Abstracts of Significant Cases Bearing on the Regulation of Insurance

2023

Olivea Myers[1]

United States Court of Appeals

Oklahoma

Pharm. Care Mgmt. Ass'n v. Mulready, 78 F.4th 1183 (10th Cir. Aug. 15, 2023)

Pharmaceutical Care Management Association ("PCMA") challenged an Oklahoma law regulating pharmacy benefit managers ("PBMs") arguing that "'establish[ed] minimum and uniform access to a provider and standards and prohibitions on restrictions of a patient's right to choose a pharmacy provider.'" *Id.* at 1190. PCMA argued that the Employee Retirement Income Security Act of 1974 ("ERISA") and Medicare Part D preempted the Oklahoma law. The district court held that ERISA did not preempt the Oklahoma law and that sections of the law pertaining to ERISA were permissible. The district court also held that Medicare Part D preempted some sections of the law and that those sections were unenforceable. PCMA appealed the district court ruling regarding the court's ERISA preemption decision. Oklahoma argued that laws that had a minor effect on a benefit plan's design were exempted from preemption. *Id.* at 1201. Oklahoma further argued that the law only applied to minor economic effects rather than affecting the design of the plan. The Tenth Circuit Court of Appeals held that both ERISA and Medicare Part D preempted the Oklahoma law. ERISA's preemption provision states that ERISA preempts "'any and all State laws insofar as they may now or hereafter relate to any employee benefit plan.'" *Id.* at 1193. "A state law relates to an ERISA plan if it has (1) a 'connection with' or (2) a 'reference to' an ERISA plan." *Id.* at 1193-1194. The court held that the Oklahoma law "impede[s] PBMs from offering plans some of the most fundamental network designs, such as preferred pharmacies, mail-order pharmacies, and specialty pharmacies." *Id.* at 1200. The court further held that Oklahoma is attempting to "'govern[] a central matter of plan administration'" and "'interfere[] with nationally uniform plan administration.'" *Id.* (citing *Rutledge v. Pharm. Care Mgmt. Ass'n.*, 141 S.Ct. 474, 480 (2020)). The court further held that provisions of the Oklahoma law were also preempted by Medicare Part D because a provision of the Oklahoma law attempted to regulate Part D plans by establishing a "rule that govern[ed] PBM pharmacy networks for Part D plans." *Id.* at 1209.

1. Olivea Myers is Legal Counsel III with the NAIC.

State Court

California

*Myers v. State Bd. of Equalization, No. B307981, 2023 WL 3050778, at *1 (Cal. Ct. App. Apr. 24, 2023)*

Myers ("Appellant") filed suit to compel the California State Board of Equalization, the Insurance Commissioner of the State of California, and the Controller of the State of California ("Respondents") to collect the gross premium tax imposed by California law from certain health care service plans, which are regulated by the Department of Managed Health Care under a different regulatory scheme than insurers. In 2015, the California Court of Appeals adopted a standard for deciding whether health care service plans are insurers for tax purposes. The standard requires balancing the indemnity aspects of the business against the direct service aspects in relation to determining whether indemnity constitutes a significant financial proportion of the business. Appellant contended that the trial court incorrectly understood the meaning of indemnity under the standard and that it should have applied a different test to determine whether the real parties in interest were insurers. Respondents argued that the health care service plans are not insurers under this standard and California law. The gross premium tax is imposed on insurers "'in lieu of all other taxes and licenses, state, county, and municipal, upon such insurers and their property.'" *Id.* at *2. "All other businesses, except for banks and financial corporations, are subject to a corporate franchise tax which is calculated on the basis of the business's net income." *Id.* The court held that the trial court properly applied the standard for deciding whether health care service plans were insurers for gross premium tax purposes because it was bound by the precedent of the 2015 case.

Maryland

*Sarpong v. Nationwide Mutual Fire Ins. Co., No 1811, 2023 WL 8824687, at *1 (Dec. 21, 2023)*

