50 THE NEW ERA OF CASUALTY RATE REGULATION*

by

JAMES B. DONOVAN

Legal developments within the past four years have marked the period as one of unprecedented significance with respect to governmental supervision of the casualty insurance industry. As we enter upon a new era of state regulation, a study of the events which created that era may broaden our comprehension of the unique experiment in political science to which the immediate future of the industry is bound. Such a review should be of especial interest to actuaries, for in the foreground of this historic development have been the rates which are primarily the responsibility of those trained in the actuarial sciences.

I

THE DECISION OF THE SUPREME COURT

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

For seventy-five years previously the Court had consistently held that the Commerce Clause did not deprive the individual states of power to regulate and tax specific activities of foreign insurance companies which sold policies within their territories[2].

* This paper presented by invitation.

1. 322 U.S. 533, 64 Sup. Ct. 1162, 88 L. ed. 1440 (1944) noted in 44 Col. L. Rev. 772 (1944) and the subject of Powell, "Insurance as Commerce" (1944) 57 Harv. L. Rev. 937.

2. First held in *Paul v. Virginia*, 8 Wall. 168 (1868). Subsequent cases are collected in Gavit, the Commerce Clause of the United States Constitution (1932) pp.134-139. See also 322 U.S. 533, 544, 567. 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.

In the course of these decisions the Court had stated that "issuing a policy of insurance is not a transaction of commerce",[3] "the business of insurance is not commerce",[4] and "contracts of insurance are not commerce at all, neither state nor interstate".[5] 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,[6] 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 concluded:[7]

> "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 of the Justices 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."[8] The argument that the Sherman Act necessarily invalidated many state laws regulating insurance was dismissed as "exaggerated."[9] 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

3. *Paul vs. Virginia*, 8 Wall. 168, 183 (1868).
4. *Hooper v. California*, 155 U.S. 648, 655 (1895).
5. *N.Y. Life Ins. Co. v. Deer Lodge County*, 231 U.S. 495, 510 (1913).
6. Mr. Justice Roberts and Mr. Justice Reed took no part in the consideration or decision of the case. 322 U.S. 533, 562.
7. 322 U.S. 533, 553.
8. Id. at 561.
9. Id. at 562.

such interstate trade and commerce, are violations of the Sherman Act. The decision of the District Court for the Northern District of Georgia,[10] which had dismissed the indictment as insufficient in law was reversed.

Three Justices dissented. In a lengthy opinion the late Chief Justice Stone discussed what he believed to be the two questions presented: (a) 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 (b) 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:[11]

> "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."[12] But

10. 51F. Supp. 712 (1943). The case went to the Supreme Court on direct appeal under the Criminal Appeals Act. 56 Stat. 271, 18 U.S.C. 682, amending 34 Stat. 1246.

11. 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 (1944) 44 Col. L. Rev. 772, 773.

12. 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 Alliance v. N.L.R.B.*, 322 U.S. 643, 64 Sup. Ct. 1196, 88 L. ed. 1509 (1944).

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."[13] 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, that insurance is not commerce."[14] 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 the Justice believed that while "abstract logic" might support the majority, "the common sense and wisdom of the situation seem opposed".[15] He concluded:[16]

> "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 businesses 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 dismissing the indictment, the issues in the case were never actually tried, for reasons hereinafter set forth.

13. Id. at 585.

14. Id. at 588. 35 states, including New York, had filed briefs as *amici curiae* urging affirmance of the District Court decision sustaining the demurrer: 41 states later petitioned the Court for a rehearing (den., 323 U.S. 811).

15. Id. at 589.

16 Id. at 594, 595.

II

THE DECISION OF CONGRESS

The *S.E.U.A.* decision immediately became the subject of controversy. Although Attorney General Biddle issued a statement to the contrary,[17] many state officials and insurance executives feared that the foundations of state regulation and taxation had been shaken.[18] 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.[19] 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.

While the *S.E.U.A.* case was before the Court, therewere introduced in both Houses of Congress companion bills to exempt the business of insurance from the Sherman and Clayton Antitrust Acts.[20] With

17. 90 Cong. Rec. Part 10, pp. A3359, A3360, June 23, 1944. See editorial, N.Y.L.J., June 13, 1944, p. 2270, col. 1. Mr. Biddle later announced that no further action under the anti-trust laws would be taken until Congress and the states had an opportunity to act. Joint Hearings on S. 1362, H.R. 3269 and H.R. 3270 before Subcommittees of Committees on the Judiciary, 78th Congr., 2nd Sess., Part 6, p. 639, June 23, 1944.

