

Tennessee Attorney General Holds that Tennessee Statute Prohibiting Preferences or Distinctions in Certain Insurance Transactions is Not Unconstitutional

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In its April 24, 2013 opinion, the Tennessee Attorney General opined that the Tennessee Unfair Competition and Unfair or Deceptive Practices Act, which prohibits preferences or distinctions in certain insurance transactions, is not unconstitutional. The statute at issue, Tenn. Code Ann. § 56-8-104(18)(A), provides as follows:

(18) Preferences or Distinctions in Certain Insurance Transactions prohibited.

(A) Making, offering to make, or permitting any preference or distinction in property, marine, casualty, or surety insurance as to form or policy, certificate, premium, rate, benefits, or conditions of insurance, based upon membership, nonmembership, or employment of any person or persons by or in any particular group, association, corporation, or organization, or making the preference or distinction available in any event based upon any fictitious grouping of persons...

The opinion explained that this statute essentially prohibited insurance companies from offering discounts to certain groups of people based upon their membership and/or employment by a particular organization or company. “This type of anti-discrimination restriction is designed to prevent insurance companies from offering discounts or other preferences ‘to persons, or groups of persons, based upon factors other than legitimate rate-making considerations.’ These provisions prevent ‘unfair discrimination among similarly-situated purchasers of insurance.’”

The Attorney General concluded that the anti-discrimination restriction in Tenn. Code Ann. § 56-8-104(18)(A) does not violate the commercial speech protections of either the First Amendment of the United States Constitution or Article I, Section 19 of the Tennessee Constitution. “Both of these constitutional guarantees provide a qualified protection for commercial speech.”

Additionally, the Attorney General noted that by enacting Tenn. Code Ann. § 56-8-104(18), the General Assembly effectively has prohibited insurance companies’ preferences in premiums, rates, benefits, or other conditions of insurance based upon group membership or employment. It noted that this provision is consistent with other provisions of the Act, which prohibit insurance companies from granting preferences based upon factors other than risk, citing Tenn. Code Ann. § 56-8-104(7)(A)-(E), and, conversely, which prohibit insurance companies from giving less

favorable terms based upon other impermissible factors, such as race, sex, national origin, and disability, Tenn. Code Ann. § 56-8-104(7)(F) & (G).

“The General Assembly has thus deemed harmful to the public the commercial activity of granting insurance rate reductions or other preferences based upon group association rather than risk factors, and it has banned such activity in keeping with other anti-discrimination provisions that prohibit granting preferences or offering less favorable terms based upon impermissible considerations.”

The opinion noted the significant difference which existed between regulating the practice of offering rebates and prohibiting the practice of offering reduced rates or other preferences based upon group affiliation. A prior Attorney General opinion concluded that a total ban on rebates would be an unconstitutional restraint on commercial speech.

Finally, the opinion recognized that the Act sets forth exceptions to the anti-discrimination provisions of Tenn. Code Ann. § 56-8-104(18). Among others, the Act contains an exception for “any domestic company that confines its insurance business and operations to this state and to the provision of insurance solely for the benefit of its members, or members of its parent or sponsoring organization.” Tenn. Code Ann. § 56-8-104(18)(B). Companies that fit within this exception require their customers to be members of the company or the company’s parent or sponsoring organization. Membership is not in any way exclusive but, in fact, is open to any person who wishes to purchase insurance. Further, all members are offered rates on the same basis, adjusted for the legitimate individual risk characteristics. This business model, therefore, does not result in unfair discrimination among similarly-situated purchasers of insurance, nor does it create preferences that are based upon factors other than legitimate rate-making considerations, since both domestic and foreign companies that operate under this model by their very nature would not be engaged in this sort of discrimination.

Application of the foregoing exception does not raise significant equal protection concerns. “Rather than creating a true exception to Tenn. Code Ann. § 56-8-104(18), subsection (18)(B) appears merely to state the obvious.” Therefore, a domestic or foreign company that provides insurance “solely for the benefit of its [own] members, or members of its parent or sponsoring organization” does not violate Tenn. Code Ann. § 56-8-104(18).

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