Library 6090/6672

The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLES M. CONDON
ATTORNEY GENERAL

April 27, 1999

The Honorable Rudolph M. Mason
Chairman, Insurance Subcommittee
Labor, Commerce and Industry Committee
House of Representatives
P.O. Box 11867
Columbia, SC 29211

RE: Opinion Request of March 3, 1999 "No Pay, No Play" Legislation

Dear Representative Mason:

You have a requested an opinion regarding the constitutionality of proposed legislation commonly referred to as "No Pay, No Play," which, as written, prohibits the recovery of non-economic damages by an uninsured owner or operator of a motor vehicle. You also requested an opinion as to the constitutionality of also excluding the recovery of economic damages.

The South Carolina General Assembly possesses full power to enact any law not inconsistent with the Constitution. Riley v. Martin, 274 S.C. 106, 262 S.E.2d 404 (1980). As often stated by this Office, in considering the constitutionality of an Act, it must be presumed that the Act is constitutional in all respects. No statute will be considered void unless the constitutionality is clear beyond all reasonable doubt. Thomas v. Macklen, 186 S.C. 290, 190 S.E. 539 (1938); Townsend v. Richland County, 190 S.C. 270, 2 S.E.2d 777 (1939). All doubts of constitutionality are generally resolved in favor of constitutionality. While this Office may comment upon potential constitutional problems, it is solely within the province of the courts of this State to declare an act unconstitutional.

As you stated in your opinion request, four other states (California, Louisiana, Michigan, and New Jersey) have enacted "No Pay, No Play" statutes. The statutory language of the proposed South Carolina legislation which you forwarded with your opinion request is quite similar to the statute enacted in California. The constitutionality of the California statute (Proposition 213) has been tested and survived constitutional analysis in a court of law. The constitutionality of this statute was the subject of the opinions in Quackenbush v. Superior Court of the City and County of San Francisco, 60Cal. App. 4th 454 (Ct. App. 1997)(First District) and in Yoshioka v. Superior Court of Los Angeles County, 58 Cal. App. 4th 972 (Ct. App. 1997) (Second District), both issued at the

end of 1997. The constitutionality was again the subject in Honsickle v. Superior Court of Los Angeles County, 69 Cal. App. 4th 756 (Ct. App. 1999).

The California statute contains the following language precluding an uninsured owner or operator from recovering noneconomic damages:

> (a) Except as provided in subdivision (c), in any action to recover damages arising out of the operation or use of a motor vehicle, a person shall not recover non-economic losses to compensate for pain, suffering, inconvenience, physical impairment, disfigurement, and other nonpecuniary damages if any of the following applies:
>
> > (1) The injured person was at the time of the accident operating the vehicle in violation of Section 23152 or 23153 of the Vehicle Code [dui], and was convicted of that offense.
> >
> > (2) The injured person was the owner of a vehicle involved in the accident and the vehicle was not insured as required by the financial responsibility laws of this state.
> >
> > (3) The injured person was the operator of a vehicle involved in the accident and the operator cannot establish his or her financial responsibility as required by the financial responsibility laws of this state.
>
> . . .
>
> (c) In the event a person described in paragraph (2) of subdivision (a) was injured by a motorist who at the time of the accident was operating his or her vehicle in violation of Section 23152 or 23153 of the Vehicle Code, and was convicted of that offense, the injured person shall not be barred from recovering non-economic losses to compensate for pain, suffering, inconvenience, physical impairment, disfigurement, and other nonpecuniary damages.

Cal. Motor Vehicle Code § 3333.4. In Yoshioka and in Quackenbush, the plaintiffs challenged the constitutionality of this legislation arguing the legislation violated equal protection and due process rights under both the federal and California constitutions; in Quackenbush, the plaintiffs further argued the legislation violated constitutional rights because it burdened the right to travel and denied the targeted drivers the First Amendment right to petition government for redress of grievances.

