IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 93-5040

AMERICAN BANK & TRUST CO. OF OPELOUSAS,

Plaintiff-Appellant,

VERSUS

LYNDA A. DRAKE,
in Her Capacity as Deputy Commissioner
of Financial Institutions,

Defendant-Appellee.

Appeal from the United States District Court
for the Western District of Louisiana
(6:90-CV-635)

(April 5, 1994)

Before WOOD,[*] SMITH, and DUHÉ, Circuit Judges.

JERRY E. SMITH, Circuit Judge:[**]

The American Bank and Trust Company of Opelousas ("AB") seeks declaratory and prospective injunctive relief that would allow it to engage in the general sale of insurance in Louisiana. The

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[*] Circuit Judge of the Seventh Circuit, sitting by designation.

[**] Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

district court abstained from reaching a decision, under Railroad Comm'n v. Pullman Co., 312 U.S. 496 (1941). We affirm.

I.

On April 11, 1990, ABT filed this action against Fred C. Dent,[1] in his capacity as the Commissioner of Financial Institutions for Louisiana ("Commissioner"), seeking declaratory and prospective injunctive relief prohibiting the Commissioner from enforcing state statutes. ABT contends that the Commissioner's refusal to promulgate parity regulations allowing ABT and other state chartered banks to sell life and casualty insurance products as general agents violates the Equal Protection Clause of the Fourteenth Amendment.

In November, the district court dismissed the action for lack of subject matter jurisdiction under the Eleventh Amendment. On appeal, we held that the case falls within the Ex Parte Young, 209 U.S. 123 (1908), exception to Eleventh Amendment immunity. See American Bank & Trust Co. v. Dent, 982 F.2d 917 (5th Cir. 1993). Lacking a full record on the Commissioner's alternative claim for abstention, we remanded to the district court to consider the propriety of abstention under Burford v. Sun Oil Co., 319 U.S. 315 (1943), or Pullman.

On remand, ABT filed a motion to stay ruling and allow discovery on the abstention issues in order to create a record.

[1] Subsequently, he has been replaced by Lynda Drake, Deputy Commissioner of Financial Institutions.

The district court stayed discovery, then decided to abstain from deciding the case under Pullman and stayed the proceeding. ABT timely appealed from the abstention order.

ABT contends that it has been denied equal protection by the Commissioner's refusal to permit ABT to engage in general insurance agency activities, including the selling of life and casualty insurance products. ABT contends that although other state and federal financial institutions in Louisiana are permitted to sell insurance, state-chartered banks are not.

National banks may sell insurance through offices and branches located in communities of less than five thousand persons. 12 U.S.C. § 24 Seventh; 12 C.F.R. § 7.7100. Federal and similarly situated state-chartered thrifts are also permitted to engage in general insurance agency activities in Louisiana through their respective service corporation subsidiaries. 12 C.F.R. § 545.74(c)(6)(ii); LA. R. S. §§ 6:902(B), 6 LA. REG. 541 (Sept. 1980). Finally, federal and similarly situated state-chartered credit unions in Louisiana may sell insurance to their members. LA. R. S. 6:644(B)(9).

Four Louisiana statutes are relevant for consideration of the plaintiff's complaint and the abstention issue.

LA. R. S. 6:121(B)(1) reads, in pertinent part:

> The commissioner shall have the power to enact and promulgate rules and regulations as may be necessary or appropriate to implement the provisions of this Title. The commissioner in making rules and regulations pursuant to this power shall consider among other matters the impact any such rule or regulation will have on the dual banking system as well as the impact any such rule or regulation will have on the public interest in the

business of banking.

LA. R. S. 6:121(B)(2) reads, in pertinent part:

> Notwithstanding any other provision of this Title, the commissioner shall not authorize any bank, bank holding company, or subsidiary thereof to engage in any insurance activity except an insurance activity in which a bank may engage pursuant to the provisions of R.S. 6:242(A)(6).

LA. R. S. 6:242(A)(6) reads, in pertinent part:

> In addition to the general corporate powers conferred in R.S. 6:241 and the powers conferred by other provisions of the laws of this state, a state bank shall have the following banking powers and those incidental to the exercise of these powers:
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> (a) To act as the agent for any insurance company authorized to do insurance business in this state by soliciting and selling insurance, but only with respect to credit insurance which, within the terms and conditions authorized by law, is limited to assuring repayment or partial repayment of the outstanding balance due on a specific extension of credit by a bank in the event of the death, disability, or involuntary unemployment of the debtor and collecting premiums on those policies issued through the bank by such insurance company; and to receive for services so rendered such commissions or fees as may be agreed upon between the bank and the insurance company for which it is acting as agent. Notwithstanding any other provisions of this Title, no bank shall engage or be authorized to engage in any insurance activity that is not expressly permitted by this Paragraph.
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> (b) Nothing contained in this Title shall prohibit any bank which was engaged as a general insurance agent or broker on January 1, 1984, from continuing to be so engaged.

LA. R. S. 6:242(C) reads:

> In addition to any other powers, a state bank shall have and possess such rights, powers, privileges, and immunities of a national bank domiciled in this state as may be prescribed by rule or regulation promulgated by the commissioner. In the event of a conflict between this Subsection or any rule or regulation promulgated hereunder and any other provision of law, the provisions of this Subsection shall control.

This section authorizes, but does not require, the Commissioner to

promulgate rules or regulations granting state banks parity with national banks. But the statute is silent as to state bank parity with state savings and loans or thrifts, savings banks, or credit unions. As there is also no national insurance regulatory system, there is no question of parity between national- and state-chartered insurance companies.

On March 21, 1990, ABT requested that the Commissioner promulgate parity regulations granting it and other state-chartered banks insurance agency powers comparable to those enjoyed by other financial institutions, including authority to engage in the sale of insurance products as a general agent. The Commissioner rejected the request.

