STATE INSURANCE STATUTE STRUCK DOWN FOR INTERFERING WITH FREE COLLECTIVE BARGAINING

John Hancock Mutual Life Ins. Co. v. Commissioner of Ins.
208 N.E.2d 516 (Mass. 1965)

The Massachusetts legislature enacted a statute which stipulated that if premiums on a life, disability, or hospital insurance policy are normally collected by an agent employed by the insurer, the policy could not lapse or be terminated for failure to pay any premium falling due during a strike of the insurer's agents.[1] John Hancock Mutual Life Insurance Co. filed with the Massachusetts commissioner of insurance a proposed policy endorsement which was addressed to the problem of policy lapse during an agents' strike,[2] but the endorsement was rejected because it provided less protection to policyholders than the minimum required by the statute (hereinafter referred to as section 187F).

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[1] Mass. Gen. Laws Ann. ch. 175, § 187F (Lawyers Coop. Supp. 1965):

1. No life insurance policy, non-cancellable disability insurance contract, hospital expense or hospital and surgical expense contract, now or hereafter in force in the commonwealth, premiums for which are normally collected by insurance agents employed by the insurer, shall terminate or lapse by reason of default in payment of any premium, installment or interest on any policy loan payable to said insurer during the period that said insurer's agents are on strike.

2. The insured or premium payer of any policy or contract of insurance set forth in paragraph 1, shall be entitled to a grace period of thirty-one days immediately following the authorized termination of such strike, within which the payment of any premium installment or interest on any policy loan may be made, during which period of grace the policy or contract of insurance shall continue in full force and effect.

3. If a claim arises under the policy or contract of insurance during a strike period as set forth in paragraph 1, or during the grace period as set forth in paragraph 2, before the overdue premium, or installment or interest on a policy loan, if any, are paid, the amount of such overdue premium or installment together with interest not to exceed six per cent per annum and the amount of any loan with interest due, may be deducted from the amount payable under the policy or contract in settlement.

[2] John Hancock Mut. Life Ins. Co. v. Commissioner of Ins., 208 N.E.2d 516, 518 n.1 (Mass. 1965). The proposed provision stated:

If any premium becomes payable by the stated terms of the policy during the period of a strike in the state where the owner resides . . . and such premium is not paid when due or by the end of the grace period, if any, expressly stated in the policy, the policy will be reinstated without evidence of insurability upon receipt by the Company at its Home Office within 60 days after the premium due date and during the lifetime of the Insured of the overdue premium. . . . A strike of the Company's agents shall not operate to prevent lapse of the policy if the premium is not paid when due or by the end of the grace period expressly stated in the policy, if any . . . .

Suing for judgment declaring section 187F invalid, Hancock asserted that the statutory prevention of lapse would cause it sufficient economic harm to enable its union to coerce concessions it could not get absent the effect of section 187F, and therefore, section 187F sufficiently upset the balance of bargaining power between Hancock and its agents to violate the federal policy of free collective bargaining. The court held section 187F invalid on the ground that it did interfere with free collective bargaining, and that it interfered with the right of an employer to protect and continue his business by hiring replacements for strikers and the right of an employee to refrain from participating in a strike.[3]

Although the court concluded that section 187F interfered with the right to hire replacements for strikers and the right of an employee to refrain from participation in a strike, this conclusion may be dismissed summarily. Section 187F did not, either expressly or impliedly, prohibit an insurer from having agents, whether replacements or non-striking regular employees, in the field. The language of section 187F merely prevents the insurer from terminating industrial insurance policies during a strike because premiums were not paid.[4]

With respect to the court's main holding that section 187F disrupted the free collective bargaining process, it should be noted that the regulation of insurance, except for regulation of labor relations, was left to the states by the McCarran-Ferguson Act.[5] Section 187F was not explicitly directed to labor controversies or collective bargaining. Therefore, although the Labor-Management Relations Act (Taft-Hartley Act)[6] is applicable to the insurance business, it was not clear that the Labor Act applied. Consequently, *Hancock* presented a possible conflict between the policy of federal labor-management relations and the policy underlying state insurance regulations enacted in conformity with the Congressional delegation of authority in section 2 of the McCarran-Ferguson Act. In resolving the possible conflict, the policy underlying section 187F should have been examined and weighed against the impact of section 187F on free collective bargaining, for state interests still have a

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[3] *Id.* at 525.

