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REGULATION OF INSURANCE—THE STATE-FEDERAL CONTROVERSY

ALICE M. CHELLBERG

TO RESIDENTS of foreign countries the division of powers between federal and state governments in the United States is no doubt puzzling. Many residents of the U.S.—including some lawyers—are confused on this point, as well. On the one hand they hear the cry of states' rights, and objections to encroachment by the federal government on the powers reserved to the states. On the other hand they hear pleas by some states that the federal government assume responsibilities—mostly financial—previously borne by the states.

These shifts of power or intrusions on authority, depending upon the issue and the point of view, have touched many areas of our nation's economic, social and political activity. It therefore may not have come to the attention of those attorneys not closely connected with the business, that the insurance industry is presently in the midst of a state versus federal conflict of which the United States Supreme Court will be the arbiter.

Non-insurance lawyers may or may not be vitally interested in the practical result of this controversy, but the legal issue is one which should interest all attorneys. From the industry point of view that issue is: May an agency of the federal government assume regulatory jurisdiction over the business of insurance, despite passage by Congress of a law expressly designed to preserve such jurisdiction to the states?

The federal agency involved is the Federal Trade Commission. The aspect of the insurance business over which jurisdiction is asserted is the advertising of companies writing accident and health insurance. The federal statute is the McCarran Act, often referred to simply as Public Law 15. The cases now pending before the U.S. Supreme Court on writs of certiorari involve the American Hospital and Life Insurance Company of San Antonio, Texas and National Casualty

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Company of Detroit.¹ Another, *Federal Trade Commission v. Crafts*, involving Fireman's Fund Indemnity Company of San Francisco, went off on a procedural point and was disposed of by the Supreme Court on October 14, 1957.²

The story behind these cases may best be dealt with chronologically.

The real starting point is subsection 3 of Section 8 of Article I of the U.S. Constitution, which gives Congress the power "To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." This, of course, is known as "the commerce clause." It vests in Congress primary power to regulate interstate commerce.

The plenary power of Congress over interstate commerce includes the power of Congress to consent that the states regulate interstate commerce. This doctrine of congressional consent has been followed in many cases³ and it is well settled that it is now the law. This is evidenced by such comments as that of the late Chief Justice Stone in *International Shoe Co. v. Washington*:

It is no longer debatable that Congress, in the exercise of the commerce power, may authorize the states, in specified ways, to regulate interstate commerce or impose burdens upon it.⁴

Congress, in consenting to regulation of interstate commerce by the states, does not delegate any of its powers. Hence there arises no question of any unconstitutional delegation of congressional power. Rather, the Congress permits the states to exercise their regulatory laws—the police power—over interstate commerce, and to regulate, burden or otherwise interfere with interstate commerce in ways that, in the absence of such consent, would be forbidden.

It is an unquestioned fact that from early times insurance companies have done business across state lines and therefore have been doing an interstate business. Why, then, has there been anything other than federal regulation over interstate insurance activities?

The answer to this question is found in the 1869 U.S. Supreme

¹ U.S. Supreme Court appellate docket Nos. 436 and 435.

² 244 F.2d 882 (C.A. 9th, 1957), rev'd — U.S. — (1957).

³ E.g., *Southern Pacific Co. v. Arizona*, 325 U.S. 761 (1945); *Hooven & Allison v. Evatt*, 324 U.S. 652 (1945); *Kentucky Whip & Collar Co. v. Illinois Central R. Co.*, 299 U.S. 334 (1937); *Whitfield v. Ohio*, 297 U.S. 431 (1936); *Clark Distilling Co. v. Western Maryland R. Co.*, 242 U.S. 311 (1917); *In re Rahrer (Wilkerson v. Rahrer)*, 140 U.S. 545 (1891); *Safe Harbor Water Power Corp. v. Federal Power Commission*, 124 F.2d 800 (C.A. 3rd, 1941).

⁴ 326 U.S. 310, 315 (1945).

