L/jmc *

Decision 92-12-060 December 16, 1992

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of Yellow Cab Cooperative, Inc., for Approval of Securities or Agreements of Indemnity for Adequate Protection Against Liability Pursuant to General Order No. 115-D(5)	ORIGINAL Application 89-05-066 (Filed May 26, 1989; amended June 27, 1989, September 29, 1989, and January 16, 1990)

ORDER DENYING REHEARING
AND MODIFYING DECISION 92-09-053

Decision 92-09-053 (the Decision), issued September 2, 1992, denied Yellow Cab Cooperative, Inc.'s (Yellow Cab's) application for a determination that an insurance policy issued by Chariots of Hire Risk Retention Group Insurance Company (Chariots of Hire) satisfied Yellow Cab's obligation to provide evidence of adequate legal liability protection under Public Utilities Code § 5391.

The Decision held, inter alia, that pursuant to Public Utilities Code § 5392, the Commission could not accept filings to demonstrate adequate protection against legal liability that were not of the kinds listed in that section. The Decision also found, as a factual matter, that Yellow Cab had not shown that its arrangements with the Chariots of Hire company afforded the security for the protection of the public contemplated by the Public Utilities Code.[1]

---

1. Yellow Cab characterizes these factual findings as "secondary." (Application for Rehearing at p. 1, fn 1.) The Decision relies on its analysis of the adequacy of the policy written by Chariots of Hire as an independent basis to deny Yellow Cab's Application. (D.92-09-053 at p. 24 (mimeo).) We

(Footnote continues on next page)

Yellow Cab filed an Application for Rehearing of the Decision on October 2, 1992 (Application). Yellow Cab charges, inter alia, that our analysis of Public Utilities Code §§ 5381, 5391 and 5392 was "perfunctory," that our reading of the Insurance Code was "inadequate" and that our decision results in "blatant discrimination... in clear and unambiguous violation of federal law." (Application at pp. 1-2.) We have carefully considered all of the issues and arguments raised in the application for rehearing and are of the opinion that legal error has not been demonstrated. However, we will modify the Decision in a number of ways to clarify its meaning.

Public Utilities Code § 5391 requires charter-party carriers of passengers to be able to pay for damages for which they are liable, including bodily injury, death or destruction of property. Public Utilities Code § 5392 states:

> The protection required under Sections 5391 and 5391.2 shall be evidenced by the deposit of any of the following with the commission covering each vehicle used or to be used under the certificate or permit applied for:
>
> (a) A policy of insurance, issued by a company licensed to write insurance in this state, or by nonadmitted insurers subject to Section 1763 of the Insurance Code, if the policies meet the rules promulgated therefor by the commission.
>
> (b) A bond of a surety company licensed to write surety bonds in the state.

(Footnote continued from previous page)

did not make these findings only as a matter of convenience, as Yellow Cab suggests (Application for Rehearing, supra); we did so because a considerable amount of testimony was presented and we believed that testimony merited analysis at that time. (D.02-03-053 at p. 12.)

> (c) Evidence of the qualifications of the charter-party carrier of passengers as a self-insurer as may be authorized by the commission.

D.92-09-053 held that a straightforward reading of Public Utilities Code § 5392 clearly limited filings to the three types listed in the statute. (Decision at p. 4.) The Decision further noted that this reading made sense in the light of the purpose of Public Utilities Code §§ 5391 and 5392. (Id. at p. 5.) We are not persuaded by any of Yellow Cab's arguments that the Decision's reading of Public Utilities Code §§ 5381, 5391 and 5392 is in error.

The Public Utilities Code protects the public by requiring charter-party carriers of passengers to show that they can pay for damages for which they are liable. (Pub. Util. Code § 5391.) D.92-09-053's interpretation of Public Utilities Code § 5392 is in accord with this policy because it states the Commission will only accept as proof of liability protection policies or bonds issued by companies subject to the oversight of the California Department of Insurance. This ensures adequate protection because the Department of Insurance, unlike the Public Utilities Commission, has the expertise to review the financial soundness of the companies that issue those policies or bonds and thus can determine that the liability protection is adequate.

The only time this Commission evaluates the adequacy of a charter-party carrier's demonstration of liability protection is when the carrier is self-insured. In that case, it is the overall financial health of the transportation company that is being evaluated. The Commission is the agency with the expertise to evaluate the financial soundness of a transportation company it regulates. If Public Utilities Code § 5392 were interpreted to allow the filing of policies or bonds not subject to the oversight of the Department of Insurance the public would not be protected because this Commission does not have the resources or

the ability to determine whether those insurance filings would be adequate.

