Irreconcilable Differences: Florida=s Countersignature Laws, GLB and the Constitution

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Florida=s countersignature laws were recently subjected to constitutional scrutiny and failed. The insurance industry with business interests in Florida is floundering to determine how to proceed in the wake of *Council of Insurance Agents + Brokers v. Tom Gallagher*[i]. There the Council of Insurance Agents, perhaps discontented with ongoing enforcement of countersignature laws in some states even after the enactment of the Gramm-Leach-Bliley Act,[ii] (GLB), brought suit against the state seeking a declaration that Florida=s countersignature laws violated at least two provisions of the federal Constitution. Florida=s various agent associations, though directly financially interested in the outcome of the case, did not seek to participate directly within the litigation. To those associations= dismay, and notwithstanding the contrary sentiment expressed by Congress within GLB finding that countersignature requirements imposed on nonresident producers do not limit that producer=s activities based upon his place of residence[iii], United States District Court Judge Robert L. Hinkle struck Florida=s countersignature law as discriminatory against nonresident producers[iv]. Thus, the statutory protection for Florida=s resident agents, entitling them to participate in, and perhaps more importantly, be paid commission on, policies placed by nonresident producers, is abolished, at least for the time being.

Another Quick Review of GLB

Enacted in November of 1999, GLB is the now well-known law responsible for the spilling of substantial ink on explanation and compliance with the law=s privacy protections. Anyone visiting a physician or local pharmacy in recent months has been stained with some of the ink spilled on the new HIPAA forms. Perhaps less, but certainly enough has been written on the other primary component of GLB: the Anationalization@ of insurance producer[v] licensing laws. Before GLB, each of the States enacted its own insurance producer licensing laws, some stricter than others. Subtitle C of GLB, however, sought to preempt certain producer licensing laws of the various states, unless the National Association of Insurance Commissioners (NAIC) determined that a majority of the states achieved uniformity or reciprocity in producer licensing by November 12, 2002.

Had that majority of states failed to achieve the necessary uniformity and reciprocity by the stated deadline, the states would have been forced to surrender certain regulatory authority over producer licensing to the National Association of Registered Agents and Brokers (NARAB), to be supervised by and under the oversight of the NAIC. NARAB=s stated purpose was to Aprovide a mechanism through which uniform licensing, appointment, continuing education, and other insurance producer sales qualification requirements and conditions can be adopted and applied on a multi-state basis, while preserving the rights of states . . . to prescribe and enforce laws and regulations with regard to insurance-related consumer protection and unfair trade practices.@[vi] The NAIC adopted the Producer Licensing Model Act (Model Act) which could be utilized by states electing to implement the uniformity and reciprocity provisions of GLB. States were not required to enact the Model Act *verbatim* and the states were not precluded from satisfying the uniformity or reciprocity requirements by other means.

In short, the uniformity requirements of GLB were satisfied when a majority of states:

* Established uniform standards relating to the integrity, personal qualifications, education training, and experience of insurance producers;

* Established uniform continuing education requirements;

* Established uniform ethics course requirements; and

* Did not impose regulations upon nonresident licensed producers limiting activities based upon the producer=s place of residence or business.

The reciprocity requirements likewise were satisfied when a majority of states:

* Permitted producers licensed in their home state to obtain licenses in other states to sell insurance to the same extent as permitted in their home states so long as the producer=s home state issued licenses on a reciprocal basis;

* Accepted satisfaction of the continuing education requirements fulfilled in a producer=s home state, so long as the producer=s home state accepted continuing education requirements fulfilled on a reciprocal basis;

* Did not impose regulations upon nonresident licensed producers limiting activities based upon the producer=s place of residence or business.

Currently, 48 states have met the licensing uniformity requirements, which number includes FloridaBthus deemed complaint with GLB. Forty-one states have met the reciprocity requirements, which number does not include Florida. Due to compliance by the majority of states, the creation of NARAB was avoided.

Florida=s Response

Like many of the most populous states, Florida was not quickest to respond to GLB. Florida=s policy makers were presented with their options[vii]:

(1) Take no action, thus leaving the existing regulatory scheme in place. Some in Florida boasted that Florida=s regulatory scheme was stronger than the Model Act, negating the sense in adopting the Model Act or revising Florida=s laws to mirror it.

(2) Adopt the Model Act Only. Adoption of the Model Act in its entirety would have replaced all existing relevant laws.

