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implicit in all title suits. Alternatively the Court can disregard basic title law and continue to interpret the statute in such a way as to render nugatory the present work of the Legislature, in which event the obvious requirement of diligence can be specifically added by amendment. To imply that claims that cannot possibly be ascertained, coming from claimants that cannot possibly be known, can never be set at rest in judicial proceedings authorized and directed by legislation, is contrary to the widely accepted view obtaining in the United States and perpetuates in title matters a serious problem that can be solved only by amendment to the Florida Constitution and certiorari to the Supreme Court of the United States for a reiteration of its decisions in this connection.

JAMES W. MIDDLETON

INSURANCE IN FLORIDA AND THE McCARRAN ACT

I. INTRODUCTION

On June 5, 1944, the United States Supreme Court handed down a decision which brought a near-chaotic condition to the systems of state regulation of insurance. The effect of the decision in *United States v. South-Eastern Underwriters Association*,¹ by declaring insurance to be interstate commerce, was to reverse more than seventy-six years of holdings of this Court. Commencing with *Paul v. Virginia*² in 1868 and continuing until the *SEUA* decision of 1944, the Supreme Court had consistently and steadfastly held to the doctrine that insurance was not interstate commerce. Mr. Justice Field stated the almost historic position of the court prior to the *SEUA* case in his opinion in *Paul v. Virginia*:³

“Issuing a policy of insurance is not a transaction of commerce. . . . These contracts are not articles of commerce in any proper meaning of the word. . . . They are like other personal contracts between parties which are completed by their signatures and the

¹322 U. S. 533, 64 Sup. Ct. 1162, 88 L. Ed. 1440 (1944).

²8 Wall. 168, 19 L. Ed. 357 (U. S. 1869).

³*Ibid.*

transfer of the consideration. Such contracts are not interstate transactions, though the parties may be domiciled in different states.”

In 1895 the Supreme Court went even further in stating:

“The business of insurance is not commerce. The contract of insurance is not an instrumentality of commerce. The making of such a contract is a mere incident of commercial intercourse. . . .”⁴

Many efforts have been made in the past to place the business of insurance under federal supervision,⁵ but the Supreme Court, until 1944, maintained a firm stand upon the doctrine that insurance was not interstate commerce.⁶ Thus the regulation of the business of insurance was reserved to the states.⁷ This decision⁸ upset seventy-six years of precedent and made the business of insurance subject to control by the Federal Government.⁹

During those seventy-six years the states had, with the approval of the United States Supreme Court, complete jurisdiction over the business of insurance. There was, consequently, built up a system of control which had met with the approval and cooperation of the insurance industry. Through years of experience the states had acquired an adept and effi-

⁴*Hooper v. California*, 155 U. S. 648, 655, 15 Sup. Ct. 207, 210, 39 L. Ed. 297, 301 (1895).

⁵*Address of Hon. Joseph C. O'Mahoney, Chairman Temporary National Economic Committee*, 26 A. B. A. J. 907 (1940); H. R. No. 738, 39th Cong., 1st Sess. (1866); H. R. No. 9629, 52nd Cong., 1st Sess. (1892); SEN. REP. No. 4406, 59th Cong., 1st Sess. (1906); S. J. RES. No. 103, 63rd Cong., 2nd Sess. (1914-15); S. J. RES. No. 51, 73rd Cong., 1st Sess. (1933).

⁶*Colgate v. Harvey*, 296 U. S. 404, 432, 56 Sup. Ct. 252, 260, 80 L. Ed. 299, 312 (1935); *National Union Fire Ins. Co. v. Wanberg*, 260 U. S. 71, 75, 43 Sup. Ct. 32, 33, 67 L. Ed. 136 (1922); *New York Life Ins. Co. v. Deer Lodge County*, 231 U. S. 495, 34 Sup. Ct. 167, 58 L. Ed. 332 (1913); *New York Life Ins. Co. v. Cravens*, 178 U. S. 389, 20 Sup. Ct. 962, 44 L. Ed. 1116 (1900); *Orient Ins. Co. v. Daggs*, 172 U. S. 557, 19 Sup. Ct. 281, 43 L. Ed. 552 (1899); *Noble v. Mitchell*, 164 U. S. 367, 17 Sup. Ct. 110, 41 L. Ed. 472 (1896); *Liverpool Ins. Co. v. Massachusetts*, 10 Wall. 566, 19 L. Ed. 1029 (U. S. 1870).