In its application for rehearing, Yellow Cab states that Public Utilities Code §§ 5381, 5391 and 5392 operate so that the means listed in § 5392 are not exclusive of other means. (Application at p. 2.) Without more, this argument cannot demonstrate that the Decision is in error. Yellow Cab further argues that the word "shall" in Public Utilities Code § 5392 is not mandatory. In light of the arguments we give above and those stated in D.92-09-053, we are not persuaded by this contention. However, we will modify D.92-09-053 to clearly indicate the relationship between §§ 5391 and 5392.

Further, the Decision is not in error when it finds that the California Risk Retention Act of 1991, Insurance Code §§ 125-140 (California Act), does not require the Commission to accept proof of liability protection not listed in Public Utilities Code § 5392. Since the California Act does not conflict with the Public Utilities Code it does not supersede the Public Utilities Code. (See Ins. Code § 127.)

The purpose of the California Act is:

> (a) To regulate the formation and operation of risk retention groups and purchasing groups in this state formed pursuant to the federal Liability Risk Retention Act of 1986, to the extent permitted by that law.
>
> (b) To promote the formation and operation of risk retention groups and purchasing groups in this state. Californians who are experiencing difficulty in obtaining liability coverage are encourage to form and operate risk retention and purchasing groups in this state.

Thus, while the California Act supports the formation and operation of risk retention groups, it also evinces a purpose to regulate those groups to the extent permitted by federal law. Federal law reserves to the states the ability to decide acceptable means of demonstrating adequate liability protection

(see 15 U.S.C.A. § 3905 (d) (West Supp. 1992)), and Insurance Code § 130(e)(2) specifically provides that while policies written by risk retention groups may be used to demonstrate adequate liability protection, state agencies have the discretion to accept or deny such proof of financial responsibility:

> "Liability" includes financial responsibility required by the state for any activity for which an individual shall be required to obtain a license or certificate to provide a service. For purposes of this subdivision, a state agency shall have discretion to accept or deny proof of financial responsibility.

Moreover, Public Utilities Code § 5392 does not restrict the formation or operation of risk retention groups. Section 5392 merely states that in order to protect the public by ensuring that liability protection is adequate, only policies written by companies subject to the oversight of the Department of Insurance may be filed to demonstrate that protection. Certainly, this provision cannot restrict the formation of risk retention groups: it presented no obstacle to the formation of Chariots of Hire, the risk retention group at issue here.

Public Utilities Code § 5392 also does not restrict the operation of risk retention groups because that section does not prevent them from writing policies. Section 5392 only places restrictions on the policies that are filed with the Public Utilities Commission. Even when a risk retention group writes a policy to provide liability protection, § 5392 does not prevent the policy from being filed to demonstrate adequate liability protection. Public Utilities Code § 5392 merely requires that for the protection of the public, if such a policy is to be filed with the Commission, whether or not it is written by a risk retention group, then the company writing the policy must be subject to the oversight of the Department of Insurance. Risk retention groups that meet the requirements of § 5392 may have their policies accepted by the Commission.

The application for rehearing also argues that, "By... implication, the Legislature 'amended' Section 5392 when it enacted the California Act." (Application at p. 3.) Amendments by implication are disfavored. (Division of Labor Enforcement v. Moroney (1946) 28 Cal.2d 344, 346.) We are not persuaded that the California Act confers on this Commission by implication the power to determine the financial soundness of risk retention groups.

Yellow Cab further contends that the Decision is in error because the California Act grants the Commission the power to accept or reject risk retention insurance policies filed under Public Utilities Code § 5392 on their financial merits. Yellow Cab relies on that portion of Insurance Code § 130(e)(2) that states, "a state agency shall have discretion to accept or deny proof of financial responsibility." (Application at p. 4.) We are not persuaded by this argument.

D.92-09-053 interprets Insurance Code § 130(e)(2) to be the California Act's counterpart to the federal rule that the power to determine which types of insurance are adequate for the purposes of financial responsibility is reserved to the states. This reading is reasonable since the California Act takes pains to confer upon the state those powers reserved to the states under federal law. Insurance Code § 125(a), 128(a). This reading is also reasonable because Insurance Code § 130(e)(2) gives state agencies the ability to accept or deny proof of financial responsibility. In order to make D. 92-09-053 more explicit on this point, we will modify the Decision to clarify its discussion of Insurance Code § 130(a)(2).

