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Applications of Federal Antitrust Laws to the Insurance Industry

The McCarran-Ferguson Act generally exempts the insurance industry from federal antitrust laws to the extent that there is state regulation. This Note attempts to determine what the Act means by state regulation. After concluding that Congress sought to exempt only effective regulation, the author finds that federal antitrust laws apply to the insurance industry only where there is no effective state legislation or the states lack jurisdictional power to regulate effectively. Further, the author examines the increasing scope which is being given to the exception applying federal antitrust laws to boycotts, coercion, or intimidation regardless of state regulation.

INTRODUCTION

Immediately after the United States Supreme Court decided in United States v. South-Eastern Underwriters Ass'n² that the insurance business was interstate commerce subject to federal regulation, Congress passed the McCarran-Ferguson Act. The purpose of this Act was to protect the continued regulation and taxation of the insurance business by the states. The terms of the McCarran Act, however, did not overrule the South-Eastern decision. As a result, the federal government's role in the regulation of the insurance business is unclear, and for more than 15 years the extent to which the McCarran Act relieves the insurance industry of the federal antitrust laws' requirements has never been clearly established. The objective of this Note, therefore, is to examine the McCarran Act in an attempt to ascertain the extent to which the federal antitrust laws remain applicable to the insurance industry.

I. THE PROBLEM

For 75 years³ the United States Supreme Court adhered to the view that the business of insurance was not commerce within the

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1. 322 U.S. 533 (1944).
3. Beginning with Paul v. Virginia, 75 U.S. (8 Wall.) 168 (1868), the Supreme Court had held that insurance was not commerce and that insurance contracts were not interstate transactions even though the parties to such contracts were domiciled in different states. This view was fol-
meaning of the commerce clause and, therefore, was not subject to regulation by Congress.\textsuperscript{4} In 1944, however, the Court changed its position and held in \textit{South-Eastern} that insurance is interstate commerce subject to the provisions of the Sherman Act.\textsuperscript{5}

Congress regarded the \textit{South-Eastern} decision as "precedent-smashing";\textsuperscript{6} many observers felt that it endangered traditional practices long considered essential to the insurance industry.\textsuperscript{7} The industry had argued before the Court that "competition in the field of insurance is detrimental both to the insurers and the insured . . . ."\textsuperscript{8} To Congress they made the prediction that the natural result of increased competition would be to render many companies insolvent.\textsuperscript{9} Existing state regulatory statutes were designed, the industry argued, to preserve solvency, and the application of the federal antitrust laws to exclude state regulation might have a disastrous result.\textsuperscript{10} Congress was also concerned by

\begin{footnotes}
\item The insurance industry vigorously attacked state regulation as being an unconstitutional restraint on interstate commerce until the danger of federal control made state regulation an attractive alternative. See H.R. REP. Nos. 3269 & 3270, 78th Cong., 1st Sess. 29–30, 61–62 (1943). In 1868, the Supreme Court decided that insurance was not commerce. Paul v. Virginia, 75 U.S. (8 Wall.) 168 (1868). During this period, when state regulation was a reality and federal regulation was non-existent, the insurance industry often sought federal regulation of insurance, See ABA, \textit{SECTION OF INSURANCE LAW PROCEEDINGS} 133 (1944–45).
\item 322 U.S. 533 (1944). Only seven Justices sat in the determination of \textit{South-Eastern}; only four of these constituted the majority. Thus, a minority of the full Court reversed the 75-year precedent established by Paul v. Virginia.
\item The precise question of whether Congress has the power under the commerce clause to regulate the insurance business had never been presented to the Court until \textit{South-Eastern}. In that case the insurance industry cited cases previously decided against them to support their new position. However, the Court reasoned that its prior decisions involved questions of upholding state law whereas the problem presented in \textit{South-Eastern} involved the effective limits of the Sherman Act. Thus, the Court did not feel bound by its prior decisions. 322 U.S. at 545.
\item See 90 \textit{CONG. REC.} 6524–25 (1944).
\item Although Attorney General Biddle issued a statement to the contrary, 90 \textit{CONG. REC.} A3359–60 (1944), many feared that the foundations of state regulatory and taxing systems had been shaken. S. REP. No. 20, 79th Cong., 1st Sess. (1945); 91 \textit{CONG. REC.} 483–88, 1085–93 (1945). Not all insurance interests, however, agreed with this view. See statement of Senator O'Mahoney, H.R. REP. Nos. 3269 & 3270, 78th Cong., 639 (1944); Sawyer, \textit{INSURANCE AS INTERSTATE COMMERCE} (1945). Newspapers generally criticized the \textit{South-Eastern} decision. 44 \textit{COLUM. L. REV.} 772, 773 n.10 (1944).
\item 322 U.S. at 561. See, e.g., Harrington, \textit{An Exploration of the Effects of the S.E.U.A. Decision}, 1944 Ins. L.J. 590.
\item H.R. REP. No. 873, 78th Cong., 1st Sess. 8 (1944).
\item See 91 \textit{CONG. REC.} 1092 (1945). This fear was found to be exag-
the refusal of some insurance companies to abide by state regulatory provisions or to pay state taxes.\textsuperscript{11} After \textit{South-Eastern} these companies argued that state regulation and taxation were unconstitutional restraints on interstate commerce. As a result of these arguments and events, the insurance companies pressed for legislation in Congress which would authorize continued state regulation and taxation of the insurance business and which would exempt the insurance industry from federal antitrust laws.\textsuperscript{12}

In the session of Congress immediately following the \textit{South-Eastern} decision there was virtual unanimity as to the desirability of protecting the existing state regulatory systems; however, there were conflicting views as to the extent to which the proposed legislation should exempt the insurance industry from federal regulation. A compromise measure known as the McCarran-Ferguson Act was passed in 1945. The Act declares that the continued regulation and taxation of the insurance business by the states is in the public interest, and it specifically provides that the insurance business shall be regulated by the states rather than by the federal government.\textsuperscript{13} Nevertheless, the McCarran Act clearly gerated when the Supreme Court held that the insurance business is within the states' concurrent power over commerce. As long as Congress has not pre-empted the field, the states are free to regulate. Robertson v. California, 328 U.S. 440 (1946). The \textit{Robertson} case upheld state regulation which limited the activities of unadmitted insurers or unlicensed agents. The Court held that state power did not necessarily depend on congressional authorization through the McCarran Act. \textit{Cf.} Parker v. Brown, 317 U.S. 341 (1943), which held that the Sherman Act did not apply to an agricultural marketing combination operating under the authority of state law. The \textit{Parker} case suggests that regulated rate-making by state bureaus is valid even without congressional authorization. Sawyer, \textit{Insurance as Interstate Commerce} 149-50 (1945). See text commencing at note 112 infra.

