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Whenever a Senator or a Congressman writes an article touching upon any matters which conceivably could be the subject of legislation, there is a rather general disposition on the part of his readers to think that he has a bill in his pocket. Let it be understood that such is not the present case.

Nothing in this article should be construed as indicating that the writer intends to introduce any particular legislation, or would favor or support any particular legislation. In discussing certain problems respecting insurance, and respecting the insurance industry, the attempt will be made to discuss them from the standpoint of the lawyer, and not from the standpoint of the legislator.

Insurance is an important segment of our national economy. In no other country in the world has insurance come to play such an important part in the every-day life of the average citizen. In no other country of the world is acceptance of insurance so widespread; and in no other country in the world is faith in insurance so great. Similarly, in no other country in the world has insurance discharged its responsibility with greater honor than here in the United States. The record of insurance, in this country, is one of which the industry, the Government, and the people whom it serves can justly be proud.

With its growth in volume, and in responsibilities, the insurance industry has naturally had many problems. Probably none of those problems, varied as they may have been, and serious as some of them undoubtedly were, has equalled the problem with which the insurance industry found itself confronted on June 5, 1944, when the Supreme Court handed down its decision in the now-famous case of *The United States v. The Southeastern Underwriters Association.*[1] Fur-

[1] 322 U. S. 533, 88 L. Ed. 1440 (1944).

thermore, the problem presented by that decision was not a problem for the industry alone, but was a problem also for the Congress, and for the several States.

It would be appropriate to quote here from the dissenting opinion of the late Mr. Chief Justice Stone, in that case, 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 the occasion for loosing a flood of litigation and of legislation, State and national, in order to establish a new boundary between State and national power, raising questions which cannot be answered for years to come, during which a great business and the regulatory officers of every State must be harassed by all the doubts and difficulties inseparable from a realignment of the distribution of power in our Federal system.[2]

That is a strong and forthright and forceful statement; but there is no word of overstatement in it. All of the ramifications and implications of the problem created by the Supreme Court's decision have not yet been explored. By no means all of the questions raised by that decision have been even recognized and faced, let alone answered. The harassment, the doubts, and the difficulties referred to by the late Chief Justice will persist for many years to come.

Nevertheless, we must consider that this decision has settled the law on the point involved, and that the business of insurance is commerce, now and henceforward, and will remain commerce, and must be dealt with as commerce. Congress has accepted that view, and has confirmed it by the very enactment of Public Law 15 of the 79th Congress.[3] The people have accepted that view. The insurance industry must not make the mistake of assuming that the Congress, at any foreseeable future time, will accept a different view or take a different course.

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2 322 U. S. 533, 583, 88 L. Ed. 1440, 1474 (1944) (dissenting opinion).

3 Act of March 9, 1945, Chapter 20, 59 Stat. 33.

Following the decision of the Supreme Court in the *Southeastern Underwriters Association* case, it was obvious that the insurance business would need some period of time in which to become readjusted to its newly acquired status, under the Federal Anti-Trust Act and related Federal laws; and that the States would require some time in which to act. This obvious need for time was the basis of the enactment of Public Law 15, which created the so-called "moratorium period." [4]

This Act set forth a Congressional declaration that the continued regulation and taxation, by the States, of the business of insurance, is in the public interest; and that silence on the part of Congress should not be construed to impose any barrier to the regulation or taxation of such business by the States. The Act provides that the business of insurance shall be subject to State laws which regulate and tax it. The Act specifically made the Sherman Act and related acts inapplicable to the business of insurance until January 1, 1948; and further provided that after the end of the moratorium period, the Sherman Act, Clayton Act, and the Federal Trade Commission Act are to be applicable to the business of insurance "to the extent that such business is not regulated by State law."

Under our Constitutional system, the power to regulate trade and industry is vested jointly in the Federal Government and the States. The line of division is too tenuous to permit of any precise definition of the respective areas of control. However, with respect to the major control or regulation of the insurance industry, the Congress has decided that the public interest will be better served by regulation and control imposed and exercised by the several States through their State legislatures.

