

No. 70816-9

IN THE SUPREME COURT OF
THE STATE OF WASHINGTON

ROXETTE BUSANI, individually and as the representative
of all persons similarly situated,

Respondent,

v.

UNITED SERVICES AUTOMOBILE ASSOCIATION,

Petitioner.

**MEMORANDUM OF THE NATIONAL ASSOCIATION
OF INSURANCE COMMISSIONERS
AS *AMICUS CURIAE*
IN SUPPORT OF PETITIONER**

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**MEMORANDUM OF THE NATIONAL ASSOCIATION OF
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SUPPORT OF PETITIONER**

Pursuant to Washington Rule of Appellate Procedure 13.4(h), the National Association of Insurance Commissioners (NAIC) respectfully submits this memorandum as *amicus curiae* in support of the motion of the petitioner, United Services Automobile Association (USAA), seeking discretionary review in this matter.

INTRODUCTION

This matter involves a class action certification on the question of whether underinsured motorist (UIM) coverage imposes a duty on USAA to disclose to its insureds that they might have claims for so-called inherent diminished value (IDV). The superior court's certification has the effect of applying Washington law to insurance policies of individuals residing in 27 states, including Washington. Thus, the practical effect of this trial court certification reaches far beyond the borders of Washington in contravention of established principles of constitutional and regulatory law. Furthermore, it also conflicts with the state-by-state nature of insurance regulation through which the question of recoverability of IDV is appropriately evaluated. This conflict is significant. By applying Washington law to purported IDV claims in other states, the trial court appears to replace the policy judgments of other states with its own. This

conflict will impair the ability of state regulators and legislators to protect their residents in this and other areas of insurance regulation. Due to the implications of that judgment for consumers, insurers, and regulators, it is in the public interest to grant USAA's petition for discretionary review.

IDENTITY AND INTEREST OF THE *AMICUS CURIAE*

The NAIC is composed of the chief insurance regulators in the 50 states, the District of Columbia, and four United States territories. Each member 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. Although it appears today as *amicus curiae* for USAA, the NAIC wishes to note its general support for the use of class action lawsuits in appropriate circumstances as a means for insurance consumers to redress wrongs and abuses by insurers. The trial court's decision, however, has negative implications for consumers that go beyond the parties in this dispute. Because of the potential for erosion of the power of state insurance regulators to protect insurance consumers, the NAIC asks to appear before this court and asks this court to accept review.

In this case, a Washington trial court certified a 27-state plaintiff class, which will have the effect of extraterritorially applying Washington law pertaining to UIM coverage. This decision ignores how the

relationship between insurer and policyholder 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. Instead of upholding this longstanding regulatory system, it appears that the trial court took for itself, and from state regulators and legislators, the responsibility for making policy judgments concerning UIM coverage and IDV. State insurance policymakers face the previously inconceivable situation of having their judgments possibly overruled by one Washington trial court. This is inconsistent with our national system of insurance regulation.

The NAIC believes 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 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 common and somewhat uniform 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).

Where one state's insurance regulator has determined a particular regulatory course with respect to the business of insurance in his or her state, the NAIC believes effective regulation requires sister states to respect that decision. The NAIC takes no position with respect to how states may regulate the UIM coverage/IDV issue. The NAIC wishes only to emphasize that the law gives each state the power to make these judgments free from interference by sister states. Upholding the trial court's class certification would erode that power and would be in direct contravention to statutory law and judicial precedent. To avoid this outcome, the NAIC supports USAA's petition for discretionary review.

STATEMENT OF THE CASE

This brief adopts the statement of the case presented in Petitioner's Motion for Discretionary Review.

ARGUMENT

The trial court's certification of the 27-state plaintiff class has the effect of applying Washington law extraterritorially. This result

contravenes the law, which clearly leaves the regulation of the business of insurance within the jurisdiction of the individual states.

I. CONSISTENT WITH ESTABLISHED PRINCIPLES OF INSURANCE REGULATION, STATES TAKE VARIED APPROACHES TO REGULATING THE BUSINESS OF INSURANCE

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.

