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Securities Regulation—Insurance—McCarran-Ferguson Act—State Statute Regulating Merger Does Not Preclude Operation of Federal Securities Law.— SEC v. National Sec., Inc.

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would have confronted a significant delay in obtaining relief. The Supreme Court in *NLRB v. C & C Plywood*⁵⁸ recognized the importance of a quick resolution of grievances. The Court stated that

[i]f the Board in a case like this had no jurisdiction to consider a collective agreement prior to an authoritative construction by the courts, labor organizations would face inordinate delays in obtaining vindication of their statutory rights.⁵⁹

Although *C & C Plywood* did not involve an arbitration clause, the distinct likelihood of delay in *Strong* would appear to make the Court's reasoning applicable. Because the Board's order in *Strong* effectuates a policy against inordinate delay and is within the Board's discretionary power, the decision cannot properly be considered to be in derogation of arbitration. In all probability, arbitration would have extended the existing industrial strife, a result contrary to the avowed function of arbitration to expedite industrial settlements.

Strong is a significant decision because it extends the discretionary power of the Board one step beyond the decision in *Acme*. The Board is now clearly empowered to interpret the contract to remedy an unfair labor practice even though the contract provides for arbitration. This power is certainly proper and necessary in situations like *Strong*. Unfortunately, however, the case is subject to an interpretation that the Board may construe the contract to remedy an unfair labor practice in any situation, regardless of arbitration. In situations where an amicable collective bargaining relationship exists and where the fringe benefits are not clear on the face of the contract, arbitration would appear to be the preferable forum for resolving the dispute. To the extent that the opinion may be utilized by the Board or by the courts as a *carte blanche* authorization of the Board to decide all contract issues incidental to an unfair labor practice, the policy of fostering arbitration could be significantly weakened. To avoid this possibility, the majority should have set forth more clearly the guidelines and considerations which the Board must follow in cases where its power to remedy unfair labor practices and arbitration present alternative methods of resolving the dispute. These considerations, as discussed above, revolve around the ease of interpreting the contract, the likelihood of inordinate delay, and especially the relationship of the parties.

KURT M. SWENSON

Securities Regulation — Insurance — McCarran-Ferguson Act — State Statute Regulating Merger Does Not Preclude Operation of Federal Securities Law.—*SEC v. National Sec., Inc.*¹—The Securities and Exchange

⁵⁸ 385 U.S. 421 (1967).

⁵⁹ *Id.* at 429.

¹ 393 U.S. 453 (1969). The majority opinion was written by Mr. Justice Marshall.

Commission brought an action in the United States District Court for the District of Arizona² seeking a temporary injunction to prevent the merger of two insurance companies, National Securities, Inc. and Producers Life, Inc. The complaint alleged that Section 10(b) of the Securities Exchange Act of 1934³ had been violated because the proxy solicitations mailed by National Securities contained material misrepresentations of fact and material omissions making the communications misleading. Nonetheless, temporary relief was denied. Shortly thereafter the merger was approved both by the shareholders of Producers Life and by the Arizona Director of Insurance. As part of his duties, the Director was required by Arizona law to find that the merger or consolidation (a) "[was not] contrary to law";⁴ or (b) "[i]nequitable to the stockholders of any domestic insurer involved";⁵ and (c) "[w]ould substantially reduce the security of and service to be rendered to the policyholders of the domestic insurer in this state or elsewhere."⁶ After the approval of the merger, the SEC amended the complaint and sought restoration of the status quo and an accounting to determine the extent to which the defendant had been unjustly enriched at the expense of the shareholders of Producers Life. The district court dismissed the amended complaint: first, because the SEC was acting beyond its jurisdictional powers under the Securities Exchange Act of 1934;⁷ and, second, because the invalidation of the corporate merger of National Securities and Producers Life would at least "impair" if not "invalidate" or "supersede" a state law regulating the business of insurance within the meaning of the McCarran-Ferguson Act.⁸ Hence, the state act must control. The Court of Appeals for the Ninth Circuit affirmed, relying on the McCarran Act.⁹ The Supreme Court granted certiorari because of the importance of the questions raised to the administration of the securities laws.¹⁰

The issues framed by the Supreme Court were (a) whether the relevant Arizona statute was a state law enacted "for the purpose of regulating the business of insurance" within the meaning of the McCarran Act; and (b) whether a statutory merger was a purchase and sale of securities within Section 10(b) of the Securities Exchange Act of 1934 and the Commission's

² 252 F. Supp. 623 (D. Ariz. 1966).