Court decision of *Paul v. Virginia*.⁵ Under this decision, followed in subsequent cases over a period of seventy-five years, the issuance of policies of insurance was held not to be a transaction of commerce. Not being commerce, insurance could not be interstate commerce. State laws regulating insurance were accordingly upheld, despite the fact that they were applied to companies domiciled in other states and were concerned with transactions occurring across state lines.⁶

The result was that a vast body of state law regulating the business of insurance was developed. Accordingly, consternation and confusion were great when, in 1944, the Supreme Court reversed its previous position and held that insurance was commerce and therefore, when conducted across state lines, interstate commerce.⁷

There were two consequences of the *S.E.U.A.* decision which caused particular concern to the states, the insurance industry and the Congress. First, the grant to Congress of exclusive power to regulate interstate commerce threatened the validity of existing state laws taxing insurance companies from which large revenues were derived by the states. Second, the *S.E.U.A.* case was an anti-trust suit. By holding the insurance business subject to the Sherman Act, a direct conflict was created with practices long authorized or even required by state law. For example, the laws of some states permitted or required that rates be fixed on the basis of pooled experience.

The use of pooled experience as a basis for making insurance rates is highly desirable. In contrast to the seller of a commodity, who knows, or can ascertain, the exact price of his product, the largest element in an insurance rate—the loss factor—is not known in advance. It can only be estimated on the basis of an average of what that particular coverage has cost in the past. An old and very large company, if it has kept elaborate records and has been writing the particular coverage for a considerable period, may be able to do a fairly accurate job on its own. But if the company is young or small, or its records are not extensive, it may arrive at a wrong rate. If that rate is too high, it will not sell much business and those who do buy from it

⁵ 8 Wall. (U.S.) 168 (1869).

⁶ E.g., *N.Y. Life Ins. Co. v. Deer Lodge County*, 231 U.S. 495 (1913); *Nutting v. Massachusetts*, 183 U.S. 553 (1902); *New York L. Ins. Co. v. Cravens*, 178 U.S. 389 (1900); *Hooper v. California*, 155 U.S. 648 (1895); *Fire Asso. of Philadelphia v. New York*, 119 U.S. 110 (1886); *Liverpool & L. Life & F. Ins. Co. v. Mass.*, 10 Wall. (U.S.) 566 (1871); *Ducat v. Chicago*, 10 Wall. (U.S.) 410 (1871).

⁷ *United States v. South-Eastern Underwriters Assn.*, 322 U.S. 533 (1944).

will have paid too much. If the rate is too low and much business is sold, insolvency of the company is apt to result and those who bought the insurance risk catastrophe. The best way to make proper rates, therefore, is to combine the experience of many insurers. The broader the base, the more accurate the result. Under the Sherman Act, however, collaborative action of the type needed for insurance rate making would be regarded as illegal price fixing.

The National Association of Insurance Commissioners (which is made up of the chief state insurance administrative officials) and the insurance industry were in agreement that an effort should be made to strengthen and preserve state regulation of interstate insurance activities. As a result the NAIC presented to Congress a legislative proposal which was the basis of what in 1945 became the McCarran Act, or Public Law 15.⁸ Pending a later examination of its specific

⁸ 59 Stat. 33-34 (1945), 15 U.S.C.A. 1011-15 (1948). Since the cases herein discussed hinge directly on an interpretation of this law, it is set out below in full text:

PUBLIC LAW 15—79th CONGRESS

[CHAPTER 20—1ST SESSION]

[S. 340]

AN ACT

To express the intent of the Congress with reference to the regulation of the business of insurance: Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the 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 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

provisions, it may be noted that this statute, in essence, makes the federal anti-trust laws inapplicable to insurance to the extent that the business is regulated by state law.

The invitation contained in the McCarran Act to oust federal regulation of insurance by passage of state laws was accepted by the National Association of Insurance Commissioners and the several states. In May 1945 the Committee on Federal Legislation of the National Association of Insurance Commissioners called on various groups in the insurance business to form an All-Industry Committee to study the problems flowing from application to the insurance business of the Sherman Act, the Clayton Act, the Federal Trade Commission Act and the Robinson-Patman Act. This committee, working with the NAIC, drafted a number of model bills designed to provide state regulation of insurance and thus prevent application of the federal anti-trust laws. One of the model laws was an "Act Relating to Unfair Methods of Competition and Unfair and Deceptive Acts and Practices in the Business of Insurance." Legislation based on this so-called "Little FTC Act" has been enacted by 41 states and Hawaii.⁹

Notwithstanding this legislation, or other laws already on the statute books which were deemed to serve the same purpose, the Federal Trade Commission, in December 1953, approved a resolution authorizing an investigation of accident and health insurance advertising. In January 1954 all insurance companies in the United States writing any type of accident and health insurance were requested to file sample specimens of all advertising material of a printed or published nature used during 1953, including radio and TV scripts. In October 1954 the FTC issued the first batch of 17 complaints, with those issued subsequently increasing the final total to 41.