11. But this emergency is immediate and it is necessary to pass this legislation now. The States do not know what to do with respect to the collection of taxes and the insurance companies do not know what to do with respect to the payment of taxes.

91 CONG. REC. 1092 (1945).

Bills were introduced in Congress during the pendancy of the \textit{South-Eastern} case to exempt insurance from all federal legislation and to validate continued state taxation and regulation. S. 1362, H.R. 3270, 78th Cong., 1st Sess. (1943). The House passed its bill by a vote of 283 to 54, 90 CONG. REC. 6565 (1944), but the bill failed to pass the Senate largely because of the vigorous opposition of Senator O'Mahoney of Wyoming. See Time, Dec. 13, 1943, p. 82.


13. Sections 1 and 2(a) provide:

Congress 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
provides that the federal antitrust laws remain applicable in at least two situations. First, section 2(b) provides that while federal antitrust laws do not supersede state laws regulating and taxing the insurance business, they are applicable to the insurance industry to the extent that state laws do not regulate insurance companies. Second, section 3(b) provides that nothing in the McCarran Act shall affect the Sherman Act's prohibition of actual or attempted acts of boycott, coercion or intimidation.

II. THE EFFECT OF STATE REGULATION UNDER THE McCARRAN ACT

A. THE BASIC POLICY OF THE McCARRAN ACT

Section 2(a) of the McCarran Act provides that the business of insurance "shall be subject to the laws of the several States . . ." The House report indicates that Congress wanted the states to retain the control they enjoyed over the insurance business prior to South-Eastern—subject to the exception contained in the proviso to section 2(b). This proviso states that the Sherman, Clayton and Federal Trade Commission Acts apply to the insurance business "to the extent that such business is not regulated by State law." However, section 2(b) also adds that no other
federal law shall apply to the insurance business unless it "specifically relates" to that business.

In *Prudential Ins. Co. v. Benjamin*, the Supreme Court noted that the purpose of the McCarran Act was "to give support to the existing and future state systems for regulating and taxing the business of insurance" by specifically disclaiming any federal pre-emption of the field; it thereby prevented the state systems from being unconstitutional burdens on interstate commerce. This purpose was effectuated by delegating to the states Congress' power to regulate and tax insurance as interstate commerce. While the Court in *Benjamin* proclaimed that the primary intent of the statute was to insulate the insurance industry from federal regulation, the Court did not decide the extent to which Congress intended to abdicate federal control. Subsequent decisions by the federal appellate courts have produced a diversity of opinion on this point. In 1960, the Supreme Court attempted to clarify this issue in *FTC v. Travelers Health Ass'n* when it stated that the basic policy of the McCarran Act "was to allay doubts, thought to have been raised by [the decision of the Supreme Court in *South-Eastern*] as to the continuing power of the States to tax and regulate the business of insurance." Here the Court emphasized that the Act was designed to permit the continued exercise of state power rather than to prevent the exercise

Sherman, Clayton, FTC and Robinson-Patman Acts to the insurance business. The implication of this section was that after the moratorium period the acts enumerated would be applicable to the insurance business unless limited by other provisions of the McCarran Act. But § 2(b), in its enumeration of the federal antitrust laws applicable to the insurance business after the moratorium, failed to include the Robinson-Patman Act even though all other Acts listed in § 3(a) were included. Thus, the McCarran Act did not clearly indicate whether the Robinson-Patman Act applied to the insurance industry. On the other hand, the Robinson-Patman Act is substantially contained in the Clayton Act—only the criminal provisions are excluded. Therefore, the omission of the Robinson-Patman Act from § 2(b) has not prevented its application to the insurance business.

20. *Id.* at 429–30.
21. The Eighth Circuit took a limited view of the extent to which the federal government intended to abdicate its power in favor of the states. It stated that the purpose of the McCarran Act was "to continue the regulation of the insurance business, unhampered . . . by federal legislation relating to interstate commerce." *North Little Rock Transp. Co. v. Casualty Reciprocal Exch.*, 181 F.2d 174, 176 (8th Cir. 1950). (Emphasis added.) The Fifth Circuit, on the other hand, indicated that in its opinion the McCarran Act was intended to yield control of the insurance industry to those states which *had undertaken* or would *undertake* to regulate the insurance business. *American Hosp. & Life Ins. Co. v. FTC*, 243 F.2d 719, 723 (5th Cir. 1957), *aff'd*, 357 U.S. 560 (1958).
22. 362 U.S. 293 (1960).
23. *Id.* at 299.
of federal power. The insurance industry's main objection to federal control—the possibility of insolvency through "uncontrolled" competition—seems to be adequately met by this permissive approach. If the states are concerned with the adverse effect of federal antitrust laws upon the solvency of the insurance companies, they are free to "pre-empt" the area under the McCarran Act. On the other hand, where the states have not regulated or where they are unable to regulate, the Act provides for the application of federal antitrust laws so as to prevent "gaps" or "voids" in the overall antitrust program.

B. THE REQUIREMENT OF REGULATION

The McCarran Act, as amended, provided for a three-year moratorium period during which the federal antitrust laws did not apply to the insurance industry. The purpose of the moratorium was to provide the states with an opportunity to regulate the insurance business and to pre-empt the application of the federal antitrust laws. All states took advantage of this opportunity by passing laws specifically designed to preclude the application of the federal antitrust laws after the termination of the moratorium. For example, all states enacted Fair Trade Practices acts applicable to the insurance business. These state laws have been construed as preventing the FTC from exercising jurisdiction over the insurance industry. Other state statutes which are not specifically related to insurance but which prescribe general business standards similar to federal antitrust law may also preclude federal regulation. Such legislation, however, does not necessarily amount to regulation within the meaning of the McCarran Act; regulation may mean something more than legislation.

