Eight Years After S.E.U.A. - Present Status of the Regulation of Insurance as Commerce

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A. ANALYSIS OF THE S.E.U.A. DECISION

On June 5, 1944, the United States Supreme Court handed down its earth-shaking decision in the case of United States v. South Eastern Underwriters Association.¹ This case involved a criminal prosecution brought in the District Court of the United States for the Northern District of Georgia against an association of fire insurance companies operating in Georgia and surrounding states, and against 27 of its officers and 198 of its member companies. It was charged that a conspiracy existed to fix and maintain arbitrary and non-competitive rates and to monopolize trade and commerce in violation of the Sherman Anti-Trust Act. A demurrer to the indictment was sustained by the U.S. District Court in August, 1943. On appeal, the United States Supreme Court reversed the District Court by a 4 to 3 decision (Justices Roberts and Reed having disqualified themselves). The high court thus sustained the indictment on the ground that the defendants were engaged in interstate commerce and, therefore, subject to the Sherman Anti-Trust Act. An opinion written by Mr. Justice Black (Justices Murphy, Douglas and Rutledge concurring), distinguished a long line of cases beginning with Paul v. Virginia² which held that insurance was...

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¹ 322 U.S. 533, 64 S.Ct. 1162, 88 L.Ed. 1440 (1944).

not commerce. The Court pointed out that the earlier cases involved only the validity of state statutes and that this was the first case which squarely presented the question whether the Commerce Clause grants to Congress the power to regulate insurance when conducted across state lines. Chief Justice Stone filed a vigorous dissenting opinion in which Justice Frankfurter concurred. Justice Jackson filed a separate dissenting opinion. Chief Justice Stone pointed out that "Nothing in its (Sherman Act) legislative history suggests that it was to apply to the business of insurance." The Chief Justice further questioned the decision of the Court "in now overturning the precedents of seventy-five years governing a business of such volume and of such wide ramifications," and he commented that the decision "cannot fail to be the occasion for loosening a flood of litigation and of legislation, state and national, in order to establish a new boundary between state and national power, raising questions which cannot be answered for years to come, during which a great business and the regulatory officers of every state must be harassed by all the doubts and difficulties inseparable from a realignment of the distribution of power in our federal system."4

Justice Jackson, in his dissenting opinion, also pointed with alarm to the fact that: "The Court's decision at very least will require an extensive overhauling of state legislation relating to taxation and supervision. The whole legal basis will have to be reconsidered. What will be irretrievably lost and what may be salvaged no one can now say, and it will take a generation of litigation to determine. Certainly, the states lose very important controls and very considerable revenues."5

Eight years have passed since the decision in the South Eastern Underwriters case—eight years of insurance as commerce. It is time to examine again the record to see whether any or all of the dire predictions made as to the effect of the S.E.U.A. decision on the insurance industry have come true.

B. MAJOR COURT DECISIONS SINCE THE SOUTH EASTERN UNDERWRITERS DECISION

While the South Eastern Underwriters' decision inevitably produced some litigation in order to clarify the confused situation which resulted from the Court's holding that insurance is commerce, one could not truthfully say that a "flood of litigation" has been loosed as a result of that decision during the last eight years.

Almost two years to the day passed before the United States Supreme Court handed down any decisions directly involving questions arising under the South Eastern Underwriters case.

3 Supra, note 1, 322 U.S. at p. 574.
4 Supra, note 1, 322 U.S. at p. 583.
5 Supra, note 1, 322 U.S. at p. 590.
6 The decision in the case of Polish National Alliance v. National Labor Relations Board, 322 U.S. 643, 64 S.Ct. 1196, 88 L.Ed. 1509 (1944), was handed
On June 3, 1946, the Court decided two cases affirming the power of the states to regulate or tax insurance companies. In the case of *Prudential Insurance Company v. Benjamin* it was held that the State of South Carolina had power to impose a three percent premium tax on a foreign life insurance company even though the tax imposed under the South Carolina statute applied only to foreign insurance companies and not to domestic insurance companies. This case involved Public Law 15 which declares that the continued regulation and taxation by the several states of the business of insurance is in the public interest and that such business shall be subject to the laws of the several states which relate to the regulation or taxation of such business. The Court declared Public Law 15 valid as involving no unconstitutional delegation of power by Congress and as violating no constitutional provisions.

The second case, decided on June 3, 1946, was the case of *Robertson v. California* which upheld a conviction of the defendant-appellant of having violated a California statute requiring the licensing of insurance agents, and making it a misdemeanor to act as agent for a nonadmitted insurance company. In this case the Court, without regard to Public Law 15 (the McCarran Act), upheld the state power to regulate the business of insurance. Justice Rutledge wrote the opinion of the Court and Justice Douglas dissented in part. The Court stated that "to avoid any semblance of retroactive effect in a criminal matter, we have refrained from explicit reliance upon the (McCarran) Act in this case. It does detract from our decision on other grounds that the McCarran Act, if applied, would dictate the same result."

Down on the same day, June 5, 1944, when the Court decided the South Eastern Underwriters case, *supra*, note 1. The Polish Alliance case held that a fraternal benefit society was subject to the National Labor Relations Act because the Polish National Alliance was an insurance company and that its operations "affect" commerce within the meaning of the Act. Justice Frankfurter wrote the opinion and there were no dissents therefrom.

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7 328 U.S. 408, 66 S.Ct. 1142, 90 L.Ed. 1342, 164 A.L.R. 476 (1946). Note: State Farm Mutual Automobile Ins. Co. v. Duel, 324 U.S. 154, 65 S.Ct. 573, 89 L.Ed. 812 (1945) was not decided under S.E.U.A. or Public Law 15. In this case the United States Supreme Court on Feb. 12, 1945, upheld, under the Fourteenth Amendment to the Federal Constitution, a Wisconsin statute requiring, as interpreted by the Wisconsin insurance commissioner, premium reserves on out of state membership fees. The high Court upheld the judgment of the Wisconsin Supreme Court without deciding the question whether the Wisconsin statute as applied was in violation of the commerce clause inasmuch as this question was not raised in the lower court but was first raised in the U.S. Supreme Court, since it emerged only after the appeal was filed on June 1, 1944. The U.S. Supreme Court decided the Southeastern Underwriters case, *supra*, note 1, holding that insurance is commerce, on June 5, 1944. The high Court concluded that the company would not be prejudiced since it could raise the commerce question in the Wisconsin courts, either in the present case or in other pending cases.

