IN THE SUPREME COURT OF MISSOURI

No. SC 84610

STATE OF MISSOURI ex rel.
AMERICAN FAMILY MUTUAL INSURANCE COMPANY

Relator,

vs.

THE HONORABLE THOMAS C. CLARK, JUDGE OF THE 16TH JUDICIAL CIRCUIT OF THE STATE OF MISSOURI and THE HONORABLE EDITH L. MESSINA, JUDGE OF THE 16TH JUDICIAL CIRCUIT OF THE STATE OF MISSOURI

Respondents.

REMEDIAL WRIT PROCEEDINGS UNDER THE ORIGINAL JURISDICTION OF THE SUPREME COURT OF MISSOURI

BRIEF OF AMICUS CURIAE OF J. LEE COVINGTON II, SUPERINTENDENT OF THE OHIO DEPARTMENT OF INSURANCE

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Superintendent Covington accepts the Jurisdictional Statement and Statement of Facts as set forth by Relator American Family Mutual Insurance Company.

I. INTRODUCTION

Amicus Curiae J. Lee Covington II, Superintendent of the Ohio Department of Insurance, ("Superintendent") submits this Brief in Support of Relator American Family Mutual Insurance Company's Petition for Writ of Prohibition.

Superintendent Covington's fundamental proposition is that each state should be left to decide its own course of action when dealing with issues of insurance law. What is appropriate for Missouri may not be appropriate for Ohio. Each state should be permitted to make its own decision based upon the law and public policy of the individual state. As a sister state regulator, Superintendent Covington is primarily concerned with the issue of sovereignty. If the trial court's decision is allowed to stand, Ohio consumers will be subjected to the jurisdiction of a Missouri court despite the unique nature of insurance law and Ohio precedent that directly contradicts the trial courts' conclusion. It is not the Superintendent's objective to suggest a course of action for Missouri when interpreting its insurance policies, but rather, to ask that Ohio be left to decide the law of insurance for Ohio.

Accordingly, Superintendent Covington submits this Brief to oppose class certification and to defend his statutory right and duty under Ohio law to regulate all matters pertaining to insurance law within the geographic confines of the State of Ohio. The Superintendent seeks uniformity of application and enforcement of insurance policies entered into by the citizens of the State of Ohio. If this matter is certified as a multi-state class action, the expectations of Ohio insurance consumers will be thwarted. Furthermore, the Superintendent's authority as a regulator will be undermined and a

degree of uncertainty will be imposed upon the marketplace that is impermissible under current insurance law doctrine. At a minimum the Superintendent would ask that all policies of insurance entered into in Ohio be excluded from any class certification if one is entered.

II. LAW AND ARGUMENTERROR! BOOKMARK NOT DEFINED.

A. Multi-State Class Certification In This Case Would Offend The Principles Of State Sovereignty

The Ohio Department of Insurance ("Department"), through its Superintendent, is the regulator of the insurance industry in the state of Ohio, and as such is in a unique position to aid the court in understanding the broad implications of the issues presented in this matter. Insurance regulation is unique in that it is a matter left solely to the individual states. There is no national uniform body of insurance regulatory law. Congress specifically recognized the province of the states over insurance law when it enacted the McCarran-Ferguson Act, 15 USC Sec. 1011, *et seq*. in 1945. The Act provides in part:

> that the continued regulation and taxation by the several States of the business of insurance is in the public interest…The business of insurance…shall be subject to the laws of the several States which relate to the regulation or taxation of such business…No act of Congress shall be construed to invalidate, impair, or supercede the law enacted by any State for the purpose of regulating the business of insurance…

While McCarran-Ferguson addresses the role of the federal government in the regulation of insurance, it has also been interpreted to mean that a state may only regulate within its own borders. In *Federal Trade Commission v Travelers Health Association*, 362 U.S. 293, 300 (1960), the Supreme Court stated "…it 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." *Id.* at 300. Continuing, the *Travelers* Court reasoned 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." *Travelers Health Asso. v. Virginia*, 339 U.S. 643, 649.

Id. at 362 U.S. 302.

