Pups, Plants and Package Policies - Or the Insurance Antitrust Exemption Re-Examined

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PUPS, PLANTS AND PACKAGE POLICIES — OR THE INSURANCE ANTITRUST EXEMPTION RE-EXAMINED*

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I.

INTRODUCTION.

Is the insurance business subject to the federal antitrust laws? If so, to what extent? If not, should it be?

These questions have once again been brought sharply to the fore as a result of a series of federal court decisions during the last two years. Most recently, the United States District Court for the Northern District of Ohio, on the merits, held the so-called "mutual rule," under which the members of a local independent insurance agents board refused to deal in mutual insurance, to be an unreasonable restraint of trade in violation of sections 1 and 2 of the Sherman Act.¹

About a year ago the United States District Court for the Southern District of New York denied motions to quash subpoenas duces tecum issued by a grand jury investigating possible antitrust violations in the aviation insurance industry.² The court based its decision on the ground that the federal antitrust laws were not completely inapplicable to the insurance industry, following the Supreme Court decision of less than a month before in F.T.C. v. Travelers Health Ass’n,³ in which the Court had held that a Nebraska statute pro-

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hibiting unfair or deceptive practices in the insurance business either in Nebraska or "in any other state" did not afford a Nebraska mail-order insurance company exemption from the regulatory jurisdiction of the Federal Trade Commission over deceptive advertising practices. Finally, late in 1959, the United States District Court for the Northern District of California, in denying a motion to dismiss for lack of jurisdiction, held the Sherman Act to be applicable to price fixing conspiracies among insurance companies effectuated by boycott, coercion and intimidation.4

Underlying this series of recent cases, followed or distinguished in most of them, and the natural starting point for a consideration of the questions raised above is the per curiam opinion of the Supreme Court almost three years ago in National Cas. Co. v. F.T.C. and American Hosp. & Life Ins. Co. v. F.T.C.5 Each case involved the mailing across state lines of allegedly misleading accident and health insurance advertising literature. The facts of the two cases, which had been consolidated for purposes of appeal, may be simply stated. The National Casualty Company, domiciled in Detroit, was licensed to conduct an insurance business in every state, the District of Columbia and Hawaii. Most of its business was solicited through independent commission agents in the various states; the advertising material in question was prepared at the home office of the company and shipped in bulk to agents who distributed it locally and assumed the distribution expense; less than five per cent of the solicitations were conducted by direct mail advertising from the home office; more than eighty per cent of the policies issued by the home office were issued on the basis of an application taken by an agent in the state of residence of the insured; only five per cent of the premiums received by the company were sent to the home office directly by mail from the policyholders; and the company did not advertise through radio, television or other media of mass communication. The facts were substantially the same for the business of the American Hospital and Life Insurance Company, except that this latter company was licensed to write accident and health insurance in only fourteen states, including its domiciliary state of Texas. As a result of complaints, the F.T.C. issued cease and desist orders charging that the companies' advertising was false, misleading and deceptive in violation of section 5 of the Federal Trade Commission

Act. In each of these orders the F.T.C. specifically found that it had jurisdiction over the practices involved. Appeals were taken by the companies to the Circuit Courts of Appeal for the Fifth and Sixth Circuits on the jurisdictional issue, and in each instance the F.T.C. was reversed. The ground for reversal in each case was that jurisdiction had been taken from the F.T.C. by the provisions of the McCarran-Ferguson Act of 1945 under which the business of insurance had been subjected to regulation by the states and in which Congress had declared that the Sherman Act, the Clayton Act and the Federal Trade Commission Act, all as amended, should apply to the business of insurance only to the extent that that business had not been regulated by state law.

The Supreme Court affirmed on the jurisdictional issue. The three principal arguments advanced by the F.T.C. were discussed by the Court, however, in terms which raised more questions than they answered. First, the Court determined, at least for the “instant cases,” that nothing in the legislative history of the McCarran-Ferguson Act warranted the F.T.C. contention that the state “regulation” required to oust Commission jurisdiction must consist of definite state administrative standards and actions, and not mere statutory prohibition, with regard to the particular insurance practice concerned. Second, the Court expressly found that most of the states in which the companies were distributing their advertising literature in fact had their own statutes forbidding unfair and deceptive practices and apparently further found that the mere existence of those statutes was sufficient to keep the Federal Trade Commission Act from applying. Third, the Court carefully left open the question of the “intent of Congress with regard to interstate insurance practices which the States cannot for constitutional reasons regulate effectively . . . .” On this branch of the case the Court simply stated that the question did not now arise because the particular advertising program there involved required the use of company agents to distribute the material locally and because the states had “ample means” to regulate this advertising within their own boundaries.

11. Id. at 562-63.
12. Id. at 563-64. On this point the F.T.C. had argued to the Court that rejection of F.T.C. jurisdiction would create a “no man’s land” which Congress could not have intended. Brief for the Petitioner, p. 41. Both Circuit Courts of Appeal
**National Casualty** and **American Hospital & Life** have attracted surprisingly little critical commentary although the cases represent the first direct consideration by the Court of the particular problems involved.\(^{13}\) The three legal issues before the Court in those cases are, nevertheless, of major significance far beyond the field of accident and health insurance advertising, which is just one narrow phase of the problem of governmental regulation of the insurance business. Indeed, those three issues are vital in determining the applicability in general of the federal antitrust laws to that business, a determination not yet squarely presented to the Supreme Court but currently made increasingly important because of the recent rise in the number of insurance antitrust cases and the comprehensive investigation into insurance antitrust practices now being conducted by the Antitrust and Monopoly Subcommittee of the Senate Committee on the Judiciary.\(^{14}\)

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\(^{13}\) "irreducible area" of F.T.C. jurisdiction probably existed but that it simply was not presented in the record of these two cases. 245 F.2d 883, 886-87 (6th Cir. 1957); 243 F.2d 719, 724 (5th Cir. 1957). The extent of this area was later substantially defined in **F.T.C. v. Travelers Health Ass'n**, 362 U.S. 293 (1960).

\(^{14}\) This investigation was authorized by S. Res. 231, 85th Cong., 2d Sess. (1958), 104 Cong. Rec. 1503 (daily ed. Feb. 5, 1958). It was designed to inquire into arbitrary and uniform insurance rates and restrictive measures impeding the entry of new insurance companies which seek to charge lower rates. S. Rep. No. 1200, 85th Cong., 2d Sess. 6 (1958). In this sense the current investigation follows in the tradition of the several earlier extensive inquiries into insurance. These principal earlier investigations, which will be discussed in the course of this paper, were the Armstrong Investigation of life insurance in New York (1905), the Merritt Investigation of fire insurance in New York (1911), the Lockwood Investigation of housing conditions, which also considered fire insurance rate making, in New York (1922), and the Temporary National Economic Committee (TNEC) Investigation into the concentration of economic power conducted by a special federal committee in 1938-1940. The insurance phase of this last investigation considered only the life insurance business but, significantly, included both the insurance and investment phases of that branch of insurance.

However, the current Senate investigation is intended to go beyond these earlier inquiries in the sense that it proposes to review the entire status of insurance regulation by the states and will attempt to determine whether any revision should be made by Congress of the substantially complete exemption from the federal antitrust laws now afforded insurance by the **McCarran-Ferguson Act**. 104 Cong. Rec. 1491 (daily ed. Feb. 5, 1958) (statement by Senator Kefauver). Indeed, the scope of the investigation will be extremely comprehensive. It is apparently felt that the fact that in 1957 some 8% of the national income went into $26 billion of life, casualty and property insurance premiums justifies a very detailed inquiry into the industry. With regard to property insurance, the investigators propose to consider the following topics: (1) how rates are established; (2) uniformity in policy forms; (3) standards applied by states in approval of rates; (4) reasons for exclusion of investment income in fire insurance rate making; (5) whether deviations from "bureau" rates are readily granted; (6) whether companies are free to adopt new merchandising methods which will bring insurance to the public at lower cost; (7) restrictions on entry and licensing of new firms; (8) discriminatory state capital and surplus requirements against out-of-state insurers; (9) mergers and acquisitions; (10) enforcement of state unfair trade practice acts; and (11) control
It is the purpose of this paper to examine in this broader context the implications of the Court's treatment of only the first two of the three issues recently placed before it. The third issue, the problem of the extraterritorial reach of state law, would in itself require a separate paper. I have no intention of attempting to rationalize all of the antitrust cases involving the insurance industry and to restate the law in that field. My purpose, rather, is to explore two specific problems. First, under the existing McCarran-Ferguson Act language, what degree of state regulation is required to exclude application of the federal antitrust laws? Second, to what extent have the states actually achieved the requisite degree of regulation? Under this second heading an attempt will be made to determine the actual state of the law with regard to two selected insurance transactions or practices in which antitrust problems might arise, to appraise the effectiveness of the present legal treatment of those practices, whether by application of state prohibitory laws or by direct state regulation, and to make suggestions as to the course the law should take in the future with regard to those practices.

These two problems are inherent in any attempt to apply the federal antitrust laws to the business of insurance. Unless and until Congress elects to change the present provisions of the McCarran-Ferguson Act, these problems cannot honestly be avoided, either by parties or courts, in any insurance antitrust litigation. Nor can they be avoided by Congress, state insurance commissioners or the

by states over switching assets from one state to another under the "zone" examination system. With regard to life insurance, the investigators will focus on the problem of size and economic power and the potential for good or evil in development of the economy resulting from increasing concentration of savings in life insurance companies. The Senate Subcommittee also proposes to review the question considered earlier by the TNEC, i.e., whether maximum insurance benefits at the lowest cost consistent with financial stability are being provided by life insurance companies. Address entitled The Congress Looks at Insurance, by Donald P. McHugh, Counsel of the Senate Antitrust and Monopoly Subcommittee, American Management Ass'n, New York City, May 6, 1958. Subcommittee Press Release, May 6, 1958. See also N.Y. Times, May 7, 1958, p. 58, col. 1 (city ed.).

The Subcommittee investigation was under the overall supervision of former Senator Joseph C. O'Mahoney, Democrat of Wyoming, who was a member of the TNEC and who played a leading role in events leading up to passage of the McCarran-Ferguson Act in 1945. Senator Estes Kefauver, Democrat of Tennessee, has headed the general study of the effectiveness of the McCarran-Ferguson Act. In August 1958 the Subcommittee began with five days of hearings on aviation casualty insurance and air travel insurance. Other hearings were held in May, June and August 1959 on ocean marine insurance and state fire and casualty rating laws and in May 1960 on non-admitted alien insurers and surplus line insurers. Hearings Before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary, 85th Cong., 2d Sess., 9 pts. (1959-60). As yet the only report issued has been one covering aviation and ocean marine insurance. S. Rep. No. 1834, 86th Cong., 2d Sess. (1960). A summary review of the investigation thus far appears in Knowlton, Present Status of the Investigation of the Business of and the Regulation of Insurance by the Antitrust Subcommittee of the United States Senate, 1960 Ins. L.J. 641.
insurance industry in considering the necessity for any revision of the McCarran-Ferguson Act and its present partial exemption of the insurance business from the federal antitrust laws.

II. BACKGROUND

For tyros in insurance a few preliminary words about the development of the industry's present unique status under the federal antitrust laws may be helpful before delving into detailed consideration of the two problems selected.

The history of the unusual relationship between the federal government, the states and the business of insurance is largely the story of fire insurance in the United States. Early insurance regulation in the middle of the nineteenth century was undertaken by the states rather than by the federal government.15 While the more sophisticated Eastern states, in which most of the large companies of the day were domiciled, attempted to develop affirmative supervision of insurance through establishment of sound underwriting practices, the newer Western states were pursuing a different course. These states sought to favor their own small domestic companies against the Eastern "agency" companies by enacting laws requiring large deposits from the so-called "foreign," i.e., out-of-state, insurers and by imposing heavy taxes on their local operations.16

After the Civil War these state impositions, coupled with disastrous losses suffered in several major city conflagrations, forced Eastern fire insurance companies to seek relief from Congress. The

15. Insurance, which began in the United States in the late 18th Century, was not subject to statutory supervision marked by effective regulation until the 1830s. Prior to that time regulation consisted generally of simple charter limitations on capital imposed by the states. The first continuing administrative supervision of insurance began with appointment of an insurance commissioner by New Hampshire in 1851. Massachusetts soon followed in 1858 with an insurance department headed by the famous Elizur Wright, who has been called the "father of life insurance." By 1890 some seventeen states had administrative supervision of insurance. Three-fourths of the states in 1919 had a single full-time official heading their insurance departments. At the present time every state has a regulatory agency for insurance. The supervisory officials have been organized since 1871 in a cooperative body known as the National Association of Insurance Commissioners (hereinafter referred to as NAIC), whose efforts are directed toward improving state regulation of insurance. 1 Richards, Insurance § 40 (5th ed. 1952). The functions of the NAIC are described in Martin, The NAIC and State Insurance Department Functions, 1952 Ins. L.J. 583.

16. For example, Wisconsin required every foreign insurer to take $25,000 worth of state bonds. 1876-77 Insurance Blue Book, Fire Insurance, 1860-1869, 29-34 (Centennial Issue 1877). For an early state case upholding a 3% premium tax against the argument that it would interfere with interstate commerce, see People v. Thurber, 13 Ill. 554 (1852). A good description of the various burdens imposed by Western states appears in Nehemkis, Paul v. Virginia: The Need for Re-Examination, 27 Geo. L.J. 519, 523-25 (1939).
newly organized National Board of Fire Underwriters unsuccessfully sought the creation of an Insurance Bureau and an Insurance Commissioner as part of the Treasury Department at Washington to whom all deposits and fees were to be paid.17 Frustrated before Congress, the National Board turned to the courts. In May, 1866, one Samuel B. Paul was appointed agent in Virginia by several New York fire insurance companies. His principals refused to comply with the local statutory requirement of a deposit of bonds prerequisite to doing business. Nevertheless, Paul sold a single policy, was indicted for violation of the statute and was convicted. There can be little question that this was a "put-up" case in which the fire insurance companies hoped that the Supreme Court would rule that insurance was interstate commerce and thus outside the reach of burdensome state statutes.18

But the companies once again met disappointment, for the Supreme Court affirmed the conviction in the famous, and extremely troublesome, decision, Paul v. Virginia.19 In the course of his opinion Mr. Justice Field made two categorical statements which were to plague the Court and to influence the development of constitutional law for the next seventy-five years: first, the issuance of a policy of insurance is not a transaction of commerce; second, insurance policies are not commodities or articles of commerce which have any existence independent of the parties to them.20 The real impact of Paul v. Virginia, however, was not made felt through applications of these two narrower versions of its meaning. Despite the fact that nothing

17. The National Board of Fire Underwriters was formed in 1866 as a "trade association" for joint action after the fire insurance companies had in November, 1865, appointed a committee to draft a suitable proposal for presentation to Congress. Insurance Blue Book, op. cit. supra note 16 at 32. A copy of the Memorial to Congress by the National Board of Fire Underwriters appears in 13 Ins. Monitor and Wall St. Rev. 191 (1865). The Insurance Monitor is one of many early insurance trade periodicals, most of which have long since been discontinued. A good bibliography of these, and also of the modern insurance trade literature, will be found in 2 Buley, The American Life Convention (1906-1952) 1133 (1953). The bill based on the National Board proposal, H.R. 738, 39th Cong., 1st Sess. (1866), was reported favorably by the House Judiciary Committee but was laid on the table without any further action. Cong. Globe, 39th Cong., 1st Sess. 3490 (1866). Editorial opinion in the insurance trade press of the day indicates that the industry saw in this bill an escape from harassment by the states. 14 Ins. Monitor and Wall St. Rev. 53 (1866) ; 2 Ins. Times 179 (1869). The unsuccessful 1866 bill was only the first of many subsequent attempts by the insurance industry, even as late as 1933, to secure federal supervision of the business. These later proposals are summarized in Mr. Justice Jackson's dissent in United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533, 592 n.13 (1944) (dissenting opinion).


19. 75 U.S. (8 Wall.) 168 (1868).

20. Id. at 182-85.
in the original case itself justified such an extension, in many later cases the Court relied upon it to find that the entire "business of insurance," as distinguished from the mere insurance policy or its issuance, was not in interstate commerce. Under this reading of the case marine insurance and life insurance were swept indiscriminately from under the reach of federal power. It is, therefore, no surprise that the one federal court case which prior to 1943 considered the applicability of the federal antitrust laws to insurance flatly dismissed a private antitrust action on the authority of Paul v. Virginia and its satellite cases and did not even consider its decision worth reporting officially.

The first direct federal action against the insurance business came on November 20, 1942, with the indictment by a grand jury at Atlanta of 198 fire insurance companies and 27 individuals under sections 1 and 2 of the Sherman Act. The companies were charged with conspiring through the South-Eastern Underwriters Association, a

21. Hooper v. California, 155 U.S. 648, 653 (1895) (upholding a state bonding requirement imposed on a foreign marine insurer); New York Life Ins. Co. v. Cravens, 178 U.S. 389, 401 (1900) (upholding a state statute modifying normal life insurance policy terms). It is also significant that reliance upon Paul v. Virginia in an early Canadian case has continued to this day in that country substantially the same division between the roles of central and local governments in insurance regulation as exists in the United States. In Parsons v. Citizens Ins. Co., [1879] 3 Can. Sup. Ct. 215, two justices of the Canadian Supreme Court expressly relied on Paul v. Virginia in holding valid an Ontario provincial statute requiring certain conditions to be included in a fire insurance policy despite the provisions of the British North America Act of 1867, which reserved to the Dominion government exclusive power over "trade and commerce." See opinions of Fournier, J., at 277, and Henry, J., at 288. This case was subsequently affirmed on another ground, without decision on the question of insurance as "trade or commerce," by the Judicial Committee of the Privy Council. Citizens Ins. Co. of Canada v. Parsons, [1881] A.C. 96 (P.C. Ont.). On the problem of insurance as "trade or commerce" in Canada, see also Angers pro Regina v. Queen Ins. Co., 21 L.C.J. 307 (Q.B. 1877), aff'd per curiam, [1878] 3 A.C. 1090 (P.C. Que.). For a discussion of the impact of these cases on the Canadian scheme of insurance regulation see MacDonald, The Regulation of Insurance in Canada, 24 CAN. B. REV. 257, 265 (1946); Gray, More on the Regulation of Insurance, 24 CAN. B. REV. 481 (1946).


23. 26 Stat. 209 (1890), as amended, 15 U.S.C. §§ 1, 2 (1958). The decision of the Department of Justice to prosecute South-Eastern Underwriters Association apparently resulted from an appeal by Attorney General Roy McKittrick of Missouri after that state had struggled for some 20 years to handle the problem of rate-fixing combinations by fire insurance companies under its own state laws. See Joint Hearings Before the Subcommittees of the Committees on the Judiciary on S. 1362, H.R. 3269, and H.R. 3270, 78th Cong., 1st Sess., pts. 1-3, at 23-78 (1943) (hereinafter cited as 1943 Hearings). Missouri's battles with the fire insurance companies make an amazing story which began with an order by that state's insurance superintendent in 1922 reducing fire insurance rates as he was authorized to do under Missouri's then new rating law, Mo. Rev. Stat. § 6283 (1919). The legal struggle continued through dozens of court cases in both state and federal courts during the next 20 years and ultimately involved bribery of the insurance superintendent by "Boss" Pendergast and substantial losses to policyholders in the companies affected. For a brief synopsis of the history of this litigation see Note, 41 ILL. L. REV. 647, 654 (1947).
regional rating bureau, to fix premium rates on fire insurance and allied lines and with using boycotts to force other insurance companies into the conspiracy and to compel persons to purchase insurance only from Association members, all in restraint of trade in six Southeastern states. The district judge sustained a demurrer dismissing the indictment, relying on Paul v. Virginia and the accumulated precedent of seventy-five years that insurance was not commerce and was, therefore, outside the antitrust laws.24

Shortly after the district judge had rendered his decision, and even prior to the Supreme Court's noting probable jurisdiction in the case,26 a series of three bills proposing a complete and blanket exemption of the insurance business from the federal antitrust laws was introduced into Congress on behalf of the fire insurance companies.28 Joint Subcommittees of the Committees on the Judiciary of both houses of Congress held eleven days of hearings, scattered over a period of nine months, on these bills.27 However, before the hearings were completed, the Supreme Court on June 5, 1944, handed down its decision in the South-Eastern Underwriters case holding that the


25. The Supreme Court noted probable jurisdiction on October 10, 1943. See 320 U.S. 776 (1943).

26. H.R. 3270, 78th Cong., 1st Sess. (1943) was introduced by Mr. Walter on Sept. 20, 1943. 89 Cong. Rec. 7686 (1943). The text of this bill, which was quite simple, appears as follows at 90 Cong. Rec. 6549 (1944): "That nothing contained in the act of July 2, 1890, known as the Sherman Act, or the act of October 15, 1914, as amended, known as the Clayton Act, shall be construed to apply to the business of insurance or to acts in the conduct of that business or in anywise to impair the regulation of that business by the several States." Other bills to the same effect were H.R. 3269, 78th Cong., 1st Sess. (1943) introduced by Mr. Hancock also on Sept. 20, 1943, 89 Cong. Rec. 7686 (1943), and S. 1362, 78th Cong., 1st Sess. (1943) introduced by Senator Bailey and Van Nuys on Sept. 21, 1943, 89 Cong. Rec. 7689 (1943). These complete exemption bills were the proposals of the fire insurance industry. 2 Buley, The American Life Convention (1906-1952) 940 (1953). It appears that the life insurance business took no active part in promoting these bills. Statement of Mr. Leroy Lincoln, President of the Metropolitan Life Insurance Company, appearing at 1944 American Life Convention Proceedings 75. For a description of the pressures exerted on Congressmen by the fire insurance companies, see 89 Cong. Rec. 10144-145 (1943); 89 Cong. Rec. A 5272 (1943). Material prepared by the National Board of Fire Underwriters raised the spectre of federal control of the insurance business unless the complete exemption bills were passed. See National Board Pamphlet, Recent Attempts to Apply the Federal Anti-trust Laws to the Fire Insurance Business Focus Attention on a Matter of Vital Importance Which Calls for Action by Congress 4 (1943). This pamphlet, sent to fire insurance agents throughout the country, was accompanied by a National Board letter dated Sept. 23, 1943 (the complete exemption bills had been introduced only three days before) urging that each agent write his Congressman in support of passage of the bills but warning that agents should write up their own views and not simply send along the printed pamphlet. Both documents are on file at the Insurance Library Association of Boston.

