

# REGULATION OF INSURANCE UNDER THE McCARRAN ACT

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It is a shibboleth of private capital that the less government, the better—"the fewer laws, the less confided power." Since the closing of the frontier, our national history has been marked by the ceaseless struggle of industry to guard its freedom of decision against the encroachment of governmental restraint.

During the past four years, one great segment of American business has seemingly rejected this traditional policy. The insurance industry has not only supported but solicited the enactment by all state legislatures of a comprehensive network of regulatory statutes. Such regulation deals with the lifeblood of an industry—what it may sell and the price it may charge. An analysis of this new system, and its probable success or failure, is the concern of this paper. But an understanding of the matter requires more than a statement of existing facts. We must examine the origins of this anomalous development, must trace the succession of events which led an industry to ask that government be granted a greater voice in its business decisions.

## I

### THE SOUTH-EASTERN UNDERWRITERS ASSOCIATION CASE

On June 5, 1944 in *United States v. South-Eastern Underwriters Ass'n*,<sup>1</sup> the Supreme Court of the United States by a 4-3 decision determined for the first time that (1) an insurance company conducting a substantial part of its business across state lines is engaged in "commerce among the several States" and is subject to regulation by Congress under the Commerce Clause of the Constitution, and (2) the Sherman Antitrust Act is applicable to the business of insurance.

For seventy-five years the Court had consistently held that the Commerce Clause did not deprive the individual states of power to regulate or to tax specific activities of foreign insurance companies which sold policies within their territories.<sup>2</sup> In the course of these decisions the Court had stated that "issuing a policy of insurance is not a transaction of commerce,"<sup>3</sup> "the business of insurance is not commerce,"<sup>4</sup>

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<sup>1</sup> 322 U. S. 533 (1944), 44 COL. L. REV. 772. The case is the subject of Powell, *Insurance As Commerce*, 57 HARV. L. REV. 937 (1944).

<sup>2</sup> First held in *Paul v. Virginia*, 8 Wall. 168 (U. S. 1868). Subsequent cases are collected in BERNARD C. GAVIT, *THE COMMERCE CLAUSE OF THE UNITED STATES CONSTITUTION* 134-139 (1932). The precise question of whether Congress has the power under the Commerce Clause to regulate interstate insurance transactions had never been submitted to the Court.

<sup>3</sup> *Paul v. Virginia*, 8 Wall. 168, 183 (U. S. 1868).

<sup>4</sup> *Hooper v. California*, 155 U. S. 648, 655 (1895).

and "contracts of insurance are not commerce at all, neither state nor interstate."<sup>5</sup> On such decisions, and an assumption of consequent lack of federal power, was founded the system of insurance regulation by the several states.

In the *S.E.U.A.* case Mr. Justice Black, speaking for a majority of the seven Justices who participated,<sup>6</sup> analyzed these authorities. He pointed out that certain activities of a business may be intrastate and therefore subject to state control, while other activities of the same business may be interstate and therefore subject to federal regulation. He observed that there is a wide range of business and other activities which, though subject to federal regulation, are so intimately related to local welfare that, in the absence of Congressional action, they may be regulated or taxed by the states. The primary test applied by the Court to such activities, the Justice said, is not the mechanical one of whether the particular activity affected by the state regulation is part of interstate commerce, but rather whether, in each case, the competing demands of the state and national interests involved can be accommodated. Reviewing the varied activities which had been held by the Court to be interstate commerce, he declared:<sup>7</sup>

Not only, then, may transactions be commerce though non-commercial; they may be commerce though illegal and sporadic, and though they do not utilize common carriers or concern the flow of anything more tangible than electrons and information. These activities having already been held to constitute interstate commerce, and persons engaged in them therefore having been held subject to federal regulation, it would indeed be difficult now to hold that no activities of any insurance company can ever constitute interstate commerce so as to make it subject to such regulation;—activities which, as part of the conduct of a legitimate and useful commercial enterprise, may embrace integrated operations in many states and involve the transmission of great quantities of money, documents, and communications across dozens of state lines.

He concluded:<sup>8</sup>

No commercial enterprise of any kind which conducts its activities across state lines has been held to be wholly beyond the regulatory power of Congress under the Commerce Clause. We cannot make an exception of the business of insurance.

The majority next held that the comprehensive language of the Sherman Act embraced the business of insurance and that there existed no evidence of a contrary Congressional intent. If exceptions are to be written into the Act, "they must come from the Congress, not this Court."<sup>9</sup> The argument that the Sherman Act necessarily invalidated many state laws regulating insurance was dismissed as "exaggerated."<sup>10</sup> The majority accordingly held that a conspiracy to restrain interstate trade and commerce by fixing and maintaining arbitrary and non-competitive premium rates on fire and allied lines of insurance in six states, and a conspiracy to monopolize such interstate trade and commerce, are violations of the Sherman Act.

<sup>5</sup> *New York Life Ins. Co. v. Deer Lodge County*, 231 U. S. 495, 510 (1913).

<sup>6</sup> Mr. Justice Roberts and Mr. Justice Reed took no part in the consideration or decision of the case.

<sup>7</sup> 322 U. S. 533, 549, 550 (1944).

<sup>8</sup> *Id.* at 553.

<sup>9</sup> *Id.* at 561.

<sup>10</sup> *Id.* at 562.

The decision of the District Court for the Northern District of Georgia,<sup>11</sup> which had sustained a demurrer to the indictment, was reversed.

Three Justices dissented. In a lengthy opinion the late Chief Justice Stone discussed what he believed to be the two questions presented: (1) whether the business of entering into contracts in one state, insuring against the risk of loss by fire of property in others, is itself interstate commerce, and (2) whether an agreement or conspiracy to fix the premium rates of such contracts and in other ways to restrict competition in effecting policies of fire insurance, violates the Sherman Act.

The Chief Justice declared:<sup>12</sup>

The court below has answered "no" to both of these questions. I think that its answer is right and its judgment should be affirmed, both on principle and in view of the permanency which should be given to the construction of the commerce clause and the Sherman Act in this respect, which has until now been consistently adhered to by all branches of the Government.

Mr. Justice Frankfurter joined in the opinion of the Chief Justice in a brief separate dissent. He held that the relations of the insurance business to national commerce and finance undoubtedly afford constitutional authority for appropriate regulation by Congress of the business of insurance, "certainly not to a less extent than Congressional regulation touching agriculture."<sup>13</sup> But he believed that the Sherman Act had never been intended to apply to insurance transactions such as those charged by the indictment and could find "no Congressional warrant" for causing the "far-reaching dislocations" referred to by the Chief Justice and Mr. Justice Jackson.

In a separate dissent Mr. Justice Jackson addressed himself to what he termed the "practical and ultimate choice" that faced the Court "to say either that insurance was subject to state regulation or that it was subject to no existing regulation at all."<sup>14</sup> He reviewed the previous Supreme Court decisions, the growth of insurance regulation by the several states, and the absence of Congressional legislation. He declared that while a modern insurance business as usually conducted is in fact commerce, in contemplation of law insurance had acquired an established doctrinal status not based on present-day facts. "For constitutional purposes a fiction has been established, and long acted upon by the Court, the states, and the Congress,

<sup>11</sup> 51 F. Supp. 712 (N.D. Ga. 1943). The case went to the Supreme Court on direct appeal under the Criminal Appeals Act, 56 STAT. 271 (1942), 18 U.S.C. §682 (1946), amending 34 STAT. 1246 (1907).