The U.S. Supreme Court has also recognized the importance of sovereignty in other state-based regulation systems in other areas. *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996). The BMW case involved a punitive damages suit and the disclosure of certain pre-sale repairs to new vehicles under an Alabama consumer protection statute. In rejecting the Alabama trial court's award of punitive damages for conduct occurring outside Alabama, the Court opined "a State may not impose economic sanctions on violators of its laws with the intent of changing the tortfeasor's lawful conduct in other States." *Id*. at 572. It is clear then that the U.S. Supreme Court strongly supports the principles of sovereignty to allow states to regulate only within their respective borders.

State courts have reached a similar conclusion concerning the extraterritorial effect of a state's insurance laws. Probably the best example comes from holdings addressed to the liquidation of an insolvent insurance company. Arkansas in *National Liberty Ins. Co. v. Trattner*, 173 Ark 480; 292 S.W. 677 (1927); Michigan in *Commissioner of Ins. v. National Life Ins. Co*., 280 Mich. 344; 273 N.W. 592 (1937); and, most importantly Ohio

in *Hogan v. Empire State Surety Co*., 26 Ohio Dec. 424 (1915), have all held that a state's liquidation laws cannot be given extraterritorial effect. This is precisely why Ohio, in Ohio Rev. Code §§ 3903.50 - 3903.59, like most other states, provides for ancillary receiverships to protect property of a foreign insurance company maintained in Ohio. In contrast, many states have specific statutes addressed to the extraterritorial reach of the state's workers compensation laws. See *Pendergast v. Industrial Comm. of Ohio*, 136 Ohio St. 535, 27 N.E. 235 (1940). Interestingly, each of the cases cited above predate Congress's enactment of McCarran-Ferguson. As such, McCarran-Ferguson in some measure merely codified existing common law addressed to each state's ability to regulate insurance within its own borders.

In the present action, Plaintiffs in the underlying case seek to do what Congress, Federal and State courts have expressly prohibited. The Plaintiffs, by certifying a multi-state class action, seek to impose Missouri law on citizens and regulators of the several other states that have no connection to Missouri.

The Superintendent of the Ohio Department of Insurance is responsible for regulating the activities of some 1500 companies licensed to do business in Ohio. Many, if not all, of the property and casualty companies use non-OEM parts. There is no law prohibiting their use in Ohio. No policy of insurance may be issued in Ohio before its terms are reviewed and approved by the Superintendent. Ohio Rev. Code § 3915.03. If this court finds, through judgment or settlement, that American Family's use of non-OEM parts is per se unlawful as suggested by the plaintiffs, then the Superintendent will be denied the ability to regulate in a manner consistent with what is best for Ohio. This

not only usurps his authority to formulate Ohio policy and control the fairness and competitiveness of the Ohio market place, but also places the Superintendent in the potentially untenable position of having to choose between the judgment of this court and Ohio law. This cannot be the law of Missouri or Ohio.

Because Ohio may choose to treat policies of insurance differently than Missouri does, the trial court incorrectly determined that Respondent met the predominance test of Rule 52.08, Mo.R.Civ.P. Certifying a multi-state class where there is no predominant question of law has the practical affect of doing what Congress, Federal and State courts have expressly prohibited. It would give extraterritorial effect to Missouri law and improperly overlay the court's judgment on other states' insurance laws, regulations and judicial decisions.

The National Association of Insurance Commissioners ("NAIC") recognized this problem in *Avery v. State Farm Mut. Auto. Ins. Co*., 746 N.E.2d 1242 (Ill. App. 2001). The NAIC filed an amicus curiae brief in the Illinois Supreme Court urging the Court to consider the real world effects of affirming certification of a non-OEM parts class where the Illinois state court judge's decision improperly "reached far beyond the borders of Illinois in contravention of established principles of constitutional and regulatory law." *Brief of the National Association of Insurance Commissioners as Amicus Curiae in Support of Defendant-Petitioners,* In the Supreme Court of Illinois, No. 91494. While courts must always deal with choice of law questions in the context of multi-state class certification, the Superintendent urges the court to exercise caution in insurance cases, like this case, due to the unique nature of our state-based regulatory system.