[4] See note 1, *supra.*

[5] McCarran-Ferguson Act § 2, 59 Stat. 33 (1945), 15 U.S.C. § 1012 (1964):

(a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several states which relate to the regulation or taxation of such business.

(b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance . . . unless such Act specifically relates to the business of insurance. . . .

McCarran-Ferguson Act, § 4, 59 Stat. 33 (1945), 15 U.S.C. § 1014 (1964): Nothing contained in this Act shall be construed to affect in any manner the application to the business of insurance of the Act of July 5, 1935, as amended, known as the National Labor Relations Act. . . .

[6] 61 Stat. 136 (1947), 29 U.S.C. § 141 (1964). Section 4 of the McCarran-Ferguson Act specifically provides that the National Labor Relations Act applies to the insurance industry. *Ibid.*

place in labor relations as evidenced by the doctrine of primary jurisdiction over labor disputes. Primary jurisdiction over labor controversies has been vested in the National Labor Relations Board[7] to insure uniformity in adjudication of disputes.[8] However, exception to the rule of exclusive jurisdiction of the NLRB has been made where one of the parties to a dispute engages in violent tortious acts, even though the conduct may be enjoinable under the Taft-Hartley Act.[9] Thus, the violent tort cases balanced the interest of consistent application of labor policy against the state's interest in maintenance of domestic peace, and concluded in favor of state interest.[10]

The opinion in *Hancock* failed to discuss possible policy reasons for enactment of section 187F,[11] but discussed only the effect of section 187F on labor relations. Concededly, the analogy between *Hancock* and the violent tort cases is weak because the balance in the latter was heavily in favor of state interest.[12] However, inquiry into where the balance lay was not fore-

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[7] Garner v. Teamsters Union, 346 U.S. 485 (1953). San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236 (1959), held in part that state courts may not exercise jurisdiction over a labor dispute arguably subject to NLRB jurisdiction even where the NLRB declined to exercise its jurisdiction. Subsequent to the decision in *Garmon*, § 14(c) of the Labor-Management Relations Act was enacted, limiting the *Garmon* decision. Section 14(c) enables state courts or agencies to exercise jurisdiction over labor controversies where the NLRB has declined to exercise its primary jurisdiction because of an insubstantial effect of the controversy on interstate commerce. Labor-Management Reporting and Disclosure Act § 701(a), 73 Stat. 541 (1959), 29 U.S.C. § 164(c) (1964).

[8] Garner v. Teamsters Union, *supra* note 7, at 490-91: "A multiplicity of tribunals and a diversity of procedures are quite as apt to produce incompatible or conflicting adjudications as are different rules of substantive law."

[9] Youngdahl v. Rainfair, Inc., 355 U.S. 131 (1957); UAW v. Wisconsin Employment Relations Bd., 351 U.S. 266 (1956); United Constr. Workers v. Laburnum Constr. Corp., 347 U.S. 656 (1954).

[10] San Diego Bldg. Trades Council v. Garmon, *supra* note 7, at 247.

[11] The court merely stated that "The harm sought to be averted by this exercise of police power does not clearly appear," and adverted to the absence of statutory history. John Hancock Mut. Life Ins. Co. v. Commissioner of Ins., *supra* note 2 at 525.

[12] Potential state and federal substantive policy clash is absent in the violent tort cases, because the Labor-Management Relations Act clearly prohibits violent intimidation of persons. Section 8(b) of the act provides in part:

> It shall be an unfair labor practice for a labor organization or its agents—(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7 . . . or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances . . . . (4) . . . to threaten, coerce, or restrain any person . . . where an object thereof is—[forcing an employer or self employed person to join a labor or employer organization, forcing any person to cease dealing with another, forcing recognition of an uncertified union where another union has been recognized, or forcing work assignment to employees in one bargaining unit instead of those in a competing bargaining unit.]

Labor-Management Relations Act (Taft-Hartley Act) § 8(b), 61 Stat. 141 (1947), as amended 73 Stat. 542 (1959), 29 U.S.C. § 158(b) (1964).

closed merely because the state interest in *Hancock* was not as compelling. An analysis of the factors which could have prompted the enactment of section 187F reveals that the state interest in *Hancock*, compared to its slight effect on collective bargaining, was sufficient to sustain the section.

