Abstracts of Significant Cases Bearing on the Regulation of Insurance 2019

Olivea Myers*

United States Court of Appeals

Fifth Circuit

Texas v. United States, 945 F.3d 355 (5th Cir. 2019)

A group of states led by Texas ("Plaintiffs") sued the federal government challenging the constitutionality of the Patient Protection and Affordable Care Act ("ACA") in the United States District Court for the Northern District of Texas. Plaintiffs argued that the individual mandate requiring all citizens to have health insurance is unconstitutional and that it is not severable from the entire Act; therefore, the entire law should be invalidated. The district court agreed with Plaintiffs and held that the individual mandate was unconstitutional, inseverable, and therefore, struck down the ACA in its entirety. California and other intervening states appealed the district court's decision to the United States Court of Appeals for the Fifth Circuit. The United States House of Representatives motioned the Fifth Circuit to intervene as a defendant, and the Fifth Circuit granted the motion. The issues raised in this case were: 1) did Plaintiffs' have standing to challenge the individual mandate; 2) did the House of Representatives have standing to intervene; 3) is the individual mandate constitutional; and 4) even if the court finds that the individual mandate is unconstitutional, is it severable and should the remaining provisions of the ACA should remain in effect.

The Fifth Circuit held that both the House of Representatives and Plaintiffs have standing, as there is a live case and controversy, and that the individual mandate is unconstitutional. The Fifth Circuit remanded the case to the district court to "explain with more precision what provisions of the post-2017 ACA are indeed

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inseverable from the individual mandate." In January 2020, the General Counsel of the House of Representatives filed a petition for a writ of certiorari in the United States Supreme Court and a motion to expedite consideration of the certiorari petition. The Supreme Court ordered the Plaintiffs to file a response to this motion. On January 21, 2020, the Supreme Court denied the motion to expedite consideration of the certiorari petition.

United States District Courts

District of Columbia

New York v. United States Dep't of Labor, 363 F.Supp.3d 109, (D.D.C. 2019)

In this case, eleven states and the District of Columbia ("States") sued the United States Department of Labor ("DOL") alleging that the DOL's Final Rule interpreting the definition of "employer" under the Employee Retirement Income Security Act of 1974 ("ERISA"), is unlawful under the Administrative Procedure Act ("APA"). The States further argued that the DOL's Final Rule violates the Patient Protection and Affordable Care Act

The district court held in favor of the States, holding that the Final Rule is unlawful because the bona fide association and working owner provisions conflict

to conceal the true cost of the program, and presenting the BTPP to create an impression that the price for the BTPP was comprised of pass-through charges even though NCL received an unearned and undisclosed commission. The sole issue before the district court was whether Plaintiffs' claims related to the purchase of the BTPP, fall within the scope of the arbitration clause.

The district court held that the Plaintiffs' claims fall under the scope of the arbitration clause in the Guest Ticket Contract. "The whole purpose of [BTPP] is to protect Plaintiffs' stay on the cruise, which is the core of the Contract. . . Indeed, without the stay on the cruise, which is the core of the Contract there is no [BTPP] and therefore no claims for the Plaintiffs to advance." The district court applied the same analysis to the class action waver, holding that the waiver applies to the Plaintiffs' claims and should be enforced. The district court granted NCL's motion to compel arbitration and dismissed the case.

State Courts

California

Mercury Cas. Co. v. Lara, 35 Cal. App. 5th 82 (Cal. Ct. App. 2019)

In its 2014 edition, the *Journal of Insurance Regulation* reported on *Mercury Cas. Co. v. Jones*, Case No. 34-2013-80001426 (Cal. Super. Ct. June 11, 2014), where the Petitioner, Mercury Casualty Company ("Mercury") challenged the insurance commissioner's order that its proposed homeowners insurance rates were excessive. Mercury challenged the application of Proposition 103, which was enacted by California voters in 1988 and required insurers to roll back insurance rates 20%. Insurers are able to request a variance from this percentage if the resulting rate would be "confiscatory." Insurers would have to prove to the commissioner that the decrease in insurance rates would cause the insurer to suffer deep financial hardship to its enterprise as a whole. Mercury claimed the commissioner prohibited the use of Mercury's own data to demonstrate the financial hardship.

The Court found that Mercury's request to substitute its own expense data into the ratemaking formula would effectively relitigate a matter that was already decided by the administrative law judge. The Court also affirmed the commissioner's removal of institutional advertising expenses from the ratemaking formula, as such expenses are expressly excluded under state regulations.

