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Recommended Citation
Austin J. Lilly, Insurance as Commerce Five Years Under the SEUA Decision, 11 Md. L. Rev. 81 (1950)
Available at: http://digitalcommons.law.umaryland.edu/mlr/vol11/iss2/1

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INSURANCE AS COMMERCE
FIVE YEARS UNDER THE SEUA DECISION

By Austin J. Lilly*

Since time whereof the memory of today's man runneth not to the contrary, that is to say, for the better part of more than 100 years, the business of insurance in the United States has been subject to state regulation. As insurance goes, one hundred years is a substantial period in its United States history. The first insurance department has not yet celebrated its 100th birthday. In insurance history, as such, one hundred years is merely a whipstitch.

The early origin of insurance is wrapped in the mists of antiquity. Operations conducted by a mutual insurance organization are recorded as early as 1375. Notwithstanding that Lord Coke in 1588 "notices the practice as a novelty",

* Of the Baltimore City Bar, General Counsel, Maryland Casualty Company, Baltimore. LL.B. University of Maryland 1907. The following article is based upon, and to a large extent follows, textually, a paper read before the Barristers' Club of Baltimore, October 25, 1949. Grateful acknowledgment is extended, in particular, to John M. McFall, Vice President and Chief Attorney of United States Fidelity and Guaranty Company of Baltimore; J. Dewey Dorsett and Ray Murphy, General Manager and General Counsel, respectively, of the Association of Casualty & Surety Companies of New York; and James B. Donovan, Counsel of the National Bureau of Casualty Underwriters of New York; whose writings and whose thoughtful and constructive contributions to the discussion and settlement of the outstanding problems of first instance created by SEUA, freely availed of by the writer of this paper, have been of invaluable assistance to the insurance industry. Mr. Donovan has recently completed a further well-documented study entitled "Insurance Becomes Commerce" in two articles, the first of which was published in the Insurance Council Journal, April, 1950, at page 141.

1 U. S. v. South Eastern Underwriters Association, et al., 322 U. S. 333 (1944), reversing 51 F. Supp. 712 (1943); and designated popularly as "SEUA" or "S.E.U.A."

2 For data (some of which are controversial from the historical standpoint) in this paragraph and the two next following paragraphs, see Joyce, INSURANCE, (2d Ed., 1917), Vol. 1, Preliminary Ch.
there are facts from which it is deduced that maritime insurance was in use from the very remote ages by the Greeks, Romans and other nations, and formed the traditionary ground-work of the insurance system as we know it today. The practice of insurance grew up probably as naturally in the face of need for it as did matrimony, and with just about as little history of the individual early transaction as of the individual marriage. From the date of the earliest reported case, in 1588, down to 1756, there are believed to be not more than 60 reported decisions upon insurance.

Fire insurance, as we know it now, was a going business in 1609. It began to function in the United States about 1724. Life insurance, which had its modern beginnings in the 16th Century, was manifest in the United States as early as 1759, but the first general life company was the Pennsylvania Company for Insurance Upon Lives and Granting Annuities, chartered in 1812. Accident insurance, originally relating only to railway accidents, was established in London in 1849. In 1856, it was extended to embrace accidents of all kinds. The Travelers, of Hartford, Conn., 1863, is credited with the distinction of being the first accident insurance company in the United States. Casualty insurance (using the term generally) existed in Hartford, Connecticut, operating through a chartered company, in 1866; Plate Glass, in New Jersey in 1868. Liability insurance, one of the great branches of the casualty field, was initiated in England through the Employers' Liability Assurance Corporation of London in 1880, following the enactment of the Employers' Liability Act of that year. It seems to have come to America in 1887.

Fidelity and Guaranty insurance had its modern beginnings in London in 1720. It was first introduced in the United States through the Guaranty Company of North America, a Canadian corporation, abortive. The Knickerbocker Casualty Company of New York was the first United States company to write these lines — chartered in 1875. It was authorized by statute in 1880 to change its name to the Fidelity and Casualty Company of New York.
Workmen's Compensation insurance in the United States is a creature of the Twentieth Century.

