Regulation of the Insurance Business and Public Law No. 15, 79th Congress, First Session

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Mr. Chief Justice Stone's prophecy in his dissenting opinion in the famous case of United States v. South-Eastern Underwriters Association that because of that decision "only time and costly experience can give the answers" to the many novel and important questions that will confront the insurance industry, has certainly come true. The Court's decision in that case overturned a precedent of seventy-five years' standing in reversing the ruling made in Paul v. Virginia that insurance is not commerce. Now everyone knows that insurance is commerce and that when the business of insurance is conducted across state lines, it constitutes interstate commerce. The confusion resulting from the Court's holding in the South-Eastern Underwriters decision, was not dispelled by Congress when it enacted Public Law No. 15, 79th Congress, 1st Session.

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1 322 U.S. 533, 88 L. ed. 1440, 64 S. Ct. 1162 (1944).
2 75 U.S. 168, 19 L. ed. 357 (1868).
3 Public Law No. 15, 79th Congress, 1st session, reads as follows:

"AN ACT To Express the Intent of the Congress with Reference to the Regulation of the Business of Insurance.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that the Congress hereby declares that the continued regulation and taxation by the several states of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several states.

SEC. 2 (a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several states which relate to the regulation or taxation of such business.

(b) No Act of Congress shall be construed to invalidate, impair or supersede any law enacted by any state for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance; Provided, That after January 1, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by state law.

SEC. 3 (a) Until January 1, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended,
The purpose of Public Law No. 15, is to express the intention of Congress with reference to the regulation of the business of insurance. Congress by this act declared 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."

Public Law No. 15 declared 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 insurance: Provided, That after January 1, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914 known as the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State law."

It further provided that:

"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."

Under the provisions of Public Law No. 15, 79th Congress, 1st Session, it appears that today (and until January 1, 1948) the Sherman Anti-Trust Act, the Clayton Act, the Federal Trade Commission Act and the Robinson-Patman Anti-Discrimination Act shall not apply to the business of insurance or to acts in the conduct thereof.

(b) Nothing contained in this Act shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation.

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

SEC. 5. As used in this Act, the term 'State' includes the several states, Alaska, Hawaii, Puerto Rico and the District of Columbia.

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

Approved March 9, 1945."
not apply to the business of insurance or the conduct thereof, except that the Sherman Act shall apply to agreements to boycott, coerce or intimidate, or to acts of boycott, coercion or intimidation. However, the National Labor Relations Act of 1938, the Fair Labor Standards Act of 1938 and the Merchant Marine Act of 1920 apply to insurance to the same extent as heretofore.

After January 1, 1948, the Sherman Act, the 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. The Robinson-Patman Act shall apply to the business of insurance, apparently without reference to whether insurance is regulated by State law. Also the National Labor Relations Act of 1938, the Fair Labor Standards Act of 1938, and the Merchant Marine Act of 1920 apply to the business of insurance to the same extent as heretofore.

Numerous questions have already arisen with reference to the effect on the insurance industry of Public Law No. 15 and the federal statutes mentioned in that Act. Among the questions frequently asked are the following: First — How do the federal statutes referred to in Public Act. No. 15 affect the insurance industry? Second — What did Congress mean in providing that certain federal acts therein mentioned “shall be applicable to the business of insurance to the extent that such business is not regulated by state law”, after January 1, 1948? Third — Does membership in a regional or national organization gathering information on rates, policy forms, coverages, and the like, violate the Sherman Act?

In order to understand rightly Public Law No. 15 and its impact upon the business of insurance, it is important that the origin, history and purpose of the federal acts mentioned in Public Law No. 15 be understood. With this in mind, this article will examine briefly the federal statutes in the order of their importance, beginning with the Sherman Anti-Trust Act.

The Sherman Anti-Trust Act

Prior to the enactment of the Sherman Act, there was no federal legislation in respect to the regulation or control of monopolies, contracts and combinations in restraint of trade. There is no common law of the United States as such; that is, federal jurisprudence does not recognize the common law with respect to crimes. Hence, there was no authority in the Federal Government to punish persons who committed acts which at common law constituted unlawful restraint of trade. The individual states were unable to suppress effectively this menace which had arisen in America in the last half of the nine-
teenth century, because these monopolistic aggregations crossed state lines. It soon became apparent that the only way to repress successfully these monopolistic aggregations would be by the enactment of federal legislation which would make impossible the evasion and circumvention previously practiced. Finally, on July 2, 1890, Congress passed a bill, thereafter known as the Sherman Anti-Trust Act, designed to curb such evil and to keep open "the free and natural flow of trade in the channels of interstate commerce."

Sections 1 and 2 of the Sherman Act provided, in part:

"SECTION 1. Every contract, combination, in the form of trust or otherwise, or conspiracy in restraint of trade or commerce, among the several states, or with foreign nations, is hereby declared to be illegal . . ."

"SECTION 2. Every person, who shall monopolize, or attempt to monopolize or combine or conspire with any other person or persons to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a misdemeanor."