⁷U. S. CONST. AMEND. X.

⁸*United States v. South-Eastern Underwriters Ass'n*, 322 U. S. 533, 64 Sup. Ct. 1162, 88 L. Ed. 1440 (1944).

⁹U. S. CONST. Art. 1, §8.

cient method of supervision. These methods and the laws had been developed with no thought of their constitutionality from the standpoint of interstate commerce. When the United States Supreme Court declared insurance to be interstate commerce these laws were placed in jeopardy as possibly being invalid, and the cases decided in line with the earlier decisions of the Supreme Court immediately became questionable. It thus became necessary to revamp the state laws¹⁰ or to place the business under the direct control of the Federal Government. Arguments were presented favoring federal control, as well as arguments in favor of continued state control.¹¹ The great majority of the insurance industry as well as the individual states were eager to see control maintained at the local level; to keep control, by Congressional permission, at the state level.

II. THE McCARRAN ACT

As the result of the majority view that insurance should be regulated by the states, Congress passed Public Law 15, often called the McCarran Act.¹² This act granted to the states the right to continue the control of insurance, subject to certain restrictions. Varied interpretations as to the exact and full meaning of these restrictions are possible. The McCarran Act states:

“ . . . 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 Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.”

In Section 2 of the act, as amended,¹³ Congress stated that the Sherman Act,¹⁴ the Clayton Act,¹⁵ and the Federal Trade Commission

¹⁰United States v. South-Eastern Underwriters Ass'n, 322 U. S. 533, 64 Sup. Ct. 1162, 88 L. Ed. 1440 (1944). 91 CONG. REC. 1443, 1481 (1945).

¹¹See note 10 *supra*; SAWYER, INSURANCE AS INTERSTATE COMMERCE, c. XI (1st ed. 1945).

¹²59 STAT. 33 (1945), 15 U. S. C. §1011 (1946).

¹³61 STAT. 448 (1947), 15 U. S. C. A. §1012 (Supp. 1947).

¹⁴26 STAT. 209 (1890), 15 U. S. C. §1 (1946).

¹⁵38 STAT. 730 (1914), 15 U. S. C. §12 (1946).

Act¹⁶ would not apply to the business of insurance before June 30, 1948; after that date these acts were to:

“ . . . be applicable to the business of insurance to the extent that such business is not regulated by State Law.”

The act did provide, however, that the Sherman Act should be applicable immediately, insofar as boycott, intimidation, and coercion were concerned.¹⁷

The general intent of Congress is clear upon a complete reading of the act, supplemented by the President's statement made at the time he signed the bill.

He said:

“ . . . This bill grants the insurance business a moratorium from the application of the anti-trust laws and certain related statutes . . . until January 1, 1948. The purpose of this moratorium period is to permit the states to make necessary readjustments in their laws with respect to insurance. . . . After the moratorium period, the anti-trust laws and certain related statutes will be applicable in full force and effect to the business of insurance. . . .”¹⁸

Congress, by the McCarran Act, has granted the states the right to regulate the insurance industry, but it is a qualified permission. In other words, Congress is looking with tolerance upon the states' efforts to regulate the business adequately, but, if the laws and the enforcement do not meet the demands of Congress, it will be a simple matter to bring about federal control of the entire business or any given segment merely by the interpretation that “ . . . such business is not regulated by State Law.”¹⁹ It therefore has become necessary for the states to scrutinize their own laws and secure, by June 30, 1948, legislation meeting the requirements of Congress.

¹⁶38 STAT. 717 (1914), 15 U. S. C. §41 (1946).

¹⁷59 STAT. 34, §3(b) (1945), 15 U. S. C. §1013 (1946).

¹⁸SAWYER, *INSURANCE AS INTERSTATE COMMERCE* 66 (1st ed. 1945).

¹⁹59 STAT. 33 (1945), 15 U. S. C. A. §1011 (Supp. 1947).