Insurance is a business that has grown by leaps and bounds. Judge Gontrum⁵ tells us that when Paul v. Virginia⁴ was decided, in 1869, the assets of the business in our country amounted to approximately $303,000,000.00, or about 1% of the national wealth. Some seventy years later, insurance assets, securing its obligation to some 60 million policyholders, amounted in round figures to some forty-six billion dollars, or 15% of the national wealth. As of today, the figures have further substantially increased.

This growth occurred during approximately 100 years of state regulation, as sustained early in the period by Paul v. Virginia.⁴ In that case, the issues of regulation as between the Federal Government and the States merged into a frontal attack (inspired, mirabile dictu, by the insurance interests) against state regulation in the 60's. It culminated in a victory for the States. The State of Virginia had enacted a statute pursuant to which foreign insurance companies were required to obtain licenses to transact business therein. As a condition precedent to the issuance of the license, the foreign company was required to make, as a guaranty of the performance of its obligations, a deposit with the State Treasurer. The plaintiff, Paul, a resident of Virginia, applied for a license as an agent for several New York fire insurance companies. The license was denied because the companies refused to post the deposit. Paul proceeded nevertheless to write a policy of insurance. He was arrested, convicted and fined $50. A writ of supersedeas was denied by the Supreme Court of Appeals of Virginia, and by writ of error the case was taken to the Supreme Court of the United States, on the ground that the Virginia statute, since it controlled or attempted to control the admission of foreign insurance companies, was in violation of the Commerce Clause of the Constitution of the United

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⁵The Hon. John B. Gontrum, Glen Arm, Baltimore County, Maryland, Insurance Commissioner of Maryland from May, 1939 to September, 1943, when he resigned to accept an appointment as Judge of the Third Judicial Circuit of Maryland, sitting at Towson.
⁴75 U. S. 168 (1869). See also, infra, n. 10.
States, which gives to Congress the exclusive power to regulate commerce with foreign nations and among the several states.5

The Supreme Court held that the Virginia statute did not interfere with the exclusive power of Congress to regulate commerce among the states, because insurance is not commerce. The court reduced the matter apparently to its fundamentals. It said:

"Issuing a policy of insurance is not a transaction of commerce. The policies are simple contracts of indemnity. . . . These contracts are not articles of commerce, in any proper meaning of the word. They are not subjects of trade and barter offered . . . as something having existence and value independent of the parties to them. . . . They are like other personal contracts between parties which are completed by their signature and the transfer of the consideration. Such contracts are not interstate transactions though the parties may be domiciled in different states. . . ."

Accordingly, the states were free to act in the regulation of insurance under their inherent powers recognized and expressed in the Tenth Amendment to the Constitution, which limited the grant of powers therein contained by providing that the "powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states, respectively, or to the people".

In 1895, the United States Supreme Court decided, in the case of Hooper v. California,6 that the business of maritime insurance was not commerce. In 1900, it decided, in the case of New York Life Insurance Co. v. Cravens,7 that the business of life insurance was not commerce. In 1913, in the case of New York Life Insurance Co. v. Deer Lodge County,8 which dealt with the imposition of a tax by Deer Lodge County, Montana, against the New York company, the Supreme Court decided that "The number of transactions does not give the business any other character than magnitude". In this case the Insurance Company contended

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5 U. S. Const., Art. 1, Sec. 8.
6 155 U. S. 648 (1895).
7 178 U. S. 389 (1900).
8 231 U. S. 495, 509 (1913).
that the county could not so tax it, sought a reversal of *Paul v. Virginia*, and cited in support of its contention numerous cases which, even in that comparatively early day, illustrated the trend of the Court toward the extension of the interstate commerce field, for instance, in respect of the regulation of maximum work hours for such railroad employees as train dispatchers and telegraphers, intrastate rates of interstate carriers where the effect of the rates was to "burden" interstate commerce, the activities of local grain exchanges shown to have an injurious effect on interstate commerce, the production of coal as it related to the maintenance of wages for union labor.

