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INSURANCE RETALIATORY LAWS

George A. Pelletier, Jr.*

Introduction

Although insurance may have been considered “essentially local” at one time this is no longer true, for it is a business carried on across state lines with increasing frequency. Due to the desire of states to protect their citizens from undue discrimination when doing business in another state, retaliatory statutes have been enacted attempting to provide protection for domestic insurance companies. The retaliatory statutes demand equality of treatment for insurance companies of one state when they do business in a foreign state, and impose the same burdens and exactions on insurance companies from the foreign state if this equality is refused. A retaliatory statute simply says to other states: “We will meet you on the basis of equality and comity, and will treat you as you treat us.”

Retaliatory statutes vary in detail in the forty-five states in which they have been adopted, but they are basically alike.
The Texas statute is representative:

Whenever by the laws of any other state or territory of the United States any taxes, licenses, fees, fines, penalties, deposit requirements or other obligations, prohibitions or restrictions are imposed upon any insurance company organized in this State and licensed and actually doing business in such other state or territory which, in the aggregate are in excess of the aggregate of taxes, licenses, fees, fines, penalties, deposit requirements or other obligations, prohibitions or restrictions directly imposed upon a similar insurance company of such other state or territory doing business in this State, the Board of Insurance Commissioners of this State shall impose upon any similar company of such state or territory in the same manner and for the same purpose, the same taxes, licenses, fees, fines, penalties, deposit requirements or other obligations, prohibitions or restrictions; provided, however, the aggregate of taxes, licenses, fees, fines, penalties, or other obligations imposed by this State pursuant to this (statute) on an insurance company of another state or territory shall not exceed the aggregate of such charges imposed by such other state or territory on a similar insurance company of this State actually licensed and doing business therein . . . provided, further, that for the purpose of this Section, an alien insurer shall be deemed a company of the State designated by it wherein it has (a) established its principal office or agency in the United States, or (b) maintains the largest amount of its assets held in trust or on deposit for the security of its policyholders or policyholders and creditors in the United States, or (c) in which it was admitted to do business in the United States.

The provisions of this Section shall not apply to ad valorem taxes or real or personal property or to personal income taxes.

The provisions of this Act shall not apply to a company of any other state doing business in this State if fifteen per cent (15%) or more of the voting stock of said company is owned by a corporation organized under the laws of this State, and domiciled in this State....

Despite wide enactment and the usual problems of interpretation giving rise to litigation, fairly little has been written concerning the nature and inter-


Any reference hereafter to a state's retaliatory statute is to the statute cited above.

Several of the statutes are quite limited in scope. The Idaho and New Mexico statutes retaliate only on agent or broker licensing. The North Carolina statute is also relatively ineffective for by another statute (N.C. Gen. Stat. § 105-228.8 (1960)) it is inapplicable to taxes. The Alabama statute is considered unconstitutional and not in use. See the section entitled Effectiveness, infra, pp. 268-69.


California is the only state to have its retaliatory statute specifically authorized in the state constitution. Cal. Const. art. 13, § 14 4/5.
pretation of retaliatory statutes. Although the problems generated by retaliatory statutes are not as numerous as they once were, (a result of the expanded coverage of the statutes), many troublesome questions remain.

I. Nature and Purpose

The legal rights of primitive man were grounded in his right to avenge or retaliate by a return in kind for the evil done to him—an eye for an eye, a tooth for a tooth. The English common law was formed during a period when retaliation was still a prime rule of law. On the eve of the Norman Conquest, the crude form of criminal law practiced in England permitted a blood-feud whereby the kin of a slain person could avenge his death by killing the slayer and taking his belongings. A case as late as 1221 is reported in which a man who had wounded another underwent a similar mutilation by order of the court. Retribution of this sort was in time supplanted by greater reliance on payments of money for such wrongs.

Strict retaliation has now almost completely disappeared from domestic law except in the case of capital punishment for murder. Nevertheless it retains a special niche in international relations, undoubtedly due to the lack of adequate legal institutions capable of settling disputes and preserving order between nations. Similarly the threat of retaliation has been used as a club between the various states of the nation to encourage a desired course of action by other states. The states have enacted retaliatory statutes pertaining to decedents' estates, registration and taxation of motor vehicles, licensing and taxation of liquor and most notably, of course, out-of-state corporations.

Retaliatory statutes are defensive in nature for they seek to protect residents of the state from undue impositions in other states. For example, the theory of the insurance retaliatory statutes is that foreign insurance companies doing business in the home state shall suffer the same burdens as domestic insurance companies doing business in the foreign state. This can be achieved by the statutes in either of two ways—reciprocity or retaliation. Reciprocity denotes

4 Felton, Retaliatory Insurance Taxation, October 1961 BEST'S FIRE & CAS. NEWS 81; Leavey, Retaliatory Laws in the United States Relating to Insurance, 1953 INS. L.J. 103; Seitz, Retaliatory Insurance Tax Law Discriminatory Against Domestic Companies Within Enforcing State, 18 NEB. L. BUL. 150 (1939); Annot., 91 A.L.R. 795 (1934); Note, A Review of the Retaliatory Laws, 6 S.C.L.Q. 221 (1953); Note, Retaliatory Taxation of Insurance Companies, 27 VA. L. REV. 686 (1941); See also 17 FLETCHER CYCLOPEDIA CORPORATIONS § 8461 (perm. ed. rev. 1960); id. at v. 18, § 8802 (1955); 19 APPLEMAN, INSURANCE LAW & PRACTICE § 10352 (1946); PATTERSON, THE INSURANCE COMMISSIONER IN THE UNITED STATES 106-08 (1927).


6 Id. at 488.

7 The existence of the doctrine of retaliation is a reflection both of the absence of law enforcing machinery in international law and of the desire of states to justify their acts by an appeal to the support of its tenets. On the one hand, it is a method by which one state may force another to cease its transgressions against the law. On the other it provides justification on legal grounds for acts ordinarily illegal . . . [T]heir legality is claimed to arise from the appropriateness as responses to the prior illegalities of another state, the original lawbreaker having refused to give satisfaction for its wrongs or to end its wrongful practice.

COLBERT, RETALIATION IN INTERNATIONAL LAW 1 (1948).

a relation between two states which exists when each accords to citizens of the other certain privileges, on condition that its citizens also enjoy similar privileges at the hands of the other state. It is the return of a favor for a favor. On the other hand, as we have seen, retaliation is a return of disfavor with disfavor.

The insurance retaliatory statute is, at least in part, reciprocal for it says “that while we welcome all insurance corporations of other states to the trans- action of business within our limits, we insist upon a like welcome elsewhere. . . .” Assuming Texas is the base state, reciprocity results when the burdens of foreign states are no greater than those imposed by Texas on insurers from these states. But, if the burdens in any state are greater, Texas retaliates by imposing the same burdens on insurers from that state on their business in Texas — in effect applying the insurance laws of the other state. For instance, suppose another state imposes a four per cent tax on premiums earned in that state by foreign life insurance companies, whereas the rate in Texas is three and three-tenths per cent. If the other state chooses to accept the reciprocity offered by the statute it will lower its rate to three and three-tenths per cent. Otherwise, Texas will retaliate (other fees and burdens being equal) by the imposition of a four per cent rate against the premiums earned in Texas by the life insurers of the other state. Thus, the value of the reciprocal function is properly the antithesis of the use of the retaliatory function — the less retaliation the greater the reciprocal function has succeeded. Reciprocity is certainly more desirable than retaliation and should be the preferred result of the use of the statute, although it be a coercive result due to the threat of retaliation. However, even the reciprocal concept of a return of a favor for a favor carries with it the coerciveness of refusing to grant this favor if the other side will not likewise grant it.10