³ 15 U.S.C. § 78j (1964), which provides in part:

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange— . . .

(a) . . .

(b) To use or employ, in connection with the purchase or sale of any security, registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

⁴ Ariz. Rev. Stat. Ann. § 20-731(B)(1) (Supp. 1969).

⁵ Id. at § 20-731(B)(2).

⁶ Id. at § 20-731(B)(3).

⁷ 252 F. Supp. 623, 626 (D. Ariz. 1966).

⁸ Id. The applicable section of the McCarran-Ferguson Act is 15 U.S.C. § 1012(b) (1964).

⁹ 387 F.2d 25, 32 (9th Cir. 1967).

¹⁰ 390 U.S. 1023 (1968).

Rule 10b-5.¹¹ On the first issue, the Supreme Court HELD: The Arizona law, to the extent that it attempts to protect the interests of the shareholders of insurance companies, is not a state law regulating the business of insurance.¹² Although the state statute, to the extent that it attempts to protect the interests of the policyholder, clearly relates to the business of insurance,¹³ the McCarran Act does not preclude a federal remedy which affects a matter subject to state insurance regulation.¹⁴ On the second issue, the Court HELD: A statutory merger in which stockholders receive shares of the acquiring corporation in exchange for shares of the acquired corporation, is a "purchase or sale" of securities within section 10(b) and Rule 10b-5.¹⁵ The arguments whether a statutory merger should be considered a purchase or sale of securities have been explored previously.¹⁶ Accordingly, this note will focus upon the Supreme Court's interpretation of the McCarran Act and will analyze (a) the method of statutory construction used by the Supreme Court and (b) the difficulties resulting from the test adopted by the Court to determine whether a state regulation will preempt federal jurisdiction.

The relevant Section of the McCarran Act is 2(b):

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, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance. . . .¹⁷

One interpretative approach to this language is to apply the "plain meaning" technique of statutory construction. If the meaning of the statute is clear and unambiguous on its face, then recourse to other materials becomes unnecessary. In this light, since the Arizona statute related to the normal activities of an insurance company, it was clearly regulative of "the business of insurance." Accordingly, the McCarran Act precluded federal jurisdiction.¹⁸

The Supreme Court chose a different method of statutory construction. Using legislative history in its effort to define the proper scope of the McCarran Act, the Court recounted that its decision in *United States v.*

¹¹ 17 C.F.R. § 240.10b-5 (1968).

¹² 393 U.S. at 457.

¹³ *Id.* at 461.

¹⁴ *Id.* at 462. The Court asserted that no conflict existed between the state interest in protecting policyholders and the federal interest in affording remedies to defrauded shareholders of an insurance company. Therefore, any "impairment" of a state regulation of the business of insurance would be a most indirect one. *Id.* at 463.

¹⁵ *Id.* at 467. The board anti-fraud purposes and definitional sections of the Act were cited as support for this statutory interpretation. The Court also construed § 10(b) as sufficiently broad to cover any fraud in the purchase or sale of securities, and thereby disposed of one of the district court's grounds for dismissal. *Id.* at 468.

¹⁶ See *Dasho v. Susquehanna Corp.*, 380 F.2d 262 (7th Cir. 1967); Note, Securities Regulation—Statutory Merger Involves A "Purchase" or "Sale" Under Section 10(b), 36 Ford. L. Rev. 362 (1967). See also Comment, The Expanding Uses of Rule 10b-5, 10 B.C. Ind. & Com. L. Rev. 313, 324-28 (1969).

¹⁷ 15 U.S.C. § 1012(b) (1964).

¹⁸ In essence, this mode of statutory construction was employed by the district court. 252 F. Supp. 623, 626 (D. Ariz. 1966).