Nevertheless, Justice McKenna, who delivered the opinion of the Court, stood firm. After consideration of the historical background which led up to *Paul v. Virginia* and substantially culminated for his purpose in *Hooper v. California*, Justice McKenna said:

"If we consider these cases numerically, the deliberation of their reasoning, and the time they cover, they constitute a formidable body of authority and strongly invoke the sanction of the rule of *stare decisis*."

In this setting, SEUA was decided. On November 20, 1942, an indictment was returned by a grand jury for the District Court of the Northern District of Georgia against 198 corporations and 27 individuals, charging them with a conspiracy to fix and maintain arbitrary and non-competitive rates on fire insurance sold by them in the States of Alabama, Florida, Georgia, North Carolina, South Carolina and Virginia, in violation of Section 1 of the *Sherman Anti-Trust Act* and with conspiracy to monopolize trade and commerce in fire insurance in said states, in violation of

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*Supra*, n. 4.
12 *See also Judge Gontrum's "Paul v. Virginia — A Review of the Past and a Look into the Future", a paper read before the General Session, Section of Insurance Law, A.B.A., Chicago, 8-25-43 (Proceedings of the Section, p. 15); and before the Mid-Year Meeting of the National Association of Insurance Commissioners, New York, 11-30-43; while he was Insurance Commissioner of Maryland. This paper was widely noted in the current Insurance Press and is also available in pamphlet form.
11 *Supra*, n. 8.
13 *Supra*, n. 1.
Section 2 of that Act. The case was heard on demurrer, which the Trial Court sustained. Judge E. M. Underwood, relying upon *Paul v. Virginia* and the supporting cases which followed it, agreed with counsel for the defendants that since insurance was not commerce it could not be interstate commerce and, accordingly, the United States had failed to state a case.14

On August 30, 1943, the United States filed a petition for appeal to the Supreme Court.15 A brief on behalf of thirty-four states, as *amici curiae*, was filed, in which the Attorneys General thereof asserted, *inter alia*, that "the question involved is whether or not this Court would deny the right to the states to supervise the business of fire insurance as conducted within their borders, strike down the present nation-wide system of state regulation and supervision, and substitute . . . federal regulation and supervision" therefor.

The Attorneys General pointed out that:

"A reversal by this court of its previous rulings that such business is not interstate commerce would bring the business under the Commerce Clause of the Constitution and the laws enacted pursuant thereto including both the Sherman Act and the Federal Trade Commission Act and other acts as well . . . and make necessary a drastic and unwarranted readjustment by the states of their policies with reference to the business of fire insurance.

"The proper determination of this question is of such vital interest and importance to the several States and to their citizens that it was determined to file this brief as *amici curiae* requesting that the decision of the Lower Court be affirmed."16

On June 5, 1944, the Supreme Court in a four to three decision reversed the trial court and remanded the case for a trial on its merits.17 Pursuant to the majority opinion, fire insurance transactions which stretch across state lines con-

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15 Supra, n. 1.
16 Supra, n. 1.
17 Trial on the merits was never had.
stitute interstate commerce and the Sherman Anti-Trust Act (under which the indictment was filed) was intended to apply to the fire insurance business. Justices Reed and Roberts did not sit. Chief Justice Stone, Justice Jackson (in part) and Justice Frankfurter dissented.

A petition for rehearing was denied. Forty-one states petitioned the Supreme Court to grant the rehearing on the ground that: the Court, in holding that insurance is interstate commerce and is subject to the Sherman Act, has destroyed the foundation upon which state regulation is based.