In all retaliatory statutes except that of Wisconsin, the reciprocal function is not complete, for the statutes serve only to increase the burden on the foreign insurer to equal that imposed on the retaliating state’s insurers doing business in that foreign state. The Wisconsin statute, however, provides for a proportionate reduction in the burden imposed on foreign insurers when the burdens imposed on Wisconsin insurers in the foreign state are less than Wisconsin would normally impose on foreign insurers. Ohio also has a reciprocal provision

9 Phoenix Ins. Co. v. Welch, 29 Kan. 480, 482 (1883).
10 Professor Patterson in his classic work, The Insurance Commissioner in the United States (1927) states at 107 that retaliatory statutes are often “euphemistically” termed a “reciprocal” or “comity” provision. He further states: It may be confidently asserted that they were passed at the instigation of domestic insurers, for the purpose of erecting a sort of tariff wall around the state; and that they did not benefit the insuring public, however much they may have increased the state’s revenues. At the same time the retaliatory law was a weapon with which to attack the high tariff walls of other states. The type of tariff wall that Professor Patterson means is a conditional one which will come down, or rather not be imposed, if Texas (the base state) insurers doing business in another state are not made to bear burdens in excess of those imposed by Texas on insurers of that other state. This view of the statute is entirely one of retaliation and does not take into consideration the reciprocal feature of the statute. As suggested above, the retaliatory statute is not purely retaliatory in nature for its purpose of protecting the domestic insurer doing business in another state is equally served if retaliation is not necessary, that is the burdens are equal or the other state reduces its burdens to an equal level.
but it is limited to application of retaliatory laws on mutual insurance companies.

Retaliatory statutes are not generally considered to be revenue measures, any increase in revenue being purely incidental to the regulatory function. However, if the state has few domestic companies, the statute may be more important as a revenue-producing measure than as protection for domestic companies doing business in other states.

The retaliatory statutes in net effect tend to place a ceiling upon the rate of taxation which any state can apply to foreign insurance companies. Now that retaliatory statutes are the rule, any given state would find some difficulty in applying burdens on foreign insurance companies considerably in excess of those found elsewhere, because its own insurance companies would find themselves operating under the same extra burdens in all other states in which they might be doing business. Thus, in any state having insurance companies which do business in a number of other states, the legislature would quickly have its attention called to the effect on that state's own companies of any increase in the burdens it imposed on foreign insurers. In 1959 the Illinois legislature contemplated raising the tax on foreign insurers from two per cent to four per cent to raise more revenue. Illinois insurers operating in other states defeated the measure by showing that for every additional dollar collected by Illinois, the insurance companies of Illinois doing business in other states would pay an additional ten dollars under the retaliatory laws of other states. Even more recently, due to retaliation by other states, Texas was forced to amend the part of its Insurance Code relating to permissible investments by insurance companies.

Thus, retaliatory statutes not only protect domestic insurers when they do business in another state, but also indirectly protect foreign insurers from any increase in burdens. If the statutes worked completely, the result would be an equal level of burdens imposed in each state on foreign insurers, probably resulting in a uniform rate of taxation, as this is the largest single exaction or burden. Indeed, the statutes may be the reason why the tax on premiums has stayed close to two per cent in most states.

11 E.g., Massachusetts Mut. Life Ins. Co. v. Knowlton, 94 N.H. 409, 54 Atl.2d 163 (1947); Pacific Mut. Life Ins. Co. v. State, 161 Wash. 135, 296 Pac. 813 (1931); Life & Cas. Ins. Co. v. Coleman, 233 Ky. 350, 25 S.W.2d 748, 749 (1930) ("The primary purpose of this act is not to raise revenue but to secure for the insurance companies of Kentucky even-handed treatment by the legislatures of other states."). Contra, Patterson, op. cit. supra note 10.

12 This example is cited in Felton, Retaliatory Insurance Taxation, October 1961 Best's Fire & Cas. News 81, 88 (1961).

13 Ch. 151 S.B. No. 236 (1963); Ch. 389, H.B. No. 686 (1963) amended Tex. Ins. Code Ann. § 3.39 (1963). The Dallas Morning News, Aug. 18, 1963, p. 15, col. 4 stated that the Texas law had to be changed as the "retaliatory tax laws impede expansion of Texas insurance companies into other states." However, the changes appear to be slight as most of the former law is retained. Texas also has an unusual taxing scheme whereby reductions in the premium tax rate are given for certain percentages of assets invested in Texas securities. Tex. Rev. Civ. Stat. art. 7064 (1960). The California Attorney General has held that this discriminates in favor of Texas insurers and deserves retaliation under the California retaliatory statute. 39 Calif. Att'y. Gen. Op. 98 (1962). Texas may in time also find it necessary to repeal this law if other states follow the California determination. See also Employers Cas. Co. v. Hobbs, 52 Kan. 815, 107 P.2d 715 (1940); (1960-1962) Ore. Att'y. Gen. Biennial Rep. 80 (concerns a similar statute of Alabama).
II. CONSTITUTIONALITY

In 1868 in *Paul v. Virginia*\(^{14}\) the United States Supreme Court upheld a discretionary license requirement of Virginia applicable only to foreign insurers. The Court said that because corporations were merely a creature of the law of the state of their incorporation and dependent on the comity of other states for recognition, they were not citizens within the privileges and immunities clause of the Constitution. Thus, the states could:

- exclude the foreign corporation entirely,
- restrict its business to particular localities, or
- exact such security for the performance of its contracts with their citizens as in their judgment will best promote the public interest. The whole matter rests in their discretion.\(^{15}\)

The Court went on to hold that insurance was not commerce within the meaning of the commerce clause:

The policies are simple contracts of indemnity against loss by fire, entered into between the corporations and the insured, for a consideration paid by the latter. 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 signature and the transfer of the consideration. Such contracts are not interstate transactions, though the parties may be domiciled in different States. The policies do not take effect— are not executed contracts — until delivered by the agent in Virginia. They are, then, local transactions, and are governed by the local law.\(^{16}\)

The Court’s determination that “issuing a policy of insurance was not a transaction of commerce” was expanded by subsequent cases to include all aspects of the insurance business.\(^{17}\) In *Ducat v. Chicago*\(^{18}\) the Court permitted a discretionary tax on foreign insurers by holding that the law was clearly established that a state could discriminate against foreign insurance companies.

This was followed by *Philadelphia Fire Ass'n v. New York*\(^{19}\) in which the Court specifically upheld the constitutionality of the New York retaliatory statute. Philadelphia Fire Association, a Pennsylvania insurer doing business in New York, objected to the imposition of a three per cent premium tax under the retaliatory statute, (three per cent being the rate charged New York insurers doing business in Pennsylvania). Philadelphia's sole argument was that the tax was unlawful because the Association was a “person” within the “jurisdiction” of New York, and it had been denied “equal protection of the laws” under the fourteenth amendment. The Court, relying on *Paul v. Virginia*, stated that: “The State, having the power to exclude entirely, has the power to change the conditions of admission at any time, for the future, and to impose as a condition the payment of a new tax, or a further tax, as a license fee.”\(^{20}\) Further, a foreign corporation was not within the “jurisdic-

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\(^{14}\) 75 U.S. (8 Wall.) 168 (1868).
\(^{15}\) Id. at 181.
\(^{16}\) Id. at 183.
\(^{17}\) See Powell, *Insurance as Commerce*, 57 Harv. L. Rev. 936, 942-56 (1944).
\(^{18}\) 77 U.S. (10 Wall.) 410 (1870).
\(^{19}\) 119 U.S. 110 (1886).
\(^{20}\) Id. at 119.
tion" of New York until it paid its taxes, including the retaliatory tax which was the object of the suit, and thereby obtained its license to do business. 21 It is noteworthy that the majority opinion specifically left open the commerce question, which had not been argued. 22