Sarpong ("Plaintiff") filed a claim with Nationwide Mutual Fire Insurance Company ("Defendant") for a loss of personal property that was damaged or stolen when he was evicted, and his personal property was removed from his residence. Defendant covered the loss of property due to theft, but did not cover loss due to "'neglect of the insured to use all reasonable means to save and preserve property at the time of and after a loss[.]'" *Id.* at *1. Defendant denied coverage because Plaintiff failed "'to secure, retrieve, or remove [his] property' from the front lawn of his residence." *Id.* Plaintiff filed a complaint with the Maryland Insurance Administration ("MIA") arguing that Defendant erred in denying his homeowner's insurance claim. The MIA issued a Determination Letter stating that Defendant did not violate Maryland insurance law in denying Plaintiff's claim and Plaintiff subsequently requested an administrative hearing. The Administrative Law Judge ("ALJ") issued a proposed decision holding that Defendant did not "violate Maryland insurance law because [Plaintiff] . . . failed to

protect his personal property as required under the terms of [Plaintiff's] policy, both before and after the eviction." *Id.* at *3. The ALJ held that Plaintiff knew that he was being evicted and he could have moved out of the residence and placed his items in storage to protect them prior to the eviction and that Plaintiff did not provide any evidence that Defendant "misinterpreted any pertinent fact or policy provision, did not act arbitrarily or capriciously, nor did it fail to provide [Plaintiff] with a reasonable explanation for its denial." *Id.* The court of appeals held that the final order of the ALJ was supported by substantial evidence. The court held that Plaintiff never presented any evidence at the hearing to support his assertions and that there was evidence to support Defendant's denial of his claim on the grounds that he failed to protect his personal property. *Id.* at *4.

Michigan

*Nationwide Agribusiness Ins. Co. v. Dept. of Treasury, No. 21-000039, at *1 (Mich. Tax Tribunal, Jan. 23, 2023)*

Nationwide Agribusiness Insurance Company ("Petitioner") filed an amended Michigan corporate income tax return as a unitary business group ("UBG"). The Michigan Department of Treasury ("Respondent") issued assessments against Petitioner because it claimed that an insurance company cannot be a part of a UBG because Michigan law prohibits an insurance entity from claiming to be a part of a UBG for purposes of premium tax, retaliatory tax, or tax credits. Respondent further contended that insurers from various foreign states cannot be compared to the burdens a Michigan company would pay in the insurer's origin state. The court held that although Petitioner satisfies the elements of a UBG under Michigan law, they cannot file returns as a UBG because Michigan law does not have any provision for the calculation of premium taxes on a groupwide basis. The court further held that the statutory definition of insurance company does not include UBGs. The court held that the legislature did not include UBGs on purpose. Therefore, it intended for premium and retaliatory taxes to be calculated on an entity-by-entity basis.

New Jersey

*Caride v. Kumar, No. A-2627-21, 2023 WL 9016158, at *1 (N.J, Super. Ct. App. Div. Dec. 29, 2023)*

Kumar ("Appellant") appealed a final agency decision of Commissioner of the Department of Banking and Insurance ("Department") revoking his insurance producer license and imposing civil penalties, surcharge, attorney's fees and costs of investigation, for violations of the New Jersey Insurance Producer Licensing Act of 2001 ("Producer's Act") and the New Jersey Insurance Fraud Prevention Act ("Fraud Act"). *Id.* at *1. The Department alleged violations against Appellant for violating the Producer's Act because Appellant "did not 'witness the signature[s] of prospective insured[s]; did not have. . . face to face meeting[s] with the prospective insured[s] with regard to the application prior to submitting it, and forged the prospective insureds' signatures on the applications.'" *Id.* at *2 The Department also alleged violations of the Fraud Act

because Appellant "'submitted. . . insurance policy applications. . . for the purpose of obtaining an insurance policy, knowing that each of these applications contained a forged signature of the prospective insured, and other false or misleading information concerning any fact or thing material to the application or contract. . . .'" *Id.* Appellant disputed the charges, and the Department moved the matter to the Office of Administrative Law ("OAL") for hearing as a contested case. The Administrative Law Judge ("ALJ") concluded that Appellant's "actions warranted revocation of his producer license; the imposition of statutory monetary penalties; reimbursement of investigation costs; and attorney's fees." *Id.* at *3. Appellant appealed and asked the court to vacate the revocation of his license. The court affirmed the ALJ's determination stating that the "' [C]ommisoner may . . . revoke. . . an insurance producer's licenses or may levy a civil penalty in accordance with [New Jersey law] or any combination of actions. . . .'" *Id.* at *8.

New Jersey State Firemen's Ass'n v. Div. of Tax'n,
33 N.J. Tax 157 (N.J. Tax Ct. Jan. 30, 2023)

The state firefighters' association ("Association") brought action against the Director of Division of Taxation ("Division") and foreign insurance carriers contending that Division improperly altered the calculation of the fire insurance premium tax payable directly to Association by foreign fire insurance companies by requiring application of the statutory cap used to compute the insurance premium tax payable to Division by domestic and foreign insurance companies. Association argues that the fire insurance premium tax statute imposes a tax upon all New Jersey sourced fire insurance premiums, and that Division impermissibly legislated the fire insurance premium tax statute, which resulted in Association receiving less fire insurance premium tax revenue than what was mandated in the statute. The court held that Division's interpretation of the tax statutes was improper, and that the Division's taxation notice was invalid. The court held that the fire insurance premium tax and insurance premium tax statutes state that 2% of all fire insurance premiums are sourced to New Jersey and the fire insurance premium tax is then deducted from the carrier's insurance premium tax and capped if the New Jersey sourced premiums exceed 12.5% of worldwide premiums.