The issue before this Court is whether the claims of the plaintiffs below are properly resolved through the class action mechanism. Amicus Covington suggests that to certify the present class would be to misapply class action law. Such a decision could impede sister states' ability to enforce their own laws and regulations concerning the use of non-OEM parts. For these reasons alone, the Superintendent urges this court to grant Relator's Petition.

B. Common Questions of Law and Fact do not Predominate to the Extent Necessary to Justify a Multi-State Class Certification.

The potential usurpation of Ohio's sovereignty is even more apparent in light of Ohio case law that directly contradicts the holding of the Missouri trial court, and establishes a conflict between Ohio law and Missouri law.

An Ohio trial court faced with the same question refused to certify a class and the Ohio Superintendent supports that decision. On April 17, 2002, in the matter of *Augustus v. Progressive Insurance et al*., the Court of Common Pleas of Cuyahoga County, Ohio announced its decision refusing to certify a national class action addressed to the use of non-OEM parts.[1] In so doing, the Ohio Court held:

* * *

> [t]he action is nonetheless not maintainable by a class action because this Court cannot find under the circumstances of this litigation that the

[1] A copy of the Court's decision is included in the Appendix hereto. Cuyahoga County is one of Ohio's most populous counties with Cleveland as its seat.

> questions of law and fact common to the putative class members predominate over any questions affecting only the individual members;
>
> * * *
>
> this litigation contains many factual variables to determine a potential class member's proper inclusion in the class and the member's right to relief once found to be a member of the class;
>
> * * *
>
> as a result, proceedings as a class action is not a superior method of adjudication.

The *Augustus* court rejected arguments essentially identical to those advanced by the Plaintiffs herein. Augustus argued that non-OEM parts were inherently defective, that the common law of contract was uniform throughout the country and that an individual assessment of the vehicle would not be necessary to determine if it had been restored to its pre-loss condition. The Cuyahoga County Court concluded that common questions of fact did not predominate and hence class certification was not appropriate. The court also rejected the argument that because the common law of contracts was uniform, common questions of law predominated. The court instead applied fundamental notions of due process inherent in the class certification process and held that common questions of law did not predominate. That opinion is currently on appeal and Superintendent Covington has filed an Amicus brief in support of affirmance evidencing the department's consistence in approach.

The *Augustus* decision rejecting class certification is directly on point with the case before this court and represents the law of Ohio on this issue. Moreover, the *Augustus* decision is in line with other Ohio decisions as well as decisions in Alabama,

California, Florida, Illinois, Maryland, Tennessee, and Washington that have also denied national certification in virtually identical non-OEM parts cases. See *Breissinger v. State Farm Mut. Auto. Ins. Co.*, Ohio C.P. No. A9797974 (Mar. 16, 1999), unreported; *Collins v. Nationwide Mut. Ins. Co.*, Ohio C.P. No. 99 CVH-06-4714 (May 17, 2001), unreported; *Moorehead v. State Farm Mut. Auto. Ins. Co.*, N.D. Ala. No. 95-AR-0668-S (Sept. 12, 1996), unreported; *Murphy v. Government Employees Ins. Co.*, Fla. Cir. Ct. No. 00-1043 CA-30 (May 25, 2001), unreported; *Rios v. Allstate Ins. Co.*, Ill. Cir. Ct. No. 94 CH 11396, Tr. at 9-15 (Jan. 27, 1998), unreported; *Snell v. The Geico Corp*. (Md. Cir. Ct.), 2001 WL 1085237, *6-*7 unreported; *Murray v. State Farm Mut. Auto. Ins. Co*. (W.D. Tenn.), 1997 U.S. Dist. LEXIS 24008, *20-*21, *31-*32 unreported; *Schwendeman v. USAA Cas. Ins. Co.*, Wash. Super. Ct. No. 99-2-06505-1SEA (Oct. 20, 2000), unreported. (All unreported cases are included in the Appendix of Amicus Covington filed contemporaneously with this brief and incorporated herein by reference.)

Rule 52.08 of the Missouri Rules of Civil Procedure is identical in all material respects to Rule 23 of the Ohio Rules of Civil Procedure. Both require that plaintiff carry the burden of establishing that common questions of law and fact predominate.

