Opinion No. 91-10

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OPINION OF: TOM UDALL, Attorney General

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TO: Fabian Chavez, Jr., Superintendent of Insurance, Department of Insurance, Post Office Drawer 1269, Santa Fe, New Mexico 87501

QUESTIONS

1. Whether 1991 N.M. Laws, ch. 135, § 1 (codified as NMSA 1978, § 59A-32-19 (Cum. Supp. 1991)) requires insurers offering private passenger motor vehicle insurance to New Mexico residents to provide a minimum 20% rollback of current insurance premiums for bodily injury liability, property damage liability and collision coverage.

2. Whether there would be any constitutional or other legal problems with the enforceability of a statute requiring such a rollback.

CONCLUSIONS

1. No. Section 59A-32-19 does not require an insurance rate rollback. Rather, § 59A-32-19 requires insurers to provide a minimum 20% insurance premium differential between premiums charged to policyholders who have been involved in an accident during the prior three year period and those who have not.

2. Possibly. Case law from other jurisdictions generally requires fair and reasonable, or nonconfiscatory, rates. Thus, legislation can constitutionally require insurers to rollback premium rates if the rollback does not result in the establishment of confiscatory rates or if there is a statutory mechanism to allow insurers to obtain rate relief in the event that confiscatory rates result. Rollback legislation that precludes upward rate adjustments to achieve fair and reasonable rates is facially unconstitutional.

FACTS

In 1991 N.M. Laws, ch. 135, § 1, the legislature amended § 59A-32-19 of the New Mexico Insurance Code, effective June 14, 1991. The Department of Insurance has received several inquiries from consumers and insurers concerning the effect of § 59A-32-19, as amended, on current motor vehicle insurance rates and several new insurance rate submissions that purport to comply with the new law. The rates that have been submitted provide for a 20% premium rate differential between drivers who have been in accidents within the past three years and those who have not. In some submissions, the rate differential is created by increasing rates for drivers who have had accidents and, in others, the differential is created by increasing all rates and then

providing a discount for drivers without accidents. Other insurers have stated that their rate structures already provide for such a rate differential and believe they are in compliance with § 59A-32-19. According to the Department of Insurance, no insurers have responded to the amendment to § 59A-32-19 by submitting new rates providing for a 20% rollback in motor vehicle insurance premium rates for drivers without accidents in the past three years.

ANALYSIS

1. RULES OF STATUTORY CONSTRUCTION

It is a general rule of statutory construction in New Mexico that courts are bound to enforce the plain and literal meaning of a statute. Legislative intent is primarily derived from the language actually employed in a statute. State v. Ellenberger, 96 N.M. 287, 288, 629 P.2d 1216, 1217 (1981); Southern Union Gas Co. v. New Mexico Pub. Serv. Comm., 82 N.M. 405, 407, 482 P.2d 913, 915 (1971); Sunset Package Store, Inc. v. City of Carlsbad, 79 N.M. 260, 262, 442 P.2d 572, 574 (1968). A court will not consider other evidence to determine the legislative intent, unless it determines a statute to be vague or ambiguous. In such a case, the court could consider other evidence such as, for example, the title of the statute and the history and background of the legislation. See, e.g., State v. Ellenberger, 96 N.M. at 288-89, 629 P.2d at 1217-18; Methola v. County of Eddy, 95 N.M. 329, 333, 622 P.2d 234, 238 (1981); Bradbury & Stamm Const. Co. v. Bureau of Rev., 70 N.M. 226, 232, 372 P.2d 808, 812-13 (1962).

We believe that the wording of § 59A-32-19 is plain and unambiguous and would be understood by a court to require a minimum 20% rate differential rather than a rollback from the current rates. Even if a court considered the other factors noted herein, such as the statute's title, we believe that the result would be the same.