While the language of the Sherman Anti-Trust Act is broad and sweeping, it is not in any sense precise. Mr. Justice Stone in *Apex Hosiery Company v. Leader* pointed out that:

"** The prohibitions of the Sherman Act were not stated in terms of precision or of crystal clarity and the Act itself did not define them. In consequence of the vagueness of its language, perhaps not uncalculated, the courts have been left to give content to the statute, **"

In the early years of the existence of the Sherman Anti-Trust Law the United States Court interpreted the Sherman Act in such a manner as to deprive it of much of its effectiveness as a remedial statute. The decision in *United States v. E. C. Knight*, where the rule of law announced was that a restraint of trade, however unreasonable, is not prohibited by the Anti-Trust law, no matter how disastrous the interference may be upon commerce among the several states unless it directly affects commerce, apparently limited the power of the federal government to deal with monopolies and trusts. The *Knight* case has been overruled by subsequent decisions. As a result, the formation of trusts and gigantic combinations was stimulated. The decisions in *United States v. Trans-Missouri Freight Association* and *United States v. Joint Traffic Association* established that the Sherman Act applied to all contracts in restraint of trade including such contracts between railroad companies. Since these decisions did

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4 310 U.S. 469, 84 L.Ed. 1311, 60 S. Ct. 982 (1940).
5 156 U.S. 1, 39 L.Ed. 325 (1895).
6 166 U.S. 290, 41 L.Ed. 1007 (1897).
7 171 U.S. 505, 43 L.Ed. 259 (1898).
not involve combinations of industrial enterprises, they had no appreciable effect on the organization of trusts at this period. Then came the decision in *Addyston Steel & Pipe Co. v. United States*, 8 which was the first decision of the Supreme Court since the *Knight* case that related directly to industrial combinations. This decision greatly strengthened the Sherman Act and restrained, to some extent at least, the further creation of trusts. The next important decision was the one rendered in the *Northern Securities* 9 case, which held illegal a holding company as a combination in restraint of trade. The decision in the *Northern Securities* case gave indications of the powerful force which the Anti-Trust Act was to exert in later dealing with combinations and trusts.

In 1911, the United States Supreme Court set at rest some of the doubts expressed as to the potency of the Anti-Trust Statute of 1890 to control monopolistic combinations by ordering a dissolution of the Standard Oil and American Tobacco Companies in *United States v. Standard Oil Co.*, 10 and *United States v. American Tobacco Co.* 11 The adoption in these cases of the famous "rule of reason" as the standard to be applied in deciding cases arising under the Sherman Act, however, caused widespread disapproval. Later the unsatisfactory results obtained in accomplishing the actual dissolution of these two trusts were blamed on the supposed weakness of the Sherman Act.

Because of the mounting popular criticism of the Sherman Act, Congress in 1914 adopted the Clayton and Federal Trade Commission Acts to clarify and strengthen the Sherman Law. These laws will be discussed hereinafter, but previous mention should be made of several other decisions construing the Sherman Act which are important to the insurance industry.

In *Standard Sanitary Manufacturing Co. v. United States*, 12 the Supreme Court, in speaking of the provisions of the Anti-Trust Laws, said:

"Nor can they be evaded by good motives. The law is its own measure of right and wrong, of what it permits, or forbids, and the judgment of the Courts cannot be set up against it in a supposed accommodation of its policy with the good intention of the parties, and it may be, of some good results."

In *United States v. Socony Oil Company*, 13 the court declared that:

"* * * For over forty years this court has consistently and without deviation adhered to the principle that price-fixing

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8 175 U.S. 211, 44 L.Ed. 136 (1899).
9 193 U.S. 197, 48 L.Ed. 679 (1904).
10 221 U.S. 1, 55 L.Ed. 619 (1911).
11 221 U.S. 106, 55 L.Ed. 663 (1911).
12 226 U.S. 20, at p. 49, 57 L.Ed. 107 (1912).
13 310 U.S. 150 at p. 218, 84 L.Ed. 1129, 60 S. Ct. 811 (1940).
agreements are unlawful per se under the Sherman Act and
that no showing of so-called competitive abuses or evils which
those agreements were designed to eliminate or alleviate may
be interposed as a defense. * * *"

In *Parker v. Brown*, the court held that state legislation setting
up a scheme for regulating the marketing of raisins by producers with
a view to maintaining and stabilizing market price, under which the
imposition of restrictions was to be proposed by and had to be ap-
proved by a referendum of producers, was not prohibited by the pro-
visions of the Federal Anti-Trust Act making it unlawful to combine
or conspire with any other person or persons to monopolize any part
of the trade or commerce among the several states, since the Federal
Act is aimed solely at combinations to restrain competition and at-
ttempts to monopolize by individuals and corporations and does not
apply to state action.

In the *Maple Flooring*, and *Cement Manufacturers* cases, it
was held that trade associations which openly and fairly gather and
disseminate information as to the cost of their product, the volume
of production and other trade statistics, without any attempt to reach
any agreement as to prices or any intention to restrain competition, do
not violate the Sherman Act.

Consideration of other decisions construing the Sherman Anti-
Trust Law would extend this article unduly. Adherence by the insur-
ance industry to the principles and rules laid down in the considered
cases will tend to protect the business of insurance not only from
litigation involving the Anti-Trust laws but also from criticism con-
cerning their method of doing business.