By failing to acknowledge Ohio case law directly on point, the Plaintiffs in the underlying case failed to meet their burden under Mo.R.Civ.P. 52.08 to show, through an extensive analysis of state law variances, that common questions of law predominate over the putative class members' claims. Plaintiff's analysis consisted of evidence tending to show that the common law of contract is consistent throughout the country. This analysis ignores the *Augustus* decision and the analysis that the Ohio Court employed. While the

law of contract may be the same in Ohio and Missouri, the application of that law to the facts presented in the context of a class certification request lead to diametrically opposite results. The inquiry in this matter is one of class certification not merely of contract law. Without such analysis, the court cannot blindly impose Missouri law on the vast number of putative class members residing in the 13 sovereign sister states where Plaintiffs below claim causes of action exist.

Furthermore, an analysis of Ohio's common law cannot be conducted in a vacuum. Common law coexists with statutory law. A given state's codification of the law may extend, ratify or abrogate the common law. Ohio statutory law requires insurers and repair facilities or installers to notify a consumer when an estimate for repairs of that consumer's motor vehicle is based in whole or in part upon the use of any non-OEM parts. Ohio Rev. Code § 1345.81. Rule 3901-1-54(H)(4) of the Ohio Administrative Code specifically requires all written estimates prepared for or by an insurer that are based upon the use of non-OEM parts to clearly notify the consumer that non-OEM parts were used to calculate the estimate. Ohio Adm. Code 3901-1-54(H)(4).[2] The Superintendent routinely tests for compliance with these notification requirements on periodic market conduct examinations of licensed automobile insurers.

Ohio law currently permits the use of non-OEM parts. However, the Superintendent's position should not be misconstrued to mean that Relator's duty to

[2] Ohio Adm.Code 3901-1-54 is specific to Ohio's insurance code and was promulgated under the Unfair and Deceptive Practices Act found in Ohio Rev. Code 3901.19-3901.26. These provisions give the Superintendent authority to regulate the

restore an insured's car to its "pre-loss condition" is satisfied simply because these parts are legal to use. Such a position would be the logical equivalent of Plaintiff's argument that every category of non-OEM parts Relator used was inherently inferior, thereby eliminating his burden to demonstrate that common issues of law or fact actually predominate. Both positions ignore the issue as to whether Relator has met its contractual duty. This can only be determined on a case-by-case analysis of each repair while taking into account the applicable state's law. Plaintiff's overly simplistic approach to this case as one of common law contract ignores both statutory law and judicial interpretations of Ohio contract law. When these legal authorities are considered it is apparent that Ohio law is significantly different from the interpretation of Missouri law by the Respondents on the question of use of non-OEM parts and class certification of non-OEM lawsuits. As such, the predominance requirements of Mo.R.Civ.P. 52.08 have not been met, at least as to Ohio.

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claims settlement practices of insurers writing automobile insurance in Ohio, including the use of non-OEM parts.

C. A multi-state class action is not the superior method for the fair and efficient adjudication of Plaintiffs' claims, as consumers may still seek statewide relief through administrative or judicial action in other states.

In many class actions, a court faces only two alternatives: either certify a class, or leave plaintiffs to pursue hundreds or thousands of cases individually. In such cases, when considering whether a class action is a superior method of adjudication, courts properly compare the class method to the other extreme: a possible flood of individual court cases. Courts must then consider not only whether judicial economy will be harmed by a slew of separate suits, but courts must also consider whether individual claims, such as consumer claims, will be financially small enough that most consumers will not find it worth it to sue, leaving legitimate claims completely unremedied.

But in this case, the statewide nature of insurance regulation means that the Court need not compare a multi-state class action to the other extreme of individual cases, as the Court can, and should, reject the full-fledged multi-state class action that Plaintiffs in the case below seek, while still allowing for whatever statewide mechanisms that each State establishes. Thus, if the Court finds that some type of class action is superior to individual claims concerning Missouri policies, then it may do so without treading on Ohio's regulatory scheme, as long as the class does not purport to stretch to Ohio policies that fall under Ohio's jurisdiction. But in considering whether to allow a full-fledged multi-state class action to go forward over Ohio's objections, this Court should weigh whether that multi-state method is the best method of resolution for Ohioans.