A hearing on each complaint was conducted by a hearing examiner of the Commission. The opinions of the examiners, some of which were very lengthy, dealt with the question of the FTC's jurisdiction,

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.

Approved March 9, 1945.

⁹ Remaining states: California, Idaho, Illinois, Missouri, Montana, Oregon and Rhode Island.

where that issue had been raised, as well as with the merits of the allegations that the advertising was false and misleading.

In the *Crafts* case, Mr. James Crafts, president of Fireman's Fund Insurance Company, refused to answer questions at the hearing on the complaint against his company, on the ground that the Federal Trade Commission had no jurisdiction. The Commission applied to the U.S. District Court for an order requiring Mr. Crafts to testify and to produce the documents called for in a subpoena *duces tecum* issued by the FTC. The District Judge entered an order requiring compliance with the subpoena by Mr. Crafts, who then appealed to the Court of Appeals for the Ninth Circuit.

By unanimous opinion filed on February 27, 1957¹⁰ the District Court order was reversed and the Federal Trade Commission's subpoena was held unenforceable until it had been determined by the courts what jurisdiction, if any, the FTC had over the business of insurance. The court felt that the subpoena which had been served on Mr. Crafts did not properly present the question of jurisdiction to the District Court, and therefore ordered it quashed. Having decided that the subpoena could not be enforced, the court saw no reason to interpret Public Law 15, but did say that it was the distinct purpose of Congress, emphatically set out in the act, "to abandon the field of regulation to the states, where the power traditionally lay."¹¹ On October 14, 1957 the Supreme Court, without hearing and without opinion, reversed the Court of Appeals.¹² Although this action establishes the legality of the FTC subpoena, it does not resolve the basic question of FTC jurisdiction over insurance advertising.

In *The American Hospital and Life* case, the hearing examiner ruled that of the 14 states in which the company did business the FTC had jurisdiction in one (Mississippi) because it had no statute forbidding deceptive and misleading advertising. The examiner found, however, that the FTC had not established that false and misleading statements and representations had been made by the company. Counsel for the Commission appealed from this ruling. On April 24, 1956, the Federal Trade Commission, by a 3 to 2 decision,¹³ held that it had

¹⁰ *Crafts v. Federal Trade Commission*, 244 F.2d 882 (C.A. 9th, 1957), rev'd — U.S. — (1957).

¹¹ *Ibid.*, at 894.

¹² The Court's order cited *Endicott Johnson Corp. v. Perkins*, 317 U.S. 501 (1943) and *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186 (1946).

¹³ *American Hospital & Life Ins. Co.*, CCH Trade Reg. Rep. ¶ 25,954 (F.T.C. 1956)

jurisdiction and that the company had issued false and misleading statements.

The American Hospital and Life Insurance Company perfected its appeal by petition to the United States Court of Appeals for the Fifth Circuit. Without passing on the merits, the court unanimously reversed the FTC and set aside the cease and desist order which the Commission had issued, on the ground of lack of jurisdiction. After commenting on the purpose and effect of the McCarran Act, the court stated:

The Commission urges that a state does not have and never did have the power adequately to control the advertising practices of out-of-state insurance companies doing business within its boundaries. The Congress, seemingly, had no doubt that a state might exercise such power and we have none. The Supreme Court, we think, has expressed the same view . . . with respect to another phase of state insurance regulation.¹⁴

The opinion of the hearing examiner, in the *National Casualty Company* case, held that four out of five categories of advertising complained against were misleading and deceptive, and that the jurisdiction of the Commission was limited to direct mail advertising and to all advertising in those states which had no statute regulating it. Upon appeal the Commission, by another 3 to 2 decision issued May 21, 1956,¹⁵ held that all of the advertising complained of was deceptive and that the Commission had full jurisdiction over all of the company's advertising practices irrespective of the existence of state statutes regulating such practices.

National Casualty Company took an appeal to the U.S. Court of Appeals for the Sixth Circuit. That court, in a unanimous decision, found it unnecessary to decide the merits and held that, under the McCarran Act, the FTC was without jurisdiction over the company's business in those states where such business was regulated by state law. The court set aside the Commission's cease and desist order and remanded the case to the FTC for further proceedings on the question of state regulation.¹⁶

Petitions for writs of certiorari on the latter two cases, filed by the Solicitor General, were granted by the United States Supreme Court on November 12, 1957. The question which these cases put to the

¹⁴ 243 F.2d 719, 724 (C.A. 5th, 1957).

