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Nat'l Ass'n of Mut. Ins. Co. v. State of Nev. Dep't of Bus. & Indus., Div. of Ins., 139 Nev. Adv. Op. 3 (Feb. 16, 2023)

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SUPREME COURT AFFIRMS REGULATION LIMITING USE OF CREDIT RATING
CHANGES THAT OCCURRED DURING COVID-19.

Summary

The Nevada Division of Insurance's (the Division) enabling statutes provide it with authority to promulgate regulations protecting against unfair use of consumer credit information. Its new regulation, R087-20, imposes only limitations and not a blanket ban on the use of consumer credit information and does not interfere with existing statutory provisions. The Legislature has provided adequate interpretation and guidance standards to the Division to constitute a constitutional delegation of authority such that the Division's approved promulgation of R087-20 does not mean its enabling statutes are unconstitutional delegations of authority.

Background

The Division adopted regulation R087-20 prohibiting insurers from adversely using consumer credit information changes that occurred during the COVID-19 emergency declaration, plus two years, having determined that it was unfair for insurers to use credit score declines against insureds who lost their jobs due to COVID-19. The National Association of Mutual Insurance Companies (NAMIC) sought to invalidate R087-20, seeking a declaratory judgment that (1) the Division exceeded its statutory authority; (2) if not, then the Division's enabling statutes are an unconstitutional delegation of power; and (3) R087-20 is unconstitutional under both federal and state constitutions. The district court held that the Division had the authority to enact R087-20, but not retroactively. The district court also held that the Division's enabling

¹ By Colin Meenk.

statutes are not unconstitutional, and that R087-20 does not violate federal and state constitutions.

Discussion

NAMIC argued that (1) the Division exceeded its statutory authority in passing R087-20, (2) R087-20 conflicts with existing statutory provisions, and (3) R087-20 otherwise violates the United States and Nevada Constitutions, or at least their Contracts Clauses.

The State Supreme Court first confirmed that NAMIC has standing to bring these challenges by adopting the test established by *Hunt v. Washington State Apple Advertising Commission*.² To challenge a regulation in court, a plaintiff must show that the regulation threatens to impair the rights their rights.³ But under *Hunt*, an association has standing to sue on behalf of its members if it can establish that (a) its members would have standing to sue, (b) it's seeking to protect interests relevant to its purpose, and (c) individual members need not participate in the suit.⁴ NAMIC satisfied the first prong by providing a list of members that could reasonably be affected by R087-20. NAMIC satisfied the second prong by being an advocate for its members and their interests that would be adversely affected by R087-20. NAMIC satisfied the third prong because declaratory relief actions like what it seeks are best settled in a group context and do not require proof of impact to each member.

The Court addressed NAMIC's first argument by examining the plain meaning of the text of the Division's enabling statutes NRS 679B.130(1)(a), NRS 679B.150(1)(b), and NRS 686A.680(1)(a). NRS 679B.130(1)(a) grants the Division general authority to promulgate "reasonable regulations."⁵ NRS 679B.150(1)(b) allows promulgation of standards to protect

² *Hunt v. Washington State Apple Advert. Comm'n*, 432 U.S. 333, 343, 97 S. Ct. 2434, 2441 (1977).

³ NEV. REV. STAT. 233B.110(1) (2021).

⁴ *Hunt*, 432 U.S. at 343.

⁵ NEV. REV. STAT. 679B.130(1)(a) (2021).

against “unjust, unfair, inequitable, unfairly discriminatory, misleading, [and] deceptive” policies.⁶ NRS 686A.680(1)(a) restricts calculation of credit reports from factors that would “lead to unfair or invidious discrimination.”⁷ NAMIC argued R087-20 is unrelated to any unfair or invidious discriminatory insurance practices, unfair discrimination in the Nevada Insurance Code is limited to protected class-based discrimination, and that even if COVID-19 created two distinct classes, insureds with recent negative credit events are not similarly situated to others whose credit remained stagnant or improved since the emergency declaration. However, the State Supreme Court acknowledged that the Division adopted R087-20 pursuant to both NRS 686A.680(1)(a) and NRS 679B.150, the latter making no mention of protected class-based discrimination and thereby allowing the Division to regulate unfair discrimination generally. Furthermore, invidious, class-based discrimination under 686A.680(1)(a) is additive to unfair discrimination, not restrictive as NAMIC interpreted it. The Court found the Division did not exceed its statutory authority.

The Court also found R087-20 does not conflict with existing statutory provisions. NAMIC argued that R087-20 conflicts with NRS 686A.600-.730 because the regulation bans the use of credit information Chapter 686A otherwise allows. However, the Court found that R087-20 does not impose a total ban on use of consumer credit information, only on use that is unfairly discriminatory, nor does it redefine any terms in Chapter 686A.

Finally, the Court rejected NAMIC’s federal and state constitutional challenges. NAMIC argued that a reading of the Division’s enabling statutes allowing the Division to pass R087-20 would make those statutes unconstitutional delegations of power, and even if this delegated authority is proper, R087-20 unconstitutionally interferes with NAMIC members' contracts in

⁶ NEV. REV. STAT. 679B.150(1)(b) (2021).

⁷ NEV. REV. STAT. NRS 686A.680(1)(a) (2021).

violation of the United States and Nevada Constitutions' Contracts Clauses. The Court upholds delegations where the Legislature has established “suitable standards” to govern the manner and circumstances under which the agencies can exercise their delegated authority,⁸ and will avoid interpreting statutes to render them impermissible delegations of legislative authority.⁹ Here, the Court found sufficient Legislative standards in the listed limitations of 686A.680(1) that guide the Division in enforcing the statutes governing the use of consumer credit. The Legislature also provided standards for differential treatment in NRS 686A.130(5). NAMIC failed to provide any proof that R087-20 impaired any of its members’ contracts, and without this basis to determine actual impairment severity, the Court also rejected NAMIC's Contracts Clause claims.

Conclusion

Hunt allows an association to sue on behalf of its members if it can satisfy three prongs. While NAMIC had standing to sue to invalidate R087-20, the State Supreme Court rejected its arguments that the Division exceeded its statutory authority, that R087-20 conflicts with existing statutory provisions, and that R087-20 violates the United States and Nevada Constitutions. The Court found that (1) the Division’s enabling statutes provided it with adequate authority to promulgate regulations protecting against unfair use of consumer credit information, (2) that R087-20 imposes only limitations and not a blanket ban on use of consumer credit information and therefore does not interfere with existing statutory provisions, and (3) that the Legislature has provided adequate interpretation and guidance standards to the Division to constitute a constitutional delegation of authority such that the Division’s approved promulgation of R087-20 does not mean its enabling statutes are unconstitutional delegations of authority.

⁸ *Sheriff v. Luqman*, 101 Nev. 149, 153, 697 P.2d 107, 110 (1985).

⁹ *See McNeill v. State*, 132 Nev. 551, 556, 375 P.3d 1022, 1025 (2016) (“Because we presume that the Legislature is aware that it may not delegate the power to legislate pursuant to the separation of powers, we presume that it acted in accordance.”).