Rhode Island

New England Prop. Serv. Grp., LLC v. USAA Cas. Ins. Co.,
*No. PC-2023-00130, 2023 WL 4991996, at *1 (R.I. Super. July 28, 2023)*

Policyholders submitted an insurance claim through their homeowner's policy they held with USAA Casualty Insurance Company ("Defendant") in response to storm-related damage to their home ("the Claim"). Policyholders executed a Claim Assignment Contract ("the Contract") with New England Property Services Group, LLC ("Plaintiff"). The Contract assigned all of Policyholders' rights and benefits related to the Claim to Plaintiff in exchange for Plaintiff undertaking the necessary repairs to restore Policyholders' home to it pre-loss condition. A disagreement arose between Plaintiff and Defendant over Defendant's proposed amount of loss. A claims adjuster working for Defendant informed Policyholders that Defendant would be issuing an undisputed

payment that represented Defendant's valuation of the amount of loss for the Claim. *Id.* at *3. Plaintiff responded by demanding an appraisal from Defendant. Defendant responded and explained that Defendant did not believe that the Contract was valid, and Plaintiff would need to submit a letter of representation on behalf of the Policyholders if Plaintiff wanted payment to made directly to them. *Id.* Defendant did not respond to Plaintiff's repeated demand for an appraisal and Plaintiff filed a complaint. *Id.* Plaintiff argued that it was the rightful assignee of a nonnegotiable "chose in action" which is defined as a "proprietary right in personam, such as a debt owed by another person. Or [t]he right to bring an action to recover a debt, money, or thing." *Id.* at 8. Defendant argued that the Claim was not assignable because a "claim is not an obligation to pay a sum certain or a 'definite debt' as Plaintiff alleges, but instead, 'involved the duty of an insurer to engage in negotiations with a claimant to determine the value of a claimed loss'. . . ." Defendant also argues that it is impermissible for Plaintiff to appoint a "'near family member to act as its appraiser of choice'" pursuant to Rhode Island law. *Id.* at 7. The court was asked to determine whether the contract was assignable, whether the Contract between Plaintiff and Policyholders was a valid and enforceable assignment, and whether Plaintiff and Defendant has to appoint a "competent and impartial" appraiser for the appraisal process. *Id.* at 15.

The court held that the Claim itself is freely assignable and enforceable because it was in writing and it "specifically identifies what rights the Policyholders were assigning to Plaintiff." *Id.* at 10. The court further held that when "Policyholders assigned their interests in the Claim to Plaintiff, Plaintiff became the "equitable owner" of the Claim and therefore, had the same rights under the Policy to pursue recovery for the Claim as the Policyholder did prior to assignment. *Id.* The court held that the anti-assignment provision of the Policy did not prohibit the assignment of the Claim because Rhode Island law "only permits an insurance company to prohibit assignment of the insurance policy." *Id.* at 12. The court also held that both Plaintiff and Defendant are required to appoint a "competent and impartial" appraiser to represent their interest in the appraisal process pursuant to Rhode Island law and the language of the Policy." *Id.* at 14.

Washington

New York Life Ins. Co. v. Mitchell, 528 P.3D 1269 (Wash. May 11, 2023)

New York Life Insurance Company ("NY Life") issued two life insurance policies to Lorenzo Mitchell and those policies named his nephew, Simon Mitchell, was named as the sole beneficiary of those policies. Lorenzo died two years after the policies were issued and Simon sought to collect on the policies. NY Life became aware that Lorenzo had down syndrome and lived with significant intellectual disabilities. *Id.* at 548. NY Life sued Simon in the United States District Court for the Western District of Washington seeking declaratory relief that the policies were unenforceable due to (1) imposter fraud, (2) incapacity, and (3) lack of insurable interest. *Id.* at 549. Simon argued that the incontestability clause barred NY Life's challenge to the policies. The federal district court certified the question of whether the incontestability clause barred NY Life's claims.