¹⁵ *National Casualty Co.*, CCH Trade Reg. Rep. ¶ 26,010 (F.T.C. 1956).

¹⁶ *National Casualty Company v. Federal Trade Commission*, 245 F.2d 883 (C.A. 6th, 1957).

Supreme Court is whether the Federal Trade Commission has jurisdiction to regulate accident and health insurance advertising, despite Public Law 15 and despite state laws regulating such practices.

It seems clear that the Commission does not have jurisdiction over insurance advertising, whether pertaining to accident and health or other types of insurance, when the question is viewed from any of three aspects, namely: (1) the background and legislative history of the McCarran Act; (2) the plain language of the Act itself; and (3) construction of the Act by the courts, particularly the Supreme Court of the United States.

BACKGROUND AND LEGISLATIVE HISTORY

As previously mentioned, for seventy-five years, from 1869 to 1944, the business of insurance was regulated exclusively by the states because of Supreme Court holdings that insurance was not commerce. Not being commerce, it could be subject to federal regulation as interstate commerce. This situation was changed completely when the Supreme Court reversed itself in the *South-Eastern Underwriters*¹⁷ case and held that insurance was commerce and hence, when conducted across state lines, interstate commerce.

The activity of the industry and the National Association of Insurance Commissioners which followed the *S.E.U.A.* decision shows clearly that their efforts were directed towards restoring state regulation. For example, in the Legislative Proposal submitted to the Congress by the Executive Committee of the NAIC the "Declaration of Policy" section of the memorandum of explanation of the proposed text of legislation stated:

The National Association of Insurance Commissioners sincerely believes that the states can adequately regulate the insurance business, and because of legal considerations and the close proximity of state supervisory officials to the people affected, are in a better position to regulate that business than the Federal Government. In that regard it has regulatory machinery available, including regulatory statutes and trained personnel. It is our understanding that Congress shares this belief. It is therefore regarded as essential that Congress should declare its policy and its will.

Commission Act to that business should be excluded; this, if for no other reason

The memorandum subsequently dealt specifically with Federal Trade Commission jurisdiction as follows:

It is quite obvious that if the regulation of the insurance business is to continue in the several states, that any possible application of the Federal Trade

¹⁷ *United States v. South-Eastern Underwriters Assn.*, 322 U.S. 533 (1944).

Commission Act to that business should be excluded; this, if for no other reason than that the states can satisfactorily perform the functions which the Commission might be called upon or elect to exercise.

That the Congress did share the belief of the Insurance Commissioners that regulation of the business of insurance should be returned to the states is clearly evidenced by many passages from the debate on Public Law 15. An example is found in the following statement by Senator Ferguson, one of the sponsors of the bill:

It is clear what we intended to do. After a conference with the House, we believed that the States should regulate insurance, and taxation on the insurance business.¹⁸

PLAIN LANGUAGE OF PUBLIC LAW 15

It is evident that Congress was urged by the industry and the National Association of Insurance Commissioners to restore to the states the authority to regulate the business of insurance which the *Southeastern Underwriters* decision had taken away. It also is clear that the Congress in enacting Public Law 15, which followed in substance the NAIC legislative proposal, believed it was returning the regulation of insurance to the states. This intent is not only implicit in the enactment of Public Law 15 because of its background, but also is clearly stated in the act itself.

It will be noted that in the first section of the McCarran Act Congress declared that "continued regulation and taxation by the several states of the business of insurance is in the public interest." In Section 2(a) it is stated forthrightly that "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."

In Section 2(b) Congress specifically provided that the Sherman Act, the Clayton Act and the Federal Trade Commission Act should be applicable to the business of insurance but only "to the extent that such business is not regulated by State law." In Section 3 Congress provided a moratorium—an adjustment period during which application of the anti-trust laws was to be suspended as regards the business of insurance, whether state laws on the subject existed or not—and then provided that at all times and under all conditions the Sherman Act should apply to insurance with respect to acts or agreements of boycott, coercion or intimidation.

The question has been raised from time to time as to why Congress

¹⁸ 91 Cong. Rec. 1551-1552 (Feb. 27, 1945).

did not provide an outright exemption from the anti-trust laws, except for boycott, coercion and intimidation, and let it go at that.