Seventy-six years after Paul v. Virginia, the Court overruled the concept of insurance as purely local and permitted federal antitrust prosecution in the South-Eastern Underwriters case. 23 The implications of the decision for state regulation, especially that which discriminated against foreign insurers, were profound. If insurance were no longer local but instead were "commerce" between the states, it fell within the constitutional guarantee of freedom from discrimination against interstate commerce. The response of the states was significant. Fourteen immediately repealed their retaliatory laws, and nineteen took steps to equalize tax rates between foreign and domestic insurers. 24

Another important result of South-Eastern Underwriters was the amenability of insurance to congressional regulation in matters other than antitrust. Here, however, Congress proceeded on a rather unusual tack. Congress may "regulate" interstate commerce "through the device of divestment of a subject matter of its interstate character, thus indirectly causing state laws to apply." 25

21 The law is still much the same. See, e.g., Prudential Ins. Co. v. Benjamin, 328 U.S. 408 (1946); Robertson v. California, 328 U.S. 440, 445, n. 6 (1946); Metropolitan Cas. Ins. Co. v. Brownell, 68 F.2d 481 (7th Cir. 1934), aff'd, 294 U.S. 580 (1935). Once the corporation is admitted to do business in the state it becomes a "person" entitled to the guarantees of the "equal protection clause." However, classifications for taxation, including a domestic-out-of-state dichotomy, are not violations of the clause if there is reasonable ground for it. Prudential Ins. Co., supra; Metropolitan Cas. Ins. Co., supra. The insurance retaliatory statutes are a legitimate classification. See infra note 34. See also 17 Fletcher, Cyclopaedia Corporations §§ 8396, 8399 (perm. ed. rev. 1960); 40 Minn. L. Rev. 508 (1956).

Arguments based on the "due process clause" have received similar treatment. Prudential Ins. Co. v. Benjamin, 328 U.S. 408 (1946) (An Act of Congress permitting state tax legislation which discriminates against interstate commerce is not for that reason a violation of the "due process clause.") See Fletcher, op. cit. supra at § 8395. See infra note 33.

22 It is not to be implied, from anything we have said, that the power of a State to exclude a foreign corporation from doing business within its limits is to be regarded as extending to an interference with the transaction of commerce between that State and other States by a corporation created by one of such other States.


23 United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533 (1944). There were two dissenting opinions. Chief Justice Stone in his, concurred in by Justice Frankfurter, stated (at 574) that nothing in the legislative history of the Sherman Antitrust Act suggested that it was to be applied to the business of insurance. He sternly warned (at 583) of the consequences of overturning the precedents of seventy-five years which governed "a business of such volume and of such wide ramifications." Furthermore, the decision "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." While the decision did remove a legal anachronism from the books (see infra note 26) it imperiled the existing order, and in this respect Chief Justice Stone was correct. Fortunately this did not have to be proved for Congress intervened. For an excellent analysis of South-Eastern Underwriters see Stern, The Commerce Clause and the National Economy, 1933-1946, Part Two, 59 Harv. L. Rev. 883, 909-25 (1946).

24 Kastner Talks on Premium Tax Situation, 45 Eastern Underwriter 4 (Nov. 9, 1945).

Many of the states in attempting to further mollify the situation equalized premium tax rates between domestic and out-of-state companies.

25 The Constitution of the United States of America 168 (Corwin ed. 1952). Chief Justice Stone in International Shoe Co. v. Washington, 326 U.S. 310, 315 (1945) said: "It is no longer debatable that Congress, in the exercise of the commerce power, may authorize the states, in specified ways, to regulate interstate commerce or impose burdens on it."
The McCarran-Ferguson Act in 1945 did just this by returning the regulation of the insurance industry to the states, provided each would enact adequate laws in certain areas.

Thus in Prudential Ins. Co. v. Benjamin, the Court was able to allow South Carolina to discriminate in the application of a premium tax between domestic and foreign insurance companies because this was permitted by the McCarran Act. The Court held that the commerce clause was not a limitation upon Congress but a grant of power which Congress had exercised by enacting the McCarran Act. The congressional power over the commerce did not prohibit discrimination against interstate commerce. Thus if the states and Congress exercise the power jointly, their action, like that of Congress alone, was largely unlimited. State action could be overturned only if the evil in contravention of the Constitution was clear and gross.

Shortly thereafter, the Court in a per curiam decision citing Prudential, affirmed a decision of the Kansas Supreme Court, In re Insurance Tax Cases,


The former belief that insurance was not commerce, and thus not subject to Congressional regulation, had "rested on a sustained tradition of local control and on oft-repeated words by the Supreme Court." But with the expansion of the commerce power from its first outlines in Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824), plus the growth of the fiscal powers of the nation as expounded by Chief Justice Marshall in McCulloch v. Maryland, 17 U.S. (4 Wheat.) 315 (1819), it was as clear as "anything could be — short of a judicial decision — that Congress had ample authority to take or full control of insurance any time it so desired." Dowling, Congress & Insurance, 5 J. Pub. L. 110 (1956) (emphasis added). See Stern, supra note 23 at 909.

27 For an analysis of its subsequent effectiveness by one of its authors, see McCarran, Insurance as Commerce, 23 Notre Dame Lawyer 299 (1948); see also Ekern, The Regulation of Insurance, 1951 Ins. L. J. 409.


29 The fact that the Act has engendered such discrimination has not passed without criticism. In an article in the University of Pennsylvania Law Review entitled "The Insurance Industry: A Case Study in the Workability of Regulated Competition," the authors in speaking of Prudential and the McCarran Act say:

In the years since this decision was handed down, many if not all of the states have levied premium taxes on out-of-state companies. The burdensome nature of these taxes is increased by the fact that they are not uniform as to rate or rate base. . . .

This ability of the McCarran Act to insulate such legislation from attack on constitutional grounds must be counted against it in our attempt to assess its over-all impact. There can be no economic justification for such a tax. States desiring to protect their citizens from "foreign" companies domiciled in states where regulation is less stringent can surely find more effective tools than what is, in effect, a discriminatory protective tariff.

upholding the validity of taxes and fees imposed on foreign insurers under the Kansas law which included a retaliatory provision.

The constitutionality of retaliatory statutes has been further upheld in state courts against arguments that the laws violated a state constitutional provision of equality and uniformity in taxation, that they were a denial of due process, that they were a violation of equal protection, and that they represented an unconstitutional delegation of the taxing power to the legislature of the other state. Alabama is the only state now holding that a retaliatory statute is unconstitutional. The Alabama court viewed the statute as a grant of the "law-making power" to the other state and a denial of equal protection.

III. THE STATUTES IN OPERATION: APPLICATION, EFFECT AND CONSTRUCTION

A. General Rules

The basic purpose of retaliatory statutes is the equalization of burdens imposed on foreign insurance companies by increasing the burdens in the retaliating state to meet those of the state in which they are greater. The statutes seek to achieve this purpose on the basis of reciprocity, or comity; but, when reciprocity is denied, a retaliating sanction results. Hence, the courts have held that the statutes should be "strictly construed, executed with care, and not applied to any case that does not fall plainly within the letter of the law."
Retaliatory statutes will not be invoked unless the restrictions or burdens of the foreign state can be clearly proved. It must be shown as a matter of fact that the foreign state imposes greater burdens or prohibitions upon insurance companies of the retaliating state than are presently levied by that state on like companies of the foreign state doing business in it. If the statutes of the foreign state are not clear, there must either have been judicial construction by the courts of the foreign state or administrative application of the ambiguous legislation. The administrative action does not have to be correct or even within the apparent power of the agency; all that is required is the actual imposition of the restrictions or burdens.