1. The meaning of "regulated by State law"

The proviso to section 2(b) limits the application of federal

24. Id. at 297–302.
28. E.g., Minn. Stat. § 72.20 (1957). All the states and Puerto Rico have adopted similar legislation that defines conduct which constitutes unfair competition.
antitrust laws to the business of insurance "to the extent that such business is not regulated by State law." The principal problem created by this proviso is in the meaning of the word "regulated." Since the Act gives no indication of what constitutes state regulation, the Act's underlying policies must be examined to ascertain its meaning.

The McCarran Act was designed to continue state regulation of the insurance business. Congress determined that the states were better equipped than the federal government to regulate the insurance industry because of their proximity to the local insurance industry's problems and because of their experience and expertise in regulating the industry. Nonetheless, Congress did seek to place some limitation on the pre- eminent position given state regulation. By providing that federal antitrust laws were still applicable to the extent that the states failed to regulate, Congress apparently sought to balance its protection of state regulation with the requirement that there be complete regulation (whether state or federal). Maintenance of a balance between these interests would seem to require that federal antitrust laws should be pre-empted only if a state's insurance laws (1) cover the subject matter, (2) regulate the subject matter to the extent state power permits, and (3) provide for effective administration of the laws applying to the subject matter.

31. See note 14 supra.

32. Legislation does not necessarily indicate regulation. Normally, some officer or agency responsible for enforcement of the state's legislation would seem to be needed in order to effectively regulate. There is language in FTC v. National Casualty Co., 357 U.S. 560 (1958), which indicates that federal antitrust laws may be applicable if a state's legislation falls short of regulation. See note 37 infra.

Also state laws must regulate the same subject as the federal laws they preclude. Professional & Business Men's Life Ins. Co. v. Bankers Life Co., 163 F. Supp. 274 (D. Mont. 1958). What is not clear, however, is whether a state has regulated when it has legislated on the subject generally or whether each specific point of the federal act must be eclipsed by a corresponding provision in a state law.

33. This proviso could be construed to mean that the federal antitrust laws remain applicable whenever regulation under state law fails to meet the standards of federal antitrust law. Such an interpretation would require the enactment of uniform antitrust laws by the states—patterned after the federal statutes—if federal regulation is to be precluded. The Supreme Court has rejected this approach. Instead, in Prudential Ins. Co. v. Benjamin, 328 U.S. 408 (1946), the Court determined that as a necessary corollary to the adoption of the McCarran Act, Congress must have determined that uniform state regulation of the insurance industry is not necessary. Congress must have been aware, the Court reasoned, of the diversity of state laws regulating insurance when it passed the McCarran Act. Id. at 430.

34. 91 CONG. REC. 1482 (1945).
Some cases suggest that a state has "regulated" whenever it has "legislated" unless it is shown that the legislation is a mere sham to avoid federal regulation. For example, in *North Little Rock Transp. Co.*, the Eighth Circuit, in affirming a summary judgment for the defendant on an allegation of combination in restraint of trade, did not inquire beyond the fact that the state had a statute which authorized the licensing of rating bureaus. This was held to be sufficient to meet the requirement of "regulation." Again, in *FTC v. National Casualty Co.*, the Supreme Court held that a state insurance law which "authorizes enforcement through a scheme of administered supervision" constitutes "regulation." One federal district court has relied upon this language in *National Casualty* to assert that "a State regulates the business of insurance within the meaning of [section] 1012(b) [section 2(b)] when a State statute generally proscribes or permits or authorizes certain conduct on the part of the insurance companies."

On the other hand, the Supreme Court has recognized that some types of state legislation may fail to constitute state regulation because the subject matter may not be open to effective administration. In *FTC v. Travelers Health Ass'n*, the Court held that the FTC had jurisdiction to control the false advertising practices of a Nebraska insurance company. The insurer had contended that since Nebraska's statute prohibiting false advertising applied to out-of-state violations by a domiciled insurer, this constituted regulation within the meaning of section 2(b). The Court rejected this reasoning; it argued that "regulated by State law" means regulation by the state in which the illegal activities took place rather than regulation by a sister state. On remand, the Eighth Circuit adopted the Supreme Court's view and held

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37. The FTC argued that "a general prohibition designed to guarantee certain standards of conduct is too 'inchoate' to be 'regulation' until that prohibition has been crystalized into 'administrative elaboration of these standards and application in individual cases.'" While the Court rejected this view, it noted that a distinction *might* be drawn between "legislation" and "regulation." 357 U.S. at 564, 565. The idea that a state by merely passing legislation may not have regulated within the meaning of § 2(b) of the McCarran Act was apparently original with the Court since the "petitioner does not argue that the statutory provisions here under review were a mere pretence." *Ibid.*
40. *Id.* at 299–300.
that an insurance company is not regulated by state law unless the company is subject to the state's legal process.\footnote{41}

The Supreme Court's approach in \textit{FTC v. Travelers Health Ass'n} seems to be the better view. The Court indicated that section 2(b) pre-empts the federal law only if the subject matter is within the state's jurisdictional power and if the state insurance law provides for effective administration.\footnote{42} The insurance industry constitutes a substantial segment of the national economy; obviously, it alone should not be allowed to operate outside of both state and federal antitrust laws. One illustration of the dangers which result from a failure to enforce state insurance laws involves the insurance rating bureau. These bureaus are private agencies comprised of various representatives of the local insurance industry. They are permitted by state law to establish rates—subject to the state insurance commissioner's approval. While the McCarran Act's legislative history indicates that Congress was willing to allow state-controlled rating bureaus to be exempt from federal antitrust laws,\footnote{43} some states are unable to control effectively the operations of these bureaus.\footnote{44} As a result these bureaus tend to ignore the public interest and to fix rates in excess of loss ratios.\footnote{45} This failure by the states to regulate ef-

