

# Michigan Law Review

---

Volume 56 | Issue 4

---

1958

## The Adequacy of State Insurance Rate Regulation: The McCarran-Ferguson Act in Historical Perspective

Spencer L. Kimball

*University of Michigan Law School*

Ronald N. Boyce

*Member of the Utah Bar*

Follow this and additional works at: <https://repository.law.umich.edu/mlr>



Part of the [Antitrust and Trade Regulation Commons](#), [Insurance Law Commons](#), [Legislation Commons](#), and the [State and Local Government Law Commons](#)

---

### Recommended Citation

Spencer L. Kimball & Ronald N. Boyce, *The Adequacy of State Insurance Rate Regulation: The McCarran-Ferguson Act in Historical Perspective*, 56 MICH. L. REV. 545 (1958).

Available at: <https://repository.law.umich.edu/mlr/vol56/iss4/3>

This Article is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact [mlaw.repository@umich.edu](mailto:mlaw.repository@umich.edu).

THE ADEQUACY OF STATE INSURANCE RATE  
REGULATION: THE McCARRAN-FERGUSON ACT IN  
HISTORICAL PERSPECTIVE†

*Spencer L. Kimball\** and *Ronald N. Boyce\*\**

ANY substantial inquiry into the functioning of the insurance commissioner in American society poses the question, at the threshold of the inquiry, whether state regulatory power over the insurance business is likely to continue, or whether insurance will fall increasingly under the aegis of the federal government. This article seeks to ascertain the minimum conditions for the permanent preservation of state regulatory power over the insurance business, and to determine whether they are now satisfied. These conditions may be summarily stated: the Congress of the United States has shown its willingness to apply federal antitrust and marketing legislation to the insurance business, to the extent that the states do not regulate. Application of such statutes would have destructive impact on the present structure of the insurance business. Even more important, it seems possible that once the federal government entered the field of insurance regulation, the scope of its intervention might increase until it occupied the field. Though rate regulation has been one of the lesser functions of the state insurance commissioner, federal concern with combinations of insurers to fix premium rates has now made adequate state regulation of rate making pivotal for the preservation of state control over insurance. Unless the commissioner is able to perform his statutory duty of regulating rates well enough to prevent effective pressures for federal regulation, he may cease to have any role to play in our society.

THE FUNCTION OF RATE MAKING AND RATE REGULATION

In its nature, insurance is a mutual enterprise. Basically it is a scheme by which the individual's insurable risks are distrib-

†The authors gratefully acknowledge a grant from the University of Utah Research Fund which made this project possible. The material on Wisconsin law was obtained at the University of Wisconsin under a research grant from the Rockefeller Foundation.

\*Professor of Law, University of Michigan.—Ed.

\*\*Member of the Utah Bar.—Ed.

uted among a large group of persons, each policyholder making a contribution in the form of an advance premium or a *post hoc* assessment toward the totality of losses incurred by the group. The nature and internal operation of the corporate (or other) structure of the enterprise must be subjected to legal control, to the end that reasonable expectations of policyholders be not frustrated. So also the adequacy of the rate structure must be assured, for if the insurance fund is not large enough to pay losses, the scheme does not give protection. The essentially cooperative character of the insurance business, even when organized for private profit, gives both the policyholder and company a stake in the long-run adequacy of insurance premiums.<sup>1</sup> In mutual or non-profit companies, the policyholder has little legitimate concern to set maximum premiums, for dividends restore overpayments to him. In nonparticipating stock companies, however, overpayments are profits, and policyholders, who do not participate in them, have an interest in making sure that premiums are not excessive. In both kinds of company, policyholders have an interest in seeing that the rate structure is not unreasonably discriminatory.

The adequacy of rates is basic to the very existence of the insurance institution; the prevention of excessive or discriminatory rates goes to the fairness of marketing practices. Rate regulation seeks to bring the rate structure of the business under public control for the achievement of the twin objectives of adequacy of the insurance fund and fairness of premium charges.

#### THE DEVELOPMENT OF RATE REGULATION

As a feature of the commissioner's activity, rate regulation is of recent origin. Patterson described it in 1927 as "embryonic";<sup>2</sup> even after thirty more years it is still much less sophisticated and thorough than public utility rate regulation.<sup>3</sup> Perhaps insurance rate regulation has developed slowly because of the high degree of competition prevalent in the industry. Capital

<sup>1</sup> Even stock insurance company men insist on "the essential mutuality of all insurance." See ANNUAL PROCEEDINGS OF FIRE UNDERWRITERS' ASSOCIATION OF THE NORTHWEST 29, 32 (1896). In the short-run, capital and surplus requirements may ensure that a temporary inadequacy of premiums will not destroy a stock company.

<sup>2</sup> PATTERSON, THE INSURANCE COMMISSIONER IN THE UNITED STATES 268 (1927).

<sup>3</sup> In 1955, Patterson said it was still "one of the least effective phases of insurance regulation." CASES AND MATERIALS ON INSURANCE, 3d ed., 43 (1955).

and surplus requirements for stock companies, and assessability of policyholders for mutuals, gave some assurance that inadequacy of the fund be not a disaster. Though inadequate rates constitute a graver danger to the insuring public than excessive or discriminatory ones, a high degree of sophistication about insurance must precede control to insure adequacy of rates. Thus a high level of competition, which kept premiums from being grossly excessive, forestalled effective regulation until well into the twentieth century, even though there were many periods in insurance history when rates were inadequate. An 1839 corporate charter expressed the attitude of the whole nineteenth century; it authorized the company to charge "such premium or consideration . . . as may be agreed on between the said corporation and the party or parties agreeing with them."<sup>4</sup>

Historically, fire insurance losses seemed to follow cyclical patterns. When the loss ratio was low and profits high, the prospect of large profits attracted newcomers to the insurance business.<sup>5</sup> Companies were easy to start; neither experience nor elaborate physical plant were essential. A rented office, a few clerks, some solicitors on straight commission, and the capital fund required by statute, were all that was necessary. Unsophisticated early fire insurance rating put flat rates of perhaps \$1 per \$100 on brick construction, and \$2 per \$100 on frame. Later, agents and field men made inspections and worked out a rough rating schedule, but only in the last third of the nineteenth century did a scientific rating plan supported by statistics begin to develop.<sup>6</sup> Premium volume might be enormous in relation to capital, and a new company might easily enjoy the illusion of large profits if its accounting practices did not provide for adequate reinsurance reserves, for income in the expansive phase of the business greatly exceeded outgo, even if the business were actuarially insolvent.<sup>7</sup> Hence overconfident underwriting with rates driven down to uneconomic levels by excessive competition might go undetected until a catastrophic fire wiped weak companies out of existence with great loss to policyholders. In 1877 the president of the Fire Underwriters' Association of

<sup>4</sup> Wis. Laws 1838-1839, No. 36.

<sup>5</sup> BREARLEY, *THE HISTORY OF THE NATIONAL BOARD OF FIRE UNDERWRITERS* 9-10, 285-286 (1916) [hereinafter cited as BREARLEY].

<sup>6</sup> WISCONSIN LEGISLATIVE FIRE INS. INVESTIGATING COMM. REP. 38 (1913).

<sup>7</sup> This illusion was recognized in *SIXTH ANNUAL PROCEEDINGS OF FIRE UNDERWRITERS' ASSN. OF N.W.* 130-131 (1875); see also *id.* at 200.

the Northwest stated that about 4000 insurance companies had come into existence at one time or another, and that only 1000 remained.<sup>8</sup> An industry committee reporting in 1850 alleged that from the beginning to 1810 the fire insurance business was profitable, that from 1811 to 1830 it produced an average profit of about three percent on capital investment, while during the years from 1831 to 1850 the entire business was carried on at a great loss of capital. The committee said there was a loss for the entire period from 1791 to 1850.<sup>9</sup> Whether these statements were accurate or not, they represented industry belief, and explain the insurance fraternity's attitude toward price fixing combinations.<sup>10</sup>

Faced with periodic threats to the integrity and profitableness of their business, insurance men sought to rationalize the making of rates. As early as 1806 companies made informal agreements on rates,<sup>11</sup> and by 1819 there were local boards whose members undertook not to depart from established premium rates.<sup>12</sup> Not until after the Civil War were rate-fixing combinations effective, however. In 1865 and 1866 losses skyrocketed and a felt need to end chaotic competition resulted in the 1866 organization of The National Board of Fire Underwriters. The board's objective was "to establish and maintain, as far as practicable, a system of uniform rates of premium." But the habit of decades of uncontrolled competition was not so easily broken, and within five years the board became virtually moribund under pressure of relentless competitive forces. Perhaps rationalization of the industry would have been delayed indefinitely had it not been for the Chicago and Boston fires of 1871 and 1872. Scores of companies went to the wall in the aftermath of these catastrophes and out of them came real impetus for the formation of rate making combinations. Although competitive forces continually reasserted themselves, concerted rate making was thereafter the normal pattern. The National Board immediately revived. Regional and state, and even city, boards were organized, all directed to the restraint of anarchic competition.<sup>13</sup>

<sup>8</sup> EIGHTH ANNUAL PROCEEDINGS OF FIRE UNDERWRITERS' ASSN. OF N.W. 17 (1877).

<sup>9</sup> BREARLEY, 284-286.

<sup>10</sup> Insurance men saw the board, not as a monopoly, but merely as an association for statistical purposes. See TUCKETT'S MONTHLY INSURANCE JOURNAL, July 1852, as quoted in BREARLEY, 287.

<sup>11</sup> *Id.* at 283.

<sup>12</sup> The Salamander Society was founded in New York City in 1819. *Id.* at 249. WANDEL, THE CONTROL OF COMPETITION IN FIRE INSURANCE 15 (1935) [hereinafter cited as WANDEL].

<sup>13</sup> BREARLEY, 1-50. See WANDEL, 15-32, for a detailed statement of organizations.

Difficulties with the enforcement of concerted rate making led to constant effort to develop new methods. National concert broke down and was replaced by regional organizations in the 1880's. The National Board shifted its attention to fire prevention and insurance statistics, though it still exercised persuasive influence to help maintain the local rating organizations.<sup>14</sup> In the 1880's the compact system developed, with heightened emphasis on the locality as the scene for agreements among local agents to respect the rates set by compact managers.<sup>15</sup> Since the commission method of compensating soliciting agents made competition felt most keenly at the local level, it was at the local level that restraint could be most effectively exercised. The compact system was effective enough to call forth anti-compact legislation in various states.<sup>16</sup>

Companies frequently circumvented the anti-compact laws, especially by promulgation of advisory rates. For example, when the 1895 Missouri legislature amended the antitrust statute to apply to insurance companies, the salaried rate maker of the Association of Fire Underwriters of Missouri wrote to all companies doing business in the state that he was entering the business of selling rate books. The companies bought the rate service, and local agents formed informal, confidential clubs whose objectives were to ensure "correct practices" in the underwriting of fire risks. Little was put in writing and only when disaffected members informed on their colleagues was there reliable information about these combinations. The scheme was effective, but in Missouri, at least, prosecution was eventually successful and seventy-three insurance companies were ousted in quo warranto proceedings.<sup>17</sup>

The boards were also concerned with fire prevention and control, through fire departments and laws regulating construction. BREARLEY, 39-47.