A Virginia case was concerned with action of the Rhode Island insurance commissioner, who under dubious legislative authority had required a ninety thousand dollar additional security deposit from a Virginia insurance company because of its financial difficulties. Under its statute, Virginia had retaliated by requiring the same additional security deposits from Rhode Island insurance companies doing business in Virginia. The Rhode Island insurance company in question urged that the Rhode Island commissioner did not have the power to act as he did. The Virginia court held that he did, but said that the crucial issue was the fact of Rhode Island’s actions, not the propriety of the action under Rhode Island law.

The Rhode Island insurance company in the above case further argued that it was not a “like” insurance company under the statute because its capital structure varied from that of the Virginia insurer Rhode Island had acted on. The court held that “like” meant companies handling similar lines of insurance—a decision in line with that of most courts.

There does not have to be an insurance company from the retaliating state already doing business in the other state for there to be a “like” company for purposes of invoking the retaliatory statute. Although some contrary authority exists, the majority view is that the mere possibility of a future entry into the other state by a company from the retaliating state is sufficient cause for


40 This factor seems inherent in the judicial decisions; however, see Fidelity & Deposit Co. v. Brown, 92 Vt. 390, 104 Atl. 294 (1918), where application of the retaliatory statute was refused on this basis. Some statutes (for example, Delaware and Michigan) specifically require that there be a “like” or “similar” company.

applied the retaliatory law. In an early Illinois case, *Germania Ins. Co. v. Swigert*, the court faced a retaliatory statute which required the laws of the other state actually to be imposed on agencies of Illinois companies. It said:

> Does a law any the less require a thing to be done because there is no present subject-matter upon which to operate? The requirement of the law is but the declaration of the rule to be observed, and it must antecede the facts which call it into action. The existence of the law and the existence of a present subject-matter upon which it will take effect are entirely distinct things. The existing law makes the requirement—declares the rule—and it remains in force just as well without as with a present subject-matter upon which to actively operate; and since it is the existence of the law, and not the application of the law to its subject-matter, that determines when [the retaliatory statute] shall be obligatory, it must follow that it is unimportant whether insurance companies organized under the laws of this state, have agencies in the state of Louisiana or not.

Furthermore, said the court, there was no provision made in the statute ascertaining whether Illinois companies were operating in the other state.

In 1943 Massachusetts enacted a new tax statute which continued the old tax rate for insurance companies already established and doing business, but provided lower rates for new companies. This posed a real problem for states having retaliatory laws but having no insurance companies operating in Massachusetts. Should the retaliatory statute be applied on the same basis as in cases such as *Germania* even though there were not, and never could be, any insurance companies of that state subject to the old high tax? In the three states in which the point was litigated, including Illinois, it was held that the retaliatory statute could not be applied. The Illinois court distinguished *Germania* on the ground that the Massachusetts statute contained intrinsic limitations as to its applicability and duration. The statute depended by its very terms on the existence of an Illinois company which could fall under this extra tax limitation and there were none.

Some retaliatory statutes expressly provide for retaliation not only if there are insurers of the retaliating state doing business in the other state, but was recently relied on by the Attorney General of Ohio in an opinion. Ohio Att'y Gen. Informal Opinion No. 544, December 28, 1962, pp. 13-16. See also [1955-1956] Fla. Att'y Gen. Biennial Rep. 363, where the statutory requirement of an actual company doing business in the other state was followed literally.

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42 State v. Insurance Co. of North America, 71 Neb. 335, 100 N.W. 405 (1904); State v. Insurance Co. of North America, 71 Neb. 335, 100 N.W. 405 (1904); Union Central Life Ins. Co. v. Durfee, 164 Ill. 186, 45 N.E. 441 (1896); State ex rel. Phillips v. Fidelity & Casualty Ins. Co., 77 Iowa 648, 42 N.W. 509 (1889); *Germania Ins. Co. v. Swigert*, 128 Ill. 237, 21 N.E. 530 (1889); *Phoenix Ins. Co. v. Welch*, 29 Kan. 672 (1883). See Appleman, op. cit. supra note 4 at pg. 60; 17 Fletcher, op. cit. supra note 4, at pg. 539:

> To justify the imposition of a retaliatory statute by a state it is not necessary that there be a domestic company of that state doing business in the state against which the retaliation is made, and the mere existence of a discriminatory law in another state may be sufficient to put such retaliatory statute into operation.

43 128 Ill. 237, 21 N.E. 530 (1889).

44 Id. at 532.

also if there are companies in the retaliating state which "might seek to do business in such other state."46 However, the Texas statute, along with those of most other states, requires that there be a direct imposition upon a domestic insurance company before there can be retaliation. This requirement for a company actually to be doing business in the other state can be explained away, as in Germania, or it could be argued that the onerous requirements of the other state are the reason for the absence from that state of any of their insurance companies.

B. Equalizing the Burden: Determination, Comparison.

The determination of the propriety of retaliation against a foreign insurance company is dependent upon the exactions from insurance companies of the retaliating state doing business in the state of domicile of the foreign company. The question is thus whether these "exactions" are greater than those required by the retaliating state. The statutes of the other state must be examined to see if this be the case, which due to the variance in insurance statutes cannot always be an exact comparison. Nor is it a simple task.

If each state were to impose the same taxes on insurance companies with variance only as to rates, and other burdens were equal, the problems in applying retaliatory statutes would be greatly simplified. The insurance commissioner of the retaliating state could then easily compare the burden by a comparison of the rates. However, each state has different regulations and systems of taxation of insurance companies which vary not only as to rates, but also as to rate application. One state may impose a general tax on insurance companies on the basis of gross premiums, whereas another may tax on the basis of gross premiums less claims paid. Also, one state may impose taxes or fees, allow deductions or exclusions, or provide for deferred installment payments of its tax, all of which may not be available in another state.

Because they are the greatest burdens, the bases of retaliation are primarily (1) the tax on premium income earned in the state and (2) the fees paid. In applying their retaliatory statute some state insurance commissions consider these items alone because of the difficulty involved in computing and comparing all the burdens, due no doubt to the lack of uniformity in insurance regulation among the states. Moreover, the commissions are generally understaffed and to make adequate comparison would take considerably more manpower with little possibility of an increase in revenue.

1. Aggregate Versus Item-by-Item Approach

When making a comparison between the exactions of one state and those of the state in which the foreign insurance company is chartered, what is intended is not a comparison of a particular tax with a like tax, a particular fee with similar fee, nor a balancing of fines, penalties or other obligations with those of the other state. The immediate difficulty with that method of comparison arises where the other state imposes an obligation which the retaliating state does not have, as then there could be no valid comparison.

46 E.g., Arizona, Delaware and Maryland.
Rather, what is intended is an aggregate comparison, at least of those burdens which can be aggregated.

In *Employers Cas. Co. v. Hobbs*, a Kansas case involving a Texas insurance company doing business in Kansas, the company claimed that it was wrongly forced to pay certain sums which a Kansas insurance company would have had to pay in Texas, but which were not prescribed by the Kansas taxing statute. These were: 1) six dollars for publication of certificates of compliance by all insurance companies doing business in Texas, 2) one hundred-fifty-five dollars as one-fifth of one per cent of premiums received by the company for motor vehicle insurance, and 3) five-hundred dollars as three-fifths of one per cent of the premiums received by the plaintiff on all workmen's compensation insurance in Kansas. The Texas insurer first sought to argue that items of taxation should be matched on an item-by-item basis and if Texas had a tax not used in Kansas there could be no exaction under the Kansas statute. Under this theory, Kansas could retaliate only on items specified in both Texas and Kansas and as to which the burden imposed by Texas was greater than that imposed by Kansas. In the alternative the company urged an aggregate approach. The court accepted the latter argument, saying that the statute required payment for the privilege of doing business in Kansas of "an amount equal to the amount of such charges and payments imposed by the laws of such other state," when they were greater.