8 59 Stat. 34, 15 U.S.C.A. 1011-1015, Public Law 15, also known as the McCarran Act, was adopted March 9, 1945.


One week after the decisions in the Prudential and the Robertson cases, on June 10, 1946, the United States Supreme Court upheld\(^\text{11}\) a decision of the Kansas Supreme Court\(^\text{12}\) in In re Insurance Tax Cases, sustaining the regular Kansas premium tax similar to the South Carolina premium tax. The United States Supreme Court in the cases of American Indemnity Co. v. Hobbs,\(^\text{13}\) and Pacific Mutual Life v. Hobbs,\(^\text{14}\) affirmed the validity of the Kansas premium tax imposed under the provisions of the Kansas retaliatory law.\(^\text{15}\) The per curiam opinion of the United States Supreme Court filed in all four of the above cases merely cited the cases of Prudential Insurance Co. v. Benjamin, and Robertson v. California to affirm the judgment of the lower court.\(^\text{16}\)

In Prudential Ins. Co. v. Indiana\(^\text{17}\) the United States Supreme Court affirmed the judgment of the Indiana Supreme Court holding valid the Indiana insurance premium tax law\(^\text{18}\) imposing a tax on premiums collected by foreign insurance companies in Indiana as not constituting a burden upon or discriminating against interstate commerce, especially in view of Public Law 15 stating the taxation of the interstate business of insurance shall continue by the states. The United States Supreme Court cited its decision in the Prudential Ins. Co. v. Benjamin case in affirming the lower court.

In Prudential Ins. Co. v. Barnett\(^\text{19}\) the Mississippi Supreme Court ruled that in view of Public Law 15 the Mississippi insurance premium tax of 2½ per cent imposed on foreign insurance companies was valid, notwithstanding that local companies are required to pay but one-half of that amount against which their ad valorem tax may be credited.

In Keehn v. Brady Transfer & Storage Co.\(^\text{20}\) a lower federal court held that the requirement of the Iowa Code of 1939\(^\text{21}\) that a company issuing insurance other than life insurance disclose its financial condition is valid until Congress occupies the field by the passage of an insurance regulatory law, since the Iowa statute involved is non-discriminatory, being applied on home and foreign insurance companies alike, and is not a burden on interstate commerce.


\(^{12}\) In re Insurance Tax Cases, 160 Kan. 300, 161 P. (2d) 726 (1945).

\(^{13}\) 328 U.S. 822, 66 S.Ct. 1358, 90 L.Ed. 1602 (1946).

\(^{14}\) Ibid.

\(^{15}\) Supra, note 12.

\(^{16}\) Supra, notes 11, 13 and 14.

\(^{17}\) 328 U.S. 823, 66 S.Ct. 1363, 90 L.Ed. 1603 (1946). Lower court decision is found in 224 Ind. 17, 64 N.E. (2d) 150 (1945).

\(^{18}\) Burn's Annotated Indiana Stats., §39-4802.

\(^{19}\) 200 Miss. 233, 27 S.(2d) 60 (1946).

\(^{20}\) 64 F. Supp. 392 (D.C. N.D. Ill., 1946), reversed on other grounds, 159 F. (2d) 383 (7th Cir., 1947).

\(^{21}\) Iowa Rev. Stats. (1939), § 8945.
In Mendola v. Dineen$^{22}$ the New York Court held that the provisions of the New York Statute$^{23}$ relating to the licensing and regulation of both domestic and foreign insurance companies doing business in the State of New York and of insurance agents, brokers and adjusters, are reasonable regulatory and protective measures, constituting proper exercise of the state's police power, and hence are not invalid as violating the Commerce Clause of the United States Constitution,$^{24}$ especially in view of Public Law 15 (the McCarran Act) expressing Congress' intention to leave to the states the regulation of foreign insurance companies doing business therein.

In Traveler's Health Ass'n. v. Virginia$^{25}$ the Traveler's Health Association of Nebraska attacked the validity of the provisions of the Virginia Blue Sky Law which requires persons selling or offering for sale securities, including insurance certificates, in the State of Virginia to obtain a permit from the State Corporation Commission, and also that such individual must agree that suits can be filed against him by service of process on the Secretary of State. Punishment may be by criminal action or by a "cease and desist order." The section also provides for service by registered mail where other types of service are unavailable "because the offering is by advertisement and/or solicitations through periodicals, mail, telephone, telegraph, radio, or other means of communications beyond the limits of the state."

The Traveler's Association was not licensed in Virginia and conducted its business by mail. New members were secured from persons recommended by present members in Virginia who submitted names to the home office in Nebraska. Applications were then mailed prospects who mailed the completed application with premium to the Company and in due time received their policies. About 800 members were in Virginia.

The Commission served the Company with process by registered mail and proceeded under the law to issue a "cease and desist" order. The Company appeared "specially" to protest the jurisdiction of the state. The Virginia courts upheld the statute and the United States Supreme Court affirmed.

This decision undoubtedly ends the day of uncontrolled mail order insurance. The states will, in all likelihood, in the near future impose strict regulations on mail order insurance and may even require all insurers to be licensed in each state in which the insurer solicits insurance.

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$^{22}$ 185 Misc. 540, 57 N.Y.S. (2d) 219 (1945).
$^{23}$ Mckinney's N.Y. Insurance Law, §§ 40, 42, 110 et seq.
$^{24}$ U.S. Const., Art. 1., Sec. 8, Cl. 3.
In *North Little Rock Transportation Co. v. Casualty Reciprocal Exchange*, the United States Supreme Court denied a petition for a writ of certiorari to the United States Circuit Court of Appeals. This action had the effect of upholding the validity of the Arkansas "All-Industry type" of casualty rating law which provides for a state automobile risk plan, under which each auto insurer accepts an equitable number of risks from applicants unable to obtain insurance elsewhere. The decisions of the United States District Court and the United States Court of Appeals sustained the legality of the state insurance law in question and of Public Law 15. In this case the Transportation Company had sued the Casualty Reciprocal Exchange and others to recover treble damages under the Federal Anti-Trust Acts and to enjoin the fixing of automobile liability insurance rates. The Company had challenged the validity of Public Law 15 and Act 116 of the Acts of Arkansas, 1947, pursuant to which the Casualty Reciprocal Exchange had fixed the casualty insurance rates complained of. The United States Court of Appeal cited the *Prudential Insurance Co. v. Benjamin* case, and the *Robertson v. California* case, among others, in support of its decision upholding the federal and state acts involved.

