

**UNITED STATES DISTRICT COURT
DISTRICT OF MAINE**

UNITED SOUTHERN ASSURANCE CO.,)	
)	
Plaintiff)	
)	
v.)	Civil No. 90-0150 P
)	
G. WILLIAM DIAMOND, Secretary of State, State of Maine,)	
)	
Defendant)	

**RECOMMENDED DECISION ON CROSS-MOTIONS
FOR SUMMARY JUDGMENT**

This case is before the court on cross-motions for summary judgment. The plaintiff challenges a Maine statute that requires motor carriers moving within and through Maine's borders to be insured by an insurance company licensed by Maine's Bureau of Insurance in order to transact business in Maine. The plaintiff alleges that the statute is unconstitutional because it violates the Supremacy Clause, the Equal Protection Clause and the Commerce Clause of the United States Constitution. The defendant argues that the statute is supported by federal law and withstands the constitutional challenge. For the reasons enumerated below, I recommend that the court grant the defendant's motion for summary judgment.

I. SUMMARY JUDGMENT STANDARDS

Fed. R. Civ. P. 56(b) provides that "[a] party against whom a claim . . . is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof." Such motions must be granted if

the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Fed. R. Civ. P. 56(c). The party moving for summary judgment must demonstrate an absence of evidence to support the nonmoving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986).

In determining if this burden is met, the court must view the record in the light most favorable to the nonmoving party and "give that party the benefit of all reasonable inferences to be drawn in its favor."

Ortega-Rosario v. Alvarado-Ortiz, 917 F.2d 71, 73 (1st Cir. 1990) (citation omitted). "Once the movant has presented probative evidence establishing its entitlement to judgment, the party opposing the motion must set forth specific facts demonstrating that there is a material and genuine issue for trial." *Id.* at 73 (citations omitted); Fed. R. Civ. P. 56(e); Local R. 19(b)(2). A fact is "material" if it may affect the outcome of the case; a dispute is "genuine" only if trial is necessary to resolve evidentiary disagreement. *Ortega-Rosario*, 917 F.2d at 73.

II. FACTUAL CONTEXT

The parties dispute no material fact relevant to a determination of this action.¹ The plaintiff, United Southern Assurance Company ("USA"), is a Florida-based insurance, bonding and surety company approved and licensed by the Interstate Commerce Commission ("ICC"). Local Rule 19(B) Statement of Material Facts ("Plaintiff's Statement") & 1; Statement of Defendant Pursuant to Local Rule 19(b)(2) ("Defendant's Statement") & 1. While USA is licensed to write insurance in several states, it is not authorized to transact business in Maine. *Id.* USA writes liability insurance for interstate motor carriers that are subject to federal regulation by the Interstate Commerce Commission. Plaintiff's Statement & 2; Defendant's Statement & 2.

¹ I note that the plaintiff's Statement of Material Facts is not properly supported by appropriate record citations as required by Local Rule 19(b). A plaintiff may not support its statement by citing to its own complaint unless the referenced allegations are admitted in the answer. *See* Fed. R. Civ. P. 56(c) and (e). To the extent the defendant has indicated that he does not dispute the plaintiff's Statement, however, I accept the facts as stated therein.

Maine also regulates interstate motor carriers pursuant to 29 M.R.S.A. ' 2708.² *See* Plaintiff's Statement & 3; Defendant's Statement & 3. The Secretary of State is responsible for enforcing the requirements of 29 M.R.S.A. ' 2708. *See* Amended Complaint & 2; Answer to Amended Complaint & 2. The Maine Bureau of Insurance scrutinizes insurance companies for fiscal soundness prior to authorizing such a company to transact business in Maine. Defendant's Answers to Interrogatories and Request for Production of Documents ("Defendant's Answers to Interrogatories")³ & 4 at 3. In addition, all insurance companies authorized to write insurance in Maine participate in the Maine Guarantee Program, which pays outstanding claims in cases where authorized insurers default. *Id.* Insurance companies not authorized to transact business in Maine do not participate in this guarantee program. *Id.*

² Section 2708 provides three options to motor carriers operating within the state by which they can satisfy the insurance requirement. One option is to present an indemnity bond in a form and amount approved by the Secretary of State and backed by a surety company authorized to transact business in the state. Another is to present a declaratory judgment issued by the ICC authorizing the motor carrier to self insure. The final option is to provide a policy from an insurance company authorized to transact business within the state or authorized to transact business in any other state. Insurers not licensed in Maine must provide an indemnity bond from a surety company authorized to transact business in Maine bonding them in an amount prescribed by the Secretary of State.