The *Employers* case follows the general method of using a comparison of the aggregate of the burdens imposed. What is sought is a comparison of the cost of doing business between the states concerned, even though with certain burdens this is not possible.

There is a logical division between items such as taxes, licenses or fees, and fines, penalties, security deposits, or prohibitions. "Other obligations" or "other charges" when used in a statute, could conceivably, depending on the nature of the items involved, be grouped within any of the categories above. Using the aggregate approach for taxes, licenses and fees is logical, as these are "recurrent annual governmental charges for doing business." But fines, penalties, deposit requirements and prohibitions are generally non-recurring items, making it more difficult to assess their burden as part of an aggregate. The proper application of the retaliatory statute to these items is on an item-by-item approach. That is, when a fine or penalty is invoked against a foreign insurance company, and in the foreign state a higher fine or penalty is imposed for a similar infraction, this higher amount should be imposed. As to security deposits and prohibitions, if the foreign state has greater deposit requirements or prohibitions, then they would be imposed against the foreign state's insurers, again, an item-by-item approach. Another approach to this problem would be for the commissioner merely to take these items into consideration, but

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47 149 Kan. 774, 89 P.2d 923 (1939).
not in a purely mathematical formula, in determining whether the retaliatory statute should be applied to the circumstances before him. This may, in fact, be a necessary prerequisite to the use of any specific comparisons, for if on balance the total burdens, including an abstract comparison in toto of fines, penalties and other obligations and prohibitions of the other state is not greater, the retaliatory statute is not applicable at all.

Ultimately, this resolves itself into the question of how far the insurance commissioner wishes to go in applying the retaliatory statute, for the ease of retaliating only on premium taxes and fees may overcome other advantages gained by a more complete retaliation. Provided the other burdens imposed in the other state are not substantially more than those in the retaliating state there will be no litigation over the lack of full retaliation. Also, in such a case there is the possibility of mutual retaliation if the computation of burdens imposed in the other state is not correct or complete. That is, the foreign state may in turn retaliate if, after the home state has applied its retaliatory provisions, the foreign state computes the resulting burdens imposed on its insurers doing business in the retaliating state to be in excess of those it imposes on insurers from that state.

Quite a few statutes, including those of California and Illinois, make the logical distinction between taxes, licenses or fees and other obligations. New York separates (1) deposits of securities; (2) taxes, fines, penalties; (3) fees for licenses and certificates of authority; and (4) restrictions, obligations, conditions or penalties imposed for the privilege of doing business. Also, many states segregate security deposits by providing that if the other state has a greater deposit requirement, companies of that state doing business in the retaliating state “shall make like deposits for like purposes. . . .” However, most statutes do not make any distinction between the various items but group them together as, for example, the Texas statute set out above.

As shown by a recent Ohio case, Indemnity Ins. Co. v. Stowell, statutory authority for this separation is not necessary. The question raised in that case was whether the retaliatory statute should be invoked against a Pennsylvania insurance company for license fees imposed on a similar Ohio company in Pennsylvania. The Pennsylvania fees were greater than those imposed by Ohio, but the aggregate burden of taxes and license fees on an Ohio company in Pennsylvania would be no greater than on a Pennsylvania company in Ohio. As a result of a prior case, the Ohio Superintendent of Insurance recognized that he was required to consider taxes in the aggregate in applying the statute. But, he urged that because the statute uses the words “taxes, fines, penalties, license fees, deposits of money, securities, or other obligations or

49 This is the wording of the New York statute. See also, e.g., the statutes of Colorado, Illinois, Kansas and Michigan. While most states do mention security deposits in their statute, not all segregate this requirement and specify a “like” imposition as the states above do. Under statutes which do not so specify, it would not be mandatory on the Insurance Commissioner to impose “like” deposits, and he could merely consider this as a factor in deciding whether any retaliation is appropriate. However, most states do retaliate on a “like” basis for such items, regardless of whether their statute requires it.

prohibitions” and it would be impossible to aggregate all these items, he should not be required to aggregate any two or more of them. The Court said that the general intent of the retaliatory statute was to achieve substantial equality and this required that taxes and license fees be aggregated. Aggregation in toto of all burdens was not being urged, and it was sufficient, the Court observed, to note that there were four logical classifications of the items: (1) taxes and license fees, (2) fines and penalties, (3) deposits of money or securities and, (4) prohibitions.

The retaliatory statutes of twenty-three states specifically require that the aggregate method of computation be used. The Texas and Iowa statutes, typical of these provisions, provide that when taxes, fees, or other obligations are imposed upon insurers of that state doing business in another state which “in the aggregate are in excess of the aggregate” of taxes, fees, or other obligations imposed on similar insurance companies of that other state in the retaliating state, the higher taxes, fees, and other obligations shall be imposed. The decisions show that statutory authority for the use of the aggregate approach is not necessary. The statutes of those states which do not have the word “aggregate” usually have wording to this effect: In case of retaliation the same taxes, fees, etc., shall “be imposed upon all insurance companies of such states and their agents,” or, there shall be imposed “an amount equal to the amount of such charges and payments imposed by the laws of such other state or country,” or, as in New York, “an amount determined in the manner prescribed by such other state, and shall be subjected to such greater requirements imposed by such other state upon similar insurers of this state. . . .” The courts have held that even statutes such as the latter do not prevent the use of the aggregate method. In statutes which use the word “amount” it is noteworthy that the word is used in the singular, whereas if an item-by-item comparison has been intended, “amounts” would have been used.

2. Computation and Comparison of Burdens

In computing the aggregate, problems arise when one state allows a deduction or grants a benefit which the other does not. In most states the tax levied on insurance companies is primarily one on premiums collected in that state, but “premiums” may be net in one state, gross in another. Similarly, one state may not tax annuities or assessment income, while the other does. Or, dividends or amounts paid for reinsurance may be deducted in one, but not another. As a further factor, the usual case is that the state taxing the lesser level of premium income has the higher rate of taxation.

Take the case of two insurance companies, A and B, A coming from state X where assessments are not included in “premiums” while B comes

51 Arizona, Arkansas, California, Colorado, Delaware, Florida, Georgia, Illinois, Iowa, Kentucky, Maryland, Michigan, Montana, Oklahoma, Oregon, Pennsylvania, South Dakota, Texas, Utah, Virginia, Vermont, Washington and West Virginia.
53 Indiana.
54 Kansas and Tennessee.
from state Y where they are included. Other burdens being equal, when is the retaliatory statute applicable? When A company does business in Y it is logical there would be no retaliation, provided the rate of taxation is the same. The tax imposed in Y is greater than in X, where A comes from, for in Y it is levied on premiums, including assessments. However, if state X has a higher tax rate it could be argued that state Y should retaliate by taxing premiums, minus assessments, at state X’s higher rate and then tax assessment income at the normal rate which it (state Y) imposes. The argument behind this is that when B insurance company, as a domiciliary of Y, does business in X it is taxed at this higher rate on its premiums, less assessments, plus the fact that the absence of taxation on an item by one state should not preclude another from taxing it. But this fails to take into account that the total or aggregate tax payable in state X, which has the higher base rate, may be less than that payable in state Y where premiums are taxed in full but at a lesser rate. The Y state courts have generally agreed that the retaliatory statute is not applicable in such a case.\textsuperscript{6} However to the extent necessary to equalize, total or aggregate tax payable, if the tax payable in X should ever exceed that payable in Y, Y would then apply its statute.

