Opinion No. 73-33

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BY: OPINION OF DAVID L. NORVELL, Attorney General

TO: The Honorable Turner W. Branch State Representative 4308 Avenida La Resolana, N.E. Albuquerque, New Mexico

QUESTIONS

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Is the Automobile Injury Reparations Act, Senate Bill 220, as amended, which was passed by the 31st Legislature, 1st Session, constitutional?

CONCLUSION

No.

OPINION

*{*64}* **ANALYSIS**

Senate Bill 220, as amended, the Automobile Injury Reparations Act, more commonly known as the "no fault" automobile insurance law, was passed by the 31st Legislature in the closing hours of its first session, but as this is written it has not been acted upon by the Governor. Therefore, it will be referred to in this opinion as SB 220.

At last count, 15 other states, Arkansas, Connecticut, Delaware, Florida, Illinois, Maryland, Massachusetts, Michigan, Minnesota, New Jersey, New York, Oregon, South Dakota, Utah and Virginia, as well as Puerto Rico, had enacted so-called "no fault" automobile insurance laws, but they differ widely in content. The constitutionality of only two of these laws (those of Massachusetts and Illinois) has been determined by the courts, and the answers were exactly opposite because the laws were so different. The most significant difference was that one was *{*65}* compulsory and one was not. Also, one applied to all motor vehicles and one did not.

In **Pinnick v. Cleary,** 271 N.E.2d 592, 42 A.L.R.3d 194 (Mass. 1971), the compulsory Massachusetts statute, which includes all motor vehicles, was upheld. In **Grace v. Howlett,** 51 Ill. 478, 283 N.E.2d 474 (1972), the non-compulsory Illinois statute, which covered only private passenger automobiles, was held unconstitutional. Since New Mexico's SB 220 is strikingly similar to the Illinois statute, we find **Grace v. Howlett** to be highly persuasive authority.

The Illinois court found that the classifications of persons covered by the act were so unreasonable that they constituted special legislation and thus violated a constitutional provision almost identical to Art. IV, § 24, New Mexico Constitution, which, after prohibiting the enactment of special laws in many enumerated instances, concludes:

"In every other case where a general law can be made applicable, no special law shall be enacted."

The Illinois court decided that a general law could be written to eliminate the many inequities and unreasonable classifications it found in the law, particularly by making it compulsory and applicable to all motor vehicles. It found it unnecessary to decide whether the unreasonable classifications violated the due process and equal protection clauses of the state and federal constitutions, which we think are in themselves cogent reasons for declaring SB 220 invalid.

We summarize: The gaps in SB 220's coverage make it a matter of chance whether or not some injured persons, particularly passengers and pedestrians, will receive its benefits. The "threshhold" provisions of § 8 apply to uninsured as well as insured persons, hence an uninsured person would find himself equally prohibited from suing for general damages until or unless his special damages (medical expenses) exceeded $ 1,000. Whether an injured person could reach this threshhold would depend to some extent on geography and his pocketbook, since medical expenses vary from one part of the state to another and it is well known that wealthy people hire more expensive doctors and utilize more expensive hospital facilities than poor people. The wealthy are penalized in another way, however, for if they buy any automobile liability insurance at all they have to buy the "no fault" minimum package of "first party" insurance, regardless of their collateral sources of recovery. Workmen's compensation and Social Security benefits are deducted from benefits payable under "no fault" insurance, but Railroad Retirement benefits are not. It is the opinion of this office that the classifications inherent in the bill not only make it special legislation such as is proscribed by Art. IV, § 24, New Mexico Constitution, but deny due process and equal protection of the law in contravention of the 14th Amendment of the federal constitution and Art. II, § 18, New Mexico Constitution.

Section 8 is the heart of SB 220. It contains the so-called "threshhold" provisions which limit liability for general damages (for pain and suffering) to those cases in which the special damages (for medical expenses) pass a threshhold of $ 1,000, except in cases of death or very serious injuries (loss of body member, sight or hearing; permanent and serious disfigurement; permanent loss of 50% or more of a bodily function; or permanent and continuous inability to perform essential duties of one's occupation).