(3) Enact a hybrid of the Model Act and Florida=s existing law. GLB provided a Aconsumer protection@ savings clause which permitted states to retain and enforce certain regulatory requirements regarding insurance-related consumer protection.[viii] Inasmuch, Florida could have adopted the Model Act and, simultaneously, retain certain of its regulatory requirements pursuant to the savings clause.

(4) Enact uniformity or reciprocity legislation which was not based upon the Model Act.

The likelihood of obtaining the NAIC=s blessing of compliance was considered by the policymakers for each of the options.

Ultimately, Florida took the fourth approach and expressed its intent to Aachieve uniformity or reciprocity, while preserving applicable consumer protection laws@ in 2002 with the enactment of Committee Substitute for House Bill 1841[ix] which amended several relevant statutes while specifically identifying other existing laws as Aconsumer protection@ laws. One such category of laws specifically identified was Florida=s countersignature laws.[x] Then, in 2003, Florida further amended its producer licensing provisions to conform to the Model Act in several respects with the enactment of Committee Substitute for Senate Bill 2364[xi].

Florida=s Countersignature Laws

Recall the discussion above regarding GLB=s requirements that states refrain from imposing regulations upon nonresident licensed producers which would limit or condition their activities on the basis of their places of residence.[xii] However,

pursuant to the express terms of GLB, countersignature requirements for nonresident producers are not Adeemed to have the effect of limiting or conditioning a producer=s activities because of its residence or place of operations.@[xiii] So, states are expressly permitted to impose or retain countersignature requirements on nonresident producers and still satisfy the uniformity and reciprocity requirements of GLB. Florida=s countersignature laws provide that when property or casualty insurance is placed for any Florida risk, an agent who is Aresident of this state@ must participate in the placement of and countersign the policy and be paid at least a specified share of any commission for the placement of the coverage. GLB=s embrace of the states= countersignature requirements is contrasted with the recent decision in *Council*[xiv].

Council of Insurance Agents & Brokers v. Tom Gallagher

The Honorable Robert L. Hinkle, United States District Judge on bench in the Tallahassee Division of the United States District Court for the Northern District of Florida, on September 30, 2003, entered Judgment in favor of Plaintiff based upon his scathing Order Granting Summary Judgment for Plaintiff which declared Sections 624.425, 626.741 and 626.927, Florida Statutes, Florida=s countersignature laws, unconstitutional.

The Plaintiff, Council of Insurance Agents + Brokers (Council), presented a Aconstitutional challenge to the State of Florida=s disparate treatment of insurance agents and brokers who do not reside in the State@ claiming that the Atreatment is unconstitutional because it provides local insurance agents and brokers with an unfair competitive advantage over non-resident insurance agents and brokers operating in Florida.@[xv] The Council represents 300 of the Anation=s largest commercial property/casualty insurance agencies and brokerage firms, operating in 1200 locations . . . [which] place $80 billion in insurance premiums, . . . [representing] three-quarters of the commercial marketplace.@[xvi] Council represented within its Complaint that Committee Substitute for House Bill 1841, the bill noted above enacted for the purpose of bringing several provisions of Florida law into compliance with GLB, Areaffirmed the continued applicability of Florida=s countersignature laws.@[xvii] And, certainly such reaffirmance is expected given GLB=s express ratification of the countersignature concept despite the language of the law which *seems* to contradict such ratification by forbidding treatment based upon residency. Interestingly, Council did not bring the GLB language sanctioning the imposition of nonresident countersignature requirements to the court=s attention.

Instead, Council brought three causes of action: (1) violation of the Commerce Clause of the United States Constitution; (2) violation of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution; and (3) violation of the Privileges and Immunities Clause of the United States Constitution.[xviii] The Commissioner of Insurance answered Council=s Complaint[xix] and shortly thereafter Motions for Summary Judgment were filed by both Plaintiff[xx] and Defendant[xxi].

Within Defendant=s argument in support of his Motion for Summary Judgment, the Commissioner advanced many arguments in favor of Florida=s countersignature laws including that they were born of a public purpose, that they have been previously scrutinized and upheld by various courts and that they are intended to and do protect the insurance buying public[xxii]. Yet, the Commissioner did not employ any analysis of GLB and its express acknowledgment of the validity of countersignature. In response to the Commissioner=s arguments, Council urged that the laws at issue rest upon the illegitimate purpose of economic favoritism.[xxiii] Council acknowledged that fifty years ago, the State=s interest in Aassuring the presence of local agents to serve the needs of the policyholders who had previously encountered difficulties in dealing with insurance companies headquartered out of state@ may have been salient given the localized nature of all business, including the business of insurance, at that time.[xxiv] However, Council noted that only four states, including Florida, continue to maintain countersignature requirements and AFlorida alone completely precludes nonresident agents and brokers from engaging in some insurance-related activities in which resident licensees are entitled to engage.@[xxv] Council, while not contrasting the laws at issue with the prohibitions set out in GLB, did note that one of the Commissioner=s own exhibits, a 1988 Academic Task Force report identifying alleged benefits of the countersignature requirement, indicated that Athe countersignature requirement results in different treatment of possibly identical policies, simply because one originates in another state.@[xxvi] It is likely that the comparisons were not made due to GLB=s express sanction of countersignature laws.