The Federal District Court, in the *North Little Rock* case, in discussing the application of the Federal statutes to the business of insurance, said in part:


"3. In the absence of public regulation or Congressional exemption, the price fixing activities of the Bureau involved in this case would constitute a violation of the Sherman Act. United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 60 S.Ct. 746, 84 L.Ed. 1104, rehearing denied, Socony Vacuum Oil Co. v. United States, 310 U.S. 658, 60 S.Ct. 1091, 84 L.Ed. 1421.

"4. The Sherman Act is not violated by acts authorized and regulated by state statute. Parker, Director of Agriculture, et al. v. Brown, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315. There the court said: 'We find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature.' (p. 351) Also Prudential Insurance Co. v. Benjamin,
etc., supra. This also is expressly provided by the McCarran-Ferguson Act, which exempts insurance from the Sherman Act 'to the extent that such business is regulated by state law.' Act 116 of Arkansas, 1947, constitutes proper regulation within the meaning of that statute.

"5. The McCarran-Ferguson Act is not a delegation 'to individual States power to legislate in the regulation of insurance transactions coming within the Commerce Clause,' but is a division of power between the United States and the several States, a rendering unto Caesar the things that are Caesar’s. Connecticut Light & Power Co. v. Federal Power Commission, 324 U.S. 515, 65 S.Ct. 749, 89 L.Ed. 1150. In this case the court found that the congressional action in extending federal jurisdiction to only 'those matters which are not subject to regulation by the States ***' constituted a legal standard that must be given effect in resolving conflicting claims by federal and state authorities of power to regulate. (p. 531) Also Prudential Insurance Company v. Benjamin, etc., supra.”

In the recent decision in California State Automobile Ass'n v. Maloney28 the United States Supreme Court sustained the validity of the California Compulsory Assigned Risk Law29 against attacks based on the Due Process Clause of the Fourteenth Amendment. In this case, the Court, through Mr. Justice Douglas, said:

"The case in its broadest reach is one in which the state requires in the public interest each member of a business to assume a pro rata share of a burden which modern conditions have made incident to the business. It is therefore not unlike Noble State Bank v. Haskell, 219 U.S. 104, 55 L.Ed. 112, 31 S.Ct. 186, 32 L.R.A. NS 1062, Ann. Cas. 1912A 487, which sustained a state law assessing each state bank for the creation of a depositor's guaranty fund. What was there said about the police power—that it 'extends to all the great public needs' and may be utilized in aid of what the legislative judgment deems necessary to the public welfare (p. 111)—is peculiarly apt when the business of insurance is involved—a business to which the government has long had a 'special relation.' See Osborn v. Ozlin, 310 U.S. 53, 65, 66, 84 L.Ed. 1074, 1079, 1080, 60 S.Ct. 758. Here, as in the banking field, the power of the state is broad enough to take over the whole business, leaving no part for private enterprise. Mountain Timber Co. v. Washington, 243 U.S. 219, 61 L.Ed. 685, 37 S.Ct. 260, Ann. Cas. 1917 D 642, 13 NCCA 927; Osborn v. Ozlin, supra. The state may therefore hold its hand on conditions that local needs be serviced by the business. Osborn v. Ozlin, supra, was such a case; it sustained on that theory Virginia's law requiring Virginia residents to have a share in writing casualty and surety risks in Virginia. The principle of Osborn v. Ozlin now presses for recognition in a situation as acute as any with which the states

29 CAL. STAT. (1947), ch. 39, as amended, ch. 1205.
have had to deal. Highway accidents with their train of property and personal injuries are notoriously important problems in every community. Clearing the highways of irresponsible drivers, devising ways and means for making sure that compensation is awarded the innocent victims, and yet managing a scheme which leaves the highways open for the livelihood of the deserving are problems that have taxed the ingenuity of lawmakers and administrators.

"Whether California's program is wise or unwise is not our concern. See Olsen v. Nebraska, 313 U.S. 236, 85 L.Ed. 1305, 61 S.Ct. 862, 133 A.L.R. 1500; Lincoln Federal Labor Union v. Northwestern Iron & Metal Co., 335 U.S. 525, 93 L.Ed. 212, 69 S.Ct. 251, 260, 267, 6 A.L.R. (2d) 473. The problem is a local one on which views will vary. We cannot say California went beyond permissible limits when it made the liability insurance business accept insurable risks which circumstances barred from insurance and hence from the highways. Appellant's business may of course be less prosperous as a result of the regulation. That diminution in value, however, has never mounted to the dignity of a taking in the constitutional sense. See Noble State Bank v. Haskell, supra; Block v. Hirsh, 256 U.S. 135, 155, 65 L.Ed. 865, 870, 41 St.Ct. 458, 16 A.L.R. 165.

"Affirmed." (Emphasis ours)

In Darr v. Mutual Life Ins. Co.\textsuperscript{30} it was held that an insurance company's activities in the development of the contents of its insurance contracts, the preparation of its policy forms, the entering into of insurance contracts, the carrying out of such contracts, and the like, were covered by the Federal Fair Labor Standards Act\textsuperscript{31} because "these insurance policies (contracts) are goods produced for commerce."\textsuperscript{32} The United States Circuit Court of Appeals decision affirmed the lower Federal Court's decision that the employees of a life insurance company who are engaged in the maintenance and operation of the company's home office buildings in New York City are covered by the Fair Labor Standards Act of 1938.\textsuperscript{33}

In the \textit{Darr case}, the United States Circuit Court of Appeals said, in part:\textsuperscript{34}

"The decisions which we are bound to follow lead us to the conclusion that the Fair Labor Standards Act does cover these plaintiffs. In United States v. South Eastern Underwriters' Ass'n., 322 U.S. 533, 64 S.Ct. 1162, 88 L.Ed. 1440, it was held that insurance business conducted across state lines in substantially the same way the appellee conducts its business was subject to regulation by Congress under the Commerce Clause. While


\textsuperscript{31}29 U.S.C.A. §§ 203(j), 206, 207.

\textsuperscript{32}Supra, note 30, 169 F. (2d) at pp. 264-265.

