
DOCKET NO. 06-12951-HH

**IN THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

**NATIONAL VIATICAL INC., GROVER T.
AND DORIS E. MITCHELL**

Appellants

v.

**JOHN OXENDINE, GEORGIA INSURANCE
AND FIRE SAFETY COMMISSIONER**

Appellee.

**NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS'
BRIEF OF AMICUS CURIAE IN SUPPORT OF APPELLEE AND
SUPPORTING AFFIRMANCE OF THE JUDGMENT BELOW**

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION**

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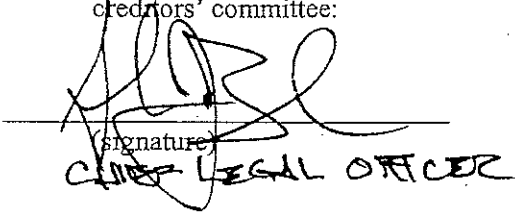
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If yes, identify all parent corporations, including grandparent and great-grandparent corporations:
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If yes, identify all such owners:
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5. Is party a trade association?
 YES NO
If yes, identify all members of the association, their parent corporations, and any publicly held companies that own 10% or more of a member's stock:
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CLUB LEGAL OFFICER

August 21, 2006

(date)

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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, the territories and insular possessions of the United States. Founded in 1871, it is the nation’s oldest association of state government officials.

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.***¹

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,

¹ See National Association of Insurance Commissioner, NAIC Mission Statement, available at http://www.naic.org/index_about.htm (last visited August 21, 2006).

consumer guides, handbooks, periodicals and the *Proceedings of the NAIC*; the management of accreditation standards for, and coordination of, the review of 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 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.

Any member of the NAIC may request the filing of an amicus brief. Such request requires approval by the Executive Committee of the NAIC. At the request of Georgia Insurance and Fire Safety Commissioner John Oxendine, the members of the NAIC seek to appear as amicus to assist this Court on the pending appeal by presenting the legal, regulatory, consumer protection and public policy concerns presented by the business of life settlements.

The NAIC's interest derives principally from having promulgated the Viatical Settlements Model Act and the Viatical Settlements Model Regulation ("NAIC Model"), the primary purpose of which is to provide protection to the life insurance consumer considering or undertaking a viatical or life settlement transaction. The Georgia Life Settlements Act ("Georgia Act")² is based on the

² O.C.G.A. § 33-59-1, *et seq.*

NAIC Model. As of July 2006, thirty-eight (38) of the 54 NAIC member jurisdictions have adopted a version of the Model Act or related legislation to address the area of life settlements. (Natl. Assn. of Insurance Comrs., 4 *NAIC Model Laws, Regulations and Guidelines* (2006), pp. 697-33.) Any decision by this Court on the constitutionality of the Georgia Act would have negative implications for state insurance regulators throughout the country, on the insurance companies they regulate, and, most importantly, on the consumers they are charged with protecting.

The NAIC seeks to appear as amicus here to support Appellee's arguments related to the application of the Commerce Clause to the Georgia Act. The NAIC, as the collective voice of the nation's insurance regulators, endorses Commissioner Oxendine's position that regulation of life settlements is an appropriate exercise of the power reserved to the states by the McCarran-Ferguson Act.³

The NAIC has extensive experience with the interpretation and application of the McCarran-Ferguson Act and various State laws, many of which are based on NAIC model laws, along with constitutional challenges and administrative law matters. With regard to the McCarran-Ferguson Act, the Supreme Court has stated that "[t]he views of the NAIC are particularly significant, because the Act

³ 15 U.S.C. § 1011, *et seq.*

ultimately passed was based in large part on the NAIC bill.” *Group Life and Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 221 (1979).

STATEMENT OF THE ISSUES

The NAIC adopts the Statement of the Issues filed by Appellee.

SUMMARY OF ARGUMENT

The District Court’s decision in granting the Appellee’s motion to dismiss should be affirmed. The Georgia Act does not violate the Commerce Clause of the U.S. Constitution. Moreover, the McCarran-Ferguson Act protects the regulation of life settlements from attacks based on the Commerce Clause. 15 U.S.C. § 1012.