The answer is that Congress realized that some of the states might not avail themselves to the fullest extent of the rights granted them under Sections 1 and 2(a) to regulate insurance. Therefore, to encourage state regulation and to prevent a gap in the regulatory system, at least as far as interstate insurance activities were concerned, the Congress provided for application of the federal anti-trust laws to insurance if the states did not regulate, but to the latter extent only. If this is not the clear meaning of the clause that the federal laws "shall be applicable to the business of insurance to the extent that such business is not regulated by State law," then it is difficult to ascribe any meaning to it whatsoever.

CONSTRUCTION OF PUBLIC LAW 15 BY THE COURTS

The issue of whether, through the McCarran Act, Congress effectively consented to regulation by the states of interstate insurance activities has been answered in the affirmative by the courts.

In *Prudential Insurance Company v. Benjamin*¹⁹ the U.S. Supreme Court held squarely that the intent, and effect, of Public Law 15 was to give the states the power to burden interstate commerce through regulation or taxation. The Court could hardly have used clearer language on this point than the following:

Obviously Congress' purpose was broadly to give support to the existing and future state systems for regulating and taxing the business of insurance. This was done in two ways. One was by removing obstructions which might be thought to flow from its own power, whether dormant or exercised, except as otherwise expressly provided in the Act itself or in future legislation. The other was by declaring expressly and affirmatively that continued state regulation and taxation of this business is in the public interest and that the business and all who engage in it "shall be subject to" the laws of the several states in these respects.

Moreover, in taking this action 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 exacted; 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.

. . . It clearly 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.²⁰

¹⁹ 328 U.S. 408 (1946).

²⁰ 328 U.S. 408, 429-431 (1946).

The above holding was followed in *North Little Rock Transportation Company v. Casualty Reciprocal Exchange*,²¹ where the Court of Appeals for the Eighth Circuit said:

The purpose of the McCarran Act was to permit the States to continue the regulation of the business of insurance, unhampered, to the extent provided by the Act, by federal legislation relating to interstate commerce.

The U.S. Supreme Court reiterated its views in *Wilburn Boat Co. v. Fireman's Fund Insurance Company* by stating, after a reference to the *South-Eastern Underwriters* case:

The measure Congress passed shortly thereafter, known as the McCarran Act, was designed to assure that existing state power to regulate insurance would continue.²²

CLAIM OF JURISDICTION BY FEDERAL TRADE COMMISSION

It has been demonstrated that the background and legislative history of the McCarran Act, the plain language of the Act itself and the interpretation given it by the Supreme Court, all manifest an unmistakable intention to leave regulation of the business of insurance to the states and preclude federal jurisdiction except for boycott, coercion or intimidation, to which the Sherman Act remains applicable.

It may seem surprising, therefore, that the Federal Trade Commission is asserting jurisdiction over insurance advertising. The only answer is that the reasoning of the FTC majority in *The American Hospital and Life* opinion (followed in the *National Casualty Company* case) was fallacious and some of their authorities irrelevant.

The Commission majority construed Public Law 15 as intending to permit the states to regulate only the *intrastate* aspects of insurance, with reservation of federal authority over *interstate* activities. This ignores all facts and precedents and makes Public Law 15 a nullity.

No distinction between intrastate and interstate transactions in insurance appears anywhere in the McCarran Act. The background and legislative history of the law show clearly that when Congress referred to "continued regulation and taxation by the several states" it had reference to regulation and taxation as applied prior to the *South-Eastern Underwriters* case. It is incontrovertible that such regulation and taxation included both inter- and intrastate aspects of insurance. The proviso in Section 2(b) that the federal acts are to apply to insurance "to the extent that such business is not regulated by state law"

²¹ 181 F.2d 174, 176 (C.A. 8th, 1950), cert. denied 340 U.S. 823 (1950).

²² 348 U.S. 310, 319 (1955).

is made meaningless by the FTC interpretation. The Supreme Court's holding in the *Prudential* case that by Public Law 15 Congress gave permission to the states to tax and regulate interstate insurance transactions is completely ignored. There is no mention of that case whatsoever in the FTC majority opinions.

The fallacy of the Commission's contention that the McCarran Act had no effect whatsoever on its jurisdiction over insurance is further emphasized by Section 4 of the statute. It provides that nothing in the Act shall "affect in any manner" the application to the insurance business of the National Labor Relations Act, the Fair Labor Standards Act or the Merchant Marine Act. If Congress had intended the Federal Trade Commission Act to be on the same footing and applicable to insurance irrespective of state law, surely it would have been included in Section 4, rather than elsewhere in the Act.

