferguson Act, the U.S.

Supreme Court in *Travelers* stated that "[o]ne of the major arguments advanced by proponents of leaving regulation to the States was that the States were in close proximity to the people affected by the insurance business and, therefore, were in a better position to regulate that business than the Federal Government." *Id.* at 302. Thus, what the Plaintiff is asking for here would be the opposite of what is intended by the McCarran-Ferguson Act. The U.S. Supreme Court stated that

> [s]uch a purpose would hardly be served by delegating to any one State sole legislative and administrative control of the practices of an insurance business affecting the residents of every other State in the Union. This Court has referred before to the 'unwisdom, unfairness and injustice of permitting policyholders to seek redress only in some distant state where the insurer is incorporated.'

Id. at 302 (quoting *Travelers Health Ass'n v. Virginia ex rel. State Corp. Comm'n*, 339 U.S. 643, 649 (1950)).

In *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), the U.S. Supreme Court supported the state-by-state method of regulation. The *Gore* case involved disclosure of certain pre-sale repairs to new vehicles. The U.S. Supreme Court recognized that states take differing approaches to common issues and, in the end, left undisturbed this manner of regulation. "No one doubts that a State may protect its citizens by prohibiting deceptive trade practices . . . . But the States need not, and in fact do not, provide such protection in a uniform manner. . . . The result is a patchwork of rules representing the diverse policy judgments of lawmakers in 50 States." *Id.* at 568-569. "That diversity demonstrates that reasonable people may disagree . . . ." *Id.* at 570. The effect of these policy judgments, however, is confined to the state's

territory. In disallowing an Alabama court's award of punitive damages for conduct occurring outside of Alabama, *Gore* stated that "a State may not impose economic sanctions on violators of its laws with the intent of changing the tortfeasors' lawful conduct in other States." *Id.* at 572. *See also Healy v. Beer Inst.*, 491 U.S. 324, 337 (1989) ("Commerce Clause protects against inconsistent legislation arising from the projection of one state regulatory regime into the jurisdiction of another State.").

Several other cases confirm that a state's power to regulate the relationship between insurer and policyholder is confined to its borders. *See In re Insurance Antitrust Litig.*, 938 F.2d 919, 928 (9th Cir. 1991), *aff'd in part and rev'd in part on other grounds sub nom. Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993) ("[E]stablished law blocks regulation by one state of the United States of the insurance business outside the borders of that state. A state's regulation of insurance does not have extraterritorial effect within the United States."); *Allstate Ins. Co. v. Lanier*, 361 F.2d 870, 873 (4th Cir. 1966) (quoting *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 429-430 (1946)) ("[T]he dominant purpose of Congress in passing the McCarran-Ferguson Act was to 'give support to the existing and future state systems for regulating and taxing the business of insurance' and 'to throw the whole weight of its power behind the state systems.'"); *Page v. Liberty Mut. Fire Ins. Co.*, 869 F. Supp. 596 (N.D. Ill. 1994) (Court rejects argument contrary to proposition that McCarran-Ferguson Act not intended to allow state to regulate extraterritorially.); *Hamilton Life Ins. Co. v. Republic Nat'l Life Ins. Co.*, 291 F. Supp. 225, 230 (S.D.N.Y. 1968) ("The primary legislative purpose of the McCarran-Ferguson Act was to reaffirm the States' power to regulate

insurance . . . and to ensure that state regulatory schemes would not be impaired and overridden except by specific and explicit Congressional enactments."); *United States v. Chicago Title & Trust Co.*, 242 F. Supp. 56, 60 (N.D. Ill. 1965) ("The Supreme Court decisions after the McCarran Act . . . indicate the inability of states to affect matters extraterritorially.") (footnote omitted).

Furthermore, assuming there is class certification in this case, in order for a New Mexico trial court to validly apply New Mexico law to the claims of nonresident plaintiffs, there must be some reasonable relationship between the two. In *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), a class action case, the U.S. Supreme Court rejected as arbitrary and unfair the application of Kansas law to those claims with which Kansas did not possess sufficient minimum contacts. The forum state "must have a 'significant contact or significant aggregation of contacts' to the claims asserted by each member of the plaintiff class, contacts 'creating state interests,' in order to ensure that the choice of . . . law is not arbitrary or unfair." *Id.* at 821-822 (quoting *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 312-313 (1981)). Thus, the members of the NAIC believe that, to comply with the due process clause and the full faith and credit clause of the U.S. Constitution, a state must have significant contact or a significant aggregation of contacts to justify application of its law to the claims of distant plaintiffs.

CONCLUSION

The members of the NAIC agree that life insurance companies have a duty to make certain disclosures in their life insurance policies. However, the members adamantly believe that the nature and extent of that duty is to be determined on a state by state basis. The members believe that asking a court to apply its own state law to an insurance dispute when the state has no connection to the parties or the dispute is asking that court to disregard the due process clause of the U.S. Constitution. The practical effect of a nationwide class can reach well beyond the borders of New Mexico and clash with the public policy and law of other states, which are deserving of full faith and credit under the U.S. Constitution.

WHEREFORE, the members of the NAIC ask that state insurance commissioners, directors and superintendents, each already charged by both state and federal law to protect insurance consumers in their own respective states, be allowed to protect their citizens in accordance with their own state's public policies, that the class certificate be reversed, and that whatever relief this Honorable Court orders, if any, be tailored in such a fashion to comply with the due process and full faith and credit clauses of the U.S. Constitution.

Respectfully submitted,

SIMONE, ROBERTS & WEISS, P.A.

By: Randal W. Roberts

Randal W. Roberts
Attorney for the National Association of Insurance Commissioners As *Amicus Curiae*
8102 Menaul Blvd. N.E.
Albuquerque, NM 87110
(505) 298-9400

I hereby certify that a true and correct copy of the foregoing was served upon the following person(s) via U.S. Mail, with first-class postage prepaid, on this 12th day of June, 2002:

John M. Eaves
6400 Uptown Boulevard, N.E.
Suite 110-W
Albuquerque, New Mexico 87110

Dennis M. McCarey
6707 Academy Road, N.E.
Albuquerque, New Mexico 87109

Alan K. Konrad
#172 PMB 571
901 Rio Grande Boulevard, N.W.
Albuquerque, New Mexico 87104

J. Kevin McCall
One IBM Plaza
Chicago, Illinois 60611

David F. Cunningham
P. O. Box 787
Santa Fe, New Mexico 87501-0787

Cynthia A. Braun
P. O. Box 1190
Albuquerque, New Mexico 87103-1190

Randal W. Roberts