2-4-1980

Barnes v. District Court, In and For City and County of Denver

NO. 79 SA 579

IN THE

SUPREME COURT

OF THE

STATE OF COLORADO

J. RICHARD BARNES, as Colorado Commissioner of Insurance, THE INSURANCE BOARD OF THE STATE OF COLORADO, KIRK BRADY, JAMES Q. HAMMOND, RONALD T. ANDERSON, DORIS DRURY and of the Insurance Board of the State of Colorado,	)
Petitioners,	)
v.	)
DISTRICT COURT, IN AND FOR THE CITY AND COUNTY OF DENVER and THE HONORABLE RAY JONES, Judge, Second Judicial District, LAWYERS TITLE INSURANCE CORPORATION AND FIDELITY NATIONAL TITLE INSURANCE COMPANY,	)
Respondents.	)

REPLY MEMORANDUM

On January 25, 1980, petitioners moved to strike the unauthorized reply of respondent Lawyers Title Insurance Corporation or alternatively to file a reply memorandum thereto. On January 29, 1980, petitioners received notice that this court granted the above motion allowing petitioners up to and including February 4, 1980, to file their reply memorandum. This memorandum is respectfully submitted in response to the court's order of January 29, 1980.

I.

LACK OF AUTHORIZATION FOR
THE RATE FILING.

Transamerica Title Insurance Company did not authorize the rating bureau to file rate increases on its behalf in 1979.

Respondent, however, states that Transamerica granted the rating bureau written authority to file rates on its behalf in 1971. Apparently respondent takes the position that the written authority granted the bureau in 1971 (under the old statute) remains in effect until revoked (under the new statute). This position is absurd.

It is hornbook law that the repeal of a statute destroys the effectiveness of the repealed act in futuro and divests the right to proceed under the statute. C. D. Sands, Sutherland Statutory Construction, section 23.33 (4th ed. 1972).

Even without considering rules of statutory construction, however, the vast difference between the two statutes is obvious. House bill 1510 established a whole new relationship between insurors and the rating bureau. Under the old statute, an insuror who was a member of and subscriber to the rating bureau had no choice as to whether to grant the bureau written authorization to file rates on its behalf. The old statute made adherence to the bureau's filing mandatory. Under the new statute, the insuror who is a member of or subscriber to the rating bureau has a choice as to whether it will authorize the bureau to file rates for it. Under the old system, the insuror could not revoke or modify the bureau's filing authority. Under the new system, the insuror can revoke or modify the bureau's rate filing authority at any time.

Yet, respondent asks this court to resurrect the old statute so that the rate filing authorization granted the bureau by Transamerica can be continued. Respondent may bemoan it, but the fact remains that the old statute is dead. With

House bill 1510, the legislature instituted a new game plan with new rules. Authority granted the bureau under the vastly different provisions of the repealed statute does not extend to the new game plan. To find otherwise would be to negate all the provisions of House bill 1510 which allow insurors to choose whether they wish to adhere to the bureau's rate.

Further, House bill 1510 requires two written authorizations before the bureau's rates can be filed on behalf of an insuror. As argued, one authorization must be given by an insuror to the bureau. A second authorization must be given to the insurance commissioner pursuant to C.R.S. 1973, 10-4-405, as amended:

> (4) An insurer may satisfy its obligation to make such filings by becoming a member of, or a subscriber to, a licensed rating organization which makes such filings and by authorizing the commissioner to accept such filings in its behalf; but nothing contained in this title shall be construed as requiring any insurer to become a member of, or a subcriber to, any rating organization. (emphasis added.)

This latter authorization, too, was lacking. Transamerica never authorized Commissioner Barnes to accept the bureau's filing in its behalf.

II.

PRICE FIXING VERSUS PRICE COMPETITION.

Respondent's arguments concerning price fixing versus price competition deserve only brief reply.

Under House bill 1510, title insurors may independently or jointly authorize the rating bureau to file rates on their behalf and may further authorize the commissioner to accept such rates as their statutory filings. The new statute allows this legalized price fixing. The key word here is authorize. Any attempt, direct or indirect, to make an insuror adhere to the bureau's rates in the absence of authority or after the

revocation of such authority is prohibited by statute. C.R.S. 1973, 10-4-415(1)(g), (i), (j), and (k).

III.

ADHERENCE TO STATUTORY PROCEDURES.

Contrary to respondent's allegations, petitioners have not misrepresented the district court's ruling. That court issued a series of conclusions of law relating to Commissioner Barnes' lack of jurisdiction, authortiy and power to issue the "Order" contained in his notice of hearing. (See court's Conclusions of Law (1)(a), (b) and (c) and (2).) These conclusions of the district court were incorrect in every particular.

In fact, the procedures followed by Commissioner Barnes were in strict accordance with the statute. A summary of the steps taken by the commissioner along with the statutory authority for each step shows this fact conclusively. There are two possible beginning points for the summary: either the bureau had authority under House bill 1510 to file rate increases for Transamerica Title Insurance Company or it did not.

Situation 1.

The bureau did not have authority to file rate increases on behalf of Transamerica because Transamerica had not given it such authority in writing subsequent to the passage of House bill 1510 or because Transamerica did not authorize Commissioner Barnes to accept the bureau's filing on its behalf. In this case, the district court's findings and conclusions are, of course, a nullity.