That concurrent state-federal jurisdiction was not contemplated by the McCarran Act can be demonstrated in another way, also. Section 2(b) puts the Sherman Act, the Clayton Act and the Federal Trade Commission Act on the same footing in that each is to be applicable to insurance only to the extent that such business is not regulated by state law. As previously mentioned, it was recognized immediately after the *S.E.U.A.* decision that existing state laws and practices, particularly as to insurance rate making, were in direct conflict with the Sherman Act. What was required, authorized or permitted under state laws would constitute illegal price-fixing under the Sherman Act. This fact was clearly pointed out in the memorandum which accompanied the legislative proposal submitted to Congress in November 1944 by the National Association of Insurance Commissioners. Congress was therefore aware of the conflict and obviously intended to resolve it by exemption from Sherman Act to the extent that the business of insurance is regulated by state law. If concurrent jurisdiction was not intended as between state laws and the Sherman Act, it was not intended as between state laws and the Federal Trade Commission Act, because there is nothing in the McCarran Act that requires or permits any distinction or difference in application of the two federal statutes.

That the Sherman Act is ousted by state rate regulatory laws was the holding in *North Little Rock Transportation Co. v. Casualty Reciprocal Exchange*,²³ on which writ of certiorari was denied by the United States Supreme Court. The only logical corollary will be a

²³ 181 F.2d 174 (C.A. 8th, 1950), cert. denied 340 U.S. 823 (1950).

holding that the Federal Trade Commission Act is similarly ousted by state laws governing insurance advertising.

STATE LAWS EFFECT OUSTER OF FTC ACT

We have seen that the McCarran Act provided that the Federal anti-trust laws, including the Federal Trade Commission Act, should be applicable to the business of insurance only to the extent that such business is not regulated by state law.

It has been claimed by some that confusion exists as to what Congress meant, in the McCarran Act, by "regulated by state law." This confusion, if such there be, disappears when it is understood that any warnings which were voiced to the effect that the state regulation which was necessary under Public Law 15 must be "affirmative" or "effective" regulation were not expressions of opinion as to the *legal* effect of state regulatory statutes, but rather were warnings of further *legislative* action which would likely be taken by Congress if the states failed to take advantage of their opportunity under the McCarran Act to pass the necessary licensing and regulatory legislation.

A clear expression of the concept that enactment of state law, of itself, accomplishes an ouster (to the extent of the enactment), is found in the following exchange between Senator McCarran and Senator Murdock which occurred during the course of debate on Public Law 15:

MR. MCCARRAN: . . . Regulatory acts must be *enacted* by the several States in each of the several States. *Otherwise* the anti-trust acts become effective after January 1, 1948. . . .

MR. MURDOCK: And it is intended that on the expiration of the moratorium the Sherman Act, the Clayton Act, and the other acts mentioned will again become effective except—

MR. MCCARRAN: Except as the States themselves have provided regulations. . . .

MR. PEPPER: . . . [Reading Section 2.] Does that mean that after January 1, 1948, the *States may determine* whether or not the Sherman and the other acts become applicable to the business of insurance?

MR. MCCARRAN: The *answer to that question* is "Yes." During the 3-year moratorium the states may, if they see fit to do so, *enact legislation* for the purpose of regulation. If they *do enact such legislation*, to the extent that *they regulate they will have taken the business of insurance* in the respective states *out from under* the Sherman Anti-Trust Act, the Clayton Act, *and the other acts.*²⁴ [Italics added.]

In another part of the debate Senator Ferguson and Senator Barkley voiced the two concepts that are fundamental to an understanding of

²⁴ 91 Cong. Rec. 1471 (Feb. 26, 1945).

the McCarran Act: (1) legislation by the states ousts the federal statutes; (2) failure of the states to do an effective administrative job carried the hazard of *further congressional action*, but *not* an automatic inflow of federal statute or administrative agency.

MR. FERGUSON: . . . In other words, under the terms of the bill, *there are six things on which a state could not legislate*. They are boycott, coercion, or intimidation, or agreements to boycott, coerce, or intimidate. But with respect to anything else, if the states were *specifically to legislate* upon a particular point, and that legislation were contrary to the Sherman Act, the Clayton Act, or the Federal Trade Commission Act, then the State *law would be binding*. That is *exactly what we attempted to do in the bill*. It is clear what we intended to do. After a conference with the House, we believed that the States should regulate insurance, and taxation on the insurance business. But we spelled out certain things on which we thought Congress should not allow the States to legislate. Those are the things which I have mentioned. As to the others, the State has full power to act by legislation—not by agreement but by legislative act.²⁵ [Italics added]. . . .