\footnote{41. 298 F.2d 820 (8th Cir. 1962).} 
\footnote{42. This appears to have been the view of the President and some members of the Senate. See Letter From Franklin D. Roosevelt to Senator Radcliffe, 91 \textsc{Cong. Rec.} 482 (1945), and the remarks of Senator Murdock, \textit{id.} at 1482. However, at times in the debate, "legislation" and "regulation" were equated, \textit{e.g.}, remarks of Senator Ferguson, \textit{id.} at 1481. \textit{But see} McCarran, \textit{Federal Control of Insurance: Moratorium Under Public Law 15 Expired July 1, 34 A.B.A.J. 539, 542 (1948), where one of the authors of the bill concluded:} 

\textit{Thus for purposes of enforcement of federal laws, the question is one strictly of legal construction. The inquiry will be: "Is this practice regulated by State law?"—not "Is it effectively regulated?" or "Is it wisely regulated?" but simply: "Is it regulated?"} 

\textit{However, during the congressional debates, Senator McCarran observed that federal regulation would only be precluded by \textit{effective} state regulation. 91 \textsc{Cong. Rec.} 1444 (1945). See generally 60 Mich. L. Rev. 392, 393 (1962).} 
\footnote{43. See, \textit{e.g.}, 91 \textsc{Cong. Rec.} 1481 (1945) (remarks of Senator Murdock).} 
\footnote{45. \textit{Hearings before the Subcommittee on Antitrust and Monopoly of the Senate Committee of the Judiciary, 86th Cong., 1st Sess., pt. 3, at 1520–21 (1959).}
effectively allows conduct which is not subject to state control to be immune from federal regulation. The objectives of the McCarran Act are frustrated. They will continue to be thwarted unless "regulated by State law" is construed as requiring state legislation which covers the subject matter, regulates the subject matter to the outer limits of state power, and provides for effective administration.

2. Impediments to state regulation

Even if a state's laws are effectively administered, there may be some areas which the state cannot "regulate" and which, therefore, may not be exempt from the federal antitrust laws. Because there are effective limits on the state's power, the state may lack the power to assert its jurisdiction over "foreign" insurance companies and thus fall short of the McCarran Act's requirement of "regulation." This jurisdictional disability, therefore, may determine whether the state can effectively regulate an insurer and, thus, whether federal antitrust laws apply.

(a) The unauthorized foreign insurer

The unauthorized foreign mail-order insurer, with its apparent immunity from state regulation, has created an area of conflict between the state regulatory bodies and the FTC. In National Casualty the FTC ordered two "foreign" insurance companies to stop sending deceptive advertising to their agents in other states, where they were not licensed, for local distribution. The states in which the advertising was being distributed did have statutes prohibiting false and misleading advertising. Only an insubstan-

46. Nevertheless, the burden should be on the party seeking to apply federal antitrust laws to show the ineffectiveness of state regulation. Congress obviously sought to allow the states some discretion in the area of regulation.

47. The jurisdictional problem involves more than the mere effectiveness of the state's legislation. It involves the effective limits of the state's legislative power. Without the power to assert its legislative jurisdiction over foreign insurance companies, a state cannot satisfy the McCarran Act's requirement of "regulation" in any area involving companies not otherwise subject to that state's service of process.

48. "Unauthorized foreign insurer" denotes an insurance company which is neither domiciled in nor licensed by the state in which it is soliciting business. Thus, the would-be regulating state does not have the sanction of license withdrawal available.

49. The FTC has asserted that there is an "irreducible area of Commission jurisdiction" in which federal authority must be exercised over activities which cannot be reached by state laws. American Hosp. & Life Ins. Co. v. FTC, 243 F.2d 719, 724 (5th Cir. 1957). See also Bergson, Regulation v. Competition, 1956 Ins. L.J. 703, 707.

50. 357 U.S. at 562.
tial amount of the advertising ever reached the public without going through a licensed agent.\(^5\) Thus, despite the FTC's contention that there was a jurisdictional "gap," the dissemination of the advertising was subject to statutory controls in every state in which it was distributed.\(^5\) In this situation the Court held that the McCarran Act prevented the FTC from exercising jurisdiction.

On the other hand, in a 1960 case, \textit{FTC v. Travelers Health Ass'n},\(^5\) an unauthorized foreign insurer mailed misleading and deceptive advertising \textit{directly} to the public. Because the insurer had no agents in the "receiving" state, the "receiving" state did not have the direct regulatory power over the insurer which was available in \textit{National Casualty}. Thus, it would have been difficult for the "receiving" state to bring \textit{effective} action against the insurer.\(^5\) Despite this fundamental difference, the Eighth Circuit, relying upon \textit{National Casualty}, held that the FTC could not assume jurisdiction because the laws of the state in which the insurer was domiciled prohibited\(^5\) the dissemination by its domiciliaries of false and misleading advertising in any other state.\(^5\)

On appeal, however, the Supreme Court adopted the view that the McCarran Act was not meant to force residents of one state to rely upon the legislation of other states to protect them from deceptive advertising practices.\(^5\) Thus, a state's attempted regulation of extraterritorial advertising practices does not prevent the FTC from taking jurisdiction over these activities.

Of course, this result in \textit{FTC v. Travelers Health Ass'n} does not prevent the "receiving" state (1) from exercising its jurisdiction and (2) from controlling these deceptive advertising practices. In 1950, in \textit{Travelers Health Ass'n v. Virginia},\(^5\) the Supreme Court upheld Virginia's exercise of jurisdiction over an out-of-state mail-order insurer which did not act through local agents. The insurer's 800 policyholders in Virginia constituted its "mini-

\(^{51}\) \textit{Ibid.}
\(^{52}\) Whatever may have been the intent of Congress with regard to interstate insurance practices which the states cannot for constitutional reasons regulate effectively, that intent is irrelevant in the cases before us. Respondents' advertising programs require distribution by their local agents, and there is no question but that the States possess ample means to regulate this advertising within their respective boundaries. \textit{Id.} at 564.
\(^{53}\) 362 U.S. 293 (1960).
\(^{54}\) This is not to say that the states lack power to regulate in this area. See notes 58–64 \textit{infra} and accompanying text.
\(^{55}\) \textit{NEB. REV. STAT.} \S 44-1503 (Supp. 1957).
\(^{56}\) \textit{Travelers Health Ass'n v. FTC}, 262 F.2d 241 (8th Cir. 1959).
\(^{57}\) 362 U.S. at 299–300.
"minimum contact" with the state. 59 Seven years later, in *McGee v. International Life Ins. Co.*, 60 the Court extended its application of the "minimum contacts" theory to a situation where the insurer had only one policyholder within the state. While the insurer in *McGee* did not regularly advertise by mail in the "receiving" state as it did in *Travelers Health Ass'n v. Virginia*, the delivery of the contract, the mailing of the premiums, and the residence of the insured in the "receiving" state were sufficient for jurisdiction. 61