Fire insurance in its principles does not differ from any other regular type of insurance. Accordingly, as a result of the SEUA decision, the insurance business in respect of its cooperative rating operations pursuant to which the price to be charged for insurance is determined under state regulation, commission control, and other cooperative features, faced a rather gloomy prospect. The States themselves, a while back, had feared the effects of cooperation amongst the insurers for the determination of rates, and had so hampered it that the unhappy ensuing situation was investigated by the so-called Merritt Committee in New York some 40 years ago. The result of its findings submitted in 1911 was an approval of cooperative ratemaking, on the theory that unrestricted price competition was a danger to the continued existence of the smaller companies. As was said by the Honorable James F. Malone, Jr., then Insurance Commissioner of Pennsylvania, in 1948:

"The stock fire insurance business [read any insurance business] found it desirable and even necessary to form the various rating organizations, trade organizations, and to adopt the practices and to formulate the rules which have occasioned most of the comments and criticisms."^{18}

From this necessity, cooperation was carried to the point, for instance, of dictating the number of agents which a company might have in a certain territory, the amount of com-

missions to be paid agents and brokers, of forbidding agents located outside of highly competitive and tightly regulated areas to write business in such areas, and the like. All of which, insurance men being only human, led to evasions which led to further rules, so that, as Mr. Malone puts it,

"the problem of enforcement grew until in a few localities the local producers' organization was vested with powers ordinarily not found outside Government. . . ."

It was such a business, so operated, grown old in the process of governing itself as insurance principles and economics dictated, under constant pressure of expedients dictated by competition, fostered by selfishness and enforced by almost unlimited power, that found itself by virtue of SEUA subject for the first time to the impact of Federal Anti-Trust legislation, i.e.,

1. The Sherman Anti-Trust Act,\textsuperscript{10} which forbids combinations in restraint of trade, and monopolies;
2. The Clayton Act,\textsuperscript{20} which further implements the Sherman Act;
3. The Robinson-Patman Price Discrimination Act,\textsuperscript{21} which prohibits certain discriminations, rebates and payments of commissions to brokers (the application of which to the business of insurance is not certain but in 1944 was greatly to be feared); and
4. The Federal Trade Commission Act,\textsuperscript{22} which declares unfair methods of competition and unfair, deceptive acts or practices to be unlawful, with FTC determining the nature of the acts complained of.

The business of insurance was in a dither. As a matter of fact, it had become so ditherish in 1943 that, after the U. S. appeal from the Georgia decision, there were introduced in Congress, on September 20, companion bills exempting insurance from the Sherman and the Clayton Acts, the \textit{Walter-Hancock Bill},\textsuperscript{23} and the \textit{Bailey-Van-Nuys Bill}.\textsuperscript{24}

\begin{footnotes}
\item[22] 15 U. S. C. A. Secs. 41-56.
\item[23] H. R. 3270.
\item[24] Sen. No. 1362.
\end{footnotes}
On June 22, 1944, the House passed the Walter-Hancock Bill. On June 23, 1944, the Attorney General of the United States recorded himself in the Congressional Record as intending to take no action against the companies until the States, the Companies and the Federal Government should have had an opportunity to determine upon their course of action.

Next, still in 1944, the Executive Committee of the National Association of Insurance Commissioners adopted a program embodying four specific recommendations:

(a) Declaration by Congress that the regulation and taxation of the insurance business shall continue in the several states;

(b) Complete elimination of the insurance business from the Federal Trade Commission Act;

(c) Complete elimination of the insurance business from the Robinson-Patman Act; and

(d) Partial elimination of the insurance business from the Sherman and Clayton Acts.

Meanwhile, the Senate Judiciary Committee, by a divided vote, recommended the passage of the Bailey-Van-Nuys Bill. As to this bill and its House counterpart, the going became rough when it was realized that enactment would exempt the heady business of insurance from the application of the Anti-Trust Laws, without qualification. Facing this rather stony fact, representatives of the Insurance Commissioners and the Insurance Industry agreed upon a compromise measure, the McCarran Act, so-called—which after protracted negotiation was enacted as Public Law 15, of the 79th Congress of the United States, and was approved by the President on March 9, 1945.25 In summary, it provides that:

25 U. S. C. A. Secs. 1101-1115. The text of the Act is:

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 im-
(a) Regulation and taxation by the states of the business of insurance is in the public interest; and silence of Congress shall be no barrier.