This exemption from "threshhold" liability extends to

"[e]very owner, registrant, operator or occupant of a private passenger automobile and every person or organization legally responsible for his acts or omissions [including

insurance companies] . . . because of accidental bodily injury resulting from accidents occurring within this state . . ."

Thus the exemption is extended to uninsured owners, registrants, operators or occupants of automobiles involved in accidents, yet there is no compulsory insurance provision. "Private passenger automobile," as defined by § 2, excludes vehicles "not principally used in an occupation, profession or business other than farming or ranching" and those owned and operated by the United States government, the State of New Mexico, or any political subdivision of the state. It also excludes motorcycles.

*{*66}* Under § 4, every motor vehicle liability insurance policy must contain minimum "first party" personal injury protection benefits, which, in brief, are medical expenses of $ 5,000 per person incurred within one year; work loss benefits of $ 500 per month per person per month for up to one year, or $ 6,000; and survivor's loss benefits of $ 500 per month for up to one year, or $ 6,000, for death of any one person.

"First party" coverage includes a pedestrian struck by the insured automobile. But a pedestrian who is run down by an uninsured vehicle, or any other vehicle not classified as a private passenger automobile, may recover nothing or may at least be denied the speedy payment of "economic loss" benefits which is the prime purpose of the act, according to § 3. Yet both pedestrians are under the "threshhold" limitations of § 8.

As pointed out by the trial court in its memorandum opinion in **Grace v. Howlett,** which appears at [1972] Ins. L.J. 59 (Jan. 1972), and 8 Trial 10 (Jan./Feb., 1972),

"Other and equally arbitrary classifications . . . are manifest in the statutory scheme here in question. Persons injured in or by taxicabs, buses, trucks, other commercially operated vehicles and rental cars are inexplicably excluded from . . . first party benefit coverage, unless they happen to belong to a household owning an insured automobile. Also, persons involved in the very **same** accident may be treated differently; thus, a pedestrian belonging to a household that owns an insured automobile would receive the benefits . . . while a person riding in the car that struck the pedestrian would not receive such benefits if neither he nor the driver was covered by insurance . . .

"In sum, the discriminatory and arbitrary classifications inherent in the instant 'no fault' insurance statute multiply, yet none of them can be found to bear any reasonable relationship to the intended purposes of the act."

For a discussion of the foregoing opinion, see note, "Equal Protection: No-Fault And the Poor," 36 Albany Law Review 727 (1972); annotation, "Validity And Construction of 'No-Fault' Automobile Insurance Plans," 42 A.L.R.3d 229, 233. The latter also discusses **Pinnick v. Cleary, supra.**

We turn now to a discussion of the New Mexico cases which bear on the issues of whether the classifications of SB 220 violate Art. IV § 24, New Mexico Constitution. The

following definition of general and special laws has been quoted with approval at least twice by the New Mexico Supreme Court:

"Laws of a general nature are such as relate to a subject of a general nature, and a subject of general nature is one that exists or may exist throughout the state, or which affects the people of the state generally, or in which the people generally have an interest. * * *

"Special laws are those made for individual cases, or for less than a class requiring laws appropriate to its peculiar condition and circumstances."

I Lewis' Southerland, Stat. Const. (2d Ed), Sec. 197; **State v. A.T.&S.F. Ry. Co.,** 20 N.M. 562, 567, 151 P. 305 (1915); **Crosthwait v. White,** 55 N.M. 71, 80, 226 P.2d 477 (1951).