In 2015, the Commissioner fined Mercury 27.6 million dollars for charging consumers unapproved and unfairly discriminatory rates. In the present case, Mercury appealed the Commissioner's fine and the California Court of Appeals affirmed the Commissioner's decision. On August 14, 2019, the California Supreme Court denied Mercury's petition for review, thereby upholding the Commissioner's order fining Mercury.

Illinois

Corbin v. Allstate Ins. Co., No. 5-17-0296, 2019 WL 362480 (Ill. App. Ct. 5th Jan. 29, 2019)

Plaintiffs filed a class action lawsuit against Allstate. Plaintiffs alleged three claims: 1) Allstate violated the Consumer Fraud Act by engaging in unfair and deceptive practices in developing their rating methodologies; 2) Allstate's alleged failure to disclose its use of price optimization (charging longtime policyholders

and Insurance ("Department"). The Director of the Department issued an order refusing Holden a license. The Department found that Holden's application failed to disclose that he used to be President of Guaranty Land Title Insurance, Inc. ("Guaranty"). Holden's application also failed to disclose three voluntary forfeiture agreements Guaranty entered into when Holden was President of the Company. The Department also held that Holden violated state law by transacting business as an insurance producer without a license in 2008 and 2009. Holden appealed the Department's order to the Administrative Hearing Commission ("AHC"). The AHC upheld the Department's order. Holden then appealed the AHC's decision in the Cole County Circuit Court. While Holden's appeal was pending, he filed another application for the same non-resident title insurance producer license in October 2014. In that application, he disclosed the information he omitted in his previous 2009 application. The Department again refused to issue Holden a non-resident title insurance producer's license relying on the same grounds used in the 2009 application. Holden sought relief from the AHC again, and the Department's order was again upheld as the AHC found that the Department had cause to deny Holden's application and that his arguments were barred by collateral estoppel because the same issues were raised in his 2009 appeal. Holden filed another petition in the Cole County Circuit Court where the circuit court agreed with Holden. The Circuit Court found that the Department violated Holden's constitutional rights to due process for denying his 2014 application based on the same reasons as the 2009 application. The Department appealed to the Missouri Court of Appeals. The Department argued that the Circuit Court's decision should be reversed because the Circuit Court lacked statutory authority to review the administrative decision as a contested case.

The Missouri Court of Appeals held that, "for purposes of judicial review, the Missouri Administrative Procedure Act classifies administrative proceedings as either 'contested' or 'non-contested cases.'" "Contested cases provide the parties with an opportunity for a formal hearing with the presentation of evidence, including sworn testimony of witnesses and cross-examination of witnesses, and require written findings of fact and conclusions of law." "Non-contested cases do not require formal proceedings or hearing before the administrative body." In a non-contested case, the circuit court hears evidence, determines facts, and determines the validity of the agency's decision. The court of appeals held that based on a Missouri Supreme Court ruling, the Department's decisions are non-contested cases. The court of appeals reversed and remanded the circuit court's ruling and ordered that the circuit court lacked the statutory authority to review this case as a contested case. The court also held that Holden could amend his petition so that it can be reviewed as a non-contested case in the circuit court.

Nebraska

Diamond v. Dep't of Ins., 302 Neb. 892, (Neb. 2019)

The Nebraska Department of Insurance ("Department") issued an order against Petitioner Mark Diamond, a licensed insurance producer in Nebraska, holding that he violated three provisions of the Insurance Producers Licensing Act ("Act") and assessed him a $2,500 fine. Diamond appealed the Department's decision. Diamond was the chief executive officer and President of Bella Homes, LLC. Bella Homes "intended to buy homes from individuals who were struggling to make their mortgage payments and provide a 3-to 7-year repayment plan." Bella Homes "was expected to purchase the homeowner's mortgage from the existing lender and enter into a lease with the homeowner. . . ." Diamond formed this company at the request of a friend who had twice been convicted of fraud and could no longer handle another's finances. Bella Homes never purchased the home loans of its customers and did not protect the customer's homes from going into foreclosure. In 2012, the United States of America and the State of Colorado filed a civil action against Bella Homes, LLC and the individuals within the company, which included Diamond. The complaint alleged several violations of Mortgage Assistance Relief Services ("MARS") rules. In March 2012, Diamond confessed liability in defrauding distressed homeowners nationwide and a consent judgment was entered against him in the federal case. In December 2016, the Department filed an action against Diamond for violating §§ 44-4065(1) and 44-4509(1)(g) and (h) of the Act. The Director of the Department found that Diamond had a duty to report the federal

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the MARS Rule fell into the definition of "fraud" under the Act; therefore, the district court's decision upholding the Department's order was affirmed.