*South-Eastern Underwriters Ass'n*¹⁹ had served as a catalyst to the enactment of the Act. The traditional pattern of state insurance regulation was endangered by its holding in *South-Eastern Underwriters* that insurance transactions were subject to the prohibitions of the Sherman Act by virtue of the "commerce clause" power of Congress.²⁰ The Court stressed also the atmosphere of confusion, urgency and uncertainty surrounding the passage of the McCarran Act and indicated that it "was an attempt to turn back the clock, to assure that the activities of insurance companies in dealing with their policyholders would remain subject to state regulation."²¹ Thus, the McCarran Act was an endeavor to preserve the traditional scheme of state insurance regulation. This established regulatory scheme was subsumed in the phrase "business of insurance."

In *National Securities*, the Supreme Court conceded that the phrase "business of insurance" lacked a precise definition, yet observed that its focus traditionally had been on the "relationship between insurer and insured, the type of policy which could be issued, its reliability, interpretation, and enforcement"²² Accordingly, the Court proposed as a test that "[s]tatutes aimed at protecting or regulating this relationship, directly or indirectly, are laws regulating the 'business of insurance.'"²³

The Court seems justified in the conclusion that only certain aspects of the activities of insurance companies were traditionally regulated by the states, and that the core of "business of insurance" had been centered on the relationship between the insurer and the insured. During the period when insurance companies enjoyed a constitutional immunity from Congress' "commerce clause" powers,²⁴ the states developed a rigid and effective scheme for the regulation of the insurance industry.²⁵ Unaffected by the federal anti-trust laws, rate-making bureaus were established and became a vital part of the state regulation of insurance.²⁶ The justification for these bureaus was that cut-throat price competition might impair the financial stability of the insurer and seriously jeopardize its ability to fulfill its contractual obligations to the policyholder.²⁷ Other measures were adopted by the states to assure the reliability of the insurer and its services. For example, these included: (a) establishment of a standard of solvency and the requirement that a minimum amount of reserves be maintained; (b) supervision of investments in accordance with a permissible list; (c) prescription of certain basic contractual terms; (d) licensing and regulation of insurance companies and their

¹⁹ 322 U.S. 533 (1944).

²⁰ *Id.* at 553, 560-61. In *Paul v. Virginia*, 75 U.S. 168 (1869), the Supreme Court had held that insurance transactions were not interstate commerce.

²¹ 393 U.S. at 459.

²² *Id.* at 460.

²³ *Id.*

²⁴ From 1868 to 1944, the period between *Paul v. Virginia* and *United States v. South-Eastern Underwriters Ass'n*.

²⁵ See P. McCarran, *Federal Control of Insurance: Moratorium Under Public Law 15 Expired July 1*, 34 A.B.A.J. 539 (1948); Note, *Insurance in Florida and the McCarran Act*, 1 U. Fla. L. Rev. 411, 412-13 (1948).

²⁶ Note, *Insurance in Florida and the McCarran Act*, 1 U. Fla. L. Rev. 411, 415 (1948).

²⁷ *Id.* at 416.

agents; (e) rendition of periodic examinations of the insurer and the making of annual reports.²⁸ An examination of these state regulations indicates that the states' concern centered on the type and quality of services rendered by the insurer to the policyholder, and on the insurer's fiscal stability.

With respect to the sale of securities, the states did initially enact the "Blue Sky Laws."²⁹ However, after the Depression revealed that state regulation failed to provide sufficient protection to the investor, Congress began enactment of legislation regulating securities.³⁰ One such enactment was the Securities Act of 1933,³¹ which does not support the proposition that insurance companies engaged in security matters are to be outside the scope of federal jurisdiction. Rather, it exempts from its scope only the sale of insurance policies³² and leaves the issuance of securities by insurance companies within its purview. Thus, it would seem that simple status as an insurance company provided immunity from federal regulation only when the insurance company was actually engaged in the business of selling insurance.

In short, then, prior to the McCarran Act state regulation of insurance focused on the relationship between the insurer and the insured. In addition, the federal government on occasion regulated the sale of insurance securities. Against this background the Supreme Court construed the "business of insurance" phrase to exclude a state statute protecting the interests of stockholders.