The December 12, 1979, filing of Transamerica, then, was properly made pursuant to C.R.S. 1973, 10-4-405. Thereafter, a public hearing was properly called pursuant to C.R.S. 1973, 10-4-406 and 407, as amended. Petitioners contend that the case at bar fits within situation 1 exactly.

Situation 2.

For purposes of this hypothetical situation, assume that Transamerica did authorize the bureau to file a rate increase on its behalf subsequent to the passage of House bill 1510 and assume that Transamerica authorized Commissioner Barnes to accept the filing on its behalf. Further, for purposes of this hypothetical situation, assume that thereafter Transamerica revoked this authority and filed its own rate increase which was above the rates currently in effect but below the bureau's filing.[1]

Now, plug in the facts from the case at bar. The bureau filing, then, is to go into effect on January 1, 1980, pursuant to C.R.S. 1973, 10-4-406(5)(b), as amended. On December 12, 1979, Transamerica revokes the bureau's authority pursuant to C.R.S. 1973, 10-4-415(1)(j). This revocation is effective immediately. On that same day, Transamerica files new increased rates pursuant to C.R.S. 1973, 10-4-405.[2] This new filing is placed on public file. Before the rate filing is deemed approved pursuant to C.R.S. 1973, 10-4-406(2), as amended, Commissioner Barnes issues a notice of hearing pursuant to C.R.S. 1973, 10-4-407. A copy of such notice is served on Transamerica. Pending the outcome of the hearing, the commissioner suspends the filed rate increases pursuant to C.R.S. 1973, 10-4-406(2):

> (2) ... the filing shall be deemed approved as of 12:01 a.m. on such sixteenth day, unless within such fifteen-day period the commissioner concludes it to be in the public interest to hold a public hearing to determine whether the filing meets the requirements of this part 4 and gives notice of such hearing to the insurer or rating organization that made the filing, in which case the effectiveness of the filing shall be subject to the further order of the commissioner. (emphasis added.)

There can be no doubt that pursuant to the above statute the commissioner has authority to suspend the rate increase requested

under the new filing. Once that fact is established, the power to keep the present rates in effect pending the outcome of a hearing follows automatically. The statute sets up a "file and suspend" system analogous to that of the Public Utilities Commission (see C.R.S. 1973, 40-6-111). The purpose of such a "file and suspend" system was succinctly stated by the court in Chenango and Unadilla Tel. v. Public Service Commission, 45 AD2d 409, 357 N.Y.S.2d 937 (1974). In that case, the court considered a file and suspend system analogous to that at issue here and stated "in our opinion the suspension period was designed more as a vehicle to maintain the status quo pending examination of a(n) ... increase in toto." (emphasis added.)

Under either fact situation, the action taken by Commissioner Barnes was within his jurisdiction, within his authority and power, and was valid.

CONCLUSION

The notice of hearing issued by Commissioner Barnes on December 27, 1979, was absolutely within his jurisdiction and statutory power. The hearings called as a result of that notice have been held. The matter is now at issue before Commissioner Barnes and a rate decision and order is imminent.

The attempted exercise of jurisdiction by the district court was clearly improper. For the reasons stated in its pleadings, petitioners request that the rule be made absolute.

FOOTNOTES

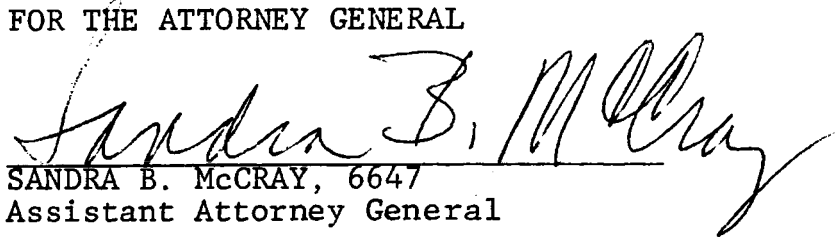
[1]In its December 12 filing, Transamerica requested rates identical to those on file in the Division of Insurance. The rate increase filing assumption in Situation 2 is made to untangle the knots created by Respondent in its characterization of these identical rates. In the District Court, Respondent used the fact of identical rates to create the impression that when the Commissioner

directed Transamerica to maintain its current rates, he was really directing the use of new rates. The Commissioner's direction was, in truth, one of maintaining the status quo.

This latter fact stands out more clearly if we assume the new rate filing was an increase. The result under the statute must be the same whether the new rates filed were higher than, equal to or lower than those in effect at the time of the filing.

[2]The December 12 filing represents an abundance of caution on the part of Transamerica since it is likely that Transamerica was not required to make this new filing. Under the statutory scheme of both the old and the new statutes, the "old rate" continues in effect for an unlimited period of time. Thus, it appears that House bill 1510 did not affect the validity of the old rates.

FOR THE ATTORNEY GENERAL



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CERTIFICATE OF SERVICE

I hereby certify that I placed a true and correct copy of the foregoing REPLY MEMORANDUM in the United States mail, postage prepaid, on the 4 day of February, 1980, addressed as follows:

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