A. The Plain Meaning of § 59A-32-19

Subsections 59A-3-19(B) and (C) contain the language that is at issue. Subsection 59A-32-19(B) provides that:

[a]ny rates, rating schedule or rating manuals for bodily injury, property damage liability and collision coverage for a private passenger motor vehicle insurance policy submitted to be filed with the superintendent of insurance and any premium charged to those policyholders shall provide for a minimum twenty percent premium discount **off the premium that would otherwise be charged to that policyholder if he had been involved in an accident during the prior three-year period, in which the insured was fifty percent or more at fault.**

(Emphasis added.) Subsection 59A-32-19(C) provides that:

[t]he premium discount required by Subsection B . . . shall be effective for each insured vehicle, provided that each driver rated on the vehicle is at least nineteen years

of age, has been a licensed driver for at least three years and has not been involved in an accident in the immediate preceding three years for which the insured was fifty percent or more at fault.

(Emphasis added.)

Thus, the plain language of Subsection (B) merely requires insurers to provide a minimum 20% premium differential between those policyholders who have been involved in an accident during the prior three-year period and those without such accidents. Subsection (C) requires that the differential apply to certain drivers described in the statute----i.e., to those older than nineteen years of age who have been licensed for at least three years and have not been in an accident in the preceding three years for which they were fifty percent or more at fault. The statute does not state that premium rates must be set at any particular level or that the discount must be 20% below rates currently filed with the Superintendent of Insurance ("Superintendent"). Furthermore, the statute does not necessarily require insurers to change currently filed premium rates.[1]

If currently filed rates contain the prescribed differential, no change in rates need be filed to satisfy § 59A-32-19.

B. Title of § 59A-32-19

The title of § 59A-32-19 as codified is: "59A-32-19. Discounts or Reductions in Premiums." It has been suggested that the title of § 59A-32-19 may support the conclusion that the statute requires a 20% discount off existing premium rates. We do not agree.

In State v. Ellenberger, 96 N.M. 287, 629 P.2d 1216 (1981), the former head coach of the University of New Mexico men's basketball team argued that a New Mexico statute concerning false public vouchers did not apply to him. The statute was part of an article headed "Misconduct by Officials" and the coach asserted that he was a public employee rather than an official. The court disagreed, stating that the heading to an article represents little more than a convenient tag to an organizational grouping of statutes and cannot be used to create an ambiguity in an otherwise clear expression of the legislature. Id. at 288, 629 P.2d at 1217. Inasmuch as the text of the statute generally prohibited making or permitting false public vouchers and did not limit its application to officials, the court held that statute applied to coach Ellenberger. Id. at 289, 629 P.2d at 1218. The court also stated that:

[t]he rule which permits reading the title of an act in aid of statutory construction applies only in cases where the legislative meaning is left in doubt by failure to clearly express the law. Moreover, the ambiguity which justifies a resort to the title must arise in the body of the act; an ambiguity arising from the title is not sufficient . . . . The title of an act cannot limit the plain meaning of the text . . . . The title is not conclusive in regard to the meaning of a statute.

Id. at 288, 629 P.2d at 1217 (quoting 73 Am. Jur. 2d Statutes § 98 (1974)). See also 2A N. Singer, Sutherland Statutory Construction § 47.03 (4th ed. 1985).

As discussed above, the text of § 59A-32-19 is unambiguous and does not require a reduction or discount from current rates. Thus, despite the legislature's use of the words "Discounts or Reductions in Premiums" in the title, we do not believe that a court would construe the statute to require an insurance premium rate rollback because the plain meaning of the text of the statute does not require a 20% rate reduction.

Furthermore, there is not necessarily any contradiction between the title and text of § 59A-32-19. There are two reasons that the section relates to discounts or reductions as its title suggests. First, the title does not specify how a "discount or reduction" in premiums is to be measured or state expressly that there will be a discount or reduction from current rates. The text of the statute refers in several places to premium "discounts" that are not defined as reductions from current rates.[2]

The legislature may define terms in a particular manner that does not necessarily coincide with the common usage of a word. See 2A N. Singer, Sutherland Statutory Construction § 47.07 (4th ed. 1985). See also Incorporated County of Los Alamos v. Johnson, 108 N.M. 633, 634, 776 P.2d 1252, 1253 (1989); State v. Nance, 77 N.M. 39, 45-6, 419 P.2d 242, 247 (1966), cert. denied, 386 U.S. 1039 (1967).