Moreover, Insurance Code § 130(e)(2) contains no provisions that require state agencies to review the financial merits of risk retention insurance groups on their financial merits. The application for rehearing apparently argues that under Insurance Code § 130(e)(2) might imply that this Commission has the discretion to decide what types of insurance are acceptable to it. If we had the discretion to decide what types

of insurance were acceptable to us, it is clear how we would exercise it. We would rely on the expertise of the Department of Insurance and therefore allow the use of risk retention groups in only two circumstances: (1) where a risk retention group is an admitted insurer, or (2) where the certificate has been countersigned by a licensed surplus lines broker. This is what the statute already requires. As we explained in D. 92-09-053, by accepting these two methods of demonstrating financial responsibility, we would ensure that the Department of Insurance, the agency with the appropriate expertise, could oversee the financial soundness of the insurance companies writing policies demonstrating liability protection.

We now turn to the questions of federal law raised in the application for rehearing. D. 92-09-053 concluded that the federal Liability Risk Retention Act of 1986, (15 U.S.C.A. §§ 3901-3906), (Federal Act) does not preempt state laws, rules, regulations and orders when they apply to the demonstration of financial responsibility in obtaining a license or permit to undertake specific activities.

The Federal Act provides, at § 3905 (d):

> Subject to the provisions of section 3902(a)(4) of this title relating to discrimination, nothing in this chapter shall be construed to preempt the authority of a State to specify acceptable means of demonstrating financial responsibility where the State has required a demonstration of financial responsibility as a condition for obtaining a license or permit to undertake specified activities. Such means may include or exclude insurance coverage obtained from an admitted insurance company, an excess lines company, a risk retention group, or any other source regardless of whether coverage is obtained directly from an insurance company or through a broker, agent, purchasing group, or any other person.

Thus, subject to its provisions relating to discrimination, the plain language of the Federal Act allows

California to specify what constitutes, "an acceptable means of demonstrating financial responsibility" where such is required as a condition to obtaining a license or a permit to undertake specified activities within California. Such means "may include or exclude insurance coverage" obtained from any source.

Further, the legislative history of the Federal Act indicates that Congress intended to establish a scheme where state laws regulating risk retention groups' formation and operation--that is the sale of insurance by risk retention groups to their members--were preempted to a great extent, but where state authority to regulate a different matter, the demonstration of financial responsibility, was preserved. (Cf. H.R.Rep. No. 865, 99th Cong., 2d Sess., reprinted in 1986 U.S. Code Cong. & Admin. News 5303, 5305, 5309, 5311-5312, 5318, see also Home Warranty Corp. v. Caldwell (11th Cir. 1985) 777 F.2d 1455, 1468, 1472.)

The legislative history of the Federal Act also indicates that Congress intended the reference to discrimination in § 3950(d) to prevent states from frustrating the scheme set out in the Federal Act by using financial responsibility requirements to circumvent the Federal Act's preemption concerning the formation and operation of risk retention groups. (Cf. H.R.Rep. No. 865 99th Cong., 2d Sess., supra, at pp. 5319-5318.)

Yellow Cab argues that D.92-09-053 is in error because it interprets Public Utilities Code § 5392 so that it violates the Federal Act. We are not persuaded by these arguments.

Section 3905(d) of the Federal Act clearly states that state law which specifies financial responsibility requirements for state-licensed activities is not be limited unless, and only to the extent that, such law discriminates against risk retention groups. The conclusion in D. 92-09-053 is also consistent with the purpose of the Federal Act. As we glean from the legislative history, the Federal Act preempts state law prohibiting the formation and operation of risk retention groups because risk

retention groups can only sell insurance to their members, who are the owners of the group and do not need to be protected by state law. (Cf. Id. at pp. 5305, 5309.) State law in this area can safely be preempted because the larger public interest, which state law protects, is not involved. On the other hand, the Federal Act reserves to the states the power to regulate financial responsibility since that area involves the general public. The balance that Congress struck in favor of deregulation when only risk retention group members were involved was struck in favor of state regulation when the general public was involved. (Cf. Id. at pp. 5313, 5316-5318.)

The application for rehearing confuses the Federal Act's preemption of state law regulating the formation and operation of risk retention groups in § 3902(a)(1) and its protection of the public by reserving to the states their traditional regulatory powers over insurance when the public is involved in § 3905(d). Section 3905(d) is subject only to the antidiscrimination provisions of § 3902 (a)(4), and not § 3902(a)(1). The preemption contained in the Federal Act's § 3902(a)(1) does not apply to the authority reserved to the states under § 3905(d).