27. The 1943 Hearings supra note 23 were published in six parts. Hearings were held on Oct. 20, 27, Nov. 3, Dec. 3, 14, 15 and 21, 1943, and on Mar. 30, May 26, 27 and June 23, 1944.
business of insurance transacted across state lines was interstate commerce and was subject to the federal antitrust laws.\(^2\)

Congressional reaction to the decision was swift. Within a few months both the House of Representatives and the Senate passed the complete exemption bills.\(^2\) In the Senate, however, the bills were immediately reconsidered and then passed over.\(^2\) The McCarran-Ferguson Act, a new approach to the problem devised in cooperation with the National Association of Insurance Commissioners, became law at the next session of Congress in 1945.\(^1\) Because the Act itself

28. United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533 (1944). The opinion was handed down on June 5, 1944. On the same day the Supreme Court also held the insurance business to be subject to the federal labor laws. Polish Nat'l Alliance v. NLRB, 322 U.S. 643 (1944).

29. The principal complete exemption bill, H.R. 3270, was passed by the House on June 22, 1944 by a roll-call vote of 283 to 54, 92 Representatives not voting. 90 Cong. Rec. 6565 (1944). The same bill passed by voice vote in the Senate on Sept. 21, 1944. 90 Cong. Rec. 8054 (1944). H.R. 3270 had been reported to the Senate favorably without amendment and without further hearing. S. Rep. No. 1112, 78th Cong., 2d Sess. (1944). The bill passed in the Senate despite the fact that six members of the Committee on the Judiciary, Senators O'Mahoney, Hatch, Kilgore, Murdock, Wheeler and Langer filed a strong minority report in which they asked that further action on the bill be withheld until the NAIC could present its more balanced proposal for action by Congress. Id., Part 2, Minority views at 2, 3.

30. The reconsideration was at the request of Senators Barkley and Hatch. 90 Cong. Rec. 8054 (1944). However, most credit for withstanding this lobby pressure and for reconsideration in the Senate of the complete exemption bills so state insurance authorities could later present their proposals was accorded by the press of the day to Senator O'Mahoney of Wyoming. Time, Dec. 13, 1944, p. 82; New Republic, May 29, 1944, p. 738. Senator O'Mahoney, of course, had become quite familiar with the subject of insurance as a member of the TNEC in 1938-40.

31. In November, 1944, the NAIC finally submitted their proposal for Congressional action in the light of South-Eastern Underwriters. This proposal, which formed the basis for the McCarran-Ferguson Act itself, included a complete exemption from the Federal Trade Commission Act and the Robinson-Patman Act but exempted insurance from the Sherman Act and the Clayton Act only until July 1, 1948. Even after that date the last two acts were still to be inapplicable to rate making under state supervision, cooperative services and investigations, reinsurance, brokers' commissions, and collection of statistics or rate making jointly if use of jointly-made rates was not compulsory. 1945 NAIC Proceedings 32. In transmitting these proposals to Congress the Commissioners carefully indicated the differences between the complete exemption proposed by the stock fire and casualty companies on the one hand and the NAIC proposals, which were also endorsed by life insurance companies and mutual fire and casualty insurance companies, on the other. (The conflict of interests between the stock and the mutual fire and casualty companies will be made apparent again later). Both sets of proposals sought complete exemption from the Federal Trade Commission and Robinson-Patman Acts. But the NAIC proposal sought only limited exemption from the Sherman and Clayton Acts. The letter accompanying the NAIC submission made quite clear that the Commissioners recognized that certain activities of the industry should be subject to the federal antitrust laws. Letter from David A. Forbes, Insurance Commissioner of Michigan, representing the NAIC, addressed to Senator Vandenberg and dated Nov. 22, 1944. This letter, reprinted at 90 Cong. Rec. 8482 (1944), states in part: "The Commissioners believe that the insurance business has no more right to ask for a blanket exclusion from these acts than has any other business that has been held to be engaged in interstate commerce."

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is short and because of the importance of its precise language to the discussion which follows, the full text of the Act is set out in the margin.  

III. WHEN HAVE THE STATES "REGULATED"?

Now we turn to the first of the three questions considered by the Supreme Court in National Casualty and American Hospital & Life — under the language of the section 2(b) proviso of the McCarran-Ferguson Act, what degree of state regulation is required to exclude application of federal statutes regulating business, especially the so-called "antitrust statutes"? The Court appears to have concluded that mere passage by a state of prohibitory statutes covering the same general ground as the federal acts, without more, is sufficient. The Court claims to have based its conclusion on this point on a consideration of the legislative history of the McCarran-Ferguson Act.

32. "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 June 30, 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 June 30, 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 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."
It must be recognized that the Court carefully limited its finding on this point to the facts of the "instant cases," which presumably meant deceptive advertising cases arising under the Federal Trade Commission Act, as distinguished from other federal antitrust statutes or statutes regulating business.

However, careful examination of the "conventional" legislative history of the McCarran-Ferguson Act, together with the surroundings in which that history is set, will, I believe, point to a conclusion opposite to that reached by the Court.33 I make this statement for four reasons.

A. The Three Purposes of the Act.

First, Congress' attention in the events leading up to the McCarran-Ferguson Act was divided among three separate topics: preservation of general state insurance regulation; continuation of state taxation of insurance; and applicability of the federal antitrust laws to insurance. Congress' intentions with regard to the first two cannot be regarded as having any bearing on its intentions with regard to the third, which alone is covered by the section 2(b) proviso.

The legislative history leading up to passage of the McCarran-Ferguson Act clearly indicates that, after subjection of the insurance industry to the interstate commerce power by the South-Eastern Underwriters decision, Congress and the insurance companies were faced with three distinct questions. First, was general state regulation of insurance on such matters as licensing, solvency and policy forms now invalid because encroaching on an activity exclusively in interstate commerce? Second, was continued state taxation of the insurance business invalid for the same reason? Third, were the federal antitrust laws applicable? And, if so, did they invalidate the direct regulation activities of the states?

Congress distinctly answered the first two of these questions in
the negative and declared its clear intention to preserve general state
insurance regulation and taxation in section 2(a) of the McCarran-
Ferguson Act, which expressly provides 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," and in section 2(b) of that Act, which provides that
no "Act of Congress shall be construed to invalidate, impair or
supersede any law enacted by any State for the purpose of regulating
the business of insurance, or which imposes a fee or tax upon such
business, unless such Act specifically relates to the business of insur-
ance." These sections, I submit, have nothing whatever to do with the
problem, the extent to which federal antitrust laws are applicable.
This third problem was dealt with specifically and individually in
the proviso to section 2(b). Therefore, congressional statements of
intention as to its meaning must be considered by themselves.

At the outset it should be noted that debates in both houses of
Congress indicate that perhaps even less concern was devoted to
the antitrust problem than to preservation of state insurance regula-
tion on such general matters as solvency, licensing and policy forms
and to continuation of state taxation of the industry,84 both of which
had been so bitterly opposed for years by the companies. In fact, litiga-
tion following the McCarran-Ferguson Act certainly suggests that
these were the only subjects with which the insurance companies them-
se
selves were really seriously concerned.85

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34. See e.g., 91 Cong. Rec. 481-82 (1945) (statement by Senator Radcliffe); 91
Cong. Rec. 1086 (1945) (statement by Mr. Walter).

35. Litigation in both federal and state courts focused on upholding the states
in their attempts to continue to tax and regulate insurance companies. The com-
panies attempted to argue that the combination of the South-Eastern Under-
writers decision and the McCarran-Ferguson Act had brought insurance under the
interstate commerce power to such an extent that the states could no longer tax
or regulate it. This argument, reminiscent of Paul v. Virginia and legislative at-
tempts of the latter part of the 19th Century to secure federal regulation, and so
contrary to the concern of the companies during the debates on the McCarran-
Ferguson Act regarding their liability for state taxes, provoked Mr. Justice Rutledge
to remark upon "the versatility with which argument inverts state and national
power, each in alternation to ward off the other's incidence...." Prudential Ins.
Co. v. Benjamin, 328 U.S. 408, 412 (1946). The courts rejected this insurance
company argument and consistently upheld state taxes on insurance, Prudential
150 (1945), aff'd per curiam, 328 U.S. 823 (1946); In re Insurance Tax Cases,
160 Kan. 306, 161 P.2d 726 (1945), aff'd per curiam, 328 U.S. 822 (1946);
Prudential Ins. Co. v. Barnett, 200 Miss. 233, 7 So. 2d 60 (1946), and various
state requirements imposed as prerequisites for admission of foreign insurance
companies to do business, Robertson v. California, 328 U.S. 440 (1946) (licensing
of agents); Mendola v. Dineen, 185 Misc. 540, 57 N.Y.S.2d 219 (Sup. Ct. 1945)
(licensing of companies).
The clear division between the several purposes of the McCarran-Ferguson Act and the limitation of the section 2(b) proviso to the antitrust question is apparent from the legislative source materials.

As originally submitted to the Senate, S. 340, which was ultimately to become the McCarran-Ferguson Act, did not contain the present section 2(b) proviso. However, even in this embryo form of the Act, it was clear that the questions of general state regulation and taxation of insurance were to be treated as separate from the question of application of the antitrust laws. For example, the Senate Committee Report on S. 340 stated:

The purpose of the bill is two fold: (1) To declare that the continued regulation and taxation by the several States of the business of insurance is in the public interest; and (2) to assure a more adequate regulation of this business in the States by suspending the application of the Sherman and Clayton Acts for approximately two sessions of the State legislatures . . .

The same report also concluded:

Enactment of this bill will (1) remove doubts as to the right of the States to regulate and tax the business of insurance, and (2) secure more adequate regulation of such business.

The second purpose in each citation can only be construed as referring to the antitrust problem.

After the section 2(b) proviso was added to S. 340 by the Conference Committee, Senator Pepper, in attempting to determine the meaning of the proviso in particular, made the distinction between the three subjects of Congressional concern quite explicit, by stating on the Senate floor:

I do not oppose State regulation which is not inconsistent with the operation of the Sherman antitrust Act and the Clayton Act. On matters of taxation, general regulation, and all that sort of thing, I think the states should regulate, but I think that now that insurance has been brought, by the decision of the Supreme Court, up to the bar of the Clayton Act and the Sherman Act, we should not give the insurance companies immunity from the applicability of those acts.

The distinction, and the limitation of the section 2(b) proviso to antitrust questions are even more obvious from the following exchange concerning the meaning of the section 2(b) proviso in con-

38. Id. at 3.
nexion with the applicability of the federal antitrust laws. Senator Ferguson, co-author of the McCarran-Ferguson Act, stated:

I believe that a statement as to the fair construction of the act would add to the helpfulness of what the Senator from Nevada has said. . . . After the moratorium has expired, if a State has not legislated on the subjects covered by the three acts to which reference has been made, those acts shall be applicable to the business of insurance. But insofar as the State is concerned which has specifically legislated on the subject, the three acts shall not apply.

. . .

MR. O'MAHONEY. I believe the Senator from Michigan went a little further than was his intention when he said that if the States have legislated certain things will take place. The bill says if the States have regulated.

MR. FERGUSON. I had reference to legislation dealing with regulation and taxation. 40

This last statement of Senator Ferguson's can only be understood in light of the fact that Congress was concerned in connection with this legislation with the three separate problems of state taxation of insurance companies, state regulation of those companies of a peculiarly insurance nature, i.e., reserves, licensing and policy form provisions, and the application of the antitrust laws. Senator Ferguson was clearly referring only to the first two of these and not to the third although his initial statement suggested that he was referring to the several federal antitrust statutes expressly named in the section 2(b) proviso.

At this point I wish only to urge that ringing congressional declarations favoring unequivocal preservation of state general insurance regulation and taxation not be read into the section 2(b) proviso.

B. Two Restrictive Practices Alone Considered.

Second, in the deliberations leading up to the passage of the McCarran-Ferguson Act Congress gave close consideration to the impact of the federal antitrust laws on the insurance business only with respect to two specific restrictive insurance practices — rate making or price fixing and boycotts. Therefore, the meaning of the word "regulated" in the section 2(b) proviso must be derived almost exclusively from congressional consideration of those two subjects.

All of the legislative efforts of 1943-45 stemmed from the antitrust prosecution in the South-Eastern Underwriters case, which in-

40. 91 Cong. Rec. 1443 (1945). (Emphasis added.)
volved only two charges: rate or price fixing agreements and acts of boycott, coercion and intimidation. Congress' eleven days of hearings on the proposed complete exemption bills were devoted almost exclusively to these two topics, with most of the testimony centered on the rate-making problem.41 No hearings were held on the bill which became the McCarran-Ferguson Act itself. The committee reports on all of these bills show the same congressional concentration.42 In fact, a proposal for a careful investigation of the entire insurance industry was ignored.43 And bills which would have dealt individually with insurance company practices under the antitrust laws were not even considered.44

It is not surprising that Congress did not carefully consider the application of the federal antitrust laws to other restrictive acts and practices of the insurance industry. The entire problem, unfortunately, arose and was disposed of when the attention of Congress was consumed by the war effort. Congress' attention was also distracted by the raising of the emotion-arousing spectre of direct federal regulation of insurance,45 and by expressions of great concern from the insurance companies on matters other than antitrust, such as their continued liability for state taxes, a matter which has already been discussed above.

C. Rate Making to be "Affirmatively" Controlled.

Third, with respect to the two insurance practices considered in detail, acts of boycott, coercion and intimidation were subjected fully

41. 1943 Hearings, supra note 23.


43. H.R. Res. 382, 78th Cong., 1st Sess. (1943), filed by Mr. Lynch, called for a thorough investigation of fire insurance and allied lines of insurance so that Congress would have full information on which to base its action. This resolution was referred to the House Committee on Rules, 89 Cong. Rec. 10738 (1943), and apparently died there.

44. E.g., H.R. 4444, 78th Cong., 2d Sess. (1944), introduced by Mr. Anderson, would have listed all of the specific insurance transactions and practices which should be subject to the federal antitrust laws. This bill was referred to the House Committee on the Judiciary, 90 Cong. Rec. 2869 (1944), and was never reported out. During debate in the House on the complete exemption bills Mr. Anderson attempted unsuccessfully to amend H.R. 3270 to incorporate this concept. 90 Cong. Rec. 6561-62 (1944).

45. E.g., 90 Cong. Rec. 6559-60 (1944) (statement by Mr. Summers). Senator O'Mahoney had, however, made it quite clear, as early as the conclusion of the TNEC investigation of life insurance, that federal regulation of the industry was not being contemplated. O'Mahoney, Address to Insurance Forum of A.B.A. Annual Meeting, 26 A.B.A.J. 907, 913 (1940).
to the federal antitrust laws by section 3(b) of the McCarran-Ferguson Act, and, therefore, congressional consideration of them will shed no light on the meaning of section 2(b). With regard to the remaining topic of rate making or price fixing, congressional intention, from the very beginning, was clearly to exempt such acts from the federal antitrust laws only to the extent that they were affirmatively and specifically approved or controlled by the state insurance commissioners.

That this is a correct interpretation of the congressional intention is clearly indicated by the following source materials.

1. The Legislative History of the Complete Exemption Bills.

The House Committee Report on the complete exemption bills, which were rejected in favor of the McCarran-Ferguson Act, stated:

As a matter of fact the hearings show, through assertions and demonstrations of Governors, State insurance commissioners, and business organizations, that State regulation has promoted efficiency and satisfaction in the insurance business, and that such a result has been accomplished with a steady decrease in insurance rates throughout the country. Under existing law which declares ample power in the States, there is no reason why the States should not continue to meet developments by the exercise of that power.  

And on the House floor during debate on these bills, Mr. Satterfield, a member of the House Committee on the Judiciary, said: "If the States legislate and properly administer the supervision of insurance within their borders it is not necessary to invoke the Sherman and Clayton Acts to avoid these combinations and monopolies complained of."  

2. The Legislative History of the McCarran-Ferguson Act prior to Insertion of the Section 2(b) Proviso.

S. 340, which was ultimately to become the McCarran-Ferguson Act, was filed shortly after the opening of the Seventy-ninth Congress by Senator McCarran for himself and Senator Ferguson. The bill was quite simple in form. Section 1 declared continued regulation and taxation by the states of the business of insurance to be in the public interest. Section 2 provided: (a) the insurance business should

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47. 90 Cong. Rec. 6530 (1944). (Emphasis added.) See also 90 Cong. Rec. 6540 (1944) (statement of Mr. Anderson) and 90 Cong. Rec. 6545 (1944) (statement of Mr. Voorhis).
be subject to state laws relating to its regulation and taxation; and (b) no act of Congress should be construed to supersede any state regulatory or tax laws unless the congressional enactment expressly so provided. Section 3 completely exempted the insurance business from the Federal Trade Commission and Robinson-Patman Acts. Section 4(a) suspended the application of the Sherman and Clayton Acts until January 1, 1948, as a "moratorium" to enable the states and Congress to make "adjustments" and to adopt necessary legislation. Section 4(b) made clear that application of the Sherman Act to agreements or acts of boycott, coercion or intimidation was not to be suspended even for the moratorium period.

The Senate Committee Report on S. 340 clearly stated that the purpose of the bill with regard to the antitrust problem was to secure "adequate regulation and control" and "more adequate regulation" of the insurance business by the states. Debate on the Senate floor did not consider this problem but centered on the question whether it was really intended that the Sherman and Clayton Acts should apply again to insurance after the moratorium period. Senator Taft pointed out the contradiction between sections 2(b) and 4(a) of the original bill in that the former section appeared to prevent the Sherman Act from ever invalidating any state law while the latter seemed to provide that the Sherman Act should be effective again as to insurance after January 1, 1948. Section 2(b) was thereupon amended to exclude the Sherman and Clayton Acts specifically from its terms. With this amendment, the bill passed the Senate by voice vote. Thus it was made quite clear at this point in the Senate that at least the two named federal antitrust statutes were to apply, without qualification, to insurance after the moratorium period.

Meanwhile, in the House, Mr. Walter, a member of the Committee on the Judiciary, had introduced another bill, H.R. 1973, which was the same as S. 340 as originally reported to the Senate. The House Committee Report on H.R. 1973 included statements almost identical to those in the Senate Report on S. 340. In debate on the House floor Mr. Walter emphasized that H.R. 1973, as submitted by his committee, was the bill agreed upon by the insurance companies, the insurance commissioners and the several congressional

committee members. He claimed that S. 340, as amended and passed by the Senate, "was not in accordance with that understanding and agreement . . . ." The House debate on this point shows that the concern again seems to have been the preservation of the states' ability to pass legislation authorizing supervised fire and casualty insurance rating bureaus without having them attacked under the Sherman Act.

At about the same time, the House Committee on the Judiciary reported out S. 340, but with everything after the enacting clause in the Senate version stricken out and H.R. 1973 substituted. This bill was substantially the same as S. 340 as passed by the Senate, except that the language in section 4(a) relative to the purpose of the moratorium period and the Senate amendment to section 2(b) were not included. Debate on the House floor did not reach the question of the meaning of the Senate amendment, but considerable concern was expressed generally about the omission in the House version of the bill of the statement of purpose for the moratorium period in section 4(a). Mr. Anderson protested this omission, claiming that it was desired by the insurance industry to clarify the purpose of the bill. He cited a press release from the insurance industry groups, which stated the purpose of the moratorium as follows: ". . . in order that the legislatures of the various States may have time in which to adopt laws designed to authorize concert of action in rate making and other cooperative activities when approved by State supervisory officials. . . ."

