

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO
ALBUQUERQUE

COURT OF APPEALS OF NEW MEXICO
ALBUQUERQUE
FILED

JOAN FERRELL, MARIA C. CAPPUZZELLO,
ELIZABETH MARTINEZ, AND H. JAKE SALAZAR,
For themselves and all others similarly situated,

JAN 30 2006

Plaintiffs-Appellees,

Patricia R. Wallace

vs.

No. 26,058
Sandoval County
D-1329-CV-02-885
Honorable Cynthia A. Fry

ALLSTATE INSURANCE COMPANY and
ALLSTATE INDEMNITY COMPANY,

Defendants-Appellants.

**BRIEF OF THE NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS AS
AMICUS CURIAE
IN SUPPORT OF DEFENDANTS-APPELLANTS**

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The National Association of Insurance Commissioners (“NAIC”) respectfully submits this memorandum as *amicus curiae* in support of Defendants’ Allstate Insurance Company and Allstate Indemnity Company’s Appeal from Order Granting Class Action Certification.

INTRODUCTION

This matter involves a class action lawsuit alleging Allstate’s failure to disclose on the face of its automobile insurance policies the fees charged to consumers who choose to pay their premiums in installments constitutes a breach of contract. The District Court certified a class of Allstate policyholders from thirteen states who paid installment fees to Allstate within six years of the commencement of the action. The NAIC has sought to appear as *amicus curiae* to express its concern that the class certification in this case potentially subverts the authority of state insurance departments to regulate insurance practices in their home state. The McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015 (2000) charges the insurance commissioners of various states with the responsibility of regulating the business of insurance within their jurisdiction. The practical effect of class action certification in this matter is a New Mexico court’s substantive rulings on required disclosures and what constitutes “premium” will affect policyholders in twelve other states. This result is in contravention of the well-established state-based system of insurance regulation and the constitutional principles supporting that system.

INTEREST OF THE AMICUS CURIAE

The NAIC is a voluntary association of the chief insurance regulators in the 50 states, the District of Columbia, and the five territories of the United States. Founded in 1871, the NAIC 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 in achieving the following fundamental insurance regulatory goals in a responsive, efficient and cost-effective manner, consistent with the wishes of its members:

- (a) Protect the public interest;
- (b) Promote competitive markets;
- (c) Facilitate the fair and equitable treatment of insurance consumers;
- (d) Promote the reliability, solvency, and financial solidity of insurance institutions; and support and improve state regulation of insurance.¹

As a not-for-profit organization, the NAIC's purpose is to provide its members with a national forum for discussing common issues and interests and working cooperatively on regulatory matters transcending the boundaries of their own jurisdictions. Collectively, the commissioners work to develop model legislation, rules, regulations and white papers to coordinate regulatory policy. Their overriding objective is to protect consumers and assist in maintaining the financial stability of the insurance industry. 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 creation of task forces and working groups; the drafting 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 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

¹ See National Association of Insurance Commissioner, NAIC Mission Statement, available at http://www.naic.org/index_about.htm (last visited December 15, 2005).

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. The members of the NAIC seek to appear as *amicus curiae* in this matter to apprise the Court of the regulatory and public policy concerns regarding the multi-state class action certification order and its effect on the authority of state insurance departments to regulate insurance practices in their home state and to join in defendants' request that the order granting class action certification be reversed. The Executive Committee has approved the filing of this amicus brief.

ARGUMENT

CLASS CERTIFICATION IN THIS CASE INTERFERES WITH THE ABILITY OF STATE INSURANCE REGULATORS, LEGISLATORS AND COURTS TO REGULATE THE BUSINESS OF INSURANCE IN THEIR HOME STATE

The NAIC is concerned with the potential far-reaching effect of the class action certification in this case on the regulation of insurance in the United States. Although the NAIC supports the use of litigation in appropriate circumstances as a means for insurance consumers to redress wrongs and abuses by insurers, certification of a multi-state class action in this case goes beyond appropriate judicial remedies. The potential judicial remedy would impose New Mexico law and a New Mexico court's interpretation of other states' laws on insurance consumers, insurers, and insurance regulators in the other states included in the class.

