1974 WL 27741 (S.C.A.G.)

Office of the Attorney General

State of South Carolina
May 7, 1974

***1** The Honorable J. Ralph Gasque
Senator
District No. 11
State House
Columbia, South Carolina

Dear Ralph:
Thank you for your letter of April 18, 1974, in which you posed two specific questions concerning Senate Bill 371, hereinafter referred to as the No-Fault Insurance Bill.

First you raised the question of the possible unconstitutionality of Article II-A, Section 1 which establishes what is known as the threshold requirement for tort recovery. Under the terms of this Bill, if a person has provided security, as established by the requirements of this act, he may not be sued in tort for '. . . pain, suffering, mental anguish and inconvenience because of bodily injury, sickness or disease . . .' unless the medical and hospital benefits exceed five hundred ($500) dollars or the injury or disease results in permanent disfigurement, a fracture of a weightbearing bone, etc. You have asked whether or not these provisions would be deemed constitutional. Several recent cases have considered this very question and in all but one the courts have found the threshold requirement to be constitutional. Grace v. Howlett, 283 N.E.2d 474 (1972), struck down a similar section in the Illinois No-Fault Insurance Law but without discussing the merits of the specific issue. The Illinois law, however, did not require every car owner to purchase this insurance, therefore, the provisions of the act resulted in inequities. Other cases which have dealt with this issue have upheld similar threshold requirements. See Opinion of the Justices, 304 A.2d 881 (1973); Pinnick v. Cleary, 271 N.E.2d 592 (1971); Lasky v. State Farm Insurance Company, Phyllis M. May and Ethel Anthony, Case No. 42,956, filed April 17, 1974.

Lasky is an especially helpful case as Florida No-Fault Insurance Law appears to be virtually verbatim the South Carolina No-Fault Insurance Law. One difference, however, is that Florida provides the threshold amount of one thousand ($1,000) dollars as compared to South Carolina's requirement of five hundred ($500) dollars. The court upheld the threshold amount and determined it did not violate the constitutional requirements of due process and equal protection. The Grace case had found the threshold requirement to be a denial of equal protection because there must first be a showing of five hundred ($500) dollars in expenses to recover amounts over that amount and only provides an opportunity to recover fifty (50%) percent of less than that amount. The Court held that '. . . substantial differences existed between the cost of medical services provided for the poor and for the wealthy, and also between geographical areas in the state', therefore, resulting in discrimination. The Lasky case expressly rejects the rationale of geographical and rate disparities as being without merit. See also Pinnick. In addition, the Florida statute as well as the South Carolina statute allows medical services which are received free to be computed as if they had been actually paid in determining the five hundred ($500) dollar threshold amount. However, the Lasky case did hold one part of the Florida No-Fault Insurance Act unconstitutional and it is that section which comports to our Article II-A, Section 1(c)(B) which states that suit may be brought if the injury or disease constitutes in whole or in part:
***2** (1) Of permanent disfigurement, or

(2) A fracture to a weight bearing bone, or

(3) A compound fracture, or a comminuted fracture, or a displaced fracture, or a compressed fracture, or

(4) Loss of a body member, or

(5) Permanent injury within reasonable medical probability, or

(6) Permanent loss of a bodily function, or

(7) Death.

In the Florida Act, death was listed separately from the above-cited list all the remaining being verbatim the Florida statute. Death was upheld as a reasonable classification and not equatable to a denial of equal protection. The remaining enumerated injuries were held to be a denial of equal protection. The court states in part:
One who is involved in an accident and sustains a broken little toe may maintain, under this provision, an action for pain and suffering, since the little toe contains a weight bearing bone. On the other hand, although one's skull is not considered a weight bearing bone, it is normally a more valnerable and consequential area of injury. A person involved in an accident who suffered a fractured skull which is not a compound, comminuted, displaced or compressed fracture, may not maintain an action for pain and suffering under this provision, unless the fracture is considered to be a permanent injury. The same is not true as to the weight-bearing little toe.

On the basis of this reasoning, the court held this statute would result in a denial of equal protection and struck this portion. The court's rationale is pertinent to our statute and should be applicable in determining the probable constitutionality of this section.

Another question raised in regard to the constitutionality of the threshold provisions is whether or not it constitutes a denial of the right to trial by jury. The Lasky case deals specifically with this issue and held that it does not. The court compares the limiting of access to a court to the Workmen's Compensation laws and states in passing:
Similarly here, the no-fault act abolishes all right of recovery of specific items of damage in specific circumstances, and, as to those areas, leaves nothing to be tried by a jury.

See also Opinion of the Justices at pp. 885. 886.

The Florida Court expressly distinguishes this case from Kluger v. White, 281 So.2d 1 (1973), which held unconstitutional part of the Florida No-Fault Insurance Law relating to property. The Court stated:
In Kluger, we held that the provisions of F.S. § 627.738 invalidly deprived persons of their right of access to the courts where the statute deprived a person of any and all means by which he could be made whole for property damage less than five hundred and fifty dollars in amount, resulting from a vehicular accident, unless he voluntarily elected to purchase insurance for property damage to his own vehicle. Thus a person who elected not to insure his own vehicle against property damage, and who sustained damage to his car in the amount of five hundred and forty dollars as the result of the fault of another would be without recourse against anyone under § 627.738, despite a clear loss to him and even where evidence of fault of the other party was overwhelming.

***3** In addition, you have raised the question as to the constitutionality of Article III, Section 1 which concerns the establishment of an arbitration commission. Similar arbitration provisions have been considered in the cases of Opinions of the Justices and Grace. In both these provisions were struck. However, the statute in the Opinion of the Justices, and to the same effect the statute in Grace, stated that there would be arbitration in all or any specific type of cases

in which the amount exceeded the certain said amount. It appears these provisions would submit all claims including personal injury claims to an arbitration board; in contrast, the South Carolina provisions only establish arbitration as the procedure for determining disputed property claims.

In the case of Grace, the objection to the arbitration procedure was largely based upon Illinois law. The arbitration process required any appeal to be de novo which was a procedure that the Illinois Act had abolished in 1962. Additionally, the Illinois Constitution states: 'There shall be no fee officers in the judicial system.' The No-Fault Insurance Act requires the losing litigant pay the fees of the arbitration and all costs that have accrued as a condition for appeal. On the basis of these conflicts with Illinois law, the arbitration provisions were struck. In the Opinion of the Justices, objections were made to the fact that arbitration was required for all cases in which the amount involved was less than three thousand ($3,000) dollars which would apparently include personal injury and property damages. The New Hampshire Constitution requires a trial by jury in any controversy involving an amount in excess of five hundred ($500) dollars or title to real estate. In addition, the court felt that the cost of convening a panel of arbitrators would quite probably equal the recoverable amount involved and would work as an unreasonable condition on the right to trial by jury.

South Carolina Constitution, Article I, Section 14 states in part: 'The right of trial by jury shall be preserved inviolate.' Therefore, a basic question exists as to whether or not the right to a jury trial would be denied by this procedure under our constitutional provisions. The Legislature has generally been given flexibility in this area as apparent by Workmen's Compensation laws which have abolished jury trials in certain cases. See Lasky. Therefore, it is my opinion that as the proposed provision only submits property damage to arbitration, and does provide a procedure for appeal to the Court of Common Pleas, the provision would be upheld. However, it should be pointed out that this opinion cannot be free from doubt in light of the conflict in case law and would probably need court determination.

Very truly yours,

Daniel R. McLeod
Attorney General

1974 WL 27741 (S.C.A.G.)

End of Document