<sup>12</sup> 322 U. S. at 563. The majority did not agree with the Chief Justice that the first of these questions was presented by the decision of the District Judge, whose construction of the indictment was binding on such an appeal under the Criminal Appeals Act. Their belief was that the District Court had held the indictment bad for the sole reason that the entire "business of insurance" (not merely the part of the business in which contracts are physically executed) can never under any possible circumstances be "commerce." *Id.* at 537. See Note, 44 COL. L. REV. 772, 773 (1944).

<sup>13</sup> *Id.* at 583. This belief that the modern business of insurance is not commerce but yet is subject to Congressional power under the Commerce Clause, was shared by the Chief Justice. *Id.* at 562, 563. It divided the Court, in reasoning but not result, in another case decided in the same term, *Polish National Alliance v. N.L.R.B.*, 322 U. S. 643 (1944).

<sup>14</sup> 322 U. S. at 585.

that insurance is not commerce."<sup>15</sup> He stated that the decision could have consequences upon tax liabilities, refunds, liabilities under state law to states or to individuals, and "even criminal liabilities." Because of these facts he believed that while "abstract logic" might support the majority, "the common sense and wisdom of the situation seem opposed."<sup>16</sup> He concluded:<sup>17</sup>

To force the hand of Congress is no more the proper function of the judiciary than to tie the hands of Congress. To use my office, at a time like this, and with so little justification in necessity, to dislocate the functions and revenues of the states and to catapult Congress into immediate and undivided responsibility for supervision of the nation's insurance business is more than I can reconcile with my view of the function of this Court in our society.

While the Supreme Court thus reversed the District Court decision sustaining the demurrer, the issues in the case were never tried, for reasons hereinafter set forth.

## II

### THE McCARRAN ACT

The *S.E.U.A.* decision immediately became the subject of controversy. Although Attorney General Biddle issued a statement to the contrary,<sup>18</sup> many state officials and insurance executives feared that the foundations of state regulation and taxation had been shaken.<sup>19</sup> It was contended that the decision reversed a Supreme Court practice instituted by Marshall not to decide a constitutional question except by a majority of the full Court.<sup>20</sup> Others criticized the Department of Justice for proceeding in such a case under the criminal, rather than the civil, provisions of the Sherman Act. Some saw the decision as the welcome discarding of an unrealistic fiction. But of paramount importance was a pending struggle in Congress.

<sup>15</sup> *Id.* at 588. Thirty-five states, including New York, had filed briefs as *amici curia* urging affirmation of the District Court decision sustaining the demurrer; forty-one states later petitioned the Court for a rehearing (*denied*, 323 U. S. 811 (1944)).

<sup>16</sup> *Id.* at 589.

<sup>17</sup> *Id.* at 594, 595.

<sup>18</sup> 90 CONG. REC. A3359, A3360 (1944). See editorial, N.Y.L.J., June 13, 1944, p. 2270, col. 1. Mr. Biddle later announced that no further action under the antitrust laws would be taken until Congress and the States had an opportunity to act. *Joint Hearings before Subcommittees of Committees on the Judiciary on S. 1362, H.R. 3269, and H.R. 3270, 78th Cong., 2d Sess. Pt. 6, 639 (1944).*

<sup>19</sup> SEN. REP. NO. 20, 79th Cong., 1st Sess. (1945); *cf.* Congressional debates cited in footnote 24 *infra*. Not all insurance interests agreed with this view. See statement of Senator O'Mahoney, *Joint Hearing before Subcommittees of Committees on the Judiciary on S. 1362, H.R. 3269, and H.R. 3270, 78th Cong., 2d Sess., Pt. 6, 639 (1944).* For views within the insurance industry before and after the decision, see generally ELMER W. SAWYER, *INSURANCE AS INTERSTATE COMMERCE* (1945). Newspaper editorial opinion is summarized in Note, 44 COL. L. REV. 772, 773 n. 10 (1944) as "in general, violently opposed to the decision."

<sup>20</sup> Charles Warren, N. Y. Times, June 8, 1944, p. 16, cols. 2, 3. *Contra*: Note, 44 COL. L. REV. 772, 773 (1944); letters, Hinds and Fraenkel, N. Y. Times, June 12, 1944, p. 18, col. 6. In *Insurance As Commerce*, 57 HARV. L. REV. 937, 938 (1944), the redoubtable Professor Powell commented: "What respect such minority assumption of reverse leadership should command from mere observers, though of necessity of minor consequence, is within the constitutional freedom of each observer. A gracious pursuer of the judicial course might pay the minority quartette a delicate compliment, too delicate perhaps for acid analysis, by emulating their courage and independence and thus viewing their views as they viewed those of their predecessors."

While the *S.E.U.A.* case was before the Court, there were introduced in both Houses of Congress companion bills to exempt the business of insurance from the Sherman and Clayton Antitrust Acts.<sup>21</sup> To recognize the special problems of insurance and to grant it entire or partial exemption from the antitrust laws, would be consistent with the precedents established by Congress with respect to many other industries.<sup>22</sup> With opposition including the Department of Justice, the Attorney General of Missouri, and Senator O'Mahoney, the bills were still being considered at joint public meetings of House and Senate Judiciary Subcommittees when the *S.E.U.A.* decision was rendered.<sup>23</sup>

Further hearings were held and bills proposed by various interests. On January 18, 1945, Senators McCarran and Ferguson introduced a measure which, after prolonged debate and substantial amendment, passed both Houses and was approved by President Roosevelt on March 9, 1945. The text of the statute (hereinafter referred to as the McCarran Act) as enacted, is as follows:<sup>24</sup>

*Sec. 1.* Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.

*Sec. 2. (a)* The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business. *(b)* 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 Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State law.

*Sec. 3. (a)* Until January 1, 1948, the Act of July 2, 1890, as amended, known as the

<sup>21</sup> H.R. 3270, S. 1362, 78th Cong., 1st Sess., introduced respectively on September 20 and 21, 1943. See Note, 32 GEO. L. J. 66 (1943).

<sup>22</sup> For exemption of marine insurance, see §29 of the Merchant Marine Act of 1920 (41 STAT. 1000 (1920), 46 U.S.C. §885(b)(1946)). Further illustrative examples of such exceptions are: fishing cooperatives (48 STAT. 1213 (1934), 15 U.S.C. §521 (1946)); agricultural or horticultural cooperatives (42 STAT. 388 (1922), 7 U.S.C. §291 (1946)); export associations (40 STAT. 517 (1918), 15 U.S.C. §62 (1946)); shipping agreements approved by the Maritime Commission (39 STAT. 733 (1916), as amended, 46 U.S.C. §814 (1946)); transportation agreements approved by the I.C.C. (24 STAT. 380 (1887), as amended, 49 U.S.C. §5(1946)); aviation agreements approved by the Civil Aeronautics Board, 52 STAT. 1004 (1938), 49 U.S.C. §494 (1946); marketing and other agreements approved by the Secretary of Agriculture (48 STAT. 34 (1933), as amended, 7 U.S.C. §608 (1946), 50 STAT. 248 (1937), 7 U.S.C. §671 (1946), 49 STAT. 781 (1935), 7 U.S.C. §852 (1946)).

<sup>23</sup> *Joint Hearings before the Subcommittees of the Committees on the Judiciary on S. 1362, H.R. 3269, and H.R. 3270, 78th Cong., 1st and 2d Sess., Pts. 1-6 (1943-1944).* The House passed the bill on June 22, 1944, by a vote of 283 to 54. The Senate Committee on the Judiciary favorably reported it on September 20, 1944, with a strong minority dissent. The bill died in the Senate without vote.