Another particularly troublesome question is whether the impositions of local governments are taxes, fees, fines or other obligations includable in the computation of the aggregate burden imposed by that state. In a 1961 Illinois case (involving a California insurance company), \textit{Pacific Mut. Life Ins. Co. v. Gerber,}\textsuperscript{57} the court was faced with the problem of whether to take into consideration, in comparing burdens, the Illinois personal property taxes paid by Pacific. California levied a tax on premiums of two and thirty-five-one-hundredths per cent, which was “in lieu of all other taxes and licenses, state, county and municipal, upon such insurers and their property,” except their real estate. The applicable Illinois rate was two per cent, but the taxing statutes specifically provided for the exclusion of personal property taxes. Pacific made two contentions to support its claim for a refund. First, express language of the retaliatory statute required that the retaliatory tax assessed against it be reduced by the amount of Illinois personal property taxes paid. Second, the object of the retaliatory statute was comity as it was a reciprocal measure with a purpose of equalizing the aggregate burden of all taxes imposed upon both domestic and foreign insurance companies. The court denied these contentions, stating:

\begin{quote}
When the entire section is read, particularly in light of the pre-
fatory language, we think it clear that the legislature included
within its scope only the taxes paid by insurance companies, as
such, as a condition precedent to their doing business in the
respective State. If it were not otherwise, and if plaintiff’s theory
was carried to its logical conclusions, the result would be a con-
struction that State differences in such things as motor vehicle fees,
fuel tax and the like, required “by other law(s) of this State,”
\end{quote}

\begin{itemize}
\item \textsuperscript{56} See State v. American Ins. Co., 79 Ind. App. 88, 137 N.E. 338 (1922); State v. Con-
\item \textsuperscript{57} 22 Ill.2d 196, 174 N.E.2d 862 (1961).
\end{itemize}
were intended to be included in the computation of the retaliatory tax. . . . The ad valorem tax on personal property is not assessed as a condition precedent to the doing of an insurance business in either California or Illinois. 58

In accord with Gerber is a Massachusetts decision, 59 which refused to allow a California insurance company to include payments to a fire preventive association, the Boston Protective Department, within its computation of taxes paid in Massachusetts. Because the tax was a payment required by the city, the court held it was not an exaction imposed by law (that is, a law of the state), and hence not within the retaliatory statute. 60 Similarly a Pennsylvania court held that payments to the Philadelphia Fire Insurance Patrol were not “obligations” as used in the Pennsylvania retaliatory statute and could not be credited against the retaliatory tax assessed. 61 “Obligations” was limited by the principle of ejusdem generis to “obligations” similar to the “taxes, fees, fines . . . ” comprehended by the statute.

However, the majority view is that local burdens should not be retaliated if the other state allows them to be included in the computation of taxes paid in that state. The leading case is Life & Gas. Ins. Co. v. Coleman, 62 in which the Kentucky Court of Appeals held that municipal taxes paid in that state by a Tennessee insurance company would be deducted in computing the amount of taxes owed under the Kentucky retaliatory statute. The primary taxation of foreign insurance companies in Kentucky was at a rate of two per cent on the premiums received in the state, while the Tennessee rate was two and one-half per cent, but it was in lieu of all other taxes. The company admitted that it was subject under the retaliatory statute to pay two and one-half per cent, but argued that for purposes of equalization of rates it should be given a credit (or permitted to deduct) the amount of municipal taxes paid in Kentucky. The court agreed, but limited the amount of credit or deduction by providing that the insurance company was always to be liable for at least two per cent of premiums collected in the state, the normal Kentucky rate. The court reasoned: The purpose of the statute is equalization of the burdens but there can be no equalization unless the taxes levied or the obligations imposed are the same in aggregate. For equalization to be achieved:

[I]t is necessary to levy a specific tax to meet a similar tax levied by another state, but, if the aggregate of the taxes collected from a foreign insurance company in the retaliating state equals the tax imposed on foreign insurance companies by the state in which the taxed company is incorporated, the object of the law has been attained. Equality is the result aimed at and is achieved when the ultimate taxes levied are equal. . . . 63

58 Id. at 865.
60 In New York similar deductions are permitted. See infra note 64 and accompanying text. As a result of the Firemen’s Fund Ins. Co. case, however, New York refused to allow deductions to Massachusetts insurers for payments. 1954 N.Y. Att’y Gen. Ops. 189.
62 233 Ky. 350, 25 S.W.2d 748 (1930).
63 Id. at 750.
In a New York Court of Appeals decision, *John Hancock Mut. Life Ins. Co. v. Pink*,\(^6\) which involved payments by a Massachusetts insurer of an excise or general business tax the City of New York imposed on the privilege of doing business, it was held that the tax was one required or imposed by "the laws of this state." The Court reasoned that because the state had specifically authorized the City to levy the tax the City was merely the agent of the state. It consequently was an imposition within the meaning of the retaliatory statute and could be deducted from the retaliatory tax due New York. Thus, other states would not be warranted in retaliating for the business tax so long as the total burden imposed in their state was higher, making the deduction of the general business tax from the retaliatory tax a benefit to them.

The Attorney General of Ohio recently rendered an opinion\(^6\) at the request of the Insurance Commissioner, wherein he advised against a retaliatory imposition on New York insurers for the New York City general business tax. In *Pink, supra*, the New York tax imposed on foreign insurers was held deductible from any retaliatory tax due. "Therefore, it is evident that (the New York City general business tax) cannot be considered in determining the aggregate burden imposed by New York for if the company merely pays this as a part of its New York tax, it does not become an additional burden which would compel Ohio to retaliate."\(^6\)

The Ohio Attorney General's Opinion also covered payments made under New York law to local fire departments by out-of-state fire insurance companies, which amounts were credited against the two per cent premium tax imposed on these companies. By reason of this credit the Attorney General rejected any retaliation in Ohio other than in response to the basic two per cent imposition. This type of credit against the premium tax is to be distinguished from other instances in which the amount of the item paid was held to be a credit against the retaliatory tax. In other words, this credit was included in the burden imposed in the other state for purposes of comparison of aggregate burdens. The former should never be retaliated against by a like imposition for it is a part of the basic premium tax, whereas the latter, having merely the status of a credit against the retaliatory tax, can be retaliated against if the impositions in the other state (namely New York in the above discussion) are greater, thus precluding a retaliatory tax (due New York) on which it can be offset.

A Montana decision, *Occidental Life Ins. v. Holmes*,\(^\) involved real estate taxes allowed as a deduction in California but not Montana. Citing the Kentucky decision in *Coleman, supra*, the Montana court held that real estate taxes were a matter properly included in the computation of the respective burdens. It was shown that if the real estate taxes were added to the Montana premium tax, which was less than the California rate, the California insurers in Montana were paying more than Montana insurers in California. Hence,

\(^{6a}\) 276 N.Y. 421, 12 N.E.2d 529 (1938).
\(^{6c}\) Id. at 27.
the retaliatory statute was not applicable. The dissent raised the interesting proposition that a Montana insurance corporation doing business in California would not be permitted to deduct any real estate taxes paid in California from the premium tax because Montana does not permit a California insurer to deduct real estate taxes. Thus, under the California retaliatory statute, California would deny such a deduction to a Montana insurer. The obvious fallacy in this reasoning is that by this case Montana is granting the right to deduct real estate taxes to California insurers.

If, for example, state X permits the deduction of these essentially local burdens from the retaliatory tax as a tax, fee, fine, or other obligation imposed by that state, then state Y should not retaliate these local burdens as was shown in Occidental, supra, and Coleman, supra. However, this is true only so long as the total impositions in Y are in excess of those imposed by X on a "like" company doing the same amount of business. When they are less, then Y should fully retaliate on the companies from X, including any local impositions. This line of reasoning is based on the proposition that by the retaliatory laws we are striving for equalization of burdens; and not simply the imposition of another tax. Under this reasoning, decisions like that of the Illinois court in Gerber, are incorrect.68

Following Occidential, the Montana legislature amended its retaliatory statute to accord substantially with the majority decision.