18. Senate Report No. 20, to accompany S. 340, Committee on the Judiciary, 79th Congr., 1st Sess., Jan. 24, 1945; cf. Congressional debates cited in footnote 22 *infra*. Not all insurance interests agreed with this view. See statement of Senator O'Mahoney, Joint Hearing before Subcommittees of Committees on the Judiciary, 78th Congr., 2nd Sess., on S. 1362, H.R. 3269, and H.R. 3270, Part 6 at p. 639, June 23, 1944. Newspaper editorial opinion is summarized in Note (1944) 44 Col. L. Rev. 772, 773 as "in general, violently opposed to the decision."

19. Article, Charles Warren, N. Y. Times, June 8, 1944, p. 16, Cols. 2, 3; *contra*, Note (1944) 44 Col. L. Rev. 772, 773; letters, Hinds and Fraenkel, N.Y. "Times", June 12, 1944, p. 18, col. 6. In "Insurance as Commerce" (1944) 57 Harv. L. Rev. 937, 938, 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 quartet 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."

20. H.R. 3270, S. 1362, 78th Congr., 1st Sess., introduced respectively on September 20 and 21, 1943. See Note (1943) 32 Geo. L. J. 66.

opposition including the Department of Justice, the Attorney General of Missouri and Senator O'Mahoney (D., Wyo.), 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.[21] 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.[22] The text of the statute (hereinafter referred to as the McCarran Act) is as follows:

> "*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 of 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,

21. Joint Hearings on S. 1362, H.R. 3269, and H.R. 3270 before Subcommittees of Committees on the Judiciary, 78th Congr., 1st and 2nd Sess., parts 1-6. 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.

22. P.L. No. 15, 79th Congr., 1st Sess., Ch. 20, Secs. 1-5 (March 9, 1945); 59 Stat. 33, 34, 15 U.S.C. Secs. 1011, 1015. For legislative history see House Legislative Calendar, 79th Congr., 1st and 2nd Sessions, Committee on the Judiciary, Jan. 29, 1946, No. 22, p. 103. Congressional debate may be found in 91 Cong. Record 499-509 (Jan. 25, 1945), 1112-1122 (Feb. 14, 1945), 1470-1473 (Feb. 26, 1945) and 1548-1559 (Feb. 27, 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, Jan. 25, 1945.

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 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 usual 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:[23]

> "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, coercison or intimidation until January 1, 1948.
>
> The purpose of this moratorium period is to permit the States to makes necessary readjustments in their laws with respect insurance in order to bring them 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 of for boycott, coerion 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 perserves the right of the States to regulate in a manner consonant with the Supreme Court's interpretation of the antitrust laws."

23. White House Press Release, Mar. 10, 1945; "National Underwriter" Mar. 15, 1945, p. 4, col. 1; reprinted in part, N.Y. Times, March 11, 1945, Sec. 5, p. 45, col. 5; never officially reported. (The text is inaccurately reprinted in various 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., Jan. 25, 1945 at 503.

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

The moratorium period in the Act, originally to end January 1, 1948, subsequently has been extended to June 30, 1948 by Congress on its own initiative.[24] 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 completley than it has been able to do during the present session."[25]

Since the enactment of the McCarran Act, certain of the problems created by the *S.E.U.A.* decision have been the subject of judicial review. Foremost are two decisions of the Supreme Court of the United States.

In *Prudential Ins. Co. v. Benjamin,* [26] 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.[27]

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.[28] 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:[29]

> "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."

24. P.L. No. 238, 80th Cong., 1st Sess., ch. 326 (July 25, 1947).
25. Sen. Rep. No. 407, 80th Cong., 1st Sess. 419 (1947).
26. 328 U.S. 408, 66 Sup. Ct. 1142, 90 L. ed. 1342, 164 A.L.R. 476 (1946).
27. Mr. Justice Black concurred in the result and Mr. Justice Jackson took no part in the consideration or decision of the case.
28. 328 U.S. at 420.
29. Id. at 424, 425.

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' 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.

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."[30]

> "Two conclusions, corollary in character and important for this case, must be drawn from Congress' action and the circumstances in which it was taken. One is that Congress intended to declare, and in effect declared, that uniformity of regulation, and of state taxation, are not required in reference to the business of insurance by the national public interest except in the specific respects otherwise expressly provided for. This necessarily was a determination by Congress that state taxes, which in its silence might be held invalid as discriminatory, do not place on interstate insurance business a burden which it is unable generally to bear or should not bear in the competition with local business. Such taxes were not uncommon among the states, and the statute clearly included South Carolina's tax now in issue.
>
> "That judgment was one of policy and reflected long and clear experience. For, notwithstanding the long incident of the tax and its payment by Prudential without question prior to the *South-Eastern* decision, the record of Prudential's continuous success in South Carolina over decades refutes any idea that payment of the tax handicapped it in any way tending to exclude it from competition with local business or with domestic insurance companies."