\textsuperscript{33}29 U.S.C.A. §§ 201-209.

\textsuperscript{34}Supra, note 30, 169 F. (2d) at p. 264.
that, perhaps, is not wholly determinative of the question whether insurance policies are "goods" within the meaning of section 3(i) of the Fair Labor Standards Act, 29 U.S.C.A. Sec. 203 (i), it does show that the issuance of such policies may be a part of interstate commerce and supersedes such decisions as Paul v. Virginia, 8 Wall. 168, * * *.*34a

The impact of the S.E.U.A. decision and of Public Law 15 as regards the regulation and taxation of insurance companies has been examined and discussed by the courts in other cases of lesser importance, as in Ware v. Travelers Ins. Co.35 where the court upheld the resident agents statute; in First National Benefit Soc. v. Garrison,36 wherein the right of the state of California to regulate a foreign insurance company was sustained; in Glass v. Prudential Ins. Co.,37 where the court upheld the validity of the Alabama premium tax as applied to a foreign insurance company; in Keehn v. Hi-Grade Coal & Fuel Co.,38 where it was held that a New Jersey statute regulating insurance was not rendered invalid by the S.E.U.A. decision; in Insurance Commissioner of Pennsylvania v. Griffiths,39 which involved an action to recover an assessment under a decree of a foreign court; and in Keehn v. Laubach, et. al.,40 where the court sustained the validity of the requirement that an insurance company disclose its financial condition. All of these cases involved in the main about the same type of situations that have arisen from time to time before S.E.U.A. and the courts' rulings were just about what one would expect under the circumstances in each case.

The foregoing summary and discussion of the most important decisions involving insurance regulatory and tax laws since S.E.U.A. serves to demonstrate that the present thinking of the courts regarding the powers of the states to regulate and tax the business of insurance is

34a The decisions discussed hereinbefore are the only cases of prime importance decided since S.E.U.A. which involve directly the power of the states under existing Federal laws (and especially under Public Law 15) to regulate insurance companies doing business in two or more states. There are a number of other decisions which involve, in general, the regulation of insurance companies. However, in these cases the courts were called upon to consider merely very general questions of regulation or of statutory construction. Among some of the more recent decisions of this type are the following: Klukas v. Yount, 98 N.E. (2d) 227 (Ind. App., 1951); Commissioner v. O’Leary, 168 Pa. Super, 569, 72 A. (2d) 789 (1951); Indemnity Ins. Co. of No. Am. v. Rutherford Ftr. Lines, 64 S.E. (2d) 668 (Va., 1951); Arkansas Inspection & Rating Bureu v. Ins. Co. of No. Am., 218 Ark. 830, 238 S.W. (2d) 929 (1951); Bd. of Ins. Commissioners v. Great Southern Life Ins. Co., 239 S.W. (2d) 803 (Tex., 1951); Employers' Liability Ass'm. Corp. v. Lejeune, 189 F. (2d) 521 (5th Cir., 1951); Dearborn Nat. Ins. Co. v. Forbes, 329 Mich. 107, 44 N.W. (2d) 892 (1951).

35 150 F. (2d) 463 (9th Cir., 1945).
37 246 Ala. 579, 22 S. (2d) 13 (1945).
38 23 N.J. Misc. 102, 41 A. (2d) 525 (1945).
39 23 N.J. Misc. 96, 41 A. (2d) 386 (1945).
about what it has been before S.E.U.A. The recent decisions involving the power of the state to regulate or to tax insurance companies make it crystal clear that the courts will, in general, uphold such power of the states, at least to the same extent and degree as before the S.E.U.A. decision. Each case must, of course, be decided on its own facts, but there is no reason to expect at this time any basic change in the courts' attitude toward the states' regulation of the business of insurance.

C. FEDERAL LEGISLATION—PUBLIC LAW 15

Even before the decision of the United States Supreme Court in the S.E.U.A. case in June, 1944, the National Association of Insurance Commissioners had taken a great interest in the criminal action brought by the Federal Government against the South Eastern Underwriters' Association because of the importance of the legal issues involved. In November of 1943, a resolution was adopted by the State Insurance Commissioners at their midyear meeting, which reaffirmed the historic position of the Commissioners in favor of continued regulation of the business of insurance by the states. After the S.E.U.A. decision in June, 1944, which held that insurance was commerce and if conducted across state lines was interstate commerce, the Commissioners appointed a special committee which took an active part in the formulation of the law which was approved March 9, 1945, and which became known as the McCarran Act, or Public Law 15.41

Public Law 15, the only Federal law of prime importance affecting the business of insurance since S.E.U.A., was adopted to express the intention of Congress that the continued regulation and taxation by the several states of the business of insurance is in the public interest and that such business is to be subject to the laws of the several states which relate to the regulation or taxation of such business. The McCarran Act also created a so-called moratorium period. An anti-trust moratorium was deemed necessary to give the insurance industry enough time in which to become adjusted to its new status under the Sherman Anti-Trust Act and related federal laws. In order to accommodate the insurance industry and to allow sufficient time for the states to examine their laws and to overhaul and amend those already on the books where needed, to rescind some insurance laws and to adopt new laws regulating insurance, if necessary, Congress adopted the McCarran Act which specifically made the Sherman Anti-Trust Act and related Acts inapplicable to the business of insurance until January 1, 1948.42 However, the McCarran Act (Public Law 15) provides that even during the moratorium period, as well as thereafter, the Sherman Act is to remain

42 § 3a, Public Law 15, 15 U.S.C.A. § 1011 et seq. By amendment in 1947 the moratorium period was extended to June 30, 1948.
applicable to boycott, coercion and intimidation.\footnote{Ibid., \$3b.} The McCarran Act provides further that at the end of the moratorium period, the Sherman Act, Clayton Act and the Federal Trade Commission Act shall be applicable to the business of insurance “to the extent that such business is not regulated by state law.”\footnote{Ibid., \$2b.}

Another important part of the McCarran Act is the declaration by Congress that the continued regulation and taxation of the business of insurance by the states is in the public interest and that silence on the part of Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the states.\footnote{Ibid., \$1.} The Act also provides that the business of insurance shall be subject to state laws which regulate and tax it.\footnote{Ibid., \$2a.}