Second, §§ 59A-32-19(A) and (E) describe how § 59A-32-19 relates to the rate reduction provided for in §§ 59A-32-14 through 59A-32-18. The latter four sections provide for an "appropriate" three-year "reduction in premium charges" for drivers who are fifty-five years or older and complete a prescribed accident prevention course. Subsection 59A-32-19(A) states that: "Sections 59A-32-14 through 59A-32-18 . . . shall not prohibit an insurer . . . from providing a minimum twenty percent discount." Subsection 59A-32-19(E) provides that insurers are authorized but not required to apply the "premium discount for persons at least fifty-five" to drivers who receive "the minimum twenty percent discount" under § 59A-32-19. The references to the premium reduction, or discount, for drivers fifty-five or older, makes § 59A-32-19's text entirely consistent with its title.[3]

C. Legislative History of § 59A-32-19

The legislative history of § 59A-32-19 underscores the argument that it does not provide for a rollback in existing premium rates. Section 59A-32-19 was initially introduced into the 1991 legislature in a form that may have mandated automobile insurance rate reductions. Subsection (B) of the original bill provided in pertinent part "for a **minimum twenty percent premium discount off the premium that would otherwise be charged to a policyholder exhibiting average risk characteristics based upon actuarial calculations approved by the superintendent of insurance."** (Emphasis added.) Under this original version of § 59A-32-19, the Superintendent would, in effect, determine the base premium level from which the version containing the 20% discount would be deducted and tie that level to average risk characteristics based upon

actuarial calculations. The legislature, however, rejected the original version in favor of the version containing the 20% differential.

When a statute is determined to be ambiguous, a court can consider the original version of the bill to determine legislative intent, State v. Alderete, 88 N.M. 150, 151, 538 P.2d 422, 423 (Ct. App. 1975); 2A N. Singer, Sutherland Statutory Construction § 48.04 (4th ed. 1985), and assume that the legislature was cognizant of the differences between the two bills and intended what was passed. Cf. Stinbrink v. Farmers Insurance Company of Arizona, 111 N.M. 179, __, 803 P.2d 664, 666 (1990).

2. CONSTITUTIONALITY OF RATE ROLLBACK LEGISLATION

The opinion request also asks about the constitutionality of rollback legislation in general, presumably for purposes of future legislation. Cases from the United States Supreme Court and other jurisdictions illustrate a number of constitutional issues associated with insurance reform and automobile insurance premium rate rollback legislation. The thrust of these decisions is that legislation mandating unjust and unreasonably low rates is confiscatory and, therefore, unconstitutional.

A. Takings Clause and Due Process Challenges

The so-called "takings clause" of the fifth amendment to the United States Constitution prohibits private property from being taken for public use without just compensation. It has been interpreted by the United States Supreme Court to protect public utilities from being limited to a charge for serving the public that is so unjust as to be confiscatory. In Federal Power Comm'n v. Hope Natural Gas Co., 320 U.S. 591 (1944), the Court discussed the standards for establishing government rate or price controls under a statute requiring a just and reasonable rate:

From the investor or company point of view it is important that there be enough revenue not only for operating expenses but also for capital costs of the business. These include service on debt and dividends on the stock . . . . By that standard the return to the equity owner should be commensurate with returns on investments in other enterprises having corresponding risks. That return, moreover, should be sufficient to assure confidence in the financial integrity of the enterprise, so as to maintain its credit and to attract capital.

Id. 320 U.S. at 603. See also Duquesne Light Co. v. Barasch, 488 U.S. 299 (1989)(the determination whether a utility rate is so low as to be confiscatory under the takings clause should include scrutiny of "what is a fair rate of return given the risks under a particular rate setting system and . . . the amount of capital upon which the investors are entitled to earn that return." 488 U.S. at 310).[4]

The United States Supreme Court established the validity of state price or rate controls under the due process requirements of the fifth and fourteenth amendments to the United States Constitution in Nebbia v. New York, 291 U.S. 502 (1934). Due process demands only that the law shall not be unreasonable, discriminatory, arbitrary or

capricious and must have a real and substantial relation to the object sought to be obtained. Id. at 539.