**The Clayton Act**

On October 15, 1914 the Congress enacted the Clayton Act, the
first statutory addition to the Sherman Law. The Clayton Act is
entitled "An Act to supplement existing laws against unlawful re-
strictions and monopolies, and for other purposes", and embodies the
result of nearly twenty-five years of experience under the original
Sherman Anti-Trust Act of 1890. As has been noted, the original
Anti-Trust law had been criticized as being vague and general and
the construction given to it by the courts was unpopular.

The Democratic party of 1912 included in its platform a statement
favoring an amendment to the Sherman Act. "We regret", this state-
ment declared, "that the Sherman Anti-Trust Law has received a

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judicial construction depriving it of much of its efficiency, and we favor the enactment of legislation which will restore to the statute the strength of which it has been deprived by such interpretation”. This pronouncement of one of the major political parties — followed by the election of the Democratic candidate to the presidency — proved to be the basis for legislation in 1914 designed to supplement the Sherman Act.

On the other hand, moderate-sized business units were dissatisfied with the judicial interpretation of the Sherman Act, because it not only denounced great aggregations of capital in the form of trusts, but the Act likewise denounced cooperative agreements among moderate-sized business competitors where the intent was not to monopolize. These moderate-sized enterprises favored relaxation of the Sherman Act. They protested that they were unable to determine what they could or could not do under the law. It is not at all surprising, therefore, that legislation designed to reconcile these varying demands with respect to the Anti-Trust laws should prove to be confusing and, to some extent, ineffectual.

The primary and fundamental purpose of the Clayton Act was to suppress monopoly in its incipiency, by setting up a series of statutory definitions declaring in specific terms that the acts so defined should be deemed in unlawful restraint of trade, and by means of such definitions to clarify the meaning of the Sherman Act.

In *United Shoe Machinery Co. v. United States*,\(^\text{17}\) the Court, in construing Section 3 of the Clayton Act, pointed out that:

> “The Clayton Act was intended to supplement the Sherman Act, and within its limited sphere established its own rule. Under the Sherman Act, as interpreted by this Court before the passage of the Clayton Act, contracts were prohibited which unduly restrained the natural flow of interstate commerce, or which materially interrupted the free exercise of competition in the channels of interstate trade. In the second section monopolization or attempts to monopolize the interstate trade were condemned. The Clayton Act (section 3) prohibits contracts of sale, or leases made upon the condition, agreement, or understanding that the purchaser or lessee shall not deal in or use the goods of a competitor of the seller or lessor where the effect of such lease, sale, or contract, or such condition, or agreement of understanding ‘may’ be to substantially lessen competition or tend to create monopoly. The cause of action is therefore not the same.* * * The Clayton Act specifically applies to goods, wares, machinery, etc. whether ‘patented or unpatented’. This provision was inserted in the Clayton Act with the express purpose of preventing rights granted by patent from securing immunity from the inhibitions of the act.”

\(^{17}\) 258 U.S. 451, at p. 460, 66 L.Ed. 708, 42 S. Ct. 363 (1922).
The Clayton Act deals with a wide range of subjects — some of which have no place in an anti-trust measure. It applies only to interstate commerce and deals chiefly with (1) unjust trade discrimination; (2) sales or leases conditioned upon exclusive handling by vendee or lessee of vendor’s or lessor’s goods, wares and merchandise; (3) the exemption of labor and labor organizations from federal regulation and control; (4) corporate acquisition of capital stock of other corporations; (5) interlocking corporate directorates; (6) regulation of bids between corporations for supplies and materials; (7) the issuance of injunctions and restraining orders in the enforcement of the above matters.

Under section 7 of the Clayton Act an insurance company may not acquire the stock of a competing company, where the effect of the transaction may be to substantially lessen competition, or to restrict commerce or tend to create a monopoly. Section 14 of the Act imposes individual liability upon the directors, officers, and agents of a corporation which has violated the provisions of the Anti-Trust laws, where such individuals “have authorized, ordered, or done any of the acts constituting in whole or in part such violations.” The remedy of the “triple damage” suit is created by Section 4 of the Act. It provides that “any person who shall be injured in his business or property” through a violation of the Anti-Trust laws may recover triple damages against the guilty party, together with costs of suit and reasonable attorney fee.

A study of the decisions of the courts applying the Clayton Act and the Federal Trade Commission Act of 1914 demonstrates the futility of attempting by statutory enactment of legislative definitions to strengthen or supplement existing laws. As one text writer well said:18

“It will be apparent from this review of the legislation of 1914 that, insofar as the proponents of the supplemental anti-trust legislation had hoped to clarify the law of restraints and monopolies by substituting specific rules of conduct for general principles, they largely failed.”

The stock acquisition and interlocking directorate provisions of the Clayton Act are of great importance to many insurance companies because of the need for fleet operation or other forms of underwriting combinations of sufficient resources to cover single risks of tremendous size. Many insurance companies, however, are not affected by these provisions of the Clayton Act.