Any tax, license or other fee or other obligation imposed by any city, county, or other political agency of such other state or country on Montana insurers of their agents or representatives shall be deemed to be imposed by such state or country within the meaning of this section.

This section shall not apply as to personal income taxes, nor as to ad valorem taxes on real or personal property nor as to special purpose obligations or assessments imposed by another state in connection with particular kinds of insurance other than property insurance; except that deductions, from premium taxes or other taxes otherwise payable, allowed on account of real estate or personal property taxes paid shall be taken into consideration by the Commissioner in determining the propriety and extent of retaliatory action under this Section.69

The basic provisions in the retaliatory statutes of Arkansas, California, Florida, Georgia, Oregon, South Dakota and Utah have the above provision. Under this provision, the retaliating state computing the aggregate burden will impose the same "local" burdens, with certain exceptions, as are imposed in the foreign state on the retaliating state's insurers unless the foreign state allows them as a deduction. In the last instance, the local burdens will be taken into consideration by the commissioner in imposing retaliatory action. Many states, including Texas, have provisions in their retaliatory statutes that make the statute inapplicable to ad valorem taxes on real or personal property or to personal income taxes. Some go on further to provide that any tax obligation imposed

by a city, county or other political subdivision of another state shall be deemed within the meaning of the retaliatory statute. The addition of this provision, just as in the Montana provisions above, involves some overlapping, as ad valorem taxes are also usually imposed by cities and counties. It is arguable, and this appears to be the interpretation followed, that the non-applicability of the statute to ad valorem and similar taxes is an exception to the general rule on local burdens. The rationale for this conclusion is based on the arrangement of the statute; the exception is stated after the general provision making all local assessments includable in the aggregate.

In a study made in 1958 by the National Association of Insurance Commissioners on “The Problem of Retaliatory Taxation on Municipal Taxes and Fees” the following reasons were given for why retaliation on these exactions was difficult:

1. The municipal taxes and fees in a state do not constitute a simple specific overall tax levy like a state tax at 2 per cent but can be a multitude of exactions, differing in rate or amount by community, county, parish or district.
2. Such levies can be upon the company, directly upon the agent of the company, or upon both.
3. Such levies can be by almost any municipal division of that state such as city, village, town, county or parish and in one isolated instance within our knowledge, by a school district.
4. There is question as to the legality of retaliation against such municipal levies under the normal retaliatory law.
5. There is difficulty of obtaining accurate information for use as a basis of retaliation.
6. The normal human reluctance of state department personnel makes them unwilling to undertake difficult added burdens of administration when most departments are, even now, understaffed.
7. There is apprehension on the part of domestic company personnel that such retaliation, even if legal, may provoke reprisals and antagonisms.

Several states are, however, retaliating on the basis of these exactions. Virginia does so by including in its taxes an additional “charge” which is computed by applying a stated ratio to the premiums reported as being taxable. The ratios are calculated each year and are based on the percentage ratio of taxes paid by Virginia insurers to political subdivisions of the states where these companies are from compared with premiums received by Virginia companies in these states. Connecticut retaliates against the New York general business tax in a similar manner. Many retaliatory statutes, including Virginia’s, specify retaliation not only for the laws of another state but also for any political subdivision thereof. The statutes of Maryland, Missouri and

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70 Arizona, Arkansas, California, Connecticut, Delaware, Florida, Georgia, Maryland, Missouri, Montana, New Jersey, Oklahoma, Oregon, Pennsylvania, South Dakota, Utah, Virginia and West Virginia. See also Michigan. (California and Delaware in letters to this writer state that they do not retaliate for local burdens at the present.) Even without express authorization in the statutes there is sufficient broad language to permit this retaliation. (Kansas and New York in letters to this writer state that they do so retaliate, or have done it on occasion.) See, e.g., John Hancock Mut. Life Ins. Co. v. Pink, 276 N.Y. 421, 12 N.E.2d 529 (1938); Life & Casualty Ins. Co. v. Coleman, 233 Ky. 350, 25 S.W.2d 748 (1930).
New Jersey specifically provide for computation on a basis similar to that of Virginia and Connecticut.

What is to be done in the process of equalization if the other state permits installment payment of the tax? When faced with this question the Illinois Supreme Court refused to grant an insurance company from a state where installment payment was permissible (California), either the right to pay in this manner or a discount.71 The Court said that while "comity between the states is to be encouraged, [and] reciprocity is to be promoted," to allow what the California insurer urges would be going too far. It would "permit the California statute to amend or supersede the time fixed for the payment by the Illinois act."72 A Washington case, Pacific Mut. Life Ins. Co. v. State,73 reached a contrary result on the same California provision, the Court saying:

[T]he Insurance Commissioner should take into consideration, in connection with other pertinent facts, the time fixed for the payment of the tax, and if, as in the case at bar, it appears that the tax paying date is later than that fixed by our statute, that fact should be considered in deciding whether or not the tax imposed by the sister state is in fact more onerous than that imposed by our insurance act.74

In Occidental Life Ins. Co. v. Holmes, supra, the Montana court simply assumed the right of the State tax collector to make a percentage allowance for the privilege granted in California.

In a Texas case,75 under a prior retaliatory statute, an Oklahoma insurance company had secured a reduction of its rate of taxation under the Texas insurance law by investing a certain proportion of its assets in Texas property. Its new rate of taxation was one and one-half per cent of premiums earned in Texas. The Oklahoma rate for a similar foreign company would have been four per cent, which the Insurance Commissioner argued was grounds for applying the retaliatory statute. The Court said that in reality compliance with this provision for reduction of rates was equal to paying an aggregate rate of four and five-one hundredths per cent and hence the retaliatory statute did not apply. The Texas retaliatory statute was then amended to accord with this result.

This Texas law, which grants a lower tax rate if the company invests a certain proportion of its assets in Texas securities also caused problems in determining the burden of a Texas insurance company outside the state. In a Kansas case a Texas insurance company urged that the computation for retaliatory purposes should be the same as would be applied to a Kansas company in Texas if the Kansas company had invested fifty per cent of its assets in Texas securities.76 The obvious fallacy of such reasoning is that the analogy is valid only if the Kansas company had invested fifty per cent of its

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72 Id. at 439.
73 161 Wash. 135, 296 P. 813 (1931).
74 Id. at 815.
assets in Texas. This fallacious analogy, a sort of reverse *renvoi*, was also
tried in a Wisconsin case in which the insurance company unsuccessfully
sought to obtain a deduction in two states for one inspection fee.\(^77\)

Another problem arises when a state refuses to allow a certain line or
type of insurance to be sold in that state. In Ohio, for example, workmen's
compensation insurance is said to be implied with a public interest and
private insurance companies may not write it.\(^78\) An employer in Ohio must
either become a self-insurer or pay premiums to the state fund monopoly. The
Pennsylvania Attorney General stated that this "prohibition" should be applied
against Ohio insurers doing business in Pennsylvania because of the Pennsyl-
vania law requiring retaliation for "prohibitions."\(^79\) This problem was subse-
quently considered by a lower court in Pennsylvania which, in a well-reasoned
opinion,\(^80\) held that Ohio insurers could write workmen's compensation insurance
in Pennsylvania. Ohio's public policy against private insurance com-
panies writing workmen's compensation insurance was not a "prohibition"
as that term was used in the retaliatory statute.\(^81\) The Court said:

> The establishment of such a policy implies no favoritism to Ohio
companies, and no "discrimination" against ours. . . . Ohio
companies, as well as Pennsylvania companies are within the
prohibition of the Ohio Statute, and to invoke retaliation because
of the adoption of such public policy would be to give the statute
an extremely liberal, instead of a strict, construction.\(^82\)

The statute required "like" impositions to be imposed, but, said the Court,
contrary to the Attorney General's Opinion, there could be no "likeness" in
impositions here. Pennsylvania had its own fund for insuring State-owned
property, said the Court, yet Pennsylvania insurers had not been forbidden
from insuring state-owned property in other states. Subsequently the Pennsyl-
vania retaliatory statute was amended to provide that the existence of a
monopolistic state fund for writing a certain type of insurance was not to be
construed as a reason to deny insurers from that state the right to transact
such classes of insurance in Pennsylvania.