<sup>14</sup> BREARLEY, 63-64, 72-73, 78, 84; WANDEL, 16.

<sup>15</sup> WANDEL, 51; FOURTEENTH ANNUAL PROCEEDINGS OF FIRE UNDERWRITERS' ASSN. OF THE N.W. 49 (1883); WISCONSIN LEGISLATIVE FIRE INS. INVESTIGATING COMM. REP. 38 (1913).

<sup>16</sup> An unsuccessful bill was introduced in Michigan in 1883, and bills became law in New Hampshire and Ohio in 1885, in Michigan in 1887, and in many other states thereafter. N.H. Laws 1885, c. 93; Ohio Laws 1885, p. 231; Mich. Laws 1887, No. 285. BREARLEY, 76; WANDEL, 125; *United States v. Southeastern Underwriters Assn.*, 322 U.S. 533 at 555, n. 43 (1944). The vulnerability of insurance to more powerful opposing business interests was strikingly shown here, for the furniture manufacturers of Grand Rapids were said to be behind the anti-compact law in Michigan. BREARLEY, 76, 289.

<sup>17</sup> In St. Joseph, Missouri, the association was called the "Underwriters' Social Club" but the Supreme Court of Missouri was not convinced that the purposes were social: "In order that [the secretary] might not become lonesome in the club rooms . . . , and

Even in states where anti-compact sentiment did not at first produce restrictive legislation, there was a pervasive undercurrent of such feeling. Brearley counted four laws and two bills in the 1880's, eleven laws and twenty-nine bills in the 1890's, and five laws and sixty-six bills in the first decade of the new century. By 1912, twenty-three states had enacted such laws.<sup>18</sup> Though enforcement was spotty, some states attempted rigorous house cleaning.<sup>19</sup>

The Wisconsin story shows the pervasive character of the anti-compact sentiment. In 1887 Governor Rusk<sup>20</sup> mildly castigated the "growing tendency of insurance companies to combine in fixing the rates of insurance. . . ." <sup>21</sup> An anti-compact bill was unsuccessfully introduced in the legislature.<sup>22</sup> A legislator started to draft a bill to create a state fire insurance company, but quickly abandoned it.<sup>23</sup> In 1889 two bills were introduced and made some progress; one was "A bill to prevent combinations and 'insurance trusts' in the state of Wisconsin," while the other would have appointed an assistant insurance commissioner in each locality to fix rates.<sup>24</sup> There were at least thirteen more anti-combination bills in the next two decades. One bill became law and forbade combinations to fix prices, except that local associations of insurance agents were explicitly authorized

just to be social, each of the local agents of the defendant companies sent him their daily reports, . . . and just to be social he examined each report and . . . compared the rates specified in each policy with the Fetter rates, and if there was a variance put a slip on the report calling attention of the general agent of the company to the variance. . . ." Later even that much writing was dispensed with in an unsuccessful attempt to evade prosecution. *State ex inf. Crow v. Firemen's Fund Ins. Co.*, 152 Mo. 1 at 35-36, 52 S.W. 595 (1899). See also *Aetna Ins. Co. v. Robertson*, 131 Miss. 343 at 390, 94 S. 7 (1922), for a history of Mississippi Inspection and Advisory Rating Bureau, which sought to escape the anti-compact law by removing the form of compulsion from the organization. The effort proved very costly to the companies. See also WANDEL, 127-133, for a discussion of the ways of meeting this unfriendly legislation.

<sup>18</sup> BREARLEY, 291. There were also some repealer bills. *Id.* at 291-292. *United States v. Southeastern Underwriters Assn.*, 322 U.S. 533 at 555, n. 43 (1944).

<sup>19</sup> In 1900, for example, nearly a hundred companies paid \$1000 fines to Missouri. BREARLEY, 295. Even more striking is the levy of \$8,000,000 in penalties against fire insurance companies by Mississippi. *Aetna Ins. Co. v. Robertson*, 131 Miss. 343 at 493, 94 S. 7 (1922).

<sup>20</sup> Later first United States Secretary of Agriculture. RANEY, *WISCONSIN, A STORY OF PROGRESS* 271 (1940).

<sup>21</sup> Wis. A. J. 25 (1887).

<sup>22</sup> A. 844, Wis. (1887) (assembly bill).

<sup>23</sup> On back of MS. bill A. 684, Wis. (1887).

<sup>24</sup> A. 695, A. 694, Wis. (1889).

to fix rates.<sup>25</sup> Notwithstanding its persistence, the opposition to insurance rate fixing was mild; despite Populism in the 1890's and the rise of Progressivism as a potent political force at the turn of the century there was no serious talk of insurance rate regulation in Wisconsin until 1911.

Anti-compact laws provided much too facile a solution to a very complicated problem. Uncontrolled competition had recurrently proved disastrous to policy holders; the latter had much at stake in the adequacy of premiums. Some states recognized the danger of demoralizing rate wars by coupling prohibition of compacts with denunciation of engaging in rate wars.<sup>26</sup> Nor did anti-compact laws truly restore free and open competition<sup>27</sup>

Regulation of insurance rates was a more sophisticated solution. It permitted concerted rate making but brought it under social control. The pressures for the creation of rate setting bureaus were deeply rooted in the basic needs of the business, and could not be denied. Before the turn of the century the idea of regulation was already being discussed.<sup>28</sup> Early in the twentieth century, insurance rate regulation began.<sup>29</sup>

Kansas was early with a statute in 1909; it gave power to the insurance commissioner to see that rates were adequate but not excessive, and it also forbade discrimination against or in favor of individuals, but did not deal with discriminatory classification.<sup>30</sup> Litigation arising out of this act tested and established the constitutionality of state rate regulation. The United States Supreme Court held that insurance was affected with a sufficient public interest for the state to control its price.<sup>31</sup>

In the following decades many other states enacted rate regulatory statutes, usually authorizing the formation of private rating bureaus but controlling their practices.<sup>32</sup> By 1944, only three states had no social control of rate making.

Control was of two kinds. Some statutes reflected the earlier,

<sup>25</sup> Wis. Laws, 1897, c. 356.

<sup>26</sup> PATTERSON, *THE INSURANCE COMMISSIONER IN THE UNITED STATES* 273 (1927).

<sup>27</sup> See, e.g., *PROCEEDINGS OF THE NATIONAL CONVENTION OF INSURANCE COMMISSIONERS* 20 (1915).

<sup>28</sup> A. 694, Wis. (1889) would have provided for rate setting by assistant insurance commissioners located in each municipality, while A. 376, §6, Wis. (1899) would have set up an ex officio state board to set rates for accident insurance.

<sup>29</sup> See WANDEL, 134.

<sup>30</sup> Kan. Laws, 1909, c. 152.

<sup>31</sup> *German Alliance Ins. Co. v. Lewis*, 233 U.S. 389 (1914).

<sup>32</sup> PATTERSON, *THE INSURANCE COMMISSIONER IN THE UNITED STATES* 274 (1927).



somewhat naive, simple opposition to rate making combinations, while others reflected the more sophisticated recognition of the need for concert under social control. Twelve states had no explicit rate regulatory statutes, but only anti-combination provisions. Four of these anti-combination provisions were directed specifically at insurance, while the other eight were general anti-monopoly provisions in statutes or state constitutions. Fourteen states had anti-compact provisions directed specifically to insurance, and forbidding combinations except as authorized by cognate rate regulatory statutes. Fifteen states had general anti-monopoly statutes or constitutional provisions and also rate regulatory statutes. Four states had only rate regulatory provisions. Thus in 1944 fifteen states either had no control over insurance rates, or the unsophisticated anti-monopoly provisions which did not regulate rate making but rather sought to preserve competition. In the other thirty-three states there was rate regulatory machinery, usually coupled with anti-monopoly provisions.<sup>33</sup> The effectiveness of control varied from purely paper machinery in some states to relatively complete and effective control in others like New York, and direct state rate making in Texas.<sup>34</sup> Even in states with fairly effective control in leading lines of insurance like fire and workmen's compensation, the control was relatively ineffective or altogether lacking in other lines.<sup>35</sup> It might be a reasonably accurate generalization to say that in 1944, though ostensibly there was control in two-thirds of the states, insurance rate making was as yet largely uncontrolled in the United States.<sup>36</sup>

<sup>33</sup> The above classification and count is from note, 33 *Geo. L. J.* 70 (1944); a somewhat different classification and count is to be found in Brief for the United States 130-131, *United States v. Southeastern Underwriters Assn.*, 322 U.S. 533 (1944). No conclusions reached here would be affected by the diversity. See also Brief for Appellees 51-52. And see Joint Hearing Before the Subcommittees of the Committees on the Judiciary on S. 1362, H.R. 3269 and H.R. 3270, 78th Cong., 1st sess., 55-57 (1943).

<sup>34</sup> See Marryott, "Mutual Insurance under Rate Regulation," 15 *LAW AND CONTEMP. PROB.* 540 at 558 (1950), for automobile rates in New York, and see *Tex. Stat. (Vernon, 1936) art. 4878 et seq.*

<sup>35</sup> Moser, "Operation of Independents Under the Rate Regulatory Pattern," 15 *LAW AND CONTEMP. PROB.* 523 at 526 (1950).

<sup>36</sup> See, e.g., 1 *RICHARDS, INSURANCE*, 5th ed., 216 (1952). The Department of Justice studied regulation in the 43 states having rating bureaus in 1944, and thought that half of the states left the public "virtually at the mercy of the combinations of fire-insurance companies which fix and maintain the rates to be charged by their members." Joint Hearing Before the Subcommittees of the Committees on the Judiciary on S. 1362, H.R. 3269, and H.R. 3270, 78th Cong., 1st sess., 55-57 (1943). And see *id.* at 102, when Attorney-General McKittrick of Missouri alleged that none of the 18 states within the territorial jurisdiction of the Western Underwriters' Association had been successful in controlling the business in the public interest. But see *id.* at 124.