South Carolina and Congress had acted in complete coordination to sustain the tax, the Court declared, and it is therefore "reinforced by the exercise of all the power of government residing

[30]. Id. at pp. 431, 432.

in our scheme." The judgment of the Supreme Court of South Carolina, upholding the tax, accordingly was affirmed.[31]

In *Robertson v. California*[32] 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[33] are part of California's comprehensive regulatory scheme for the business of insurance with the stated legislative objective "to protect the public by requiring and maintaining professional standards of conduct on the part of all insurance agents and insurance brokers acting as such within this State."[34]

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 requirement of a license to act as an agent or broker was upheld as part of "a series of regulations designed and reasonably adapted to protect the public from fraud, misrepresentation, incompetence and sharp practice which falls short of minimum standards of decency in the selling of insurance by personal solicitation and salesmanship."[35] As to the State's refusing to admit insurers not conforming to reasonable standards, Mr. Justice Rutledge declared:[36]

> "The evils flowing from irresponsible insurers and insurance certainly are not less than those arising from the activities of irresponsible, incompetant

31. The Court expressly withheld any opinion concerning the validity of other types of State taxes. Id. at 431, note 40. The effect of the McCarran Act on various types of "discriminatory" state legislation is discussed in Note (1945) 45 Col. L. Rev. 927.
32. 328 U.S. 440, 66 Sup. Ct. 1160, 90 L. ed. 1366 (1946).
33. Deering's California Codes, Ins. Code of Calif., Secs. 703, 1642.
34. Id. Sec. 1639.
35. 328 U.S. at 447.
36. Id. at 457.

> or dishonest insurance agents. The two things are concomitant, being merely different facades of the same sepulchre for the investments and security of the public... 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 .
>
> No such consequence has followed for 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 has 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.L.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 commented that it did not "detract from our decision on other grounds that the McCarran Act, if applied, would dictate the same result."[37]

Mr. Justice Douglas dissented in part. He agreed with the Court that California's general license requirements for insurance agents were constitutional, "even prior to the McCarran Act". He stated however:[38]

> "But prior to that Act California could not under our decisions under the commerce clause exclude an interstate business, at least in absence of a showing that it was a fraudulent enterprise or in an unsound condition. No such showing is made here.

37. Id. at 462.
38. Id.

> The McCarran Act changes that rule; but it should not be allowed to make unlawful what was lawful when done."

In concluding this review, it may not be without significance that in a recent case involving the transportation of natural gas in interstate commerce,[39] 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:

> "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, 59 Stat. 33, 15 U.S.C. §1011, 15 U.S.C.A. §1011 et seq., 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, 66 S. Ct. 1142, 90 L. Ed. 1342, 164 A.L.R. 476. Congress has undoubted power to define the distribution of power over interstate commerce. Southern Pacific Co. v. State of Arizona, 325 U.S. 761, 769, 65 S. Ct. 1515, 1520, 89 L. Ed. 1915, and 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 portection against the evil effects of wholly unregulated sale of insurance interstate. Robertson v. People of State of California, 328 U.S. 440, 66 S. Ct. 1160, 90 L. Ed. 1366."

[39] *Panhandle East, Pipe Line Co. v. Public Serv. Com'n*, - U.S. - , 68 Sup. Ct. 190 at 197, 92 L.ed. 173 at 181 (1947), not yet officially reported.

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. Apart from a decision in California that the state anti-trust statutes are now applicable,[40] the principal determination has been that under existing circumstances the rights of the states to regulate and to tax transaction of the business have not been altered.[41]

40. *Speegle v. Board of Fire Und.*, 29 C. (2d) 34, 172 P. (2d) 867 (1946).