Because of the special nature of the debit system of insurance, the state has an interest in preventing lapse of policies during a strike. The business is carried on chiefly for the benefit of wage-earning persons, many of whom cannot afford to carry ordinary insurance policies or who cannot adapt their budgets to meet the payments due at annual, semiannual, or quarterly intervals. Therefore, insurance is usually sold on the basis of weekly or monthly cost instead of by face amount.[13] Premiums are normally paid to a debit agent who calls on the insured at weekly or monthly intervals. Commissions on premiums collected is the principal item of an agent's compensation.[14]

Further, industrial insurance has been criticized because of its high lapse rate with consequent loss or added cost to policyholders.[15] Statistics cited in the *Hancock* opinion indicate that more than eighty per cent of debit policy premiums are collected by agents.[16] It seems that a strike's interruption of an agent's periodic call at the policyholder's home, combined with his reliance on the agent's call, would contribute considerably to lapse by default in payment of premiums. Loss of premiums paid by and loss of insurance protection for policyholders resulting from an agents' strike is a legitimate legislative concern in regulating the insurance business.

What losses will the insurance companies suffer if they must provide continued insurance protection during a strike? The Massachusetts court reasoned that section 187F would deprive the insurance company of current income and could require liquidation of long term investments at a loss. Additionally, many for whom no claims arose during a strike might choose not to pay their arrears and drop their policies when the premium moratorium was lifted.[17] Others, who had claims arise during the moratorium, wisely would

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[13] Maclean, Life Insurance, 406-07 (9th ed. 1962).

[14] Additional factors in the agent compensation formula are new business written by the agent and success of the agent in conserving the business under his care. That portion of the agent's compensation which depends on his success in conserving the business under his care is computed with reference to the lapse rate of an individual agent's business compared with the lapse rate of the whole company. *Id.* at 418.

[15] *Id.* at 412. However, although Maclean states that the percentage of the total premiums paid on all terminated industrial life policies for which no nonforfeiture or cash benefit is received is less than one per cent, his statistics assume continued agent activity. *Ibid.*

Twenty-six weeks of premium payment prerequisite to nonforfeiture benefit is cited for policies of the larger companies. Cash surrender values are provided for industrial life policies which have been in force for three to five years. *Id.* at 415.

[16] John Hancock Mut. Life Ins. Co. v. Commissioner of Ins., *supra* note 2, at 519 n.4.

[17] See text accompanying note 13 *supra*. One of the primary reasons for selling industrial insurance on the basis of weekly or monthly cost is that many policyholders

choose to pay their arrears and collect on their policies.[18] Thus, the moratorium in effect would require the insurance company to assume risks of all who were policyholders at the commencement of a strike, yet be compensated for the assumption of risk only by those who chose to continue their policies when the moratorium was lifted. Further, the court reasoned, the losses just mentioned are contrary to the actuarial basis on which the insurance business is founded, since strikes are not events which can be reasonably predicted by the insurance company. Where, as here, the insurance company cannot enforce its contract rights, the union has an economic force on its side which it would not have in the absence of section 187F.[19]

Contrary to the court's reasoning, rate adjustments could be made to cover losses from the insurer's inability to enforce its contract rights. The insurer has claim experience for various times of year, and knows when labor contracts come up for consideration. Strike duration and frequency are the only unknowns in the statistical equation with which the insurer must work.[20] It seems that this deficiency in experience can be compensated for, however. Preliminary assessment of the probability of strike occurrence and of strike duration could be based on past bargaining experience and the insurer's knowledge of the union's economic strength. As experience accumulated, the insurer could adjust rates to recoup losses arising from erroneous judgment. Over a period of years, the rate adjustment for strike losses would stabilize to the point where strike losses caused by operation of section 187F could be accurately estimated. Further, it seems probable that most of the persons who were covered by insurance during a strike but failed to pay their arrears when the strike terminated would start new policies when the agents again became active in the field. These persons, those whose inaction caused loss to the insurer, would be the very people who would repay that loss through adjusted premiums.