³ Found as Exh. C to Memorandum of Law in Support of Motion for Summary Judgment of Plaintiff United Southern Assurance Co. ("Plaintiff's Memorandum").

Even though the plaintiff is not licensed to write insurance in Maine, Maine will accept Form E certificates of insurance from motor carriers insured by the plaintiff if USA complies with the provisions of Maine's Permanent Rule 90-352(8)(E).⁵ See Plaintiff's Statement & 3; Defendant's Statement & 3. If USA wants to be the primary insurer of its motor carrier clients in Maine, it must utilize a procedure known in the insurance industry as "fronting." See Affidavit of David R. Tooley in Support of Motion for Summary Judgment ("Tooley Affidavit")⁶ & 10. By this procedure, a third-party insurer or surety authorized to transact business in Maine provides the required Form E and charges USA a premium, although USA remains the insurer. *Id.* USA wishes to bypass Maine's licensing and bonding requirements and file its own Form E certificates of insurance with Maine's Secretary of State on behalf of its insured interstate motor carriers. Plaintiff's Statement & 3; Defendant's Statement & 3.

III. LEGAL ANALYSIS

A. Standing

The Secretary raises the threshold issue of standing. He asserts that USA lacks standing to bring this action because it has suffered no concrete personal injury. The plaintiff asserts that its injury

⁴ "Form E" is entitled "Uniform Motor Carrier Bodily Injury and Property Damage Liability Certificate of Insurance." See 49 C.F.R. § 1023, Appendix of Forms. This form was developed by the Interstate Commerce Commission and is submitted to the Secretary of State to certify that an insurance policy has been issued.

⁵ Found at Chap. 154, Me. Dep't of Secretary of State, Div. of Motor Vehicles (Aug. 21, 1990). The rule provides that an insurer not licensed to write insurance in Maine may satisfy the insurance requirements of 29 M.R.S.A. § 2708 either by bonding with a surety company authorized to transact business in Maine or by depositing in an escrow account with the Secretary of State the same bond amount.

⁶ Found as Exh. D to Plaintiff's Memorandum.

derives from the added burden it faces as a consequence of Maine's statutory and regulatory insurance requirements. *See* Amended Complaint §§ 15-17.

Standing doctrine embodies "a blend of constitutional requirements and prudential considerations." *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 471 (1982) (citation omitted). Article III requires the plaintiff to show that it has suffered an injury that is causally connected to the defendant's actions and "is likely to be redressed by a favorable decision." *Id.* at 472 (citation omitted). A plaintiff who has satisfied this constitutional requirement must go on to convince a court that various prudential considerations also warrant hearing the case. Such considerations include a general policy against asserting the rights or interests of third parties; refraining from adjudicating abstract questions of wide public significance amounting to generalized grievances; and requiring that the plaintiff fall within the "zone of interests" to be protected or regulated by the statute or constitutional guarantee in question. *Id.* at 474-75. "As to constitutional challenges to official action, however, the result might well be to recognize standing whenever permitted by constitutional constraints." 13 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 3531.7 at 515 (1984).

USA complains that the Secretary is imposing insurance and bonding requirements that far exceed those established by federal law. It asserts that it is forced by Maine law to bear the added economic burden of "fronting" in violation of its constitutional rights. I find that the plaintiff has alleged a specific and personal injury and that its claims involve constitutional challenges. Accordingly, USA has established that it has sufficient standing to bring this action before the court.

B. Preemption Claim

The search for preemption is fundamentally a search for congressional intent. *Schwartz v. Texas*, 344 U.S. 199, 202-03 (1952), *overruled on other grounds*, *Lee v. Florida*, 392 U.S. 378 (1968). The Supreme Court has recognized three avenues by which federal law may preempt state law: (1) Congress may explicitly define its preemptive intent, (2) absent specific intent, "Congress may indicate an intent to occupy an entire field of regulation" and (3) "if Congress has not displaced state regulation entirely, it may nonetheless preempt state law to the extent that the state law actually conflicts with federal law." *Michigan Canners & Freezers Ass'n v. Agricultural Mktg. & Bargaining Bd.*, 467 U.S. 461, 469 (1984). State laws that are preempted violate the Supremacy Clause, U.S. Const. art. VI, cl.2.

The plaintiff argues that Maine's statute and rule regulating motor carrier insurance coverage are preempted by 49 U.S.C. § 10927. The defendant asserts that nothing in the express language of section 10927 prohibits Maine from passing laws with the same intent as federal laws. Considering each of the three avenues for preemption in turn, I find that Maine's statute has not been preempted by federal law.