MR. BARKLEY: . . . But I wish it to be understood that in voting for the approval of the conference report, I am accepting the interpretation placed upon it by the conferees, namely, that if any State, through its legislature, undertakes to go through the form of regulation merely in order to put insurance companies within that State on an island of safety from congressional regulation, that effort will be futile, and not only can *Congress* deal with any phase of the insurance business not dealt with by a State legislature, but even in a case in which a State Legislature deals with any phase of it, but does not deal with it adequately in the opinion of Congress, *Congress* is not in any way barred by the conference report from dealing with that subject and with the phase of it which Congress deems to have been inadequately dealt with by the State; so that *hereafter we can enact such legislation* as we may deem proper and wise to have enacted in connection with the regulation of this business, which clearly is interstate commerce.²⁶ [Italics added.]

Although Congress made ouster of federal law, under the McCarran Act, conditional upon state legislation, it did not in any way qualify the latter term. Simple language was used: “. . . to the extent that such business is not regulated by State law.” There can be no confusion as to what was meant by this phrase if attention is given to the true meaning of the word “law.”

The uniform view of the common-law authorities has been that “law” is a body of rules, detached from the enforcement process.²⁷ Pollock points out that the conception of law, many of its ideas and

²⁵ 91 Cong. Rec. 1551–1552 (Feb. 27, 1945).

²⁶ 91 Cong. Rec. 1558 (Feb. 27, 1945).

²⁷ Consult Erskine, *Principles of the Law of Scotland*, Titles 1, 2 (1754); Stone, *Law and Its Administration* 3 (1934); 1 Cooley, *A Treatise on Constitutional Limitations Which Rest Upon States of the American Union* 183 (8th ed., 1927); Pollock, *A First Book of Jurisprudence* 23–29 (1911).

much of its form are prior in history to official intervention of the state to maintain law. Mr. Justice Story stated it as follows:

The laws of a State are more usually understood to mean the rules and enactments promulgated by the legislative authority thereof, or long-established local customs having the force of laws.²⁸

It will be seen, therefore, that under Public Law 15 the enactment by a state of a law which regulates some aspect of the insurance business is, of itself, sufficient to effect ouster of the federal anti-trust laws as far as their application to the particular subject is concerned.

Although a few states have not enacted the model Fair Trade Practice Act which was drafted by the National Association of Insurance Commissioners and the industry for the express purpose of constituting state regulation of a kind which would oust Federal Trade Commission jurisdiction, all states have laws of some type under which insurance advertising is regulated. It is therefore submitted that jurisdiction of the FTC is ousted under the McCarran Act in all 48 states and the District of Columbia.²⁹

The fact that some of the state regulatory laws were enacted subsequent to 1953, when the acts and practices on which the FTC com-

²⁸ *Swift v. Tyson*, 16 Pet. (U.S.) 1, 17, 41 U.S. 1, 17 (1842).