The recent decisions in Calfarm Ins. Co. v. Deukmejian, 771 P.2d 1247 (Cal. 1989), and Guaranty National Insurance Co. v. Gates, 916 F.2d 508 (9th Cir. 1990), applied due process or takings analyses to state statutes requiring rollbacks of automobile insurance rates. In practice, courts have tended to interweave the requirements of both constitutional provisions in their statutory analyses.

In Calfarm, the California Supreme Court considered the facial constitutionality of an initiative, Proposition 103, requiring that automobile insurance rates be reduced 20% below the rates in effect one year earlier. The court found that one provision of the initiative, which prohibited rate relief for the first year unless an insurer were in danger of insolvency, was facially invalid. It held that this provision violated due process requirements because it temporarily precluded adjustments necessary to achieve the constitutional standards of fair and reasonable rates. Id. at 1255-56.

The Calfarm court, nevertheless, upheld the constitutionality of the statute as it applied to future years. The court stated that the Constitution is not so much concerned with the setting of initial rates so long as rates as finally set are not confiscatory. Id. at 1252. Any law that sets prices that may prove confiscatory in practice must be carefully scrutinized by the courts to ensure that the sellers will have an adequate remedy from confiscatory rates. Id. at 1253. In upholding the rate reduction as to future years, the court relied on other statutory provisions that afforded insurers the opportunity to seek interim rate relief from the California Commissioner of Insurance and prohibited the Commissioner from "approving or maintaining any rate in effect which is excessive, inadequate, or unfairly discriminatory." Id. at 1256-57.[5]

The court concluded that these safeguards reflected a general legislative intent to ensure a fair rate of return after the first year; it reasoned that, since "a confiscatory rate" is necessarily "an inadequate rate," the statute as a whole required rates within a range which can be described as fair and reasonable and prohibited approval or maintenance of confiscatory rates. Id.

In Guaranty, the United States Court of Appeals for the Ninth Circuit struck down a Nevada statute that required a 15% insurance rate rollback and did not permit any rate relief unless an insurer was "substantially threatened with insolvency." 916 F.2d at 513. The court examined a general statutory provision that prohibited "excessive, inadequate, or unfairly discriminatory" rates. Id. at 515. The court found that the provision prohibiting "inadequate rates" did not save the statute's constitutionality, because the statute defined "inadequate" to guarantee only a break-even return, not a constitutionally required fair and reasonable return. Id.

In another case, State Farm Mutual Automobile Ins. Co. v. New Jersey, 590 A.2d 191 (N.J. 1991), the New Jersey Supreme Court considered the constitutionality of insurance reform legislation imposing taxes and surcharges on insurers that could not

be passed through to consumers. The court pointed out that the statute created a mechanism for individual insurers to seek special rate relief to assure a fair rate of return. In view of the possibilities offered by that mechanism, the court ruled that the statute did not constitute a facially unconstitutional taking because it could not find that the statute rendered it impossible for any insurer to achieve a fair rate of return.[6]

In State Farm, the court also stated that, since the initiative did not on its face impose a confiscatory taking, a fortiori, the act met the minimal requirements for constitutionality under a due process analysis. 590 A.2d at 207. Thus, insurance rollback legislation that does not result in confiscatory rates would not violate the takings clause nor would it be a violation of due process rights.

B. Impairment of Contracts and Bills of Attainder

Insurers also have challenged insurance rate legislation as a violation of the so-called contracts clause of the federal Constitution providing that no state shall pass a law impairing the obligation of contract. U.S. Const. art. 1, § 10, cl. 1. The contracts clause argument has been rejected by the state courts that have considered it. Calfarm Ins. Co. v. Deukmejian, 771 P.2d at 1263; State Farm Mutual Automobile Ins. Co. v. New Jersey, 590 A.2d at 207-8. The Calfarm and State Farm cases held that insurance rollback legislation does not violate the contracts clauses of the state or federal Constitutions because the police power of the state to regulate business cannot be contracted away, and the economic interest of the state may justify its continuing protective power notwithstanding interference with existing contracts.

