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Opinion No. 08-84

Constitutionality of Bill Regulating Unfair Insurance Practices

QUESTIONS

Senate Bill 4208/House Bill 4207 is titled "The Tennessee Unfair Trade Practices and Unfair Claims Settlement Act of 2009." The bill rewrites Part 1 of Title 56, Chapter 8, regulating unfair insurance practices. Sections 5 and 7 of the act define an extensive series of unfair methods of competition or unfair or deceptive acts or practices in the business of insurance. Section 6 of the act defines an extensive series of unfair claim practices. Section 9(a) also authorizes the Commissioner of Commerce and Insurance to declare by rule "certain acts to be unfair trade practices or unfair methods of competition or unfair or deceptive acts or practices in the business of insurance that are not specifically defined in this Act."

1. Does the bill unconstitutionally delegate lawmaking authority to the Commissioner in violation of Article II, §§ 1 and 2, of the Tennessee Constitution?

2. Does the bill violate any other constitutional provisions?

OPINIONS

1. No. Rules promulgated under this provision should articulate the Commissioner's reasons for prohibiting the practices in question.

2. Section 5(u) of the Bill imposes an absolute ban on any unauthorized use of a lending institution's name or logo in an advertisement or business solicitation. We think this ban would be found unconstitutional on its face under the First Amendment to the United States Constitution and Article I, § 19, of the Tennessee Constitution. No other provision of the Bill, on its face, violates a provision of the United States or Tennessee Constitution.

ANALYSIS

Introduction: Summary of Senate Bill 4208/House Bill 4207

This opinion addresses the constitutionality of Senate Bill 4208/House Bill 4207, enacting "The Tennessee Unfair Trade Practices and Unfair Claims Settlement Act of 2009," (the "Bill").

The Bill deletes the current Tenn. Code Ann. §§ 56-8-101, *et seq.,*and substitutes a new statutory scheme. Section 2 of the Bill states:

> The purpose of this Act is to regulate trade and claims settlement practices in the business of insurance in accordance with the intent of Congress as expressed in the Act of Congress of March 9, 1945 (Public Law 15, 79th Congress) and the Gramm-Leach-Bliley Act (Public Law 106-102, 106th Congress), 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. Notwithstanding any other laws of this state to the contrary, the Commissioner shall have sole enforcement authority for this Act, and nothing herein shall be construed to create or imply a private cause of action for a violation of this Act.

The act thus refers to the McCarren-Ferguson Act passed in 1945, codified at 15 U.S.C. §§ 1011, *et seq.*, and the Gramm-Leach-Bliley Act of 1999 ("GLB"). GLB clarifies the power of various financial institutions to engage in the business of insurance. Section 104 of GLB, now codified at 15 U.S.C. § 6701, describes the activities that remain subject to state regulation. The Bill includes considerable material that is in the current statute. It appears, therefore, that the Bill is intended to update Tennessee law on unfair insurance practices to reflect changes in the insurance industry brought about by GLB.

Section 3 includes definitions. The closing sentences of this section state:

> The Federal Employment Retirement Income Security Act (ERISA) preempts certain entities and some activities of those entities from the application of state laws. The purpose of these definitions is to include within this Act and regulations issued pursuant to it, all entities and activities to the extent not preempted by ERISA.

Section 4 of the Bill makes it illegal to engage in unfair trade practices or unfair claim practices, either as defined in Sections 5, 6, or, 7, or determined by rule of the Commissioner of Commerce and Insurance to be an unfair trade practice or unfair claim practice. Sections 5, 6, and 7 define prohibited practices. Section 8 authorizes the Commissioner of Commerce and Insurance to examine and investigate persons or insurers to determine whether they are engaged in unfair trade practices. Subsection (a) of Section 8 provides in relevant part:

> However, in the case of depository institutions, the commissioner shall have the power to examine and investigate the insurance activities of depository institutions in order to determine whether the depository institution has been or is engaged in any unfair trade practice prohibited by this Act. The commissioner shall notify the appropriate federal or state banking agencies of the commissioner's intent to examine or investigate a depository institution and advise the appropriate federal or state

> banking agencies of the suspected violations of state law prior to commencing the examination or investigation.[1]

Sections 9 through 12 address enforcement by the Commissioner of Commerce and Insurance. Section 13 contains a severability clause. Section 14 amends Title 56, Chapter 7, Part 1 by adding a new section regarding the effect of insurance payments made in advance of a trial. The language in the new section currently appears at Tenn. Code Ann. § 56-8-105. Under Section 15, the act is to take effect upon becoming a law for the purpose of rulemaking, and on January 1, 2009 for all other purposes.

1. Unlawful Delegation of Legislative Authority

The request asks explicitly about Section 9(a) of the Bill. This section provides:

> In addition to any other authority granted in this Act, the commissioner shall have the authority to declare by rule certain acts to be unfair trade practices or unfair methods of competition or unfair or deceptive acts or practices in the business of insurance that are not specifically defined in this Act. The commissioner may promulgate such rules by public necessity upon making a finding that such is in the public interest.

