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Opinion No. 13-33

Unfair Trade Practices in the Insurance Business

QUESTION

Is Tenn. Code Ann. § 56-8-104(18) unconstitutional to the extent that it prohibits insurance companies from offering insurance discounts or other preferences to customers based on their affiliation with or employment by a particular group?

OPINION

The provisions of Tenn. Code Ann. § 56-8-104(18) are defensible from a facial constitutional challenge. The State's prohibiting insurance companies from granting reduced rates or other preferences based upon group affiliation does not implicate commercial speech protections under the United States or Tennessee Constitutions. Moreover, the statute's exception for domestic companies that provide insurance solely for the benefit of their own members or members of a parent or sponsoring organization does not raise equal protection concerns under the United States or Tennessee Constitutions, inasmuch as both foreign and domestic companies that operate under this business model are not in violation of Tenn. Code Ann. § 56-8-104(18).

ANALYSIS

The Tennessee Unfair Trade Practices and Unfair Claims Settlement Act, codified at Tenn. Code Ann. §§ 56-8-101 to -113 (hereinafter "the Act"), seeks to regulate insurance trade and claims settlement practices "by defining, or providing for the determination of, all such practices in this state that constitute unfair methods of competition or unfair or deceptive acts or practices and by prohibiting the trade practices and claim settlement practices so defined or determined." Tenn. Code Ann. § 56-8-101(b). One practice prohibited as an unfair trade practice is the

> [m]aking, offering to make, or permitting any preference or distinction in property, marine, casualty, or surety insurance as to form or policy, certificate, premium, rate, benefits, or conditions of insurance, based upon membership, nonmembership, or employment of any person or persons by or in any particular group, association, corporation, or organization, or making the

> preference or distinction available in any event based upon any fictitious grouping of persons.

Tenn. Code Ann. § 56-8-104(18)(A) (formerly Tenn. Code Ann. § 56-8-116(a) (2008)). Essentially, this statute prohibits insurance companies from offering discounts to certain groups of people based upon their membership in or employment by a particular organization or company. This type of anti-discrimination restriction[1] is designed to prevent insurance companies from offering discounts or other preferences "to persons, or groups of persons, based upon factors other than legitimate rate-making considerations." *Caldwell v. Standard Nat'l Ins. Co.*, 194 S.E.2d 456, 458 (Ga. 1972) (discussing virtually identical provision of Georgia insurance law). *See also* 5 Couch on Insurance § 69:34 (2012). These provisions prevent "unfair discrimination among similarly situated purchasers of insurance." Tenn. Att'y Gen. Op. 86-016 (Jan. 24, 1986) (addressing anti-discrimination features present in the prior version of the Act).

The anti-discrimination restriction in Tenn. Code Ann. § 56-8-104(18)(A) does not violate the commercial speech protections of either the First Amendment of the United States Constitution or Article I, Section 19, of the Tennessee Constitution. Both of these constitutional guarantees provide a qualified protection for commercial speech. *See Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2664-72 (2011); *Douglas v. State*, 921 S.W.2d 180, 183-88 (Tenn. 1996); *H & L Messengers, Inc. v. City of Brentwood*, 577 S.W.2d 444, 449-53 (Tenn. 1979). States are "allowed to regulate commercial speech to a significantly greater degree than other areas of expression." *Douglas v. State*, 921 S.W.2d at 183-84 (citing *Virginia Pharmacy Board v. Virginia Citizens Consumer Council*, 425 U.S. 748, 772 n.24 (1976)). Specifically, a state may "ban a particular type of commercial transaction within its borders," and when it does so, "speech proposing or facilitating the unlawful transaction may be banned without offending the First Amendment." *Katt v. Dykhouse*, 983 F.2d 690, 695 (6th Cir. 1992). "[T]he State does not lose its power to regulate commercial activity deemed harmful to the public whenever speech is a component of that activity." *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978). As the United States Supreme Court has observed, "it has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed." *Id.* (quoting *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949)).