3. Debate in the Senate on S. 340 after Insertion of the Section 2(b) Proviso.

In the Conference Committee the bill as it finally became law was drafted. The Conference Report, submitted on February 22, 1945, states only that the principal difference between the conference bill and the bill as passed by the House was the inclusion of the Federal Trade Commission Act and the Robinson-Patman Act in the moratorium provision, which had previously been section 4(a) and now became section 3(a). The report was, however, silent as to the most significant change in the previous bill. At the end of what had previously been section 2(b), a proviso was now added for the first time, which stated that the Sherman Act, the Clayton Act and the Federal Trade Commission Act, all as amended, after the moratorium

52. 91 Cong. Rec. 978-79 (1945).
54. 91 Cong. Rec. 1089 (1945). (Emphasis added.)
period "shall be applicable to the business of insurance to the extent that such business is not regulated by State law."56

The Conference Report was agreed upon in the House without debate,56 so that source gives no help in interpreting the meaning of the new proviso expressing a conditional applicability of the federal antitrust laws. However, debate on the Senate floor centered largely around this point, and the intent in that body is clear.

When Senator Murdock, a member of the Committee on the Judiciary, asked: "So that during the moratorium it is intended, is it not, that the States shall affirmatively step into the regulation of the insurance business?"; Senator McCarran replied: "That is correct."57

The following colloquy draws a clear distinction between the terms "legislate" and "regulate." Senator Pepper stated that he was "a little disturbed by what I have discovered in paragraph (b) of section 2." and continued:

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.58

Apparently still not satisfied, Senator Pepper continued:

I shall not consent to postponing until January 1, 1948, the effective date of the law, and according to the States the privilege of enacting some mild form of legislation which they may call regulatory, thereby defeating the purpose of the Supreme Court decision and defeating the act itself. Apparently the conference report goes further than I had understood it to go. It does not stop with a moratorium at the end of 3 years. At the end of 3 years the moratorium would continue if in the meantime a State had regulated the business to any extent whatever. That would defeat the Supreme Court decision.

MR. McCARRAN. The moratorium would not be continued; but if in the meantime the States themselves had regulated the

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56. 91 Cong. Rec. 1396 (1945).
57. 91 Cong. Rec. 1442 (1945). (Emphasis added.)
58. 91 Cong. Rec. 1443 (1945). (Emphasis added.)
business of insurance, the Sherman and Clayton Acts and the other acts would not become effective.\textsuperscript{59}

Senator McCarran’s statement can only be taken as a reassuring reply to Senator Pepper’s inquiry of concern.

Probably the most clearly expressive passage in the entire Senate debate as to the meaning of the section 2(b) proviso, which quite strangely I have not found cited in any of the literature considering this problem, is the following exchange:

\begin{quote}
\textbf{MR. MURDOCK.} Mr. President, does the Senator from Maine take the position that, under the conference report, it becomes necessary for the Congress to act again affirmatively subsequent to any State action taken?

\textbf{MR. WHITE.} Not at all; that is not my view of the matter at all. My view is that the State may \textit{regulate}. If, however, the State goes \textit{only to the point indicated}, then these Federal statutes apply throughout the whole field beyond the scope of the State’s activity.

\textbf{MR. McCARRAN.} That is a \textit{correct} statement.

\textbf{MR. MURDOCK.} Without any subsequent action on the part of Congress?

\textbf{MR. WHITE.} Without any subsequent action on the part of Congress.

\textbf{MR. MURDOCK.} I think that therein lies a \textit{very important feature} of this whole matter. I agree thoroughly with the Senator from Maine that insofar as the States step into the picture affirmatively and act by \textit{regulation}, they may do so. As the Senator from Wyoming has said, we convey no authority, we simply recognize their right to \textit{regulate}. Insofar as they fail to \textit{cover the same ground} covered by the Sherman Act and the Clayton Act, those acts become effective again.

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\textbf{MR. BARKLEY.} I should like to ask, in this connection, whether, where States \textit{attempt to occupy} the field — but do it \textit{inadequately} — by going through the \textit{form of legislation} so as to deprive the Clayton Act, the Sherman Act, and the other acts of their jurisdiction, it is the Senator’s interpretation of the conference report that in a case of that kind, where the legislature fails \textit{adequately} even to deal with the field it attempts to cover, these acts still would apply?

\textbf{MR. McCARRAN.} That is my interpretation.\textsuperscript{60}
\end{quote}

\textsuperscript{59} \textit{Ibid.} (Emphasis added.)
\textsuperscript{60} 91 \textit{Cong. Rec.} 1444 (1945). (Emphasis added.)
Many other instances from the legislative history could be cited, but those above should suffice.

4. Extracurricular Statements by Key Congressmen.

Several statements made outside the floor debates by Congressmen responsible for the McCarran-Ferguson Act are extremely helpful. Congressman Sumners of Texas, Chairman of the House Committee on the Judiciary, stated that the states must "demonstrate their ability properly to govern the business of insurance." Senator O'Mahoney, a key figure in this entire sequence of legislative events and a member of the Senate Committee on the Judiciary, referred to the purpose of the new law as "strengthening State regulation and prohibiting the evils of private monopoly." The most significant of these statements came several years later from Senator McCarran himself when he made quite clear that, by the section 2(b) proviso, Congress meant that the states should regulate "affirmatively and effectively." On that same occasion Senator McCarran spelled out what steps in state regulation were necessary in order to exclude the federal antitrust laws: (1) an explicit state law regulating the particular practice; (2) a prohibitory rather than a permissive statute; (3) machinery for regulation; (4) authority specifically assigned for regulation; (5) general standards to govern the discretion of the regulatory authority; and (6) provisions for public notice of violations, hearing and appeal.

5. Congress' Practice in Granting Conditional Exemptions from the Antitrust Laws for Rate Fixing.

Congress' normal practice in granting exemptions to specific regulated or semi-regulated industries from the federal antitrust laws, particularly with regard to inter-company agreements fixing rates, was to exempt such agreements only to the extent that they had been specifically "approved" by an appropriate regulatory agency. In

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65. E.g., 39 Stat. 733 (1916), as amended, 46 U.S.C. § 814 (1958) (shipping rate agreements approved by the Federal Maritime Board). This Congressional policy is also shown by the relatively contemporary (to the McCarran-Ferguson...
light of the various statements made during the debates cited above, it is almost impossible to conclude that Congress was departing from this established policy.

6. The District of Columbia Rate Regulation Bill Precedent.

Early in 1944 Congress had enacted a regulatory fire insurance rate law which was patterned after several of the state insurance rate regulation laws which will be discussed in detail later in this paper. This law provided for fixing of insurance rates by rating bureaus with control over rates through power of approval or disapproval ultimately vested in the Superintendent of Insurance for the District.66 That Congress, in considering the McCarran-Ferguson Act, was fully aware of this earlier legislation and was in fact deriving the meaning of the word "regulated" in the section 2(b) proviso from the basic concept of the District of Columbia rating bill is shown in several statements on the floor of Congress by members of the Senate Committee on the Judiciary. For example:

MR. FERGUSON. . . . I think that if nothing else comes of the hearings before our committee, we may awaken in the minds of the insurance commissioners and the people back home that they ought to spend more time and effort in making rules and regulations which will eliminate any vicious practices from the insurance business. Some of them have taken for granted that if they have an insurance commissioner the business is properly regulated. . . .

MR. O'MAHONEY. Mr. President, I may add to what the able Senator from Michigan has very properly stated that Congress within 6 weeks has passed a bill providing for a rating bureau to be maintained in connection with the operation of insurance in the District of Columbia. That bill was known to us, the pendency of the bill was known, and considered by the members of the subcommittee, although it came out of the Committee on the District of Columbia.

I can say to the insurance industry that the fact that that bill was passed without controversy is in itself an indication that the Congress does not regard, and certainly I do not regard, the institution of a rating bureau as a monopolistic practice. Combinations can be made for wholly beneficial purposes. My

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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. 67

7. The Understanding of the Executive Department and Others as to the Meaning of the Section 2(b) Proviso.

During debate in the Senate on the original version of S. 340 Senator Radcliffe called attention to a letter written to him by President Roosevelt in response to an inquiry as to the government's intentions regarding direct federal regulation of insurance. The President's letter of January 2, 1945, read in part as follows:

But there is no conflict between the application of the antitrust laws and effective State regulation of insurance companies, and there is no valid reason for giving any special exemption from the antitrust laws to the business of insurance. The antitrust laws prohibit private rate fixing arrangements between insurance companies and acts of boycott, coercion, or intimidation. The antitrust laws do not conflict with affirmative regulation of insurance by the States such as agreed insurance rates if they are affirmatively approved by State officials. 68

Also most significant is the statement made by President Roosevelt on signing the McCarran-Ferguson Act into law:

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. 69

A statement to the same effect was made by the then Attorney General Biddle, and similar interpretations have been voiced subsequently by various Department of Justice and other government officials. 70

67. 90 Cong. Rec. 6627 (1944). (Emphasis added.) See also 90 Cong. Rec. 6540 (1944) (statement of Mr. Anderson) (He was the author of the District of Columbia rating bill); 91 Cong. Rec. 1481 (1945) (statement of Senator Ferguson).

68. The letter is reproduced in full at 91 Cong. Rec. 482 (1945). (Emphasis added.)


This view has also been adopted by representatives of the insurance industry, by various insurance commissioners, and by the large majority of independent commentators who have studied the question.

8. Previous Decisions of the Supreme Court.

Apparently the basic concept of the section 2(b) proviso of the McCarran-Ferguson Act was derived from a ferry regulation statute passed by the first Congress which is considered as having established the so-called "congressional consent to state regulation" doctrine, but judicial decisions interpreting that statute do not appear to have considered the instant question. Nor are certain decisions arising under the somewhat similar Federal Power Act very helpful, although cited by the F.T.C. in its brief before the Supreme Court

Antitrust Division. See also Michels, Insurance — The Case Against Broad Exemption from the Antitrust Laws, 20 Fed. B.J., 66, 72 (1960). The author was then Special Assistant to the General Counsel, F.T.C.

71. Keesling, The Impact of the Sherman Act on Insurance, 1944 American Life Convention Proceedings 70, 74. The author was then President and General Counsel of the West Coast Life Insurance Company.


74. The statute in question is 1 Stat. 54 (1789), 46 U.S.C. § 211 (1958), in which Congress declared that pilotage should continue to be regulated by state laws until further provision was made by Congress. This was the statute upheld in the famous case of Cooley v. Board of Wardens, 53 U.S. (12 How.) 299 (1852). It appears that the section 2(b) proviso of the McCarran-Ferguson Act was based upon this early statute as the result of a suggestion made by Thomas I. Parkinson, who had worked at the Columbia Law School on a project involving the "congressional consent" doctrine. Parkinson was later president of the Equitable Life Assurance Society. See Dowling, supra note 73, at 111. For a detailed examination of the congressional consent doctrine as such, see Note, Congressional Consent to Discriminatory Legislation, 45 Colum. L. Rev. 927 (1945). The doctrine appears to sustain what would otherwise be discriminatory state statutes taxing insurance, such as higher taxes on foreign than on domestic insurance companies, "realtiatory" tax laws, and laws granting a lower tax rate if a certain proportion of assets attributable to policies issued in a particular state is invested in that state.
in the National Casualty and American Hospital & Life cases on the McCarran-Ferguson Act question, because the particular statutory provision there involved was the result of a specific contrary judicial decision. It is also frequent practice to cite certain state decisions which have given definitions for the term "regulate," but these decisions are not at all helpful because they only determine that the term includes the power to issue detailed rules and regulations. Our problem, of course, is whether the term includes an obligation to that effect.

Strong additional support for the broader view of the word "regulated" can be drawn from Parker v. Brown, a Supreme Court decision holding that a mandatory state program to control production and distribution of raisins exempted the participants from the federal antitrust laws. The state program there upheld involved detailed state administrative regulation and enforcement machinery and elimination of price competition. The debates in Congress leading up to the McCarran-Ferguson Act show repeatedly and clearly that this decision, then quite recent, was heavily relied upon as the basis for partial and conditional exemption of insurance rate making from the federal antitrust laws. Also helpful is another Supreme Court decision holding that sales of natural gas by an interstate pipeline carrier directly to industrial consumers, though in interstate commerce, are subject to state regulation. This latter case even drew an analogy to the McCarran-Ferguson Act and concluded: "The Natural Gas Act created an articulate legislative program based on a clear recognition of the respective responsibilities of the federal and state regulatory agencies. It does not contemplate ineffective regulation at either level."

75. Connecticut Light & Power Co. v. F.P.C., 324 U.S. 515, 527 (1945); United States v. Public Utilities Comm'n, 345 U.S. 295, 300-11 (1953), both construing § 201(a) of the Federal Power Act, 49 Stat. 847 (1935), 16 U.S.C. § 824(a) (1958). These cases were cited as authority by the F.T.C. in the National Casualty and American Hospital & Life cases. See Brief for the Petitioner, p. 50. The Supreme Court's decision on the question now under consideration may be attributable, at least in part, to inadequate presentation in the F.T.C. brief of the materials available in support of its position.

76. State ex rel. Hollywood Jockey Club, Inc. v. Stein, 133 Fla. 530, 539-45, 182 So. 863, 867-69 (1938); Van Ingen v. Hudson Realty Co., 106 App. Div. 444, 448, 94 N.Y. Supp. 645, 648-49 (1905); These cases were, for example, cited by the F.T.C. in support of its interpretation of the section 2(b) proviso in F.T.C. Press Release and Memorandum, April 28, 1950, p. 6 (a comprehensive survey of state insurance regulatory laws).

77. 317 U.S. 341 (1943).

78. E.g., 91 Cong. Rec. 1480 (1945) (statement by Senator O'Mahoney).

D. Other Restrictive Practices Treated the Same.

Fourth, the congressional intention to exempt rate making or price fixing from the federal antitrust laws only to the extent that such practices were specifically and affirmatively approved or controlled by the state insurance commissioners was clearly extended to restrictive practices subject to antitrust laws other than the Sherman Act — to the Clayton Act, the Federal Trade Commission Act and the Robinson-Patman Act, although detailed consideration was not given to each of those practices.

Section 4(a) of S. 340, as originally submitted, to the Senate and first passed by both the Senate and the House, specifically suspended application of both the Sherman and Clayton Acts to the business of insurance only for the moratorium period. However, section 3 of that same bill expressly exempted the insurance business from the Federal Trade Commission and Robinson-Patman Acts without any limit of time or other qualification. This complete exemption troubled a number of members of the House when S. 340 was originally debated. For example, Mr. Cochran said to Mr. Walter:

The gentleman certainly does not want to stand on the floor of this House and tell the Members that he is in favor of insurance companies or insurance brokers putting out false advertising in connection with the conduct of their business.

To Mr. Walter's reply that "we" were not concerned with that sort of thing, Mr. Cochran retorted: "I, as one Member, will not vote for the moratorium if you leave section 3 in the bill." At least three other members of the House also questioned the section 3 exemptions. These objections prompted Mr. Kefauver, a member of the House Committee on the Judiciary, shortly before conclusion of debate in the House to express grave doubt as to the wisdom of section 3 and to state:

Also, in conference, I greatly hope that the provisions of section 3 may be included in section 4-a as I do not think at this time we have enough information to justify the permanent exclusion of these two acts insofar as they relate to the business of insurance.

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82. 91 Cong. Rec. 1086 (1945).
83. 91 Cong. Rec. 1089 (1945) (statement by Mr. Anderson); 91 Cong. Rec. 1089 (1945) (statement by Mr. Patman); 91 Cong. Rec. 1091 (1945) (statement by Mr. Bailey).
84. 91 Cong. Rec. 1092 (1945).
The Conference Committee apparently adopted this view since, as pointed out earlier, the Federal Trade Commission and Robinson-Patman Acts were included in the Conference Committee version of the bill as part of the moratorium provision which had now become section 3(a). At the same time the Federal Trade Commission Act, as amended, was specifically included in the new section 2(b) proviso. It seems almost impossible to argue that the two additional antitrust statutes would have been included in both the section 3(b) moratorium and the section 2(b) proviso subject to an interpretation different from that clearly intended with regard to the two statutes which had been included in the moratorium provision from the beginning. The impossibility of this argument is confirmed by the repeated references to the “Sherman Anti-trust Act, the Clayton Act, and the other acts” in the Senate discussion of the meaning of the word “regulated” in the section 2(b) proviso as reported by the Conference Committee.

E. Conclusion.

There would seem to be little question that something more than mere legislation is required of the states under the section 2(b) proviso of the McCarran-Ferguson Act if they are to avoid the application of the federal antitrust laws, even absent any change in the present form of that Act. It also seems fairly clear that the required state regulation, which might be accomplished either through direct administrative supervision or through application of state antitrust laws, must meet rather definite and workable standards. The following would seem to be the minimal requirements:

1. Specific statutory provisions paralleling the provisions of the federal antitrust laws and covering the same specific areas such as cooperative rate making, mergers, interlocking directorates and price discrimination.

2. Administrative agencies and machinery authorized and actually established to administer and enforce these laws. Such agencies would, of course, have to be adequately financed and staffed.

85 The failure to refer to the Robinson-Patman Act by name in the section 2(b) proviso, as was done in the section 3(a) moratorium provision, raises a nice question whether the Robinson-Patman Act is covered by the section 2(b) proviso. The NAIC thought so on the ground that the Robinson-Patman Act was, at least in part, an amendment of the Clayton Act, and the section 2(b) proviso does refer to the Clayton Act “as amended.” 1947 NAIC PROCEEDINGS 183. See also Stone & Campbell, Insurance and the Robinson-Patman Act, 1949 INS. L.J. 533, 555-56. For a contrary view, see Glassie, Insurance and the Robinson-Patman Act: Revisited, 1957 INS. L.J. 85, 96-100.

86 See, e.g., notes 58 and 60 supra and accompanying text.
3. Provision for bringing suitable legal or administrative proceedings, with power to conduct investigations, hold hearings, issue appealable cease and desist orders, and impose fines and other suitable penalties, such as revocation of a license to do business.

IV.

HOW EFFECTIVE IS STATE REGULATION OF INSURANCE?

If Congress, in the section 2(b) proviso of the McCarran-Ferguson Act, intended to make the federal antitrust laws applicable to insurance to the extent that that business has not been affirmatively and effectively regulated by the states themselves, we must next inquire into the second problem presented to the Supreme Court in the National Casualty and American Hospital & Life cases — to what extent have the states achieved the requisite degree of regulation?

The Supreme Court, of course, considered this issue only with regard to the accident and health insurance advertising problem immediately before it and decided, on its more limited reading of the section 2(b) proviso, that the mere existence of unfair trade practice statutes in the large majority of states, without more, excluded the application of the Federal Trade Commission Act. I do not propose to undertake a detailed examination of the actual enforcement activities of the states against deceptive insurance advertising practices under their unfair trade practice statutes as compared with the effectiveness of enforcement activities of the F.T.C. itself; nor do I propose to examine the quality of state regulation with regard to every possible insurance industry practice which might constitute a federal antitrust violation. Topics such as exclusive channels of distribution, collective refusals to deal, monopoly, mergers, interlocking directorates and price discrimination would each require individual treatment for adequate consideration.

Instead I have chosen to examine closely only two insurance industry practices — one primarily characteristic of fire and casualty insurance, and the other involving both property and life insurance — which, in the absence of effective state regulation, under the interpretation of the section 2(b) proviso advocated above might be regarded as violating existing federal antitrust laws. In order to make this evaluation of state action as realistic as possible, the discussion will focus particularly on Massachusetts law for illustrative purposes.87

87 Massachusetts was selected because of its long history of active supervision of insurance and because it is the domiciliary state of many important insurance companies. For example, in the life insurance field, the John Hancock Mutual Life Insurance Company and the New England Mutual Life Insurance Company of
A. Rate Making or Price Fixing.

Cooperative rate making or price fixing in insurance is characteristic of property insurance rather than of life insurance. Rates, or rather premiums, for the latter form of insurance are fixed by individual companies although, of course, a considerable degree of uniformity is introduced through use of standard mortality tables. Since most rate making problems in property insurance have arisen in connection with fire, rather than casualty, insurance, the discussion which follows will concentrate primarily on fire insurance rates.

Here again a brief historical survey is essential for full understanding of the present problem areas.