<sup>24</sup> 59 STAT. 33 (1945), 15 U.S.C. §§1011-1015 (1946). For legislative history see House Legislative Calendar, 79th Cong., 1st and 2d Sessions, Committee on the Judiciary, Jan. 29, 1946, No. 22, p. 103. Congressional debate may be found in 91 CONG. RECORD 499-509, 1112-1122, 1470-1473, 1548-1559 (1945). As introduced, the measure was based upon a draft by a legislative committee of the National Association of Insurance Commissioners. See 91 CONG. REC. 504 (1945).

Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, and the Act of June 19, 1936, known as the Robinson-Patman Anti-discrimination Act, shall not apply to the business of insurance or to acts in the conduct thereof. (b) Nothing contained in this Act shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation.

*Sec. 4.* Nothing contained in this Act shall be construed to affect in any manner the application to the business of insurance of the Act of July 5, 1935, as amended, known as the National Labor Relations Act, or the Act of June 25, 1938, as amended, known as the Fair Labor Standards Act of 1938, or the Act of June 5, 1920, known as the Merchant Marine Act, 1920.

*Sec. 5.* As used in this Act, the term "State" includes the several States, Alaska, Hawaii, Puerto Rico, and the District of Columbia.

*Sec. 6.* If any provision of this Act, or the application of such provision to any person or circumstances, shall be held invalid, the remainder of the Act, and the application of such provision to persons or circumstances other than those as to which it is held invalid, shall not be affected.

In approving the McCarran Act, President Roosevelt issued a public statement in which he said:<sup>25</sup>

I have given my approval to S. 340, the insurance bill, which passed the Congress last week. This bill grants the insurance business a moratorium from the application of the antitrust laws and certain related statutes, except for agreements to boycott, coerce, or intimidate, or acts of boycott, coercion or intimidation, until January 1, 1948. The purpose of this moratorium period is to permit the States to make necessary readjustments in their laws with respect to insurance in order to bring them into conformity with the decision of the Supreme Court in the South-Eastern Underwriters Association case. After the moratorium period, the antitrust laws and certain related statutes will be applicable in full force and effect to the business of insurance except to the extent that the states have assumed the responsibility, and are effectively performing that responsibility, for the regulation of whatever aspect of the insurance business may be involved. It is clear from the legislative history and the language of this act, that the Congress intended no grant of immunity for monopoly or for boycott, coercion or intimidation. Congress did not intend to permit private rate fixing, which the Anti-trust Act forbids, but was willing to permit actual regulation of rates by affirmative action of the States.

The bill is eminently fair to the States. It provides an opportunity for the orderly correction of abuses which have existed in the insurance business and preserves the right of the States to regulate in a manner consonant with the Supreme Court's interpretation of the antitrust laws.

Shortly after the enactment of the McCarran Act, the Government discontinued the *S.E.U.A.* prosecution in the Northern District of Georgia.<sup>26</sup>

<sup>25</sup> White House Press Release, Mar. 10, 1945; National Underwriter, Mar. 15, 1945, p. 22, col. 3; reprinted in part, N. Y. Times, Mar. 11, 1945, §5, p. 45, col. 5; never officially reported. [The text is inaccurately reprinted in various insurance journals and texts, in each of which there are omitted from the fourth sentence the words, "and are effectively performing that responsibility."] The President had previously emphasized "affirmative" State regulation in a letter to Senator Radcliffe before the McCarran Act was passed. 91 CONG. REC. 503 (1945).

<sup>26</sup> On June 25, 1945 a nolle prosequere order signed by District Judge Underwood, with consent of the Department of Justice, concluded the *S.E.U.A.* case.

The "moratorium" period in the Act, originally to end January 1, 1948, subsequently was extended to June 30, 1948, by Congress on its own initiative.<sup>27</sup> The extension was stated by the Senate Judiciary Committee to be desirable "in order to provide the Congress an additional time to examine into the situation more completely than it has been able to do during the present session."<sup>28</sup>

### III

#### SUBSEQUENT DECISIONS

Before considering the state regulatory legislation enacted to complement the McCarran Act, we should review several court decisions affecting that statute. Foremost are three opinions by the Supreme Court and one by the United States Court of Appeals for the Eighth Circuit.

##### A. Prudential Insurance Company v. Benjamin

In *Prudential Ins. Co. v. Benjamin*,<sup>29</sup> the insurance company protested an annual tax levied by South Carolina on foreign insurers (but not on domestic companies) as a condition of being authorized to do business within the state. The tax amounts to three per cent of the aggregate of premiums received from business done in South Carolina, regardless of its interstate or local character. Citing the *S.E.U.A.* decision, the insurer contended that the tax was an unconstitutional discrimination against interstate commerce in favor of local business. The Court unanimously upheld the tax.

The late Mr. Justice Rutledge traced the winding paths of the previous decisions, commenting that "the history of the commerce clause has been one of very considerable judicial oscillation." The authorities cited by Prudential were distinguished on the ground that in none of them had Congress acted or purported to act, either by way of consenting to the state's tax or otherwise. The Court stated:<sup>30</sup>

None of the decisions conceded, because none involved any question of, the power of Congress to make conclusive its own mandate concerning what is commerce. But apart from that function of defining the outer boundary of its power, whenever Congress' judgment has been uttered affirmatively to contradict the Court's previously expressed view that specific action taken by the states in Congress' silence was forbidden by the commerce clause, this body has accommodated its previous judgment to Congress' expressed approval.

Since there was no contention by Prudential that commerce was not involved, the Court would give effect to the positive expression by the McCarran Act that the "continued regulation and taxation by the several States of the business of insurance" is in accord with Congress's policy. The Court thus rejected the argument of Prudential that the Commerce Clause "of its own force," and without reference to any action by Congress, forbids discriminatory State taxation of interstate commerce.

<sup>27</sup> 61 STAT. 448 (1947), 15 U.S.C. §1012 (Supp. 1949).

<sup>28</sup> SEN. REP. NO. 407, 80th Cong., 1st Sess. (1947).

<sup>29</sup> 328 U. S. 408 (1946).

<sup>30</sup> *Id.* at 424-425.

Reviewing the McCarran Act, the Court found that it was the intention of Congress to "put the full weight of its power behind existing and future state legislation to sustain it from any attack under the commerce clause to whatever extent this may be done with the force of that power behind it, subject only to the exceptions expressly provided for." The Court declared:<sup>31</sup>

Moreover, in taking this action [enactment of the McCarran Act] Congress must have had full knowledge of the nation-wide existence of state systems of regulation and taxation; of the fact that they differ greatly in the scope and character of the regulations imposed and of the taxes enacted; and of the further fact that many, if not all, include features which, to some extent, have not been applied generally to other interstate business. Congress could not have been unacquainted with these facts and its purpose was evidently to throw the whole weight of its power behind the state systems, notwithstanding these variations.

South Carolina and Congress had acted in complete coordination to sustain the tax, the Court noted, and it is therefore "reinforced by the exercise of all the power of government residing in our scheme."<sup>32</sup> The judgment of the Supreme Court of South Carolina, upholding the tax, accordingly was affirmed.

#### B. *Robertson v. California*

In *Robertson v. California*,<sup>33</sup> appellant had been convicted in California of the crimes of (a) soliciting and selling a policy of insurance without being licensed as required by law, and (b) acting without a license as an agent for a non-admitted insurer. The statutes violated are part of California's comprehensive regulatory scheme for the business of insurance.