By enacting Tenn. Code Ann. § 56-8-104(18), the General Assembly effectively has prohibited insurance companies from granting preferences in premiums, rates, benefits, or other conditions of insurance based upon group membership or employment. This provision is consistent with other provisions of the Act, which prohibit insurance companies from granting preferences based upon factors other than risk, *see* Tenn. Code Ann. § 56-8-104(7)(A)-(E), and, conversely, which prohibit insurance companies from giving less favorable terms based upon

[1]Other sorts of anti-discrimination restrictions include those at Tenn. Code Ann. § 56-8-104(7)(A) (prohibiting life insurance companies from discriminating between individuals of same class and life expectancy); Tenn. Code Ann. § 56-8-104(7)(F) (prohibiting certain discriminatory practices based on sex, race, religion, national origin, marital status, income, or educational background); and Tenn. Code Ann. § 56-8-104(7)(G) (prohibiting certain discriminatory practices based on mental or physical impairment).

other impermissible factors, such as sex, race, national origin, and disability. *See* Tenn. Code Ann. § 56-8-104(7)(F) & (G).

The General Assembly has thus deemed harmful to the public the commercial activity of granting insurance rate reductions or other preferences based upon group association rather than risk factors, and it has banned such activity in keeping with other anti-discrimination provisions that prohibit granting preferences or offering less favorable terms based upon impermissible considerations. This ban is "more akin to a conduct regulation than a speech restriction." *Tennessee Secondary School Athletic Ass'n v. Brentwood Acad.,* 551 U.S. 291, 297 (2007). Commercial speech that offers to make such a prohibited transaction is not protected by the First Amendment.

The fact that Tenn. Code Ann. § 56-8-104(18) regulates conduct rather than speech distinguishes it from the statute addressed in Tenn. Att'y Gen. Op. 86-016 (Jan. 24, 1986). There, this Office was asked to opine on the constitutionality of a law that prohibited insurance companies from offering any rebate as an inducement to enter into an insurance contract unless the rebate was specified in the contract itself. *See* Tenn. Code Ann. § 56-8-104(7) (Supp. 1985) (now Tenn. Code Ann. § 56-8-104(8) (Supp. 2012)). Rather than prohibiting insurance companies from offering rebates, the statute merely imposed a disclosure requirement on insurance companies to specify the terms of any rebate in the insurance contract. Inasmuch as the provision was a direct regulation of commercial speech, this Office analyzed its constitutionality by applying established First Amendment principles and, ultimately, concluded that it imposed "a permissible restraint on commercial speech." Tenn. Att'y Gen. Op. 86-016 (Jan. 24, 1986) (citing *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985); *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980); and other authorities).

In Opinion 86-016, this Office further opined, relying on *Dade County Consumer Advocate's Office v. Department of Insurance*, 457 So. 2d 495 (Fla. Dist. Ct. App. 1984), that a total ban on rebates would be an unconstitutional restraint on commercial speech. The *Dade County* case, however, was decided upon state constitutional due process grounds, not First Amendment grounds. In a 4-3 opinion, the Florida Supreme Court subsequently affirmed the District Court of Appeal's decision, *see Department of Ins. v. Dade County Consumer Advocate's Office*, 492 So. 2d 1032, 1035 (Fla. 1986) (citing Fla. Const. art. I, § 9)), but only the dissent addressed a possible First Amendment challenge to the ban on rebates. In summarily rejecting such a challenge, the dissent observed that "[t]he statutes under attack here regulate not speech, but conduct—conduct which the Florida legislature apparently finds inimical to the public welfare." *Id.* at 1038 (Boyd, J., dissenting).

In any event, a significant difference exists between regulating the practice of offering rebates and prohibiting the practice of offering reduced rates or other preferences based upon group affiliation. If done in secret, the practice of offering rebates "*tended* to unfairly discriminate among similarly situated purchasers of insurance," but the practice itself was not inherently discriminatory. Tenn. Att'y Gen. Op. 86-016 (Jan. 24, 1986) (emphasis added). In contrast, the practice of offering preferences based upon group affiliation is in itself a form of discrimination. As discussed above, constitutional commercial speech protections do not preclude the General Assembly from banning such discriminatory practices.