1. History.

Joint making of fire insurance rates in the United States began as early as 1806. For the next sixty years, however, fire insurance was marked by extreme competition with predatory rate cutting which resulted in many company failures. The combination of these practices and the disastrous losses following the Civil War led the companies in 1866, as noted earlier, to organize the National Board of Fire Underwriters to serve as a nation-wide cooperative rate-making bureau. However, demoralization in the industry soon led to a new intensive period of rate cutting in the 1870s. During this period local and regional rating bureaus assumed, on a somewhat lesser scale, the rate-making functions previously performed by the National Board. The industry, however, again suffered devastating losses as a result of new conflagrations, particularly the great Chicago fire, which led again to cooperative rate making on a comprehensive scale.

Boston and the Massachusetts Mutual Life Insurance Company of Springfield; in the fire and casualty field, the Liberty Mutual Insurance Company of Boston and the Springfield Fire & Marine Insurance Company of Springfield.


89. Kimball & Boyce, supra note 73, at 547-48.

90. The reasons for the huge fire insurance company losses in the 10 years ending in 1866 are well summarized in a report of the Massachusetts legislature's Committee on Insurance, which considered and rejected action to curb cooperative rate making. The reasons given for the poor industry experience were hasty loss estimates and premium calculations; demoralization and widespread fraud brought on by the Civil War; the general scramble for business in the South during the Reconstruction period; and highly unusual conflagration losses, e.g., the Portland, Maine fire of 1866, which wiped out $3,504,700 of insurance capital in a single day and which alone led to the winding up of many companies. See Mass. S. Rep. No. 385, June 8, 1869.

91. Oviatt, History of Fire Insurance in the United States, in Zartman & Price, Yale Readings in Insurance, Property Insurance, 70, 88-92 (2d ed. 1914); Klitzke, Fire Insurance Rates and the Law, 1956 Ins. L.J. 631, 632. A study made in 1935 listed two national fire insurance industry associations concerned with general supervision over rate making policy, the National Board of Fire Under-
As a consequence, the 1880s found the Western and Southern states attempting to apply their general state antitrust statutes to the insurance price fixing combinations. In some state courts these efforts met with success.\(^92\) In others they did not.\(^93\) Both groups of cases turned in large part on the question whether insurance was an "article" or "commodity," a problem which, as will be seen later, is still of importance under at least one of the present federal antitrust statutes and many of the present state antitrust laws. In some states the issue never rose above contradictory lower court decisions and thus was left in a state of confusion.\(^94\)

Other attacks on these combinations were made under the common law of restraint of trade, again with mixed success.\(^95\) Therefore, the states began to pass specific "anti-compact" laws directed

writers and the Insurance Executives Association. In addition, rates were actually made by the following regional "bureau" organizations, most of which covered more than one state and the makeup of which is substantially the same today, 8 Eastern, 1 Southern, 2 Pacific, and 2 Western, and various state rating bureaus. See WANDER, THE CONTROL OF COMPETITION IN FIRE INSURANCE 17 (1935). This book is an excellent study of the entire history of self-government in the fire insurance industry. Similar rating bureaus exist in the field of casualty insurance, which includes workmen's compensation, burglary, theft and robbery, plate glass breakage, automobile, steam boiler and machinery, and sprinkler leakage, etc., insurance. MICHELBAUCHER, CASUALTY INSURANCE PRINCIPLES, 1-14 (1930). However, in these forms of insurance most bureaus operate on a national basis. MAGEE, PROPERTY INSURANCE 55 (3d ed. 1955). For a list of the bureaus operating in the various casualty insurance fields, see 1943 Hearings, supra note 23, at 316-17 (testimony of Mr. E. L. Williams, President, Insurance Executives Association). Examples are the National Automobile Underwriters Association and the Sprinkler Leakage Conference.

\(^92\) Beechley v. Mulville, 102 Iowa 602, 70 N.W. 107 (1897); State v. Phipps, 50 Kan. 609, 31 Pac. 1097 (1893); American Fire Ins. Co. v. State, 75 Miss. 24, 22 So. 99 (1897).

\(^93\) Aetna Ins. Co. v. Commonwealth, 106 Ky. 864, 51 S.W. 624 (1899) (alternative holding); Queen Ins. Co. v. State, 86 Tex. 250, 24 S.W. 397 (1893) (alternative holding). The Queen Insurance case, one of the earliest cases involving insurance rate combinations, was either relied upon or distinguished by many of the cases in other states during this same period. It was based principally on the view that insurance was not "trade" or "commerce" and cited Paul v. Virginia on this point. That the status of insurance was not being adequately analyzed is suggested by the decision of a Texas court several years later that the business of an insurance agent was a "trade or profession" for purposes of exempting certain of his office property from an attachment statute. Betz v. Maier, 12 Tex. Civ. App. 219, 33 S.W. 710 (1896).

\(^94\) In Ohio insurance price-fixing combinations were held both to be in violation, State ex rel. Taylor v. Ross, 4 Ohio N.P. (n.s.) 377 (C.P. 1906), and not to be in violation, Foster v. Ankenbauer, 14 Ohio N.P. (n.s.) 637 (C.P. 1913), State v. Bovee, 6 Ohio N.P. (n.s.) 337 (C.P. 1907), of that state's general antitrust statute.

expressly at rate-making combinations in insurance.\textsuperscript{98} Convictions under these statutes were readily obtained and confirmed.\textsuperscript{97} And, although some lower federal courts thought otherwise, the United States Supreme Court viewed these new statutes as perfectly constitutional.\textsuperscript{98} Not to be outdone in ingenuity, the fire insurance companies promptly abandoned their formal rating bureaus and joint organizations and began to “subscribe” to “private rating services.” The employees of these organizations were former employees of the rating bureaus; the old rate books were still used; but the new rates were viewed as “advisory” only and not binding on any particular company. Of course, all companies observed them.\textsuperscript{99} The courts, however, refused to be fooled by the veneer and regularly invalidated these groups as well under the anti-compact laws.\textsuperscript{100} One of these private rating services, which was euphemistically described as the “Social Club of St. Joseph, Mo.,” was bitingly evaluated by the Supreme Court of Missouri as “a plain, palpable, but bungling, pool, trust, agreement, combination, confederation and understanding organized to evade the antitrust laws of Missouri but wholly inefficient for such a purpose.”\textsuperscript{101} Such company “ruses” even led some states to pass statutes specifically forbidding evasion of the anti-compact statutes by the use of “rate books” or “advisory” organizations. This caused the companies to retaliate by simply withdrawing from the state concerned and ceasing to write new business there.\textsuperscript{102}

\begin{small}
\begin{itemize}
\item \textsuperscript{96} The first such law was apparently Ohio’s in 1885. Brearly, \textit{op. cit. supra} note 88, at 289. Between 1885 and 1912 some 22 other states enacted statutes of this type, including, in order of enactment, New Hampshire, Michigan, Kansas, Georgia, Maine, Missouri, Iowa, Alabama, Nebraska, Wisconsin, Virginia, South Carolina, South Dakota, Texas, Arkansas, North Carolina, Tennessee, Mississippi, Oregon, Washington, Arizona and Louisiana. See United States v. South-Eastern Underwriters Ass’n, 322 U.S. 533, 555 n.43 (1944).
\item \textsuperscript{97} In re Pinkey, 47 Kan. 89, 27 Pac. 179 (1891); State ex inf. Crow v. Aetna Ins. Co., 150 Mo. 113, 51 S.W. 413 (1899); State v. American Sur. Co., 91 Neb. 22, 135 N.W. 365 (1915), \textit{setting aside earlier contrary opinion}, 90 Neb. 154, 133 N.W. 235 (1911).
\item \textsuperscript{99} Bohlinger, \textit{The Impact of the Federal Antitrust Laws Upon Insurance Rates in the United States}, an address before the Insurance Conference, Munich, Germany, Dec. 11, 1956, p. 3. The author is a former Superintendent of Insurance of New York. A copy of the address is on file at the Insurance Library Association of Boston.
\item \textsuperscript{100} E.g., Hartford Fire Ins. Co. v. Raymond, 70 Mich. 485, 38 N.W. 474 (1888); \textit{McK. Att’y Gen. Ann. Rep.}, Opinion No. 4, p. 27 (1888).
\item \textsuperscript{101} State \textit{ex rel.} Crow v. Fireman’s Fund Ins. Co., 152 Mo. 1, 52 S.W. 595 (1899).
\item \textsuperscript{102} Events in South Carolina illustrate the confusion created. In 1916 the legislature enacted an anti-compact law specifically forbidding use of rate books and advisory organizations. This was the Laney-Odum Bill, 29 Stats. of S.C. No. 371 (1916). The foreign fire insurance companies replied by withdrawing from the state, \textit{96 Spectator} 210 (1916), and suing to enjoin enforcement of the statute, the validity of which was upheld in court, Henderson v. McMaster, 164 S.C. 268, 88
\end{itemize}
\end{small}
State curbs on rate-fixing combinations were not, however, limited to direct methods. Statutes were passed and upheld which imposed twenty-five per cent penalty charges on the amount of loss payable to the insured if the fire insurer was a member of a rate-fixing combination. Normal policy terms protecting the insurance company, such as proof of loss requirements, were altered and even entire policies voided. Some state statutes automatically revoked certificates of authority to do business.

Because of the great disruption of normal insurance services to the general public caused by the legal assaults on the rating bureaus, it was soon suspected that attempting to eliminate the rate-fixing combinations might not be the best solution to the problem. Serious general doubt was expressed as a result of exhaustive investigation into fire insurance practices by the Merritt Committee in New York in 1911 as a result of which New York passed one of the early laws specifically authorizing the fixing of fire insurance rates by the rating bureaus with general supervision to be exercised by the state insurer. 

S.E. 645 (1916). Because of the injury to a public unable to purchase insurance, a new statute authorizing the rating bureaus under general state supervision was enacted in 1917, 30 Stats. of S.C. No. 183 (1917). The companies then entered the state and began to write business again. Eastern Underwriter, Mar. 2, 1917, p. 16, col. 1. These statutes were upheld both by state courts, Aetna Ins. Co. v. Kennedy, 161 Ala. 600, 50 So. 73 (1909); Fireman's Fund Ins. Co. v. Hellner, 159 Ala. 447, 49 So. 297 (1909); and by the United States Supreme Court, German Alliance Ins. Co. v. Hale, 219 U.S. 307 (1911) (construing the Alabama statute), against constitutional objections. However, these statutes being considered penal in nature, the situations in which they would be applied were carefully limited. See Southern States Fire Ins. Co. v. Kronenberg, 199 Ala. 164, 74 So. 63 (1917) (no penalty where company conducted only incidental correspondence with rating bureau).

Aetna Ins. Co. v. Kennedy, 161 Ala. 600, 50 So. 73 (1909); Continental Ins. Co. v. Parkes, 142 Ala. 650, 39 So. 204 (1907).

But enforcement of this statute was refused against an insurance company suing under a right of subrogation from its insured under the policy because that right was considered as merely derivative and unrelated to the business of the rate-making combination. Freed v. American Fire Ins. Co., 90 Miss. 72, 43 So. 947 (1907).


Kansas had apparently passed the first new statute in 1909, under which the insurance commissioner was given the power to review required filings of proposed rates and to order reductions whenever he felt those rates excessive. Kan. Sess. Laws 1909, ch. 152. However, the first really exhaustive analysis of the defects of the anti-compact laws and the merits of cooperative action under state supervision appears in 1 Report of the Joint Committee of the Senate and Assembly of the State of New York Appointed to Investigate Corrupt Practices In Connection with Legislation and the Affairs of Insurance Companies Other than Those Doing Life Insurance Business, N.Y. Leg. Doc. No. 30, 134th Sess. 41-51, 76-78 (1911). This is the Merritt Committee Report, which was published in three volumes.
Doubt as to the adequacy of mere general supervision of the bureau activities led to a further investigation by the Lockwood Committee in New York in 1922, as a result of which the New York rating law was amended to provide for closer state control over rating bureaus and for regular reviews of rates proposed. Statutes of this same general type had already been held constitutional by the United States Supreme Court. Under this rate "approval" type statute it was soon established that the rates fixed were binding as to all companies unless an individual company could show that the rates were confiscatory as to it, and that any insurer might join the rating bureau for rating purposes but need not agree to be bound by any other rules of the associations, such as those concerning levels of commissions or number of agencies. At the same time other states, notably Texas, delegated outright rate-setting power to the state supervisory authorities, and rates so established were held to be absolutely binding on all insurers without exception.

Despite these settling statutory developments in some states, in others the battle under the state anti-compact and antitrust laws continued. As late as 1934 Florida held that insurance was not an

109. Intermediate Report on the Joint Legislative Committee on Housing (Lockwood Committee), Leg. Doc. No. 60, pp. 199, 224, 251 (1922). This report led to amendment of N.Y. Ins. Law § 181.
114. For example, the Mississippi Inspection and Advisory Rating Bureau was the cause of considerable litigation in that state. At first a suit under the antitrust statute was dismissed for failure to prove the agreement to fix rates alleged. Miller *ex rel. State v. Fidelity Union Fire Ins. Co.*, 126 Miss. 301, 88 So. 711 (1921). Then the Bureau was found in violation of the antitrust law over a defense by the companies that only the insurance commissioner, and not the State Revenue Agent, could bring suit under the antitrust statute against insurance companies. Aetna Ins. Co. v. Robertson, 126 Miss. 387, 88 So. 883 (1921). Penalties ranging from $1350 to $195,875 and totaling $8,055,075 were upheld against the 140 foreign fire insurance companies held guilty of violating the antitrust statute. Aetna Ins. Co. v. Robertson, 131 Miss. 343, 94 So. 7 (1922), cert. denied, 263 U.S. 698 (1923). The last Mississippi Supreme Court opinion contains a valuable history of the South-Eastern Underwriters Association. See 131 Miss. at 390-97, 94 So. at 14-17. The Robertson cases are discussed in detail in Watkins, *The Fire Insurance Anti-Trust Suit in Mississippi*, 13 VA. L. REV. 108 (1926).
article of “merchandise” within that state's antitrust statute. 116 By the time of the South-Eastern Underwriters decision in 1944, however, the tide in the states had shifted. Some twenty or thirty states had by then enacted some form of rate supervision law, and a number of the specific insurance anti-compact laws had been repealed. 118

After South-Eastern Underwriters and passage of the McCarran-Ferguson Act the states undertook to revise and extend their supervision of rate making so as to insure definite exemption of the rate-making bureaus from the federal antitrust laws. Separate model bills for (1) fire, marine and inland marine, and (2) casualty and surety insurance rate making were prepared by a special All-Industry Committee, composed of the various insurance trade associations, in cooperation with the National Association of Insurance Commissioners. 117 These model bills provided for rate filings by the bureaus with the insurance supervisory authority in each state. The commissioner was given power to review the filings, to hold hearings and to order reductions in rates filed. If he failed to act within thirty days of filing, the rates were to be “deemed” to have become effective. Provision was made for appeal from the commissioner’s orders and for independent filings by non-bureau companies. A “deviation” procedure was also to be established within each rating bureau, and members’ requests for deviations from bureau rates could be pursued before the commissioner if turned down in the bureau itself. The standard for the commissioner’s review of rates was simply that they should not be unfair, excessive or discriminatory. 118 By 1950 every state, the District of Columbia, Hawaii and Puerto Rico had enacted

117. The text of the model Fire, Marine and Inland Marine Rate Regulatory Bill (May 18, 1946 draft) appears at 1946 NAIC PROCEEDINGS 410. The text of the model Casualty and Surety Rate Regulatory Bill (May 18, 1946 draft) appears at 1946 NAIC PROCEEDINGS 397. The All-Industry Committee was organized in May, 1945, at a joint meeting of the Federal Legislation Committee of the National Association of Insurance Companies and industry representatives. The following insurance trade associations were represented on the Committee: American Institute of Marine Underwriters, American Life Convention, American Mutual Alliance, American Reciprocal Association, Associated Factory Mutual Fire Insurance Companies, Association of Casualty and Surety Executives, Bureau of Personal Accident and Health Underwriters, Health and Accident Underwriters Conference, Inland Marine Underwriters Association, Insurance Executives Association, Life Insurance Association of America, National Association of Casualty and Surety Agents, National Association of Independent Insurers, National Association of Insurance Brokers, National Association of Mutual Insurance Agents, National Board of Fire Underwriters, National Fraternal Congress of America, and the Surety Association of America. 1 Richards, INSURANCE 217, n.10 (1952).
118. The provisions of the statutes patterned after the model bills are discussed and described in detail in Donovan, State Regulation of Insurance, 1956 INS. L.J. 11; 1950 A.B.A. INS. LAW SECT. PROCEEDINGS 334; Bohlinger, supra note 99 at 7-8.
both fire and casualty rating laws, most separately and some in combination, generally patterned after the model bills prepared by the All-Industry Committee and the NAIC.\textsuperscript{119} In a few states, notably California, the rating laws do not require rate filings in advance, and bureau members are expressly prohibited from agreeing to adhere to rates fixed by the bureau. Rates are allowed to become effective, with authority in the commissioner to order a review and substantiation of rates at any time thereafter.\textsuperscript{120} In a few other states, particularly Texas, the state continues to fix rates directly.\textsuperscript{121}

Apparently the enactment of these various types of rating laws led immediately to substantial rate reductions in a number of states.\textsuperscript{122}

2. \textit{Weaknesses in Current State Regulation of Rates.}

Despite these intensive legislative efforts, recently various problems have become apparent which raise considerable question as to the effectiveness of these statutes, particularly the All-Industry laws, in securing the best possible insurance coverage for the public at the lowest possible rates.


The rather indefinite statutory standard that rates should not be unfair, excessive or discriminatory may leave too much discretion in the administrative authority. Surprisingly, despite the obviously large number of reviews which insurance commissioners necessarily have made of rate filings, there has been almost no judicial statement as to what the specific content of this statutory standard should be. There are, however, serious indications that politics and various irrational factors have influenced the making of rates in many cases, resulting in rates which from a strictly competitive point of view may either have been too high or even, quite often, artificially low.\textsuperscript{123}


\textsuperscript{120} \textsc{Cal. Ins. Code} §§ 1850-1860.3. See also \textsc{Idaho Code Ann.} §§ 41-200 — 2018 (1959 Supp.).

\textsuperscript{121} \textsc{Tex. Ins. Code Ann.} art. 5.25 (1952).

\textsuperscript{122} Business Week, May 28, 1949, p. 24, col. 2; June 18, 1949, p. 28, col. 3; July 2, 1949, p. 54, col. 3. The various types of present rating laws are reviewed and compared in Matthias & Robison, \textit{State Regulation of Insurance Rates}, 1952 \textsc{Ins. L.J.} 537; \textit{Note, The Regulation of Insurance Rates}, 47 \textsc{Colum. L. Rev.} 1314 (1947).

\textsuperscript{123} For a case demonstrating the inexactness of insurance rate filing reviews under the "model laws", see National Bureau of Cas. Underwriters \textit{v. Superin-
b. Domination by Rating Bureaus.

The rating bureaus appear to play too dominant a role in the entire rate-making process. This will be made apparent in the consideration of deviations and independent filings below. The bureaus represent the large majority of fire and casualty insurance companies, with their membership being drawn mostly from stock companies. Many mutual companies, direct writing companies and “independents” are not members. There are some indications in judicial decisions, 124 and it is asserted by some industry observers, 125 that the bureaus’ stranglehold has been weakened in the past few years. However, as will be seen, the bureaus still exert a very strong influence over rates. Their lack of tolerance for any independent action is illustrated by the bill recently passed by the New York State Assembly aimed at curtailing the highly successful direct writing or mail order automobile insurance business conducted by Allstate Insurance Company. Bureau members reportedly resent the attractiveness to the public of lower rates charged by Allstate, which apparently result from a tougher claims policy and, as will appear below, a lower commission schedule. 126

tendent of Ins., 6 App. Div. 2d 73, 174 N.Y.S.2d 836 (1958), rev’d as moot 6 N.Y.2d 842, 160 N.E.2d 84 (1959). There the Superintendent challenged a filing for increased auto insurance rates on the grounds that the loss experience covered only 2 instead of 5 years, that the administrative expense loading factor was too high and that the entire compulsory automobile insurance law system was too new to justify any increase in rates based on alleged experience to date. The court reversed the Superintendent because his findings were not based on substantial evidence and indicated that review of rates required specific findings in statistical and money factor terms by the reviewing authority. As will be demonstrated in the discussion which follows, the present structure of rate making in property insurance would hardly appear to support such a standard. On the general problem of the standards for casualty rate making, see Kulp, Casualty Insurance 573-607 (3d ed. 1956).

124. For example, bureau rate filings proposing a reduction in basic fire insurance rates and an increase in extended coverage rates have been disapproved, and the Commissioner’s decision upheld. Fire Ins. Rating Bureau v. Rogan, 4 Wis. 2d 558, 91 N.W.2d 372 (1958). See also Cravey v. Southeastern Underwriters Ass’n, 214 Ga. 450, 105 S.E.2d 497 (1958) where bureau rates were suspended.