The Georgia Act does not discriminate against out-of-state providers.

ARGUMENT

A. The Development of the NAIC Model Act

Sales of life insurance policies to third parties, other than the insured are generally referred to as the “secondary market” for life insurance. Although this market has only been in existence for less than twenty (20) years, it has prompted the enactment of numerous laws and regulations governing its practices. In their earliest incarnations, the transactions were referred to as “viatical settlements” and typically involved terminally ill individuals selling their life insurance policy to pay the expenses associated with their final illness and death. The first viatical company was formed in 1989 to buy life insurance policies of terminally ill

individuals for a percentage of the face value. To facilitate an alternative to this type of transaction, the NAIC developed a model regulation establishing the parameters for insurance companies to offer accelerated benefits. By 1992, it became clear that an accelerated death benefit was not always going to be available to the insured and that viatical transactions would continue.

Those who took advantage of offers to purchase their policies were generally ill and uninformed about their rights and the safeguards they should expect. Policyholders were paid less than they should have accepted and in some cases were not paid at all because they did not know they should insist on an escrow account to hold the settlement proceeds.

In the face of these activities, the NAIC undertook to develop a model law on viatical settlements to protect consumers who sold their policies at a time when they were not in an optimal bargaining position. A committee was appointed in the spring of 1992 to develop an initial draft for discussion. (Natl. Assn. of Insurance Comrs., *Proceedings of the NAIC* (2d Quarter 1992), p. 667). Input was received from various interested parties during the drafting process, including the viatical settlement industry, the life insurance industry and associations of people suffering from AIDS.

The NAIC adopted the Viatical Settlements Model Act (the “Model Act”) in 1993 and the Viatical Settlements Model Regulation (the “Model Regulation”) in

1994. (Natl. Assn. of Insurance Comrs., *Proceedings of the NAIC* (3d Quarter 1993), pp. 7, 30; Natl. Assn. of Insurance Comrs., *Proceedings of the NAIC* (2nd Quarter 1994), pp. 13, 39, 53. This initial version of the NAIC Model covered only the sale of a life insurance policy by a “person who has a catastrophic or life threatening illness or condition.” One of the most important parts of the Model Act is a set of protections for insurance consumers. These provisions include mandatory disclosure requirements, payment of proceeds into an escrow account, and confidentiality of medical information. The Model Regulation addresses the most challenging issue, which is how to assure a fair percentage of the face value of the policy is paid to the policyholder.

A number of states quickly adopted statutes based on the NAIC Model to address ongoing and emerging problems, however, due to continuing dramatic changes in the industry, the NAIC Model was viewed by some as incomplete the late 1990’s. As a result, the NAIC again appointed a committee to address evolving concerns about viatical settlements. This set of revisions focused on necessary protections for the life insurance companies who had written the policy being sold. The life insurance companies and viatical settlement companies worked together to develop forms for communication between them about the policies being sold. Extensive revisions were completed to the Model Act in 1998 and to the Model Regulation in 1999. (Natl. Assn. of Insurance Comrs., *Proceedings of the NAIC*

(1st Quarter 1998), pp. 8-9, 14, 17; Natl. Assn. of Insurance Comrs., *Proceedings of the NAIC* (3rd Quarter 1999), pp. 25-26 [amended to add three appendices]).

At the same time, providers in the secondary market modified their practices and the character of the purchases they were making. While the first purchases of life insurance focused on AIDS patients, as the medical treatments for AIDS improved, providers broadened their market to include purchases of policies from persons with cancer, heart disease and other ailments. By late 1997, providers began to purchase policies from individuals who were not terminally ill. These transactions became known as “senior settlements” or “life settlements” because they typically involved older people who no longer needed their policies. Because these policies were generally of higher face amount and would take longer to mature, it was more difficult to market these to individual investors. As a result, providers began to solicit institutional investors to provide funding for purchases.