New York

New York State Land Title Ass'n, Inc. v. New York State Dep't of Fin. Servs., 178 A.D.3d 611 (1st Dep't 2019)

In this case, Petitioner is challenging Insurance Law § 6409(d) and the New York State Department of Financial Services' ("DFS") Insurance Regulation 208 by stating that Insurance Law § 6409(d) is ambiguous as to the term "other consideration or valuable thing," and that certain provisions of Insurance Regulation 208 have a rational basis. DFS investigated licensed title insurers to assess how title insurers were calculating their premiums. As a result of the investigation, DFS uncovered that the title insurers were engaging in practices that ultimately resulted in higher premiums and closing costs for consumers, which violated Insurance Law § 6409(d). DFS found that insurers were reporting meals and entertainment expenses in "advertising, marketing and promotion, and travel, and 'other.'" DFS found that approximately 5.3% of premiums charged statewide violated Insurance Law § 6409(d). As a response, DFS promulgated Insurance Regulation 208, which delineates permissible and impermissible practices and prohibits offering inducements, such as meals, entertainment, gifts, and vacations. Insurance Regulation 208 was clear that the list was not exhaustive. Petitioner argued that Regulation 208 and its provisions were arbitrary and capricious, and that the regulation exceeds DFS's regulatory authority.

The appeals court found in favor of DFS, holding that Insurance Law § 6409(d) unambiguously prohibits an insurer from "offer[ing] or mak[ing], directly or *indirectly*, . . . any commission, any part of its fees or charges, or *any other consideration or valuable thing*, as an *inducement* for, or as compensation for, *any* title insurance business" (emphasis added). The appeals court further explained that the "word 'any' unambiguously indicates that this legislative prohibition was intended to be broadly construed, allowing for DFS to define 'any other consideration or valuable thing. . . .'" The court found that clarifying Insurance Law § 6409(d) through Insurance Regulation 208 was within DFS' regulatory authority. The appeals court upheld the lower court's ruling as to two other provisions that were adopted to clarify Insurance Law § 6409(d) and affirmed the decision to annul

Independent Ins. Agents and Brokers of New York, Inc. v. New York State Dep't of Fin. Servs., 65 Msc.3d 562 (Sup. Ct. Albany Co. July 31, 2019)

Independent Insurance Agents and Brokers of New York, Incorporated ("Plaintiff"), representing insurance agents, brokers, and financial advisors challenged the New York State Department of Financial Services' ("DFS") Amendment to NYCRR 224.0 *et seq*. The Amendment, also known as the Suitability and Best Interests in Life Insurance and Annuity Transactions, was issued by DFS on July 17, 2018. It adopted a uniform standard of care which must be met by agents and brokers, requiring them to act in the best interests of their client. Plaintiff offered many arguments including that the Amendment must be annulled for because the DFS exceeded its authority and that the regulation conflicts with the governing statutory scheme. DFS argued that it has broad supervisory power over the banking, insurance, and financial services. DFS further argued that the Amendment "is based on the principle that agents and brokers making recommendations about complex insurance transactions are more informed about market intricacies and potential impacts, and thus should be obligated to provide guidance in the best interests of the customer when making a recommendation."

The trial court agreed with DFS and held that the Amendment is a proper exercise of its regulatory power and that DFS complied with the State

"Tennessee Code Annotated [§] 56-37-111, it is the responsibility of the insurance company, not TIG, to refund premium."

The chancery court affirmed the Department's order holding that the Petitioners had a statutory fiduciary duty to return unearned premiums to the policyholders or their finance companies upon cancellation of a policyholder's insurance policy. The court explained that Tenn. Code Ann. § 56-37-111 provides, "whenever a financed insurance contract is cancelled, the insurer shall return whatever gross unearned premiums are due under the insurance contract directly to the premium finance

Amica Life Ins. Co. v. Wertz, No. 18-1455 (NAIC brief filed April 10, 2019)

The NAIC and the Interstate Insurance Product Regulation Commission ("IIPRC") filed a joint amicus brief with the Tenth Circuit Court of Appeals in this case on April 10, 2019. This appeal follows an order issued by the United States District Court for the District of Colorado, which upheld a life insurance policy's two-year suicide exclusion contained in a policy issued pursuant to the Uniform Standards approved by the IIPRC. The appellant continued to argue that Colorado's one-year suicide exclusion statute applied and that adoption of the IIPRC's Uniform Standards represented an unconstitutional delegation of authority to an interstate