IN THE SUPREME COURT OF MISSOURI

No. SC 84610

STATE OF MISSOURI, ex rel.
AMERICAN FAMILY MUTUAL INSURANCE COMPANY

Relator,

v.

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

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BRIEF OF THE NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS AS *AMICUS CURIAE* IN SUPPORT OF RELATOR

Pursuant to Missouri Rule of Civil Procedure 84.05, the National Association of Insurance Commissioners (NAIC) respectfully submits this Brief as *amicus curiae* in support of the position of Relator, American Family Mutual Insurance Company (American Family), seeking a writ of prohibition and, in the alternative, a writ of mandamus to undo the class certification in the present case before the Sixteenth Judicial Circuit Court of the State of Missouri.

INTRODUCTION

This matter involves a nationwide class action alleging breach of contract and bad faith under Missouri law. The case principally concerns American Family's involvement in the use of non-original equipment manufacturer (non-OEM) crash parts in the repair of vehicles pursuant to insurance policies between American Family and its policyholders. Non-OEM parts are those vehicle parts made by someone other than the original manufacturer. On December 14, 2001, the Sixteenth Judicial Circuit Court certified a nationwide class comprised of virtually all American Family policyholders who made claims and had repairs made pursuant to American Family automobile insurance policies where non-OEM parts were used and certain repairs were allegedly omitted.

The practical effect of this class certification reaches far beyond the borders of Missouri in contravention of established principles of constitutional and regulatory law.

Since the Circuit Court certified a nationwide class of plaintiffs, this ruling affects policyholders in 13 other states. More importantly, it also conflicts with decisions previously made in other jurisdictions concerning regulation of non-OEM parts. This conflict is significant. By applying Missouri law to purported non-OEM parts-related claims in other states, the certification potentially replaces the policy judgments of other states with that of the Jackson County Circuit Court. Due to this judgment's nationwide reach, this conflict casts doubt upon 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 issue the writ sought by American Family to undo the Circuit Court's class certification.

INTEREST OF THE *AMICUS CURIAE*

The NAIC is comprised 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 American Family, 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 Circuit Court's class certification, however, possesses negative implications for consumers that go far 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.

In this case, the class certification will result in a Missouri trial court extraterritorially applying Missouri law and public policy decisions regarding non-OEM crash parts, infringing upon the well-considered judgments of the regulators and legislators of other states. The Circuit Court's Order demonstrates a failure to consider the differences among the insurance laws of other states, and will lead to the application of Missouri law to insurance transactions that occurred outside of Missouri with no connection to Missouri. In certifying a nationwide class, the Circuit Court ignored 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 Circuit Court effectively takes for itself, and from state regulators and legislators, the responsibility for making policy judgments concerning non-OEM parts. State insurance policymakers face the previously inconceivable situation of having their judgments overruled by one Missouri trial court. This stands our national state-based system of insurance regulation on its head.

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. For example, the application of one state's substantive law regarding breach of contract and bad faith by that state's court to a dispute concerning a policy issued in, and risk located in, another state threatens the other state's ability to regulate effectively by overriding the considered judgments reached by regulators and legislators in that state.

Concerning non-OEM parts, states have differed in their regulatory approaches. These differences reflect the varying considerations used by regulators and legislators in determining the best regulatory approach for their state's residents. Among the factors examined by regulators and legislators are repair costs, the impact of repair costs upon insurance premiums, and judgments about the quality of the repair and the parts themselves. The NAIC takes no position with respect to these careful and considered judgments. The NAIC wishes only to emphasize that the law gives the states the power

to make these judgments free from interference by sister states. Upholding the Circuit Court's class certification would serve to erode that power and would be in direct contravention to statutory law and judicial precedent. To avoid this outcome, the NAIC supports American Family's petition for a writ of prohibition and, in the alternative, a writ of mandamus.

ARGUMENT

The Circuit Court's certification of a nationwide class will have the effect the applying Missouri law extraterritorially. Such a 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 HAVE TAKEN VARIED APPROACHES TO THE USE OF NON-OEM PARTS

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.