## THE SOUTHEASTERN UNDERWRITERS CASE AND ITS AFTERMATH

From 1868 to 1944 it was generally assumed that insurance was not commerce, and was not subject to federal regulation.<sup>37</sup> An elaborate structure of state supervision might depend on this assumption, for if insurance were subject to federal regulation, broadly phrased federal statutes like the Sherman, Clayton, and Federal Trade Commission Acts would be applicable to insurance, conflicting statutes of the states would be invalid, and still other state statutes might conceivably fall as undue burdens on interstate commerce. However, all of the cases treating insurance as outside of commerce had been concerned with the validity of state regulation, which the companies had vigorously fought until the imminence of federal control made state regulation the lesser of two evils.<sup>38</sup> Since such regulation might be valid even if insurance were commerce, where the local interest was dominant and Congress had not acted, no cases clearly held that insurance was not subject to federal regulation.

As the federal power under the commerce clause expanded during the 1930's, it became increasingly clear that in due time the complex national insurance business would be declared subject to federal control under the commerce clause.<sup>39</sup> At an earlier date, when state regulation was a reality while federal regulation was in abeyance, insurance men often called for federal regulation of insurance. Insurance companies sought relief "from the aggressive acts of hostile [state] legislatures."<sup>40</sup> But as federal regulation neared reality desire was replaced by pervasive fear. In 1944 the Department of Justice prosecuted the Southeastern Underwriters' Association and associated companies and officials for violation of the Sherman Act. The Supreme Court declared that insurance was commerce, and that the Sherman Act forbade

<sup>37</sup> See *United States v. Southeastern Underwriters Assn.*, 322 U.S. 533 at 578 (1944). The notion originated with *Paul v. Virginia*, 8 Wall. (75 U.S.) 168 (1868).

<sup>38</sup> See Joint Hearing Before the Subcommittees of the Committees on the Judiciary on S. 1362, H.R. 3269 and H.R. 3270, 78th Cong., 1st sess., 29-30, 61-62.

<sup>39</sup> See, e.g., *id.* at 545, n. 23; note, 32 *Geo. L. J.* 66 at 73 (1943); Orfield, "Improving State Regulation of Insurance," 32 *MINN. L. REV.* 219 at 221, n. 13 (1948); Nehemkis, "Paul v. Virginia: The Need for Re-Examination," 27 *Geo. L. J.* 519 (1939); GAVIT, *THE COMMERCE CLAUSE OF THE UNITED STATES CONSTITUTION* 333-334 (1932). Actually, it was already clear long before. See, e.g., Dawson, "A Case for National Supervision," 1 *MOODY'S MAGAZINE* 312 at 314 (1905-1906) (Dawson was one of the leading actuaries of his time).

<sup>40</sup> See ABA SECTION OF INSURANCE LAW PROCEEDINGS 133 (1944-1945) for summary of bills introduced and other serious proposals. See also Murphy, "Insurance Under the Commerce Clause," 33 *IOWA L. REV.* 91 at 92-94 (1947); the quotation (in text above)

rate making combinations, and some insurance men thought the end of the world was come.<sup>41</sup>

State officials, too, feared that the entire structure of state insurance regulation was endangered by the decision.<sup>42</sup> So also did the dissenting judges.<sup>43</sup> This fear was exaggerated, as the subsequent *Robertson* case demonstrated. Insurance was within the concurrent power over commerce, and the states could continue to regulate its local aspects so long as Congress did not occupy the field.<sup>44</sup> The most serious immediate danger to the states was that state insurance taxation might be invalidated as an undue burden on commerce. Companies refused payment of taxes to the states, and a cry went up for legislation in Congress to authorize continued state regulation and taxation.<sup>45</sup> Pending decision of the *Southeastern Underwriters* case, there were unsuccessful attempts to exempt insurance from all federal regulation, and to validate continued state taxation and regulation.<sup>46</sup> In the next session of Congress after the *Southeastern Underwriters* case, there was virtually unanimous agreement that the

is from INSURANCE BLUE BOOK (Centennial Issue, 1876-1877) 29-34 (c. VI, "Fire Ins. 1860-1869"). But the Temporary National Economic Committee recommended continued, though strengthened, state regulation. TNEC Rep. (1938-1941) pp. 40-43, 586-587; and see Address of Senator O'Mahoney, 26 A.B.A.J. 907 (1940).

<sup>41</sup> See, e.g., editorial, THE NATIONAL UNDERWRITER, Life Ins. ed., June 9, 1944, p. 1. For a collection of quotations on this point, see note, 23 CHI-KENT L. REV. 317 at 320 (1945).

<sup>42</sup> E.g., Harrington (Insurance Commissioner for Massachusetts), "An Exploration of the Effects of the S.E.U.A. Decision," 1944 INS. L. J. 590.

<sup>43</sup> United States v. Southeastern Underwriters Assn., 322 U.S. 533 at 581 (1944) (C.J. Stone); id. at 583 (J. Frankfurter); id. at 590 (J. Jackson).

<sup>44</sup> *Robertson v. California*, 328 U.S. 440 (1946), upheld state regulation forbidding doing of business by unadmitted insurers or unlicensed agents. State power did not necessarily depend on congressional authorization through the McCarran Act. Cf. *Paul v. Virginia*, 8 Wall. (75 U.S.) 168 (1868). The case of *Parker v. Brown*, 317 U.S. 341 (1943), holding that the Sherman Act did not apply to an agricultural marketing combination operating under authority of state law, suggests that regulated rate making by bureaus might be valid even without congressional authorization. Note, 96 UNIV. PA. L. REV. 223 at 228 (1947). See also Guiher, "United States v. Southeastern Underwriters' Ass'n: Its Impact on Existing Federal Statutes," ABA SECTION OF INS. LAW PROCEEDINGS 33-37 (1944-1945), and SAWYER, INSURANCE AS INTERSTATE COMMERCE 149-150 (1945), for an indication that the insurance companies had much hope for the doctrine of *Parker v. Brown*.

<sup>45</sup> "But this emergency is immediate and it is necessary to pass this legislation now. The States do not know what to do with respect to the collection of taxes and the insurance companies do not know what to do with respect to the payment of taxes." 91 CONG. REC. 1092 (1945).

<sup>46</sup> S. 1362; H.R. 3270, 78th Cong., 1st sess. (1943). The House bill passed the House of Representatives by a vote of 283 to 54, 90 CONG. REC. 6565 (1944), before it met the vigorous and successful opposition of Senator O'Mahoney of Wyoming. TIME, Dec. 13, 1943, p. 82; NEW REPUBLIC, May 29, 1944, p. 378.

state regulatory structure and power to tax must be safeguarded but there were conflicting views as to how far the act should exempt insurance companies from existing applicable federal legislation. After hurried consideration of the problem,<sup>47</sup> Congress enacted the McCarran-Ferguson Act,<sup>48</sup> which declared "that the continued regulation and taxation by the several States of the business of insurance is in the public interest," and provided in section 2(b) that "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, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: *Provided*, That after January 1, 1948, . . . the Sherman Act, . . . the Clayton Act, . . . [and] the Federal Trade Commission Act, shall be applicable to the business of insurance to the extent that such business is not regulated by State law."

The proviso was a compromise, prepared by a conference committee. It mediated between the faction in Congress that advocated complete exemption from the antitrust laws (the House bill) and that supporting substantial surveillance by the federal government (the Senate bill).<sup>49</sup> It gave to the states the primary responsibility to determine and enforce public policy with respect to rate making combinations, but preserved some role for the federal government.

Through cooperative effort of the insurance industry and the state commissioners of insurance, model bills regulating rate making were prepared for submission to state legislatures.<sup>50</sup> These "All-Industry" bills were enacted with more or less variation in substantially all of the states.<sup>51</sup> The motivation of state legislatures was undoubtedly mixed, combining in varying proportions the desire to improve the quality and scope of state regulation of insurance rating, the desire to enable insurance companies to escape the provisions of the federal statutes, and the desire to maintain intact state control and taxation of the insurance business.

<sup>47</sup> For a fairly detailed statement of the legislative history of the McCarran Act, see note, 23 CHI-KENT L. REV. 317 (1945).

<sup>48</sup> 59 Stat. 33 (1945), 15 U.S.C. (1952) §§1011-5.

<sup>49</sup> Senator Murdock (Utah), 91 CONG. REC. 1480-1481 (1945).

<sup>50</sup> See Moser, "Operation of Independents Under the Rate Regulatory Pattern," 15 LAW AND CONTEMP. PROB. 523 at 527 (1950).

<sup>51</sup> By 1950 every state and territory had adopted the fire and marine bill, or the casualty and surety bill, or both. See 1 RICHARDS, INSURANCE, 5th ed., 216-220 (1952).

Under this model legislation the principle of concerted rate making under social control was established as nation-wide policy at the state level, in preference to the less sophisticated prohibition-of-concert principle of the Sherman Act.<sup>52</sup> The act provided for rates to be ascertained on the basis of statistical experience, which should be open to the public and to the insurance commissioner. It provided that rates be filed by each insurer or by a rating organization it should select. Subscription to the rating bureaus was to remain open to all insurers, and operation of the bureaus was to be subject to state control. Finally, the rates themselves might be disapproved by the commissioner if they were "excessive, inadequate, or unfairly discriminatory."<sup>53</sup> This adds up to a stringent system of regulation, in theory at least.

#### THE EFFECTIVENESS OF RATE REGULATION IN THE STATES

The theoretically stringent system of regulation provided by the "All-Industry" laws is somewhat less than uniformly stringent in practice. Whether the statutes are implemented or not depends upon the competence and attitudes of the commissioner and his staff, the adequacy of the commissioner's budget, and the cooperation of the attorney general's office, to mention only some obvious prerequisites. It is not possible within the compass of a single article to examine exhaustively the effectiveness of rate regulation, and broad generalizations have limited meaning because of the great variation, both from state to state and from year to year. Nevertheless, two particular examples may provide some basis for judgments about the subject.

<sup>52</sup>But see Brief for the United States 113-116, *United States v. Southeastern Underwriters Assn.*, 322 U.S. 533 (1944), where the government sought to disparage the scientific character of insurance rate making techniques, and contended that under present circumstances, there was no justification for any other policy than that of the Sherman Act. The competitive principle was not entirely abandoned; the statutes permitted independents to file rates without joining bureaus and bureau members to file percentage deviations from bureau rates, ordinarily based on lower expense factors. See Kulp, "The Rate-Making Process in Property and Casualty Insurance—Goals, Technics, and Limits," 15 *LAW AND CONTEM. PROB.* 493 at 513-514 (1950). Brook, "Public Interest and the Commissioners'—All Industry Laws," 15 *LAW AND CONTEM. PROB.* 606 (1950), makes a very persuasive case for the proposition that rate regulation is unsound. Brook thinks that free competition would prevent excessive rates, while sufficiently stringent solvency laws would prevent inadequate insurance rates from injuring policyholders.