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The Federal Trade Commission Act

The Federal Trade Commission Act dates from September 26, 1914 and was adopted, as was the Clayton Act, to supplement and strengthen the Sherman Act. The Federal Trade Commission Act established an administrative tribunal to which businessmen could resort for advice and guidance. As President Woodrow Wilson pointed out in an address to Congress on January 20, 1914:

"* * * The business men of the country desire something more than that the menace of legal process in these matters be made plain and intelligible. They desire the advice, the definite guidance and information which can be supplied by an administrative body, an interstate trade commission."

And in the same address President Wilson pointed out further that:

"* * * Nothing hampers business like uncertainty. Nothing daunts or discourages it like the necessity to take chances, to run the risk of falling under the condemnation of the law before it can make sure just what the law is. * * *"

The Federal Trade Commission Act gives the Commission broad and sweeping powers over businesses engaged in interstate commerce. It provides:

"Unfair methods of competition in commerce or deceptive acts or practices in commerce are hereby declared unlawful. The Commission is hereby empowered and directed to prevent persons ... from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce."

"Whenever the Commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair methods of competition or unfair or deceptive act or practice in commerce, and if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public ..." it may issue and serve a complaint, hold a hearing, and issue a "cease and desist" order against the offender.

The Act also contains provisions giving the Commission broad powers to investigate the "organization, business, conduct, practices and management of any corporation engaged in commerce," and to require such corporation to file with the Commission, under oath, "reports or answers in writing to specific questions, furnishing to the Commission such information as it may require as to the organization, business, conduct, practices, management, and relation to other corporations ..."

The scope of the Federal Trade Commission Act, and the method of its administration by the Commission, were concisely outlined by
the Supreme Court in *Federal Trade Commission v. Beechnut Packing Company*, as follows:

"** ** The case now before us was begun under the Federal Trade Commission Act, which was intended to supplement previous anti-trust legislation. That act declares unlawful 'unfair methods of competition', and gives the Commission authority, after hearing, to make orders to compel the discontinuance of such methods. What shall constitute unfair methods of competition denounced by the act is left without specific definition. Congress deemed it better to leave the subject without precise definition, and to have each case determined upon its own facts, owing to the multifarious means by which it sought to effectuate such schemes. The Commission, in the first instance, subject to the judicial review provided, has the determination of practices which come within the scope of the act ** **

In the case of *L. B. Silver v. Federal Trade Commission*, Circuit Judge Denison, in discussing Section 5 of the Trade Commission Act, said:

"A study of the Congressional Record convinces me that the Federal Trade Commission Act was wholly collateral to the Sherman and other Anti-Trust Acts, and that the unfair methods of competition, intended to be reached by Section 5, are only such methods as tend towards that monopoly or restraint of competition which the Anti-Trust Acts prohibit."

If the Supreme Court adheres to its new concept that insurance is commerce, insurance companies will in the future be subject to visitations from the Federal Trade Commission in appropriate proceedings under this act. It is to be noted that no concerted action by a group of companies is necessary to bring the Federal Trade Commission into action; the act relates to "unfair methods of competition" and "unfair or deceptive acts or practices in commerce", and not necessarily to combination or conspiracies participated in by more than one company. Consequently, the Commission may proceed in a proper case against a single insurance company.

What would constitute "unfair methods of competition" or "unfair or deceptive acts or practices", as applied to the insurance business? As the Supreme Court said in *Federal Trade Commission v. Beechnut Packing Company*, these terms have been "left without specific definition" in the act itself. The Commission has never heretofore had occasion to apply them to the insurance business, but it has compiled a rather extensive list of business practices generally which it

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condemns as being in violation of the act. Most of these condemned practices pertain more particularly to dealings in tangible goods and commodities.

Just what attitude the Commission may take in exercising police power over the great insurance industry remains to be seen. It would be futile to indulge in predictions. However, in the absence of any federal act for the comprehensive control and regulation of the insurance industry, and in view of the improbability that Congress will enact such a statute at an early date, the Federal government may find the Federal Trade Commission Act a convenient means by which to investigate any suggested evils prevalent in the insurance industry, and to obtain data and evidence for prosecutions under the anti-trust acts. There is a sound basis for the belief that at the end of the moratorium period provided in Public Law No. 15 [Sec. 3 (a)] the insurance business will be held to be subject as well to the regulatory and investigatory powers of the Federal Trade Commission Act as to the anti-trust features thereof. The Federal Trade Commission has the machinery for investigations and could undertake hearings and make findings with much less fanfare and unfair publicity than could a Committee such as the National Economic Committee approved by Congress in 1938.

THE ROBINSON-PATMAN PRICE DISCRIMINATION ACT

The Robinson-Patman amendment to the Clayton Act prohibits price discrimination in the sale of "commodities" and "goods" of like grade and quality, with power vested in the Federal Trade Commission to police its provisions. Under the South-Eastern Underwriters decision, it is clear that in 1936, when this amendment was enacted, Congress had the power to include insurance within its scope, although the insurance industry was probably not aware of this fact. The question is: Did Congress intend, by the language which it employed in that Act, to include insurance within its terms? Do the terms "commodities" and "goods", as used in the Robinson-Patman amendment, extend to a sale of insurance, and the issuance of an insurance policy, or are they meant to embrace only tangible articles of commerce? In Paul v. Virginia, the Supreme Court, in referring to insurance policies, said:

"They are not subjects of trade and barter offered in the market as something having an existence and value independent of the parties to them. They are not commodities to be shipped or forwarded from one state to another, and then put up for sale."