(b) The business shall be subject to state laws which regulate and tax it.

(c) No act of Congress, unless it refer specifically to Insurance, shall invalidate any such state law: PROVIDED, that after January 1, 1948 [later extended to June 30, 1948] the Sherman Act, the Clayton Act, and the Federal Trade Commission Act shall be applicable to Insurance, to the extent that Insurance is not regulated by state law.

(d) Until January 1, 1948 [later extended to June 30, 1948] the aforesaid Acts and the Robinson-Patman Act shall not apply to Insurance.
(e) The Sherman Act shall continue to apply to boycott, coercion and intimidation.

(f) This Act shall not affect the application of the National Labor Relations Act, the Fair Labor Standards Act, or the Merchant Marine Act of 1920.

The significant difference between the earlier bills and the McCarran Act is that under the former, Insurance was exempted from the Federal Anti-Trust and related Acts; whereas under the latter (now Public Law 15, as aforesaid) it shall be exempt only to the extent that the business is regulated by state law: with no exemption whatsoever of agreements or acts of boycott, intimidation or coercion!

This bit of legislation is unique in the history of the United States. So far as I know, it has no parallel. Nevertheless, its enactment constituted the winning of merely the first (and possibly inconclusive) round in the battle for preserving the existing pattern for control of the insurance business.

The insurance laws of the states and territories of the United States, including the District of Columbia, were sufficient for the operation of the business before it had obtained the highly undesirable status of commerce. But, insofar as they might be expected to constitute a shield against anti-trust prosecutions, they presented a maze of inconsistencies. The insurance business itself, in its two main subdivisions of stock and mutual, in its minor subdivisions, in its rating and administrative organizations with their consequential fringes of independent operators, consisted of an almost unintelligible conflict of interests. This was the material which had to be worked into some degree of harmony if the great objective of continued state control, as represented by coordinated operations and rate-making, offered by the McCarran Act, was to be attained.

The first step toward its attainment was the organization in May, 1945, at a joint meeting of the Federal Legislation Commission of the National Association of Insurance Commissioners and outstanding representatives of the insurance companies, of a committee designated as the All-
Industry Committee. Cooperating with the Industry was a special committee of the Insurance Section of the American Bar Association, appointed in 1946. This committee not only rendered invaluable constructive assistance, but it undertook and has carried out effectively the task of keeping the Industry informed of developments and progress.

The mountainous All-Industry Committee labored and brought forth the draft of two monumental pieces of legislation for enactment by the States, identified as the Casualty and Surety Rate Regulatory Bill, and the Fire, Marine and Inland Marine Rate Regulatory Bill, which provide for state supervision of rating activities for various types of property insurance, casualty insurance and surety insurance. The bills provide that rates must conform to prescribed standards; that they shall not be excessive, inadequate or unfairly discriminatory; that rate manuals and plans shall be filed with the Insurance Commissioner, who is directed to review such filings as soon as reasonably possible; that such rates may not be used for a waiting period without the Commissioner's approval. For a discussion of these rate regulatory bills and a report of legislative action, see Murphy: Public Law and State Regulation, particularly fns. 7-10, 13ff; Proceedings of the Section of Insurance Law, A.B.A. (Cleveland, 1947) 9; and Gardner: Insurance and the Anti-Trust Laws—A Problem in Synthesis, 61 Harvard L. Rev. (1948) 246.
period of 15 days or, if extended by the Insurance Commissioner, 30 days; and that if not disapproved within such waiting period they must be considered to meet the requirements of the Act; and shall be available to all subscribers. In addition, the All-Industry Committee prepared the drafts of bills relating to unfair methods of competition and unfair and deceptive practices in the business of insurance, with the design of clearly providing a type of state regulation which, within the field of its operation, would make unnecessary regulation under the Federal Trade Commission Act; and an Accident and Health Insurance Bill which, because of the peculiar nature of that business, related not only to rates but to applications, riders, endorsements and classifications of risks. All this material was submitted to the States, accompanied by recommendations that the State consider as part of its legislative program, statutory language broad enough to permit the payment of commissions to brokers and to provide for licensing of brokers in order to meet any possible application to insurance of the Robinson-Patman Act, which prohibits discrimination in commodity transactions and might prohibit the payment of commissions to insurance brokers under certain circumstances;\(^2\) and to provide for the plugging of other loopholes. Many states, of course, already had laws adequate to certain of these ends.