The request asks whether Section 9 of the Bill delegates legislative authority to the Commissioner of Commerce and Insurance in violation of Article II, §§ 2 and 3, of the Tennessee Constitution. Under Article II, Section 3, of the Tennessee Constitution, legislative authority of the State is vested in a General Assembly, composed of a Senate and a House of Representatives. Under Article II, § 1 [vesting legislative authority in the General Assembly], the General Assembly may not delegate power that is "purely legislative." *Gallaher v. Elam,* 104 S.W.3d 455, 464 (Tenn. 2003). But the General Assembly may, consistent with this provision, delegate to an administrative agency the authority to implement the expressed policy of particular statutes, including the power to promulgate rules and regulations that have the effect of law in the agency's area of operations. *Id., citing Bean v. McWherter*, 953 S.W.2d 197 (Tenn.), *rehearing denied,* (1997); *Tasco Developing and Building Corp. v. Long,* 212 Tenn. 96, 104-05, 368 S.W.2d 65 (1963). The test for determining whether a statute is an unlawful delegation is whether the statute contains sufficient standards or guidelines to enable both the agency and the courts to determine if the agency is carrying out the legislature's intent. *Id., citing Bean,* 953 S.W.2d at 199. In *Bean,* the Tennessee Supreme Court stated:

> Governing standards need not be expressed provided such standards can be reasonably ascertained from the statutory scheme as a whole. The necessity of expressed standards is contingent upon the statute's subject matter and on the degree of difficulty involved in articulating finite standards. *Detailed or specific legislation*

[1] The Office of the Comptroller has stated in regulations that it has exclusive visitorial powers with regard to national banks and other institutions. 12 C.F.R. § 7.4000(a). But this provision does not affect the power of state agencies to carry on functional regulation of activities under GLB. 12 C.F.R. § 7.4000(b)(1)(vi).

> *may be neither required nor feasible when the subject matter requires an agency's expertise and flexibility to deal with complex and changing conditions.*
>
> *The requirement of expressed standards may also be relaxed when the discretion to be exercised relates to or regulates for the protection of the public's health, safety, and welfare.*

Id. (emphasis added). We think the Bill, read as a whole, meets these standards. The Bill defines an extensive list of unfair trade practices. This list provides guidance in determining what other practices the Commissioner may define by rule. The terms "unfair" and "deceptive" also provide standards for the Commissioner. Further, the insurance industry is constantly changing. Broad authority is necessary to permit the Commissioner to exercise his or her expertise and flexibility to deal with complex and changing conditions. In addition, the Bill and the power given the Commissioner regulate for the protection of the general public's safety and welfare in purchasing insurance. For these reasons, Section 9(a) of the Bill does not unconstitutionally delegate legislative authority to the Commissioner of Commerce and Insurance. Rules promulgated under this provision should articulate the Commissioner's reasons for prohibiting the practices subject to the rules.

2. Other Constitutional Provisions

The request also asks whether the Bill violates any other constitutional provisions. Clearly, the Bill was drafted to fall within limits on the exercise of state regulatory authority imposed under GLB and other federal legislation. No provision of the Bill, on its face, violates the Supremacy Clause of the United States Constitution. We think a court would find that one provision of the Bill violates the First Amendment to the United States Constitution and Article I, § 19, of the Tennessee Constitution. Section 5 of the Bill prohibits the following practice as an "unfair trade practice":

> (u) Unauthorized use of lender information. It is unlawful for any person to make, publish, disseminate, circulate, or place before the public, or cause, directly or indirectly, to be made, published, disseminated, circulated or placed before the public, in a newspaper, magazine or other publication, or in the form of a notice, circular, pamphlet, letter or poster or over the internet or any radio or television, or in any other way, an advertisement, or announcement containing any assertion, representation, or statement with respect to the sale, distribution, offering for sale or advertising of any loan, refinance, insurance or any other product or service that is untrue, deceptive, misleading, *or that uses the name or logo of any lender without the express written consent of the lender whose name is used.* For purposes of this section, "lender" means any bank, savings and loan association, savings bank, trust company, credit union, industrial loan and thrift company, mortgage company, mortgage broker, or any subsidiary or affiliate thereof.

Id. (emphasis added).

This provision regulates commercial speech, which is entitled to qualified protection under the First Amendment. "Commercial speech" is defined by the United States Supreme Court as "expression related solely to the economic interests of the speaker and its audience" that does "no more than propose a commercial transaction." *Virginia Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 762, 96 S.Ct. 1817, 1825, 48 L.Ed.2d 346 (1976). Commercial speech occupies a "subordinate position in the scale of First Amendment values," *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456, 98 S.Ct. 1912, 1918, 56 L.Ed.2d 444 (1978), and is entitled to only limited protection under the First Amendment. The United States Supreme Court has articulated a four-part test to determine whether a particular regulation of commercial speech comports with the First Amendment:

> For commercial speech to come within [the First Amendment], it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest [claimed to justify the regulation] is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than necessary to serve that interest.

Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y., 447 U.S. 557, 566, 100 S.Ct. 2343, 2351, 65 L.Ed.2d 341 (1980). The Tennessee Supreme Court utilizes the same four-part test when evaluating commercial speech claims under Article I, Section 19, of our state constitution. *Walker v. Board of Professional Responsibility of Supreme Court of Tennessee*, 38 S.W.3d 540, 544 (Tenn. 2001); *Douglas v. State*, 921 S.W.2d 180 (Tenn. 1996).

The italicized language in Section 5(u) of the Bill prohibits any use of the logo or name of a lending institution in an advertisement or business solicitation without the institution's written permission. On its face, this prohibition includes using the name in an advertisement or solicitation even where the use of the name is not deceptive or misleading. Thus, for example, a lender could not use the name or logo of a competitor in any comparative advertisement without that competitor's permission. An advertisement could not even use the name of a nearby bank in providing directions to a potential customer. We think the absolute ban on any unauthorized use of a lending institution's name or logo would be found unconstitutional on its face because it is not clear what governmental interest it advances and it extends to cases where the ban serves no discernible governmental interest.[2] This opinion does not address any trademark laws the use of a bank's name or logo might violate.

[2] The same prohibition appears in Tenn. Code Ann. § 45-2-1720(a). For the reasons and to the extent discussed above, we think a court would find this prohibition unconstitutional.

No other provision of the Bill, on its face, violates a provision of the United States or Tennessee Constitution.

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