126. N.Y. Times, March 19, 1959, p. 1, col. 6 (city ed.). The strength of the bureaus and the bureau member companies is not fairly indicated just by their rate-making activities through the bureaus. The stock fire insurance companies also derive considerable influence from regional and local underwriters associations which control the sale and distribution of fire insurance. These groups have traditionally been composed of the agents representing the stock companies and have employed a number of “rules” to limit competition. Fortune Magazine, The Underwriters, July 1950, p. 77, at p. 110. For, example, the “in-or-out” rule provides that an association member cannot represent a company which is represented in the same locality by a non-member agent. This rule effectively prevents a particular insurance company from placing or “planting” policies through a non-member agent. For a description of the operation of this particular rule, see Cline v. Insurance Exchange of Houston, 154 S.W.2d 491 (Tex. Civ. App. 1941), aff’d, 166 S.W.2d 677 (Tex. Sup. Ct. 1942). The various restrictive rules of these local under-
c. Deviations Difficult.

Suggestion that the role of the bureaus has been diminishing has largely been based on an alleged trend toward a more ready granting of deviations from bureau rates to bureau members.\textsuperscript{127} It is also claimed, however, that deviations are still made too difficult.\textsuperscript{128} Despite the fact that the right to file deviations was clearly established under state rating statutes even prior to the McCarran-Ferguson Act,\textsuperscript{129} there is considerable evidence to support the charge against the bureaus. Most deviation requests granted by insurance commissioners have been dragged through the courts by bureau members to the great harassment of companies attempting to provide lower rates.\textsuperscript{130} Illustrative of the difficulties is the denial by the courts of an Allstate Insurance Company deviation request although the bureau concerned offered no evidence whatever in opposition to Allstate's petition.\textsuperscript{131}

d. Independent Filings Fought.

Closely connected with the deviation problem is the ability of companies not members of bureaus to make "independent filings." Recently a number of companies, because of difficulty in obtaining deviations, have withdrawn from the bureaus and have pursued the independent filing route.\textsuperscript{132} Several recent cases in state courts, particularly in New York, have upheld the rights of independents.\textsuperscript{133}


133. Cullen v. Holz, 2 Misc. 2d 486, 152 N.Y.S.2d 163 (Sup. Ct. 1956). This particular case involved an independent fire insurance dwelling rate filing by Allstate which was ultimately approved with rates 15% below those of the bureau.
even to the extent of their becoming only partial subscribers to bureaus and then using the bureau rate and statistical material as the basis for their own independently computed and filed rates. That the services of the rating bureau should be available to any insurer was established early by state judicial decision. The right of partial subscribership, denial of which the Department of Justice has warned might be considered a violation of the federal antitrust laws, of course, goes far to break down the rating bureau as a compulsory unit and to make it more like a statistics gathering-type trade association. Bureau companies have, of course, objected on this very ground to its use only for certain purposes by what are essentially independent companies.

e. Unscientific Rate-Making Procedures.

Fire insurance rate making in particular is certainly not a scientific matter but rather is an exercise in "educated judgment." This leads one to suspect that freer competition in rates would result if that "judgment" were not exercised collectively. Apart from the question of collective decision, the rate-making process itself may be questioned as harboring many questionable features, features which might be improved under the aegis of genuine competition among companies.

These features can be understood only against a general background understanding of the fire insurance rate-making process. Rates are of two general types (1) class, minimum or tariff rates used for types of risk, e.g., private residences, which it is uneconomical to inspect individually, and (2) schedule rates, which are characteristic of larger industrial risks where inspection is not only feasible but necessary. Schedule rating, which is by far the more important from the point of


view of premium volume, calls for use of an assumed basis rate to which
credits or charges are made for favorable or unfavorable features of
the risk, such as sprinklers, fire escapes, wood construction, etc. Basis
rates have been drawn up for various classes of structures, and the
number of these classes has recently been expanded to 110 from the
previous 26.

The basis rates (and the class rates as well) really comprise
separate elements: (1) losses, (2) expenses, (3) catastrophe losses, and (4) underwriting profit. These various
components of the basis rate are determined as follows. The element for
losses is determined by a loss ratio of incurred losses to earned pre-
miums. The necessary loss information is apparently gathered com-
pletely separately by different industry associations for the stock com-
panies, the mutual companies and the independents, and the informa-
tion is normally at least one year old. The second element, expenses,
is determined by means of an expense ratio (normally 40-50 per cent)
which includes charges for commissions to agents (to be considered
in detail below), loss adjustment expenses, taxes, license costs, fees,
etc. The third element, similar to a contingency reserve, is now com-
puted at one per cent of premium. The fourth element has been limited
by NAIC rule to five per cent since 1921.137

For several reasons it seems highly doubtful that this rate-making
structure can produce a genuinely accurate and equitable premium rate.

(1) Schedules Not Uniform. The schedules used in the schedule
form of rating, which is the more significant, are by no means uniform
throughout the country, and therefore the loss data derived from them
cannot be correlated. This means that the much greater potential
degree of accuracy in computing the loss ratio element of premium
which would be possible if nation-wide experience could be pooled
is sacrificed. It also means that rates may vary strikingly in different
sections of the country for the identical risk. Illustrative of the diffi-
culties is the fact that the Analytic System (originated in 1901) is
used in some 28 states, mostly in the Midwest and some in New Eng-
land. On the Eastern seaboard generally the Universal Mercantile
Schedule (originated in 1893) is used. The method of rate computa-
tion used in each of these systems or schedules is completely
different. And various other local areas in the country use yet other

137. The basic material on the rate-making process has been drawn largely
from Hardy, The Making of the Fire Insurance Rate (1926); Mowbray &
Blanchard, Insurance 353 (4th ed. 1955); 2 Whitney, Antitrust Policies —
American Experience in Twenty Industries 351-55 (1958); Klitzke, Fire
types of schedules.\textsuperscript{138} Although it is claimed by some observers that fire insurance rate-making processes have been improving in recent years,\textsuperscript{139} both industry representatives and state insurance commissioners have vigorously and frankly attacked the overlapping and contradictory schedule systems as completely precluding application of scientific methods of premium computation to fire insurance.\textsuperscript{140} This criticism would appear to be quite justified.

\textbf{(2) Underwriting Profit Excluded.} Although the problem has recently come in again for searching examination by both the NAIC and various individual states, it is still practice in fire rate making to compute rates solely on the basis of underwriting profit. Investment income is not included, whether from investments of required reserves, capital gains, or simply the interest on surplus.\textsuperscript{141} Prior to the general enactment of the All-Industry model rating bills after 1945, courts in the various states had split over this question.\textsuperscript{142} It seems highly questionable whether the current practice should be continued. Apparently the underlying theory is that a fire insurance company acts like two separate businesses — with the policyholders being dealt with from the underwriting side and the investment income

\textsuperscript{138} HEUBNER & BLACK, PROPERTY INSURANCE 187-204 (4th ed. 1957); Klitzke, supra note 137, at 640-42. The difference in rate-making methods, simply between the two major schedule systems, is striking. The Analytic System divides cities and towns into 10 groups according to the type of fire protection services available. Then within each city three classes of buildings are set up according to type of construction. Master tables are made up for each combination of these two categories, and these tables provide the "basis rate." Percentage credits and charges for favorable and unfavorable features are then added or subtracted. The Universal Mercantile Schedule, on the other hand, assumes a standard building in a standard city and fixes a basis rate for it of, say, 25¢ per $100 of insurance coverage. Selection of this basis rate is really arbitrary. "Key rates" are then determined for a particular city by adjustments to this basis rate. For a particular risk, monetary (rather than percentage) credits and charges are applied for features of the building, such as occupational use and fire protection. HEUBNER & BLACK, op. cit. supra at 190-91.

\textsuperscript{139} 2 WHITNEY, op. cit. supra note 137, at 351-52.

\textsuperscript{140} National Underwriter, Nov. 28, 1957, p. 13, reporting address by Mr. Ambrose B. Kelley, General Counsel, Factory Mutuals, to the Casualty Actuarial Society of Philadelphia; PINK, THE PROBLEM OF FIRE RATES 13-14 (1942) (the author was then Superintendent of Insurance of New York).

\textsuperscript{141} The insurance industry is not, however, entirely in agreement on this matter. See Kulp, The Rate-Making Process In Property and Casualty Insurance — Goals, Techniques and Limits, 15 LAW & CONTEMP. PROB. 493, 517 (1950); N.Y. Joint Legislative Committee on Insurance Rates and Regulation, Leg. Doc. No. 56, pp. 24-25 (1953).

being reserved, at least in the stock companies, for the stockholders. It would seem that an insurance business is an insurance business and nothing more. Therefore, it would be much more appropriate to include investment income in the rate base.

(3) Commissions Uncontrolled. It is still highly uncertain whether the agents' commission component of the fire insurance rate is subject to any form of state control. As pointed out above, this element comprises a substantial part of the total first year premium. If it is not subject to state control, it certainly should be. Courts over the years have been divided on whether the common law of restraint of trade or antitrust or anti-compact statutes would reach intercompany agreements fixing agents' commissions. Likewise, courts have divided over the question of whether the commissioners' regulatory power over the ultimate rates themselves extended to the commission component of those rates. The net result was that for years, until the McCarran-Ferguson Act, companies collectively agreed upon commissions through the Acquisition Cost Conference device. Supposedly such arrangements have been abandoned since 1945. This does not appear to be the case. A Mississippi court as recently as 1957 had to invalidate a fantastic device for the fixing of agents' commissions under that state's rating statute. And a suit under the Sherman Act filed by an agents' association in California alleging a commission fixing conspiracy by the auto casualty insurance

143. That the companies do take this two-part view of their business, see Fortune Magazine, supra note 126, at 78.
144. For a detailed explanation of this view, see Comment, The Rate Regulation of Fire Insurance Companies, 42 Yale L.J. 107, 110 (1932).
148. Miss. Code § 5825 (1942) (law since 1924) provided that the Insurance Commissioner should each year obtain written opinions from every stock fire insurance company doing business in the state as to the amount of commissions the companies should pay their local agents. The Commissioner would then advise the rating bureau as to the majority opinion, which in turn should fix the commission rate. On protest by the Allstate Insurance Company, which had already obtained approval of a 15% overall rate deviation from the Commissioner and wished to absorb the saving by cutting first year agents' commissions from the bureau "majority" rate of 25% to 15%, the statute was voided as an unconstitutional delegation of state authority to a private group. State v. Allstate Ins. Co., 231 Miss. 869, 97 So. 2d 372 (Sup. Ct. 1957).
companies in that state is now pending. Such a commission fixing agreement would apparently be a per se violation of the Sherman Act under existing authority. And since, as indicated above, a number of states regard the control of commissions as lying outside the power of state regulatory authorities, the section 2(b) proviso of the McCarran-Ferguson Act should be no barrier to application of the federal antitrust statutes.

(4) Agreements on More than “Pure Premium.” The problem of commissions raises another even more fundamental issue with regard to the two elements of the basic fire insurance premium other than the loss ratio element. Even admitting the argument of the companies that the expense and difficulty of compiling accurate loss experience requires some cooperative action with regard to rates, it is indefensible that this cooperative action should extend to those elements of the rate-making process which lie within the control of each company individually. It has been said accurately that insurance companies can truly compete only in three ways — price, product (the policy) and service. As will be seen below, genuine differences in “product” or policy formats or coverages have been inhibited both by state law and by the rating bureaus’ actions. If this is true, then the present practice of agreeing on expense and profit ratios removes the only remaining possible element of competition from the fire insurance business. It seems elementary that rate fixing, if permitted at all, should be limited to the “pure” or loss-experience premium.

f. New Coverages Impeded.

Closely associated with the problem of rates, but nevertheless distinct, is the problem of variations in policy forms and coverages. Every state has a standard fire policy law which sets forth specific clauses which must be included in every fire insurance policy. Considerable variation in indorsements is, however, possible. But these laws, when taken together with the rigidity produced by separate bureaus under the overall direction of different industry associations fixing rates for the several branches of insurance, have

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149. See note 4 supra.
151. Dirlam & Stelzer, supra note 125, at 205.
153. E.g., N.Y. INS. LAW § 168.
154. Patterson, Insurance Law During the War Years, 46 Colum. L. Rev. 345, 346-48 (1946). See also Patterson, EssentialS of Insurance Law 35 (2d ed. 1957).
made very difficult the development of new forms of insurance marketing to meet modern public needs. It has apparently been difficult enough for imaginative companies to secure final approval of new-type policy forms, such as installment policies payable at a discount, which are basic in this consumer credit era. But the much more serious problem arises in connection with the recent development of so-called "multiple coverage" policies which are the product of the "multiple line" or "fleet" companies. These policies, typified by the "Homeowners Comprehensive" policy which combines fire, liability, and other coverages for the home, necessarily cross the tradi-

155. For example, the Insurance Company of North America devised an "Instalment Premium Plan" under which the premium for a three year fire policy could be paid in three annual installments, with the first year's premium to be a full year premium but the subsequent premiums to be only 78% of a full year premium. The INA plan would actually have cost more than the conventional bureau-type instalment plans for three year policies, which charged only 75% of a full year's premium for each year after the first. But the INA plan also offered an "automatic reinstatement clause" with renewed full coverage after any loss, which was contrary to the bureau practice. This INA plan, or some variation of it, was upheld in Arkansas Inspection & Rating Bureau v. Insurance Co. of No. America, 218 Ark. 830, 238 S.W.2d 929 (1951), but invalidated in Virginia Ass'n of Ins. Agents v. Commonwealth, 119 Va. 574, 57 S.E.2d 401 (1949). Approval of the plan also ran into procedural difficulties in Mississippi Ins. Comm'n v. Insurance Co. of No. America, 203 Miss. 533, 36 So. 2d 165 (1948), and in Insurance Co. of No. America v. Commissioner of Ins., 327 Mass. 745, 101 N.E. 2d 335 (1951). This last case held that the statutory "deviation" procedure could not be pursued for approval of the instalment plan because the deviation procedure was designed only for actual rate schedule matters. Contra, Department of Ins. v. Merchants Fire Ins. Co., 222 Ind. 611, 57 N.E.2d 62 (1944); General Ins. Co. of America v. Bowen, 130 Ohio St. 82, 196 N.E. 774 (1935).

156. "Multiple line" companies are those which write insurance in more than one of the three traditional classes, e.g., writing both fire and casualty. "Fleet companies" are the result of the so-called "Appleton Rule" in New York, which arose about 1900 and which divided insurance writing into the three basic classes of life, fire and marine, and casualty and surety and specified further limits on the types of insurance within each of these principal classes which any one company could write. However, the law also allowed 35% of the excess surplus funds of a property insurer to be invested in another insurer. This led to the creation of "fleet" companies, each one ultimately controlled by the same parent and each one writing a different line of insurance. See generally, Winter, Multiple Line Insurance Underwriting, The Company Viewpoint, American Management Ass'n, Ins. Series No. 71, p. 16 (1947). These subsidiary companies are known in the industry as "pups." The "fleet" or "pup" companies apparently also were a response to avoid rules adopted by the local underwriters associations forbidding any association member from taking the agency of any company which already had an agent in a particular city. See Fortune Magazine, supra note 126, at 110. Such rules were held not to constitute common law restraints of trade. E.g., Louisville Bd. of Fire Underwriters v. Johnson, 133 Ky. 797, 119 S.W. 153 (1909). The local underwriters associations (which are briefly described in note 126 supra) also secured state statutes which limited each insurance company to one agent in a particular town or one agent in a city of 50,000 or less and two agents in larger cities. Such statutes were held unconstitutional as contrary to the due process clauses of both federal and state constitutions. Franklin Fire Ins. v. Montana, 37 N.M. 89, 251 Pac. 390 (1926) (statute limiting each company to one agent per city); Northwestern Nat'l Ins. Co. v. Fishback, 130 Wash. 490, 228 Pac. 516 (1924) (statute limiting each company to one agent in cities of 50,000 or less and two agents in larger cities).

157. The "Homeowner's" policy, a recent development combines fire, extended coverage and burglary protection on real and personal property, together with personal liability insurance. This package, through spreading the risk, greater selectivity, more coverage per dollar insured and reduced accounting costs, has pro-
tional three divisions of insurance — life, fire and marine, and casualty and surety. These policies have been made possible at all only by passage in recent years of special "multiple line" statutes permitting companies to write all lines of insurance other than life in a single corporate organization, provided certain minimum capital and surplus requirements are met. However, all the problems have not been solved. The state insurance commissioners are frank to admit that development of these combination policies, with their consequent cost savings to the public, has been delayed because the different branches of the industry cannot coordinate the filings of their various bureaus with regard to them. These new "multiple line" and "combination policy" developments may well necessitate a complete overhauling of the insurance rate-making structure because of consumer demand.

g. Inadequate State Staffs.

Underlying all of the particular problems discussed above is the more basic difficulty that the large majority of state insurance departments simply do not have the budget, facilities or qualified staff with which properly to review rates submitted to them or to undertake the research necessary to improve the present rate-making process.

The functions of the insurance commissioners are extremely comprehensive. They must issue and revoke licenses for insurance companies; license agents and brokers; review company submissions of new policy forms and endorsements; audit companies; supervise underwriting limitations, investment controls and management practices; oversee company withdrawals, rehabilitations and liquidations; and, in some cases, act as state fire marshal. These functions must

duced a policy with a premium 20% cheaper than the total premiums for each of these coverages purchased separately. 2 Whitney, op. cit. supra note 137, at 365. "Extended coverage" is simply a package indorsement attached to a standard fire insurance policy, without any increase in the face value of the policy, to cover other risks such as windstorm, hail, explosion, riot attending strike, civil commotion, falling aircraft, and vehicle and smoke damage. Mager, Property Insurance 215 (3d ed. 1955).

158. Such laws were given impetus by the NAIC in 1943. By 1947 some 33 states, the District of Columbia, Hawaii and the Virgin Islands had passed statutes granting multiple line powers. For a specimen law, see Wis. Stat. Ann. § 201.05 (Supp. 1961). For an analysis of the impact of these laws see Heins, Multiple Line Underwriting and Wisconsin Insurance Laws, 1957 Wis. L. Rev. 563.

159. 2 1958 NAIC Proceedings 404; Dineen, The Rating Problem, 1945 A.B.A. Ins. Law Sect. Proceedings 104, 113 (the author was then Superintendent of Insurance of New York). See the discussion of bureau organization, note 91 supra.

160. Detailed descriptions of the duties and functions of the insurance commissioners in three typical states appear in Faircloth, The Functions and Duties of the Florida Insurance Commissioner, 1953 Ins. L.J. 379; Russell, The State Insurance Department, 7 Okla. L. Rev. 142 (1954); and Note, Administrative Control of Insurance in Kentucky, 27 Ky. L.J. 462 (1939). The most comprehensive general study on this subject ever published is Patterson, The Insurance Commissioner in the United States (1927), which unfortunately is now considerably outdated.
be performed in Utah, for example, with a total staff of nine persons and a budget in 1956 of only $33,274.51. Only four members of that staff perform other than clerical functions, and the staff does not include a trained actuary. Yet, in addition to reviewing an average of twenty new policy forms per day, that staff is expected to make an effective review of premium rate filings.\textsuperscript{161} A recent study of this particular state department concluded that the "... smallness of staff forces him [the commissioner] to rely heavily on the rating bureaus."\textsuperscript{162} It further found that the department generally accepts the filed bureau rates without question and uses them to analyze the rates of non-bureau companies. If the non-bureau rates are "in line" with the bureau rates, they are approved without question. However, substantiation will be required where there is more than a 10 or 15 per cent deviation from the bureau rates.\textsuperscript{163}

These problems of inadequate staff and inadequate supervision are not confined to the smaller states. Even New York state, which is generally regarded as the pacesetter and the strictest state in regulating insurance, has recently displayed its inability to cope with the problems of aviation insurance. During the recent Senate subcommittee hearings on aviation underwriting, evidence was disclosed that the few underwriting syndicates in this field have been agreeing on rates for large hull risks\textsuperscript{164} and engaging in "coordinated" bidding for airport concessions for the sale of airline trip insurance.\textsuperscript{165} It appears that from the beginning all states other than New York have done nothing toward regulating or examining aviation underwriting but have left its supervision entirely up to New York insurance authori-


\textsuperscript{162} Kimball & Hansen, supra note 161, at 448.

\textsuperscript{163} Ibid.

\textsuperscript{164} Reinsurance with several hundred companies is apparently considered essential for such large hull risks as the Boeing 707 commercial jet airliner, for which the prototype required $6.5 million insurance coverage. Apparently the American syndicates are agreeing on rates with their British counterparts who have been brought in because of the large size of these risks. Journal of Commerce, Aug. 7, 1958, p. 2, col. 1.