I shall not go into detail to show the effort, and the conflicts that grew out of the effort, to procure the enactment by the individual States of this massive legislative program. Suffice it to say that the two measures of outstanding importance, relating to rate regulation (the Fire and Marine and the Casualty and Surety rate laws — the primary shield against the application to these insurances of the Sherman Anti-Trust Act and the Clayton Act) have been enacted in every state except Idaho,\(^2\) and enacted also in the District of Columbia and the several Territories — either in form

\(^2\) The Robinson-Patman Price Discrimination Act is an amendment to the Clayton Act, and is possibly included in the words "as amended" appearing in Pub. Law 15. In any event, state legislation is designed to eliminate putative violations.

\(^2\) Idaho now has the Fire and Marine Act. (Idaho Acts (1947), Ch. 246, amended by Idaho Acts (1949), Ch. 651).
as drafted by the All-Industry Committee, or in substance believed to be sufficient.

The sequelae are in the making.

In Prudential Insurance Co. v. Benjamin, the Prudential protested an annual tax levied by South Carolina on foreign insurers, but not on domestic companies, as a condition of being authorized to do business within the state. The tax amounts to 3% of the aggregate of the premiums received by foreign insurers from the business done in South Carolina regardless of its interstate or local character. The Prudential contended that the tax was an unconstitutional discrimination against interstate commerce in favor of local business. The Supreme Court gave effect to the positive expression in the McCarran Act that "the continued regulation and taxation by the several states of the business of insurance" is in accord with the policy of Congress, and rejected the argument of Prudential that the Commerce Clause "of its own force" and without reference to any action by Congress forbids discriminatory state taxation. The Court further strengthened today's position of the business under the McCarran Act by finding it was the intention of Congress "to put the full weight of its power behind existing and future state legislation to sustain it from any attack under the Commerce Clause to whatever extent this may be done with the force of that power behind it, subject only to the exceptions expressly provided."

In Robertson v. California (decided at the same term), the appellant had been convicted in California of the crimes of (a) soliciting and selling a policy of insurance without being licensed as required by law, and (b) acting without a license as an agent for a non-admitted insurer, in violation of California's applicable statutes. The insurer was an Arizona corporation, not licensed in California. Its business was transacted largely by radio advertising and the use of the mails, in addition to the use of such local agents as the appellant. Appellant's contention was that since the entire series of acts (undisputed) done by him was directed to

328 U. S. 408 (1946).
Ibid. 431, et seq.
328 U. S. 440 (1946).
the consummation of interstate transactions, the acts complained of, though taking place in California, were beyond the reach of the State's licensing and regulatory powers. The court rejected these contentions and sustained both California statutes. In the concluding paragraph of its opinion, the Court said:

“Our determination has been made without specific reliance upon the McCarran Act for two reasons. One is that this was not necessary. The other arises from the facts that this is a criminal proceeding, the appellant's acts . . . were committed in August following the rendition of the South-Eastern decision in June of 1944 and the McCarran Act was not approved until March 9, 1945. The effect of that statute we have considered in the Prudential Insurance Company case decided today [supra] but that case involved no criminal or penal phase and therefore no conceivable ex post facto effect. It is doubtful that more than the semblance of such an effect would be involved by reliance upon the [McCarran] Act in this case. . . . Its effect might reasonably be taken as merely declaring or confirming expressly the inference which would be indicated from Congress' silence entirely without reference to the Act's provisions. . . . It does not detract from our decision on other grounds that the McCarran Act, if applied, would dictate the same result.”