The Supreme Court has held that the "receiving" state not only has the power to exercise jurisdiction over the unauthorized foreign insurer, but it also has a substantial interest to protect. 62 Otherwise the only forum available for injured policyholders would be the insurer's domicile. 63 Thus, convenience and expense favor regulation by the "receiving" as well as domiciliary state. 64

Since the states do have the power to exercise jurisdiction over and control the practices of unauthorized foreign insurers without agents in the "receiving" state, the question arises as to whether the states can effectively regulate these out-of-state mail-order insurers. If they can, the Supreme Court could be faced with the question of whether the McCarran Act prevents the application of federal antitrust laws in a situation which combines the facts of *National Casualty* and *FTC v. Travelers Health Ass'n*. 65 But it is not clear whether the "receiving" state can effectively regulate in this area. While nearly all states have enacted service of process statutes whereby certain activities of an unauthorized foreign insurer constitute the appointment of the state insurance commissioner as the insurer's attorney for service of process, 66 this

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59. *Id.* at 648.
60. 355 U.S. 220 (1957).
61. *Id.* at 223.
64. "These [receiving state's] residents would be at a severe disadvantage if they were forced to follow the insurance company to a distant State in order to hold it legally accountable." 355 U.S. at 223.
65. See *FTC v. Travelers Health Ass'n*, 362 U.S. 293, 298 n.4 (1960), where the Court anticipated but did not resolve this problem. The FTC had argued that the receiving state's laws did not purport to reach the unauthorized foreign insurer mailing advertising to the states' residents, and even if this is the purport of these state laws, they do not pre-empt federal regulation because of their inability to regulate effectively.
66. 1 NAIC PROCEEDINGS 150 (1960). The service of process statutes were enacted to aid the enforcement of a state's Fair Trade Practices Act. Upon a determination that the out-of-state insurer has violated that law, the state insurance commissioner may issue a cease and desist order to the insurer. Upon failure to comply with the order the commissioner then proceeds in the "receiving" state's courts under the service of process.
does not guarantee effective regulation. First, the service of process act (supported by the "minimum contact" theory) is applied only after a policy has been sold in a state.\(^6\) Second, state judgments against out-of-state mail-order insurers may be "penal judgments" unenforceable in the insurance company's domiciliary state thus emasculating the effect of state enforcement. The receiving state's judgment is based on a violation of its Fair Trade Practices Act which provides for a fine when the insurer fails to comply with the commissioner's cease and desist order.\(^6\)

The judgment obtained in the "receiving" state may not be enforceable in the insurer's domicile because penal actions need not be given full faith and credit by a sister state.\(^6\) There is, however, some question as to whether the penal action rule applies to the enforcement of a penal judgment. In *Milwaukee County v. M. E. White Co.*\(^7\) the Supreme Court recognized that for the purposes of applying the full faith and credit clause, a distinction exists between a penal action and a judgment obtained on such an action. The Court declined to decide whether a judgment obtained under a penal statute would be entitled to full faith and credit.\(^7\) However, this in itself is significant, for prior to *Milwaukee County* the Court had held that a judgment obtained under a penal statute was subject to the same rule as the penal action itself.\(^7\) The vigor of the penal action rule as it relates to judgments, therefore, is now subject to considerable doubt.\(^7\)


\(^7\) See note 61 supra and accompanying text. Thus, the state insurance commissioner probably cannot act when the false advertising first enters the state; he must wait until policies are sold to residents in the state. However, since the requirements of "minimum contacts" are easily met—by the sale of one policy in the state—the practical result is that the states can readily acquire jurisdiction over the operations of the unauthorized foreign insurer.

\(^68\) The Unfair Trade Practices Act usually provides that any person who violates a cease and desist order issued by the insurance commissioner is liable to the state for a penalty not to exceed a certain sum. The penalty is recoverable by a civil action. E.g., Minn. Stat. § 72.31 (1957).


\(^70\) 296 U.S. 268, 278 (1935).

\(^71\) Id. at 279.


\(^73\) Thus, a judgment which includes a penalty, such as a judgment obtained for a Fair Trade Practices Act violation, may be subject to full faith and credit enforceable in the insurer's domicile. See Paulsen, *Enforcing the Money Judgment of a Sister State*, 42 Iowa L. Rev. 202, 207–08 (1957). Contra, Currie, *The Constitution and the "Transitory" Cause of Action*, 73 Harv. L. Rev. 268, 279–84 (1960).
may no longer be a formidable barrier to the state regulation of an unauthorized insurer.  

(b) Clayton Act violations

Fearing that merger activity would tend to weaken competitive forces through the development of undue concentrations in an industry, Congress enacted section 7 of the Clayton Act. It was intended to prevent mergers which would "substantially lessen competition, or tend to create a monopoly."  

75 Section 2(b) of the McCarran Act, however, restricts the application of section 7 where the merger involves two insurance companies.  

76 To the extent that state laws regulate such mergers, the McCarran Act exempts them from the effects of the Clayton Act. 

In contrast to other areas of insurance regulation, most states did not respond to the McCarran Act's invitation for state regulation of insurance company mergers; only a minority of states passed laws designed to regulate acquisitions forbidden by section 7 of the Clayton Act, and those states which did act often enacted laws too limited to prevent the application of the Clayton Act. First, some are patterned after the original, unamended version of section 7 and, as a result, do not regulate asset acquisitions.  

77 Where a state's laws are limited in this manner, asset acquisitions are subject to section 7. Second, the state laws usually do not regulate mergers between domestic and out-of-state insurers. For example, Pennsylvania's "Little Clayton Act" only applies to mergers involving domestic insurance companies.  