<sup>53</sup>See Gardner, "Insurance and the Anti-Trust Laws—A Problem in Synthesis," 61 *HARV. L. REV.* 246 at 260-265 (1948).

*Wisconsin*

In Wisconsin the pervasive influence of Progressivism should have ensured a hospitable climate for the development of insurance rate regulation, for regulation of railroad rates was central to Robert M. LaFollette's Progressive program. Nevertheless, serious interest in fire insurance rate regulation began rather late in Wisconsin. In 1911 the governor received a letter from a "consulting fire insurance expert in the public interest," who had done work for the state of Kansas, the pioneer state in insurance rate regulation. He sought professional employment on the ground that Wisconsin fire insurance rates were too high.<sup>54</sup> Four months later the Wisconsin legislature passed a resolution calling for the appointment of a joint legislative investigating committee to survey the entire field of fire insurance, with special attention to rates.<sup>55</sup> The committee's thoughtful report proposed cooperative rate making under public control rather than a return to anarchic competitive practices. It urged compulsory membership in rate making bureaus for all companies.<sup>56</sup> Despite the committee's careful work, the insurance companies soundly defeated the rate bill in 1913, and a modified bill again in 1915.<sup>57</sup> In 1917 a Stalwart administration introduced and passed a rate regulatory bill, throwing doubt on the truth of Progressive allegations that the Stalwarts were entirely indifferent to the popular welfare.<sup>58</sup> The law provided for compulsory membership in rating bureaus, which were made subject to control by the commissioner. Membership in the bureaus had to be open, unreasonable

<sup>54</sup> Letter from H.B. Seely of Chicago, dated Jan. 25, 1911, on file in the Wisconsin Legislative Reference Library.

<sup>55</sup> Wis. Laws 1911, J. Res. 40; and see *id.*, c. 512 for the powers of the committee.

<sup>56</sup> WISCONSIN LEGISLATIVE FIRE INS. INVESTIGATING COMM. REP. (1913).

<sup>57</sup> A. 901, Wis. (1913); Wis. A. J. 1112-1114 (1913). S. 88, Wis. (1915). Substitute Amendment 1S, unsuccessfully introduced by Senator Hansen, an insurance man, would have emasculated the bill by removing the commissioner's ratemaking powers. The unamended bill passed the Senate smoothly, but the insurance companies made a successful stand in the Assembly. "Insurance Men Fight Rate Plan," MILWAUKEE J., May 26, 1915; "Fire Insurance Rates Held High," WISCONSIN STATE J., May 26, 1915. (All Wisconsin newspaper clippings cited are on file in the Wisconsin Legislative Reference Library unless otherwise noted). After much dispute, the bill was defeated in the Assembly by a vote of 46 to 22, Wis. Assembly J. 1090 (1915), then reconsidered (*id.* at 1150) and finally defeated by a vote of 41 to 35 (*id.* at 1373).

<sup>58</sup> Wis. Laws 1917, c. 61. The bill, S. 8, Wis. (1917), was introduced by Stalwart Senator Bennett, at the request of Stalwart Governor Philipp and his appointee, Insurance Commissioner Cleary. After some compromises on the terms of the bill, it passed both houses unanimously, Wis. S. J. 361, Wis. A. J. 639 (1917). And see, for an example of such charges, editorial, LAFOLLETTE'S MAGAZINE, August 1916.

or discriminatory rates were forbidden, and the commissioner was empowered to order changes in rates after hearing.

The commissioner's power of control was no dead letter;<sup>59</sup> under some commissioners the regulation of fire insurance rates was fairly effective, but under others there was persistent public dissatisfaction with the adequacy of regulation. In 1929, as a result of conflict between mutual and stock companies over the control of the Wisconsin Inspection Bureau, which had filed a voluntary rate reduction without consulting the mutuals, an effort was made in the legislature to break the bureau's practical monopoly of fire rating.<sup>60</sup> The proposed legislation was not passed, but an investigating committee was appointed instead.<sup>61</sup> This committee recommended a revised and strengthened rating law which was adopted in 1931.<sup>62</sup> In 1943 another investigation was unsuccessfully proposed, giving strong indication of some persistence of dissatisfaction with the extent to which fire insurance rates were really regulated.<sup>63</sup>

It was in the context of persistent, even if not intense, unhappiness about the sporadic effectiveness of rate regulation in Wisconsin that the "All-Industry" bill was proposed in Wisconsin in 1947. The commissioner took the position that the existing Wisconsin statutes were better. Deputy Commissioner Timbers drafted a bill incorporating the existing statute, extend-

<sup>59</sup> "Denies Plea for Boost of Risk Rates," *CAPITAL TIMES*, Feb. 19, 1918; "Risk Concerns Oppose Smith Cut in Rates," *MILWAUKEE SENTINEL*, May 24, 1926; and see "Increase Farm Insurance Rates," *CAPITAL TIMES*, Dec. 9, 1926, for an increase in farm rates permitted to encourage commercial companies to write rural business.

<sup>60</sup> A. 298, Wis. (1929); the bill died after a short, tempestuous existence. See Wis. A. J. 1450 (1929); *id.* at 1533; *id.* at 1708; and see "Mauthe Hits at Condition in Wisconsin," *CAPITAL TIMES*, Feb. 3, 1929; "Given No Chance to Defend It," *CAPITAL TIMES*, June 20, 1929.

From this point on, this section is dependent to a substantial extent on a letter from Deputy Commissioner Charles J. Timbers, of the Wisconsin Insurance Department. Mr. Timbers was kind enough to read a preliminary draft of this section and, drawing upon his continuous experience of 42 years with the department and the Wisconsin Inspection Bureau, made valuable suggestions for changes, most of which are now incorporated in the text. Mr. Timbers is, of course, not responsible for any views expressed here.

<sup>61</sup> Wis. Laws 1929, J. Res. 82.

<sup>62</sup> WIS. LEGISLATIVE INTERIM COMMITTEE ON FIRE INS. REP. (1931). Wis Laws 1931, c. 437.

<sup>63</sup> J. Res. 56 A., Wis. (1943). The resolution failed by a vote of 39 to 33, most of the opposition coming from Republicans and the support from Progressives and Democrats. Wis. A. J. 1241 (1943); *id.*, at 3-7 for party affiliation. The sentiment for the probe was based on the spread between premiums received and losses paid of \$128 million to \$52 million in five years, thus raising clearly the issue of the meaning of "reasonable rates." See "Fire Insurance Rates Are Debated Before Committee," *SHEBOYGAN PRESS*, April 29, 1943.

ing it to allied lines of insurance, providing closer supervision of rating bureaus, and fixing a definite rating formula limiting profits. This bill was defeated and the "All-Industry" bill was adopted, with a number of minor amendments proposed by the commissioner.<sup>64</sup> The bill did not basically strengthen the Wisconsin law, nor was it responsible for the ensuing period of relatively more effective regulation of fire insurance rates. Nevertheless, beginning soon after the 1947 law there was a period in which fire insurance rate regulation was more effective. A number of rate hearings were held in 1948; fire statistical plans were developed and rate formulas devised. In 1950 the commissioner held a far-reaching hearing, which resulted in substantial revision of rates.<sup>65</sup> Perhaps the most significant new factor in 1950 was the intervention of local government officials, who were politically motivated to demand lower rates. Though they were of relatively little help in the hearing process itself, the demand of the mayor of Milwaukee for lower rates in his city had much to do with getting the hearing called initially.<sup>66</sup> The size of fire rate reductions was quickly caught up in political controversy,<sup>67</sup> and the policyholder's battle for lower rates was also taken up as a journalistic crusade.<sup>68</sup> This combination of forces kept the matter before the public. Nevertheless, despite the continued pressure, fire insurance rate regulation was relatively ineffective after the 1950 reduction, until late 1955.

<sup>64</sup> Wis. Laws 1947, c. 487. Letter from Mr. Timbers, Nov. 21, 1957.

<sup>65</sup> Indeed, in Wisconsin the commissioner's office urged the principle of a 2½% underwriting profit as compared with 5% accepted generally. In 1950 a compromise was reached, the companies accepting the commissioner's rate cut in return for his deletion from the order of any mention of the rate of underwriting profit. See, e.g., "Charges Fire Insurance Firms Attempting to Delay Rate Cut," CAPITAL TIMES, Aug. 15, 1950; "\$1,036,000 Rate Slash is Reaffirmed," CAPITAL TIMES, Aug. 30, 1950; "Fire Insurance Firms Drop Fight," WISCONSIN STATE J., Oct. 5, 1950; "Fire Insurance Rate Slash to Stand, Report," GREEN BAY PRESS-GAZETTE, Oct. 19, 1950. The issue was still alive in 1955. See, e.g., "6% Insurance Margin Upheld," WISCONSIN STATE J., Jan. 14, 1956. (There was a 1% catastrophe reserve allowance, hence the profit margin talked about was really 5%.) It should also be pointed out that the percentage of profit on capital and surplus might be far more, because (1) the premium income might greatly exceed the capital and surplus invested in the business, and (2) the companies invested their assets and received investment income not only on capital and surplus, but also on the prepaid premiums belonging to the policyholders. Hence, the 5% limitation, or even the 2½% limitation, was a far less stringent public control than existed on public utilities.

<sup>66</sup> "Fire Insurance Cut, City Aim," MILWAUKEE J., Feb. 2, 1950. The League of Wisconsin Municipalities soon took up the fight, and even urged state rate making, as in Texas, "Lange Doubts Value of State Fire Insurance Rating Bureau," GREEN BAY PRESS-GAZETTE, Oct. 31, 1950. See also "Fire Policies Probe Is Set," MILWAUKEE J., Feb. 8, 1951.

<sup>67</sup> See, e.g., "Insurance Rate Cut Far Too Small, Schmitt," CAPITAL TIMES, July 19, 1950.

<sup>68</sup> By the CAPITAL TIMES of Madison.