Challenges based upon a bill of attainder theory have also been unsuccessful. A bill of attainder is defined as a legislative act inflicting punishment without trial. Op. Att'y Gen. No. 69-10 (1969). In State Farm, the court rejected the insurers' claim that the legislation was intentionally punitive legislation directed specifically against insurers, noting that if a statute does not constitute a confiscatory taking under a takings analysis, it would likewise not be a punitive confiscation. 590 A.2d at 208.

In summary, if the legislature were to enact a statute which required a 20% insurance premium rate rollback from current rates, the statute would be constitutional and enforceable only if it still permitted insurers a constitutionally adequate rate of return. However, if the rollback resulted in the establishment of confiscatory premium rates, it could be stricken down on constitutional grounds if challenged.

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GENERAL FOOTNOTES

n1 The purpose of this opinion is only to examine the rate filing requirements in § 59A-32-19. In addition to ensuring compliance with § 59A-32-19, the Superintendent must, of

course, examine the new rate filings and proposals to raise rates against the actuarial and other requirements in NMSA 1978, Chapter 59A, Article 17, and the regulations promulgated thereunder.

n2 For example, § 59A-32-19(C) refers to the "premium discount" as defined by § 59A-32-19(B). Subsection 59A-32-19(D) also permits the Superintendent to adopt regulations that would "withhold application of the discount required by Subsection B" to drivers whose accident histories cannot be practicably verified.

n3 While §§ 59A-32-14 through 59A-32-18 may well provide for a rate rollback for eligible drivers, the provisions do no appear to be confiscatory. The Department of Insurance has advised us that this particular reduction does not have a significant revenue impact on insurers because it must be actuarily set, is limited to three years, and does not affect a large class of drivers.

n4 The constitutional requirement that a business be permitted a fair rate of return does not necessarily require any particular level of profit above what is adequate to attract and retain invested capital. Therefore, in rate regulation, investors' interests must be balanced against consumers' interests and the interests of the general public to determine what level of return is "just and reasonable." **Federal Power Comm'n v. Hope Natural Gas Co.,** 320 U.S. 591, 603 (1944); **Hutton Park Gardens v. Town Council,** 350 A.2d 1, 15 (N.J. 1975). The rate of return does not need to be as high as prevailed in the industry prior to regulation nor as much as an investor might obtain by investing elsewhere. **Hutton Park Gardens,** 350 A.2d at 15. In **Calfarm Ins. Co. v. Deukmejian,** 771 P.2d 1247, 1254 (Cal. 1989), however, the court noted that excessive profits in the past will not justify requiring an unreasonably low rate of return.

In addition, the reasonableness of price limitations is measured by the performance of skilled and efficient businesses, not of those which are inept or even unlucky. **State Farm Mutual Automobile Ins. Co. v. New Jersey,** 590 A.2d 191, 200 (1991).

n5 **Calfarm** also specifically rejected the argument that this provision of Proposition 103 was justified as an emergency measure. 771 P.2d at 1254-55. To justify a measure which deprives persons of a fair return the court stated: "an emergency would have to be a temporary situation of such enormity that all individuals might reasonably be required to make sacrifices for the common weal." **Id., quoting, Hutton Park Gardens v. Town Council,** 350 A.2d at 14. The court found that an asserted rise in insurance rates, rendering insurance unaffordable or unavailable to many, is not a temporary problem; it is a long term, chronic situation. Because the state must permit insurers a fair return over the long term, rollbacks cannot be sustained as an emergency measure fashioned to meet a temporary exigency. **Id.**

n6 The court acknowledged uncertainty about how the New Jersey Insurance Commissioner would apply the act in individual rate-increase determinations. The Commissioner arguably was permitted, but not required, to grant rate relief to insurers who could not achieve a fair of return. The court noted that the Commissioner's actions

could conceivably be the basis for an as-applied challenge to the legislation. 590 A.2d at 207.