The Washington Supreme Court held that NY Life's claim regarding lack of insurable interest was not barred because Washington law requires an "individual procuring a life insurance policy on another to have an insurable interest in the insured at the inception of the insurance contract. *Id.* at 560. The court further held that insurance contracts lacking the requisite insurable interest are void as they are against public policy. *Id.* The court held that "an insurance policy may be contested after the two-year period if there is evidence that someone other than the insured signed the application, using the name of the insured, without legal authority to do so and without the insured's consent." *Id.* at 562-563. The court further held that fraudulent statements of the insured are subject to the incontestability clause and are not grounds to set the contract aside after the statutory period, but courts have held that the incontestability clause does not apply to imposter fraud and Washington law has codified the imposter fraud rule. *Id.* at 563. The court stated that NY Life can contest the "policy on the ground that Lorenzo did not consent to enter into a contract in writing or make the application himself." *Id.* at 565. Regarding the incapacity question, the court held that the policy cannot be contested based on lack of capacity because "Washington law is clear that lack of capacity on the part of one of the parties to a contract does not make that contract void." *Id.* at 568. Therefore, "the incontestability statute applies, and NY Life cannot challenge the life insurance contract on the basis of Lorenzo's lack of capacity." *Id.*

Armed Citizens' Legal Def. Network v. Washington State Ins. Comm'r, 534 P.3d 439 (Wash. Ct. App. Aug. 29, 2023)

Armed Citizens Legal Defense Network ("ACLDN") is a for-profit company that offers memberships for gun owners for the purpose of "pooling their strength to protect one another when a member comes under scrutiny of the legal system after acting in self[-]defense." *Id.* at 443. Following a self-defense incident, ACLDN provides financial assistance for a member's legal expenses through the ACLDN Legal Defense Fund ("Fund"). After joining ACLDN, members receive an "Explanation of Member Benefits" that includes educational matters, access to listings for attorneys, initial attorney fee deposits, and bail assistance. *Id.* at 444. In March 2020, the Office of the Insurance Commissioner ("OIC") issued a cease and desist to ACLDN requiring that ALDN cease selling its memberships in Washington without having the necessary authority. *Id.* In May 2020, the OIC issued an order imposing a $200,000 fine against ACLDN for violating Washington's insurance laws. *Id.* The trial court held that a contract exists between ACLDN and its members and the contract is "specific enough to satisfy the definitional standards" of insurance and that ACLDN indemnifies its members "where members are contracting for reimbursement for legal expenses or bail expense, and finally even though self-defense is an intentional act, it is determinable contingency." *Id.* at 445. ACLDN appealed and the court of appeals affirmed the trial court's decision holding that ACLDN was engaging in the business of insurance without licensure because there was a contract formed between ACLDN and its members, there was proper indemnification by providing funding for its members throughout the various stages of litigation, and the resulting legal expenses are determinable contingencies under Washington law. *Id.* at 449.

Cases in Which the NAIC Filed as *Amicus Curiae*

Delaware Dep't of Ins. v. United States, 144 S.Ct. 422 (2023)

The United States Supreme Court denied a petition for writ of certiorari to review the decision of the United States Court of Appeals for the Third Circuit in the case of United States of America v. State of Delaware Department of Insurance, 66 F.4th 114 2023 WL 3030247 (3rd Cir. 2023). The NAIC filed an amicus brief in support of a petition for writ of certiorari filed by Delaware Insurance Commissioner Trinidad Navarro. The Delaware Department of Insurance ("Department") refused to provide documents and testimony responsive to an Internal Revenue Service (IRS) summons regarding the licensure of micro-captive insurance companies formed under Internal Revenue Code § 831(b). Compliance with the summons would have contravened Section 6920 of the Delaware Insurance Code which protects the confidentiality of such materials unless the recipient agrees to keep the information confidential. The Third Circuit Court of Appeals found that the Department did not meet the test for "reverse-preemption" under § 1012 of the McCarran-Ferguson Act and that the challenged conduct did not involve the business of insurance. Other courts have interpreted McCarran-Ferguson to require three elements before reverse preemption is appropriate: (1) whether the state law is enacted for the purpose of regulating the business of insurance; (2) whether the federal law does not specifically relate to the business of insurance; and (3) whether the federal law would invalidate, impair, or supersede the state law. However, the Third Circuit instead imposed a threshold question that courts must first assess before analyzing the other reverse-preemption requirements: i.e., whether the challenged conduct broadly constitutes the business of insurance in the first place. The Supreme Court left in place the Third Circuit's holding that the conduct at issue (i.e., the refusal by the Department to produce summoned documents without the IRS first signing a confidentiality agreement) did not constitute the "business of insurance" within the meaning of McCarran-Ferguson because the conduct did not relate to the relationship between insurer and insured, the type of policy issued, or its reliability, interpretation, and enforcement.