The court, after hearing argument of counsel for both parties and considering reams of written memoranda, found the Commissioner=s defense of the countersignature laws wholly without merit and struck the laws Ato the extent that they

deny to Florida licensed nonresident insurance agents the same rights and privileges that they afford to Florida licensed resident agents.@[xxvii] Judge Hinkle, within his 24 page Order Granting Summary Judgment for Plaintiff, wrote:

> This is one nation with one economy. Each individual state retains its own sovereignty and its own ability to govern within its borders. A state thus may require that persons seeking to engage in any particular form of . . . economic activity**B**acting as an insurance agent, for example**B**demonstrate their competence and meet appropriate prerequisites to licensure. But no state may build a fence at the border to keep out residents of other states or to keep them from competing for business within the state. Thus nonresidents who meet the same standards that a state imposes on its own residents ordinarily may not be barred from plying their trade within the state.

The court analogized the situation to that of lawyers barred in a state, but residing in another. Citing *Supreme Court of New Hampshire v. Piper*[xxviii] the court identified the clear teaching of the case that **A**the state cannot ordinarily condition a professional license on residency within the state.@[xxix] Judge Hinkle admonished:

> The . . . analogy between insurance agents and attorney=s is both apt and fatal to the Commissioner in this case. The analogy is apt because practicing law, like placing insurance, is a proper subject for state regulation; indeed, both are areas in which a state properly can and clearly should require an appropriate showing of relevant expertise. The analogy is fatal because the state cannot require an insurance agent who makes the appropriate showing of relevant expertise to be a *resident* of the state as a prerequisite to licensure, just as a state cannot require residency for admission to the state bar.[xxx]

The court noted that the Commissioner seemingly embraced the foregoing analysis at oral argument and denied that the statutes at issue draw a distinction between Florida resident and nonresident agents. But, the court said, **A**. . . under the statutes at issue, . . . nonresidents *do not* have the same rights and privileges as resident agents.@[xxxi] And certainly, there is no dispute that pursuant to the relevant laws, nonresident agents cannot **A**solicit, negotiate, or effect insurance contracts unless accompanied by resident agents and they cannot retain their entire commissions.@[xxxii]

What is curious about the outcome of the case is the inability to reconcile it with the express sanction of countersignature requirements by Congress in its enactment of GLB. While the court=s decision is precisely in line with the *intention* of GLB-- to level the regulatory playing field for insurance producers -- it ignores GLB=s specific protection of countersignature laws as not **A**deemed to have the effect of limiting or conditioning a producer=s activities because of its residence or place of operations . . ..@[xxxiii] Indeed, the court=s ruling finds directly the opposite: that Florida-licensed agents who live outside of Florida are denied the same rights and privileges afforded to Florida-licensed agents who reside within the state.[xxxiv]

Council is advancing the same cause in Nevada within *Council of Insurance Agents and Brokers v. Alice A. Molasky-Arman*.[xxxv] There it brought a three-count Complaint for Declaratory and Injunctive Relief. Both Council and the Insurance Commissioner of Nevada mo ved for summary judgment. The Insurance Commissioner claimed that the state=s countersignature laws were rationally related to a legitimate interest in protecting Nevada consumers and that Council could not prove that the law burdened a fundamental right of the nonresident agents or brokers.[xxxvi] While Council claimed that the additional requirements imposed on nonresident producers offend the Constitution and burden a fundamental right because it treats two groups of similarly situated persons differently for which no substantial reason or rational basis exists.[xxxvii] Noteworthy in its absence is *any* reference to GLB within the pleadings and arguments. The court heard argument on the competing motions for summary judgment and denied both.[xxxviii] Council has moved to amend its complaint and asked the Court to reconsider its denial of Council=s Cross Motion for Summary Judgment; the Insurance Commissioner has opposed its motion. The Court has not yet reached the merits of the case. Not surprisingly however, Council filed as supplemental authority, Judge Hinkle=s Order Granting Summary Judgment in Favor of Plaintiff.[xxxix]

As of the date of this writing, the time for filing an appeal of the Judgment entered against the Commissioner has passed. The Commissioner has filed a motion seeking relief from that portion of the Judgment directed at the surplus lines industry, to specifically delay the effective date of the Judgment until July of 2004. The Commissioner did not, however, address his motion to that portion of the Judgment regarding the countersignature laws discussed herein.