With respect to the use of non-OEM parts in vehicle repairs, states have exercised their regulatory authority in a variety of ways. This is evident from considering the approaches of a handful of states. Massachusetts mandates that damage appraisals generally incorporate non-OEM part prices in assessing vehicle repairs. Mass. Regs. Code tit. 211, § 133.04 (2001). Hawaii states that repair estimates shall identify each non-OEM part to be used, and the vehicle owner must accept their use and sign the estimate as an acknowledgment. Haw. Rev. Stat. Ann. § 437B-15 (Michie 2000).

Among states over whose policyholders the Circuit Court would exercise jurisdiction, there exists continued variation among approaches to regulating the use of non-OEM parts. Arizona mandates that the repair facility or parts installer shall not use non-OEM parts unless the consumer is advised through a notice attached to the repair estimate identifying each non-OEM part to be used and containing a disclosure statement. Ariz. Rev. Stat. Ann. § 44-1293 (West 1994). Colorado law states that no insurer shall specify the use of a non-OEM part without disclosure to the insured, and the repair facility shall obtain customer consent before any OEM, non-OEM, used, reconditioned, or rebuilt parts are installed. Colo. Rev. Stat. Ann. § 10-3-1305 (West 1999); Colo. Rev. Stat. Ann § 42-9-107 (West 1997). Under Indiana law, an insurer required to provide notice that fails to provide notice or opportunity to the insured of the insured's right to approve parts to be used in a repair and directs a body shop to make repairs commits an unfair claims settlement practice. Ind. Code Ann. § 27-4-1.5-8 (West 1993). Kansas

makes the installer of non-OEM parts responsible for negligent installation. Kan. Stat. Ann. § 50-662 (2001). In Missouri and Illinois, insurers may not specify that non-OEM parts are to be used without providing policyholders with a written estimate clearly identifying non-OEM parts to be used and a disclosure statement. Mo. Ann. Stat. § 407.295 (West 2001); 215 Ill. Comp. Stat. Ann. 5/155.29 (West 2000). Clearly, these examples are not exhaustive of the various ways in which individual states regulate the use of non-OEM parts within their borders; however, these examples demonstrate that states, in fact, take sometimes significant, and other times subtly, differing approaches to the question of regulating non-OEM parts.

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 (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." *Id.* 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 (1989) ("Commerce Clause protects against inconsistent legislation arising from the projection of one state regulatory regime into the jurisdiction of another State.").

Therefore, the McCarran-Ferguson Act and the U.S. Supreme Court support and endorse the ability of states to take differing approaches in regulating activities within their borders. It would be an anomalous result for the Circuit Court to undo through a nationwide class certification the state-by-state system of insurance regulation affirmed by Congress and the U.S. Supreme Court.

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 Circuit Court's class certification affects the relationship between insurers and policyholders in almost all other states. The U.S. Supreme Court addressed the question of extraterritorial application of state law 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 (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." *Id.* at 302. Thus, the very situation that is occurring here—where one state's trial court is effectively usurping the power of other states 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 . . . .'

Id. at 302 (quoting *Travelers Health Ass'n v. Virginia ex rel. State Corp. Comm'n*, 339 U.S. 643, 649 (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 (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 (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).

Judicial precedent in Missouri also accords with principle that states may not regulate or legislate extraterritorially. "[I]t is the settled law and almost axiomatic that the statutes of a state or country prescribe the law within its boundaries only, and have no extraterritorial force or effect." *Rositzky v. Rositzky*, 46 S.W.2d 591, 594 (Mo. 1931) (citation omitted). Another decision stated that "[t]he rule that a statute enjoys no extraterritorial effect beyond the state of enactment remains the principle of our adjudicated decisions." *Nelson v. Hall*, 684 S.W.2d 350, 354 (Mo. Ct. App. 1984) (citing *Rositzky*).