II.

We review a district court's decision to abstain from deciding a case over which it has jurisdiction for abuse of discretion. New Orleans Pub. Serv., Inc. v. Council of New Orleans, 850 F.2d 1069, 1078 (5th Cir. 1988), rev'd on other grounds, 491 U.S. 350 (1989). Under Pullman, federal courts should refrain from granting equitable relief on constitutional grounds if resolution of an unsettled question of state law may obviate the constitutional question. The district court did not abuse its discretion by abstaining from deciding the case under Pullman abstention.

Under Stephens v. Bowie County, Tex., 724 F.2d 434, 435 (5th Cir. 1984), at least one of three factors must be present for Pullman to apply: (1) Whether the disposition of a question of

state law involved in the case can eliminate or narrow the scope of the federal constitutional issue; (2) whether the state law question presents difficult, obscure, or unclear issues of state law; and (3) whether a federal decision could later conflict with the subsequent state court resolution concerning the same regulatory program or scheme, thus engendering more confusion. The district court found that factors (1) and (2) were present in this case and held abstention appropriate under Pullman. ABT contends that Pullman abstention was inappropriate, as there is no uncertainty under Louisiana law warranting it.

Abstention is proper only where state law is ambiguous:

> Federal courts need not abstain on Pullman grounds when a state statute is not "fairly subject to an interpretation which will render unnecessary" adjudication of the federal constitutional question. Pullman abstention is limited to uncertain questions of state law because "[a]bstention from the exercise of federal jurisdiction is the exception, not the rule."

Hawaii Housing Auth. v. Midkiff, 467 U.S. 229, 236 (1984) (citations omitted). ABT contends that it is unambiguous that it is unable to sell insurance under state law, while all other similar financial institutions can; thus abstention is unwarranted.

A review of the statutory provisions in question, however, reveals this to be a dubious conclusion. The problem is that it is uncertain whether state law permits state-chartered banks to sell insurance. The language of § 6:242(C) suggests that it invalidates the distinctions drawn between state and national banks in §§ 6:121(B)(2) and 6:242(A)(6). If § 6:242(C) is interpreted as permitting state banks to sell insurance, then ABT's claim that its

constitutional rights have been violated is no longer viable. Under Boehning v. Indiana State Employees Ass'n, 423 U.S. 6, 7-8 (1975), abstention is proper.

ABT asserts that applying standard canons of statutory construction, the apparent conflict between §§ 6:121(B)(2) and 6:242(A)(6), on the one hand, and § 6:242(C) on the other, disappears. Section 6:242(C) was enacted in 1988; §§ 6:121(B)(2) and 6:242(A)(6) were enacted in 1985 and amended and reenacted in 1990. Because the legislature reenacted the sections barring the sale of insurance subsequent to the enactment of the parity provision, ABT contends that the parity provision has been repealed implicitly.

"A repeal may be express or implied. It is express when it is literally declared by a subsequent law. It is implied when the new law contains provisions that are contrary to, or irreconcilable with, those of the former law." LA. CIV. CODE art. 8; see also Louisiana Civil Serv. League v. Forbes, 246 So. 2d 800, 809 (La. 1971) ("Where the new statute is worded differently from the preceding statute, the Legislature is presumed to have intended to change the law."), overruled on other grounds, Barnett v. Develle, 289 So. 2d 129 (La. 1974).

We disagree with ABT's confidence that state law is squarely against it. Applying Stephens, it is not certain that a Louisiana court would resolve the conflict among the statutes in the manner that ABT predicts. While §§ 6:242(A)(6) and 6:121(B)(2) were reenacted subsequent to the enactment of § 6:242(C), the amendments

to them were minor and unrelated to the provisions now in issue. State law is unsettled, and it is hardly inevitable that Louisiana courts would follow ABT's reasoning.

Moreover, it would be nonsensical for the state legislature to permit state banks the same range of action as federal banks for two years, then retract it. Because state banks would be the only financial institutions that could not sell insurance, and because such a limitation seemingly would be irrational, the legislature would be more likely to have intended that the parity provision repeal the limitations, rather than the reverse.

Applying Stephens's third factor, there has been no state case construing the interrelationship between these various statutes; thus there is no authoritative pronouncement on point.[2] Since our interpretation cannot bind the Louisiana courts, there is a great danger that our decision might conflict with a later ruling by the state court.

The district court did not abuse its discretion by applying Pullman abstention. There are conflicting signs of legislative intent, no identifiable policy grounds supporting ABT's reading, and no authoritative state cases interpreting the statutes.

III. DISCOVERY

[2] The Commissioner relies upon First Advantage Insurance v. Green, No. 365352 (19th Dist. Court, Div. F) (Dec. 22, 1993), as an authoritative pronouncement of state law. This reliance is misplaced. First Advantage construed 12 U.S.C. § 92, dealing with the power of nationally-chartered banks to sell insurance in communities of fewer than 5,000 people. It is silent as to the rights of state-chartered banks to sell insurance.

On remand, ABT sought a stay for further discovery so that it could take depositions from the current and former Commissioners. Instead, the district court stayed all discovery and ruled on the abstention issues.

ABT contends that the depositions of the Commissioners would "have provided information about the decision-making process utilized by the Commissioners. That process is pertinent to the defendant's abstention arguments, and evidence on the decision-making was essential to the completion of the record upon which the pending motion would be decided."

Further discovery on the abstention issue would be pointless. The fundamental issue in this case is how to construe the conflicting statutes regarding insurance sales by state-chartered banks. ABT has not identified how information about the regulatory decision-making process would help us to decide whether or not it is permitted to sell insurance.

AFFIRMED.