From 1917 workmen's compensation insurance rating was under a regime of social control even more strict than that for fire insurance, at least so far as the basic statute was concerned.<sup>69</sup> Likewise, a rating law for automobile liability insurance was passed in 1919.<sup>70</sup> This law was inadequate, however, and the commissioner supported the passage of the casualty and surety insurance "All-Industry" bill in 1947.<sup>71</sup> Outside the fire and compensation fields, however, actual regulation was not effective; the casualty rate division was inadequately staffed and was not very active. It approved automobile rate filings without public hearings, because of the lack of enough competent personnel in the division to review the statistical data.<sup>72</sup>

From 1948 to 1950 there was a short burst of activity in supervision of rate making, especially in the fire insurance field; from 1950 to 1955 enforcement lagged. In 1955 a timely vacancy in the commissioner's office coincided with an intemperate controversy between Madison's *Capital Times* and the fire rating bureau over the question of proper rates, which resulted from approval of rate increases by the retiring commissioner over the protests of his deputy and the fire rating division. The governor then appointed to the office a vigorous commissioner, prepared to intervene decisively in the public interest. As soon as he took office, he called a public hearing; his action resulted in an eleven percent reduction in fire rates, effective August 1, 1956. An additional six percent reduction was protested by the bureau, and at present writing is in litigation before the Wisconsin courts. The new commissioner also reorganized the Wisconsin Insurance Department, putting all rate regulation under one division and increasing the effectiveness of control.<sup>73</sup>

In 1957 the commissioner went even farther. He took a position much in advance of that of insurance commissioners generally and urged enactment of a statute to give him control of

<sup>69</sup> Wis. Laws 1917, c. 637; in 1913 insurers were already compelled to file their rates and adhere to them, Wis. Laws 1913, c. 599.

<sup>70</sup> Wis. Laws 1919, c. 136; and see Wis. Laws 1923, c. 281. See Wis. Laws 1919, c. 655 for surety rates.

<sup>71</sup> Wis. Laws 1947, c. 521.

<sup>72</sup> See "Fire Insurance Premiums Are \$55,728,082 Greater than Losses in 3 Years," CAPITAL TIMES, May 19, 1948; "Auto Insurance Rate Hike Effective Monday," CAPITAL TIMES, April 15, 1948; "Have We any Regulation of Insurance Companies in Wisconsin?" editorial in CAPITAL TIMES, April 20, 1948; "No Hearing on Boost in Car Surety Rates," CAPITAL TIMES, Oct. 8, 1951.

<sup>73</sup> Letter from Deputy Commissioner Timbers, Nov. 21, 1957. WIS. INS. COMM. ANN. REP. 7-22 (1957).

the rates in credit life insurance, a new and rapidly growing field. The 1957 Wisconsin Legislature enacted such a statute. In August 1957, the commissioner demanded a twenty-five per cent cut in credit life insurance rates.<sup>74</sup> At this writing, it appears quite likely that some such reduction will soon be put into effect. There is every indication that rate regulation generally, in the hands of this vigorous commissioner, will be more effective in Wisconsin than heretofore.<sup>75</sup>

It seems fair to conclude that in the middle 1950's, insurance rate regulation is fairly effective in Wisconsin. Immediately prior to this time, in the earlier years of the decade, it was much less adequate, especially in the casualty field, despite the great importance of automobile insurance in the family budget, which in midcentury substantially exceeded the importance of fire insurance.<sup>76</sup> The *Southeastern Underwriters* case and its aftermath did not create any sudden upsurge in regulatory activity in Wisconsin. The sporadic development toward more effective regulation continued, without a decisive break with the pre-1944 past. Real regulation is only partially the result of improved statutes. It depends, too, on the channeling of pressures, especially through municipal politics, in such a way as to compete effectively with the highly organized insurance industry. It also depends on the vigor and the attitudes of incumbent commissioners. To what extent the aggressiveness of the present commissioner represents a trend that will last beyond his term in office, it is too early to tell. To whatever extent effective regulation has not yet become permanently established in Wisconsin, there remains potential pressure for federal regulation.<sup>77</sup>

<sup>74</sup> "Rogan Calls for Credit Insurance Rate Regulation," CAPITAL TIMES, May 8, 1957; Wis. Laws 1957, c. 321, §4.

<sup>75</sup> "Asks Credit Insurance Rate Cut," CAPITAL TIMES, Aug. 14, 1957.

<sup>76</sup> Letter from Deputy Commissioner Timbers, Nov. 21, 1957. In 1955, Wisconsin Auto Liability premiums were \$42,650,239, Auto Property Damage premiums were \$18,374,857, and Auto Physical Damage premiums were \$31,034,904, compared with Fire premiums of \$34,576,521, and Extended Coverage premiums of \$12,246,391, Wis. INS. COMMR. ANN. REP. 36 (1956).

<sup>77</sup> Missouri is a medium-sized state with a turbulent history of vigorous attempts to enforce anti-combination statutes, with varied results. See *State v. American Ins. Co.*, 355 Mo. 1053, 200 S.W. (2d) 1 (1946), for a review of Missouri's litigation over the question of rates; note, 33 GEO. L.J. 70 at 80-82 (1944); Stelzer, "The Insurance Industry and the Antitrust Laws," 1955 INS. L.J. 137. The Missouri attorney general instigated the investigation that led to the indictments in the *Southeastern Underwriters* case, Joint Hearing before the Subcommittees of the Committees on the Judiciary on S. 1362, H.R. 3269, and H.R. 3270, 78th Cong., 1st sess., 25 (1943). And see *id.*, 62-63, 82-84 (1943).

*Utah*

In this smaller state, there is a much shorter history of rate regulation. In fact, it was only under the compulsion of the McCarran Act that rate regulatory laws were first passed in 1947.<sup>78</sup> In the years since a regulatory statute has been on the books of the state, there has been only one incident involving the justification of filed fire insurance rates, perhaps partly because on only this one occasion was there any substantial increase in rates. The Utah Fire Rating Bureau, which is a branch of the Pacific Fire Rating Bureau, is the authorized filing agent for all but a handful of the fire carriers in the state of Utah. On January 22, 1954, the bureau filed new rates, effective April 1, involving reductions in household and farm insurance rates, but increases in mercantile and commercial building rates. The new rates were voluntarily filed, and represented a net reduction in premiums for the state. The mercantile policyholders were organized in such a way as to be able to resist the raises effectively, and through existing trade associations the merchants brought pressure to bear on the state governmental machinery. On February 15, the Insurance Division and its parent, the Department of Business Regulation, issued an order suspending the new rates pending a hearing to determine whether there was any justification for the increases in mercantile rates, and why the reduction was not larger for the household and farm rates. Hearings were held on two different days, and the matter then was taken under advisement by the agency. On April 9, the bureau made a new filing with larger reductions for home and farm rates, and smaller increases for the mercantile and commercial risks. On request of the bureau, the department permitted the withdrawing of the previous filing, dismissed the hearings with prejudice, and accepted the new filing, effective May 1, without further hearing.<sup>79</sup>

This incident, like the increased effectiveness of Wisconsin fire insurance rate regulation after 1950, illustrates one of the apparent prerequisites for effective regulation, that the pressures from insurance consumers be focused so they can be felt

<sup>78</sup> Utah Laws, 1947, c. 63.

<sup>79</sup> Notice of Hearing and Order To Show Cause to Utah Fire Rating Bureau and Harold S. Morr, Manager, dated February 15, 1954; Order of Dismissal and Allowing of Withdrawal of Rate Filing on January 22, 1954 and Approving Filing Made April 9, 1954, dated April 9, 1954.

by insurance department officials through the political machinery of the state. This seems true at least when the budget and staff of an insurance department are inadequate. Thus no one in the Utah insurance department is equipped by training or experience critically to scrutinize filed rates and supporting statistics. As a result, filed rates are accepted without question except when pressures are sufficiently concentrated to be felt through the political mechanism. This is not a criticism of the department personnel; inadequate rate regulation is inevitable with the present staffing of the department. The concentration of pressures for regulatory scrutiny of rates is to be expected when organized groups like merchants are affected, but not ordinarily when unorganized homeowners are involved, unless rates of insurance are seized upon as an issue in municipal politics, as has occurred in Wisconsin. As a result control may be expected to be haphazard, inertia being what it is in human affairs. Indeed reductions in rates may be too large for well-organized policyholders, resulting either in an inadequate rate structure, or in discrimination against unorganized policyholders, such as homeowners. Regular and adequate regulation seems dependent upon the staffing of insurance departments with trained personnel who develop routines for and a vested interest in the systematic handling of the problem. In the absence of special pressures, the Utah department relies heavily upon the bureau determinations, even to the extent of using them as a basis for approving or rejecting deviations or non-bureau filings. The absence of effective regulation does not mean that rates are not voluntarily reduced by the bureau in the light of experience, nor does it necessarily mean that rates are excessive, but it does mean that rates are set by a private body not responsible to the public, and not effectively regulated by a public agency.

Even when pressures from organized groups of consumers or through the political mechanism do operate, they seek only to force down the rates of premium. More important for the long term welfare of the public is the maintenance of adequate rates of premium. Since the highly organized insurance industry is vitally concerned with that problem, it is perhaps supererogatory for anyone else to worry about it, and yet some responsible insurance officials in Utah profess concern with the present adequacy of fire insurance rates. This concern is less with the adequacy of Utah rates than with adequacy on a national basis, where mounting losses, they allege, threaten widespread insol-

veny of fire insurance companies.<sup>80</sup> Despite this pessimism, Utah rates are even now under reconsideration by the bureau in the light of Utah experience alone, and conceivably may be reduced in the near future. There will undoubtedly be reluctance to make reductions as large as the statistics seem to warrant, however. Officials point to the fact that Utah has a very low deviation rate, i.e., even if the rates appear to be too high, competing companies have not filed deviations to any marked degree, thus suggesting a general underwriting judgment that deviations are not justified even in the face of apparently excessive rates. The companies fear quick reversal of Utah statistics, which are based on a small premium volume, and which may be colored by the fortunate absence in recent years of any major fires; they also anticipate frequent voluntary adjustments by the bureau to the extent the bureau thinks justified by the data.<sup>81</sup> It is beyond the scope of this paper to reach any considered judgment on the complicated question whether the Utah premium rates are inadequate, excessive, or unfairly discriminatory. It seems, however, that Utah premium rates are *prima facie* excessive and that the public interest demands a far more careful scrutiny of the rates than they are getting. But it is not enough for the commissioner simply to insist loudly on rate reduction; he must do so with careful regard for the vital need of the industry and the policyholder for adequate rates.

In other lines of insurance, regulation is less adequate than in fire insurance, if that be possible. The power to regulate exists on the books, but there has been no real control, in fact. Thus in January 1957, Deputy Commissioner Hanson told the press of an impending increase in automobile insurance rates. He is reported as saying that the department accepted without question the rates set by the National Bureau of Casualty Underwriters and the National Automobile Underwriters Association. In January 1958, however, when the commissioner announced another sharp increase in the automobile insurance rates, public outcry led to consideration by the attorney general, who ruled that the rates were ineffective because of failure to comply with the rate regulation law. Thus, at this writing, a hearing seems assured on the merits of this latest increase. There is no real assurance, however, that the incident will result in institutional changes.<sup>82</sup>

<sup>80</sup> Interviews with and letters from responsible fire insurance officials in Utah.