22 322 U.S. 533, 88 L.Ed. 1440, 64 S.Ct. 1162 (1944).
23 75 U.S. 168, 19 L.Ed. 357 (1868).
The theory that an insurance policy is not a "commodity" as that term is used in state statutes has been generally followed by the state courts in applying state laws although some courts have reached a contrary conclusion.24

Legal opinion is divided on the question whether the Robinson-Patman Act applies to insurance. Many attorneys are of the opinion that insurance is not a "commodity" within the meaning of the Robinson-Patman Act, nor within the term "goods, wares, and merchandise" as used in Section 2 (c) of the Act. However, the Supreme Court may give such words a broad interpretation. In an early United States Supreme Court decision, *Hamilton Mfg. Co. v. Commonwealth of Massachusetts*,25 the Court held that "commodities" as used in a constitutional provision authorizing the taxation of commodities will be construed to mean "convenience, privilege, profit and gains" and will not be confined to goods and wares only. In *Equitable Trust Co. v. Keene*,26 credit available by a cable transfer of exchange to England was held to be either a "commodity" or a "chose in action" under a New York Statute. Stocks and bonds are deemed "commodities" under various state statutes; *People v. Federal Security Co.*,27 *Opinion of Justices*,28 *Pound v. Lawrence*.29 And, as has been pointed out before, insurance has been defined as a "commodity" in some cases and in other cases the courts have held to the contrary.30

It is clear that *Paul v. Virginia*31 has been overruled, in so far as it laid down the principle that "insurance is not commerce"; but has the concept that insurance policies "are not commodities" also been repudiated? Such concept, if not rejected, has at least been greatly wakened, and earlier cases which relied upon what was said in *Paul v. Virginia*, are no longer of much force.

When the Robinson-Patman amendment is read in its entirety, however, it seems clear that Congress was aiming at price discriminations in the field of ordinary commodities of commerce, such as butter and eggs, bread, milk, and other types of goods and merchandise, and nothing more. This view is fortified by the decision of the United States Circuit Court of Appeals for the Third Circuit in *Fleetway v. Public Service Company*.32 It was there contended that a drastic cutting of fares during a rate war between two bus companies constituted a violation of Section 2 of the Clayton Act. The United States

24 7 Words and Phrases, Perm. Ed. 841; 41 Corpus Juris 129.
25 73 U.S. (6 Wall.) 632, at p. 640, 18 L. Ed. 904 (1868).
26 183 N. Y. S. 699, at p. 700 (1920).
27 255 Ill. 561, 99 N.E. 668 (1912).
30 7 Words and Phrases, Perm. Ed. (841); 41 Corpus Juris. 129.
31 75 U.S. 168, 19 L.Ed. 357 (1868).
Circuit Court, in discussing the word "commodities" as used in the act, said at page 763:

"This clearly refers to a commodity such as merchandise, and has no reference to transportation of passengers by bus."

The Robinson-Patman amendment was probably not intended by Congress to apply to the insurance business. Nevertheless, an authoritative court decision may be required to settle any doubts on this subject. The Supreme Court having said that Congress in 1890 intended to include insurance within the scope of the Sherman Anti-Trust Act, the same court might rule that insurance is a "commodity" within the meaning of the Robinson-Patman amendment to the Clayton Act.

Other Acts Mentioned in Public Law No. 15

Attention is now directed to the three Federal Acts, which under Public Law 15 apply to the business of insurance to the same extent as heretofore. These Acts are not nearly as important to the insurance industry as the Federal Acts just discussed.

National Labor Relations Act

Section 10 of the National Labor Relations Act provides:

"The Board is empowered . . . to prevent any person from engaging in any unfair labor practice affecting commerce."

Prior to June 5, 1944, the Labor Board, in administering the Act, had held in at least thirteen different cases, beginning as early as 1940, that insurance companies came within the purview of the Act. These earlier decisions of the Board will be found collected in a footnote to Mr. Justice Frankfurter's opinion in *Polish National Alliance v. National Labor Relations Board*. Any question regarding the application of the National Labor Relations Act to the insurance industry was definitely settled by the decision of the Supreme Court in the *Polish National Alliance* case, which was argued, submitted, and decided contemporaneously with the *South-Eastern Underwriters* case.

It is possible that insurance companies will not have to run the gauntlet of picket lines, strikes, slow-downs and other like incidents which characterize the labor disputes in the American industrial field. But if the insurance industry does escape all this, it will be due to the fact that a mutually harmonious relationship had developed between employer and employees, and not because the insurance industry is excluded from the operation of the Act.

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33 322 U.S. 643, 88 L.Ed. 1509 at p. 1514, 64 S.Ct. 1196 (1944).
34 322 U.S. 533, 88 L.Ed. 1440, 64 S.Ct. 1162 (1944).
FAIR LABOR STANDARDS ACT

Sections 6 and 7 of the Fair Labor Standards Act, which relate to minimum wages and maximum hours, cover any non-exempt employee "who is engaged in commerce or in the production of goods for commerce."