In Yoshioka, 58 Cal. App. 4th 972 (1997), the court analyzed the legislation under the rational basis test because it involved economic rights. This test is met if "(1) the statute has a

legitimate purpose and (2) the law makers reasonably believed the classification would promote that purpose." 58 Cal. App. 4th at 990. The court held that "[i]nterests in (1) restoring balance to our justice system and (2) reducing costs of mandatory automobile insurance are legitimate." Id. Thus, the court addressed only the classification of the uninsured and these legitimate interests and found (1) that "[c]lassifying by eliminating the uninsured has been well established as rationally related to reducing the high costs of insurance premiums" and "this classification is rationally related to restoring balance to our justice system." Id. at 990-91. The court concluded, therefore, "that a classification eliminating "the uninsured" is rationally related to the electorate's legitimate interests." Id. at 992.

In analyzing the statutory language and the claims of equal protection violations, the court in Quackenbush, 60 Cal. App. 4th 454 (Ct. App. 1997), similarly used the "rational basis" test and stated the following:

> Proposition 213's primary classification was a division between the group of people who obey the law by purchasing automobile insurance, driving sober, and committing no vehicle-related felonies and the group of people who violate these driving-related laws and are disfavored because of their violations. [Plaintiffs] cannot reasonably argue that, when allocating the pool of insurance proceeds among members of these two groups, it is unfair or irrational for the first group to be relieved of the obligation to pay insurance rates determined in part by the need to pay noneconomic damages (and in the case of felons all damages) to the second group.

Id. at 466.

The Plaintiffs in Quackenbush also directed an equal protection attack to the differences in treatment between uninsured owners and drivers, the perceived advantages for felons and drunk drivers who avoid conviction, and the prospect that an innocent uninsured motorist would be unable to recover from a wealthy uninsured tortfeasor. Id. The court rejected these attacks:

> The secondary classification scheme addressed secondary objectives, balancing the rights among members of the disfavored groups and facilitating determining which persons would be included in the disfavored groups. It reasonably accomplished these objectives and did not interfere with the accomplishment of the primary objectives of the legislation. It was required to do no more.

Id. at 467. Notably, the proposed South Carolina legislation does not discriminate between uninsured owners and drivers as the California legislation does so discriminate.

With regard to the due process attacks, the Plaintiffs in Quackenbush argued that the statute was an "automatic forfeiture procedure which violates due process because it gives the plaintiff no opportunity to explain lack of insurance." Id. The court, however, rejected these arguments:

> . . . Proposition 213 does not cause a forfeiture without providing an opportunity to contest the conditions leading to loss. Under Proposition 213, proof of insurance or financial responsibility is the determinative factor for recovering noneconomic damages. Although the statutes do not establish procedures for making this determination, courts may use their normal in limine or trial procedures to resolve the question for individual plaintiffs. An injured plaintiff will have a forum for proving compliance with financial responsibility laws and avoiding Propositions 213.

Id. at 468.

The California Court of Appeals for the Second District in Yoshioka similarly rejected a due process argument that Proposition 213 "implements an automatic penalty scheme allowing for no explanations or excuses" and, further, held that the uninsured was not entitled to a hearing.

> Similarly, Proposition 213 doesn't put culpability up for dispute. Drivers either possess insurance or they don't. If they don't and they choose to drive (instead of using other alternative modes of transportation like public transit), we can think of no justifiable defense that would require a hearing.
> . . .
> . . . here, uninsured motorists that choose to drive can easily avoid the penalty of not being entitled to noneconomic damages, by simply choosing alternative forms of transportation. Further, if the uninsured made any attempt at all (good faith or otherwise) to buy insurance, they would in fact no longer be subject to such a penalty. Therefore, we see no reason to entitle each uninsured driver to a hearing. We find no due process violation.

Yoshioka, 58 Cal. App. 4th at 989-90. See also Honsickle v. Superior Court of Los Angeles County, 82 Cal. App. 4th 756 (1999) ("a motorist who wants to preserve a right to recover noneconomic damages can either purchase insurance or find some other means of travel" and "[s]uch a prospective legislative regulation of behavior by imposition of consequences for noncompliance is clearly constitutional."). Thus, the California courts have determined that the statute did not violate the uninsured's due process rights.

