

Nevada's Statute Requiring Non-resident, but Nevada-licensed, Insurance Intermediaries to Use and Pay Resident Nevada-licensed Brokers in Issuing Policies Covering Persons, Entities, Events, or Risks Located in Nevada Violates the "Privileges and Immunities" Clause of the United States Constitution and So Is Void

This Attack on State "Countersignature" Statutes Is Part of a National Trend Conducted by the Council of Insurance Agents & Brokers. Significant Procedural Issues Are Also Discussed

Council of Insurance Agents & Brokers and Rebecca Restrepo v. Molasky-Arman, 522 F.3d 925 (9th Cir. 2007).

Case at a Glance

Section 680A.300 of the Revised Nevada Statutes provides that no authorized insurer may make, write, place, or renew any insurance policy on persons, property, or risks in Nevada, except through its duly appointed and licensed insurance agent who resides in Nevada who must countersign the policy and who will be paid a commission. The same statute provides that insurers and free and have the unlimited right to negotiate Nevada-related policies by using agents or brokers outside the state, so long as resident licensed resident and paid agents are used to countersign the policy. The lower court and the Ninth Circuit panel considered only the rights of Rebecca Restrepo but both declared the statute inconsistent with the "Privilege and Immunities Clause" of the U.S. Constitution. The Ninth Circuit remanded the case so that the district court could activate an injunction which it had already issued but stayed pending appellate decision.

Summary of Decision

The Ninth Circuit panel cites many Supreme Court cases. Only a few will be cited here. Most of them are not insurance cases, and this decision is easily locatable. Significantly, Nevada is not the only state that has a "countersign" statute. Hence, this decision explores a significant public policy, and—of course—it may be again appealed. If there is an appeal, it would be surprising if the United States

Supreme Court declined to take the case. It will probably have to take a case like this eventually.

Statute. The relevant statute is unequivocal, and the key section provided: "no authorized insurer may make, write, place, renew or cause to be made, placed or renewed, any policy or duplicate policy of insurance of any kind upon persons, property or risks resident, located or to be performed in this state, except through its duly appointed and licensed agents resident in this state, any one of whom shall countersign the policy." Under § 680A.300.5, countersigning Nevada resident agents are to be paid commissions by the insurer, and the commission is not be no less that 5% of the premium the insurer receives, except for very, very small policies. The statute provides that insurers may use out-of-state agents as long they comply with the countersigning requirement. Of course, if the total commission is 10%, then the countersigning Nevada agent gets half.

Facts. The Council of Insurance Agents & Brokers (the Council) is a national trade association representing more than 250 of the largest commercial property and casualty insurance agencies and brokerage firms. These firms are mostly corporations and partnerships, and they are not solo individuals. Members of the Council recently sold over \$80 billion in premiums and they constitute 75% of the commercial marketplace. All of the members of the Council sell in more than one state, and many of them sell in all 50 states. Most of their sales are to large, sophisticated, commercial end-users that typically have multi-state exposures. The Council includes firms of insurance intermediaries located outside Nevada that sell insurance in Nevada.

Rebecca Restrepo (Restrepo) resides in California, where she is licensed to sell insurance. She is the Managing Director of the Sacramento office of the ABD Insurance and Financial Services Company, which is a member of the Council. Restrepo is also licensed to sell insurance in Nevada, though as a non-resident agent.

Procedure. The Council originally brought this suit as the only plaintiff. The Commissioner promptly moved for summary judgment, in part on the grounds that the Council lacked standing. The Council also moved for summary judgment. The district court denied both motions, perhaps to permit discovery, but expressed concern about the standing issue raised against the plaintiff. The Council asked to

amend its Complaint; the court granted it motion; and Restrepo was added as a plaintiff in the First Amended Complaint. That complaint sought to invalidate the statute on two constitutional grounds: the Privileges and Immunities Clause and the Equal Protection Clause. (It dropped the Commerce Clause allegation present in the original Complaint.)

Summary judgments were again sought, and this time Restrepo was added to the Council's motion. The district court ruled that § 680A.300 violated both the Privileges and Immunities Clause and the Equal Protection Clause of the United States Constitution "because it denied to Nevada-licensed nonresident insurance agents the same rights that are afforded to Nevada-licensed resident agents." The district court enjoined the Commissioner from enforcing the statute, but subsequently stayed the injunction pending appeal.

Appeal. The Commissioner appealed. Besides the applicable standards for reviewing summary judgments, the panel of the court discussed standing, mootness, the Privilege and Immunities Clause of Article IV of the Constitution.

Standing. In constitutional challenges, standing results from two factors: "prudential concerns" and "constitutional limitations on the jurisdiction of the federal courts." To deal with these considerations, the plaintiff bears the burden of proving standing, and there are three constitutional requirements. First, there is "an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." Second, the challenged law (or whatever) is causally related to the injury. Third, the injury will likely be redressed by a favorable decision.