It has been the uniform position of the Wage and Hour Division of the Department of Labor that most employees of insurance companies have so close a connection with activities in interstate commerce, including the constant use of the mails and other instrumentalities of commerce, as to be a part of such commerce and hence subject to the Act. Even before June 5, 1944, most insurance companies had, as a matter of policy, voluntarily observed and complied with the requirements of the Fair Labor Standards Act, without necessarily conceding that its provisions were legally applicable to them. All doubts on the subject were settled by the decisions in the South-Eastern Underwriters\textsuperscript{35} and Polish National Alliance\textsuperscript{36} cases. Compliance by insurance companies with the Act is now a necessity, where such compliance was formerly on a more or less voluntary basis.

THE MERCHANT MARINE ACT

The Merchant Marine Act of June 5, 1920, covers a variety of subjects.

Section 885, Title 46, U.S.C.A., under heading "shipping" provides:

"(2) (b). Nothing contained in the anti-trust laws as designated in section 12 of Chapter 1 of Title 15, shall be construed as declaring illegal an association entered into by marine insurance companies for the following purposes: To transact a marine insurance and reinsurance business in the United States and in foreign countries and to reinsure or otherwise apportion among its membership the risks undertaken by such association or any of the component members."

Other sections of the Merchant Marine Act of 1920 are not of sufficient importance to the insurance industry to warrant further discussion in this paper.

PUBLIC LAW NO. 15

Finally attention is again directed to Public Law No. 15, in order to consider primarily the question almost universally asked in connection with the Act as applied to insurance rating regulations and proposed insurance rating laws, which question is the meaning of the word "regulation", as used in the law.

\textsuperscript{35} 322 U.S. 533, 88 L.Ed. 1440, 64 S.Ct. 1162 (1944).
\textsuperscript{36} 322 U.S. 643, 88 L.Ed. 1514, 64 S.Ct. 1196 (1944).
The authorities teach us that the word "regulate is generally construed broadly as meaning to adjust or control by rule, method or established mode.\(^{37}\)

In the majority of decided cases the word "regulate" has been given a comprehensive and broad meaning with appropriate regard to the welfare of those immediately concerned in the matter, as well as the public at large.\(^{38}\)

Does the Law require each rate to be affirmatively approved by the state to constitute "regulation" by the state within the meaning of Public Law No. 15? Legal opinion is divided on this question. Many eminent authorities, including former Attorney General Biddle, believe that the term "regulation" as used in the Act calls for affirmative action by the state, thus requiring specific approval by the state for each and every insurance rate. The author does not agree with this conclusion. In his opinion the Law is fully satisfied if the state sets up a statutory standard for insurance rates. A statute which provides that all rates shall be reasonable, adequate and not unfairly discriminatory would, in his opinion, constitute "regulation" by the state as that word is used in Public Law No. 15. Further provisions could include filing of rules, rates, rating plans, manuals and any amendments thereto.

However, life insurance companies are not directly affected by this problem inasmuch as such companies are generally not members of rating organizations, and their rates are based on actuarial tables required by law and not subject to agreement between any two or more such companies.

Membership in Regional or National Bureaus or Organizations

The question is often asked, whether insurance companies belonging to national or regional organizations would be in violation of the Sherman Act. The author does not believe that a combination of companies or company officials in national or regional organizations would *per se* constitute a violation of the Sherman Act. The *Maple Flooring*\(^{39}\) and *Cement Manufacturers*,\(^{40}\) cases hold that the mere gathering and dissemination of data and information, without any agreement as to prices is not a violation of the Sherman Act. Regardless of the fact that such organizations might gather information on


\(^{38}\) See Great Northern Utilities Co. v. Public Service Commission, 88 Mont. 180, 293 Pac. 294, at p. 301 (1930).


\(^{40}\) 268 U.S. 588, 69 L.Ed. 1104. 45 S.Ct. 586 (1925).
rates, coverages, policy forms and the like, and pool the experience of the several member companies, this would not violate the Act if the rates suggested by such organizations are required to be filed with a state bureau or with the insurance commissioner and where approval of such filings are required by law. When the state approves such rates, coverages, policy forms, rating plans or other agreements, this should constitute "regulation" by the state, and the company members of the bureau proposing such rates, agreements and the like, should be immune from the Sherman Act under Public Law No. 15. That the state insurance commissioner or state bureau followed the suggestion or recommendation of a regional or national bureau would not militate against such state approval constituting "regulation" within the terms of the Act. The court will construe Public Law 15 broadly in the public interest.

Amidst all of the confusion and uncertainty created by the South-Eastern Underwriters decision, one fact is clear and that is that the numerous questions which have arisen and other questions which will in the future arise can only be settled by an authoritative decision of the Supreme Court. Such decisions, as Mr. Chief Justice Stone points out in the South-Eastern Underwriters case, "can only be made upon a case-to-case basis" after a consideration of all of the relevant facts and circumstances and "only time and costly experience can give the answers".

Conclusions and Recommendations

(A) In General

Any conclusions reached herein must be formulated in the light of the public interest in this problem. The business of insurance is such an important one and has such a tremendous impact upon our every day social and business life, as well as upon the whole economic structure of our nation, that the only safe guide for future action is the public interest. The divergent, manifold and oft-time conflicting interests of the insurance companies, their agents or brokers, and the insurance departments of the several states, must be reconciled with the public interest fully protected.