<sup>81</sup> *Ibid.*

Ineffectiveness of regulation bears a close relation to inadequacy of staffs and budgets. The Utah Insurance Division expenditures for the year 1955 were \$32,581.79, of which \$3603.29 were central administration expenses of the parent Department of Business Regulation chargeable to the Insurance Division. Personal services in the department cost only \$23,020.00. The inadequacy of rate (and other insurance) regulation cannot be attributed to the poverty of the state, however, for the department collected in fees a total of \$93,637.13 for the services rendered by the staff. The Insurance Division thus makes a profit for the state of Utah of over \$60,000 out of the fees collected to pay for the department's services, in addition to one and two-thirds millions of dollars of premium tax collections intended for the general fund. The department's budget must be at least tripled before the state can justifiably plead poverty as an excuse for failure adequately to regulate insurance.<sup>83</sup>

In Wisconsin the department's budget was about \$200,000 in the same year, yet it would be hard to regard even Wisconsin's rate regulation as fully adequate.<sup>84</sup>

It seems fair to state on the basis of the data presented above that there are states in which rate regulation in the insurance field can hardly be regarded as adequate, if by "adequate" we mean that public officials actually scrutinize and either approve, or, with knowledge of the facts, fail to disapprove the rates filed by rating bureaus. Of course the "All-Industry" laws do give to all commissioners the power to regulate, and when specific pressures are applied to the state's political machinery, there may be specific acts of regulation. But systematic and constant surveillance over rates is lacking in some states. In other states there is reasonably adequate regulation in some lines of insurance, but not in other lines. And finally, there may be a few states where regulation is real, effective and complete.<sup>85</sup>

<sup>82</sup> "Car Owners Face Insurance Rate Jump," SALT LAKE TRIBUNE, Jan. 16, 1957. "Legality Clouds Rate Hike on Auto Insurance," and editorial, "Public Entitled to Proof on Rate Boost," SALT LAKE TRIBUNE, Jan. 22, 1958; "Car Insurance Boost Ruled Not In Effect," and editorial, "Increasing Your Car Insurance," DESERET NEWS, Jan. 22, 1958; "Insurance Boost Illegal, State Attorney Decides," SALT LAKE TRIBUNE, Jan. 23, 1958.

<sup>83</sup> UTAH INS. COMMR. ANN. REP. 98 (1956).

<sup>84</sup> WIS. INS. COMMR. ANN. REP. 8 (1956). And see p. 561 supra.

<sup>85</sup> If the amount spent for insurance department salaries is regarded as some indication of the presence of qualified personnel for rate regulation, Vermont, with \$15,510.23, North Dakota, with \$28,656.92, Idaho with \$24,992.90, can hardly have adequate rate

## MEANING OF THE McCARRAN-FERGUSON ACT

We now have some indication of "the extent to which [the insurance] business is . . . regulated by State law." It remains to inquire what indications there may be as to the future course of public control of insurance rate making.

Public policy with respect to the insurance business was not clearly defined before 1945. The relatively naive trust-busting policy of the Sherman Act was in effect in some states. This policy assumed that combinations were per se bad, and sought to forbid them. A more sophisticated policy was manifest in those state statutes which permitted or encouraged rate making combinations, but sought to bring them under public control. The latter clearly represented the historical trend; it was more realistic in seeing the dangers of unrestrained competition as well as of uncontrolled combination.

The McCarran-Ferguson Act recognized the merits of this kind of discriminating control, as opposed to the inflexible policy of the Sherman Act. It encouraged the states to regulate more adequately, but reserved some degree of federal control by making the Sherman, Clayton, and Federal Trade Commission Acts applicable to the insurance business "to the extent that such business is not regulated by State law." The historical contribution of the McCarran Act thus seems to be the formulation of a federal public policy that real regulation of insurance rate making at the state level is preferable to the enforcement of a non-regulatory federal anti-combination policy, but that the latter is preferable to unregulated rate making by combinations of insurers. Thus, the Judiciary Committees of both House and Senate stated that "the Congress proposes by this bill to secure adequate regulation and control of the insurance business."<sup>86</sup>

An obvious question arises: is the All-Industry bill the kind

regulation. Wyoming's total department expenditures were \$35,644.03 (including the Inheritance Taxes Department and the State Fire Marshal); South Dakota, \$40,123.04; New Hampshire, \$52,307.65. The probability is high that some of these states, perhaps all, have grossly inadequate rate regulation. Even states with adequate insurance department budgets may have inadequate regulation of rates for other reasons. The figures above came from annual reports that were at hand. They are not in all cases the most recent figures and they are not always strictly comparable, but they sufficiently make the point. Marryott, "Twelve Years of Insurance as Commerce—Prospects for the Future," 24 *INS. COUNSEL J.* 191 (1957), throws some light on the adequacy of state rate regulation from the company standpoint.

<sup>86</sup> H. Rep. 143, 79th Cong., 1st sess., 2 (1945); S. Rep. 20, 79th Cong., 1st sess., 2 (1945).

of regulation "by State law" that excludes the operation of the stipulated federal acts, in cases where in fact the commissioner lacks the staff, or the budget, or the talent, or the disposition, to do a real job of regulating. The answer turns on the meaning attributed to the word "regulate."

Two views have been vigorously espoused: one is that the passage of legislation is the only kind of "regulation" necessary to satisfy the proviso of section 2(b),<sup>87</sup> while the other is that only active regulation under the statute will satisfy the proviso.<sup>88</sup> Strong arguments can be made for both views.

The most persuasive argument that the enactment of a statute alone is sufficient to satisfy the proviso would seem to rest upon the probable reluctance of the federal courts to take on the task of ascertaining when there is "regulation." How can the court say that there is not regulation, when the statute gives to some public official the power to review rates and disapprove them? What standards are to be set up to determine when "power" becomes "regulation"? Must the statute require the commissioner actually to approve filed rates, or is it sufficient to give him power to disapprove, if he wishes, rates "deemed" approved a specified time after filing? Must there be prosecutions under the statute, or orders by the commissioner to reduce or reconsider rates or change classifications? Must there be a functionary in the insurance department qualified by training or experience to understand the rate making process? Or is it enough that someone be assigned the responsibility of reviewing rates? The requirement that regulation be real in order to exclude federal control puts an impossible burden on the court—so goes the argument. Rather than accept the burden, the court will interpret the proviso as being satisfied by the mere enactment of legislation. It is doubtful, of course, whether the task the court would have under the interpretation demanding adequate regulation is any more difficult than a multitude of problems the court solves regularly.

If the statute is interpreted as requiring more than mere

<sup>87</sup> E.g., Orfield, "Improving State Regulation of Insurance," 32 MINN. L. REV. 219 at 224 (1948).

<sup>88</sup> E.g., Raymond Harris, Deputy Superintendent and Counsel, New York State Insurance Department: "While the court may not undertake to substitute its judgment for that of the insurance commissioner in deciding whether state laws should be invoked in a particular case, it is hardly likely that the court, in interpreting Public Law 15, would accept formal legislative action as complying with the act." 4 NEW YORK STATE INS. DEPT., EXAMINATION OF INS. COMPANIES 19 (1954).



enactment of regulatory statutes by the states in order to exclude the application of the federal antitrust laws, it might be plausibly argued, though probably not successfully, that the Sherman Act as thus applied would be unconstitutional for vagueness. How could insurance companies and rating bureaus be sure when the states in which they operated were regulating enough to satisfy the proviso? To determine in advance whether they were complying with the law would be very difficult, and the variable factor would not even be within their control. In 1920 the Supreme Court struck down provisions of the Lever Act making it unlawful willfully "to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries," on the ground that the act created no ascertainable standard of guilt.<sup>89</sup> In 1946, on the other hand, the Court upheld against the same challenge a statute forbidding coercion of a radio broadcaster to employ persons "in excess of the number . . . needed."<sup>90</sup> It seems doubtful if the present Court would invalidate for indefiniteness this statute dealing with economic regulation, at least as applied to those clear cases where the state did not in fact regulate at all. The doctrine is based on a constitutional requirement of notice, described by the Court in the *Petrillo* case: "The language here challenged conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices. The Constitution requires no more."<sup>91</sup> The statute in the present case seems to meet this test. Moreover, here the indefiniteness is not in the prohibition itself, but in an exception to the prohibition in favor of the defendant. Finally, even if it were held unconstitutional if sanctioned by an indictment, it might not be for purposes of a cease and desist order, which makes the statute more definite prospectively, and does not punish prior violations of the statute alone.<sup>92</sup> Although the argument to the constitutionality of the Sherman Act as thus applied is not absurd, it does not seem likely to convince the Court.

On the other hand, the word "regulate" usually connotes

<sup>89</sup> *United States v. Cohen Grocery Co.*, 255 U.S. 81 (1921). But compare *Screws v. United States*, 325 U.S. 91 (1945), where Justice Douglas, speaking for the Court, created a requirement of specific intent and thereby overcame the vagueness of a statute punishing deprivation of constitutional rights.

<sup>90</sup> *United States v. Petrillo*, 332 U.S. 1 (1947). And see *Gorin v. United States*, 312 U.S. 19 (1941).

<sup>91</sup> *United States v. Petrillo*, 332 U.S. 1 at 8 (1947).

<sup>92</sup> For a general discussion of the problem of indefiniteness, see comment, 53 *MICH. L. REV.* 264 (1954).

something more active than mere paper machinery. Webster defines "regulate" as "to govern or direct according to rule . . . ; more narrowly, to bring under the control of law or constituted authority. . . ." The *Oxford Universal Dictionary* adds the notion, "to subject to guidance or restriction. . . ." Both suggest affirmatively enforcing policy—not merely stating it. The word "regulate" thus seems more consistent with a requirement of meaningful regulation than with mere legislation.<sup>93</sup>

Litigated cases give relatively little help in determining the meaning of "regulate." Nearly always they were concerned to delimit the outer boundaries of power to regulate, not to determine the minimal connotations of the word. Nevertheless, there is language in some cases contrasting regulation with legislation. Thus, "the word 'laws' . . . is therein definitely related to the legislature or to the legislative power, while the word 'regulate' and kindred words are attributed to the administrative power and duty."<sup>94</sup> Again, "regulation and legislation are not synonymous terms. As applied to the statute in question, regulation means a reasonable supervision by a legislative authorized agency. . . ."<sup>95</sup> Since the questions litigated were not germane to the present problem, this language is hardly conclusive, but it does suggest that "regulation" ordinarily means more than "legislation."