\section{D. STATE LEGISLATION}

\subsection{1. IN GENERAL}

At the time Public Law 15 was adopted in March, 1945, the amount and degree of regulation by the states of the business of insurance differed widely. State regulation varied from strict supervision of all lines of insurance to little or no regulation. This was due to the fact that the states differ widely in population as well as economically and socially. Moreover, insurance regulation is affected by the location of insurance companies, insurance needs and other factors. Thus, the problem facing each of the states was to analyze its own laws relating to the business of insurance to determine whether existing insurance laws constituted “regulation” within the meaning of Public Law 15 so as to continue state regulation and so as to provide immunity from the Federal Anti-Trust Acts. Those states which had little or no regulation of the insurance industry naturally wished to pass new insurance regulatory laws so as to provide the “regulation” demanded by the Act of March 9, 1945, while other states were interested in adding only such laws as were needed to supplement the insurance laws then in force, or perhaps to revamp existing laws in order to provide complete regulation. The result of seven years of enactment of state laws involving insurance regulation and taxation has truly produced a “flood . . . of legislation . . .” thus carrying out in part Chief Justice Stone’s famous prediction made in 1944 in the \textit{S.E.U.A.} case.

After the passage of Public Law 15, the National Association of Insurance Commissioners and the All-Industry Committee, representing all segments of the insurance industry, cooperated to formulate a tentative program of legislation deemed necessary to regulate effectively
the insurance industry and thus to carry out the intent of Congress. Among the important problems facing the Insurance Commissioners and the All-Industry Committee was the question of the meaning of the word "regulated" as used in Public Law 15 which provides, in part, that the Sherman, Clayton and Federal Trade Commission Acts shall be applicable to the business of insurance only "to the extent that such business is not regulated by state law." What is the yardstick to be used in determining whether particular legislation constitutes "regulation" within the meaning of Public Law 15? There are no authoritative court decisions construing the meaning of the word "regulated" as used in Public Law 15. In previous decisions involving a multitude of facts and under varying laws, the Courts generally gave the word "regulate" a broad and comprehensive definition, as meaning to control by rule, method or established mode, with appropriate regard to the welfare of those immediately concerned in the matter, as well as the public at large.

In construing the language of Public Law 15, some eminent authorities believe that the term "regulate" as used therein requires both positive and effective regulation of all phases of the insurance business, while other prominent insurance executives and attorneys just as vigorously assert that the intent of Congress as expressed in Public Law 15 will be fully satisfied by the adoption of state legislation setting up merely a standard or rule as a guide for regulation.

Another important item of discussion involved the matter of cooperative action on various subjects by and between insurance companies as, for example, in the compilation of statistics and in the adoption of rates and rating plans. Under the Federal Anti-Trust Laws, any agreement between two or more persons to fix prices constituted a violation per se of the Federal Laws. Thus, the desire of the states to avoid involvement of their insurance companies with Federal laws and to permit beneficial cooperation and collective action in certain fields between insurers, made legislation dealing with rate regulation and rating plans one of the first items of business in all of the states. State legislation, constituting "regulation" under Public Law 15 and under Parker v. Brown, could grant immunity to collaborating insurance companies from the restraints of the Sherman, Clayton and Federal Trade Commission Acts in rate matters and as to other activities.

47 Supra, note 44.
2. Rate Regulation Laws

After the passage of Public Law 15, the states gave immediate attention to the adoption of appropriate insurance rate legislation. One of the main subcommittees of the insurance All-Industry Committee was a conference committee chosen to collaborate with a subcommittee of the Committee on Rates and Rating Organizations of the National Association of Insurance Commissioners. These two groups spent a tremendous amount of time and did a herculean job in promulgating two drafts of rating laws—one a casualty and surety rate regulatory bill, and the other a fire, marine and inland marine rate regulatory bill. These so-called "model" bills were among the most carefully considered drafts of proposed legislation ever agreed upon by any group representing all segments of the industry involved.

The result was that most of the present state insurance rate regulation laws are based upon the Insurance Commissioners'-All Industry "model" bills, although in some states the rating laws adopted contain modifications of the "model" bills. In general, the legislation based on the "model" bills in broad outline, provides that: (1) The rates must conform to certain standards; that is, the rates cannot be excessive, inadequate or unfairly discriminatory; (2) The rates must be filed with the Insurance Commissioner who is directed to review such filings within a certain period of time (usually about fifteen days) before such rates become effective. The Commissioner, under such laws, is given certain powers to take action if the rates fail to meet the standards provided; (3) The insurance companies may combine in rating matters if their rating organizations are licensed and supervised by the state, but there is no requirement that the companies must combine in rating matters. In some states there is no mandatory requirement for the review of rates before they become effective.

Today, rate regulatory laws are in effect in all 48 states, the District of Columbia, Alaska and Puerto Rico. The insurance rating legislation

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50 (a) Fire and Marine: Ala., Act 132 (1945), am'd. Act 125 (1947); Alaska, ch. 58 (1947) (combined with casualty and surety bill); Ariz., ch. 126 (1947); Ark., Act 50 (1947), ARK. INS. LAWS (1950) §§ 201-203; Cal., ch. 805 (1947) (combined with casualty and surety bill), CAL. STATS. (1951) ch. 1123; Colo., ch. 217 (1947), Ins. Code (1950), 1951 Suppl. § 288a.; Conn., Act 136 (1945), superceded by Act 163 (1947); Del., ch. 161 (1947) (combined with casualty and surety bill); D.C., P.L. 327 (1944) (fire and windstorm), P.L. 541 (1948) (casualty and surety, inland marine, explosion); Fla., chs. 23950, 24067 (1947); Ga., Act 366 (1947); Hawaii, Act 61 (1947); Idaho, ch. 246 (1947); Ill., H-411 (1947); Ind., ch. 111 (1947); Iowa, ch. 260 (1947); Kan., ch. 278 (1947); Ky., H-400 (1948); La., Act 195 (ch. 30) (1948) (Combined with casualty and surety bill); Me., ch. 275 (1945); Md., ch. 927 (1947); Mass. ANNO. STATS. (1950), ch. 174-A; Mich., Act 100 (1947); Minn., ch. 120 (1947); Miss., ch. 168, L. 1924, ch. 356 (1946), am'd. S-190 (1948) (combined with casualty and surety bill); Mo. R. S. (1939), §§ 5971-5988; Mont., ch. 255 (1947); N.Y., INS. LAWS (1951), §§ 44-1443 to 44-1488; Nev., ch. 100 (1947) (combined with casualty and surety bill); N.H., ch. 261 (1947), as
enacted by many states has been in the form of two separate rating laws, one covering casualty and surety rate regulatory laws, and the other covering fire, marine and inland marine rate regulatory laws. In some states, however, a combined casualty, surety, fire, marine and inland marine law has been adopted.