78 Third, the

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74. See Travelers Health Ass'n v. FTC, 298 F.2d 820 (8th Cir. 1962), where the court seems to predict the death of the penal action rule. 

The old artificial notion that decrees or judgments involving penalties of any form were entirely outside the full faith and credit clause is, of course, no longer the law. ... But it cannot be said, we think, that the decisions of the Supreme Court have yet wiped out every possible vestige of that concept.  


76. See note 14 supra.  

77. See, e.g., CONN. GEN. STAT. REV. § 38-37 (1958), which provides:  

Any domestic insurance company may retain or acquire the whole or any part of the stock or other share capital of other insurance corporations, provided no insurance corporation shall, by reason of such retention or acquisition of stock or other share capital, conduct its business with the public in a manner which substantially lessens competition or tends to create a monopoly.  


Even where the state law purports to control mergers with an out-of-state insurer, problems arise on the face of the statutes. For example, in Louisiana a domestic insurance company seeking to merge with another ins-
state's control may amount to little more than requiring an insurance company to report a proposed merger. The Connecticut merger statute is an illustration of this limitation of state regulation.79 While the statute requires the state insurance commissioner's approval of a merger, he probably cannot refuse to approve a merger on antitrust grounds alone.80 Again, the extent to which a state's failure to enforce its merger statutes will allow the Clayton Act to apply depends on the meaning of "regulated by State law" in section 2(b) 81

Another factor which affects the application of section 7 of the Clayton Act to the insurance industry is the existence of two significant exceptions to section 7. The first permits acquisitions for investment purposes.82 This provision is important to the insurance industry because acquisitions for investment purposes are quite common. However, the few cases which have considered the investment exception have applied a strict standard and, there-

81. See note 34 supra and text following.
fore, the usefulness of this exception is quite limited. The other exception involves mergers with failing corporations. While Congress has clearly approved this exception first enunciated in *International Shoe Co. v. FTC*, it is difficult to apply. The difficulty arises in trying to limit this exception to firms which have not entered into bankruptcy, but which are heading in that direction. The very fact that the acquiring corporation seeks to purchase the "failing" company's stock or assets seems to belie the existence of this situation.

III. FEDERAL JURISDICTION DESPITE STATE REGULATION—THE BOYCOTT EXCEPTION

Section 3(b) of the McCarran Act provides that the Sherman Act's prohibitions against boycotts, coercion, and intimidation continue to apply to the insurance industry; their application is unaffected by state regulation. The primary reason for this exception was to insure that the safeguards provided by the "core" of the Sherman Act were maintained. Although the legislative history is inconclusive, Congress apparently feared that the regulation

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83. The courts are skeptical about a company's acquisition of stock in a competitor for "investment purposes" and will examine such an acquisition very closely. See United States v. E. I. du Pont de Nemours & Co., 353 U.S. 586 (1957); American Crystal Sugar Co. v. Cuban-American Sugar Co., 152 F. Supp. 387 (S.D.N.Y. 1957), aff'd, 259 F.2d 524 (2d Cir. 1958); Hamilton Watch Co. v. Benrus Watch Co., 114 F. Supp. 307 (S.D. Conn.), aff'd, 206 F.2d 738 (2d Cir. 1953). On the other hand, all of these cases can be distinguished from the insurance situation and can be explained on other grounds.


85. See Farm Journal, Inc., 53 F.T.C. 26, 47-48 (1956), where the "absorbed" company had the ability to continue operating and was not compelled by financial considerations to terminate. The Commission, proceeding under a "presumption" of illegality, went beyond the acquisition contract to discover whether the acquiring company sought to lessen competition.

Despite the general application of § 7 to the insurance industry because there is no applicable state merger law or because the state's regulation is inadequate, insurance company mergers have not been prosecuted under § 7. However, this does not mean that future (or past) mergers will be immune from attack. See United States v. E. I. du Pont de Nemours & Co., 353 U.S. 586 (1957), where a stock acquisition occurring over 30 years earlier was attacked under § 7.

86. See note 15 supra.

87. It has been argued that the statutory provision, "Nothing contained in this chapter," should be read as "Nothing contained in this section" and, therefore, § 3(b) means that the insurance business was subject to the boycott provisions of the Sherman Act only during the three-year moratorium period. This strained construction was rejected in United States v. Insurance Bd. of Cleveland, 144 F. Supp. 684, 690 (N.D. Ohio 1956).
of boycotts, coercion, and intimidation would not be effectively maintained by the states and that the public interest required the Sherman Act's continued protection against such practices.88

Recently, the boycott exception in section 3(b) has been acquiring an ever-increasing significance. The federal government has begun to assume jurisdiction in areas previously thought to be pre-empted by the states under section 2(b).89

A. Federal Action

The boycott provisions of the Sherman Act have now been given an expanded interpretation under section 3(b). In addition, state action no longer converts a group boycott into an exempted activity. Even though a group boycott is approved by a state licensed rating bureau, it is still subject to the Sherman Act prohibitions.

A district court in Professional & Business Men's Life Ins. Co. v. Bankers Life Co.90 held that an allegation by a newly formed life insurance company that its competitors were conspiring to restrain its operation of business was sufficient to allow it to bring suit under the Sherman Act as provided in section 3(b). The alleged conspirators had published handbills and other advertising designed to discourage the public from dealing with the plaintiff. The court said that although the conspiracy was a "boycott by peaceful persuasion" and not a typical boycott, nonetheless the Sherman Act applied under section 3(b).