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4 Sen. Rep. No. 20, 79th Cong., 1st Sess. (1945); H.R. Rep. No. 143, 79 Cong., 1st Sess. (1945).

Public Law 15 recognized the desirability of State regulation, and gave implied recognition also to the vast void of uncertainties created by the *Southeastern Underwriters* decision, through providing a period of time within which the States might act to assume and perfect such regulation.

The past two years have demonstrated that the Congress creditably discharged its responsibility of the moment by passing this Act. But the Congress did not discharge its responsibility for all time in the future. As the writer stated publicly when this law was approved:

> It should not be regarded as the last word on this important subject. It is not a panacea. We can only wait now for action by the States.

But let us turn for a moment to a short factual recital of some relatively recent history.

In 1945, after the Supreme Court decision in the *Southeastern Underwriters* case, the legislatures of twenty-one States,[5] because of doubts created by this case as to the validity of certain regulatory and tax laws, enacted statutes exempting officers and directors of insurance companies from any liability for payment of taxes, or fees, pursuant to State laws which might be held to be unconstitutional.

Legislation was enacted in eighteen States[6] to amend premiums tax laws which had applied to foreign and not domestic companies, and which were feared to violate the commerce clause of the Federal Constitution.

Retaliatory laws were repealed in thirteen States,[7] for the same reason.

Most of this State legislative retrenchment was enacted prior to the approval of Public Law 15; and the need there-

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[5] The twenty-one States were: Ariz., Ark., Cal., Conn., Del., Ind., Me., Md., Mass., Mich., Minn., Nev., N.J., N.Y., N.C., Ore., Penn., R.I., Tex., Vt., Va.

[6] The eighteen States were: Ala., Ariz., Ark., Conn., Fla., Iowa, Me., Mo., N.H., N.J., N.M., Okla., Ore., S. Dak., Tenn., Tex., Wash., W. Va.

[7] The thirteen States were: Ariz., Cal., Col., Del., Ga., Iowa, Me., Md., N.M., N.C., Ore., Tenn., Tex.

for has been clarified by this Act.[8] The Supreme Court's decision in the case of *Prudential v. Benjamin,* decided June 3, 1946,[9] with the aid of Public Law 15, sustained the power of a State to impose a premium tax on insurance applicable only to foreign companies.

That was approximately the situation when, in the summer of 1946, with the realization that the time of the so-called "moratorium" provided under Public Law 15 was fast expiring, the Chairman of the Senate Committee on the Judiciary began a survey in an attempt to learn the status of accomplishments and plans of the States, and of the industry, with regard to State regulation. The Chairman of the Committee, having taken a leading part in the enactment of Public Law 15, felt that it was incumbent upon him to follow the developments subsequent to this law; to determine what steps, if any, were being made by the States and by the industry toward a satisfactory solution of a most complex problem and to keep abreast of the situation as it progressed, so that the Committee might be properly informed.

Letters of inquiry were addressed to various segments of the industry, including insurance companies, company associations, and State insurance commissioners, in connection with this survey. The survey which began in the summer of 1946 was continued even after a change in political fortunes had given the gavel of the Senate Committee on the Judiciary to a new Chairman; and in July, 1947, a report was made to the Committee in which was summarized, generally, the accomplishments up to that date with respect to State legislation.

Boiled down to very brief statistics, the gist of this report was that rate regulatory legislation was introduced in the 1947 legislatures of thirty-seven States, the District of Co-

[8] Three States, Me., Md., and Ore., restored their retaliatory laws in 1947, and six States, Ark., Me., N.C., Okla., Ore., and Wash., amended their premium tax laws to restore exemption or provide lower rates for domestic companies.

[9] 328 U. S. 408, 90 L. Ed. 1342 (1946).

lumbia and Alaska. In twenty-five of these legislatures, the all-industry model bill was introduced, as it was for the District of Columbia; variations were introduced in the other twelve States.