Only one case arguably deals with the precise issue before us. In *North Little Rock Transportation Co. v. Casualty Reciprocal Exchange*,<sup>96</sup> the Eighth Circuit upheld a summary judgment of dismissal of a policyholder's action for treble damages under the Sherman Act. The fact that the State of Arkansas had enacted

<sup>93</sup> WEBSTER, *NEW INTERNATIONAL DICTIONARY*, 2d ed., 2099 (1934); *OXFORD UNIVERSAL DICTIONARY*, 3d ed., revised with addenda, 1692 (1955).

<sup>94</sup> *Marsh v. Bartlett*, 343 Mo. 526 at 540, 121 S.W. (2d) 737 (1938).

<sup>95</sup> *In re Northwestern Indiana Telephone Co.*, 201 Ind. 667 at 680, 171 N.E. 65 (1930). And see *United States v. Grimaud*, 220 U.S. 506 (1911), where on a question of the validity of delegated power, the Court talks of regulation as an aspect of the administrative process.

<sup>96</sup> (8th Cir. 1950) 181 F. (2d) 174, cert. den. 340 U.S. 823 (1950). *National Cas. Co. v. FTC*, (6th Cir. 1957) 245 F. (2d) 883, cert. granted 78 S. Ct. 119 (1957), deals tangentially with the analogous problem of the applicability of the Federal Trade Commission Act. Since the commission was reaching for jurisdiction over the interstate advertising of mail order insurers, *irrespective* of state regulation, the case does not deal directly with the question of jurisdiction where there was legislation but no regulation in fact. For a statement of this proposition, see Brief for the F.T.C. at 28. For present purposes, the case seems to suffer from the same infirmity as the *North Little Rock* case. As the United States Supreme Court has granted certiorari, however, its opinion may throw some light on the problem before us. See also note, 60 *YALE L. J.* 160 (1951).

rate regulatory legislation under the McCarran Act insulated the bureau and company from civil liability under the Sherman Act. The court did not inquire beyond the fact that there was legislation, but apparently the argument that inadequacy of regulation might bring the Sherman Act into operation was not made to the court. The case thus seems indecisive on this question.

There is no "plain meaning" of the word "regulate." It seems appropriate, therefore, to bring in legislative history as an aid to interpretation.

Pending the enactment of the McCarran Act, Senator Radcliffe of Maryland exchanged a number of letters with President Roosevelt, who made it clear that the administration was not seeking federal regulation of insurance. He thought there was "no conflict between the application of the antitrust laws and effective State regulation of insurance companies, and there is no valid reason for giving any special exemption from the antitrust laws to the business of insurance. The antitrust laws prohibit private rate fixing arrangements between insurance companies and acts of boycott, coercion, or intimidation. The antitrust laws do not conflict with affirmative regulation of insurance by the States such as agreed insurance rates *if they are affirmatively approved by State officials.*"<sup>97</sup> In signing the bill he said: "After the moratorium period, the antitrust laws . . . will be applicable . . . except to the extent that the states have assumed the responsibility, and are effectively performing that responsibility. . . ."<sup>98</sup> The day after he signed the act, the President said: "Congress did not intend to permit private rate fixing, which the Antitrust Act forbids, but was willing to permit actual regulation of rates by affirmative action of the states."<sup>99</sup> Although what the President said is hardly decisive as to the meaning of the act, the strong leadership Roosevelt exercised in Congress gives his intentions weight in providing background.

Attorney General Biddle also spoke for the administration: ". . . The view we hold toward insurance is not unlike our policy toward railroad rates, that the fixing of rates by private groups . . . *without active and definite state approval*, is a clear contravention,

<sup>97</sup> 91 CONG. REC. 482 (1945). Italics added.

<sup>98</sup> Mimeographed White House release, March 10, 1945, as quoted in Layne, "Multiple State Regulation of Mail Order Insurance," 39 GEO. L. J. 422 at 425, n. 10 (1951). A weaker version of the release is quoted in SAWYER, INSURANCE AS INTERSTATE COMMERCE 66 (1945).

<sup>99</sup> As quoted in ABA SECTION OF INS. LAW PROCEEDINGS 105 (1946).

not only of the [Sherman] act, but of the whole theory that underlies the act, the theory that competition should be free unless it is specifically regulated by the appropriate body."<sup>100</sup> These comments from the administration emphasize the need for affirmative regulation, as opposed to the application of the usual "deemer" clause, that rates are "deemed" approved unless disapproved within a specified time. The deemer clause tends to emasculate control by the commissioner.<sup>101</sup> The requirement of affirmative approval seems crucial in Mr. Biddle's view; he thought statutes containing the deemer clause would not satisfy the requirements of the McCarran Act.<sup>102</sup>

The bill was introduced in the Senate on January 18, 1945.<sup>103</sup> The President signed it less than two months later. This hasty action attests the sense of urgency that was felt. Brevity of consideration made difficult the clear isolation of the issues involved, and a wide variety of expressions are to be found in the *Congressional Record* as to the intent of the Congress. The basic purposes of the bill were to preserve to the states the power to regulate but to compel them to regulate more adequately. The method was to permit to the states a moratorium within which to set up the regulatory machinery. Senator Ferguson of Michigan thought the bill would permit the states to pass laws in conflict with the Sherman Act during the moratorium, but Senators Murdock of Utah and O'Mahoney of Wyoming objected to any form of the bill that would permit the states to authorize monopolies. They sought to delete section 2(b), which provided that "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 so provides."<sup>104</sup> The Senate then amended section 2(b) to provide that "No act . . . except the . . . Sherman Act, and/or . . . the Clayton

<sup>100</sup> Quoted in Dineen, "The Rating Problem," ABA SECTION OF INS. LAW PROCEEDINGS 104 at 105 (1946). He also said: "I think there is no doubt at all that insurance rates which are approved by a state are not subject to the Sherman Anti-Trust Act. By that I mean that if a group of insurance companies agreed on rates and filed them with a state commission or state body, and that body took active and definite action, made active and definite approval of those rates, in that case I think the matter would not be involved at all in the Sherman Anti-Trust Act." Ibid.

<sup>101</sup> Id. at 107.

<sup>102</sup> See Joint Hearing Before the Sub-Committees of the Committees on the Judiciary on S. 1362, H.R. 3269, and H.R. 3270, Pt. 6, 78th Cong., 2d sess., 638 (1944). And see note, 96 UNIV. PA. L. REV. 223 at 230 (1947).

<sup>103</sup> 91 CONG. REC. 330 (1945).

<sup>104</sup> Id. at 478-483.

Act" should apply to the insurance business unless specifically made applicable thereto.<sup>105</sup> Thus, after the moratorium, rate making combinations would be forbidden and the Sherman Act policy would be paramount in the insurance field. As Senator O'Mahoney expressed it, "There is no purpose to issue an invitation from the United States Senate to the States to enact laws which would establish monopolies in this business."<sup>106</sup> In the House, however, the bill was enacted in its original form, without the Senate amendment.<sup>107</sup> This version would make the Sherman and Clayton Acts permanently inapplicable to insurance. On motion of Senator McCarran of Nevada, the Senate refused to accede to the House version, and the bill went to a conference committee consisting of Senators McCarran, Ferguson, O'Mahoney, and Representatives Sumners, Walter, and Hancock. The committee unanimously agreed on the conference form of the bill. To section 2(b) as found in the House version was added the proviso that after the moratorium the Sherman, Clayton, and Federal Trade Commission Acts should "be applicable to the business of insurance to the extent that such business is not regulated by state law." This gave to the federal antitrust legislation some restricted application to insurance after the moratorium.<sup>108</sup>

The Senate debated the conference committee report on February 26,<sup>109</sup> and there were expressions indicating that two of the Senate conferees thought real regulation was required by the proviso. The following colloquy took place on that day:

*Senator Ferguson:* ". . . insofar as the State is concerned which has specifically legislated on the subject, the three acts shall not apply."

*Senator O'Mahoney:* "I believe the Senator from Michigan went a little further than was his intention when he said that if the States have legislated certain things will take place. The bill says if the States have *regulated*." (Italics added.)

Senator McCarran's view is very important for he introduced the bill and was chairman of the Senate Judiciary Committee

<sup>105</sup> Id. at 487, 488.

<sup>106</sup> Id. at 488.

<sup>107</sup> Id. at 1085.

<sup>108</sup> Id. at 1208, 1274, 1357. This form was a compromise between Senate and House versions. See Senator Murdock, id. at 1481-1482.

<sup>109</sup> Id. at 1442-1444.

responsible for it. To Senator Murdock's question whether Senator White of Maine thought the Congress must act affirmatively to occupy the field beyond the scope of state regulation, Senator White replied:

"Not at all; that is not my view of the matter at all. My view is that the State may regulate. If, however, the State goes only to the point indicated,<sup>110</sup> then these Federal statutes apply throughout the whole field beyond the scope of the State's activity."

*Senator McCarran*: "That is a correct statement."

*Senator Murdock*: "Without any subsequent action on the part of Congress?"

*Senator White*: "Without any subsequent action on the part of Congress."

\* \* \*

*Senator Barkley* (Kentucky): "I should like to ask, in this connection, whether, where States attempt to occupy the field—but do it inadequately—by going through the form of legislation so as to deprive the Clayton Act, the Sherman Act; and the other acts of their jurisdiction, it is the Senator's interpretation of the conference report that in a case of that kind, where the legislature fails adequately even to deal with the field it attempts to cover, these acts still would apply?"

*Senator McCarran*: "That is my interpretation."

Senator Pepper of Florida then objected to the conference report bill because he thought it "practically destroys the effect of the Supreme Court decision, and I am against that. . . ."

*Senator McCarran*: "The Senator is correct regarding the 3-year moratorium, but beyond that he is in error."

Senator McCarran subsequently changed his position. In a letter to the *Yale Law Journal*, he said, ". . . the intent of the Act was not to accomplish any particular degree of stringency of regulation, but to keep regulation at the State level, and forestall

<sup>110</sup> The words "point indicated" have no clear antecedent in the language contained in the preceding speeches. From context it *seems* to mean "enacting but not enforcing regulatory legislation." See last sentence of Senator Pepper's last preceding speech, *id.* at 1444, col. 2.