\textsuperscript{165} Apparently this action has been undertaken in an attempt to exclude certain regular accident and health insurance companies which also write in this field. For example, the two remaining large American aviation underwriting syndicates, Associated Aviation Underwriters and United States Aviation Underwriters, reputedly make "alternate" low bids for airport concessions. And Associated Aviation Underwriters is reported to have joined with Continental Casualty Company's Airport Sales Corporation in selling each other's policies over the counter by reciprocal agreement so as to provide $250,000 maximum coverage per passenger as against the $125,000 available from Tele-Trip, the subsidiary of Mutual of Omaha. Journal of Commerce, Aug. 15, 1958, p. 3, col. 4; Eastern Underwriter, Aug. 15, 1958, p. 1, col. 1.
ties. At the recent hearings representatives of that department confessed unfamiliarity with many of the restrictive industry practices disclosed.

B. Tie-In Sales.

Here historical background is unnecessary. It is enough to state that tie-in sales of insurance with either loans or other types of insurance have become increasingly common in recent years and that both state and federal authorities have been receiving a growing number of complaints concerning such tie-ins.

The different types of tie-ins involving insurance which have come to light will be examined below. But first the means by which this problem can be, and generally has been, attacked under state law should be noted. Direct supervision or approval, as in the case of rate making, is unknown. Apparently every state has enacted at least one or more statutes to deal with problems of unlawful inducements, discrimination and rebates. These statutes, of course, vary in their terms, but those of Massachusetts may be examined for illustrative purposes. That state appears to have three applicable statutory provisions, all phrased in prohibitory terms. First, insurance company representatives are forbidden to give any inducement, consideration or rebate not specified in the policy or contract; second, lenders are prohibited from lending on condition that insurance be placed in a particular manner; and third, life insurance representatives are forbidden to give any inducement for sale of a policy in the form of stocks, securities or dividends or profits on stocks or securities. Only the second of these statutes provides a specific penalty — a $100 fine per violation. Administratively, Massachusetts does seem to have expressed a general policy against tie-ins and, in the insurance field in particular, it seems from the authorities that they would definitely

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166. CIVIL AERONAUTICS BOARD, A STUDY OF AVIATION INSURANCE 5, 38 (1944).
167. This was brought out before the Senate Antitrust and Monopoly Subcommittee's hearings in August 1958, when the representatives of the New York Insurance Department testified that they had not heard about certain of the practices being employed by the aviation underwriters until they were disclosed at the Congressional hearing. Eastern Underwriter, Aug. 22, 1958, p. 1, col. 1.
171. Id. at § 193E.
172. Id. at § 121.
173. 6 MASS. Ops. ATT'Y GEN. 483, 485-86 (1922).
be condemned. 174 Occasionally, insurance tie-ins have been attacked under state antitrust statutes but, as will be seen below, without much success.

If the country is considered as a whole, how effectively have tie-ins been controlled under state law? The answer is brief. Control has been highly erratic.

1. Property Insurance.

First, mortgagees frequently require that loans on real estate be conditioned on placing hazard insurance on the property with a particular insurance company or agency to be designated by the mortgagee. The few state cases which apparently have considered this problem have generally held that the practice was not a violation, either of state antitrust statutes or of state anti-inducement or anti-rebate statutes. 175 Second, in recent years large mortgage lenders have begun to refuse to accept property insurance placed with mutual insurance companies. 176 There appear to be no cases in state courts concerning this practice. Third, apparently because the state insurance superintendent refused over the last several years to recognize their requests for automobile insurance premium increases, casualty insurers doing business in New York have been waging a tie-in "war of nerves" on their policyholders. The com-

174. For example, it has been held a violation of Mass. Gen. Laws Ann. ch. 175, § 182 (1958) for an insurance broker to grant a release from a contract authorizing him to sell stock for a commission in exchange for the sale of a life insurance policy on the life of the president of the other contracting party. Parrott v. G. H. Mansfield & Co., 266 Mass. 121, 165 N.E. 25 (1929). Also, in finding that the issuance of group life insurance to cover any remaining instalment payments at the death of purchasers under a ten year accumulative investment program was not a violation of Mass. Gen. Laws Ann. ch. 175, § 121 (1958) because the investment and life insurance companies were completely separate, the Massachusetts Attorney General stated: "There would, however, be a violation of this section if the life insurance company were identical with the vendor under the investment program, or if the insurance company benefited by or had any connection, direct or indirect, or any officer, agent, or broker of the insurance company had any such connection, direct or indirect, with the sale under this investment program." Mass. Att'y Gen. Ann. Rep. 55 (1954).

175. Holding no violation of a state antitrust statute: Feldman v. Costa, 171 S.W.2d 200 (Tex. Civ. App. 1943). Holding no violation of a state anti-inducement or anti-rebate statute: Calvin Phillips & Co. v. Fishback, 84 Wash. 124, 146 Pac. 181 (1915). In this latter case the insurance agent was granted additional compensation in the form of an exclusive right to write all fire insurance on the mortgaged property during the term of the mortgages. The court held this tie-in not offensive to the statute on the ground that the aim of the statute was only to insure a flat and uniform premium for all insureds. A similar tie-in was later held a violation of the statute in Moser v. Pantages, 96 Wash. 65, 164 Pac. 768 (1917), which distinguished Fishback on the ground that that case, unlike the Moser case, had not involved a rebate of commissions, either on the loan or on the insurance policy. This distinction, which seems unjustifiably artificial, has apparently since been maintained. See Wolfe v. Philippine Inv. Co., 175 Wash. 165, 27 P.2d 132 (1933).

panies have not only conditioned writing of new automobile insurance policies on applicants' taking out other forms of property insurance, for instance residential or home insurance, as they did in 1953, but also have even refused to renew policies of existing automobile insurance policyholders unless those existing policyholders now take out other forms of property insurance with that same company. Currently, no legal steps appear to have been taken against this form of tie-in.

2. Life Insurance.

First, some life insurance companies grant loans, particularly for residential mortgages, only if the borrower at the same time takes out a life insurance policy on his life with the particular insurance company. Earlier state cases apparently split on whether such "tie-ins" should be condemned under the state anti-inducement statutes. The cases which found the statutes not violated by this practice apparently turned on the narrow construction, which often seemed unwarranted, that the statutes concerned were directed at the sale of life insurance on condition that a loan be taken rather than on the converse situation. The most recent case arose in Ohio in 1957 and involved the Equitable Life Assurance Society's "Assured Home Ownership" plan, which required use of either an existing or a new Equitable policy to cover the remaining balance of the mortgage loan. Apparently Equitable now makes no other form of residential mortgage loan. The court found this plan not in violation of the Ohio anti-inducement statute. But the decision raised such opposition that

177. In 1953 the Department of Justice and the FBI conducted a six months' investigation into this type of practice. Apparently there were insufficient grounds on which to base either a civil or criminal federal antitrust suit. Journal of Commerce, Feb. 17, 1953, p. 11, col. 1.

178. N.Y. Times, Mar. 1, 1959, p. 1, s. 1, col. 4 (city ed.). See also the editorial in N.Y. Times, Mar. 3, 1959, p. 32, col. 2 (city ed.). The company action was apparently based upon the refusal by the Superintendent of Insurance to approve rate filings by the casualty bureaus for auto insurance rate increases of 40% for passenger cars and 17% for commercial vehicles. N.Y. Times, Feb. 10, 1959, p. 26, col. 7 (city ed.). The upshot of the entire matter was approval by the Superintendent of rate increases for passenger cars averaging 18.4% and a stern warning from the Superintendent that the department would take firm action if the insurers did not end the "gray market." The new rates applied to the 178 stock casualty companies represented by the National Bureau of Casualty Underwriters and the thirty-five companies affiliated with the Mutual Insurance Rating Bureau, which together wrote some 80% of the auto insurance business in New York state. N.Y. Times, Mar. 31, 1959, p. 1, col. 5 (city ed.).


181. Equitable Life Assur. Soc'y v. Robinson, 77 Ohio L. Abs. 18, 147 N.E.2d 648 (C.P. 1957). The court claimed that there were no reported decisions on the
a bill was introduced into the Ohio legislature which would in effect have reversed the decision and clearly applied the anti-inducement statute to this type of case. Surprisingly, a Massachusetts Attorney General’s opinion in 1919 approved this same Equitable plan on the ground that “the investment of the money paid to insurance companies by policyholders is not foreign to insurance; in fact, it is a part of the business of the companies. In effect, it is simply preferring the policyholders in the investment of the companies’ funds.” This language would appear to be a confession of the very tie-in device which the statute should condemn.

Second, life insurance policies have been issued which designate an exclusive undertaker to whom the proceeds should be paid so that the family of the deceased is prevented from selecting an undertaker independently. These arrangements have been condemned under a state constitutional provision against monopoly and a state anti-rebate statute, and under a state statute specifically designed to outlaw them. But they also have been upheld in the face of statutes of the latter type and as not being common law restraints of trade.

Third, and perhaps most serious in the life insurance field, are general credit life insurance tie-ins. Many state cases appear to

questions raised and relied for authority principally upon an unreported case from West Virginia, Equitable Life Assur. Soc’y v. Critchton, Hon. Julian F. Bouchelle, Cir. Ct., Kanawha County, W. Va., Sept. 20, 1951. See 147 N.E.2d at 655. The Ohio court also construed the anti-inducement statute as applying to insurance made conditional on taking out a loan but not the converse. See note 180 supra and accompanying text.

182. The pertinent part of the Ohio anti-inducement statute then read as follows: “... nor shall such company or person give or offer to give, or enter into any separate agreement promising to secure, as an inducement or consideration for insurance, the loan of any money, either directly or indirectly, or any contract for services.” OHIO REV. CODE ANN. § 3911.20 (Page 1953). Sen. Bill No. 64, filed Jan. 21, 1959, which was enacted into law effective on Aug. 11, 1959 added the following language: “nor as a condition of a loan that the applicant, directly or indirectly, acquire any policy of life or accident and health insurance.” OHIO REV. CODE ANN. § 3911.20 (Page 1953) (1960 Supp.)

183. 5 MASS. OPS. ATT’Y GEN. 391, 392 (1919) (interpreting MASS. GEN. LAWS ANN. ch. 175, § 182 (1958).

186. The Kentucky statutes were twice held unconstitutional, apparently on the ground that the guarantee by the particular burial associations of a burial was all that differentiated them from ordinary industrial life insurance companies. Kenton & Campbell Benevolent Burial Ass’n v. Goodpaster, 304 Ky. 233, 200 S.W.2d 120 (1946); Goodpaster v. Kenton & Campbell Benevolent Burial Ass’n, 279 Ky. 92, 129 S.W.2d 1033 (1939).
187. Tie-in sales of life and accident and health insurance with small loans were the subject of hearings in Kansas and North Carolina in 1954 and Alabama in 1957 by the special Subcommittee of the Senate Committee on the Judiciary headed by Senator Langer. An interim report filed after the first series of hearings urged further investigation into the trade association relations between the companies engaged in the credit life business, the formation of life insurance subsidiaries by finance and lending institutions, and coercion and intimidation of borrowers into taking out unwanted credit life insurance. SUBCOM. ON ANTITRUST AND MONOPOLY LEGISLATION, SENATE COMM. ON THE JUDICIARY, 84TH CONG., 1ST SESS., THE TIE-IN SALE OF CREDIT
conclude that insurance may be required as a condition of a loan, even from the particular insurance company making the loan, so long as the insurance is not just a sham to secure a higher rate of interest which would then become usurious under the particular state statute controlling interest rates.\textsuperscript{188} A number of state cases have, however, described such arrangements as "tie-ins" and at least by way of dictum condemned them if the insurance was required to be taken out either with the lender itself or a particular named insurance company.\textsuperscript{189} However, this condemnation was again based upon usury statutes rather than upon state anti-inducement or antitrust laws. In Massachusetts, credit life insurance tie-ins have been ruled in violation of that state's anti-inducement statute.\textsuperscript{190} This entire problem may have resolved itself somewhat recently by virtue of the new federal income tax provisions for life insurance companies. Changes in the formula of taxation may have made investment in life insurance company subsidiaries much less attractive for finance companies.\textsuperscript{191}

\textbf{Insurance in Connection with Small Loans and Other Transactions} 12

(Comm. Print 1955). Credit life insurance, which has grown enormously with the post-war increase in consumer credit transactions, has been the subject of many abuses, such as pyramidings (overlapping coverages), non-payment of claims, excessive insurance coverage in proportion to the loan and exorbitant rates. The abuses and the actions proposed by the NAIC and others to eliminate them are summarized in Kanzi, \textit{Consumer Credit Insurance} 133-57 (1957). See also Hill, \textit{Life Insurance and Consumer Instalment Credit}, 13 Ass'n of Life Ins. Counsel Proceedings 525 (1957) for an analysis of the present state laws.


190. 5 MASS. OPS. ATT'Y GEN. 344 (1920) (construing what is now MASS. GEN. LAWS ANN. ch. 175, § 121 (1958)).

191. The unusual advantages under the pre-1959 federal income tax law for finance companies organizing stock life insurance subsidiaries were not generally realized. The finance company will naturally charge borrowers as high a premium for credit life insurance as the traffic will bear and state law will permit. The premium charges paid over by the finance company to its life insurance subsidiary were non-taxable underwriting income to the latter because, under INT. REV. CODE of 1954, §§ 801-818, the latter company was taxed purely on a net investment income basis at roughly a 7.8% effective rate. By keeping its underwriting (premium) income as high as possible and its investment income as low as possible (within the limits imposed by state insurance laws on required reserves) the insurance subsidiary could minimize its federal income tax burden. The subsidiary would then strive for maximum dividend payout to its finance company parent so that the latter could make maximum use of the 85% corporate dividends received credit authorized by INT. REV. CODE of 1954, § 243(a). This credit is apparently available for life insurance corporate dividends on stock even though a similar credit cannot be taken under the individual dividends received credit of INT. REV. CODE of 1954, § 34. The Life Insurance Company Income Tax Act of 1959, P.L. 86-89, 86th Cong., 1st Sess. 73 Stat. 112, provided for the inclusion of at least part of premium or underwriting income in a complex tax formula. That the new tax formula would put a crimp in credit life subsidiary operations of finance companies was anticipated. See the statement by Edmund L. Grimes, chairman of Commercial Credit Company, the nation's second largest independent finance company, reported in N.Y. Times, Feb. 18, 1959, p. 45, col. 7 (city ed.).
C. What Solution Under Existing Law?

1. For Rate Making?

For the specific reasons detailed above, there is serious question whether the present rate-making system under state supervision and free from the antitrust laws in fire and casualty insurance is producing ultimate rates which are truly competitive and the lowest with which the public could be provided. Evidence also indicates that the public may not be receiving the best possible product in keeping with modern demands.

The situation is increasingly serious. Apparently reluctance of the state commissioners to approve rate increases has even forced some foreign insurance companies to withdraw from business in the United States; some bureau members are unhappy and claim that deviations are too difficult; the independents claim that independent filings are also made too difficult. 192

Defense of the present bureau rate-making system under state approval is based on the ground that insurance is different from other products because its sale does not end the obligation of the insurer. It is said that the uncertainty of the risks involved makes it impossible to measure the premium needed with any degree of accuracy, that the required statistical work is too expensive for any one company to perform alone, that a large central staff with expert experience is required, and that failure of an insurance company because its rates have been set too low would have intolerably unfavorable social consequences. 193

These are the same arguments which were made in opposition to the anti-compact laws enacted by the states just prior to the turn of the century. 194 The little statistical evidence available concerning the effect of anti-compact laws does suggest that fire insurance rates were actually much higher in those states which strictly enforced their anti-compact laws than in those states with no such laws or with lenient enforcement of statutes of this character. The reason assigned to

192. For example, one British insurance company which wrote slightly more than $12,000,000 net premiums on fire and automobile business in the United States in 1957 decided to withdraw for this reason. N.Y. Times, Dec. 29, 1958, p. 27, col. 3 (city ed.). See also Ely, Governmental Regulation of Insurance Marketing Practices, 1954 Ins. L.J. 186, 191-92.
this somewhat surprising result was that rates could not be reduced in anti-compact states because companies were unable to combine there in order to act together to take into account more favorable experience.195

A number of possible separate solutions to the rating problem under existing law have been advanced. No one of these standing alone would seem to accomplish the desired result.

a. More Evidence in Rate Filings?

The bureaus themselves have suggested that the difficulty is that too many states have failed to require adequate evidence in support of rate filings. The position taken is worth quoting.

Properly enforced it would tend to reduce to manageable size the number and variety of new filings and would exert pressures tending to center responsibility in the technically well-qualified licensed rating organization and in those companies that are willing to pay the contemplated price, in terms of maintenance of adequate supporting information, for being outside the bureau system.196

The bureau solution obviously is "conformity to bureau rates" and would not be acceptable.

b. The California-type Law?

Much support has been given to the California-type law which, as discussed above, does not require any filings in advance. However, the state can call for filings and supporting data for approval at any time. Obviously this system avoids the problem of submission of stale statistical experience with rate filings, frees the departments of a rate-fixing responsibility which they cannot really thoroughly perform anyway, avoids the threat to the solvency of small companies through

195. For example, the average stock fire insurance rate for the United States for the 19 years from 1880-1898 inclusive was reported as $1.04 per $100. Apparently no anti-compact state had a rate lower than this average. Ohio was the nearest to the average with $1.10. New Hampshire had $1.23. The other anti-compact states had rates ranging from $1.24 to $2.34, with the average for all 16 anti-compact states being $1.52. Monthly Journal of Insurance Economics, Feb. 1900, pp. 101-02, Apr. 1902, pp. 179-81.

196. Marryott, Twelve Years of Insurance As Commerce — Prospects for the Future, 24 INS. COUNSEL J. 191, 196 (1957) (emphasis added.) This view would also appear to have been adopted in states like Kentucky where bills were filed with the support of the Insurance Commissioner which would require the Commissioner to adopt uniform property insurance rates and authorize him to adopt uniform forms for any type of insurance, to prevent the use of rate schedules or bureau plans by any non-member or mere subscriber and to prevent rate filings on forms prepared by another insurer. National Underwriter (Fire & Cas. ed.), Mar. 21, 1958, p. 2, col. 3.
narrow interpretation of the statutory standard "excessive," and insures competition to the public because there will be no tendency to use the bureau advance filing as the standard for all other insurers.\(^{197}\) The points seem convincing. But the bureaus would still be free to agree collectively on rates for the bureau companies, and the accuracy of statistical loss experience would not be improved.

**c. Better State Administration?**

It has also been suggested that the present state laws be preserved but that administration of those laws be improved through such steps as larger state staffs with adequate budgets and more experts, prohibition of compulsory membership in rating bureaus, closer supervision of the activities of rating bureaus and grading of municipalities for rate-making purposes.\(^{198}\) These suggestions are all valuable but somewhat politically unrealistic because in the last analysis they all depend on larger and more skilled insurance department staffs for which state legislatures are not likely to provide the necessary money.

**d. Individual Risk Inspection?**

In England there is no public supervision of rates. The so-called "tariff companies" do fix rates through the Fire Office Committee. But the "non-tariff" companies, which are able to capture many of the large individual risks because of their more ready ability to quote special rates, pool their statistical loss experience but do not combine in making rates. Instead each company makes a close examination of each individual risk, which one of the major companies accomplishes by employing a staff of 20,000 inspectors and maintaining 92 branch offices. This system was examined by the New York Insurance Department in 1948 but considered inappropriate for the United States because too great a departure from the bureau system which had

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198. Orfield, *Improving State Regulation of Insurance*, 32 Minn. L. Rev. 219, 241-44 (1948). It has even been suggested that competitors be permitted to have standing to challenge rate filings by seeking administrative review of such filings only until such time as genuinely effective administrative regulation is provided. Comment, 58 Mich. L. Rev. 730, 753 (1960).
already been so long established here. Pooling of statistical loss experience would, of course, be valuable. But it is highly doubtful that American companies could maintain immense staffs of inspectors to cover a country so much larger than England.

e. State Antitrust Laws?

Application of state antitrust laws to cooperative rate making has apparently never been seriously considered. Such a solution standing by itself would, however, appear to be objectionable for several reasons.

First, coverage of insurance by state antitrust laws appears to be far less than complete. Some states have no general antitrust laws at all. Others have general antitrust laws which do not specifically relate to insurance. Some still have the so-called anti-compact laws which specifically concern insurance and particularly prohibit price fixing or rate making. Still a fourth group of states has general antitrust laws which specifically relate to insurance.

Second, even under many general state antitrust statutes apparently insurance might not be covered. The problem is illustrated by the general Massachusetts antitrust statute, which prohibits contracts, agreements or combinations which would produce monopoly, restrain competition or enhance the price of any “article or

199. Insurance Supervision and Practices in England (Fire, Marine & Casualty) (1948), a report prepared by Deputy Superintendents Alfred J. Bohlinger and Thomas C. Morrill for the New York Insurance Department, pp. 3-4, 20-37. The examination of the English practice was apparently made as part of the determination of required state action after passage of the McCarran-Ferguson Act.