Further, our conclusion in D. 92-09-053 does not ignore the effect of the antidiscrimination provision of § 3905(d) of the Federal Act. Public Utilities Code § 5392 does not discriminate against risk retention groups in the manner proscribed by the Federal Act. Section 5392 applies equally to all types of insurers; it does not exclude insurance policies issued by risk retention groups. It might be argued that a state financial responsibility requirement would be illegally discriminatory if state licensing authorities were to allow insurance filings by nonadmitted insurers but prohibit filings by risk retention groups, or if they imposed additional requirements on risk retention groups. The Commission has not done that here. We will accept a filing to meet financial responsibility requirements by a nonadmitted risk retention group if it is made

through a licensed surplus lines broker. This is the exact same requirement we apply to other nonadmitted insurers.

On the other hand, the application for rehearing interprets § 3905(d) of the Federal Act in a way that gives it no meaning. Under Yellow Cab's reading, risk retention groups would be effectively exempt from state financial responsibility requirements while other insurance companies would have to comply with those requirements.

Yellow Cab also claims that the requirement that non-admitted insurers place policies through surplus lines brokers has no relationship to financial responsibility. D.92-09-053 took notice of Insurance Code §§ 1763 and 1765.1 which provide that the placement of insurance by a surplus lines broker is subject to the oversight of the Department of Insurance.

To the extent that Charter Risk Retention Group Ins. Co. v. Rolko (D. Ct. M.D. Pa. 1992) 796 F.Supp 154 reaches a contrary result, we do not find it persuasive. Rolko is a decision on a motion for summary judgment for failure to state a claim. It sounds a note of caution, as D.92-09-053 stated. It does not "set forth the only way in which the financial responsibility exception of the federal law can reasonably be interpreted," as the application for rehearing claims. Moreover, the application for rehearing never states the rule it claims was promulgated in Rolko. However we will modify D.92-09-053 to clarify that the § 3905(d) delegation of authority to the states is subject to the Federal Act's provisions concerning discrimination contained in §3902(a)(4) and to include a discussion of the legislative history of the Federal Act.

Therefore, we conclude that D. 92-09-053 does not erroneously interpret Public Utilities Code § 5392. Neither the Public Utilities Code, the California Act nor the Federal Act conflicts with D.92-09-053's interpretation of § 5392.

THEREFORE, good cause appearing,

IT IS ORDERED that D.92-09-053 is modified as follows:

1. The paragraph that begins on page 4 and continues on page 5 ending at footnote 3 is modified to add, as a final sentence:

> Section 5392 ensures that the proof of liability protection is consistent with the requirements of § 5391 (i.e. is adequate) because it provides, with one exception, that proof of liability protection must be subject to the oversight of the Department of Insurance: the agency with the expertise to determine adequacy.

2. The last paragraph in the section entitled "Federal Policies", which begins at the bottom of p. 9 immediately following the quotation of § 3905(d) and continues on the top of p. 10, is modified to read:

> It is clear from these federal statutes that the Act does not preempt state laws, rules, regulations, or orders, when they apply to the demonstration of financial responsibility in obtaining a license or permit to undertake specified activities, unless they are impermissibly discriminatory. The legislative history of the Act suggests that Congress intended to establish a scheme where state laws regulating the formation and operation of risk retention groups were largely preempted, but where authority to regulate the demonstration of financial responsibility was reserved to the states so long as they do not discriminate against risk retention groups. Section 5392 applies the same restrictions to all nonadmitted insurers, including risk retention groups. Thus, § 5392 does not discriminate against risk retention groups.
>
> In this context the Act explicitly allows a state: (1) to require liability insurance to be issued by "an admitted insurance company" or "an excess lines company"; or (2) to "exclude insurance coverage obtained from...a risk retention group." The unambiguous language of the Act requires the conclusion

> that the Commission would not trespass on the Supremacy Clause of the Federal Constitution by holding that in obtaining passenger charter-party permits and certificates or passenger stage certificates applicants must provide evidence of protection against liability in one of the ways listed in PU Code § 5392.

3. The second line on p. 11 is modified to delete the word "however."

4. The first full paragraph on p. 11 immediately following the quotation from Insurance Code § 130(e)(2) is modified to read:

> Here the Legislature recognizes the power of the state and its agencies to exercise discretion in deciding what types of insurance shall constitute adequate protection against liability, where licenses and permits are involved.

IT IS FURTHER ORDERED that rehearing of D.92-09-053 as modified herein is denied.

This order is effective today

Dated December 16, 1992 at San Francisco, California.

DANIEL WM. FESSLER
President
JOHN B. OHANIAN
PATRICIA M. ECKERT
NORMAN D. SHUMWAY
Commissioners

I CERTIFY THAT THIS DECISION WAS APPROVED BY THE ABOVE COMMISSIONERS TODAY

NEAL J. SHULMAN, Executive Director