Furthermore, in order to apply Missouri law validly to the claims of a nationwide class, there must be some reasonable relationship between the two. In *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (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." *Id.* at 821-822 (quoting *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 312-313 (1981)).

Thus, Missouri 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 is happening in this case. Missouri, however, previously recognized that the dominant interests of other states' application of their law requires Missouri to decline application of its law where, as here, doing so is inappropriate. *State ex rel. Broglin v. Nangle*, 510 S.W.2d 699 (Mo. banc 1974), a wrongful death action arising from conduct in Texas, involved greater "contact" with Missouri than the non-resident policyholders swept into the class in this case. Yet, this Court found that "Texas has a substantial interest . . . in exercising control over the in-state activities of corporations which locate in that state. Since this interest is not in actual conflict with any significant Missouri interest, the Texas law must be applied." *Id.* at 703-704. In this case, Missouri has no significant interest whatsoever in the application of its law to insurance contracts regulated and

governed by the laws of other states. The other states affected by the class certification *do*. Clearly, the other 13 affected states have a substantial interest in seeing that its laws are applied to insurance transactions (and potential claims under those contracts) with a direct relation to those states. The class certification gives no credence to the laws of the other 13 states; rather, the Circuit Court sweeps aside the laws of those states in deference to the eventual application of Missouri law to insurance contracts with no relation at all to Missouri.

Therefore, 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 that of a Missouri trial court. The Circuit Court effectively declared that Missouri law will be paramount in evaluating claims concerning non-OEM parts, even those claims with a locus in another state. As illustrated above, *supra* pp. 9-11, states have addressed the non-OEM parts issue with the protection of consumers in mind. A Missouri court may conclude that American Family breached contracts and committed bad faith under Missouri law concerning contracts regulated by Missouri law. However, application of Missouri substantive law to purported claims wholly outside of Missouri ignores other states' policy judgments and offends established principle.

If the Circuit Court's class certification is allowed to stand, insurance contracts between insurers and policyholders, formed and to be performed under the laws of other states, potentially will be subject to Missouri law no matter what regulators and legislators in those states may have decided about the issue of non-OEM parts. For

example, American Family's use of non-OEM parts in Colorado in preparing repair estimates for Colorado policyholders, subject to the disclosure requirements of Colorado law, may be found to constitute breach of contract and bad faith under Missouri law—apparently regardless of whether Colorado policyholders establish any contacts whatsoever with Missouri. This chain of reasoning defies logic, in addition to the established state-by-state regulatory scheme enshrined in the McCarran-Ferguson Act.

States have made considered and differing judgments with respect to the use of non-OEM crash parts in vehicle repairs. Some have judged that non-OEM parts restore vehicles to pre-loss conditions and meet the "like kind and quality" standard typically required of those parts. Others may have reached different conclusions. Additionally, there are numerous procedures covering different facets of non-OEM parts use, such as disclosure statements and source identification. These judgments should be respected. The Circuit Court's class certification, however, threatens to discard the right of states to make these policy decisions. Effectively, state legislators and insurance regulators have been held hostage to one trial court in one state, uncertain of the effect of *their* judgments.

Finally, the NAIC asks the Court to consider a few of the numerous questions raised by 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 Missouri for Missouri 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 Missouri 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 Circuit Court's class certification, this Court should grant American Family's petition for a writ of prohibition and, in the alternative, a writ of mandamus.

CONCLUSION

For the foregoing reasons, the court should grant American Family's petition for a writ of prohibition and, in the alternative, a writ of mandamus.

Respectfully submitted this 25th day of October 2002.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served upon the following person(s) in paper copy and on a computer diskette scanned and found to be free of viruses via U.S. Mail, with first class postage prepaid, on this 25th day of October, 2002:

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CERTIFICATE OF COMPLIANCE

I certify that this Brief is double-spaced, including footnotes, and the font used is Times New Roman, 13-point size. Based on a word count using Microsoft Word, the Brief contains 3,975 words, excluding the cover page, certificate of service, certificate of compliance, and signature block.

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