The insurer in question was an Arizona corporation not licensed in California. Its business was transacted largely by radio advertising and use of the mails, in addition to the use of such agents as appellant. The evidence of non-compliance with the statutes was undisputed. Appellant's contention was, in effect, that since the entire series of acts done by him was directed to the conclusion of an interstate transaction (within the *S.E.U.A.* decision), those acts, though taking place altogether within California, were inseparably a part of an interstate transaction and therefore beyond reach of the state's licensing or regulatory power. California's refusal to license an Arizona insurer for non-compliance with its requirement of certain reserves was termed an unlawful exclusion of interstate commerce.

The Court rejected these contentions and sustained both statutes. The late Mr. Justice Rutledge declared:<sup>34</sup>

It would be idle to require licensing of insurance agents, in order to secure honesty and competence, yet to place no restraint upon the kind of insurance to be sold or the kinds of companies allowed to sell it, and then to cover their representatives with their immunity. This could only result in placing domestic and complying foreign insurers at great disadvantage and eventually in nullifying all controls unless or until Congress should take over the regulation.

<sup>31</sup> *Id.* at 430.

<sup>33</sup> 328 U. S. 440 (1946).

<sup>32</sup> *Id.* at 435-436.

<sup>34</sup> *Id.* at 457.



No such consequence has followed from the *South-Eastern* decision. It did not wipe out the experience of the states in the regulation of the business of insurance or its effects for the continued validity of that regulation.

The Court pointed out that there was no showing that this particular insurer's business was unsound or fraudulent. It was merely that California had the right to exclude a company for non-compliance with reasonable standards, "until Congress makes contrary command."

The determination of the Court was made without specific reliance upon the McCarran Act, first because it was not believed to be necessary and second, because the acts of appellant were committed after the *S.E.U.A.* decision but before the McCarran Act became law. To avoid "any semblance of retroactive effect in a criminal matter" the Court refrained from explicit reliance upon the Act, although Mr. Justice Rutledge declared that it "does not detract from our decision on other grounds that the McCarran Act, if applied, would dictate the same result."<sup>35</sup>

### C. The Panhandle Case

In *Panhandle Eastern Pipe Line Co. v. Pub. Serv. Comm'n of Indiana*,<sup>36</sup> Mr. Justice Rutledge on behalf of the Supreme Court summarized the respective powers of the Federal and State governments under the Natural Gas Act as follows:<sup>37</sup>

The Natural Gas Act therefore was not merely ineffective to exclude the sales now in question from state control. Rather both its policy and its terms confirm that control. More than "silence" of Congress is involved. The declaration, though not identical in terms with the one made by the McCarran Act . . . concerning continued state regulation of the insurance business, is in effect equally clear, in view of the Act's historical setting, legislative history and objects, to show intention for the states to continue with regulation where Congress has not expressly taken over. *Cf.* *Prudential Ins. Co. v. Benjamin*, 328 U. S. 408. Congress has undoubted power to define the distribution of power over interstate commerce. *Southern Pacific Co. v. Arizona*, 325 U. S. 761, 769, authorities cited; *cf.* *Prudential Ins. Co. v. Benjamin*, *supra*. Here the power has been exercised in a manner wholly inconsistent with exclusion of state authority over the sales in question.

Congress' action moreover was an unequivocal recognition of the vital interests of the states and their people, consumers and industry alike, in the regulation of rates and service. Indiana's interest in appellant's direct sales is obvious. That interest is certainly not less than the interest of California and her people in their protection against the evil effects of wholly unregulated sale of insurance interstate. *Robertson v. California*, 328 U. S. 440.

### D. The North Little Rock Case

In *North Little Rock Transportation Co. v. Casualty Reciprocal Exchange*,<sup>38</sup> a taxicab company was unable to obtain liability insurance because of its bad accident experience. It accordingly applied to the Arkansas Automobile Assigned Risk Plan<sup>30</sup> which assigned the risk to the Aetna Casualty & Surety Co. The Aetna

<sup>35</sup> *Id.* at 462.

<sup>36</sup> 332 U. S. 507 (1947).

<sup>37</sup> *Id.* at 521.

<sup>38</sup> 181 F. 2d 174 (8th Cir. 1950), *aff'g* 85 F. Supp. 961 (E. D. Ark. 1949).

<sup>30</sup> The Plan, similar to those established in many states, is an arrangement whereby all insurers transacting the business within a state agree to an equitable apportionment among them of those risks which in good faith are entitled to insurance but are unable to procure it through ordinary methods.

charged a premium determined by a rating organization of which it was a member (the National Bureau of Casualty Underwriters). The rating organization was licensed and regulated by the Arkansas Insurance Department, pursuant to regulatory statutes enacted subsequent to the McCarran Act.

The taxicab company thereafter sued the rating organization and all the insurers involved, alleging price-fixing and a conspiracy in restraint of trade. Treble damages and an injunction were demanded, in accordance with the Sherman Act. We shall subsequently consider the contentions and decisions in the case with respect to the state rating laws. However, the plaintiff also charged that the regulatory provisions of the McCarran Act were unconstitutional and that the acts of the defendants constituted coercion and intimidation, which the McCarran Act forbids the states to authorize even under regulation.

A motion by the defendants for summary judgment was granted by the District Court. The court declared:<sup>40</sup>

The Sherman Act . . . applies to transactions of insurance. *United States v. South-Eastern Underwriters Association*, 322 U. S. 533.

Public Law 15 . . . known as the McCarran-Ferguson Act is constitutional. *Prudential Insurance Company v. Benjamin*, Insurance Commissioner, 328 U. S. 408.

In the absence of public regulation or Congressional exemption, the price fixing activities of the Bureau involved in this case would constitute a violation of the Sherman Act. *United States v. Socony-Vacuum Oil Co.*, 310 U. S. 150, *rehearing denied*, 310 U. S. 658.

The Sherman Act is not violated by acts authorized and regulated by state statute. *Parker, Director of Agriculture v. Brown*, 317 U. S. 341. There the court said: "We find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature." 317 U. S. 350, 351. Also *Prudential Insurance Co. v. Benjamin, et al.*, *supra*. This also is expressly provided by the McCarran-Ferguson Act, which exempts insurance from the Sherman Act to the extent that such business is regulated by State law. Act 116 of Arkansas, 1947, constitutes proper regulation within the meaning of that statute. The acts of the defendants were in accordance with provisions of Act 116 of Arkansas, 1947.

The McCarran-Ferguson Act is not a delegation "to individual States power to legislate in the regulation of insurance transactions coming within the Commerce Clause," but is a proper division of power between the United States and the several States, a rendering unto Caesar the things that are Caesar's. *Connecticut Light & Power Co. v. Federal Power Commission*, 324 U. S. 515. In this case the court found that the congressional action in extending federal jurisdiction to only "those matters which are not subject to regulation by the States . . ." constituted a legal standard that must be given effect in resolving conflicting claims by federal and state authorities of power to regulate. 324 U. S. 527. Also *Prudential Insurance Company v. Benjamin, et al.*, *supra*.

With respect to the charge of coercion and intimidation, the court held:<sup>41</sup>

Nowhere in this record does it appear that any facts or conditions existed which would justify plaintiff in fearing intimidation, boycott or coercion, or show that any such boycott, intimidation or coercion was attempted or threatened. Certainly the fact that plaintiff

<sup>40</sup> 85 F. Supp. at 964.

<sup>41</sup> *Id.* at 965.

was advised that the insurance contract would be cancelled in accordance with its terms, unless premium was paid at the established rate is not sufficient. Plaintiff already knew this when it accepted the contract, and common business practice would have brought home to him this knowledge and information.

On April 5, 1950 the judgment dismissing the complaint was unanimously affirmed by the United States Court of Appeals for the Eighth Circuit.<sup>42</sup> Declaring that to rule that the McCarran Act is ineffectual or invalid "would be absurd," the court held that the case "was correctly decided by the District Court."