III. STATE REGULATION

It was generally acknowledged that, if federal control replaced state regulation, carefully drafted federal legislation would be necessary,²⁰ the states probably would suffer by losing existing tax sources, and much elaborate machinery for the enforcement of state laws would be forced into drastic curtailment if not complete disbandment.²¹ The legal effect was unforeseeable, for such a move would necessarily upset much well-established case law.

In order to determine the type of legislation necessary to meet the demands of Congress, it is wise to consider the existing federal statutes that would be applicable to the business. It is well known that the Sherman Act aims, among other things, at price-fixing combinations. As a result, the Supreme Court has held that any agreement to fix prices is illegal *per se*. It matters not if the rates are adequate, reasonable, and fair; the combination to so fix prices makes it illegal.²² Under federal control, legislation providing for governmental participation in setting the rates would be necessary or the insurance rate-making bureaus would be illegal, and yet it has been generally accepted that such bureaus are a vital factor in the sound operation of the insurance business.²³ The Supreme Court has held, however, that when a state itself becomes a member of an organization which fixes prices the Sherman Anti-Trust Act does not apply.²⁴ This holding lends weight to the conclusion that the Supreme Court will not declare the insurance rate-making bodies

²⁰Huard and Chavez, *Insurance—A Survey of State Rate Regulation*, 33 GEO. L. J. 70, 90-91 (1944).

²¹The relative merits of federal and state regulation of insurance are beyond the scope of this note. When a legal philosophy has existed over an extended period of time, the proponent of a change is burdened with proving the new view to be the better. For arguments on this subject see generally: 91 CONG. REC. 1442-1444, 1477-1488 (1945); SAWYER, *INSURANCE AS INTERSTATE COMMERCE* (1st ed. 1945); Gardner, *Insurance and the Anti-Trust Laws—a Problem in Synthesis*, 61 HARV. L. REV. 246 (1948).

²²*United States v. Socoby Vacuum Oil Co.*, 310 U. S. 150, 60 Sup. Ct. 811, 84 L. Ed. 1129 (1940).

²³See note 10 *supra*; SAWYER, *INSURANCE AS INTERSTATE COMMERCE* 148 (1st ed. 1945).

²⁴*Parker v. Brown*, 317 U. S. 341, 63 Sup. Ct. 307, 87 L. Ed. 315 (1942).

contrary to the Sherman Act as long as the states provide for supervision, as parties to the rate-making scheme. The laws, therefore, must be set up governing such bureaus in order to allow their continued operation.

Those who oppose state regulation advance the theory that bureaus are not necessary; that free and open competition will solve all rate problems. This does not hold true in the insurance business. Such practice will lead to cut-throat competition, with resultant actual financial loss to the insurance-buying public. The insurance business differs from the average sales organization. In buying merchandise from a store or sales organization the purchaser pays his money and receives a given tangible commodity. The buyer has the goods and will suffer no loss or impairment of his goods if the seller subsequently goes bankrupt trying to compete with other firms in meeting low prices. In insurance this condition is not true; here the insured pays his money and receives not a tangible product but a policy granting him protection from a specified hazard or occurrence. This protection would be no better than a share of what could be salvaged in composition or bankruptcy if the financial standing of the insurance company became impaired because of cut-rate competition, and, accordingly, when a loss occurred, the insured would not receive that product for which he had paid. It therefore becomes apparent that if the insurance companies are to determine the proper premium, in order to render the service for which they are in business, the experience of many companies should be combined to determine the most accurate over-all rate. Rate-making organizations are specifically designed to do this; such accurate information is highly desirable if not absolutely necessary.²⁵

IV. FLORIDA LAWS

Chapter 630, Florida Statutes 1941, is an act to regulate the making, filing, and use of insurance rates for casualty insurance and for fidelity, guaranty, and surety bonds. It sets up methods of regulating the rate-making organizations, as well as providing penalties for violation of the act. Under this law each company doing this particular type of business in Florida must file with the Insurance Commissioner every manual of classifications, rules and rates, every rating plan, and every modification of any of the foregoing which it contemplates using in Florida.²⁶ If it

²⁵91 CONG. REC. 1481 (1945).