The race by the insurance industry and the State Insurance Commissioners to beat the deadline of January 1, 1948 by agreeing upon a program of state regulation pursuant to Public Law 15 has at times taken on the appearance of a contest between the insurance industry to preserve its present way of doing business and the state insurance departments to preserve at all cost complete state regulation of insur-

42 322 U.S. 533, 88 L.Ed. 1440, 64 S.Ct. 1162 (1944).
43 322 U.S. 533, at p. 582. 88 L.Ed. 1440, 1473-1474 (1944).
ance, without particular regard to the public interest. Any attempt by
the insurance industry to obtain complete exemption from all of the
Federal Acts mentioned in Public Law 15 without regard to the
public interest would be short-sighted and productive of only more
regulation by Congress. On the other hand, if whole or partial exemp-
tion from Federal regulation should be sought in the honest belief
that the industry, the policyholders and the public will be benefitted,
this spirit of public service would redound to the benefit of all.
Under Public Law 15, a way is provided for insurance companies to
continue many of their practices, particularly those relating to coopera-
tive action concerning rating plans and rate making. If collaboration
between companies on this phase of the business is to be legal it must
be "regulated" by state law. Public Law 15 is a recognition by Con-
gress of the fact that on many matters unified action by two or more
companies may be in the public interest.

Nevertheless, it is certain that the days of self-regulation of the
insurance industry, as they have been known, through voluntary united
action are ended, except as such regulation is taken before January 1,
1948, or such action thereafter as is based upon some state statute
so as to constitute "regulation" by the state under Public Law 15.

In this connection, it is of interest to note that the legislative pro-
posal agreed upon by the National Association of Insurance Commis-
ioners to be submitted to Congress, but which was subsequently
changed, listed seven requisite insurance activities involving agree-
ments or concerted or cooperative action:

1. Rate making, including forms and underwriting rules;
2. Use of uniform rates, forms and rules;
3. Loss adjustment and inspection service;
4. Underwriting and reinsurance pools;
5. Payment of commissioners;
6. Pooling of statistics;
7. Rate making, including rules or plans, under agreement that
   the use is not mandatory.

Other activities which could involve concerted action and which
might be added to the Commissioners' list include: the use of policy
provisions and endorsements, appointment of agents, audits and col-
lection of premiums, accident or fire prevention, and the collection
of salvage.

Whether or not the doctrine of Parker v. Brown may ultimately
be invoked with judicial approval for the protection of insurance com-
panies complying with the requirements of state statutes, it is common
knowledge that cooperative action of the companies in the past has

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not been limited to specific things called for by state insurance laws. Moreover, in many states there are no regulatory statutes upon this subject similar to those involved in Parker v. Brown. Hence there appears no escape from the conclusion that the insurance industry as a whole must get ready to review and revise its former business practices in the realm of self regulation in conformity with the rulings of the United States Supreme Court and Public Act No. 15. Clearly, all cooperative activities between insurance companies are not condemned nor, on the other hand, are all such activities permissible.

In Georgia v. Pennsylvania Railroad Co.,\textsuperscript{45} the Supreme Court took original jurisdiction on complaint of the State of Georgia against a number of railroad companies, alleging violation of the Sherman Act with regard to concerted rates, notwithstanding that such rates were approved by the Interstate Commerce Commission. The ultimate decision in this case may affect the character of insurance rate legislation and other permissible cooperative action. If the doctrine laid down in Parker v. Brown,\textsuperscript{46} is overruled or modified, state activity in the field of concerted action by companies will constitute no complete defense to an action under the Sherman Act unless such activity is held to constitute "regulation" by the state within the purview of Public Law 15.

\textbf{(B) Summary of Conclusions and Recommendations}

From the foregoing it is manifest that the chief problems confronting the insurance industry, in view of the South-Eastern Underwriters decision and Public Act 15, 79th Congress, First Session, are:

1. The meaning of the word "regulated" as used in Public Act 15, and as applied particularly to insurance rating regulations and proposed insurance rating laws.

This arises more specifically in connection with the operations of companies belonging to regional or national rating organizations where such organizations gather information on rates, coverages, policy forms and the like, and where they pool the experience of the several member companies and thereafter conform to the experience gained through membership in these organizations. State rating organizations provided for by state law would be legal under Public Law 15. Membership in a regional or national rating organization would not violate the Sherman Law where the state authorities must approve the rate; this would constitute "regulation" within the meaning of Public Law 15.

No problem in this connection arises insofar as most life insurance companies and fraternal societies are concerned, inasmuch as such

\textsuperscript{45}324 U.S. 439, 89 L.Ed. (ad.op.) 758, 65 S.Ct. 1018 (1945).
\textsuperscript{46}317 U.S. 341, 87 L.Ed. 315, 63 S.Ct. 307 (1943).
companies and fraternal societies are not members of any national or regional rating organizations. Their rates are based on actuarial tables required by law, and hence no action is necessary in the author's opinion generally to bring most life insurance companies and fraternal benefit societies within the purview of Public Law No. 15 and the Sherman Law on this point. Many fire insurance companies and casualty companies, on the other hand, must, prior to January 1, 1948, change their practices and methods of doing business to conform to the Sherman Act.