The United States Supreme Court has supported the state-by-state method of regulation. *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 134 L. Ed. 2d 809, 116 S. Ct. 1589 (1996), is apposite to the circumstances of the present case. 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.” 517 U.S. 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, 105 L. Ed. 2d 275, 109 S. Ct. 2491, 2499 (1989) (“Commerce Clause protects against inconsistent legislation arising from the projection of one state regulatory regime into the jurisdiction of another State.”).

II. WHILE INDIVIDUAL STATES MAY REGULATE THE RELATIONSHIP BETWEEN POLICYHOLDER AND INSURER, THIS AUTHORITY HAS LIMITS THAT WERE EFFECTIVELY EXCEEDED IN THIS CASE

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 class certification affects the relationship between insurers and policyholders in 26 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, 4 L. Ed. 2d 724, 80 S. Ct. 717, 721 (1960). In discussing the legislative history of the McCarran-Ferguson Act, the U.S. Supreme Court found 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."

362 U.S. at 302. Thus, the very situation that occurred here—where one state effectively usurped the power of others to regulate their internal affairs—was exactly the opposite of the intent of 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, 94 L. Ed. 1154, 70 S. Ct. 927, 930 (1950)).

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, 125 L. Ed. 2d 612, 113 S. Ct. 2891 (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, 90 L. Ed. 1342, 66 S. Ct. 1142, 1155 (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, in order to apply Washington law validly to plaintiffs’ claims, there must be some reasonable relationship between the two. In *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 86 L. Ed. 2d 628, 105 S. Ct. 2965 (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.” 472 U.S. at 821-822 (quoting *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 312-313, 66 L. Ed. 2d. 521, 101 S. Ct. 633, 640 (1981)). Therefore, it is clear that Washington must have certain minimum contacts with plaintiffs’ claims; otherwise, application of its law to the claims of distant plaintiffs reaches the level of “arbitrariness” rejected previously by the U.S. Supreme Court. This, however, is what happened in this case.

Affirming the class certification would lead to the type of result condemned by judicial precedent. The judgments of regulators and legislators in other states would be swept aside and replaced by the judgment of a Washington trial court. Application of Washington substantive law to purported claims wholly outside of Washington ignores other states’ policy judgments and offends established principle.

If the trial court’s certification is allowed to stand, insurance contracts between insurers and policyholders, formed and to be performed under the laws of other states, potentially are subject to a Washington

standard no matter what regulators and legislators may have decided about the issue of UIM coverage and IDV. This defies the established state-by-state regulatory scheme enshrined in the McCarran-Ferguson Act.

The ability of states to make their own judgments concerning their own residents should be respected. The trial court's decision, however, threatens to defeat the right of states to make policy decisions concerning UIM coverage and IDV. Effectively, state legislators and insurance regulators in 26 other states are held hostage to one trial court in one state, uncertain of the effect of their judgments.

Finally, consider a few of the numerous questions raised by the decision in this case. In other areas of the law, will nationwide class action lawsuits in the courts of other states become the instruments of overriding policy choices made in Washington for Washington consumers? Will states now have to be mindful of the judgments of the trial courts of sister states in crafting regulatory policy to protect their residents? Will other state courts be required to give full faith and credit under the United States Constitution to the judgments of Washington courts? These questions should illustrate the uncertainty faced by consumers, legislators, regulators, and insurers. To alleviate the uncertainty created by the nationwide effect of the trial class certification, this court should grant USAA's petition for discretionary review.

CONCLUSION

For the foregoing reasons, the court should grant USAA's petition for discretionary review and reverse or redefine the trial court's class certification.

Respectfully submitted this 15th day of May, 2001.

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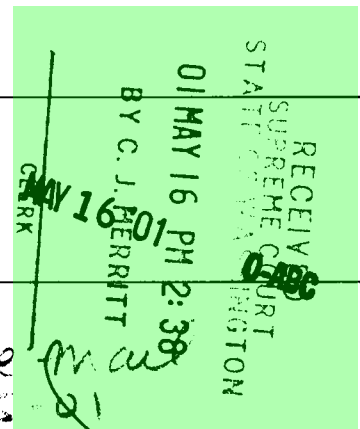
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