Stay tuned . . ..

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1. United States District Court, Northern District of Florida, Case No.: 4:02cv208-RH.

2. Gramm-Leach-Bliley Act of Nov. 12, 1999, Pub.L.No. 106-102, 113 Stat. 1338 (codified as amended in scattered sections of 12 U.S.C. and 15 U.S.C.).

3. Pub.L.No. 106-102, s. 321.

4. *Council of Insurance Agents + Brokers v. Tom Gallagher*, United States District Court, Northern District of Florida, Case No.: 4:02cv208RH, Order Granting Summary Judgment for Plaintiff at page 23.

5. An Ainsurance producer@ is broadly defined by GLB as any insurance agent, broker, or other person who Asolicits, negotiates, effects, procures, delivers, renews, continues or binds policies of insurance.@ Pub.L.No. 106-102, s. 336(3).

6. Pub.L.No. 106-102, s. 323.

7. *Licensure of Insurance Producers: The Gramm-Leach-Bliley Act, the NAIC Producer Licensing Model Act, and Florida Law*, Staff of the Florida House of Representatives Committee on Insurance, October 2001.

8. Pub.L.No. 106-102, s. 323.

9. Chapter 2002-206, Laws of Florida.

10. Policy makers in Florida were directed, AWhile Florida requires the nonresident applicant to be licensed and in good standing in their home State, . . . Florida also requires . . . them to be accompanied by a resident general lines agent to solicit, negotiate or effect insurance contracts in Florida. [I]f these qualify as Aconsumer protection@ laws under the savings provision of the Gramm-Leach-Bliley Act, then Florida . . . might be able to maintain these requirements and still achieve uniformity or reciprocity.@ *Licensure of Insurance Producers: The Gramm-Leach-Bliley Act, the NAIC Producer Licensing Model Act, and Florida Law*, Staff of the Florida House of Representatives Committee on Insurance, October 2001.

11. Chapter 2003-267, Laws of Florida.

12. Pub.L.No. 106-102, s. 321.

13. Pub.L.No. 106-102, s. 321.

14. United States District Court, Northern District of Florida, Case No.: 4:02cv208-RH.

15. *Council*, Complaint at page 1, paragraph 1.

16. *Id.* at paragraph 8.

17. *Id*. at paragraph 19.

18. *Id*. at Counts I, II and III.

19. *Council*, Answer.

20. *Council*, Plaintiff=s Cross-Motion for Summary Judgment.

21. *Council*, Defendant=s Motion to Dismiss or, Alternatively, Motion for Summary Judgment.

22. *Council*, Defendant=s Addendum to His Motion to Dismiss or, Alternatively, Motion for Summary Judgment.

23. *Council*, Plaintiff=s Brief in Opposition to Defendant=s Motion to Dismiss or, Alternatively, Motion for Summary Judgment and in Support of Plaintiff=s Cross-Motion for Summary Judgment.

24. *Id*.

25. *Id*.

26. *Id*.

27. *Council*, Order Granting Summary Judgment for Plaintiff at page 23.

28. 470 U.S. 274 (1985).

29. *Council*, Order Granting Summary Judgment for Plaintiff at page 18.

30. *Id.* at pages 18-19.

31. *Id*. at page 19.

32. Sections 624.425(1) & 626.741(5)(a), Florida Statutes.

33. Pub.L.No. 106-102, s. 321.

34. *Council*, Order Granting Summary Judgment for Plaintiff at page 22.

35. United States District Court, District of Nevada, Case No. CV-S-02-0813.

36. *Council of Insurance Agents and Brokers v. Alice A. Molasky-Arman*, United States District Court, District of Nevada, Case No.: CV-S-02-0813, Defendant=s Motion for Summary Judgment.

37. *Id*., Plaintiff=s Cross Motion for Summary Judgment.

38. *Id*., Minutes of the Court dated April 29, 2003.

39. *Id*., Plaintiff=s Notice of Supplemental Authority in Support of Its Motion for Summary Judgment.