The possibility that, within each group, policyholders would be given different discounts based upon basic rate factors does not change this analysis. The fact remains that the group of policyholders would be eligible for discounts based on their membership in the group. This is the precise practice prohibited by Tenn. Code Ann. § 56-8-104(18).

The Act sets forth several exceptions to the anti-discrimination provisions of Tenn. Code Ann. § 56-8-104(18). Among others, the Act contains an exception for "any domestic company that confines its insurance business and operations to this state and to the provision of insurance solely for the benefit of its members, or members of its parent or sponsoring organization." Tenn. Code Ann. § 56-8-104(18)(B). This exception applies only to domestic companies that confine their operations to this state. The United States Supreme Court has recognized that, "[a]lthough the McCarran-Ferguson Act exempts the insurance industry from Commerce Clause restrictions," equal protection principles[2] may prevent states from enforcing statutory provisions that on their face treat domestic and foreign companies differently. *Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869, 889 (1985). Federal and Tennessee courts traditionally have applied the lenient "rational basis" standard when "considering equal protection challenges to regulation of economic and commercial matters." *Exxon Corp. v. Eagerton,* 462 U.S. 176, 195-96 (1983); *Millennium Taxi Service, L.L.C. v. Chattanooga Metropolitan Airport Authority*, No. E2008-00838-COA-R3-CV, 2009 WL 1871927, at *6 (Tenn. Ct. App. June 30, 2009) (citing *Harrison v. Schrader*, 569 S.W.2d 822, 825 (Tenn. 1978)). In the equal protection context, "if the State's purpose is found to be legitimate, the state law stands as long as the burden it imposes is found to be rationally related to that purpose, a relationship that is not difficult to establish." *Ward,* 470 U.S. at 881. The "promotion of domestic business by discriminating against nonresident competitors," however, is "not a legitimate state purpose." *Id.* at 882.

Application of the foregoing exception does not raise significant equal protection concerns. Rather than creating a true exception to Tenn. Code Ann. § 56-8-104(18), subsection (18)(B) appears merely to state the obvious. Whether domestic or foreign, a company that provides insurance "solely for the benefit of its [own] members, or members of its parent or sponsoring organization" does not violate Tenn. Code Ann. § 56-8-104(18). Companies that fit within this exception require their customers to be members of the company or the company's parent or sponsoring organization. Membership, however, is not in any way exclusive but, in fact, is open to any person who wishes to purchase insurance. Moreover, all members are offered rates on the same basis, adjusted for legitimate individual risk characteristics. Consequently, this business model does not result in unfair discrimination among similarly-situated purchasers of insurance, nor does it create preferences that are based upon factors other than legitimate rate-making considerations, since both domestic and foreign companies that operate under this model by their very nature would not be engaged in this sort of discrimination. Rather than offering any preference based upon a fictitious grouping of persons, the company merely is offering insurance to all of its members upon the same terms. Although the General Assembly may have wished to include this specific exception to clarify the law in this area, in

[2]The Equal Protection Clause of the United States Constitution provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. The Tennessee Constitution contains a similar guarantee of equal protection in Article I, Section 8, and Article XI, Section 8. *Tennessee Small Sch. Sys. v. McWherter,* 851 S.W.2d 139, 152-53 (Tenn. 1993).

our view, such an exception was not required and does not actually operate to discriminate against foreign companies so as to raise equal protection concerns.

This Office is unaware of any other constitutional infirmity in Tenn. Code Ann. § 56-8-104(18) and, accordingly, concludes that this statute is facially constitutionally defensible.[3]

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[3]This Office cannot anticipate all possible factual situations in which Tenn. Code Ann. § 56-8-104(18) might be applied or "as applied" constitutional challenges that might develop. *See generally Waters v. Farr*, 291 S.W.3d 873, 922-23 (Tenn. 2009) (Koch, J., concurring in part and dissenting in part) (discussing in depth distinctions between "as applied" and "facial" constitutional challenges). Accordingly, such "as applied" challenges are outside the scope of this opinion.