In Wisconsin, for example, where the model bills for fire, marine and inland marine, and for casualty and surety insurance were adopted, the purpose section of both rating laws is practically identical. Section 203.32, Wis. Stats. (1949), relating to the purpose of the fire, marine and inland marine insurance rating sections reads as follows:

"The purpose of this section is to promote the public welfare by regulating insurance rates to the end that they shall not be excessive, inadequate or unfairly discriminatory, and to authorize and to regulate cooperative action among insurers in rate making and in other matters within the scope of this section. Nothing in this section is intended (1) to prohibit or discourage competition, 

am'd. 1949 (combined with casualty and surety bill); N.J., ch. 27 (1944), am'd. ch. 360 (1947); N. Mex., ch. 123 (1947); N.Y. ch. 618 (1948) (combined with casualty and surety bill); N. Car., ch. 380 (1945) (combined with casualty and surety bill); N.D., ch. 320 (1947); Ohio, S-144 (1947); Okla., ch. 174 (1915); Ore., ch. 337 (1947); Pa., PURDON'S ANNO. STATS. (1950), vol. 40, § 1224; Puerto Rico, Act 218 (1948) (combined with casualty and surety bill); R.I., ch. 2088 (1947); S. Car., Act 398 (1947); S.D., ch. 142 (1947); Tenn., ch. 104 (1945); Tex., ch. 10 (1913), am'd. ch. 161 (1945); Utah, ch. 63 (1947) (combined with casualty and surety bill); Va., ch. 268, 402 (1948); Wash., ch. 79 (1947) (combined with casualty and surety bill); W. Va. Code (1943) §§ 3370-3381 (fire), ch. 105 (1947) (marine); Wis. Stats. (1951), § 203.32; Wyo. INS. LAWS (1949), § 29. (b) Casualty and Surety: Ala., Act 133 (1945) §§217-219; Alaska, ch. 58 (1947) (combined with fire and marine bill); Ariz., ch. 122 (1947); Ark., Act 116 (1947); Ariz. INS. CODE (1950), 1951 Suppl., §§ 217-219; Calif., ch. 805 (1947) (combined with fire and marine bill); Calif. STATS. (1951), ch. 1123; Colo., ch. 215 (1947), INS. CODE (1950), 1951 Suppl., §§304; Conn., Act 133 (1945), superceded by Act 160, (1947); Del., ch. 161 (1947) (combined with fire and marine bill); D.C., P.L. 541 (1948) (includes marine); Fla., ch. 22637, (1945), am'd. chs. 23950 and 24071 (1947); Ga., Act 365 (1947); Ill., H-410 (1947); Ind., ch. 60 (1947), IND. STATS., §§ 39-3006 to 3045, m'd. ch. 75 (1947) (workmen's compensation); Iowa, ch. 259 (1947); Kan., ch. 215 (1945); Ky., ch. 100 (1946), superceded by ch. 106 (1948); La., Act 195 (ch. 30) (1948) (combined with first and marine bill); Me., ch. 274, (1947); Md., ch. 926 (1945); MASS. ANNO. STATS. (1950), ch. 175A; Mich., Act 90 (1947); Minn., ch. 119 (1947); Miss., ch. 356 (1946), am'd. S-190 (combined with fire and marine); Mo., s-392 (1948); Mo., S-144 (1948); Mont., ch. 255 (1947) (combined with fire and marine); NEW. INS. LAWS (1951), §§ 44-4401 to 44-1442; Nev., ch. 100 (1947) (combined with fire and marine bill); N.H., chs. 184, 235, 261 (1947) (combined with first and marine bill), as am'd. 1949; N. Mex., ch. 155 (1937); N.Y., ch. 618 (1948) (combined with fire and marine bill); N. Car., G.S. (1943), chs. 58, 97, ch. 380 (1945) (combined with fire and marine bill); N.D., ch. 214 (1947); Ohio, H-410 (1947); Ore., ch. 338 (1947); Penn., PURDON'S ANNO. STATS. (1950), vol. 40, §§1184; Puerto Rico, Act 218 (1948) (combined with fire and marine bill); R.I., ch. 2089 (1948); S.Car., Act, Act 398 (1947); S.D., ch. 137 (1945), superceded by ch. 143 (1947); Tenn., ch. 142 (1945); Tex., ch. 160 (1945); Utah, ch. 63 (1947) (combined with fire and marine bill); Va., ch. 281, P.L. (1933), am'd. Act 162 (1945), Act 173 (1947) (combined with fire and marine bill); Wash., ch. 79 (1947); Wis. STATS. (1951), §§ 204.37, 204.55; Wyo. INS. LAWS (1949), §§ 191-208.
or to prohibit, or encourage, except to the extent necessary to accomplish the aforementioned purpose, uniformity in insurance rates, rating systems, rating plans or practices. This section shall be liberally interpreted to carry into effect the provisions of this subsection . . .”

Section 204.37 of the 1949 Statutes, relating to casualty insurance, is in substance, the same as to purpose as Sec. 203.32 relating to fire, marine and inland marine insurance.

In California, Idaho, Montana and Missouri, no casualty rates are filed, but the Insurance Commissioner has authority later to investigate to see whether the rates measure up to the standards fixed by law. In the states of Texas and Louisiana the casualty rates are promulgated by the state. In Massachusetts where the compulsory automobile liability law is in effect, the state likewise fixes the casualty rates. In the District of Columbia, casualty rate filings are required and the Commissioner has power to investigate the rates filed to see whether they comply with the law.

In addition to the technical requirements of the various insurance rating laws, the companies are faced with the problem of strict or liberal interpretation of the state regulatory rating statutes. In jurisdictions where filings are required and where the Commissioner enforces a strict interpretation of the rating laws, the companies are required to justify rate filings by detailed statistical compilations. This requirement has caused many protests to be filed by companies who complain that the compilation of statistics is costly and that they also have difficulty in obtaining the data needed to comply with some of the Insurance Departments’ demands. Some insurers feel that too much emphasis is being placed upon statistics which, in many cases, become obsolete before they become available.