2. The Insurance Industry and the Sherman Anti-Trust Law — Membership in Regional Organizations.

Under the decisions of the United States Supreme Court in the Maple Flooring and the Cement Manufacturers cases, many of the joint activities of insurance companies coming under the Sherman Act would appear to be perfectly lawful. However, the foregoing cases were decided by a divided Court, and since those decisions were handed down some twenty years ago, it is quite possible that the Supreme Court today might not agree with the rule there laid down. The present Court might well consider that joint activities of insurance companies without specific state sanction, relating to interchange of reports, statistics, forms, endorsements, engineering and loss data and the like would constitute a violation of the Sherman Anti-Trust Law. As a matter of safety, therefore, it would appear to be desirable for the insurance industry to obtain enactment of state legislation expressly authorizing such concerted action by insurance companies. This would remove any doubt as to the legality of cooperative or joint action by two or more companies. Any state laws adopted could carefully circumscribe the permitted concerted action in the public interest.

While specific exemption for insurance corporations from the provisions of the Sherman Anti-Trust Act could be obtained by amending that law, it is doubtful whether Congress would enact such amendments.

3. The problem of intercompany stock ownership and interlocking directorates under the Clayton Act.

Life insurance companies and fraternal benefit societies, in the author's opinion, generally are not affected by these provisions of the Clayton Act. Each fraternal benefit society operates strictly on its own and there are no instances of where one fraternal benefit society controls another, either through stock ownership or interlocking directorates. Fraternal benefit societies are organized without capital stock

and are carried on solely for the mutual benefit of their members and beneficiaries. Life insurance companies generally are not concerned, although this statute may be of great importance to certain life companies. Other branches of the insurance industry, including automobile, casualty and surety, are more vitally concerned because of the need for fleet operation or other forms of underwriting combination of sufficient resources to cover single risks of tremendous size. In order that all branches of the insurance industry be in the clear under the Clayton Act, state statutes could be adopted which would provide for something less than outright prohibition, by permitting, under proper safeguards, such stock ownership and interlocking directorates as might be in the public or policyholders’ interest and where in fact no attempt is made to restrain trade or establish a monopoly.


The Federal Trade Commission Act relating particularly to “unfair methods of competition” and “unfair or deceptive acts or practices in commerce” does not necessarily require a combination or conspiracy participated in by more than one company to bring into play its provisions. The fraternal benefit societies contend that they are not engaged in competition in commerce in the sense that these terms are used in the Federal Trade Commission Act. They could be wrong in this view. Because of the very broad powers given to the Commission by the Federal Trade Commission Act to examine and investigate; it is clear the insurance industry may, at the expiration of the moratorium period, be affected by this law. It would appear to be rather difficult to obtain exemption by state legislation due to the sweeping provisions of the Federal Act. Thus there remains only one other solution to this problem and that is by federal exemption in the Act itself or by amendment to the Sherman Anti-trust law. Such exemption might be difficult to obtain. The situation thus requires the insurance industry to adjust itself to the fact that after January 1, 1948, very likely the Federal Trade Commission must be reckoned with as a factor in the operation of their business.

5. The Robinson-Patman Act.

Under the Robinson-Patman amendment to the Clayton Act, prohibiting price discrimination in the sale of “commodities” and “goods” of like grade and quality, there is a question whether this was intended to apply to insurance. Moreover, the practices it prohibits (discrimination and rebates) are generally prohibited by state law. However, it must be kept in mind there is always a chance that the Supreme Court might construe this statute broadly as applying to insurance. Only an authoritative court decision can determine the
question of the application of this statute to insurance. The laws
of the several states governing the sale of insurance and the issuance
of insurance policies impose practically the same requirements with
regard to the sale of insurance as the federal act does to the sale
of tangible articles. Specific exemption of the insurance industry by
amendment to the Robinson-Patman Act would clarify the status
of insurance companies under the act.


With respect to the National Labor Relations Act, it is clear since
the decisions in *Polish National Alliance v. National Labor Relations
Board,* 49 and *United States v. South-Eastern Underwriters Associa-
tion,* 50 that this act applies to the insurance industry. Most insurance
companies, even prior to the decision in the *Polish National Alliance*
case, had established mutually harmonious relations with their em-
ployees and it is unlikely that any friction between the companies and
their employees will in the future develop. No action is required by
the insurance companies to bring them within the scope of this law
since it is clear that they are subject to this law.


The Fair Labor Standards Act relating to minimum wages and
maximum hours has been observed generally by the insurance industry
voluntarily for some time. However, now compliance by insurance
companies with that act is a necessity, whereas such compliance prior
to the *South-Eastern Underwriters* and *Polish National Alliance cases,*
supra, was on a voluntary basis.


The Merchant Marine Act of June 5, 1920 has no application to
insurance generally and is of interest only to marine companies in
certain circumstances relating to combinations for writing marine in-
surance or reinsurance.

49 322 U.S. 643, 88 L.Ed. 1509, 64 S.Ct. 1196 (1944).
50 322 U.S. 533, 88 L.Ed. 1440, 64 St. Ct. 1162 (1944).