The New Mexico Supreme Court, in construing Art. IV, § 24, has upheld special legislation where it was impossible or virtually impossible to draft general legislation to cover the subject. **Scarborough v. Wooten,** 23 N.M. 616, 170 P. 743 (1918); **State ex rel. Interstate Streams Commission v. Reynolds,** 71 N.M. 389, 378 P.2d 622 (1963). A legislative determination that a general law cannot be made applicable is entitled to great weight and may be controlling in the absence of a palpable abuse of discretion, **Albuquerque Metropolitan Arroyo Flood Control Authority v. Swinburne,** 74 N.M. 487, 394 P.2d 998 (1964), but here there is no such legislative determination.

It is the opinion of this office, as it was of the Illinois Supreme Court in **Grace v. Howlett, supra,** that it is perfectly possible to draft a general law that will cover the subject matter of SB 220 and that it fails to pass the test of Art. IV, § 24. The same unreasonable classifications make it vulnerable to attack under Art. II, § 18.

*{*67}* As the Supreme Court said in **Board of Education v. Tax Commission,** 28 N.M. 221, 210 P. 565 (1922),

"The Legislature is not entitled to exercise an arbitrary power of classification. The power must be exercised within the limits of reason and of a necessity more or less pronounced. No definite rule can be laid down as to when classification is or is not justified. The special circumstances of each case govern the decision. The classification 'must be based upon substantial distinctions.' State v. A.T.&S.F.R. Co., supra; Scarborough v. Wooten."

And in **Gruschus v. Bureau of Revenue,** 74 N.M. 775, 778, 399 P.2d 105 (1965) the Court said,

"Equal protection does not prohibit classification for legislative purposes, **provided that there is a rational and natural basis therefor, that it is based on a substantial difference between those to whom it does and those to whom it does not apply,**

and that it is so framed as to embrace equally all who may be in like circumstances and situations." (Emphasis added)

While the reasonableness of classifications is primarily for the legislature to determine, with the courts being extremely reluctant to substitute their own judgment of reasonableness, **Hutcheson v. Atherton,** 44 N.M. 144, 99 P.2d 462 (1940), it is apparent that SB 220 does not meet the test of **Gruschus, supra.** There are just too many and substantial differences "between those to whom it does and those to whom it does not apply," and it is not "so framed as to embrace equally all who may be in like circumstances and situations." It does not "afford equal protection of the laws" under Art. II, § 18, or the 14th Amendment.

The lack of due process arises from the provisions, previously mentioned, that the "threshhold" of § 8 for suits for general damages applies to uninsured as well as insured persons, so that, for the uninsured, there is no **quid pro quo,** and from the requirement of § 4 that every motor vehicle liability policy contain the "no fault" package, so that a person desiring public liability and property damage insurance cannot get it without taking the "first party" coverage of "no fault," whether he needs it or not. While the Massachusetts Court did not find these arguments persuasive in **Pinnick, supra,** this was partly because the Massachusetts law permits the insured to elect a deductible which will exclude him partially or entirely from the personal injury protection benefits. By contrast, in New Mexico as in Illinois, a person who feels he must have liability insurance in large amounts must nevertheless take the "no fault" package also.

Provisions for mandatory arbitration of disputes between insurers, "with right of appeal to district court," are found in §§ 6(F) and (G)(2). These provisions are so sketchy and vague as to be unenforceable. Several questions suggest themselves: (1) Who appoints the arbitrators? (2) Who compensates the arbitrators? (3) In what district court is appeal venue? (4) What is the time limit for appealing to district court? (5) What is the scope of judicial review; is it a trial de novo, or is it a review of a stenographic record made in the arbitration proceedings, limited to a determination of whether or not the arbitration award is arbitrary and capricious? (6) Is the decision of the district court subject to further appellate review, and, if so, is it to the court of appeals or to the supreme court? The answer to each of these questions might well occupy a page or more of this opinion if thoroughly researched. For present purposes it is deemed sufficient to demonstrate that there are too many questions, the answers to which are nowhere to be found in the statute itself. The bill as originally drafted included a section which would have given the superintendent of insurance power to adopt "rules and regulations necessary in the administration and enforcement of the Automobile Injury Reparations Act," but this was taken out by amendment; otherwise, he might have been able to fill some of these gaps.