In states where filings of casualty insurance rates are required, the companies may do one of three things: (1) File their rates independently; (2) Become a member or a subscriber of a rating bureau, or (3) Become a member of a rating bureau but deviate from the bureau rates where this is permitted. Each company must decide for itself which method of filing it seems most advantageous for its particular operations.

In states where the so-called subsequent disapproval statutes are in force, the insurers, as a practical matter, usually do not put new rates into force until after the Department has approved the rates, for the reason that the insurers do not wish to promulgate a new rate, distribute

50a In the first known decision of its kind, the Circuit Court for Sangamon County, Ill., upheld the action of Illinois Insurance Director Day in authorizing two large fire insurance companies to deviate from the uniform rates fixed by the rating bureau of which the companies were members, and to charge lower rates in Cook County, Ill. [See 166 WEEKLY UNDERWRITER, p. 437 (No. 7, Feb. 16, 1952)].
this information to agents' or brokers' offices and then find that the Department has decided the rate is wrong and can't be used. The usual procedure is for the company to submit all rates in advance in order to protect themselves. So, most subsequent disapproval rating laws for practical reasons operate as prior approval laws.

The conclusion to be drawn from the practical workings of the various state insurance rating laws is that, despite some grumblings, misgivings and criticisms, the states have done a good job of meeting a difficult situation. This has been accomplished through fine cooperation between the insurance industry and the Insurance Departments. Naturally, some companies would prefer little or no regulation of rates, but since rate regulation is required and appears to be in the public interest, the companies for the most part have reconciled themselves to this situation. The future efforts of the insurers and the administrative authorities will, no doubt, be aimed toward improving any weakness or inadequacies in the present rating laws to the end that the public interest may be best served, competition preserved, with the companies given a maximum amount of freedom in their operations, including rate making and in the adoption and use of new and perhaps unorthodox methods of doing business.

3. **Unfair Trade Practices Acts**

Twenty-six states\(^{52}\) now have enacted so-called unfair trade practices acts applying to the business of insurance. The usual statutes of this type prohibits certain enumerated unfair acts and business practices, such as false advertising, defamation of competitors, rebates, false financial statements, unfair discrimination and the like.

4. **Clayton Type Anti-Trust Laws Relating to Interlocking Directorates**

Some states have enacted laws to regulate the problems arising from interlocking controls which are prohibited by the Federal Clayton Act.\(^{52}\)

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\(^{52}\) CAL. INS. CODE (1950), § 125; CONN. GEN. STATS. (1949), § 6094; ILL. REV. STATS. (1951), ch. 73, § 767.1; IND. INS. LAWS (1950), § 39-3727; MASS. ANNO.
These state laws usually provide that interlocking directorates, and purchases of other company stock, are authorized unless competition in the business of insurance would be lessened substantially, or a monopoly created therein. The Insurance Commissioner is usually given power, after notice and hearing, and where the Commissioner finds a violation of this Act, to issue a cease and desist order which is subject to judicial review.

The purpose of the various Clayton type state laws relating to interlocking directorates involving insurance companies is well expressed in section 6094, Connecticut General Statutes of 1949 which reads as follows:

"Any person may be a director in two or more insurance corporations when such interlocking directorate is not used as a means of substantially lessening competition or tending to create a monopoly."

5. ROBINSON-PATMAN TYPE LAWS

In some states legislation in the form of Robinson-Patman type laws was adopted. These statutes were considered necessary to make certain that the payment of commissions to brokers was permitted. The purpose of this type of statute is to meet any possible application to the business of insurance of the Federal Robinson-Patman Act which prohibits payment of commissions to the agents of the buyer, as well as prohibiting discrimination in commodity transactions.

6. ACCIDENT AND HEALTH INSURANCE LEGISLATION

Most states now have legislation requiring the filing of accident and health policy forms. In general the states do not regulate the rates to be charged for accident and health insurance. There are exceptions, however. The newer accident and health insurance regulation laws which have been adopted during the last five years have followed the provisions of the National Association of Insurance Commissioners-All Industry "model" bill. Under legislation of this type, the Commissioner usually has power, after notice and hearing, to disapprove any form containing inequitable or deceptive provisions. A form may also be

Stats. (1950), Suppl. ch. 175, § 193C; N.J. Laws (1949), ch. 333-A, § 16a; N.J. Stats. Anno. (1951), Title 17, ch. 17A, § 2; N.Y. Ins. Laws (1950), § 67; Pa. Purdon's Anno. Stats. (1950), vol. 40, § 459.2; Wash. Ins. Code (1949), § 30.25. Section 67 of the New York Insurance Law, as amended in 1950, is an excellent example of a statute designed to solve in a realistic and practical way the difficult problem of the regulation of stock ownership, interlocking directors and common management in the insurance field. However, doubts have been expressed by some attorneys concerning the legality of such statutes.

disapproved which provides for benefits unreasonable in relation to the premium charged. The states on the whole seem to be in no hurry to adopt comprehensive or detailed rate regulatory laws governing the accident and health insurance business.

Section 164, New York Insurance Law, as enacted by Ch. 630, Laws of 1951, provides in part that no policy of accident and sickness insurance shall be issued except as provided in subsection six "until the rate manual showing rates, rules and classifications of risks for use in connection with such forms of policies... has been filed with the Superintendent." The Massachusetts statutes contain provisions that are typical of the state laws which require merely approval of accident and health insurance policies but with no power granted to the Insurance Commissioner to approve or disapprove rates.

New Hampshire has a statute typical of those requiring the filing of rates governing the accident and health insurance business. Under Chapter 162, New Hampshire Laws of 1947, accident and health insurance policies and rates must be filed with the State Insurance Commissioner.

In some states the accident and sickness law is made optional for a time and mandatory after a certain date. Michigan, for example, adopted a "new set of standard provisions applicable to accident and sickness policies." Their use by insurers is optional until January 1, 1956, and upon that date is made mandatory.

In Pennsylvania the insurance rate regulation Act applies to "all classes and kinds of insurance which may be written by stock or mutual casualty companies... in this Commonwealth except:... (b) accident and health insurance." Title 40, Section 1182, Purdon's Anno. Stats. 1950, Penn.