The tendency of the federal courts to extend relief under the boycott provision of section 3(b) was further demonstrated in 1959 in California League of Independent Ins. Producers v. Aetna Cas. & Sur. Co.91 In Aetna the plaintiff, an association of insurance agents, alleged that the defendants had acted in concert as a rating bureau to decrease commission rates on automobile policies. Because California had expressly authorized cooperation among insurers in establishing insurance rates, the state was held to have regulated within the meaning of section 2(b) of the McCarran Act; therefore, the court held that the complaint failed to

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88. See 91 Cong. Rec. 1481–89 (1945).
89. Section 3(b) of the McCarran Act had never been applied until United States v. Insurance Bd. of Cleveland, 144 F. Supp. 684 (N.D. Ohio 1956). There, an insurance agents association's rules were not illegal per se, but on the facts admitted a "direct-writer" rule was held to constitute an unreasonable restraint of trade. Although it did not present a unique situation within the insurance industry, this "first case" was brought eleven years after the passage of the McCarran Act.
state a claim under the Sherman Act within the meaning of section 3(b). Following this decision, the insurance agents amended their complaint to allege that the defendants had induced other insurers to refrain from doing business with insurance agents except at set commission rates and that defendants had conspired to refuse to do business except at such rates. This allegation of a boycott was sufficient to give the federal court jurisdiction. Thus, an important aspect of federal regulation under the McCarran Act was established. The California statute, as in most states, authorized cooperation among the members of the local insurance industry in establishing rates. As a result, bureaus were created which are comprised of representatives of the various companies. These bureaus prescribe rates subject to the state insurance commissioner's approval. As previously noted, the control which these bureaus may exercise over the insurance industry is considerable because they are often the state insurance commissioner's sole fact-finding board. Now, Aetna makes it clear that the activities of these bureaus are subject to the Sherman Act's boycott provisions under section 3(b) of the McCarran Act despite the fact that the bureaus operate with state approval.

The rules and practices of insurance trade associations have also been attacked under section 3(b) for creating competitive disadvantages for nonmembers. For example, a rule which declared that any agent who solicited business in the county for non-member companies was ineligible for membership in the association was held to be an abusive trade practice (a boycott) under section 3(b) in United States v. Insurance Bd. of Cleveland. This "direct-writer" rule, which excluded agents placing insurance with companies also making sales directly to policyholders, was held an unreasonable restraint of trade "on the facts ad-

92. Accord, North Little Rock Transp. Co. v. Casualty Reciprocal Exch., 181 F.2d 174 (8th Cir. 1950), where the court held that state regulation of an insurance rating bureau's price-fixing precluded a private treble damage action under the Sherman Act.

93. The court would not distinguish between an absolute refusal to deal and a refusal to deal except at a fixed price. There is no reason to hold that § 3(b) withholds immunity in case of an actual total boycott, but grants antitrust immunity for a threatened total or partial boycott. Section 3(b) permits a Sherman Act suit in a state regulated phase of the insurance industry if conduct amounts to boycott, coercion or intimidation. These are the methods to effectuate the refusal to deal except at the agreed price.

179 F. Supp. at 66.

94. CAL. INS. CODE § 1850.

95. E.g., MINN. STAT. § 70.65 (1957).

96. See note 45 supra and accompanying text.

mitted." The court's approach was followed in *United States v. New Orleans Ins. Exch.* where another trade association of insurance agents enforced a similar "direct-writer" rule. The Supreme Court approved in a per curiam opinion.

The Insurance Board of Cleveland was involved in further litigation when its rule barring member-agents from doing business with any mutual company was challenged under the Sherman Act. Although many independent agents still did business with both stock and mutual companies, the federal district court held that the rule was an abusive trade practice constituting a group boycott. The fact that individual member-agents were free to choose whether they would join or retain membership in the association did not prevent the court from finding a boycott; their behavior as members was determined by the association.

This extension of federal action under section 3(b) seems to be desirable. The group action in *Banker's Life* to induce a public boycott by an advertising campaign is analytically indistinguishable from traditional boycott procedures. In either case, group action is being used to coerce an outside or noncomplying party to adhere to the group's rules. Similarly, in *Aetna* a trade association was attempting to coerce noncomplying agents by inducing insurance companies to refrain from doing business with...

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98. The court applied the "rule of reason" to determine the illegality of the direct-writer rule. Trade association rules, however, may also be illegal per se where they are obviously designed to restrict competition. An example of a per se violation is the "non-deviation" rule. It prohibits agents who represent companies which deviate from rates established by rating bureaus from becoming association members. Its obvious purpose is to prevent insurers from offering deviation rates by forcing deviating companies to sell through nonmember agents. Since a deviating company must depend on independent agents to sell its policies, substantial market opportunities may not be available. See generally Note, *Rules of Independent Insurance Agents' Associations Under the Sherman Act*, 105 U. Pa. L. Rev. 977 (1957).


100. The association solicited insurance and placed it with one or more of the several companies represented by it. The association's agencies owned the "expires" on the policies handled by them (the property right which inheres in having sold the original policy and in knowing when that policy will expire). This ownership generally gives the owner effective control over renewals. The direct-writer rule was strictly enforced and any member who did not conform to its provisions was subject to expulsion from the association. The court held that while such a rule did not constitute a per se violation of the Sherman Act, it did impose unreasonable restraints on interstate commerce in violation of § 1 of the Sherman Act.


them. State approval of this boycott through its rating bureau was rightly held not to have affected the application of the Sherman Act under section 3(b). The *Insurance Bd. of Cleveland* cases merely extend this principle to other practices.

B. **Treble Damage Actions Under Section 3(b)**

At the present time, the only provision of the federal antitrust laws which provides for private treble damage actions is section 4 of the Clayton Act.\(^\text{103}\) Thus, there is some question as to whether treble damage actions may be maintained under the McCarran Act since section 3(b) refers only to Sherman Act violations.\(^\text{104}\) While the Sherman Act formerly provided for treble damage actions,\(^\text{105}\) that provision was repealed in 1955 because it had been incorporated into section 4 of the Clayton Act in 1914.\(^\text{106}\) Congress felt that the Sherman Act provision was no longer necessary.\(^\text{107}\) Thus, when the McCarran Act was adopted in 1945, the treble damage provision of the Sherman Act was not being used. Since section 3(b) of the McCarran Act continues the federal regulation of boycotts, coercion, and intimidation in the insurance industry only under the Sherman Act, treble damages might seem to be unavailable to private persons against insurance company violators. However, in *Professional & Business Men's Life Ins. Co. v. Bankers Life Co.*,\(^\text{108}\) a district court pointed out that despite the repeal of the Sherman Act's provision for treble damage actions, the remedy was in fact a part of the Sherman Act when the McCarran Act was adopted. Therefore, a treble damage action is provided for by section 3(b) to the extent that such an action was permitted under the former Sherman Act provision.\(^\text{109}\)


\(^{104}\) See note 15 supra.