A petition for certiorari is now pending in the Supreme Court of the United States.

#### E. Other Court Decisions

The *S.E.U.A.* decision and the McCarran Act have also been appraised by other courts in considering various phases of the insurance business. Their uniform determination has been that under existing circumstances the rights of the states to regulate and to tax transactions of the business have not been altered.<sup>43</sup>

### IV

#### THE STATE REGULATORY LAWS

When the McCarran Act became law on March 9, 1945, regulation of insurance by the several states varied from relatively complete supervision of all lines of insurance<sup>44</sup> to little or no regulation of many classes. Collaborative activity such as price-fixing was widespread and long established in most lines of insurance, even in states with no regulatory statutes. Yet the *S.E.U.A.* decision had made clear that such concerted action, when unregulated by public authority, violates the federal antitrust laws.

Under the McCarran Act, after January 1, 1948, such antitrust laws (except as to boycott, coercion or intimidation) are applicable to the business of insurance only "to the extent that such business is not regulated by State law."<sup>45</sup> This would be true even apart from the McCarran Act.<sup>46</sup> The measure of State regulation thus

<sup>42</sup> 181 F. 2d 174 (8th Cir. 1950).

<sup>43</sup> Prudential Ins. Co. of America v. Murphy, 207 S. C. 324, 35 S.E. 2d 586 (1945), *aff'd*, 328 U. S. 408 (1946); Ware v. Travelers Ins. Co., 150 F. 2d 463 (9th Cir. 1945); First Nat. Ben. Soc. v. Garrison, 58 F. Supp. 972 (S. D. Cal. 1945), *aff'd*, 155 F. 2d 522 (9th Cir. 1946); Glass v. Prudential Ins. Co., 246 Ala. 579, 22 So. 2d 13 (1945); State of Indiana v. Prudential Ins. Co. of America, 224 Ind. 17, 64 N.E. 2d 150 (1945), *aff'd*, 328 U. S. 823 (1946); In Re Insurance Tax Cases, 160 Kan. 300, 161 P. 2d. 726 (1945) *aff'd*, 328 U. S. 822 (1946); Prudential Ins. Co. of America v. Barnett, 200 Miss. 233, 27 So. 2d 60 (1946); Keehn v. Hi-Grade Coal & Fuel Co., 23 N. J. Misc. 102, 41 A. 2d 525 (C.P. 1945); Insurance Commissioner of Pennsylvania v. Griffiths, 23 N.J. Misc. 96, 41 A. 2d 386 (Dist. Ct. 1945); Keehn v. Laubach, 22 N. J. Misc. 380, 39 A. 2d 73 (Dist. Ct. 1944), *appeal dismissed*, 133 N.J.L. 227, 43 A. 2d 857 (1945); Mendola v. Dineen, 185 N. Y. Misc. 540, 57 N.Y.S. 2d 219 (Sup. Ct. 1945).

<sup>44</sup> *E.g.*, N. Y. INS. LAW, c. 882 (1939).

<sup>45</sup> McCarran Act, Sec. 2(b); 15 U.S.C. 1012(b) (1946). Because the Act fails to repeat a reference to the Robinson-Patman Act, the criminal provisions of that statute probably are not applicable to the business of insurance. Those provisions which are amendments to the Clayton Act are, however, probably applicable "to the extent that such business is not regulated by State law."

<sup>46</sup> North Little Rock Transportation Co. v. Casualty Reciprocal Exchange, 85 F. Supp. 961 (E. D. Ark. 1949), *aff'd*, 181 F. 2d 174 (8th Cir. 1950); Parker v. Brown, 317 U. S. 341 (1943). During debate on the McCarran Act Senator O'Mahoney stated: "My whole point has always been that those combina-

being the yardstick of immunity from the federal antitrust laws, the first problem confronting state authorities and the industry was to consider what new state controls should be formulated during the moratorium in order to preserve a system of regulation exclusively by states. Federal regulation found no advocates.<sup>47</sup>

To what extent should the new state regulatory laws authorize but regulate price-fixing and other violations of the Sherman Act? Cooperative action in rating matters has long been considered to be essential in the business; it is by the pooling of experience that rates normally are made, and it is by a stabilized rate structure that rate wars, disastrous to industry and policyholders alike, are avoided. As far back as 1911, when the Merritt Committee of the New York legislature probed the problems of fire insurance in order to make recommendations to the Assembly, the Committee declared:<sup>48</sup>

It is therefore recommended that no anti-compact bill be passed, but that in place thereof a statute be enacted that will permit combination under State regulation, such regulation to stop short of actually fixing the price at which companies shall sell their insurance, but which shall be of such positive nature that all forms of discrimination in rates will cease; such statute to provide for the filing by such associations and bureaus of all schedules and specific rates with the Insurance Department, and also that all such associations and bureaus shall be subject to the closest supervision by the Superintendent of Insurance, and further that all such associations and bureaus shall keep careful records of their proceedings, and provide for the hearing of interested property-owners who feel aggrieved at the rate charged—all to the end that the potent power of publicity may operate freely to cure any arbitrary action or indefensible methods.

It was such reasoning that led to the enactment of laws in many states permitting but regulating cooperative activities in insurance rate-making, long before the *S.E.U.A.* decision.<sup>49</sup> The Report of the Sub-Committee on Federal Legislation to the Executive Committee of the National Association of Insurance Commissioners, accordingly stated:<sup>50</sup>

. . . Experience has demonstrated that unrestricted competition in the insurance business is not in the public interest. Practically every state in the Union has upon its statute books provisions prohibiting unfair discrimination in rates. If unfair discrimination is to

tions which the insurance industry desires to make should have a clearance from some authoritative spokesman of the public interest." 90 CONG. REC. 6627, (1944). This view was expressed by Attorney General Biddle in *Joint Hearings Before Subcommittees of Committees on the Judiciary on S. 1362, H.R. 3269, and H.R. 3270*, 78th Cong., 2d Sess. Pt. 6, 637 *et seq.* (1944).

<sup>47</sup> Desire for regulation by a federal agency at the time was disavowed by the industry, the President, the Department of Justice, Senator O'Mahoney, and all Congressional sponsors of the legislation. See *Joint Hearings before Subcommittees of Committees on the Judiciary on S. 1362, H.R. 3269, and H.R. 3270*, 78th Cong., 1st and 2d Sess. Pts. 1-6, esp. Pt. 6, 637-640 (1943-1944). In a letter to Senator Radcliffe, President Roosevelt stated that his administration was "not sponsoring Federal legislation to regulate insurance or to interfere with the continued regulation and taxation by the States of the business of insurance." 91 CONG. REC. 482 (1945).

<sup>48</sup> Documents of Assembly of State of N. Y., 134th Sess., Vol. XX, No. 30, Pt. I, 125 (1911).

<sup>49</sup> See Note, 33 GEO. L. J. 70 (1944). In *Osborn v. Ozlin*, 310 U. S. 53, 65 (1940), Mr. Justice Frankfurter observed: "Government has always had a special relation to insurance. The ways of safeguarding against the untoward manifestations of nature and other vicissitudes of life have long been withdrawn from the benefits and caprices of free competition."

<sup>50</sup> PROCEEDINGS, NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS 45 (76th Sess. 1945).

be avoided, there must be reasonable uniformity in the rates. Such uniformity can be obtained only by cooperation in obtaining statistical data and in the promulgation of rates based thereon. This result can be obtained only through concert of action.

Uniform state statutes embodying such principles were finally recommended by the National Association of Insurance Commissioners and an All-Industry Committee, formed at the request of the Commissioners, on which every interest in the business was represented.