7. Regulation of Unauthorized Insurers

The activities of unlicensed insurers have long troubled the various state Insurance Departments and other administrative agencies. The bad practices of some unauthorized mail order insurers resulted in widespread demand for regulation of this class of insurers. The Federal Trade Commission, taking cognizance of this situation, recently promulgated rules for mail order insurers. Many states have sought to control the activities of unlicensed foreign insurers by some form of legislation. Many of them have adopted so-called model Insurance Commissioners' Uniform Unauthorized Insurers Process Acts. These laws

declare that the doing of certain acts by the unlicensed foreign insurer, such as issuance or delivery of contracts to residents of the state, the solicitation of applications for contracts, the collection of premiums, or any other transaction of business, shall constitute an appointment by the insurer of the Insurance Commissioner as its agent for services of process.

The United States Supreme Court upheld this type of service of process statute in the case of *Travelers Health Ass'n. v. Virginia.* Some states prohibit, under penalty, any person from acting for, or aiding in the procuring of a policy of insurance in an unlicensed insurer. Other states seek to tax premiums received in the state by unlicensed insurers, and some states have enacted so-called "Reciprocal State" laws prohibiting a domestic insurer from insuring in another state having a similar law unless such domestic insurer is licensed in the other state. In Iowa no action may be maintained upon any policy of fire insurance issued upon property in Iowa by an unauthorized company, unless within six months after the issuance of the policy there has been paid into the state treasury 2 per cent of the gross premium. Some jurisdictions permit the solicitation and placement of insurance in an unauthorized company only if such insurance cannot be obtained from the majority of the licensed companies and insurance is not placed for purpose of procuring a lower rate than the lowest of an authorized insurer.

E. MULTIPLE LINE INSURANCE RATING ORGANIZATION

At the 82d Annual Meeting of the National Association of Insurance Commissioners held at Swampscott, Massachusetts in June 1951, a newly formed voluntary Multiple Peril Insurance Rating Organization was approved. This organization was formed to collect necessary experience and develop suitable plans and procedures for contracts involving combinations of coverages under the multiple line laws. Many

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60 Iowa Code Anno., § 515.137.

multiple peril insurance policies are now being written at a single rate and for a single indivisible premium. In the absence of a rating bureau equipped to make rates for the combinations of coverages it has been necessary for underwriters to make their own rates and rating plans. This new organization hopes to develop a statistical plan for each form of coverage including the new coverages that protect the property of a single owner located in several states.

CONCLUSION

A study of the court decisions, of the insurance legislation adopted by the states, and the actual administration of the state insurance laws by the state Insurance Departments during the past eight years emphasizes the determination of the states to "regulate" insurance through legislation and effective administration of the laws in such a way that the intent of Congress, as expressed in the Federal Anti-Trust Laws and especially in Public Law 15, will be fully carried out. It may be suggested that Public Law 15 is the keystone of the present day structure of state regulation of the business of insurance. Congress has, of course, the power at any session to change any or all of the federal laws, including Public Law 15. However, it is clear that so long as the states continue to make a bona-fide, sincere and effective effort to "regulate" insurance in the public interest by encouraging open competition between insurers, by only regulating the rates wherever necessary, by prohibiting discrimination and the like, Congress will not take away from the states the right of regulation and, for that matter, neither will Congress impose on the insurance industry complete federal regulation.

The end result of the S.E.U.A. decision, which led to the enactment of Public Law 15, has been a "flood of . . . legislation" with quite a bit of litigation, though not more than would be expected. The legislation adopted has resulted in the complete overhauling and amending of most state insurance laws. All of the state laws on this subject have been motivated by the desire to conform to the wishes of Congress to preserve competition and to protect the public interest. The courts, both federal and state, in deciding cases involving state regulation of insurance, too, have kept in mind the public interest and the intent of Congress as expressed in Public Law 15 regarding the continued regulation of insurance by the states. During the past eight years the courts have upheld state regulatory laws and the regulation and taxation by the states of the business of insurance. The insurance industry, on the whole, has gone along with the regulation programs proposed by the states. The insurers feel that, despite all of the worries, the work, the uncertainty and the extra regulation imposed upon the industry during the last eight years, the business of insurance is in a more sound position than ever before and that it will so continue. The fact that
insurance is now commerce and, if conducted across state lines is interstate commerce, and hence may be subject to federal and state regulatory laws, will not hamper the business of insurance in fulfilling its destiny as a great constructive force in our American economy by aiding the average individual to attain economic freedom and security.

The writer must close this paper with one word of caution. Though the litigation since S.E.U.A., involving questions of federal and state regulation of insurance, has not been as heavy as had been expected, some questions regarding the division of federal and state control of the business of insurance remain unanswered. There is still a possibility that the late Chief Justice Stone's famous prediction in the S.E.U.A. case may yet come true and "a flood of litigation" may still engulf the insurance industry before we establish the true boundaries between state and national power over the business of insurance.

One of the surest ways to bring about a demand on the part of the insurance industry for greater federal control would be for the states to overstep the bounds of reasonable regulation. The writer is of the opinion that to date the states have exercised commendable restraint in wielding their recently reaffirmed powers of regulation. It is to be hoped that the fine cooperation now existing between the insurance industry and the state insurance departments will continue, to the end that state control of insurance will never be superseded by federal control.62

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62 Despite the unprecedented number of insurance laws that have been enacted by the various states since S.E.U.A., there can be no question but that many more state laws relating to the regulation of insurance will be adopted in the near future. At the National Association of Insurance Commissioners' Convention for Zone 5, held at Dallas, Texas, March 20-22, 1952, some 34 items affecting the regulation of insurance were considered, (some of which may soon be enacted into law). At the various meetings held this year to celebrate the 200th anniversary of mutual insurance, questions of regulation were discussed. Among the problems which are currently debated are the following: Should the rates for Accident and Health policies be subject to scrutiny under legal enactments? Should merit rating plans for automobile insurance be permitted by statute? In analyzing rates for possible increase or reduction, should investment profit be taken into consideration? Should the state be zoned for hail rates instead of using county or township experience individually? What consideration should be given to experience and schedule rating plans for casualty? To what extent should trend factors be used in rate revising? What safeguards should be employed in the use of trend factors in rate revisions? Should statutes be adopted to permit the use of multiple line policies covering various risks of a single individual or corporation or groups in different states?