41. *Ware v. Travelers Ins. Co.*, 150 F. (2d) 463 (C.C.A. 9th, 1945); *First National Benefit Soc. v. Garrison*, 58 F. Supp. 972, (S.D. Cal. 1945), aff'd. 155 F. (2d) 522 (C.C.A. 9th, 1946); *Glass v. Prudential Ins. Co.*, 246 Ala. 579, 22 So. (2d) 13 (1945); *State v. Prudential Ins. Co.*, 64 N.E. (2d) 150 (Ind., 1945, not officially reported) aff'd. 328 U.S. 823, 90 L.ed. 1603, 66 Sup. Ct. 1364 (1946); *In Re Insurance Tax Cases*, 160 Kan. 300, 161 P. (2d) 726, (1945) aff'd. 328 U.S. 822, 66 Sup. Ct. 1360, 90 L. ed. 1602 (1946); *Prudential Ins. Co. of America v. Barnett et. al.*, 27 So. (2d) 60 (Miss., 1946, not yet officially reported); *Keehn v. Hi-Grade Coal & Fuel Co.*, 23 N.J. Misc. 102, 41 A. (2d) 525 (1945); *Insurance Commissioner of Pennsylvania v. Griffiths*, 23 *N.J.* Misc. 96, 41A (2d) 386 (1945); *Keehn v. Laubach et at.*, 22 N.J. Misc. 380, 39A. (2d) 73 (1944) appeal dismissed 133 N.J.L. 227, 43A. (2d) 857 (1945); *Mendola v. Dineen 185* Misc. 540, 57 N.Y.S. (2d) 219 (1945); *Prudential Ins. Co. v. Murphy*, 207 S.C. 324, 35 S.E. (2d) 586 (1945), aff'd. 328 U.S. 408, 66 Sup. Ct. 1142, 90 L.ed. 1342 (1946); and cases cited therein.

III

THE DECISIONS OF THE STATES

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[42] to little or no regulation of many classes. Collaborative action believed essential in certain lines of insurance[43] could fall within the sweeping prohibitions of the Federal antitrust laws. But under the McCarran Act, after June 30, 1948, such 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."[44] The measure of State regulation thus being the yardstick of immunity from Federal antitrust laws, the principal problem confronting State authorities and the industry has been to consider what new State controls should be formulated during the moratorium in order to preserve a system of regulation exclusively by States.[45]

We may briefly review these newly enacted laws as they affect casualty insurance, summarizing the legislation in effect on January 1, 1948. For simplification, legal citations are omitted; these are collected elsewhere[46] and may also be found in the

42. E.g., N.Y. Ins. Law, L. 1939, ch. 882, Consol. Laws, ch. 28, as amended.

43. E.g., the pooling of insurers' experience in most lines to obtain rates not excessive or inadequate. See Mowbray, "Insurance, Its Theory and Practice in the U.S." (N.Y. 1930), Chapter XIX.

44. McCarran Act, Sec. 2 (b); 15 U.S.C. 1012(b) Cf. *Parker v. Brown*, 317 U.S. 341 (1943), for similar result, in analogous situation, without such a statute. During debate on the McCarran Act Senator O'Mahoney (D. Wyo.) stated: "My whole point has always been that those combinations which the insurance industry desires to make should have a clearance from some authoritative spokesman of the public interest." 90 Cong. Rec. Part 5, p. 6627, June 23, 1944. See also statement of Attorney General Biddle in Joint Hearings on S. 1362, H.R. 3269 and H.R. 3270 before Subcommittees of Committees on the Judiciary, 78th Congr., 1st. and 2nd Sess., Part VI, pp. 637 *et seq.*

45. Desire for regulation by a Federal agency at the time was disavowed by the industry, the President, the Dept. of Justice, Senator O'Mahoney, etc. See Joint Hearings on S. 1362, H.R. 3269 and H.R. 3270 before Subcommittees of Committees on the Judiciary, 78th Congr., 1st and 2nd Sess., Parts 1-6, especially Part 6, pp. 637-640. 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. 503, Jan. 25, 1945.

46. Note (1947) 47 Col. L. Rev. 1314.

statutes of the individual states. The following summary applies to casualty lines other than workmen's compensation, the regulation of which has been traditional. Since the S.E.U.A. decision, the only new workmen's compensation rate regulation where none theretofore existed has been in Alaska, Connecticut, Hawaii, Illinois, Iowa, Montana, Nebraska, New Mexico and South Dakota. The present paper does not deal with accident and health insurance.

While seventeen states have enacted "fair trade practices" legislation specifically designed to effect an ouster of the Federal Trade Commission Act,[47] and three states have attempted to prevent application of the Clayton Act by regulating interlocking directorates and ownership,[48] these have not been the primary concern of the state legislatures. Most important has been legislation to render the Sherman Act inapplicable by the passage of rate regulatory laws. Such statutes have now become law in every state and territory except as follows: in Idaho, Rhode Island, Missouri, West Virginia, the District of Columbia and Puerto Rico, there are no laws specifically providing for regulation of casualty rates; in Virginia,[49] only automobile and fidelity and surety insurance rates are regulated and in Oklahoma[50] only automobile, glass insurance and employers liability. In all other states rating legislation of some type exists as of January 1, 1948.