²⁶FLA. STAT. 1941, §630.03 (Supp. 1947).

does not desire to file individually, it may become a member of a recognized rating bureau,²⁷ and such rating organization will make its own filing, which will apply to all members and will bind them as though each had made such filing on its own.

In order to maintain regulation of these rates, the Insurance Commissioner may approve or disapprove them. Filed rates may not be used until thirty days after filing unless prior approval is obtained from the Commissioner.²⁸ This law leaves a certain amount of discretion in the Insurance Commissioner, which is necessary for flexibility to meet changing conditions, and he may promulgate rules and regulations, other than those specified, not inconsistent with the law.²⁹ Should any violation of the law be found, the Commissioner may impose a penalty of not more than \$250.00, unless such is found to be a wilful violation, in which event the penalty may run as high as \$1000.00.³⁰ The Commissioner may also cause the license of any such offending company or rating organization to be suspended, and during such suspension no business may be carried on by the organization within the State of Florida.³¹ No license shall be suspended or fine imposed, however, except upon a written order setting forth the findings, such order to be made after a hearing held upon not less than ten days' written notice to the alleged violator.³² Any order or decision of the Insurance Commissioner shall be subject to review by writ of certiorari to the Circuit Court of Leon County, and application for such writ must be made within sixty days after the date of the Commissioner's order. The court shall determine whether the granting of the writ shall act as a stay of the order of the Commissioner, except that, if the Commissioner's order is to effect a change in the premiums, the court order will automatically stay execution of the order of the Commissioner, pending final disposition of the proceedings of the circuit court.³³

Chapter 629, Florida Statutes 1941, is another act dealing predominantly with rate regulation. The intention of this act is to regulate the

²⁷*Ibid.*

²⁸*Ibid.*

²⁹FLA. STAT. 1941, §630.08(4) (Supp. 1947).

³⁰FLA. STAT. 1941, §630.11(1) (Supp. 1947).

³¹FLA. STAT. 1941, §630.11(2) (Supp. 1947).

³²FLA. STAT. 1941, §630.11(3) (Supp. 1947).

³³FLA. STAT. 1941, §630.12 (Supp. 1947).

making and applying of rates for fire and all other kinds of insurance which fire insurance companies are authorized to write in Florida. This statute follows in effect the one previously described, with certain deviations necessary for the differences in the writing of this type of insurance. The penalty provided for violation is revocation of license, unless the act alleged was a wilful violation of the law by affirmative action or a wilful failure to comply with it, in which event such party shall be deemed guilty of a misdemeanor and upon conviction fined not less than \$100.00 or more than \$500.00.³⁴ A review of the Commissioner's order shall be by appeal to the Circuit Court of Leon County, and the rules of the Supreme Court of Florida relative to appeals shall be followed.³⁵

Both of the above laws were amended by an act of the 1947 Legislature, which amendment provides that any insurer subject to two or more chapters of Florida laws governing rate filings may select the law under which it chooses to file.³⁶ Another law was passed in the same session which provides for advisory organizations. This is designed to further cooperative action between groups of insurers for the compilation and dissemination of loss and expense statistics and for the formulation of recommendations to the rate-making organizations, both being subject to regulation by the Insurance Commissioner.³⁷

Chapter 642, Florida Statutes 1941, is the Accident and Health Statute.³⁸ This law attempts to reach some degree of uniformity as to the policies insuring against losses incurred due to hospitalization, accidents, and sickness. This law, like the two "rating bills," also takes cognizance of the rates charged for such insurance,³⁹ even though the Health and Accident branch of the insurance industry has seldom acted in concert either in gathering statistics or in setting rates in this particular field. The only real need for regulating rates in the Accident and Health field is to place the individual policy forms upon a sound footing, thus eliminating or tending to eliminate certain cut-rate forms that may be sold at a loss only to meet competition. The losses so sustained presumably are absorbed by exorbitant rates on other forms as

³⁴FLA. STAT. 1941, §629.20 (Supp. 1947).

³⁵FLA. STAT. 1941, §629.22 (Supp. 1947).

³⁶FLA. STAT. 1941, §§629.02(4), 630.01 (Supp. 1947).

³⁷FLA. STAT. 1941, §626.27 (Supp. 1947).

³⁸FLA. STAT. 1941, c. 642 (Supp. 1947).