### A. The Regulatory Laws

1. *Rating Laws:* The recommended Uniform Rating Laws were substantially followed by the legislatures in almost all jurisdictions. Material changes were made in a few states.<sup>51</sup> Rate regulation now exists in every state with respect to fire insurance and in every state but Idaho for casualty insurance, fidelity and surety lines, and inland marine insurance.<sup>52</sup>

<sup>51</sup> Noteworthy variations are: In some states (e.g., Texas, Louisiana and Virginia) the state makes the rates for many lines; in California and Missouri, rates are filed upon demand by the Commissioner; in Montana rates must be filed only when made by a combination of insurers.

<sup>52</sup> ALA. CODE ANN. tit. 28, §§355-361, 362-387 (fire and marine), 388-411 (casualty) (Supp. 1947); ALASKA COMP. LAWS ANN. tit. 42, §§42-4-1-42-4-21 (fire and marine and casualty combined) (1949); ARIZONA CODE ANN. c. 61, §§61-1000-61-1118 (fire and marine), 61-1200-61-1217 (casualty) (Supp. 1949); ARK. STAT. ANN. tit. 66, §§66-401-66-416 (fire and marine), 66-417-66-433 (casualty) (1947); CAL. INS. CODE §§1850-1860.3 (fire and marine and casualty combined) (Supp. 1949); COLO. STAT. ANN. c. 87, §§285-300 (fire and marine), 301-317 (casualty) (Supp. 1949); CONN. GEN. STAT. tit. 42, §§6123-6137 (fire and marine), 6202-6217 (casualty) (Rev. 1949); DEL. REV. CODE c. 20, Art. 11, as added by c. 161, Laws 1947 (fire and marine and casualty combined); D. C. CODE tit. 35, §§35-1401-35-1409 (fire), Pub. L. No. 541, 80th Cong., 1st Sess. (casualty and inland marine) (Supp. 1948); FLA. STAT. tit. 35, §§629.01-629.24 (fire and marine), 630.01-630.12 (casualty) (1949); GA. CODE ANN. tit. 56, §§56-2001-56-2020 (casualty), 56-2101-56-2118 (fire and marine) (Supp. 1947); HAWAII REV. LAWS tit. 21, §§8551.01-8551.17 (casualty), 8552.01-8552.16 (fire and marine) (Supp. 1947); ILL. REV. STAT. c. 73, §§1065.1-1065.18 (casualty), 1065.19-1065.35 (fire and marine); IDAHO CODE tit. 41, §§41-2001-41-2018 (fire and marine) [Idaho has not enacted a casualty rate regulatory law] (1947); IND. STAT. ANN. tit. 39, §§39-5201-39-5219 (casualty), 39-5220-39-5238 (fire and marine) (Supp. 1949); Iowa Laws 1947, c. 259 (casualty), c. 260 (fire and marine); KAN. GEN. STAT. ANN. c. 40, §§40-925-40-943 (fire and marine), 40-1111-40-1123 (casualty) (Supp. 1947); KY. REV. STAT. c. 304, §§304-601-304-617 (fire and marine), 304-625-304-644 (casualty) (1950); LA. REV. STAT. tit. 22, §§1401-1422 (fire, marine and casualty combined) (1950); ME. REV. STAT. c. 56, §§291-309, as added by c. 274, Laws 1947 (casualty), §§273-290, as added by c. 275, Laws 1947 (fire and marine) (1944); MD. CODE ANN. Art. 48A, §99A (fire and marine), §140A (casualty) (Supp. 1947); MASS. LAWS ANN. c. 174A (fire and marine), c. 175A (casualty); MICH. COMP. LAWS, c. 545, §§545.1-545.20 (casualty), c. 546, §§546.1-546.18 (fire and marine); Minn. Laws 1947, c. 119 (casualty), c. 120 (fire and marine); Miss. CODE tit. 22, §§5817-5834 (fire), 5834-01-5834-14 (casualty) (Supp. 1948); MO. REV. STAT. §§5971-5989 (fire) (Laws 1948, S.B. 144 (casualty) (1939); MONT. REV. CODE tit. 40, §§40-2401-40-2416 (fire and marine and casualty combined) (1947); NEB. REV. STAT. c. 44, §§44-1401-44-1442 (casualty), 44-1443-44-1486 (fire and marine) (Supp. 1949); NEV. INS. ACT, Art. 15A, §§121-121P (fire and marine and casualty combined); N. H. REV. LAWS, c. 329-A, as added by c. 235, Laws 1947, c. 329-B, as added by c. 261, Laws 1947 (fire and marine and casualty combined); N. J. STAT. ANN. tit. 17, §§17:29A-1-17:29A-28 (fire and marine and casualty combined) (Supp. 1949); N. M. STAT. c. 60, §§60-611-60-627 (fire and marine), 60-628-60-644 (casualty) (Supp. 1949); N. Y. INS. LAW, Art. VIII, §§180-189 (fire and marine and casualty combined); N. C. GEN. STAT. ANN. c. 58, §§58-125-58-131.9 (fire), 58-131.10-58-131.25 (casualty), 58-131.26-58-131.33 (miscellaneous) (Supp. 1949); N. D. REV. CODE tit. 26, §§26-2801-26-2818 (casualty), 26-2901-26-2917 (fire and marine) (Supp. 1949); OHIO CODE ANN. §§9592-1-9592-18 (fire and marine), 9592-19-9592-35 (casualty) (1948); OKLA. STAT. tit. 36, §§881-891 (casualty), 911-929 (fire and marine) (Supp. 1949); ORE. COMP. LAWS ANN. tit. 101, §§101-2001-101-2019 (casualty), 101-2101-101-2118 (fire and marine) (Supp. 1947); PA. STAT. ANN. tit. 40, §§1181-1199 (casualty), 1221-1238

Virtually every word of the rating statutes was the subject of extended discussion and debate. Abbreviated summaries of the laws hence serve little value and the precise text of each section should be reviewed in connection with particular problems. We may note, however, that in broad outline the fire and other regulatory statutes provide that:

1. Rates must meet certain standards (they cannot be "excessive, inadequate or unfairly discriminatory").
2. Rates must be filed with the State Insurance Commissioner, who is granted various powers if they fail to meet the statutory standards.
3. Companies need not combine in rating matters, but may do so if their organizations are licensed and supervised by the state.<sup>53</sup>

The statutes vest various supplemental powers of administration and enforcement in the State Insurance Commissioner. They contain appropriate provisions relating to notice, hearing, and judicial review for all interested parties.

In the *North Little Rock* case, previously discussed in this article, the Arkansas rating law involved was the model statute recommended by the N.A.I.C. and the All-Industry Committee. The plaintiff contended that the statute did not constitute proper regulation within the meaning of the McCarran Act, that it authorized coercion and intimidation in violation of that statute, that it violated a provision of the State Constitution forbidding "monopolies or perpetuities," and that it conflicted with the state antitrust laws. The United States District Court overruled all of these contentions and its judgment was affirmed as correct by a unanimous Court of Appeals.