The authority to regulate the business of insurance has been vested with the states for more than 100 years since the 1945 enactment of the McCarran-Ferguson Act, *supra*. The Court is obliged to weigh carefully the potential impact of a multi-state class action certification on the authority of

state regulators to effectively regulate insurers in light of a longstanding regulatory system built on cooperation among the states to protect consumers. This certification may result in the judgment of the district court replacing the prudent judgment of regulators, legislatures and courts in their home states.

Each state in the certified class has a unique regulatory framework governing the approval of insurance policy rates and forms, defining what constitutes “premium”, and establishing required disclosures in insurance policies. Regulators in the individual states review and approve premium provisions in automobile insurance policies, including any allowance for installment payments. In the present case, the Insurance Division of the New Mexico Public Regulation Commission approved Allstate’s installment fee plan under New Mexico state law.²

State insurance regulators carried out the mandate of McCarran-Ferguson by developing a complex and interdependent system of regulation that applies to insurance companies, agents, and service providers. Each state relies on its authority to regulate those insurers in its state to ensure protection of the consumer. Insurance regulators and legislators in each state rely on their state’s judicial system to interpret the statutes and regulations governing insurance and to provide appropriate judicial remedies to insurance consumers.

The district court’s order certifying a nationwide class means that, in ruling on the substantive issues presented in the case, the district court will apply New Mexico law and its interpretation of the laws of the other states included in the class to insurance consumers in all the involved states. The U.S. Supreme Court has previously addressed such extraterritorial application of a state statute concerning unfair trade practices to insurance transactions occurring outside the

² NMSA 1978, §§ 59A-18-12(A) and 59A-18-14.

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). The Supreme Court in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996) again supported the state-by-state method of regulation. The court recognized varying states’ approaches to common issues, stating that “[n]o 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 568-570. *See, e.g., Smith v. State Farm Mut. Auto. Ins. Co.*, 113 Cal.Rptr.2d 399, 420-21 (Cal. Ct. App. 2001) (district court must consider the applicability of the primary jurisdiction doctrine because challenged practices by insurers came within jurisdiction of insurance department); *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.”) Class certification is particularly troubling here because cases with substantive allegations similar to those made here have already been decided in Louisiana and Washington³ and are pending in California⁴ and New Mexico⁵. The existence and availability of state specific judicial remedies is a strong indication that a multi-state class action is not superior to other mechanisms of relief.

³ *See Cacomo v. Liberty Mut. Fire Ins. Co.*, 885 So. 2nd 1248 (La. App. 2004); *Blanchard v. Allstate Ins. Co.*, 774 So.2d 1002 (La. App. 2000); *Cacomo v. Liberty Mut. Fire Ins. Co.*, 885 So. 2nd 1248 (La. App. 2004); *Blanchard v. Allstate Ins. Co.*, 774 So.2d 1002 (La. App. 2000); *Sheldon v. American States Preferred Ins. Co.*, 95 P.3d 393 (Wash. App. 2004).

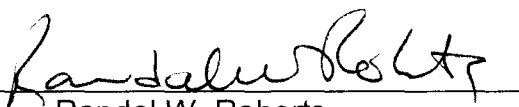
⁴ *See* Discussion in Appellants’ Brief-in-Chief at II.B. concerning pending cases in California.

⁵ *See Nakashima v. State Farm Mut. Auto Ins. Co.*, CV-2004-00908 (County of Bernalillo, New Mexico) (currently on appeal); *Steinbeck v. Mercury Ins. Co. et al.*, (Orange County, California, Superior Court Case No. 04CC00671) (currently pending on appeal).

CONCLUSION

The substantive issue in this case is whether an automobile insurance company breaches its contract with an insured by charging optional installment fees not disclosed on the face of the policy. Although a New Mexico court is well positioned to make that determination as to its own residents who are subject to New Mexico law, the NAIC submits that it is not appropriate for a New Mexico court to make its decision applicable to twelve other states through certification of a class.

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We hereby certify that a true and correct copy of the foregoing pleading was mailed to all counsel of record this ~~20~~³⁰ day of January, 2006:

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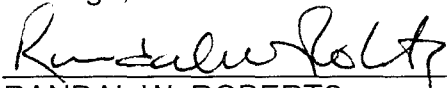
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A handwritten signature in black ink, appearing to read "Randal W. Roberts", written over a horizontal line.

RANDAL W. ROBERTS