Title 49 of the United States Code, section 10521 grants the ICC general jurisdiction over transportation by motor carrier between and among the states. Section 10922(b)(1) grants the ICC authority to issue certificates of operation to such motor carriers. Section 10927(a)(1), the particular section at issue here, states that

[t]he Commission may issue a certificate under Section 10922 . . . only if the carrier . . . applying for such certificate files with the Commission a bond, insurance policy, or other type of security approved by the Commission, in an amount not less than such amount as the Secretary of Transportation prescribes pursuant to, or as required by, section 30

of the Motor Carrier Act of 1980 . . . and the laws of the State or States
in which the carrier is operating, to the extent applicable.

I find no express statutory language precluding state involvement in the licensing process. While the ICC has general jurisdiction over motor carriers, the enabling statute indicates that Congress intended to allow some degree of state participation in licensing regulation; namely, determining the level of financial responsibility that motor carriers must demonstrate prior to operating within a state.

In addition, the regulations promulgated pursuant to the federal statutes anticipate state involvement. Title 49 C.F.R. ' 1023.51 states that

[w]henver a State requires a motor carrier to file and maintain evidence of currently effective bodily injury and property damage liability security, such motor carrier shall not engage in interstate or foreign commerce within the borders of such State unless and until there shall have been filed with and accepted by the commission of such State a currently effective certificate of insurance or surety bond as prescribed by the provisions of this subpart, and there shall have been a compliance with all other requirements of this subpart.

The regulations further provide that "[t]he provisions of this subpart shall not be construed in anyway to affect the qualifications of an insurer or surety as prescribed by State law." 49 C.F.R. ' 1023.55. In light of the statutory and regulatory language, I find no express preemption under the first prong of preemption analysis.

Absent express preemptive intent, Congress may indicate an intent to occupy an entire regulatory field leaving no room for state action. The Secretary argues that Congress has not occupied the insurance regulatory field and that, in fact, it has specifically delegated that authority to the states. The plaintiff agrees that Congress has not occupied the field of insurance but asserts that Maine is not regulating the business of insurance through the challenged statute.

As an initial matter, the legislative history reveals nothing about congressional intent to occupy the field of motor carrier regulation. However, as noted above, applicable regulations at a minimum suggest that Congress intended for the states to participate in the process of regulating motor carriers. I find that drawing a fine line between motor carrier regulation and insurance regulation, for purposes of this analysis, forces an artificial and impractical result.

While it is true that the focus of the federal and state statutes at issue here is regulating motor carriers, a necessary part of that regulation involves insurance. To the extent that this is so, federal law allows the states their traditional role of setting insurance standards within their borders. 15 U.S.C. ' ' 1011 - 1012. *See also City Cab Co. v. Edwards*, 745 F. Supp. 757, 760 (D. Me. 1990) (' ` Congress has certainly not occupied the field of regulation of the insurance industry.') As discussed above, federal law reflects the interplay between motor carrier regulation and state authority to ensure adequate insurance coverage. Accordingly, I find that Congress has not demonstrated an intent to occupy the field of motor carrier liability regulation.

This leaves for the court's consideration the final avenue of preemption -- conflict between state and federal law. A state law is invalidated in circumstances such as when ` ` it may be impossible to comply with both state and federal law, or when state law ` stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *City Cab*, 745 F. Supp. at 760 (citations omitted).

The only case construing 49 U.S.C. ' 10927 did so in the limited context of whether the statute preempted the portion of a state code providing for direct actions against insurers. *See Watkins v. H.O. Croley Granary*, 555 F. Supp. 458 (N.D. Ga. 1982). The court found that the state statute did not enlarge or limit the financial liability of motor carrier insurers and that, in view of the state's interest

in protecting claims of its citizens injured on the state highways, federal law did not preempt the state statute. *Id.* at 461.

In the instant action, both the federal and state statutes reflect the common concern that motor carriers maintain minimum levels of financial security in the event of future claims against them. To that end, Maine's statute neither interferes with nor is contrary to federal law. In addition, the federal regulations authorize the state to determine the qualifications of insurers. There is no suggestion that Maine's statute improperly enlarges the financial liability of motor carrier insurers. The additional procedures required by insurers such as USA do not interfere with the overall objectives of the federal statute. I conclude that the Maine and federal statutes can co-exist and mutually contribute to the accomplishment and execution of those objectives.

C. Equal Protection Claim

The threshold question under equal protection analysis is the level of scrutiny the court should apply:

Unless a statute provokes "strict judicial scrutiny" because it interferes with a "fundamental right" or discriminates against a "suspect class," it will ordinarily survive an equal protection attack so long as the challenged classification is rationally related to a legitimate governmental purpose.