In response to these ongoing changes, in March 2001, the NAIC adopted a revised Model Act to include provisions on fraud, advertising, optional investor protections, enhanced examination powers and increased disclosures. (Natl. Assn. of Insurance Comrs., *Proceedings of the NAIC* (4th Quarter 2000), pp. 16-17. The revised Model Act includes the broader life settlement market in the definition of viatical settlements. The Georgia Act uses the term “Life Settlement” in place of “Viatical Settlement.”

During this revision process, state insurance regulators worked with state securities regulators, who have taken steps to address investor fraud in most states, and received valuable input from the life insurance industry and viatical settlement providers. The NAIC Model now includes requirements for sharing of information between settlement providers and insurers in order to increase the capacity to identify and address fraud in the industry.

Additional revisions to the NAIC Model were adopted in 2004. These revisions included as an appendix a “Verification of Coverage” form, which form is to be completed by providers and verified by insurers to make certain that the coverage upon which the provider is bidding is understood clearly.

The NAIC currently is considering additional revisions to the NAIC Model to address fraud and consumer protection issues presented by investor-initiated life insurance, premium financing arrangements and related transactions. As with previous efforts related to the NAIC Model, this effort is being undertaken with input from the viatical and life settlements industry, the life insurance industry, and consumer groups. The NAIC and state insurance regulators are committed to continuing to work with those industries to make sure consumers who enter into life settlements or similar transactions are adequately protected.

All of the requirements of the NAIC Model and the Georgia Act are the result of several years of attention from and discussion between state insurance

regulators, life insurance and life settlement industry representatives and consumer representatives. The NAIC Model and the Georgia Act constitute a considered response to the rapid changes that have occurred since the emergence of the secondary market for life insurance policies. A ruling from this Court invalidating the Georgia Act would undo years of progress in the regulation of these transactions. As discussed below, appellants have presented no constitutional argument that justifies such a step.

B. The McCarran-Ferguson Act Protects the Regulation of Life Settlements From Attacks Based on the Commerce Clause

The McCarran-Ferguson Act⁴ recognizes the preeminent role of the states in the regulation of insurance. The Act provides, in relevant part, that:

No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by a State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance; Provided [that the Antitrust Laws] shall be applicable to the business of insurance to the extent that such business is not regulated by State Law.

15 U.S.C. § 1012(b).

Although much of the case law applying the provisions of McCarran-Ferguson deals with the second clause antitrust exemption, this case does not. Rather, the question here is whether, under the first clause, the Georgia Act is a

⁴ 15 U.S.C. § 1011 *et seq.*

“law enacted by a State for the purpose of regulating the business of insurance.”

The NAIC joins Appellee Commissioner Oxendine in arguing that that question should be answered in the affirmative and that the Georgia Act is therefore protected from invalidation under the Commerce Clause.

The Supreme Court in *United States Dep’t of the Treasury v. Fabe*, 508 U.S. 491 (1993) recognized the importance of the distinction between the two clauses of § 1012(b) by holding that:

The language of § 2(b) is unambiguous: The first clause commits laws “enacted ... for the purpose of regulating the business of insurance” to the States, while the second clause exempts only “the business of insurance” itself from the antitrust laws. To equate laws “enacted for the purpose of regulating the business of insurance” with the “business of insurance” itself, as petitioners urge us to do, would be to read words out of the statute. This we refuse to do.

Id., 508 U.S. at 504. The *Fabe* Court went on to adopt the following standard for the application of the first clause of McCarran-Ferguson:

The broad category of laws enacted “for the purpose of regulating the business of insurance” consists of laws that possess the “end, intention, or aim” of adjusting, managing, or controlling the business of insurance. Black’s Law Dictionary 1236, 1286 (6th ed. 1990). This category necessarily encompasses more than just the “business of insurance.”

Id., 508 U.S. at 505. The NAIC joins Appellee in submitting that it is this *Fabe* analysis, and not the antitrust test put forth by appellants⁵, which is determinative of the issue before this Court.