³⁹FLA. STAT. 1941, §642.01 (Supp. 1947).

to which competition is not so keen. However, uniformity and clarification of the policy forms, rather than modification of the rates, is the predominant consideration of the act. Under this statute all policy forms, riders, endorsements, rates, and any other pertinent matters which might be made a part of the contract of insurance, must be filed and approved for use before being issued to any insured in the State of Florida.⁴⁰ There is a clause, however, which allows use of a policy without approval after thirty days have elapsed since the date of filing, unless the form is disapproved by the Commissioner prior to that time.⁴¹

The Accident and Health Law prescribes limitations upon the policy contents and also sets forth the wording which must be used in the event certain coverages are desired by the insurance company.⁴² The act also provides for standard provisions which must be incorporated in the policy forms.⁴³ Group insurance is defined and classified as "Family Group Accident and Sickness Insurance," "Group Accident and Sickness Insurance," "Franchise Accident and Sickness Insurance," and "Industrial Sickness and Accident Insurance." There is the same flexibility in this law as in the other statutes to meet changing conditions by granting to the Insurance Commissioner the right to make such additional requirements as may appear necessary to carry out the intent of the law.⁴⁴

Chapter 643, Florida Statutes 1941, is another 1947 act, which, however, is not confined to any given field of insurance but treats the entire business of insurance.⁴⁵ This act, referred to as the Fair Trade Practice Act, attempts to define and to provide for the determination of unfair methods of competition and unfair and deceptive acts or practices in the insurance business. It is made unlawful to misrepresent the benefits to be derived from a policy of insurance, the financial status of a company, or generally to give out false or misleading information or advertising concerning any company or policy form.⁴⁶ It also prohibits boycott, coercion, and intimidation.⁴⁷ There is some doubt as to how

⁴⁰*Ibid.*

⁴¹*Ibid.*

⁴²FLA. STAT. 1941, §642.03 (Supp. 1947).

⁴³*Ibid.*

⁴⁴*Ibid.*

⁴⁵FLA. STAT. 1941, c. 643 (Supp. 1947).

⁴⁶FLA. STAT. 1941, §643.04 (Supp. 1947).

⁴⁷*Ibid.*

these three violations may affect the agents or others engaged in the insurance business within the State of Florida. The Sherman Anti-Trust Act covers these three violations and, since the McCarran Act does not suspend its application to boycott, coercion, and intimidation, this provision in the Florida law is probably mere surplusage. When Congress has legislated upon a subject within its province, its power as to such matter is exclusive.⁴⁸ Mr. Justice Lurton, with reference to contracts involving transportation of goods in interstate commerce, has stated:⁴⁹

“Only the silence of Congress authorized the exercise of the police powers of the State upon the subject of such contracts. But when Congress acted in such a way as to manifest a purpose to exercise its conceded authority, the regulating power of the State ceased to exist.”

By virtue of the McCarran Act, Congress has taken the position that the three named violations are of national importance and, as such, should be regulated by federal law.⁵⁰

Florida's Fair Trade Practice Act gives the Insurance Commissioner the power to investigate any acts that might be in contravention of this statute.⁵¹ If it is deemed necessary to take action for a violation, the Commissioner must serve upon the alleged violator a statement of the charges and a notice of hearing, served not less than twenty days prior to the hearing, and a transcript of the proceedings is not necessary except upon request.⁵² A cease and desist order may be filed if the hearing develops facts sufficient for the Commissioner to sustain the charges.⁵³ The act provides for review by appeal or writ of certiorari to the county court of the county of residence of the accused. Violation of a cease and desist order after it has become final constitutes a misdemeanor

⁴⁸*Seaboard A. L. Ry. v. Pace Mule Co.*, 234 U. S. 751, 34 Sup. Ct. 775, 58 L. Ed. 1576 (1913); *Chicago, Burl. & Quincy Ry. v. Miller*, 226 U. S. 513, 33 Sup. Ct. 155, 57 L. Ed. 323 (1913).

⁴⁹*Adams Express Co. v. Croninger*, 226 U. S. 491, 506, 33 Sup. Ct. 148, 152, 57 L. Ed. 314, 320 (1913).