Accident and health regulatory bills had been introduced in the legislatures of ten States, and unfair practice acts in fifteen States.

The score on legislation as of this report was substantially as follows: nineteen States had passed rate regulatory bills patterned generally after the all-industry bill. Regulatory measures were pending in seventeen States. Of these seventeen, not all of the legislatures were in session this year, and five of the seventeen States had ordered studies to be made and reports filed with the legislatures at their 1949 sessions. Regulation of some degree was in effect in fourteen other States. Some, if not all, of this regulation may be deemed adequate.

So much for statistics presented to the Committee as of the early part of July, 1947.[10]

Aside from these statistics the survey, of course, disclosed other matters of grave importance.

Not least among these was the conflict of various interests within the industry, particularly the struggle and conflict that resulted in the so-called all-industry model bills.[11]

Of course, it is well known that matters of personal interest and advantage naturally tend to magnify themselves to the group or groups concerned; and that such interests, so magnified, sometimes have a tendency to obscure the ultimate goal.

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10 By the end of 1947, rate regulatory laws, the majority of which were patterned after the All-Industry-NAIC bills, were enacted in 35 States and two Territories. Nine States had enacted rate regulatory laws in 1945 and two in 1946. In addition, fifteen States enacted fair trade practice laws and seventeen accident and health measures during their 1947 legislative sessions.

11 Draft of May 18, 1946, as approved by NAIC June 12, 1946, and subsequently amended.

However, the drafting of the so-called all-industry bill is significant. It indicates that to the industry, at least, the emphasis since the enactment of Public Law 15 has been on the rating problem. This is further borne out by the fact that four or five different versions of legislation, treating this problem according to the various concepts by groups which disagree with the tenets of the all-industry bill, also were drafted and have been urged upon the various State legislatures.

The sponsors of each of these various bills undoubtedly believe sincerely, in each case, that their bill is the solution to the problem raised. This belief is natural. Yet it is obvious, in view of the differences in content and concept of these various bills, that they cannot all be right.

Differences of this nature are, in truth, a vital part of our democratic process. Where interests are varied and many, it is almost unbelievable that one group alone could provide a vehicle of regulation that would adequately serve them all. And, of course, the acceptance of one, or none, or a combination of these bills has been a matter solely within the discretion of the sovereign States.

For the welfare and progress of the insurance industry as a whole, quarrels between segments of the industry must be settled, and differences and disagreements between factions must be ironed out. It will not do for different groups to say: "We can't get together." Congress will find a way to put them together if they fail to accomplish the result for themselves; and the bed which Congress will prepare, in that eventuality, might not be so comfortable.

There is a tendency in the Congress, among members of the Senate at least, to regard most seriously the responsibility of the Congress for dealing with the problems raised initially by the decision of the Supreme Court in the *Southeastern Underwriters* case. Congress knows that the people

of the United States regard insurance as an established institution in their lives, and that the people are looking to the Congress to protect them in everything that has to do with it. There is a growing feeling in the Congress that the Federal legislature has a positive responsibility to see to it that there is adequate regulation of insurance, by the laws of the several States, or by the act of the industry itself, promulgated into law by the legislatures of the States, if possible; and otherwise, by Federal laws enacted by the Congress.

There is increasing sentiment in the Senate for a most meticulous examination of the steps toward regulation which have been made by the various States, and a careful weighing of the adequacy of State regulatory legislation which has been enacted.[12]

This writer believes the sovereign States are capable of adequately regulating insurance. It is believed it would be most unfortunate, if not impossible, to attempt to regulate and control every phase of this immense industry from Washington. Insurance, as we know it today, has developed to its present state of importance unfettered by restrictive legislation. It has achieved its place in our economic system of free enterprise by the competitive road that has served to make us the most powerful, and the most envied, nation in the world. It would be tragic to see the industry lose its right to continue to go forward in the field of free enterprise.