It is difficult to imagine a transaction that is more clearly tied to the business of insurance than one where a beneficiary under a policy of insurance sells his or her rights under that policy to a third party. The sale of a policy directly impacts key elements of the relationship between the insurer and the insured and requires substantial communication among and between the insured, the insurer, and the life settlement provider. The insurer must have accurate information about the transaction to make sure it is done lawfully and is free from fraud and to track the appropriate owner and beneficiary of the policy once the transaction is completed. Further, a life settlement transaction directly implicates the interests and expectations of the insurance consumer and it is state insurance regulators that have the strongest interest in and the most expertise in protecting the consumer.

⁵ Appellant argues that the three part Royal Drug/Pireno test applies to the instant case. Under that test, a transaction must meet three criteria before it is immune from the application of antitrust laws under the second clause of McCarran-Ferguson. First, the activity in question must have the effect of transferring or spreading a policyholder's risk; second, the transaction should be integral to the policy relationship between the insurer and insured; and third, the activity must be limited to entities within the insurance industry. *Group Life & Health Ins. Co. v. Royal Drug Co., Inc.*, 440 U.S. 205 (1979); *Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119 (1982).

The NAIC further joins Appellee Commissioner Oxendine in urging this Court to reject appellant's attempts to equate this case with that decided in *Securities and Exch. Comm'n v. Life Partners, Inc.*, 87 F. 3d 536 (D.C. Cir. 1996). The *Life Partners* case dealt with the question of whether viatical settlement investment contracts were subject to the federal securities laws and therefore considered only the investment side of the transaction, whereby an investor acquired an interest in the life insurance policy of a third party. The *Life Partners* case did not address the authority of state insurance regulators to regulate transactions directly involving insured, insurers, and life settlement providers.

C. The Georgia Act Does Not Discriminate Against Out-of-State Providers

The Georgia Act does not favor resident life settlement providers over foreign life settlement providers, on its face, or in its purpose or practical effect. Therefore, even if the Commerce Clause is applied, the Georgia Act survives challenge. Under a dormant Commerce Clause analysis, the Georgia Act is protected from invalidation because it treats life settlement providers the same, regardless of where they are domiciled, and the state interests behind the law outweigh any incidental burdens on interstate commerce. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). There can be no doubt that state insurance regulators, like Commissioner Oxendine, have a valid interest in protecting the interests of elderly or chronically ill residents of Georgia. State insurance

regulators have as their primary mission the protection of insurance consumers. This mission necessarily extends to all aspects of the insurance transaction, including any sale of the insurance benefit through a life settlement. The consumer protections embodied in the Georgia Act constitute a compelling state interest sufficient to prevent invalidation of the law under a dormant Commerce Clause analysis.

Finally, the NAIC agrees that Congress clearly contemplated and approved state regulation of life settlements when it exempted from federal income tax the proceeds of transactions where the settlement provider is licensed by the state or the settlement otherwise meets certain requirements of the NAIC Model.⁶ Because of this Congressional authorization, the Georgia Act is immune from Commerce Clause challenge.

CONCLUSION

The NAIC joins Appellee Commissioner Oxendine in urging this Court to uphold the constitutionality of the Georgia Act. Thirty-eight states have laws in place to regulate viatical and/or life settlements. State insurance regulators throughout the country are actively regulating the secondary market for life insurance to protect the interests of the insurance companies they regulate and the insurance consumers they are charged with protecting. Under the McCarran-

⁶ 26 U.S.C. § 101(g)(2)(B).

Ferguson Act and Supreme Court precedent applying it, laws regulating life settlements are laws “enacted by a State for the purpose of regulating the business of insurance.” The NAIC urges this Court to reject appellant’s attempt to invalidate the Georgia Act and to uphold the authority of state insurance regulators nationwide to continue the important task of regulating the secondary market.

WHEREFORE, for the above and foregoing reasons, the NAIC joins with Appellee in respectfully requesting that this Court **affirm** the decision of the District Court.

Dated this 25th day of August, 2006.

Respectfully submitted,

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s/ R. Scott Johnson

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CERTIFICATE OF SERVICE

I hereby certify that I have this date served a true and correct copy of the foregoing Brief by depositing a copy of same in the United States Mail, with first-class postage affixed thereto, properly addressed as follows:

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