Restrepo sustained at least economic loss. Although she is a salaried employee, her employer had to pay countersignature commissions; that affected its earnings; and therefore hers, if for no other reason than that her year-end bonus would be affected. In addition, abrogation of constitutional rights are in-and-of themselves an injury for the purposes of standing. In this context, that rule results almost directly from the Privileges and Immunities Clause: Article IV, §2 states that the "Citizens of each State shall be entitled to all Privileges and Immunities of Citizens of the several States." Accordingly, "the ability of a citizen in one state to act as an insurance [agent or broker] in another state must be considered

a fundamental right or privilege protected by the privileges and immunities clause." *Silver v. Garcia*, 760 F.2d 33, 36 (1st Cir. 1985.) Unquestionably, the statute treats Restrepo differently because she is a non-resident. Even if she did not lose a lot of money, "identifiable trifles" can be sufficient for standing, as been proved in poll tax and similar cases.

Mootness. The Commissioner argued for the first time on appeal that Restrepo's employer had acquired a Nevada agency, and so she no longer had her economic injuries. The panel rejected this argument. Restrepo was still unable to finalize Nevada-related insurance policies. She is not a resident licensed agent. Hence her rights are still violated.

Privileges and Immunities Clause. This clause was designed to help fuse the several states into one nation. The clause was intended to create a national economic union. Citizens of each state were to be placed on the same footing as the citizens of other states. As has long been held, citizenship and residence are "essentially interchangeable." (The court's panel finds his clause so convincing that it does not so much as consider an Equal Protection Clause argument, although the district did just that.)

Of course the clause is not absolute. When a state has reasonable reasons independent of market economics to treat resident and nonresidents differently it may do so. Thus, reviewing residency requirements is a two step process. First, is the regulated activity "sufficiently basic to the livelihood of the nation. . . as to fall within the purview of the Privileges and Immunities Clause[?]" Second, is "the restriction. . . closely related to the advancement of a substantial state interest[?]"

The panel answers these questions easily. First, insurance and its occupations are important to the national economy, as other courts have already found. Second, there is no substantial interest at stake in the statute under review. Nothing in the record supported the Commissioner's claim that the state needed in-state records in order to collect premium taxes efficiently. In addition, even if this were true, there are probably less restrictive ways to achieve this goal than though § 860A.300.1. Furthermore, nothing supports the idea that non-resident agents are a source of any particular evil, e.g., untrustworthiness, which the state needed to avoid and could by means of enforcing § 860A.300. Moreover, residency does

not imply professional competence, and this is especially true since there are licenses for non-resident agents—Restrepo being one of them.

Comment

One wonders why the Commissioners did not put on more evidence. For example, one suspects that having the premium records within the states makes it cheaper and faster for the Insurance Department to audit them. At least that might have created a fact issue. Or consider this: if Nevada requires continuing education of its resident agents but not of its non-resident agents, it could be that the statute promotes state interests, or something like it. Moreover, it could probably be proved through the right expert witness that regulating the insurance industry is easier when there are components of it subject to immediate state governmental supervision. Would not this fact if proved tend to support something like the statute being reviewed? // Quinn

Cancellation & Reinstatement

Conditional Reinstatement with Stated Gap in Coverage Was Enforceable

Coverage Was Properly Denied for Accident that Occurred During Coverage Gap

Amos v. Allstate Insurance Co., 184 P.3d 28 (Alaska May 23, 2008)

Case at a Glance

Boat insurance was not in effect at the time of an accident when the policy was cancelled for nonpayment and reinstated pursuant to a conditional receipt stating that coverage was not afforded for any accident that took place before the receipt was issued, and a reinstatement notice that defined a gap in coverage for the period when the accident occurred. There was no reason why the conditional receipt and reinstatement notice should not be enforced.

A trial court did not err in dismissing an insured's claims for abuse of process against an insurer that

asserted the insured engaged in fraud and misrepresentation. For an insurer to ask its insured questions about an application for insurance after it had denied coverage on other grounds was not a sufficient deviation from acceptable litigation objectives to amount to an abuse of process.

Summary of Decision

Jack Tatum co-owned a boat that had been insured under a boat owner's policy issued by Allstate Insurance to Tatum and his wife. The policy was subject to a "short rate" table under which the entire premium for the annual premium period was earned if the policy was in effect for a minimum of five months during the annual period. In 2000 the Tatums were to pay the annual premium in six installments, beginning April 6. When Allstate did not receive the June payment the insurer gave notice that the policy would be cancelled for nonpayment on July 15 unless Allstate received a minimum payment of \$99.84. Allstate received a payment of \$51.67 by the deadline, but received no additional payments until August 14, when Tatum's wife visited her insurance agent in order to make payment for reinstatement of the policy. She wrote a check for the reinstatement payment and received a "conditional receipt" that stated that the payment did not reinstate the policy or afford coverage for any accident that took place before the receipt was issued.

Allstate issued a reinstatement notice stating that the Tatums' policy was cancelled July 15 and reinstated August 15. On August 26, 2000, Allstate received a check numbered "722" from the Tatums dated July 10. A jury later found the check was mailed after August 9. On September 6, Tatum's wife personally delivered a check for the balance of the annual premium. On the same day, Allstate received its first notice that the boat was in an August 9 collision with another boat that injured Tatum and the two occupants of the other boat. An Allstate employee notified the Tatums that their policy was in cancellation status on the date of the accident and that Allstate would not pay claims arising out of the accident. The injured parties in the other boat filed a personal injury suit against Tatum. Tatum agreed to allow two default judgments to be entered against in the suit, one for \$100,000 and the other for more than \$1 million. He did not notify Allstate of the suit.