201. There apparently were 29 such states in 1950: Alabama, California, Florida, Idaho, Illinois, Indiana, Iowa, Louisiana, Maine, Massachusetts, Michigan, Minnesota, Mississippi, Montana, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Ohio, Oklahoma, South Dakota, Tennessee, Utah, Virginia, Washington, Wisconsin, Wyoming. Ibid. In a few of these states judicial decisions or Attorney-General's rulings have held these general antitrust statutes to be specifically applicable to insurance. E.g., Speegle v. Board of Fire Underwriters, 29 Cal. 2d 34, 172 P.2d 867 (1946). But in others, early decisions holding insurance combinations not within a general antitrust statute have apparently remained effective to the present time. See People v. Aachen & Munich Fire Ins. Co., 126 Ill. App. 636 (1906), Comment, The Illinois Anti-Trust Law Disinterred, 43 Ill. L. Rev. 205, 213 (1948).


203. Some 7 states had such laws as of 1950: Arizona, Arkansas, Kansas, Missouri, Nebraska, South Carolina, Texas. F.T.C. Press Release and Memorandum, supra note 200, at 20.
commodity in common use.” Would insurance be considered an “article or commodity” within this type of statute? The answer, at least in Massachusetts, is probably “Yes.” Other documents evidencing intangible claims, like trading stamps, have been held within the statute although the status of theatre tickets has been left open. Further, that the Massachusetts court has indicated a reluctance to create other rather conventional exemptions from its antitrust statutes is helpful. The answer, however, would appear to be negative in many other states, at least on the basis of some earlier cases decided under state antitrust statutes.

Third, under a state version of the “primary jurisdiction” doctrine, state antitrust laws might be held inapplicable to rates which had been approved by the insurance commissioners. Most state authority which has considered the question points in that direction. Further.

205. Merchants' Legal Stamp Co. v. Murphy, 220 Mass. 281, 107 N.E. 968 (1915). Producers' goods, which have been held not to be the subject of a common-law conspiracy, Gloucester Isinglass & Glue Co. v. Russia Cement Co., 154 Mass. 92, 27 N.E. 1005 (1891), are probably distinguishable from both insurance and trading stamps in that they are not “common necessities” from the point of view of the consumer, to whom the statute appears to be geared.
207. For example, the Massachusetts court has refused to create an exemption from its antitrust law for labor unions engaged in price-fixing. Commonwealth v. McHugh, 326 Mass. 249, 93 N.E.2d 751 (1950).
208. See cases cited note 93 supra. But see cases cited note 92 supra.
209. The doctrine of “primary jurisdiction,” or deference by courts to administrative agencies on questions falling within the regulatory jurisdiction of the latter, has been exhaustively considered with regard to the relation of the federal antitrust laws and federal administrative bodies. See e.g., Jaffe, The Antitrust Laws and Regulated Industries: The Doctrine of Primary Jurisdiction, 67 Harv. L. Rev. 929 (1954); Note, 58 Colum. L. Rev. 673 (1958). Curiously, the applicability of the doctrine as between state antitrust laws and state administrative bodies has been rarely examined, and apparently not at all with relation to insurance or in recent years. See, e.g., Hadley, Public Utilities and the Anti-Trust Law, 10 B.U.L. Rev. 351 (1930); A.B.A. Sect. of Pub. Util. Law, Report of the Committee on the Applicability to Public Utilities of Anti-Trust Laws 19 (1922); Note, 27 Harv. L. Rev. 286 (1914). The doctrine has, however, apparently been applied, instinctively rather than explicitly, by the state courts in the insurance field. With regard to cooperative rate making through the bureaus in particular, the general insurance regulatory authority of the insurance commissioner has been held not to preclude application of the state antitrust law. Aetna Ins. Co. v. Robertson, 126 Miss. 387, 88 So. 883 (1921). However, state statutes specifically authorizing and supervising the rating bureaus have been held to supersede the application of the state antitrust laws. State ex rel. Taylor v. American Ins. Co., 205 S.W.2d 1 (Mo. Sup. Ct. 1946); Board of Ins. Commrs v. Sproles Motor Freight Lines, Inc., 94 S.W.2d 769 (Tex. Civ. App. 1936); Tex. Att'y Gen. Opinion No. V-98, Mar. 20, 1947, Trade Reg. Rep. (1947-1948 Trade Cas.) ¶ 57,557. Of course, if the rating bureaus enter agreements outside the scope of the rating statutes, i.e., agreeing to charge the fixed rate regardless of the insurance commissioner's disapproval, then the antitrust laws will still apply to such an agreement. State ex rel. Barker v. Assurance Co. of America, 251 Mo. 278, 158 S.W. 640 (1913) (dictum); Tex. Att'y Gen. Opinion No. V-98, supra. The primary jurisdiction doctrine has also been implicitly applied to other questions of insurance operations. Morris v. Liberty Life Ins. Co., 154 Kan. 152, 115 P.2d 773 (1941) (shareholder's suit questioning validity of stock issue); Kavanaugh v. Underwriters Life Ins. Co., 231 S.W.2d 753 (Tex. Civ. App. 1950) (suit for removal of officers and directors).
ther, it would seem highly inadvisable in any event to attempt to sub-
ject insurers to the burden and expense of the existing rate filing and
approval process and then also open them to the additional expense
and upsetting of operations involved in a possible later attack on those
same rates under the state antitrust laws.

Fourth, state antitrust statutes are generally regarded as not having
any extraterritorial operation and might, therefore, be unable to
reach the central operations of rating bureaus which, as indicated
earlier, are now primarily regional in character and thus may have
little genuine connection with most states.210 Further, state antitrust
statutes are generally regarded as penal in nature.211 Therefore, even
if jurisdiction could be established over activities of an interstate rating
bureau under the antitrust laws of a particular state, it is highly likely
that those laws could not be effectively enforced against the out-of-
state defendants, either by direct action in the other state.212

210. State antitrust laws have generally been held not to be applicable to com-
binations formed outside, and which do no acts in pursuance of the combination
within, the particular state, even though one member of the conspiracy may be ad-
mitted to do business in that state. Chicago Wall Paper Mills v. General Paper Co.,
147 Fed. 491 (7th Cir. 1906) (construing the Illinois antitrust statute); Dreyfus Bros.
v. Corn Products Co., 204 Ala. 593, 86 So. 386 (1920). However, either the forma-
tion of the illegal agreement, Over v. Byram Foundry Co., 37 Ind. App. 452, 77
N.E. 302 (1906); or the performance of acts in pursuance of the agreement, Waters-
Pierce Oil Co. v. Texas, 212 U.S. 86 (1909) (construing the Texas antitrust
statute), will be enough to establish jurisdiction under state antitrust laws. There is
strong suggestion from a number of the early state insurance antitrust cases that mere
"effects" within the particular state, State v. Lancashire Fire Ins. Co., 66
Ark. 466, 51 S.W. 633 (1899); State v. Aetna Fire Ins. Co., 66 Ark. 480, 51 S.W.
638 (1899); State v. Pipps, 50 Kan. 609, 31 Pac. 1097 (1893); or even "effects"
wholly outside the particular state, Hartford Fire Ins. Co. v. State, 76 Ark. 303,
89 S.W. 42 (1905), would be enough to establish jurisdiction. The logic of these
last cases would seem to apply to the interstate rating bureau situation. These cases,
however, may be considered as of limited authority because: (1) they really turned
on the state's power to exclude foreign corporations doing business in the state,
Hammond Packing Co. v. Arkansas, 212 U.S. 322 (1909) (construing the Arkansas
statute considered in the Hartford Fire Ins. case); (2) they were decided during a
period of great state anxiety to control the insurance rate-making combinations at
any cost; and (3) the state statutes involved did not extend in any way to inter-
state or foreign commerce as does the Sherman Act, under which "effects" on
American foreign commerce apparently will be sufficient to establish jurisdiction.
70 (1953).

211. Witherell & Dobbins Co. v. United Shoe Mach. Co., 267 Fed. 950 (1st
Cir. 1919) (construing a Massachusetts statute forbidding tie-ins and fixing a money
penalty); State v. Lancashire Fire Ins. Co., supra note 210 (construing an insurance
price-fixing statute with a money penalty).

212. State courts generally will not hear direct actions brought on penal statutes
of another state. Lucches v. Standard Oil Co., 224 N.Y. 99, 120 N.E. 198 (1918);
Brower v. Watson, 146 Tenn. 626, 244 S.W. 362 (1922). Of course, whether a
statute will be considered penal apparently depends on whether it affords only a
public, as distinguished from a private, remedy. Huntington v. Attrill, 146 U.S. 657
(1892). It does not appear to have been clearly established that a private state
antitrust law action for damages would be regarded as not being penal, although
some help might be drawn from analogous cases construing other types of state laws.
Salonen v. Farley, 82 F. Supp. 25 (E.D. Ky. 1949) (state anti-gambling statute
awarding triple damages to private party not penal); Adams v. Fitchburg R.R.,
67 VT. 76, 30 Atl. 687 (1894) (double damages under state wrongful death statute
or by suit in the other state to enforce a judgment obtained in the first state.\textsuperscript{218}

Fifth, enforcement of local antitrust statutes would, of course, vary from state to state. Also judicial decisions in different states would establish different standards although most states would probably follow the basic policy of condemning price-fixing agreements. For these reasons a uniform national policy might be considered desirable, if not legally mandatory.\textsuperscript{214} The federal antitrust laws as applied to price fixing, no less than the federal labor laws,\textsuperscript{215} could be considered as reflecting a national policy of sufficient importance that contradictory state policies should not be permitted to weaken their application.

f. Federal Antitrust Laws?

In the one federal case which has considered the All-Industry rating laws, an action under the Sherman Act alleging an unlawful conspiracy to fix rates through a rating bureau was denied because of

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\textsuperscript{218} Doolittle v. United States, 165 Minn. 353, 206 N.W. 484 (1926).

\textsuperscript{219} See Cedar Hill Express Co. v. St. Louis Southwestern Ry., 226 Minn. 357, 33 N.W.2d 48 (1948), which held an action by a private citizen for forfeiture of the charter of a local fire insurance underwriters association for acts of boycott contrary to the state antitrust laws to be a civil and not a penal action. On this general subject, see Leifar, Extrastate Enforcement of Penal and Governmental Claims, 46 Harv. L. Rev. 193 (1932).

\textsuperscript{214} See Minnesota v. Pelican Ins. Co., 127 U.S. 265 (1888). Although Pelican was generally criticized in the later case of Milwaukee County v. M. E. White Co., 296 U.S. 268 (1935), this particular question was expressly left open. For a recent discussion of these problems with particular relation to insurance, see Kimble, The McCarran Act and the Constitution, 13 Ass'n of Life Ins. Couns. Proceedings 339 (1956).

\textsuperscript{215} The question of pre-emption of the field from state antitrust laws by the federal antitrust laws seems to have been little considered. Early federal and state cases held that state antitrust laws could not be applied to transactions involving interstate commerce. Hadley Dean Plate Glass Co. v. Highland Glass Co., 143 Fed. 242 (8th Cir. 1906); Eclipse Paint & Mfg. Co. v. New Process Roofing & Supply Co., 55 Tex. Civ. App. 553, 120 S.W. 532 (1909). The state courts, however, found means of avoiding any conflict by applying the state laws only to that part of the combination or agreement which related to commerce wholly within the particular state. People v. Butler St. Foundry & Iron Co., 201 Ill. 236, 66 N.E. 349 (1903), or by developing a modification of the "original package" doctrine, Standard Oil Co. v. State, 117 Tenn. 618, 100 S.W. 705 (1907). More modern cases have taken the position that state antitrust laws should apply unless there is a direct conflict with the federal antitrust laws. Commonwealth v. McHugh, 326 Mass. 249, 93 N.E.2d 751 (1950). This position is quite logically justified on the ground that the Department of Justice, as a practical matter, is simply unable to prosecute all antitrust violations. Note, 64 Harv. L. Rev. 510, 511 (1951). In the insurance field and under the McCarran-Ferguson Act in particular, at least one state court has faced the question directly by applying a state antitrust statute to an agents' association boycott subject to section 3(b) of the McCarran-Ferguson Act and holding that Congress did not intend to exclude the application of state antitrust laws to those acts. Speegle v. Board of Fire Underwriters, 29 Cal. 2d 34, 172 P.2d 867 (1946).
the McCarran-Ferguson Act exemption, but the District Court opinion in that case made quite clear that, but for the protection afforded by the McCarran-Ferguson Act, the bureau activities would have constituted illegal price fixing. On the basis of the conclusions already reached that the section 2(b) proviso of the McCarran-Ferguson Act means effective regulation and that the states under the present rating structure are not producing the most effective rates possible, the federal antitrust laws apparently could be applied to the rating bureaus even without any change in the present McCarran-Ferguson Act.

That the Department of Justice takes this view is shown by several recent statements. For example, warning has been issued that interstate rating bureaus whose rates are being used in states where the bureaus themselves have not officially filed as advisory bodies under the "model" laws may well be guilty of illegal price fixing under the federal antitrust laws. This warning would appear to be based on the theory that the state where the bureau has not filed for approval of its status has not "regulated" that bureau's activities within the proviso of section 2(b) of the McCarran-Ferguson Act.

The wisdom of any attempt on this theory to apply the federal antitrust laws exclusively would, however, seem questionable. First, any such application would, of course, raise the problem of federal pre-emption mentioned above. Second, it would also raise another version of the problem of "primary jurisdiction." This latter doctrine apparently has been applied by federal courts in favor of state, as distinguished from federal, administrative agencies. The Supreme Court's latest "primary jurisdiction" decision, United States v. Radio Corp. of America, does suggest the possibility, however, that any obstacle under this heading might be overcome. It might be argued that insurance companies are not common carriers and are not subject to an absolutely uniform tariff and that, therefore, rate agreements


219. 358 U.S. 334 (1959). The Court held that approval by the F.C.C. of an exchange of television stations did not bar a civil antitrust action by the United States attacking the exchange under the Sherman Act.
approved by state insurance departments may be attacked later under the federal antitrust laws.\footnote{220} Insurance, however, would seem to be subject to that type of state regulation which should not be open to attack under the antitrust laws "for otherwise sporadic action by federal courts would disrupt an agency's delicate regulatory scheme, and would throw existing rate structures out of balance."\footnote{221} And, as stated above in connection with the discussion of state antitrust laws, it would seem quite inequitable to subject the insurers to the burden and expense of two separate proceedings, one administrative and the other under the antitrust laws.

2. For Tie-in Sales?

The analysis of tie-in transactions in insurance presented above certainly suggests that state regulation of this problem has not been effective, but rather quite irregular.

Here, as in the problem of rate making, several alternative solutions for better control of insurance tie-in practices are available under existing law. Here, however, the alternative of improving the effectiveness of direct administrative supervision is not available. Rather the task is one of finding the most realistic indirect means of reaching a type of business dealing which restrains trade.

a. State Statutes Other Than Antitrust Laws?

As has been seen above, judicial construction of state anti-inducement and anti-discrimination statutes has been erratic. And the cases involving credit life insurance under the state usury statutes disclose considerable uncertainty as to the proper handling of the tie-in problem. These difficulties could be avoided if the problem were treated instead as a problem of restraint of trade or antitrust. In consideration of insurance tie-ins under these latter legal rubrics, courts would much more likely come to a full appreciation of the issues involved.

\footnote{220} These are the grounds on which the Court seems to have distinguished its previous holding in McLean Trucking Co. v. United States, 321 U.S. 67 (1944), which did involve a regulatory scheme involving fixed rates and which held that the merger of a number of trucking lines approved by the I.C.C. could not be attacked subsequently by the United States under the antitrust laws. United States v. Radio Corp. of America, supra note 219, at 348.

\footnote{221} 358 U.S. 334 at 348.
b. Federal Antitrust Laws?

Unsatisfactory as many aspects of the treatment of tie-in problems may have been under state anti-inducement and anti-rebate statutes, application of the federal antitrust laws in this area would not be without its difficulties.

Clearly, in connection with insurance tie-in problems the Department of Justice does adopt the view that the section 2(b) proviso of the McCarran-Ferguson Act means effective state regulation and that, because state regulation of these practices has not been effective, the federal antitrust laws are applicable. The Department of Justice recently conducted an investigation and presented a case to the grand jury against a large Los Angeles lender who had flatly refused to accept any mutual insurance on property on which it made loans. Department officials have clearly warned that a large lender refusing to accept all mutual insurance or a substantial number of small lenders doing the same would be regarded as unlawful “tie-ins” constituting federal antitrust violations. A definite procedure has apparently also been established with other federal agencies for investigating and disposing of complaints based on insurance tie-ins.222

But has not the Department, in adopting this position, overlooked several serious obstacles in applying the federal antitrust laws to these cases?

Tie-ins, of course, are open to attack under either section 1 of the Sherman Act or section 3 of the Clayton Act.223 Taking section 3 of the Clayton Act first, there appears to be considerable doubt, reinforced by the Supreme Court’s latest tie-in decision, whether courts would hold insurance to be a “commodity” within that section. Opponents of the inclusion of insurance within section 3 could rely not only on Northern Pac. Ry. v. United States224 but also on the District Court holding in United States v. Investors Diversified Services, Inc.,225 which held that money, being an intangible, was not a

224. 356 U.S. 1 (1958). The action there was brought only under section 1 of the Sherman Act against sales and leases of land holdings by a railroad with preferential routing clauses included in many of the contracts. Presumably suit was not brought under the easier (for the Government) alternative of section 3 of the Clayton Act because land might not fall within the definition set forth in that section. See Turner, The Validity of Tying Arrangements Under the Antitrust Laws, 72 HARV. L. REV. 50, 51 (1958).
225. 102 F. Supp. 645 (D. Minn. 1951). Investors Diversified Services, Inc., an investment company, granted mortgage loans subject to the requirement that all
"commodity" within section 3. They might also claim support from a number of state antitrust cases discussed earlier in this paper which held specifically that insurance was not a "commodity" for purposes of those state laws.226 There are, however, strong arguments for the inclusion of insurance within section 3. First, there are also many state antitrust and anti-compact cases holding that insurance is a "commodity."227 Second, federal courts have construed other general federal statutes to cover insurance and the insurance business on the basis that insurance has really assumed the role of a necessity in our modern economic life.228 Third, for federal income tax purposes, insurance, or at least life insurance, policies are in fact regarded just as if they were salable property or commodities of any other type.229

Under section 1 of the Sherman Act any attack on insurance tie-ins might run into the difficulty of establishing "dominance" by the insurance company in the tying product, which presumably would normally be the loan rather than the insurance.230 However, this burden may have been made easier by the recent Supreme Court

hazard insurance on the property be written, placed or sold by it. Motion to strike a count under section 3 of the Clayton Act was granted by the District Court on the grounds that the "money," the subject of the mortgage loan, was not "sold" or "leased" within the meaning of section 3 and also that "money" is not a "commodity" within that section. The only even indirect reference to the status of insurance under section 3 appears in Times-Picayune Pub. Co. v. United States, 345 U.S. 594, 609 n.27 (1953). There the Supreme Court observed that the Government had elected to proceed in that case, which involved newspaper advertising space contracts, only under the Sherman Act. The Court, in the cited footnote, referred, however, to oral argument made by the Government that advertising space was not a "commodity" within section 2 of the Clayton Act. They then cited Investors Diversified Services, Inc. itself, it controls over $2.7 billions of invested assets and in 1957 set up a wholly owned life insurance subsidiary which was authorized to write insurance in 19 states and sought licenses in 17 others. Business Week, Feb. 14, 1959, p. 108, at p. 112. This information suggests the possibility of tie-ins of the credit life insurance variety. See notes 187-191 supra and accompanying text.


227. See cases cited notes 92 and 97 supra.


230. Until recently at least, the accepted test for establishing an illegal tie-in under section 1 of the Sherman Act had been the showing of a dominant or monopolistic position occupied by the seller in the market for the tying product plus the restraining of a substantial amount of commerce in the tied product. Times-Picayune Pub. Co. v. United States, 345 U.S. 594, 608-09 (1953).
decision in *Northern Pac. Ry.* which appears to have reduced the requirement of a demonstration of a substantial monopoly in the tying product to a showing of "sufficient economic power to appreciably restrain competition in the market for the tied product."\(^{231}\)

Unfortunately no judicial decisions have yet dealt directly with these problems. But this has not deterred the Government. *Investors Diversified Services* finally resulted in a consent decree in favor of the United States enjoining the tie-ins under sections 1 and 2 of the Sherman Act.\(^{232}\) And in another federal court a consent decree was entered under sections 1 and 2 of the Sherman Act and section 3 of the Clayton Act restraining life insurance companies from maintaining funeral service subsidiaries, entering contracts with funeral directors which prevented the latter from serving any persons other than the insurance companies, restricting the number of funeral homes the directors could own and restricting the funeral directors from buying their funeral merchandise from any persons other than the life insurance companies.\(^{233}\)

Application of the federal antitrust laws to insurance tie-ins would, of course, not raise the problem of primary jurisdiction because the states have not handled this particular problem through the administrative agency device. The federal pre-emption problem, however, would be raised again. As will be suggested below, the desirability of a uniform federal antitrust policy with regard to tie-ins as well as price fixing may be outweighed by the strong possibility, as outlined above, that courts would find the federal antitrust laws inapplicable to insurance tie-ins.

c. State Antitrust Laws?