Federal regulation. . . ." On the other hand he contemplated that the legislation must meet certain minimum standards to satisfy the proviso. Once these minimum requirements were met, the adequacy of state regulation was a matter of legislative and not of judicial concern.<sup>111</sup>

It must be conceded that the language in the debates, while suggesting the automatic application of federal antitrust laws if there was only paper regulation by the states, is not definitive, largely because it is not often clear whether the Senators were talking about the adequacy of the scope of the legislation, or about the adequacy of enforcement of legislation which was adequate in scope. Nor were the Senators always clear whether under the statute the states would be able to authorize rate bureaus, in contravention of the Sherman and Clayton Acts. Some Senators were even concerned lest the passing of the act estop them from voting later to subject insurance companies to the federal antitrust laws.

At the insistence of Senator Pepper, the matter was put over until February 27. He then bitterly opposed the bill on the ground that the conference compromise enabled the states to evade federal antitrust legislation by mere paper regulation. As a result of his speech, or perhaps as a result of second thought about the matter, Senators Ferguson, Murdock, and O'Mahoney all seemed to feel it was for Congress to decide whether the state regulation was such that the proviso should come into operation, at least if there was legislation by the state at all.<sup>112</sup> This shift in expressed intentions between February 26 and 27 should not change the meaning of the conference bill. The earlier expressions by the conferees seem most likely to reflect accurately the intentions of the conference committee.

It is not necessary here definitively to ascertain the meaning of "regulate" in the proviso of section 2(b). For present purposes it is sufficient that there be a reasonable case for the proposition that the Sherman Act, the Clayton Act, and the Federal Trade Commission Act are applicable to the business of insurance when

<sup>111</sup> Letter to *Yale Law Journal*, quoted in note, 60 *YALE L. J.* 160 at 163, note 11 (1951); McCarran, "Federal Control of Insurance," 34 *A.B.A.J.* 539 at 542 (1948); McCarran, "Insurance as Commerce—After Four Years," 23 *NOTRE DAME LAWYER* 299 at 306 (1948).

<sup>112</sup> 91 *CONG. REC.* 1477-1482 (1945). Senator Murdock urged that the states be given a chance: ". . . Why not be willing to have confidence that the States will do a good job when they step into it?"

there is legislation on the books but no regulation in fact. The authors think that the case is reasonable; many other persons have supported it less equivocally.<sup>113</sup>

Even if it be conceded that the Sherman, Clayton, and Federal Trade Commission Acts are *not* automatically applicable to insurance if state regulation is *not* adequate, it at least seems clear that Congress intended when it passed the McCarran-Ferguson Act to re-examine the situation and legislate if necessary to bring insurance rate making under suitable public control. A theory of automatic application shows even more clearly the concern of Congress that there be effective state regulation.<sup>114</sup> This concern continued. Thus Senator McCarran wrote in 1948: "There is a growing feeling in the Congress that the Federal legislature has a positive responsibility to see to it that there is adequate regulation of insurance, by the laws of the several States, or by the act of the industry itself, promulgated into law by the legislatures of the States, if possible; and otherwise, by Federal laws enacted by the Congress." He urged the industry to examine the adequacy of state regulation: "Such re-examination is an obligation of the industry, for while the final decision with respect to adequacy will not be, necessarily, for the industry to make, the results of a final judgment of inadequacy will be the industry's to bear."<sup>115</sup>

Senator O'Mahoney said in the Senate debate on the bill: "I interpret that to be a clear statement that if the States do not regulate, the power of Congress to regulate is clearly enunciated. I do not conceive this to be a grant of power to the States to au-

<sup>113</sup> See Dineen, "The Rating Problem," ABA SECTION OF INS. LAW PROCEEDINGS 104 at 109-110 (1946); Berge, "Insurance and the Anti-Trust Laws," ABA SECTION OF INS. LAW PROCEEDINGS 29 at 34 (1946-1947). At present writing, the extent of the Federal Trade Commission's jurisdiction over accident and health insurance advertising under the proviso in section 2(b) of the McCarran Act is a much discussed problem, and the result is uncertain. See McCarter, "Recent Misleading and Deceptive Mail-Order Accident and Health Insurance Policies and Advertising," 1956 INS. L. J. 247 at 260; note, 45 GEO. L. J. 85 (1956); *American Hospital and Life Ins. Co. v. FTC*, (5th Cir. 1957) 243 F. (2d) 719, cert. granted 78 S. Ct. 120 (1957); *Crafts v. FTC*, (9th Cir. 1957) 244 F. (2d) 882; *National Cas. Co. v. FTC*, (6th Cir. 1957) 245 F. (2d) 883, cert. granted 78 S. Ct. 119 (1957).

<sup>114</sup> See Dineen, "The Rating Problem," ABA SECTION OF INS. LAW PROCEEDINGS 104 at 110 (1946); Sawyer, "A Program Under Public Law 15," ABA SECTION OF INS. LAW PROCEEDINGS 115 at 118 (1946). And see Beach, "The Southeastern Underwriters Decision and Its Effect," 1947 WIS. L. REV. 321 at 327; Murphy, "Insurance Under the Commerce Clause," 33 IOWA L. REV. 91 at 94 (1947).

<sup>115</sup> McCarran, "Insurance as Commerce—After Four Years," 23 NOTRE DAME LAWYER 299 at 308 (1948); and see McCarran, "Federal Control of Insurance," 34 A.B.A.J. 539 at 540-541 (1948); McCarran, "Congress and Federal Regulation of Insurance," ABA SECTION OF INS. LAW PROCEEDINGS 29 at 33 (1947-1948).



thorize by permissive legislation obviously adverse combinations which would be against the public interest."<sup>116</sup> Subsequently, he reaffirmed that position: "It will not be sufficient . . . merely to announce the principle or to pass laws in the several States which merely formally assert state authority. If there is to be state regulation, the States must have insurance departments which are competent to regulate, that is to say, which are competent to examine, audit, and understand the complexities of the insurance business."<sup>117</sup> Thus, if it does not show that the Sherman, Clayton, and Federal Trade Commission Acts are automatically applicable to insurance in the event state regulation is inadequate, the legislative history of the McCarran-Ferguson Act at least clearly shows that it is the public policy of the United States that insurance rate making be adequately regulated, preferably by the states, but if not by the states then by the federal government.

### CONCLUSION

If it be concluded, as the foregoing analysis suggests may be permissible, that insurance rate making will eventually be regulated effectively, by the federal government if not by the states, and if it be concluded that state regulation is, as yet, inadequate in many of the states,<sup>118</sup> it follows that the long-term danger of a federal assumption of regulatory power over insurance is real. Unless state regulation is sufficiently stringent to prevent the development of substantial and organized consumer pressures, an attitude favorable to federal intervention may develop, or federal agencies may have excuse to expand the scope of their operations into the insurance field. It is at least possible that the Department of Justice might successfully assert federal power under existing law, where state rate regulation is nominal. It already has taken

<sup>116</sup> 91 CONG. REC. 1444 (1945); in the *Southeastern Underwriters* case, Justice Jackson said: "I have little doubt that if the present trend continues federal regulation will eventually supersede that of the states." 322 U.S. 533 at 586 (1944). See also Patterson, "The Future of State Supervision of Insurance," ABA SECTION OF INS. LAW PROCEEDINGS 18 at 26 (1944-1945).

<sup>117</sup> Address before New York Insurance Federation, Dec. 5, 1945, quoted in 1 RICHARDS, INSURANCE, 5th ed., 190, n. 3a (1952).

<sup>118</sup> See Dineen (New York Insurance Superintendent), "The Rating Problem," ABA SECTION ON INSURANCE LAW PROCEEDINGS 104 at 105 (1946), pointing out the inadequacies of staff and the necessity of increased budgets and better personnel in order to do the job required.

action against concerted activity thought to offend the Sherman Act prohibition against coercion, boycott, and intimidation, and is therefore watchful of insurance practices and could easily assume broader power.<sup>119</sup> The Federal Trade Commission has already asserted jurisdiction over insurance companies in the accident and health field to an extent which is thought by the companies and the circuit courts of appeals to exceed its power under the act.<sup>120</sup> However, the United States Supreme Court has just granted certiorari in two of the cases circumscribing the commission's power and the whole matter must be regarded as undecided. It is even more likely that a reforming Congress may step in and fill up the power vacuum left by the states, if the consumer demand for regulation is not fully satisfied by state action. It may be concluded, therefore, that the minimum condition for the sure preservation of state regulatory power over the insurance business is not now fully satisfied. While it would be extremely rash to predict the exact course events will take, or even to asseverate that state regulation is inevitably doomed, there is a real possibility that the federal government will enter the field of insurance, and that its entrance will lead eventually to total occupation of the field, and conceivably also to appropriation by the federal government of the substantial insurance tax revenues which now go largely to the states. In light of this danger, continuance of penny-wise policies of economy in budget and staff for insurance departments may in the end prove to be pound-foolish. If the states cannot do an adequate job, perhaps a federal commissioner of insurance can. If effective regulation is too expensive for some small states, the way is open for regional cooperation in the regulation of rates. The possibility of interstate cooperative use of technical facilities and personnel is already provided by many statutes.<sup>121</sup> Indeed, interstate rating may be desirable to produce a large enough premium volume in all classifications of risks to give credibility to the rate structure.<sup>122</sup>

<sup>119</sup> See *United States v. Insurance Board of Cleveland*, (N.D. Ohio 1956) 144 F. Supp. 684, where pressure from the Justice Department seemed to have compelled the bureau to terminate a number of restrictive practices. See also *United States v. New Orleans Ins. Exch.*, (E.D. La. 1957) 148 F. Supp. 915.

<sup>120</sup> See note, 45 *GEO. L. J.* 85 (1956); note, 5 *J. PUBLIC LAW* 494 (1956); and see note 113 *supra*.

<sup>121</sup> See, e.g., *Utah Code Ann.* (1953) §31-2-14; 1 *RICHARDS, INSURANCE*, 5th ed., 295 (1952).

<sup>122</sup> The extreme difficulty in computing a reliable rate structure in a small state may

Interstate rating and regulation of rates would make possible more adequate supervision within the reach of small state budgets. The long history of cooperation through the National Association of Insurance Commissioners provides an avenue for the solution of the problem, if the states really wish to preserve permanently their preeminence in the regulation and taxation of insurance.

be seen in the memorandum opinion in *Matter of Idaho Surveying and Rating Bureau*, in the Third Judicial District Court of Idaho, Civil Case No. 25750 (1955). The trial brief of Petitioner (the Bureau) is an excellent explanation of the way in which fire rates are made. See also Kulp, "The Rate-Making Process in Property and Casualty Insurance—Goals, Technics and Limits," 15 *LAW AND CONTEMP. PROB.* 493 at 503-506 (1950). And see Harrington (Insurance Commissioner of Massachusetts), "Administration of Insurance Rate Regulatory Laws," 15 *LAW AND CONTEMP. PROB.* 597 at 602 (1950).