Mr. Justice Douglas dissented in part, on the ground that prior to the McCarran Act, California could not (he says) “under our decisions under the Commerce Clause exclude interstate business, at least in the absence of a showing that it was a fraudulent enterprise or in an unsound condition. No such showing is made here. The McCarran Act changes that rule; but it should not be allowed to make unlawful what was lawful when done.”

An issue fraught with potential danger to the continuance of full state regulation is found in the case of North Little Rock Transportation Company, Inc. v. The Casualty Reciprocal Exchange,83 in the District Court for the Eastern

83 85 Fed. Supp. 961 (1949). (The District Court was upheld by a unanimous decision of the U. S. Court of Appeals for the 8th Circuit on April 6, 1950 — N. Y. Journal of Commerce, Apr. 7, 1950.)
District of Arkansas, Western Division. The facts illustrate just one more complication of the business. A taxicab company sought automobile liability insurance, which in law it was compelled to have, and was unable to obtain it on a voluntary basis because of its bad experience. Pursuant to an established routine, the application was referred to a statutory entity designated as the Arkansas Automobile Assigned Risk Plan, created for the purpose of absorbing risks which were compelled by law to obtain insurance and which were unable to arrange for it on a voluntary basis. The risk was assigned to the Aetna Casualty and Surety Company. Rate difficulties developed and the taxicab company brought its action, asking for triple damages and certain injunctive relief, against the Casualty Reciprocal Exchange (its previous insurer), the National Bureau of Casualty Underwriters, and some fifty casualty insurance companies—all doing business in Arkansas. The plaintiff's contention was that the conduct of the defendants in handling the risk and promulgating rates therefor constituted a pattern of action, followed under contract or conspiracy between them, in restraint of trade or commerce among the several states; and that the McCarran Act is unconstitutional in that Congress may not delegate to individual states the power to legislate within the Commerce Clause and cannot suspend general laws for a period of time except under its war powers. The Court decided against the plaintiff on all issues, and on appeal, was affirmed by the United States Court of Appeals for the Eighth Circuit.

The SEUA decision and the McCarran Act have been appraised by other courts also, and the principal conclusions arrived at appear to be that, in general, the right of the states to regulate and to tax the insurance business continues to exist. A brief reference may be made to the interesting fact that there are fields, however, in which the insurance industry, by virtue of its SEUA status as commerce, is not protected by the McCarran Act. For instance,

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it continues, as stated above, to be subject to the *Wage and Hour Law* and the *National Labor Relations Act*.

Mail order insurance business is still subject to Federal regulation. In this connection, it must be borne in mind that the *McCarran Act* constitutes a shield against the designated Federal statutes only, and then only to the extent that the states can and do affirmatively regulate the business. The State has no authority to regulate the mails.

The subject of insurance investments constitutes a problem which we were informed will be injected into the monopoly inquiry instituted by the House Judiciary Subcommittee. There are borderline fields of Federal authority, questions arising in which must sooner or later be determined by litigation or legislation.