²⁹ Consult: Ala. Code (1940) c. 28, §§ 26, 28; Ariz. Code c. 61, §§ 61-3301 to 61-3316; Ark. Stats. Ann. (1947) c. 66, § 17; Calif. Ins. Code (1955) §§ 780, 782, 783.5; Colo. Rev. Stats. (1953) Chap. 72, art. 15, §§ 72-15-1 to 72-15-13; Conn. Gen. Stats. (1949) §§ 2816d to 2821d; Del. Code (1953) Tit. 18, c. 1, §§ 531 to 538; D.C. Code (1951) §§ 22-1411, 22-1413, 35-1306, 35-1340; Fla. Stats. (1943) Tit. 35, c. 643, §§ 643.01 to 643.13; Ga. Code (1953) Tit. 56, c. 56-4A, §§ 56-401a to 56-413a; Hawaii Rev. L., §§ 8553.01 to 8553.14; Idaho Code (1948) §§ 41-1204, 41-1206; Ill. Rev. Stats. (1953) c. 73, § 761; Burns' Ind. Stats. Ann. (1952) §§ 39-5301 to 39-5318; Iowa Code (1949) §§ 507B.1 to 507B.13; Kan. Gen. Stats. (1949) c. 40, §§ 40-2401 to 40-2413; Ky. Rev. Stats. (1956) §§ 304.924 to 304.945; La. Rev. Stats. (1950) §§ 22:1211 to 22:1217; Me. Rev. Stats. (1954) c. 60, §§ 146 to 158; Md. Code (1951) c. 48A, §§ 321 to 335; Mass. Gen. L. (1955) c. 176D; Mich. Stats. Ann. (1957) §§ 24.567 (71) to 24.567 (85); Minn. Stats. (1946) §§ 72.20 to 72.33; Miss. L. (1956) c. 329; Mo. Rev. Stats. (1953) c. 28, §§ 561.660, 375.230; Mont. Rev. Code (1947) §§ 94-1819, 40-1106; Neb. Rev. Stats. (1952) Art. 15, c. 44, §§ 44-1501 to 44-1521; Nev. Comp. L. (1957) §§ 3656.48a to 3656.48i; N.H. Rev. Stats. Ann. (1955) c. 417; N.J. Stats. Ann. (1939) c. 17, §§ 17:29B-1 to 17:29B-14; N.M. Stats. Ann. (1953) §§ 58-9-9 to 58-9-19; N.Y. Consol. L. Chap. 28, art. IX-D, §§ 270 to 280; N.C. Gen. Stats. (1950) §§ 58-54.1 to 58-54.13; N.D. Rev. Code (1943) §§ 26-1011, 26-1012, 26-1014; Ohio Rev. Code (1954) c. 39, §§ 3901.19 to 3901.23; Okla. Stats. (1953) c. 36, §§ 117.1 to 117.13; Ore. Rev. Stats. (1955) c. 56, § 736.608; Purdon's Pa. Stats. Ann. (1953) c. 40, §§ 1151 to 1162; R. I. Gen. L. (1938) c. 612, § 54; c. 151, § 23; S. C. Code (1952) Tit. 37, c. 14, §§ 37-1201 to 37-1223; S.D. Code (1939) c. 31, §§ 31.11A01 to 31.11A08; Tenn. Code Ann. (1955) Tit. 56, c. 12, §§ 56-1201 to 56-1213; Tex. Ins. Code (1952) § 1.10(7), Tex. Pen. Code, c. 11, §§ 573, 580b; Utah Code Ann. (1953) c. 31, §§ 31-27-1, 31-27-4, 31-27-9; Vt. L. (1955) Act 174; Michie's Va. Code (1950) §§ 38.1-49 to 38.1-57; Wash. Rev. Code (1952) §§ .30.01, .30.04, .30.09; Michie's W. Va. Code (1955) §§ 3472(68) to 3472(82); Wis. Stats. (1957) §§ 207.01 to 207.13; Wyo. Comp. Stats. (1945) §§ 52-1501 to 52-1511.

plaints are based are alleged to have taken place, is unimportant. The jurisdiction of the Federal Trade Commission must exist at the time of the entry of its order. The law governing such a situation is clearly expressed in *United Corporation v. Federal Trade Commission* as follows:

And since the power of the Federal Trade Commission is purely regulatory and not punitive, it is clear that jurisdiction must exist at the time of the entry of its order. Jurisdiction at the time of the commission of acts objected to as unfair trade practices or at the time of the filing of the complaint with regard thereto is not sufficient; for the order to be entered does not relate to past practices or determine rights as of the time of the filing of the complaint, as in an action at law, but commands or forbids action in the future.³⁰

And in *Chamber of Commerce of Minneapolis v. Federal Trade Commission* the court said:

As the orders of the Commission are purely remedial and preventative, the effect thereof is entirely in the future. Therefore, the jurisdiction of the Commission should, in this respect, be measured as of the time of the order rather than as of the filing of the complaint or as of the hearing thereon.³¹

CONCLUSIONS

The Congress has the power to permit the states to regulate interstate commerce. The states have long had power to regulate and have long regulated interstate commerce in insurance. By enacting the McCarran Act, Congress permitted the states to continue to regulate insurance in both its interstate and intrastate aspects. In accordance with that consent, the laws of all states regulate the insurance business, including advertising practices relating to the sale of accident and health insurance. Concurrent state-federal regulation of insurance was not contemplated, or provided for, under the McCarran Act. The Federal Trade Commission, therefore, has no jurisdiction over insurance advertising, relating to accident and health or otherwise, and the United States Supreme Court has ample authority on which to so hold.

³⁰ 110 F.2d 473, 475 (C.A. 4th, 1940).

³¹ 13 F.2d 673, 685 (C.A. 8th, 1926).