1978 S.C. Op. Atty. Gen. 133 (S.C.A.G.), 1978 S.C. Op. Atty. Gen. No. 78-104, 1978 WL 27422

Office of the Attorney General

State of South Carolina
Opinion No. 78-104
May 25, 1978

***1** The Uniform Merit Rating Plan of the South Carolina Insurance Commission is not an ex post facto law.

Member
South Carolina House of Representatives

QUESTION:

Whether the Uniform Merit Rating Plan of the South Carolina Insurance Commission, which looks to acts committed by the applicant for insurance prior to its enactment or amendment to set the automobile insurance rates for the ensuing year, constitutes an ex post facto law?

STATUTES AND CASES:

Article I, Section 10, Constitution of the United States; Article I, Section 4, Constitution of South Carolina; South Carolina Code of Laws, 1976, Section 38–37–540(b), (b); Flemming v. Nestor, 363 U.S. 603 (1960); DeVeau v. Braisted, 363 U.S. 144 (1960); Hawker v. New York, 170 U.S. 189 (1898); Calder v. Bull, 3 Dall. (U.S.) 386 (1798); United States v. Sutton, 521 F.2d 1385 (7th Cir.1975).

DISCUSSION:

By Order filed September 30, 1974, the South Carolina Insurance Commission promulgated a Merit Rating Plan whereby drivers with certain traffic violations during the three years preceeding applications for automobile insurance would be required to pay a greater amount for automobile insurance than the basic rate applicable to their category. The Order assigned points for various sorts of traffic violations and set the amount which would be charged above the basic rate according to the number of points accumulated during the preceeding three years. Subsequent amendments to the Plan altering the points which were assigned to various violations had the effect, in some instances, of assigning a greater number of points for some violations for the purpose of determining the cost of automobile insurance for the succeding year than had been the case at the time the violation was committed.

The Constitution of the United States, Article I, Section 10, prohibits the States from passing ex post facto laws. The Constitution of South Carolina, Article I, Section 4, likewise prohibits the State from enacting such legislation.

The classic definition of an ex post facto law was formulated by Mr. Justice Chase of the United States Supreme Court in the case of Calder v. Bull, 3 Dall. (U.S.) 386 (1798). He defined an ex post facto law as:
1st. Every law that makes an action done before the passing of the law; and which was innocent when done, criminal; and punishes such action. 2nd Every law that aggravates a crime, or makes it greater than it was, when committed. 3rd. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. 4th. Every law that alters the legal rules of evidence, and receives less, or different, testimony, that the law required at the time of the commission of the offense, in order to convict the offender.

Id., at 390.

The regulation challenged here is questioned on the basis that it is alleged to impose a greater punishment than was the case at the time the traffic violation was committed.

***2** In order to determine whether legislation or regulations are invalid for imposing a greater punishment or penalty retrospectively, it is necessary to look to the legislation in question to determine whether its purposes are punitive and therefore invalid as ex post facto punishment, or whether its purposes are a valid exercise of the State's regulatory power. In determining whether legislation which bases a disqualification on the happening of a certain past event imposes a punishment, the Court has sought to discern the objects on which the enactment in question was focused. Where the source of legislative concern can be thought to be the activity or status from which the individual is barred, the disqualification is not punishment even though it may bear harshly upon one affected. The contrary is the case where the statute in question is evidently aimed at the person or class of persons disqualified.

Flemming v. Nestor, 363 U.S. 603, 613, 614 (1960). For example, Federal legislation banning the possession of firearms by convicted felons has been repeatedly held not to be ex post facto even as applied to those who were convicted of a felony prior to the effective date of the Act. E.g., United States v. Sutton, 521 F.2d 1385 (7th Cir.1975). Likewise, State laws prohibiting the practice of medicine by one convicted of a felony are also valid even when applied to one convicted prior to the passage of the Act. E.g. Hawker v. New York, 170 U.S. 189 (1898). In such instances it has been held that the legislature may look to past acts to determine the fitness of one seeking to possess a firearm or practice medicine. Since such convictions are valid indicators of the fitness of those seeking to engage in activities within the regulatory power of the government, the purposes of the legislation are considered to be regulatory and not punitive. Only the clearest evidence of a punitive intent is sufficient to overcome the presumption that such legislation is Constitutionally valid. Flemming v. Nestor, supra, at 617. DeVeau v. Braisted, 363 U.S. 144 (1960).

The Merit Rating Plan in question here is clearly a valid exercise of the regulatory power of the Insurance Commissioner to develop statistical data
... determining the amount, validity, and propriety of surcharges and discounts referable to any uniform merit rating plan or system which may have been promulgated by the Rate Division, with the approval of the Commission, or which may be under consideration for promulgation, and testing from time to time, but not less than annually, the appropriateness of such surcharges and discounts in the light of the most recent available loss experience data ...

South Carolina Code of Laws, 1976, Section 38–37–540(b), (d), and authorized the Commission to promulgate such a plan. Pursuant to this mandate, the Commission established a Uniform Merit Rating Plan filed September 30, 1974, and has amended it on subsequent occasions.

The purpose of a Merit Rating Plan is, in effect, to set the amount which a driver must pay for automobile insurance for the following year based on his driving record. Simply put, actuarial experience establishes that those with poor driving records are more likely to incur accidents than those with good records and, therefore, will make more claims under the policy, presenting a greater risk to the insurer.
***3** [A merit rating plan] is neither punitive nor unfairly discriminatory because the Texas Study made before the merit rating plan was effective there, showed that those persons with traffic violations had a much higher future loss frequency. The word “punitive” is an inflammatory word which immediately sets up certain reactions in the reader. Any time a rate structure results in some rates above and some rates below the overall average it could be called “punitive”. Are we against the punitive age classification in automobile insurance where the adult drivers are awarded and the youthful drivers are penalized? Are we against the punitive extended coverage zones in fire insurance where the properties along the Atlantic Coast are penalized? Are we against the punitive construction charges for Homeowners where the good

brick homes are rewarded and the poor frame homes are penalized? If we don't call them “punitive” these classification criteria sound quite logical.... [Merit Rating] is a classification plan and should be judged in the same light as any other classification plan.

L.J. Simon, Merit Rating Myths and Mysteries, in Automobile Insurance Rate Making, Casualty Actuarial Society, 1961, pp. 189, 190. Actuarial experience establishes that a poor driving record increases the risk of future accidents and also establishes that the risk may be most accurately gauged when the record for the preceeding three years is taken into account. R.A. Bailey and L.J. Simon, An Actuarial Note on the Credibility of Experience of a Single Private Passenger Car in Automobile Insurance Rate Making. Casualty Actuarial Society, 1961, p. 223–225.

Like any other classification plan in which the rates to be charged vary according to the risks undertaken, the Merit Rating Plan constitutes an effort to assure a reasonable rate of return to the insurance company. It is settled that regulation of insurance companies is within the police powers of the State and that one factor to be considered in the setting of rates is a reasonable rate of return to the insurance company as well as the protection of the public. 44 C.J.S., Insurance § 60(b)(2) p. 533.

CONCLUSION:

While the Merit Rating Plan and its amendments may determine, in certain instances, the amount which a driver must pay for insurance by reference to acts done prior to the effective date of the law, the Plan does not violate the prohibition against ex post facto laws since the rates are not designed to punish those acts but rather to reflect the risks undertaken by the insurance company.

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