The court in Quackenbush also rejected the argument that uninsured drivers will be discriminated against in their access to courts based on economic situation, race and ethnicity. First, the court rejected the argument that litigants will be unable to obtain counsel because attorneys fees

are generally paid from noneconomic damages and held that this argument assumes "uninsured litigants and their attorneys will be unable to find other ways to structure their relationships." 60 Cal. App. 4th at 468. Further, the court found that the statute did "not require a litigant to purchase insurance before coming to court [but] only reinforces California's determination that paying the price for insurance is as much a part of owning and driving a car as are purchasing and registering the car and buying gasoline." Id. at 468-69.

The court in Quackenbush also rejected the additional constitutional argument that the statute denies the right to travel:

> Government is permitted to regulate the conditions of travel by requiring drivers' licenses, registrations, and compliance with a myriad of traffic laws. It may impose gasoline taxes, trucking regulations and agricultural inspection even when they inhibit travel. The insurance requirement and related penalties, including Proposition 213's restriction on recovery by uninsured motors, are no more onerous than these other travel regulations.

Id. at 469.

This analysis demonstrates that, while the "No Pay, No Play" statute excluding recovery of noneconomic damages by an uninsured owner or operator is subject to constitutional challenge, similar language has withstood such constitutional challenge in a court of law. Further, as outlined above in the statutory construction under which we operate, the unconstitutionality of this statute is not clear beyond a reasonable doubt, and all doubts are resolved in favor of constitutionality.

The only other statute of which I am aware which precludes the recovery of economic damages by an uninsured owner or operator is the New Jersey "No Pay, No Play" statute with regard to Personal Injury Protection (PIP) or medical expense benefits. The current statute has not be the subject of litigation. However, its predecessor and the subject of recovery of economic damages by the uninsured was considered in Monroe v. City of Paterson, 723 A.2d 1266 (N.J. 1999), an opinion issued March 1, 1999. The predecessor statute provided that "any injured person who was required to carry medical expense benefits coverage, but who failed to do so, was subject to the verbal threshold, N.J.S.A. 39:6A-8, for the recovery of noneconomic loss." Id. at 1269. According to this opinion, in 1997, the New Jersey Legislature amended 39:6A-4.5a to provide that an uninsured person "shall have no cause of action for recovery of economic or noneconomic loss sustained as a result of an accident while operating an uninsured automobile." The New Jersey Superior Court found the legislature passed this amendment in response to prior opinions by the New Jersey courts leaving open the question of "whether uninsured claimants who may not recover for pain and suffering under N.J.S.A. 59:9-2(d) may nonetheless recover the cost of their medical expenses." Monroe, 723 A.2d at 1269. The Monroe court found that "the Legislature, by amending section 4.5,

answered 'no' to the reserved question." Id.

In Monroe, the court allowed the amendment to the statute to guide its analysis and found that, despite statutory language limiting the recovery only of noneconomic damages, an uninsured could not recover economic expenses that would have been collectible as PIP benefits had he insured his vehicle:

> Permitting uninsured vehicle owners to recover without contributing premiums to the insurance pool would increase premiums for those motorists who fulfill their statutory obligations by insuring their vehicles. Precluding recovery also avoids the anomaly [of a previous court opinion] placing an uninsured motorist in a better position than an insured driver. If permitted to sue for economic loss, the uninsured motorist would recover the deductible and copayment amounts. Additionally, an uninsured who satisfied the injury threshold and sued for paid and suffering would enjoy a tactical advantage at trial if he could introduce evidence of his out-of-pocket losses. Moreover, permitting recovery would add to court congestion because a tort action would be the only method of recovering economic loss.

Monroe, 723 A.2d at 1269-70. While this opinion does not address the constitutionality of precluding the recovery of economic damages, its certainly upholds the statutory preclusion nonetheless. Thus, while the South Carolina statute does not preclude the recovery of economic damages by an uninsured driver, the passage of the New Jersey statute with regard to PIP benefits and the analysis by the New Jersey Superior Court indicate that the presumption in favor of constitutionality would probably not be rebutted.

This letter is an informal opinion only. It has been written by a designated Assistant Attorney General and represents the position of the undersigned attorney as to the specific questions asked. It has not, however, been personally scrutinized by the Attorney General nor officially published in the manner of a formal opinion.

With kind regards, I am

Very truly yours,

Christie Newman Barrett
Assistant Attorney General