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27 This is correct as a broad general statement. However, fourteen states have attempted to deal with the problem by the enactment of the Unauthorized Insurers Process Act (for instance, Md. Acts (1949), Ch. 450), and twenty-four states by the enactment of Fair Trade Practices Acts (for instance, Md. Acts (1947), Ch. 757). These laws taken together may have the hoped for effect of diminishing the area of Federal regulation of mail order insurance. For a full discussion of the problem, see *Regulation of Mail Order Accident and Health Insurance*, by George H. Kline, Insurance Research Analyst (presently Deputy Superintendent) of the New York State Insurance Department, as submitted to the annual meeting of the National Association of Insurance Commissioners, at Seattle, Washington, June, 1949, by Robert E. Dineen, Superintendent of Insurance of New York, published by the New York Insurance Department in pamphlet form; and Report of Insurance Status Committee of the American Bar Association, *The Fifth Year of Insurance as Interstate Commerce; Proceedings of the Section of Insurance Law, A.B.A.*, Chicago, 1949, p. 273. See also a résumé of insurance activities in Washington, D. C., presented by Harry F. Perlet, Assistant Manager, Insurance Department, Chamber of Commerce of the United States, at the annual meeting (1949) of the National Association of Independent Insurers (Insurance Advocate (Nov. 12, 1949) 5). See also *Travelers Health Assn., et al. v. Commonwealth*, 51 S. E. 2d 263 (Va. 1949); now on appeal in the Supreme Court of the United States.

28 Insurance Field, 12-2-1949, p. 5.

29 Senator McCarran himself has described the potential situation more forcibly:

"I think it would be appropriate to quote here from the dissenting opinion of the late Mr. Chief Justice Stone, in that case [SEUA, supra, n. 1], where, discussing the magnitude of this problem, he declared that the action of the Supreme Court—"

"in now overturning the precedents of 75 years, governing a business of such volume and of such wide ramifications, cannot fail to be 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 diffi-"
We may all be sure that the McCarran Act and the state legislation enacted pursuant thereto do not say the final word. Superintendent Dineen, of New York, has stated, rather cogently, that:

"Every commissioner knows that Congress now has the power at least insofar as the field of interstate commerce is concerned to take over the regulation of the insurance business and that state regulation must now prove its mettle."\(^4\)

Former Commissioner Malone, of Pennsylvania, following upon comments in respect of the application of the Federal Trade Commission Act to the business, goes on to say:\(^4\)

"There can be no doubt that Congress will keep a watchful eye on everything that is done by all concerned."

These views are shared by many.

Nevertheless, there is encouragement and perhaps the faint shadow of a semi-wishful prophecy in the words of Senator Joseph F. O'Mahoney, of Wyoming, penned when the McCarran Act was still, so to speak, in swaddling clothes. He wrote:\(^2\)

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"culties inseparable from a realignment of the distribution of power in our federal system."
"That is a strong and forthright and forceful statement; but I want to say to you, with all the emphasis at my command, that there is no word of overstatement in it." (Congress and Federal Regulation of Insurance, by Senator Pat McCarran, Proceedings of the Section of Insurance Law, A.B.A., Cleveland, Ohio, 1947, p. 29 at p. 30.) See also Some procedural and Administrative Questions Arising Under Laws Resulting from Public Law 15". W. Lee Shield, Proceedings of Section of Insurance Law, A.B.A., St. Louis, 1949, p. 233. [The Federal Trade Commission completed in April, 1950, a factual survey of state, district and territorial insurance laws which may affect the application of the Federal Trade Commission Act, as amended, and the Clayton Act, as amended, to the business of insurance. The survey is available for inspection at the office of F. T. C.]

\(^4\) The AIC Bills and the Alternatives, an address delivered by the Hon. Robert E. Dineen, Supt. of Insurance of the State of New York, before the National Association of Independent Insurers, at Chicago, October 14, 1946.


"This [state regulation under the New Order] is the challenge which has been presented to the insurance industry and to the states. Leadership in business and in government can keep enterprise free if leadership is unselfish enough, courageous enough, and vigilant enough to do it. By the Act of March 9, 1945 [the McCarran Act], the government at Washington has laid the problem in the laps of the states and of the industry. It is theirs to make or to break. You can keep the insurance industry free, and when you do you will be setting an example for all business and all government in every other branch of our economy."

The years will write the final story.