That is why it would appear that, in the public interest, the several States can well afford the degree of regulation that will assure the industry the necessary freedom to progress and at the same time protect the investor, the insurer, the insured, and those engaged in the industry, from practices destructive of free and competitve enterprise.

This writer has not yet found any evidence that his faith in the philosophy enunciated by Public Law 15 of the 79th

[12] Sen. Rep. No. 407, 80th Cong. 1st Sess. (1947).

Congress was a misplaced faith. This statement is made categorically, in spite of a recognition that the problem is not nearly solved. But faith in a principle is one thing, and dealing with the specific realities of a given situation is another. The former cannot always wholly govern, though it may influence, the latter.

Undoubtedly, the cumulative whole of the actions by State legislatures during 1947 has been a step in the right direction. Undoubtedly, what has been accomplished stems from an attempt to deal intelligently with the problem as it appears from various viewpoints. Surely, no one would wish to have to judge which State has and which State has not enacted the proper bill.

However, soon or late, judgment will be passed on that point. It will not be this writer's judgment, and it may not be the industry's. In the last analysis, it will be the judgment of the people, acting through their duly elected representatives in the Congress.

One complete period of State legislation has gone by since Public Law 15 was placed on the statute books. It will not do to let another period of State legislation go by without a greater effort to secure legislation of such breadth and scope and adequacy as will eliminate complaints that might otherwise arouse the Congress to take drastic steps.

Every criticism from within the industry of a State regulatory law which has been enacted, helps to build up the argument for Federal regulation. If a State law is in truth inadequate, it *should* be criticized, but its very inadequacy is a stronger argument than any criticism. But if the criticism be merely captious, or because the legislation in question represents the outcome of some struggle in which the critic was not wholly victorious, the very voicing of that criticism does disservice to the whole industry.

Right at that point, by way of divergence but not digression, it should be pointed out that whenever any segment of

the industry belittles another segment, or any company belittles another company or companies, weapons are being placed in the arsenal of those who would castigate and punish the entire industry by way of a form of regimentation which in its ultimate effect could be destructive of much that has been built up through the years.

It profits not to quibble over details of legislation, where basic principles are not involved.

Let the industry re-examine, with a view to determining their adequacy as thoroughly and as objectively as possible, the State regulatory statutes which have been put on the books. Such re-examination is an obligation of the industry, for while the final decision with respect to adequacy will not be, necessarily, for the industry to make, the results of a final judgment of inadequacy will be the industry's to bear.

Admittedly, not even the unanimous protestations by the insurance industry of the adequacy of the legislative framework which the States have built, and are building, will suffice if that framework is in fact inadequate; but dissension and controversy within the industry can readily give the appearance of inadequacy to that framework, however sound and solid it may in fact be.

A long and difficult period of negotiation and compromise [13] was necessary to secure enactment of Public Law 15. If, after the passage of two State legislative periods, the several States have not taken action which, in the opinion of the Congress, is adequate to discharge their responsibilities with respect to the regulation and control of insurance, it will be extremely difficult to get another compromise.

Present Congressional action in this field is pressing mainly toward an examination of the extent and adequacy of State regulatory legislation.

[13] For complete documentation of legislative history, see "Insurance as Interstate Commerce—The First Two Years," Report of Committee of Insurance Section, American Bar Association.

It did not appear to be wise to proceed with any such examination hastily or with a feeling of being pressed for time. That is the major reason for the introduction of S.1508 of the 80th Congress, 1st Session,[14] to extend for an additional six months the moratorium provisions of Public Law 15, thus throwing the deadline into the middle of 1948, and removing pressures for hurried and possibly ill-advised action during the closing weeks of the first session of the 80th Congress.

Viewed in the light of an extension to provide more time within which the States might act, that bill was admittedly inadequate. However, it was not introduced, nor represented, as an effort to gain more time for the States, or for the insurance industry. Its purpose was to give more time to the Congress, within which to consider and determine the question of its policy with respect to future action. Such consideration is inevitable, and it is better that it be given during the present session of the Congress than that it should have been attempted at the end of the session which has just passed. Whether the determination will lead toward a further extension of the so-called "moratorium," or toward efforts to frame Federal regulatory legislation, or in some other direction, cannot now be predicted.