Ohio policies should not be governed by a multi-state class action in Missouri, because this Missouri class action is not superior to the regulatory remedy already available in Ohio. In Ohio, consumers may complain to the Superintendent, who may then address the issue narrowly or broadly, as Ohio law provides. The Superintendent may hold an administrative proceeding under Ohio's Unfair and Deceptive Practices Act, Ohio Rev. Code § 3901.20 *et seq*., upon the complaint of one or more consumers. See also Ohio Adm. Code 3901-1-54. Plaintiffs here did not attempt to avail themselves of this option in Ohio before suing in Missouri, seeking to represent millions of people; including Ohioans. In pertinent part, Ohio Rev. Code § 3901.22(A) states:

> (A) The Superintendent of insurance may conduct hearings to determine whether violations of section 3901.20 of the Revised Code have occurred. Any person aggrieved with respect to any act that the person believes to be an unfair or deceptive act or practice in the business of insurance, as defined in section 3901.21 of the Revised Code or in any rule of the superintendent of insurance, may make written application to the superintendent for a hearing to determine if there has been a violation of section 3901.20 of the Revised Code.

The Superintendent has a menu of remedial options available under Ohio Rev. Code § 3901.22 to redress a violation of § 3901.20. The Superintendent may issue orders to cease and desist from engaging in unfair practices. The Superintendent may also impose fines, charge costs, order restitution and seek injunctive relief to ensure an immediate cessation of unlawful conduct. The Act also authorizes the Superintendent to revoke the license of an entity found to have engaged in a prohibited practice. Most importantly, the Superintendent has the authority to institute a class action to enforce his orders. That power, codified in Ohio Rev. Code § 3901.22(E), provides:

> (E) If the superintendent has reasonable cause to believe that an order issued pursuant to division (D) of this section has been violated in whole or in part, he may, unless such order is stayed by a court of competent jurisdiction, request the attorney general to commence and prosecute any appropriate action or proceeding in the name of the state against such person.
>
> Such action may include, but need not be limited to, the commencement of a class action under Civil Rule 23 on behalf of policyholders, subscribers, applicants for policies or contracts, or other insurance consumers for damages caused by or unjust enrichment received as a result of the violation.

Thus, Ohio's Unfair and Deceptive Practices Act offers many advantages to Ohioans, compared to the prospect of being bound by a complex multi-state class action in Kansas City, Missouri, that may take years to resolve.

Other States may also allow class wide administrative remedies, or perhaps other States may allow statewide class actions in the courts, depending on the specifics of each State's insurance law and class action law. Typically, an insurance company issues enough policies that the consumers in one state are numerous enough to form their own class action, if a state allows that for insurance issues. Or administrative relief may cover large classes, as in Ohio. Either way, the Court here does not face the usual concern in class actions—that rejecting a class will leave thousands of consumers with small-dollar claims that they are unlikely to pursue individually. If the Court is concerned about whether alternate methods of relief are enough under Missouri law, then the Court may allow a Missouri class action. But the Court should not find that a multi-state action in Kansas City, Missouri, is a superior method of resolution for the rest of the country.

III. CONCLUSION

In summary, in the field of insurance regulation, each state should be free to adopt its own regulatory or administrative remedies, and the availability of statewide relief is directly related to the question of the "superior method" of resolving an issue. The question is not whether some class is superior to fully individualized cases, but whether a multi-state class is superior to allowing each State to regulate insurance within its borders—and the answer to that question is no. Ohio does not seek to tell Missouri what to do under Missouri law, and we ask only that Ohio's regulators be trusted to regulate insurance in Ohio.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing Brief of Amicus Curiae of J. Lee Covington II and the Ohio Department of Insurance, has been hand delivered, this 28th day of October, 2002, to:

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Brief of *Amicus Curiae* of J. Lee Covington II, Superintendent of the Ohio Department of Insurance, complies with the limitations contained in Rule 84.06(b) and that there are 585 lines of type and 4,638 words in the Brief, including all parts thereof.

I further certify that a floppy disk containing the Brief was filed with the Clerk of the Court, and further certify pursuant to Rule 84.06(g) that the disk has been scanned for viruses and that it is virus free.

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