In addition to the provision for appeals to the district courts from arbitration awards, it is to be noted that under § 6(G) insurers are subrogated to any right of action the insured has for damages, to the extent of benefits paid by the insurer, and so may bring suit therefor in the courts. Also § 11(D) provides for resort by the insurer to the courts for a discovery order if an injured person has not disclosed facts about his "earnings or about

his *{*68}* history, condition, treatment and dates and costs of such treatment . . ." And of course injured persons may still sue for general damages if they have certain types of injuries or pass the "threshhold" of $ 1,000 in medical expenses as provided by § 8. One of the main reasons for SB 220 is supposed to be to relieve court congestion; yet the possibilities for court action resulting from an automobile accident still are considerable. As a matter of fact, reliable statistics are not available, as they were in **Grace v. Howlett and Pinnick v. Cleary, supra,** to demonstrate the evils of "court clog" which the legislature sought to relieve through "no fault" insurance. By the same token, no such need was demonstrated to the legislature. What statistics are available tend to show that automobile accident cases do not contribute in any significant degree to court congestion in New Mexico, and that in fact no such congestion exists to any degree comparable to more populous states.

In this opinion certain sections of SB 220 have been singled out as being fatally defective, yet the whole bill is so interwoven that one part hardly makes sense without referring to others. In recognition of this fact, the similar Illinois law was made expressly non-severable, so that the whole statute had to stand or fall together. Thus in **Grace v. Howlett, supra,** once the court had found some of the key sections unconstitutional it had no problem in declaring the whole statute invalid. But SB 220 is just as expressly severable, saying in § 17 that, if any provision or application of the act is held unconstitutional,

". . . it shall be conclusively presumed that the legislature would have enacted the remainder of the act without such invalid or unconstitutional provision."

If taken literally, this severability clause would require the courts to enforce any scraps that might be salvaged from the act, regardless of whether they would carry out the legislative purpose. However, the courts never have regarded this as their duty. In **Safeway Stores v. Vigil,** 40 N.M. 190, 57 P.2d 287 (1936), a similar severability provision was held not to be an "inexorable command" but merely an aid to determining legislative intent.

Fortunately, here we have a statement of purpose in the act itself, § 3 of which states that it is intended

". . . to provide a means of promptly and equitably compensating persons for accidental bodily injury arising out of the ownership, operation, maintenance or use of private passenger automobiles as motor vehicles in lieu of liability for damages to the extent provided herein."

Obviously, if § 8 is stricken as unconstitutional the remainder of the act would not carry out this announced purpose, for it is this section which limits liability for general damages. Since portions of §§ 4 and 6 are also defective, and even the definitions contained in § 2 are in effect part of the invalid provisions, it is certain that the legislature would not have enacted SB 220 without these parts. It would be like an automobile without an engine.

For the foregoing reasons, it is the considered opinion of this office that SB 220 is invalid in its entirety. It is with great reluctance that we must reach this conclusion as the Attorney General has consistently spoken out in favor of and supported the "no fault" concept, a position not popular among his colleagues in the bar. Nevertheless, the need for and desirability of such legislation cannot cure the constitutional defects inherent in SB 220, although some of the amendments proposed in the legislature might have cured them. Be that as it may, as these amendments fell, so must the principle of "no fault" fall, at least for now.

It is not necessary to answer other questions which have been raised. However, with regard to certain irregularities in the passage of the bill, reference is made to Opinion of the Attorney General No. 64-40, issued March 25, 1964, regarding the rule that the courts will not look behind the enrolled and engrossed bill to discover such defects. Justice McGhee, speaking for the Court in **Clay v. Denman Drilling Co.,** 58 N.M. 723, 728, 729, 273 P.2d 499 (1954), expressed some distaste for the rule but adhered to it nevertheless, saying that ". . . it is too strongly entrenched in our jurisprudence to be overruled at this late date."

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