This, however, is well known. Almost every phase of insurance has become an essential of normal life in this country. Insurance finds its place in the family budget with almost as much frequency as food. Zealous and jealous guardians of the public welfare—and there are many such, in both Houses of the Congress—are therefore moved to give at least spasmodic and occasional attention to the business of insurance, to the conduct of that business, and to its impact upon the people. Chances that the attention thus given will produce impressions which, in turn, will motivate action toward Federal regulation, will be minimized if it is found that the States have passed laws with which the industry is satisfied,

14 Senate bill which became Pub. L. No. 238, 80th Cong., 1st Sess. (1946).

and with which the people are satisfied. The people, in general, will be satisfied with a law which brings with it no unpleasant consequences to them. They will be dissatisfied with any law which, rightly or wrongly, they interpret as adversely affecting their interests as individuals. The absence of abuses under a law is no guarantee that the law is good; but the existence of abuses, though under the best law that ever was drafted, cannot fail to result in public outcry against the law.

Re-examination by the industry of the progress so far made toward effective State regulation has been urged. Perhaps it would be appropriate to point out some of the questions which should be borne in mind in connection with such a re-examination.

Is this progress toward sound industry practices and freedom of enterprise? That question is particularly important to the industry.

Will the eventual solution fit into our economic pattern and afford opportunity to one who desires to pit his energy, intelligence, and financial future against others who have been able to achieve success in this industry? That question is important to all in the industry, as individuals.

Will the regulations afford the public protection alike against discrimination and indiscriminate rate cutting, against the avarice of individuals or companies, against possible unwise management, against unethical or inequitable practices of all kinds, and against other possible abuses? Protection of the public will be the primary consideration of the Congress.

Will the mutuals, the reciprocals, the capital stock companies, the independents, as well as all other segments of the industry, be equally protected, and none unduly burdened or put into a straitjacket? The various segments of the industry will be particularly interested in the answer to that question.

Will the laws place no undue restriction on enterprise, and leave the legitimate control of the business of each company in the hands of that company? This is a question which should interest alike the companies, the insurance industry, and the Congress.

Answering these questions, and other questions which must be answered in a proper evaluation of the progress made, is not simply a matter of looking at the statute books. The regulation of insurance is a complex and difficult undertaking. It requires highly trained men, and it requires experienced men. The reservoir of men with adequate training and adequate experience in this field is not large. The newly appointed insurance commissioner of a State which has just passed a regulatory law cannot hope to staff his office adequately with the aid of a "help wanted" ad in the local newspaper. Therefore, in one sense, proper evaluation of State statutes, newly passed, must await the passage of a sufficient period of time to permit the employment and training of staffs capable of administering those statutes properly. This is a point which the industry understands thoroughly. Unfortunately, it is not generally understood by the public or even by the Congress.

In spite of the confusion which still exists, and the differences of opinion over which kind of bill or regulation will achieve the results most to be desired, it seems clear that the trend so far has been generally in the right direction. While progress to date has been perhaps slower than some could have wished, it has been democratic progress. If we persevere, we shall succeed ultimately in providing the regulation, at the State level, most compatible with the complexities of the industry and the general interest and welfare of the public at large. Our recognition that this cannot be achieved in a day must not be allowed to lull us into relaxation of our efforts; and our recognition that there will be, inevitably, missteps, and retractions, and revisions, must not

be permitted to give rise to an attitude which regards any given misstep as a necessary evil, for the industry cannot afford to make too many mistakes. We must not minimize the task ahead; but we can have confidence that it can be accomplished and faith that the ultimate goal will be achieved. Many in Congress have an interest in this success; it is a certainty that Congress will be a keen observer of events as they develop.

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