\(^{105}\) 26 Stat. 210 (1890).


\(^{109}\) The court first held that § 3(b) of the McCarran Act saved the private right of action for treble damages because § 4 of the Clayton Act "is as much a part of the Sherman Act as it is of the Clayton Act . . . ." 163 F. Supp. at 283. When it was called to the attention of the court that § 7 (the treble damages provision of the Sherman Act) had been repealed, 69 Stat. 283 (1955), the court requested further briefs and arguments on the question of the effect of that repeal on the treble damage action under § 3(b) of the McCarran Act. The court then concluded that the repeal of § 7 of the Sherman Act had no effect on the private action for treble damages under the McCarran Act even though that right of action was incorporated in the McCarran Act by reference to the Sherman Act. 163 F. Supp. at 292–95. The Supreme Court has frequently applied the rule of construction that where a statute adopts by reference a specific statute, the adopting statute is not affected by subsequent
The private suit merges antitrust policy with private compensation. Private treble damage actions are permitted for two reasons: (1) to utilize private interests in enforcing the antitrust laws and (2) to provide compensation to injured parties. These reasons apply to insurance industry violations just as they do to violations in other industries. Thus, although the McCarran Act requires the private treble damage complainant to rely on a different statutory base when he sues an insurance company or insurance agents association, the remedy still exists.

C. CAN THE STATES FRUSTRATE SECTION 3(b)?

Prior to the enactment of the McCarran Act, the Supreme Court held in Parker v. Brown that a state could establish a program which restricted competition and fixed prices in violation of the Sherman Act. The Court said that although such actions would warrant sanctions under the Sherman Act if they were performed by a person, the Sherman Act did not apply to state action.

In light of this decision, the question arises whether the states might avoid the impact of section 3(b) and provide immunity to rating bureaus and trade associations by assuming their functions—that is, by designating them as "governmental agents." As "governmental agents," however, these bodies would still be subject to congressional control. As Parker noted, where Congress clearly pre-empts an area, the states cannot regulate. However, in Parker the California regulations were not contrary to all federal regulation, but instead conformed to the Secretary of Agri-
culture's orders issued under the Agricultural Marketing Agreements Act of 1938. Thus, the conflict that existed was really between two federal statutes.\textsuperscript{115} Moreover, section 3(b) clearly states that the McCarran Act does not render the Sherman Act inapplicable to "any agreement to . . . or act" of boycott, coercion, and intimidation. This arguably constitutes a pre-emption by the federal government of control of these activities.\textsuperscript{116} Under this view, state law could not infringe upon this area. Clearly, this is what Congress intended.\textsuperscript{117} Section 3(b) was placed in the McCarran Act to provide for an irreducible area of federal jurisdiction.\textsuperscript{118} This field of regulation was not meant to be determined by state law. Therefore, to allow state law to nullify section 3(b) would appear to run counter to the manifest purpose of the McCarran Act. Nevertheless, at least one state court has applied the \textit{Parker} doctrine to a state-established rating bureau.\textsuperscript{119} But that court did not indicate whether it considered the pre-emption argument.

\textsuperscript{115} 317 U.S. at 362.
\textsuperscript{116} See Bergson, \textit{Regulation v. Competition}, 1956 INS. L.J. 703, 707. This construction may be strained, however, because § 3(b) of the McCarran Act makes no explicit provisions in regard to boycotts, coercion, or intimidation. The provision is merely that "Nothing contained in this chapter shall render the said Sherman Act inapplicable to any agreement to boycott, coerce or intimidate, or act of boycott, coercion, or intimidation." 59 Stat. 34 (1945), as amended, 15 U.S.C. § 1013(b) (1958). Thus, this section can also be argued to be only a limitation on the McCarran Act and not a pre-emption of state action. 
\textit{But see} note 117 infra.

\textsuperscript{117} Nothing in this bill is to be so construed as indicating it to be the intent or desire of Congress to require or encourage the several States to enact legislation that would make it compulsory for any insurance company to become a member of rating bureaus or charge uniform rates. It is the opinion of Congress that competitive rates are in the public interest.

H.R. REP. No. 143, 79th Cong., 1st Sess. 2 (1945). The result of state legislated rates or agent's commissions would be Sherman Act immunity for the insurance business if the \textit{Parker} doctrine were applied to state action under the McCarran Act. Congress, however, rejected such a result when it passed the McCarran Act. It is evident from the Senate debate on the McCarran Act that Congress did not intend for \textit{Parker v. Brown} to affect § 3(b) in any way.

I take it that the Senator is apprehensive lest a statute by a State attempting to give validity to a private agreement to regulate would be recognized under \textit{[Parker v. Brown] . . . . . I have no doubt in my own mind that no State . . . could give authority to violate the Sherman antitrust law.

91 CONG. REC. 1480 (1945) (remarks of Senator O'Mahoney).

\textsuperscript{118} Compare with note 49 supra.
\textsuperscript{119} Insurance Co. v. Insurance Comm'n, 237 Miss. 759, 772, 116 So. 2d 224, 228 (1959).
CONCLUSION

The McCarran Act provides two routes by which the insurance industry may be subject to federal antitrust regulation. The first requires a showing that the states have not regulated within the meaning of section 2(b). Since "regulation" requires more than mere "legislation," state laws pre-empt federal antitrust laws only where it is demonstrated that the state laws also provide for enforcement. Whether the question is one of jurisdictional competence to regulate, as in the case of the unauthorized foreign insurer, or whether the question is one of sufficient statutory coverage of the field, as in the case of Clayton Act violations, the requirement of effective state regulation determines federal jurisdiction.

The second route for federal regulation is provided by section 3(b). It provides for the application of the Sherman Act to the insurance industry regardless of state regulation in cases involving boycotts, coercion or intimidation. Thus, not only are state authorized rating bureaus and trade associations subject to federal antitrust laws, but also the states cannot prevent federal regulation under section 3(b) by making these rating bureaus and trade associations agents of the state.