In Louisiana[51] for all casualty lines and in Texas[52] for automobile insurance, a state commission literally makes the rates. In North Carolina[53] and Virginia,[54] there are other forms of regulation for automobile insurance, and in Massachusetts[55] a special form of regulation for certain statutory coverages. In most states, however, there has been enacted a system of regulation having the basic outline of the traditional New York statutes, with differences of varying practical importance. It was such a model regulatory statute that the National Association of Insurance Commissioners

47. Florida, Indiana, Maryland, Massachusetts, Michigan, Minnesota, Nebraska, New Hampshire, New Jersey, New Mexico, Pennsylvania, South Carolina, South Dakota, Tennessee, Utah, Washington and Wisconsin.
48. Connecticut, Illinois and Pennsylvania.
49. Sections 4326B1 to 4326B6 and Sec. 2154 Ins. Laws of Virginia.
50. Sec. 88 Oklahoma Ins. Laws; Opinion Atty. Gen., Feb. 27, 1928, on automobile liability insurance.
51. Sec. 4277.2-4277.3 La. Gen. Stats., Dart. Annotated 1939.
52. Art. 4268B, Sections 1 to 11a, Ins. Laws of Texas.
53. Sec. 58-246 to 58-248.6 of Article 25, Chap. 58, Ins. Laws of N. Car.
54. Sec. 4326B1 to 4326B6, and 2154, Ins. Laws of Va.
55. Chapter 175, Section 113B, Annotated Laws of Mass.

and an All-Industry Committee debated and agreed upon in 1946. In broad outline, the statutes enacted provide that:

(1) rates must meet certain standards;

(2) rates must be filed with state supervisory officials, who are granted certain powers if the rates fail to meet the statutory standards;

(3) companies may combine in rating matters but only if their organizations for such purposes are licensed by the state.

Let us consider briefly each of these components of the rating laws.

1. *Rates must meet certain standards.*

The statutes normally provide that rates must not be "excessive, inadequate or unfairly discriminatory". Definitions of these terms are found in few of the state statutes[56] and the phrases await interpretation by the courts, which ordinarily should adopt the meanings customary in the business. In the State of Washington alone there are no statutory standards expressly applicable to casualty rates.[57]

The rates used should be made with due consideration to past and prospective loss experience, certain enumerated matters and "all other relevant factors within and outside the state."

2. *All rates must be filed with state supervisory officials, who are granted certain powers if the rates fail to meet the statutory standards.*

This is true in every state, except that in California no rate need be filed until required by the Commissioner in investigating alleged violations of law, and in Montana rates must be filed only when made by a rating organization.[58] With the rates must be filed all manuals of rules and all rating plans; in most states, these filings must be accompanied by supporting information only in the event that the state official does not have sufficient information to determine whether the filings meet the statutory standards.

[56] E.g., Sec. 1852(a), Cal. Ins. Laws.

[57] Sec. 19.03, Wash. Ins. Code.

[58] Chapter 805, Calif. L. 1947; Sec. 11, ch. 255, Mont. L. 1947. Manual rates of course are readily available to a state Insurance Department, irrespective of a filing requirement.

Filings may be made by either an insurer or an authorized organization acting in its behalf.

In almost all states, the rates cannot be used for a certain number of days (called a "waiting period") and in the majority of states the Commissioner has power to prevent the use of rates by action before the end of the waiting period. In every state having a rate regulatory law the Commissioner at any time may examine into any existing rates and, while he may not set aside contracts already made, he may order the discontinuance of such rates in the future.

Procedures for the gathering and compilation of experience for the information of the Commissioner are uniformly provided in the laws.

3. *Companies may combine in rating matters but only if their organizations for such purposes are licensed and supervised by the state.*

This is true in all states which have enacted rate regulatory laws. Rating organizations, advisory organizations, and joint activities of such groups, are subjected to rigid scrutiny. In almost all states, membership in these concerted activities is not compulsory for any insurer. Rating organizations must permit any insurer to subscribe to their rating services and virtually all their actions are subject to appeal to the Commissioner by a member or subscriber. Deviations by a member or subscriber on a specified basis (usually a uniform percentage deviation) are sanctioned.

THE FUTURE

Reasonable men may differ in their views as to the probable success or failure of vesting in the several states such comprehensive powers over an interstate industry. What all may agree upon is that the system can succeed only if industry and government approach their respective responsibilities with an intelligent altruism.