For this reason we must devote serious consideration to the resolution of the tie-in problem through the application of state antitrust statutes. First, we would, of course, still be faced with the problem of spotty state antitrust coverage of insurance. But, second, for the same reason as suggested above in connection with the application of the federal antitrust laws, the problem of primary jurisdiction would be eliminated. Third, there should be no problem of extraterritorial application of the state laws because loan and insurance

\(^{231}\) *Northern Pac. Ry.* v. United States, 356 U.S. 1, 6 (1958).
combination transactions would necessarily require some sort of local business contact or acts by the selling company through brokers or agents which would establish sufficient basis for jurisdiction by the state of residence of the insured borrower. 234

D. What Solution Would Be Ideal?

From the discussion above it is obvious that any attempt under present law to resolve the problem of application of suitable controls to rate making and tie-ins in insurance will raise many difficult and distracting issues. In order to avoid these complexities as far as possible, other possible courses the law might take which would seem to be both effective and at the same time politically feasible will be examined.

1. For Rate Making?

The most satisfactory solution to the rate-making problem would seem to be to have the states revise the present All-Industry model law structure, which is basically founded on the bureau system and necessarily overemphasizes the role of their member property insurance companies. Better and more competitive rates would seem to require adoption of the California-type law. This would eliminate advance filings and yet still protect the public by allowing the insurance commissioner to challenge rates at any time. He should be able to administer this type of law much more satisfactorily with perhaps an even smaller staff. The individual companies would then be completely free to fix their own rates separately. If, as the bureau companies themselves maintain, independent rate setting will result in predatory price cutting and risk of company insolvencies, this problem can be met by devoting the state insurance department resources, previously dissipated in the impossible attempt to review a myriad of rate filings, to better and more careful examinations and audits of companies. This approach to the problem has been followed in England with success and apparently with much smaller proportionate requirements for staff and budget. 235

235. See Kadyk, Control and Regulation of British Insurance Companies, 1950 A.B.A. Sect. of Ins. Law Proceedings 63. Apparently 10 employees of the Board of Trade (not counting actuarial assistants) in 1949 supervised the solvency requirements of all English insurance companies, whose total 1948 premiums were some $1,700,000,000. New York required some 335 employees to supervise companies writing approximately the same volume of insurance premiums. Illinois required
Requiring each company actually to set its own rates would naturally demand executive ingenuity and imagination not called for under the present rate-making system. Insurance has traditionally attracted more conservative career types.\textsuperscript{236} If a more daring and fertile sort of mind is required for independent rate making, it will doubtless be necessary to provide in insurance the same kind of monetary and fringe benefit incentives now available in industry generally.\textsuperscript{237}

If property insurance companies are to set rates individually, then as in the life insurance business a broad loss experience should be made available to them. This would require that a complete revision of the present class and schedule rating system be undertaken so that a national loss experience can be obtained. That loss experience should then be \textit{mandatorily} pooled in a central industry organization and made available to the various insurance companies.\textsuperscript{238} Fire and casualty insurance trade associations engaged in such statistics-collecting activity would seem to be lawful under both federal and state antitrust laws and would serve the useful economic function of correcting the inherent defect preventing true competition in insurance rate making, \textit{i.e.},

150 employees for half that premium volume. \textit{Id.} at 80. A former New York Superintendent of Insurance has concurred in this general approach: “If we had to eliminate all phases of insurance supervision except one, the examination of companies would be retained. It is the most important thing we do. The solvency of companies, their honesty and intelligent management, and ability and willingness to meet their obligations as they occur, is of primary importance to the public.” Pink, \textit{State of New York, Eighty-First Ann. Rep. of the Superintendent of Insurance}, pt. 1, p. 37a (1940). See also Smith, \textit{supra} note 134, at 83-84. For a dim view of the effectiveness of state insurance examinations, see 91 CONG. REC. A 4168 (1945) (statement by Senator O'Mahoney).

236. “Indeed, the soaring imagination is suspect in insurance. . . . It was considered a mark of statesmanship for an executive to keep his company in line with the 'right practices' in the way of policy forms, rates, and commissions, and an honor to be an officer in one of the cooperative organizations that enforced stabilization among the companies.” Fortune Magazine, \textit{The Underwriters}, July 1950, p. 77, at p. 108.

237. Surprisingly enough, insurance companies only infrequently have any plans of the following types for their executives and key employees: stock options, deferred compensation plans, executive bonus plans, profit-sharing plans, and thrift or savings plans. Such plans are either forbidden or severely limited by statutes in most states as a result of the Armstrong Investigation of 1905. That investigation uncovered many abuses by life insurance companies by way of excessive salaries and expenses. For a summary of the findings and recommendations of the investigating committee, see Report of the Joint Committee of the Senate and Assembly to Investigate the Affairs of Life Insurance Companies, N.Y. Ass'y Doc. No. 41, pp. 357-442 (1906). A good short summary of this investigation, which made Charles Evans Hughes famous as its counsel, appears in Anderson, \textit{The Armstrong Investigating in Retrospect}, 11 ASS'N OF LIFE INS. COUNSEL PROCEEDINGS 237 (1952). For present state law limitations, see Cavanaugh, \textit{Restrictions Affecting Insurance Company Pay Plans, 1958 AMERICAN LIFE CONVENTION (Legal Sect.) PROCEEDINGS} 195.

238. An \textbf{optional} experience pooling has been suggested, but this would seem to be self-defeating. See 2 WHITNEY, \textit{ANTITRUST POLICIES — AMERICAN EXPERIENCE IN TWENTY INDUSTRIES} 380 (1958).
absence of full knowledge of the market facts on which truly intelligent competitive judgments must be based. 239

In order to insure, however, that companies would not attempt to cooperate in the actual setting of rates based on the collective loss information, they would be fully subject to the antitrust laws. Despite the interstate nature of company operations and the natural desire to insure uniform national enforcement, the federal antitrust laws and the state antitrust laws should apply concurrently. 240 This solution would not require any change in the present McCarran-Ferguson Act because it could readily be argued that, if the states failed to enforce their antitrust statutes against rate-making or price-fixing combinations, then the federal antitrust laws should apply on the

239. Such an arrangement would appear to be valid under federal law under such authorities as United States v. Watch Case Mfrs. Bd. of Trade, Inc., Civil No. 67-296, S.D.N.Y., Jan. 19, 1953, Trade Reg. Rep. (1952-1953 Trade Cas.) ¶ 67,422 (consent decree). If such precautions as not identifying source and making information generally available were taken, then trade association activity would appear to fall outside the prohibition of such cases as American Column & Lumber Co. v. United States, 257 U.S. 377 (1921) and Sugar Institute, Inc. v. United States, 297 U.S. 553 (1936). In fact, in a case upholding one of the early state anti-compact statutes, Mr. Justice Holmes clearly stated: "The bill seems to assume that the statute forbids insurance companies to obtain and use each other’s experience, or to employ the same person to work up the results. It does not. It simply forbids an agreement between the companies relating to the rates which may be based upon those results." Carroll v. Greenwich Ins. Co., 199 U.S. 401, 411-12 (1905). Such an arrangement would apparently also be valid under a state law like that of Massachusetts. Mass. Gen. Laws Ann. ch. 93, § 2 (1958), forbidding combinations in restraint of trade, has been held not to apply to a bureau formed to do engineering estimates for bids by sprinkler manufacturers in order to reduce costs and to overcome the shortage of engineers. The bureau apparently did not engage in any consideration of bid prices and did not pass bid information around among the various bureau members. Berenson v. H. G. Vogel Co., 253 Mass. 185, 148 N.E. 450 (1925), cert. denied, 260 U.S. 577 (1925). Analogous arrangements do exist in the life insurance industry and would seem, at least to the extent now maintained, to be objectionable under the antitrust laws. For example, the life insurance companies maintain a Medical Information Bureau which gathers centrally the medical impairment data received by various member companies concerning applicants for life insurance. The Bureau’s facilities are used to check statements concerning medical history made by applicants for life insurance in any member company for possible misrepresentations. The workings of the Bureau are described in New York Life Ins. Co. v. Strudel, 243 F.2d 90, 91-92 (5th Cir. 1957) and in Gallagher v. New England Mut. Life Ins. Co., 33 N.J. Super. 128, 109 A.2d 457 (1954), aff’d, 19 N.J. 14, 114 A.2d 857 (1955). Apparently no cases have construed this Bureau’s status under the federal antitrust laws. But it has been held valid under the New York state antitrust law. 1954 N.Y. Att’y Gen. Ann. Rep. 189. And the arrangement would seem to fall under the principle of those federal antitrust cases which justify cooperative activities seeking to defend sellers against the fraud of buyers, fraud being a factor which naturally would upset the otherwise normal operation of the competitive market mechanism. E.g., Cement Mfrs. Protective Ass’n v. United States, 268 U.S. 588, 603-04 (1925). For an example of an unlawful insurance industry “trade association”—type practice, see United States v. Mortgage Conference of New York, Civil No. 37-247, S.D.N.Y., June 28, 1948, Trade Reg. Rep. (1948-1949 Trade Cas.) ¶ 62,273. In general, see the discussion of permissible trade association activities in Lamb & Kittelle, Trade Association Law and Practice 31-52 (1956).

ground that the states had not regulated effectively within the meaning of the section 2(b) proviso of the McCarran-Ferguson Act. State enforcement efforts would also fill gaps created by limitations in federal budgets and staffs.

2. For Tie-in Sales?

Because the apparent pattern of judicial decisions under the federal antitrust laws points towards the exclusion of insurance tie-in practices from their application, the most practical solution to regulation of these restraints of trade would be to subject them to the operation of a state statute expressly forbidding the particular transaction.

Present state anti-inducement and anti-discrimination statutes would not do the job satisfactorily because many of them were obviously not drafted with the tie-in situation in mind. And, as we have seen, many of them have also been interpreted too narrowly. The insurance industry, in cooperation with the NAIC, should prepare a uniform statute for adoption in the several states. Such a course of action has been successfully followed in an attempt to meet other insurance trade regulation problems. The uniform statute could be patterned generally after section 3 of the Clayton Act. It should grant rights to sue to both the state government, either through the attorney general or the insurance commissioner, and to any aggrieved private party. Specified remedies should include, of course, injunctions, substantial fines and actual, and perhaps even penalty, damages.

Again, this solution would require no change in the present McCarran-Ferguson Act but instead would seem to be carrying out its basic intent; and it would seem much more realistic politically than any attempt to have Congress amend the present federal antitrust laws so that they would clearly cover insurance tie-ins.

V. Summary.

Quite clearly the proposals just made are nothing more than specific suggestions for improving the effectiveness of state regulation of insurance, not in broad sweeping terms, but only with reference to two particular insurance industry practices, rate making and tie-ins, which may be regarded as restraints of trade. These narrow

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241. For example, the NAIC in cooperation with the industry prepared an Unfair Trade Practices Act, 1947 NAIC PROCEEDINGS 392, which by 1958 had been adopted in some 42 states and 3 territories, 2 1958 NAIC PROCEEDINGS 328.
recommendations reflect the basic thesis of this paper as to the intention of Congress with regard to antitrust problems in passing the McCarran-Ferguson Act.

As discussed earlier, Congress faced three distinct problems as a result of the holdings in the South-Eastern Underwriters case: first, preservation of general state insurance regulation which did not involve problems of restrictions on competition; second, preservation of state taxation of insurance; and third, applicability of the federal antitrust laws. In sections 2(a) and 2(b) of the McCarran-Ferguson Act Congress stated flatly that the first two of these subjects were to remain within the control of the states without qualification.

The third subject was dealt with specifically in the proviso to section 2(b). Unfortunately the urgency surrounding the passage of the McCarran-Ferguson Act prevented Congress from making a careful and detailed examination of every separate insurance industry practice which might conceivably constitute a restraint of trade and from determining the extent to which it wanted the federal antitrust laws to be applicable to each such practice. The South-Eastern Underwriters decision itself directed Congress' attention only to the two specific problems of rate making and acts of boycott, coercion and intimidation. As indicated earlier, Congress adopted two completely different solutions for these two specific practices which it did consider in detail. Boycotts were made expressly and permanently subject to the federal antitrust laws by the provisions of section 3(b). Rate making was, by the proviso of section 2(b), exempted conditionally from the federal antitrust laws, the condition being that the states perform substantially the same functions as would be performed by application of the federal antitrust laws — providing the public with the best possible insurance protection at the lowest possible cost. Because of lack of time other insurance practices which might constitute restraints of trade were not dealt with individually but were simply swept under the philosophy applied to the rate-making problem. Thus, by virtue of this section 2(b) proviso, with the exception of acts of boycott, the Sherman Act, the Clayton Act, the Federal Trade Commission Act and the Robinson-Patman Act, which deal with a wide variety of restraints of trade, were to apply to those restraints in the insurance business only to the extent that the undesirable features of those restraints had not been "regulated" by the states.

The legislative history analyzed above makes quite clear that Congress did not intend to subvert the achievement of South-Eastern Underwriters by permitting mere "paper" state regulation to exclude
operation of the federal antitrust laws. What the Congress intended was that the states should undertake, restrictive practice by restrictive practice, to provide suitable machinery for control. There is much contemporary evidence that this is precisely what both the states and the insurance industry understood the congressional mandate to be. All parties concerned appear to have understood that so long as the states provided effective control of restrictive insurance practices the federal antitrust statutes would not apply. If, however, the states failed to assume their responsibility, then the federal authorities were to be free to step back in — even without any change in the present language of the McCarran-Ferguson Act. The ability of federal authorities to apply the federal antitrust laws would naturally be conditioned on a determination that as to the single particular restrictive practice involved the states had failed to do an effective job of regulating that particular practice.

In light of this background it is almost impossible to comprehend the position taken by the Supreme Court in the National Casualty and American Hospital & Life cases. First, the Court's suggestion that mere "paper" state regulation would be enough to prevent application of the federal laws controlling competition seems to run directly contrary to Congress' intent. And, second, to note blandly that the majority of states have enacted their own unfair trade practice laws completely ignores the obvious intention of Congress that the actual effectiveness of operation of those laws should be examined with regard to the particular alleged restrictive practice.

The Court's failure to analyze adequately the meaning of the McCarran-Ferguson Act with regard to the application of the federal antitrust laws to the business of insurance stems, it appears, from its failure to appreciate the three separate objectives, outlined above, which the McCarran-Ferguson Act was seeking to accomplish. State regulation of insurance is not one, but three, regulations. The McCarran-Ferguson Act cannot be viewed as laying down one blanket policy for all questions of insurance regulation. The antitrust question must be cut out and analyzed separately.

That the Court's conclusions in the National Casualty and American Hospital & Life per curiam opinion rest on this dubious assumption, that the McCarran-Ferguson Act is to be viewed as a whole, is made apparent by the Court's subsequent insurance decision in SEC v. Variable Annuity Life Ins. Co. of America.²⁴² There the Court held, five to four, that variable annuities are subject to regulation by the

SEC. Mr. Justice Douglas, writing for the majority, avoided the McCarran-Ferguson Act problem by finding that variable annuities are not insurance. The concurring opinion by Mr. Justice Brennan, writing for himself and Mr. Justice Stewart, did not reach the question of the application of the Act. But Mr. Justice Harlan's dissenting opinion, concurred in by Justices Frankfurter, Clark and Whittaker, reveals the source of the misunderstanding in the National Casualty and American Hospital & Life cases. Mr. Justice Harlan stated that in those decisions — "we declined to give a niggardly construction to the McCarran Act." He also later stated that Congress, in response to South-Eastern Underwriters "enacted the McCarran-Ferguson Act, . . . which on its face demonstrates the purpose 'broadly to give support to the existing and future state systems for regulating and taxing the business of insurance,' Prudential Ins. Co. v. Benjamin, supra, at 429, and 'to assure that existing state power to regulate insurance would continue,' Wilburn Boat Co. v. Fireman's Fund Ins. Co., supra, at 319." The first of the decisions cited by Mr. Justice Harlan, Prudential Ins. Co. v. Benjamin, upheld state taxation of insurance companies, and the second, Wilburn Boat Co. v. Fireman's Fund Ins. Co., upheld a state statute controlling policy terms, both in the light of the McCarran-Ferguson Act. They accurately reflect congressional policy as to the first of the two purposes of that Act. But they have nothing to do with Congress' intention with regard to the third purpose of that Act — to express the conditional inapplicability of the federal antitrust laws.

In its current investigation the Senate Antitrust and Monopoly Subcommittee has clearly indicated that it proposes to review the entire status of regulation of restrictive insurance practices by the states and to attempt to determine whether any revision should be made by Congress of the partial and conditional exemption from the federal antitrust laws now afforded insurance by the McCarran-Ferguson Act. That investigation is taking up each potential restrictive practice separately. It seems rather unfortunate that the efforts of the subcommittee are being viewed by at least some of the state insurance authorities as primarily the first step in the direction of affirmative federal regulation of the insurance business.

243. Id. at 96-97.
244. Id. at 99.
245. 328 U.S. 408 (1946).
247. See note 14 supra.
Such attitudes reflect an oversimplification of the problem. The courts, on the one hand, are tending to overgeneralize in favor of any form of state regulation of insurance without any discrimination as to the real Congressional intent. The state insurance commissioners and the insurance industry, on the other hand, are overgeneralizing against any form of federal intervention or control, again without discrimination.

Generalizations of this nature are dangerous.

Instead, from the courts, including the Supreme Court, is required a realistic interpretation of the present McCarran-Ferguson Act. The interpretation currently being given to that Act on insurance antitrust-type problems only tends to obscure the necessity for action by the states to improve their regulation of insurance and perhaps, by creating a false impression to the contrary, is even hastening the likelihood of action by an impatient Congress which will look toward direct federal regulation of the insurance industry.

What is required on the part of state insurance commissioners and the insurance industry itself is a full understanding of the nature of the limited antitrust exemption granted by the McCarran-Ferguson Act, a careful examination of the effectiveness of state control of individual insurance practices constituting actual or potential antitrust violations and a serious effort to make those revisions in state law which will foreclose the necessity either of applying the federal antitrust laws under the present McCarran-Ferguson Act or of revising that Act.

249. Such careful surveys were made in the years immediately following passage of the McCarran-Ferguson Act. See, for example, the thorough 43 page analysis of insurance practices and the federal antitrust laws prepared for the fire insurance industry. First, Second and Third Reports of the Sub-Committee of Lawyers to the Committee on Laws of the National Board of Fire Underwriters (1945). New York, always the dominant state in insurance regulation, made an extremely comprehensive study of the same nature. Report of the Joint Legislative Committee on Insurance Rates and Regulation, Leg. Doc. No. 46 (1948). This special joint committee has been continued and regularly prepares studies and reports on problems of insurance regulation. See also 4 N.Y. EXAMINATION OF INSURANCE COMPANIES I-66 (Straub ed. 1954) for a thorough analysis of New York regulation and the antitrust law prepared by the New York department itself. What is undoubtedly the most comprehensive examination of state regulation in light of the antitrust laws is a six volume survey of the laws of every state prepared by the Federal Trade Commission in 1950. Only four typed copies of this survey were made. However, its results are summarized in F.T.C. Press Release, April 28, 1950, accompanied by a 27 page Memorandum by Mr. E. W. Thomerson, Asst. Gen. Counsel of the F.T.C. What is now required are more careful studies of this same general type. It should be noted that the Attorney-General's National Committee to Study the Antitrust Laws completely ignored the problem of insurance although Chap. VI of the Report was devoted to various other exemptions. The omission of insurance has been criticized both by some Committee members, ATT'Y GEN. NAT'L COMM. ANTITRUST REP. 290-91 (1955), and by others, 1955 A.B.A. ANTITRUST LAW SEC'T. PROCEEDINGS 131. A relatively recent compilation of the various state statutes dealing with specific restrictive practices appears in Donovan, The Case in Favor of Existing Exemptions from the Antitrust Laws, 20 FED. B.J. 56 (1960).
This paper has attempted to make clear the true intention of Congress with regard to antitrust and the business of insurance as expressed in the McCarran-Ferguson Act and to suggest the way to adequate control of but two specific insurance practices by the state — rate making and tie-ins. Similar detailed and individualized studies are essential for a myriad of other insurance practices actually, or potentially, in restraint of trade.

If this paper has, at least, provided a clearer understanding of the task before the courts, the states and the business of insurance, it will have accomplished its purpose.