2. *Fair Trade Practices*: Twenty-six states<sup>54</sup> have enacted "fair trade practices" legislation intended to regulate such activities and hence to effect an ouster of the Federal Trade Commission Act. The usual state statute of this type first prohibits certain enumerated unfair acts and practices (such as false advertising, defamation of

(fire and marine) (Supp. 1949); P. R. Acts 1948, Act No. 218 (fire and marine and casualty combined); R. I. Laws 1948, c. 2088 (fire and marine), c. 2089 (casualty); S. C. INS. LAW, Art. 10, §§8108—8108.17 (fire and marine), Art. 11, §§8109—8109.19 (casualty) (1947); TENN. CODE ANN. tit. 14, c. 6, §§6356.1—6356.19 (fire and marine), 6356.20—6356.31 (casualty) (Supp. 1949); TEX. REV. CIV. STAT. tit. 78, Arts. 4878—4905c (fire and marine), Art. 4698a (casualty), Art. 4682b (motor vehicle) (1948); UTAH CODE ANN. tit. 43, §§43-18-1—43-18-15 (fire and marine and casualty combined) (Supp. 1949); VT. REV. STAT. tit. 42, c. 394, §§9274—9286 (fire, marine and casualty) (1947); VA. CODE tit. 38, c. 8, §§39-194—38-218.12 (fire), c. 8.1, §§38-247—38-253.42 (casualty), c. 8.2, §§38-253.43—38-253.88 (inland marine and sprinkler) (1950); WASH. REV. STAT. ANN. tit. 45, Art. 19, §§45.19.01—45.19.43 (fire and marine and casualty combined) (Supp. 1947); W. VA. CODE ANN. c. 33, Art. 4A, §§3381(1)—3381(9) (fire and marine), Art. 15, §§3472(47)—3472(67) (casualty) (1949); WIS. INS. LAWS c. 203, §§203.32(1)—203.32(17) (fire and marine), c. 204, §§204.37—204.55 (casualty); WYO. COMP. STAT. c. 52, Art. 14, §§52-1401—52-1418 (fire and marine), Art. 15, §§52-1501—52-1518 (casualty) (Supp. 1949).

<sup>53</sup> This is in accord with the expressed desires of Congress, which during Committee consideration of the McCarran Act emphasized that Congress did not intend to "require or encourage" the several states to enact legislation which would compel any insurer to become a member of a rating bureau or charge uniform rates. See H.R. REP. NO. 68, 79th Cong., 1st Sess. (1945).

<sup>54</sup> Ark., Colo., Fla., Ga., Ind., Ky., La., Me., Md., Mass., Mich., Minn., Neb., Nev., N. H., N. J., N. M., N. C., Pa., S. C., S. D., Tenn., Utah, Wash., and Wis.

competitors, rebates, etc.). The Insurance Commissioner is empowered to issue cease and desist orders against violations, after due notice and hearing. The statute further contains a general prohibition of acts which the Commissioner finds, after hearing, to be unfair or deceptive. These may be reported to the Attorney General of the state, who is empowered to commence court proceedings to enjoin and restrain their continuance.

3. *Inter-Locking Controls*: Ten states<sup>55</sup> have passed statutes designed to deal with the types of inter-locking controls which are forbidden by the Clayton Act. These laws usually provide that interlocking directorates and purchases of other company stock are authorized unless competition would be substantially lessened or monopoly be created thereby.

4. *Unauthorized Insurers*: One of the more difficult problems under state regulation has been how to supervise effectively the activities of unauthorized insurers, such as companies doing solely a "mail order" business conducted outside the state. Even since enactment of the McCarran Act re-affirming state regulation, the Federal Trade Commission has been disposed to enter this field. It did so on February 3, 1950, when fair trade practice rules relating to the advertising and sales promotion of mail order insurance were promulgated by the Commission to become effective thirty days thereafter. The rules were the outgrowth of a general industry conference of mail order insurers held in Chicago in December, 1947 and were adopted subsequent to a public hearing held in Washington, D. C., in May, 1949.

Various state statutes concerning the activities of unauthorized insurers and their agents existed even prior to the McCarran Act.<sup>56</sup> In order further to cope with this problem, a uniform bill known as the Unauthorized Insurers Process Act has been proposed by the N.A.I.C. and the All-Industry Committee. The statute provides a method of substituted service of process upon unauthorized insurers and defines conduct which constitutes "doing business" in a state for purposes of jurisdiction. Laws based upon this model have been enacted in fifteen states.<sup>57</sup>

5. *Accident and Health Regulation*: All states but two<sup>58</sup> require the filing and approval of policy forms for accident and health coverage. The general pattern of regulation authorizes the Commissioner to disapprove, after notice and hearing, any form containing inequitable or deceptive provisions. To implement statutory requirements and to secure greater uniformity in administration, the National Association of Insurance Commissioners has adopted an Official Guide governing the filing and approval of policy forms.<sup>59</sup> The development of a greater degree of uniformity

<sup>55</sup> Cal., Conn., Ill., Ind., Mass., N. H., N. J., N. Y., Pa., and Wash. In some states, e.g., Tennessee, this subject is covered in the Fair Trade Practice Law.

<sup>56</sup> See conviction of such an agent in *Robertson v. California*, 328 U. S. 440 (1946).

<sup>57</sup> Cal., Conn., Fla., Ga., Ill., Iowa, Kan., Me., Md., Mich., Neb., N. H., N. Y., Pa., Texas. Such statutes probably are constitutional. See *Travelers Health Ass'n v. Commonwealth of Virginia*, 339 U. S. 643 (1950).

<sup>58</sup> Alabama and Tennessee.

<sup>59</sup> See PROCEEDINGS, N.A.I.C. 271-285 (77th Sess. 1946).

in existing statutory regulation of this segment of the insurance business is presently under study by the N.A.I.C.<sup>60</sup>

## V

### THE FUTURE: A CRITIQUE

We have reviewed the succession of events which led insurance to seek increased governmental supervision of its affairs. The comprehensive nature of the new regulation, superimposed upon a pyramid of other state statutes governing an insurer's affairs from birth through life to death, has been noted. What will be the effect of vesting in fifty-two separate Insurance Departments these new broad powers over an interstate industry? Can so complex a system, essentially created as a legal answer to a legal problem, function in a practical manner so that insurance may meet the demands of the insuring public?

The texts of the new regulatory laws do not provide the answer. The general enactment of uniform statutes, substantially following state laws under which the industry had survived for many years, was necessary. Such action prevented chaos, but it could not assure success of the system. Nor would the future of the industry be altered by minor changes in the statutes, advocated as vital by pleaders of special interests.

It has been well said that the life of the law has not been logic, but experience. Such also has been and will be the history of insurance. The statutory provisions may be helpful or harmful, but in no event will they be determinative. This is especially true because we are dealing with administrative law. Recognizing law as a rule of action, we must realize that the enactment of administrative statutes is not so important as their interpretation and administration. A knowing or willful administrator, armed with a simple statute, is a more potent force for good or evil than the ordinary man charged with enforcement of a comprehensive and seemingly rigid code.

Experience since the laws became effective means little. First, like the single blessing often accompanying woes, the industry generally has shared in the prosperity of the nation. While losses were great, the premium income rose in such fashion that responsible insurers did not strain for every additional insured or agent. There have been increased signs that this condition has been changing, but until now a desperate need for new business has seldom driven companies or producers to the weapons of the hungry.

Furthermore, the Insurance Departments granted these great new powers have approached their responsibilities with commendable wariness. This cannot be charged simply to lack of appropriations or unfamiliarity with the laws. In the best traditions of all insurance, they have exercised restraint. The industry accordingly has not yet felt the full potential impact of such regulation as could be achieved under the statutes.

<sup>60</sup> See PROCEEDINGS, N. A. I. C. 393-394 (79th Sess. 1948); *Id.* at 299-315, 404-415 (80th Sess. 1949).



There have been events with significance for the future. We can note the growing necessity in every line of insurance for national rating procedures with ultimate direction at a national level; the not unexpected provincialism which has led those in some states to close their eyes to all beyond their borders; the resistance of orthodox industry groups to the necessary but unorthodox; perplexities created as multiple line operation changes to a reality from a theory. Examples of all these spring to mind.