The Supreme Court looked also to major decisions to illuminate the scope of "business of insurance." It relied on *SEC v. Variable Annuity Life Ins. Co.*³³ for the proposition that the issuance of securities by an insurance company was not "business of insurance." In that case, an insurer issued a variable annuity, which contains characteristics both of an insurance policy and of a security.³⁴ The issue before the Court was whether the sale of a variable annuity was a sale of a security or of an insurance policy within the Securities Act of 1933 and the Investment Company Act of 1940.³⁵ The McCarran Act was urged by the insurer as a basis for the preclusion of federal jurisdiction.³⁶ Because the Court found the qualities of an investment to be predominant, the SEC was permitted to regulate the issuance of a security by an insurance company. In his concurring opinion, Mr. Justice Brennan observed that the administration of variable annuities involved

²⁸ See *SEC v. Variable Annuity Life Ins. Co.*, 359 U.S. 65, 77 n.8 (1959). See also E. Patterson, *Cases and Materials on the Law of Insurance* 43-44 (3d ed. 1955); L. Jones, *A Discussion of the VALIC Decision*, 5 Vill. L. Rev. 407, 411-12 (1960).

²⁹ See L. Loss and E. Cowett, *Blue Sky Law* 3-42 (1958).

³⁰ See 15 U.S.C. §§ 77a, 78a, 79, 80b-20 (1964).

³¹ 15 U.S.C. § 77a (1964).

³² 15 U.S.C. § 77c(a)(8) (1964).

³³ 359 U.S. 65 (1959). See also *SEC v. United Benefit Life Ins. Co.*, 387 U.S. 202, 212 (1967), where the registration requirements of the Securities Act of 1933 were held applicable to certain annuity contracts issued by insurance companies.

³⁴ A variable annuity resembles a traditional annuity in that both the insured and the insurer bear the risk that the insured will live longer than his life expectancy. On the other hand, it is similar to an investment in that the amount of the payments received by the insured are not fixed but fluctuate with the return on the money paid into the policy by the insured.

³⁵ 15 U.S.C. §§ 77a, 80b-20 (1964).

³⁶ 359 U.S. at 67.

to a large degree the business of an investment company, and that these activities were completely alien to the state regulation of the sale of life insurance and annuity contracts.³⁷ Thus, he concluded that “[t]here is no reason to suppose that Congress intended to make an exemption of forms of investment to which its regulatory scheme was very relevant in favor of a form of state regulation which would not be relevant to them at all.”³⁸ *Variable Annuity* represents a strong precedent. In it one discerns the roots of the distinction between “policyholder,” as the proper concern of the states, and “stockholder,” as the legitimate domain of the federal regulation.

Although both the historical pattern of state and federal regulation of insurance, as well as forceful precedent, underpin the Court’s holding that a state statute regulating insurance securities is not “business of insurance,” the standard proposed to determine the scope of “business of insurance”³⁹ is subject to question. It is submitted that the Court’s standard is both impractical and inadequate as a means of prescribing to the states those present and future regulatory enactments which will merit exclusive state jurisdiction. For example, both the investment practices of an insurance company as well as the adequacy of its cash reserves bear directly on the insurer’s fiscal stability and its ability to meet its obligations to the insured. Therefore, pursuant to the Court’s standard, both these forms of state regulation should be deemed “business of insurance.” However, as indicated previously, a state statute requiring a minimum amount of reserves to be maintained is “business of insurance,” while a state law regulating insurance securities is not “business of insurance.” The inadequacy of the Court’s standard is illustrated further by its holding in *National Securities* that insofar as the interests of the policyholder were to be protected, a state law authorizing the Director of Insurance to approve a merger of two insurance companies, is “business of insurance.” If the merger of two insurance companies can be found to affect the interests of the policyholder, then few state laws remain which could not be considered “business of insurance.”

It would seem, therefore, that the Court’s standard for the determination whether a state regulation pertains to the “business of insurance” will create jurisdictional uncertainty. This difficulty results from an attempt to rationalize the pattern of federal-state regulation of insurance realistically explained only by historical sequence. The states have been left certain aspects of financial control and investment, and not others, because the states, long before the enactment of McCarran, had evolved a sphere of administrative regulation which Congress was reluctant to disturb. Consequently, a proper delineation of the phrase “business of insurance” lies in a haphazard sequence of historical circumstance. Absent a restructuring of federal-state jurisdiction in the field of insurance, the courts are left to explore this source for an enlightened application of the McCarran Act.

WILLARD H. KRASNOW

³⁷ *Id.* at 81.

³⁸ *Id.* at 80.

³⁹ “Statutes aimed at protecting or regulating this relationship, directly or indirectly, are laws regulating the ‘business of insurance.’” 393 U.S. at 460.