⁵⁰59 STAT. 33 (1945), 15 U. S. C. §1011 (1946).

⁵¹FLA. STAT. 1941, §643.05 (Supp. 1947).

⁵²FLA. STAT. 1941, §643.06 (Supp. 1947).

⁵³FLA. STAT. 1941, §643.07 (Supp. 1947).

punishable by a fine not to exceed \$1000.00 or imprisonment not to exceed six months, or both.⁵⁴

None of Florida's laws have reached the United States Supreme Court as of this date; however, it has had an opportunity to rule upon some of the other states' requirements and to pass upon the McCarran Act. In one case⁵⁵ the Court held that a state could impose restrictions upon insurers and their agents, even though the business was interstate commerce. The defendant had been charged with violating the licensing laws of California.⁵⁶ The defense maintained that the agent was engaged in interstate commerce and was beyond the reach of the state's licensing powers. The Court rendered its decision without invoking the McCarran Act, since to do so would have given an *ex post facto* effect to the law. The Court upheld the state's licensing laws upon the theory that they resulted from an exercise of the police powers ". . . designed and reasonably adapted to protect the public from fraud, misrepresentation, incompetence and sharp practices" It further held that the legislation was regulatory, not discriminatory, and it governed ". . . in the absence of contrary action by Congress"

Another case decided June 3, 1946,⁵⁷ removes much doubt as regards the states' power to tax the business of insurance as it had in the past. This case upholds the right of a state to impose a premium tax on the business of insurance, even though the tax applies only to foreign and not to domestic companies. In upholding the tax the Court said that Congress must have known of the existing tax and regulatory systems in the various states, and in enacting the McCarran Act,

"Obviously Congress' purpose was broadly to give support to the existing and future state systems for regulating and taxing the business of insurance."

⁵⁴FLA. STAT. 1941, §643.11 (Supp. 1947).

⁵⁵Robertson v. California, 328 U. S. 440, 66 Sup. Ct. 1160, 90 L. Ed. 1366 (1946).

⁵⁶Section 703(a) of the California Insurance Code makes it a misdemeanor for any person, except one licensed as a "surplus line broker" to act "as agent for a non-admitted insurer in the transaction of insurance business" within the state. Section 1642 prohibits a person from acting as an insurance agent until licensed by the Insurance Commissioner.

⁵⁷Prudential Ins. Co. v. Benjamin, 328 U. S. 408, 66 Sup. Ct. 1142, 90 L. Ed. 1342 (1946).

The Court, in its opinion, threw out a guiding line for the future in stating:

“But, though Congress had no purpose to validate unconstitutional provisions of state laws, except in so far as the Constitution itself gives Congress the power to do this by removing obstacles to state action arising from its own action or by consenting to such laws . . . it clearly put the full weight of its power behind existing and future state legislation to sustain it from any attack under the commerce clause to whatever extent this may be done with the force of that power behind it”

V. CONCLUSION

Florida has taken sufficient legislative steps to regulate adequately the business of insurance within the meaning of the McCarran Act. The “rating bills” set up the machinery necessary for strict supervision of the rates, with the view of protecting the public. They allow continued operation of the rating bureaus, enabling the companies to have accurate information on losses and expenses. The contract of insurance itself is subject to scrutiny by the Insurance Commissioner. All of the legislation, prompted by the *SEUA* case and the McCarran Act, grants the Insurance Commissioner enough administrative power to see that the provisions of the laws are carried through.

The regulations imposed have not been so drastic as to stifle the capacity of the insurance business to serve the public, yet the laws have gone further than paying mere lip-service to the McCarran Act. The most important single phase of Florida’s new insurance laws in relation to the McCarran Act is the express requirement in the McCarran Act that the insurance business be operated in the public interest. Accordingly, the continuance of state regulation depends as a practical matter on a consistent showing of compliance with this mandate, which in turn involves active cooperation by the insurance companies in rendering service to the public. Florida’s laws here discussed are similar to the many others enacted in the other states during the past few years.

Mere uniformity of legislative action is not enough by itself, however; there must be uniformity of administration and cooperation of all companies throughout the nation in complying with these laws. A failure by the supervisory officials or the insurance companies could easily be