Kadrmas v. Dickinson Pub. Schools, 487 U.S. 450, 457-58 (1988) (citations omitted). There is no fundamental right or suspect class at issue here. The appropriate consideration, therefore, is whether Maine's statute "bears a rational relation to a legitimate government objective." *Id.* at 461-62. Rational-basis scrutiny "is the most relaxed and tolerant form of judicial scrutiny under the Equal Protection Clause." *Dallas v. Stanglin*, 490 U.S. 19, 26 (1989). In *Kadrmas*, the Supreme Court instructs that "the Equal Protection Clause is offended only if the statute's classification rests on

grounds wholly irrelevant to the achievement of the State's objective." *Kadrmas*, 487 U.S. at 462 (citations omitted).

The plaintiff initially argues that 29 M.R.S.A. ' 2708 violates the Equal Protection Clause because it treats interstate motor carriers differently from intrastate motor carriers. Arguing that the freedom to travel is a fundamental right, USA suggests that the court apply the "strict scrutiny" level of review. This argument is without merit since USA --an insurance company -- has no standing to argue for the fundamental rights of motor carriers.

The plaintiff next argues that Maine's regulatory scheme arbitrarily classifies insurance companies based upon their principal place of business by imposing additional requirements on those companies not licensed to transact business in Maine. This practice, it argues, cannot survive under the rational-basis test. The Secretary counters that Maine's statute and rules do not discriminate against those companies not licensed to write insurance in Maine and that, because they are designed to protect a legitimate government interest, they survive the constitutional challenge. I agree with the defendant's position.

Under 29 M.R.S.A. ' 2708, every for-hire motor carrier is required to obtain a sufficient insurance policy, a sufficient indemnity bond or a declaratory judgment from the ICC authorizing the carrier to self insure. Similarly, all insurance companies insuring such motor carriers must be authorized by the State Bureau of Insurance to write insurance in Maine whether based in Maine or not. Finally, Permanent Rule 90-352 requirements apply to all insurance companies not licensed to do business in Maine, regardless of their principal place of business.

The Maine Highway Transportation Reform Act was enacted to provide for a "safe, reliable and efficient motor carrier system" within the for-hire transportation industry in Maine. 29 M.R.S.A. ' 2702. In light of that goal, it is reasonable to conclude that Maine's interest in protecting its motoring

public would be furthered by enacting laws that require motor carriers to provide sufficient liability coverage. I find that Maine's statute is rationally related to a legitimate government interest.

D. Commerce Clause Claim

Under Commerce Clause analysis, the State's interest, if legitimate, is weighed against the burden the state law would impose on interstate commerce." *Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869, 881 (1985).

Commerce clause doctrine requires the court to consider (1) whether the challenged statute regulates evenhandedly with only 'incidental' effects on interstate commerce, or discriminates against interstate commerce either on its face or in practical effect; (2) whether the statute serves a legitimate local purpose; and, if so, (3) whether alternative means could promote this local purpose as well without discriminating against interstate commerce." *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979).

Because I do not find Maine's statute discriminatory either facially or practically and also find that it is rationally related to a legitimate government interest, I must next weigh this interest against any burden it imposes on interstate commerce. Maine offers three options for motor carriers to prove financial responsibility: insurance, bond or self-insurance. Maine then offers those insurers not licensed in the state two options to provide insurance verification on behalf of motor carriers: surety bonds written through a Maine-licensed bonding company or deposits in a cash escrow account. While these procedures may be more involved than those required of insurers already licensed by the state, I find that they regulate evenhandedly and with only incidental effects on interstate commerce.⁷

⁷The Secretary notes that there are over 700 insurance companies currently authorized to transact business in Maine and that they insure over 6,000 carriers with over 250,000 vehicles in their fleets. See Defendant's Answers to Interrogatories & 4 at 5. USA, of course, has the option of becoming licensed in Maine, but states that it will not be eligible for such licensing until 1992. Plaintiff's

The plaintiff suggests that the same purpose could be fulfilled by relying on the guarantee funds of the states in which the plaintiff is licensed to write insurance. The Secretary counters, however, that Maine cannot rely on another state's guarantee fund to protect its own citizens because there is no assurance that another state's statute "will exist in perpetuity." See Defendant's Reply to Plaintiff's Opposition to Defendant's Motion for Summary Judgment at 4. I am persuaded by the Secretary's argument. Further, the Secretary logically concludes that the legislatures of other states must have come to the same conclusion when they established their own guarantee funds.

IV. CONCLUSION

For the foregoing reasons, I conclude that Maine's statute is constitutional and not preempted by federal law. Accordingly, I recommend that the court DENY the plaintiff's motion and GRANT the defendant's motion for summary judgment.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. ' 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated at Portland, Maine this 12th day of July, 1991.

*David M. Cohen
United States Magistrate Judge*