So, too, general lines of contention are being drawn in the rating forums: The stock companies complain of increasing and unrealistic rigidity; the mutuals, of insufficient uniformity; the independents, of being asked too many questions. Behind the usual cries of "free enterprise" and "public interest" lies the desire of all for the maintenance of a position enabling them to compete for a fair share of the business. No one of the contenders can afford to permit the new laws to become a boon to their competitors or the means of their own oppression and gradual extinction.

All of these are important and to each could be devoted a lengthy treatment. But they remain problems of a specific nature, to be solved by advocacy, negotiation, reasonable compromise, and, at most, amendments to the various regulatory statutes. In a survey such as this, it would appear appropriate to examine other matters of fundamental principle, matters which will determine whether the present system of state regulation will continue or be discarded. At times it seems academic and unrealistic to speak in terms of general principle rather than the immediate and practical issues. Yet premises come before conclusions. Rather than attempt to determine here the specific problems, let us consider five basic relationships. It is upon the proper maintenance of these that the survival of state regulation depends.

First is the relationship of the states to the Federal Government, specifically the Department of Justice and the Federal Trade Commission. There should be no temporizing or cavilling here. If the system of state regulation is to be given a fair trial, it must be attempted without continual interference by federal authorities. The Federal Trade Commission recently issued a six-volume report on the status of state regulation of insurance, an objective study properly undertaken to determine the extent of F.T.C. responsibilities. If any evidence were needed, the report assuredly demonstrates that least required at the moment are more laws or directives by more public authorities. The report enumerates the almost fantastic number of statutes and administrative rules under which the industry now labors. There are no such statutes and administrators governing the daily actions of the ordinary industries policed by the F.T.C. Moreover, if a federal agency ever were created to supervise the affairs of insurance, a tremendous staff of men trained in its specialized problems would be required. For an agency with general powers and duties to enter such a field would be tragically shortsighted.

It further must be clearly understood that the present state rating laws are diametrically opposed in letter and in spirit to the Sherman Act. Unrestrained

competition is not to be applicable to the insurance industry under existing law. Whether the business could or should live directly under the Sherman Act is no longer open to question. It was advocated by the Department of Justice at the time of the *S.E.U.A.* case, was considered by Congress, and since has been considered by every state legislature. The McCarran Act and the new rating laws expressly approve regulated violations of the federal antitrust laws, such as the operation of the traditional insurance rating bureau. This is true even in those states whose statutes seemingly pay lip service to the Sherman Act theory. Except for boycott, coercion, and intimidation, any act repugnant to the federal antitrust laws may be authorized by the states so long as public regulation is provided. This is a basic fact which should not be avoided apologetically as something vaguely wrong; it should be publicly stressed again and again, so that all may understand that every legislative body in the United States has determined that it is not in the public interest to have the Sherman Act apply to the business of insurance in the unqualified manner in which it affects the ordinary industry.

So long as state regulation exists, the federal agencies must wholeheartedly cooperate with state authorities. If complaints are received, they should be referred to the appropriate State Insurance Departments. As a matter of law, with minor exceptions no federal regulatory agency may act with respect to a matter concerning insurance until it has been determined that no regulation by state law exists. But as a matter of policy, the federal agencies should not take formal action on an insurance problem until at their request the National Association of Insurance Commissioners has reviewed it and admitted that it lies beyond their regulatory powers. There can be few such admissions.

The relationship among the several states is probably the most complex, in theory. Fortunately, the National Association of Insurance Commissioners provides an established and vigorous organization capable of acting as a vehicle for effective interstate cooperation. There accordingly is no mechanical problem. What remains, however, is the question whether the individual Commissioner will abide by general decisions after his return to his home state. It is fundamental that every state remain sovereign, and it is expected that decisions will be made in the light of local conditions. These are among the very reasons why Congress has ordained that the states, and not the Federal Government, shall regulate insurance. However, with respect to interstate rating, national standard policy forms, and other similar problems, state authorities must bear uppermost in mind that they are regulating an interstate industry. If the present system is ever substantially altered, it may be attributed to a considerable extent to those who took the narrow view and sought every pretext to maintain it. A certain amount of this is inevitable. However, it remains the continuing task of the National Association to obtain generally uniform action on matters of interstate importance. The pitfall to be avoided, of course, is proceeding too far in this respect and creating central bodies with such broad negative powers, and such a lack of affirmative powers, that the industry would find

itself faced by the disadvantages of federal regulation with none of the advantages. While the entire problem is difficult and omnipresent, it appears that the leadership of the National Association is meeting it with wisdom and foresight.

The relationship of the states and the industry is vital. Substantial dislocation would result in a dismal countrywide panorama of public hearings, charges, counter-charges, injunctions, and writs. What are the principles which must prevail? In last analysis the most important is that both government and industry understand that every right is accompanied by a correlative duty. We live in an era when most talk is about rights and little about duties. The Commissioner or executive whose exclusive concern is to find his rights and assert them, does a grave disservice. Statutory requirements are important, but equally important is awareness of the principle as a necessary rule of conduct for fair play. The Commissioner may have the right to issue an order, but he has a duty not to do so until he has given to those affected fair notice and an opportunity to be heard. The insurer may have the right by "flash filing" to issue a policy which cannot be set aside, but it has the duty not to do so when it knows that indefensible discrimination will result.

Government and industry meet only through men. Intensive state regulation of an interstate industry presents tremendous human problems, delicate and taxing. They will be resolved only by good faith, an appreciation of the problems faced by the other man, and fairness blessed with a touch of charity.

The relationship of the components of the industry to one another is next. It would be too much to expect the spirit which generally characterized All Industry activity to continue indefinitely. A turning market brings into sharp relief the basic differences in interest between stock and mutual companies, the organized and unorganized, the agent and the broker. Yet these are disputes as old as the industry. The new regulatory laws may create more problems, but the insurance industry has demonstrated in the past that its components can battle hard but fairly. Probably the most difficult such problem presented by the *S.E.U.A.* decision and remaining unanswered is acquisition cost. The present situation is desired by few; it was born not of reason but historical accident. Continuing study must be given so that a sound solution is available when action is imperative.

The final relationship we consider is that of insurance and the American public. In varying ways the public is represented by the Insurance Departments, producers, and others. But here we speak of it in the broadest sense of all within insurance and all outside it.

Insurance has passed through a severe crisis. It is history now that it faced and survived that crisis with remarkable facility and vigor. The remedy selected is being given a fair trial. It is reasonable to hope that we are entering a period wherein there can be a return of concentrated effort devoted to the true business of insurance.

For a few years most of the industry was on the defensive. Justifiable institutions and practices born of necessity were to be jettisoned because of legal theories and an all-pervading fear. Legal opinions were executive decisions. The time for that is

past. We are an industry which today is probably more free of unethical conduct than any other of comparable size; yet we are subjected to more public regulation and are the victims of more discriminatory legislation.

The future for insurance is bright. It will remain so if the industry continues to go forward. The public demand for its services and resources grows greater each year. New forms of protection are sought by the public; in new areas of social security, the private insurance industry is being given an opportunity to demonstrate its worth. These challenges must be met. American insurance must be able to fill every new demand, must market the right product at the right price. Without casting sound judgment aside, we must never reject the new simply because it is untried.

A sorely beset industry has overcome unprecedented hazards and difficulties. While the future is not wholly untroubled, this is a time for insurance to recognize that many of its greatest threats are over and that its future lies in demonstrating to the general public that it is a great and essential industry, worthy of protection and support.