The examination above indicates that the economic impact on the insurer of section 187F was small. What, then, is the requisite impact on collective bargaining to invalidate a state act? The Massachusetts court relied on *General Electric Co. v. Callahan*[21] to establish the federal policy and scope of free collective bargaining, and by analogy concluded that the economic interference of section 187F with free collective bargaining was sufficient to invalidate it. *Callahan* concluded that participation in hearings before a state board which had no direct coercive power, but which issued a report assessing

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cannot adapt their budgets to meet the payments due at longer intervals. If a strike lasted very long, it is unlikely that policyholders could pay their arrears if they wanted to.

[18] See the text of § 187F, *supra* note 1. Subsection 3 provides that payment of back premiums may be deducted from a claim settlement.

[19] John Hancock Mut. Life Ins. Co. v. Commissioner of Ins., *supra* note 2, at 524-25.

[20] There have been three strikes in the insurance industry in Massachusetts since 1951. *Id.* at 525 n.5. This strike experience of companies other than Hancock may not, in itself, be sufficient experience on which to base calculations for rate adjustments, but it is a starting point.

[21] 294 F.2d 60 (5th Cir. 1961).

blame for a labor dispute, would tend to indirectly coerce concessions by parties to the dispute.[22] The *Callahan* court reasoned that mere participation in a state board mediation hearing would tend to solidify positions taken at the bargaining table, making later flexibility difficult, and publication of the report assessing blame for the dispute could put public opinion behind one party, making the other party's bargaining position more precarious. *Callahan* seems to establish that nominal interference with the bargaining process by state action renders the state action invalid. However, the *Hancock* court overlooked an important distinction between *Callahan* and *Hancock*. *Callahan* did not involve a recognized state interest,[23] whereas *Hancock* involved a congressionally recognized state interest in insurance regulation.

Teamsters Union v. Oliver,[24] in a situation parallel to that in *Hancock*, seemed to limit consideration of state interest to situations where state interest is on the order of that in the violent tort cases. However, close examination reveals that *Oliver* did not foreclose balancing state and federal interests in less compelling situations. *Oliver* dealt with the application of Ohio's anti-trust laws to a provision contained in a collective bargaining agreement between the Teamsters Union and a group of interstate carriers. Industry practice was for carriers to lease part of their fleets from individual owners, paying the owners to drive their own trucks for the carrier under the provisions of the labor contract with the Teamsters Union, and contracting for use of the trucks under a separate agreement with the owners. Fearing that the lease device could be used by the carriers to effectively avoid the union wage scale by contracting for use of the leased trucks at a loss to the owner-driver, which loss would have to be covered out of the owner-driver's wages, the union obtained a clause in their contract with the carriers which provided a minimum truck rental for owner-drivers. The clause was narrowly drawn to cover only the situation described, and the rental fixed represented only the actual cost of operating the equipment.[25] The Ohio courts attempted to invalidate the clause as an unlawful restraint on competition between truck lessors, but were reversed by the Supreme Court because the clause was related to wages, and hence a proper term of collective bargaining. Implicit in the Court's exploration of the scope of the contract clause and its emphasis on its specificity[26] is a recognition of Ohio's interest in preventing restraints on competition, negating the proposition that *Oliver* limits consideration of state interest to the violent tort cases.

Close examination revealed that Ohio's action was not to invalidate restraints on price competition, but to support a situation where bargaining power of a carrier superior to that of a one truck owner could be used to

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[22] *Id.* at 67.

[23] *Callahan*, in contrast to *Hancock* involved a labor dispute. However, absent violent tortious acts, a state has no jurisdiction over labor disputes. See text accompanying note 7, *supra*.

[24] 358 U.S. 283 (1959).

[25] *Id.* at 293-94.

[26] *Ibid.*

depress wages of drivers of carrier owned trucks by forcing them to meet the effective wage of owner-drivers or go elsewhere for work. One of the policies underlying the statutory right of collective bargaining is preclusion of wage depression caused by inequalities in bargaining power between an employer and individual employees. On balance, therefore, the Ohio action had a direct impact on federal labor policy. In *Hancock*, however, the effect of the questioned state action on federal labor policy is only nominal.

In conclusion, the opinion and holding in *Hancock* foreclosed consideration of state policy underlying a statutory provision where the state statute may have incidentally affected a bargaining relationship. Federal court precedent did not demand the result reached by the Massachusetts court. In another situation with similar degrees of state and federal policy interest, state interests should fare better than they did in *Hancock*.