In the recent Ohio Attorney General's Opinion discussed earlier, it was
similarly held that because Ohio insurers had the right to write workmen's
compensation insurance in other states, and no insurer had that right in
Ohio, it would be improper for Ohio to retaliate against special burdens im-
posed in New York on Ohio insurers for the privilege of selling workmen's
compensation insurance.\(^83\) As the Pennsylvania Court had said, the unequal

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\(^{77}\) Kansas City Life Ins. Co. v. State, 265 Wis. 414, 61 N.W.2d 816 (1953).

\(^{78}\) Ohio Rev. Code Ann. § 4123.82 (1954) (private insurance companies forbidden to
write workmen's compensation insurance). See also Thornton v. Duffy, 254 U.S. 361, 368
(1920).


\(^{81}\) The argument was one of *ejusdem generis*. "Prohibition" was included with other terms
(taxes, fines, penalties, licenses, fees) which imposed financial obligations on insurance com-
panies and was intended to apply to similar prohibitions, *cf.* Commonwealth v. Firemen's Fund
Ins. Co., 369 Pa. 560, 87 A.2d 255, (1952) (payments to be a fire patrol not an "obligation"
as used in the retaliatory statute).

\(^{82}\) Farm Bureau Mut. Ins. Co. v. Neel, 55 Dauph. 325, 332 (Pa. C.P., Dauphin County
1945).

treatment which the retaliatory statutes aimed at preventing was not present here and hence retaliation would be improper.\textsuperscript{84} In other words, the application of the retaliatory statute would not have achieved any equalization of burdens between domestic companies of both states doing business in the other state.

The Ohio Attorney General’s Opinion also refused to sanction retaliation on contributions to a fund designed to protect policyholders and claimants from the insolvency of companies writing automobile liability policies or surety bonds in conformity with the Financial Security Act. The funds so collected were in the nature of a “trust,” something apart and separate from the public funds. Ohio had not seen fit to enact such a comprehensive program for the protection of the public against the problem of the uninsured motorist and to retaliate against New York insurers for its program would not, just as in the case of workmen’s compensation insurance, gain equality of treatment for Ohio insurers.

The Pennsylvania case and the Ohio Attorney General’s Opinion interpret the retaliatory statute from a broad purpose concept of what is meant by “taxes, fines, fees, . . . other obligations and prohibitions.” This interpretation is quite proper and necessary if, indeed, the statutes are to achieve their purpose of substantially equalizing burdens.

3. Mutual Retaliation

In computing the representative aggregate burden of the foreign state, care must be taken that it adequately represents the imposition in the other state.

[Retaliatory] statutes are proper and, indeed, necessary, but should be invoked only in cases where the inequitable discrimination is clearly established; otherwise the Insurance Commissioner of the state against which the law is brought into operation will in turn apply the retaliatory law which is undoubtedly at his disposal, and an unreasonable and unjust system of mutual retaliation may be commenced which will do no good to anyone and result in much harm to legitimate business. The purpose of these laws is to equalize the amount of taxes which are required to be paid under different state laws, and not to require the establishment of an equal rate of taxation, or to insist upon the payment of additional amounts as penalties.\textsuperscript{85} Because of the statutes’ harsh retaliatory sanction they should be strictly construed and executed with care, or else mutual retaliation can result. It can be forcibly argued that this requires a state to look fully into the burdens of the other state to determine whether they are greater. Thus, all taxes, fees, fines,

\textsuperscript{84} The system adopted by Ohio in providing workmen’s compensation is based upon public policy aimed at furthering the social welfare of its workmen, and such policy has been recognized not to be an attempt to discriminate against foreign insurance companies, but as an equal prohibition applicable to both foreign and domestic companies.

\textsuperscript{85} Pacific Mut. Life Ins. Co. of Cal. v. State, 161 Wash. 135, 296 Pac. 813, 815-16 (1931). See supra note 60 for an example of mutual retaliation.
penalties and other obligations, prohibitions and restrictions are to be taken into consideration by the commissioner before imposing the retaliatory tax.

IV. PERSPECTIVE: RESULT, EVALUATION AND SUGGESTIONS

A. Survey

A short questionnaire was sent by the author to various insurance commissioners relative to the retaliatory laws of their states. The purpose was to find out the basic operational principles of the statutes, current problems in their application and opinions as to any uniformity in regulation they may have achieved. Basically, the questions asked were:

1. Whether there has been any significant difficulty in applying your retaliatory statute to foreign insurance companies as a result of different methods of taxation in their domiciliary state? (What is intended is not variances in rates, but differences in rate application, as where the other state applies the tax on gross premiums less claims paid, whereas the retaliating state may tax on the basis of gross premiums.)
2. Whether the retaliatory statutes have brought about any significant amount of uniformity between the states relative to treatment of foreign insurance companies?

The result on question one was that eight states reported difficulty compared with eleven which experienced none. The states admitting to difficulty ranged from "some" in Louisiana and Missouri to "quite a bit" in Florida. New Jersey Commissioner Howell stated that the statute is "most difficult to administer but apparently is needed as a deterrent to increases in the taxes imposed on premiums." The Illinois Department of Insurance says: "There is always a certain amount of difficulty in determining the tax and fees assessed by the various states, due to the constant changing of laws and departmental rules." However, they feel that the tax reports required of foreign insurance companies have achieved a relatively simple method of computing retaliatory taxes. Pennsylvania said that the "aggregate principle" has caused several problems. Washington reported that the greatest difficulty was in keeping abreast of the changes in the insurance laws of the various states.

Ohio said that, along with other states, it experienced difficulty in applying retaliatory statutes, and currently, as a result of Indemnity Ins. Co. v. Stowell, was faced with the problem of the level on which to retaliate — city, county, or only state exactions. As the Stowell decision did not make this clear the Ohio Insurance Department requested an opinion from the Attorney General. The Attorney General's Opinion as rendered (discussed earlier) covered only certain local impositions of New York and held that there should not be retaliation for these. This was because New York either allowed the items to be deducted from the retaliatory tax due or the premium tax.

The states which answered "no" to the question concerning difficulty of administration generally qualified it by stating "no particular" or "no significant" difficulty. The reason most states gave for this lack of difficulty was

the fact that foreign insurance companies were required to make a pro forma tax return which takes into account the method of taxation in the domiciliary state. This type of pro forma return varied considerably. The Massachusetts form applied only to premium taxes and merely stated:

Here compute your excise by the identical method and at the same rate used by the state of your incorporation in taxing a like Massachusetts insurance company, or its agents, if doing business to the same extent therein. If the computation is in every respect as above (Massachusetts premium tax rate being 2%), a statement to that effect should be made.\(^9\)

The Louisiana form, which was one of the most comprehensive of those examined, provides separate forms for foreign life and nonlife insurance companies, and takes into consideration, when applicable, such factors as annuity considerations, dividends to Louisiana policyholders, fire department taxes and municipal taxes in determining total taxes and fees payable. Commissioner Hayes of Louisiana said: "The determination of a Louisiana Retaliatory Tax Liability is based upon the aggregate 'cost of doing business' rather than item per item or fee per fee basis." \(^3\) After these forms are filed the computations based on a similar company of the retaliatory state doing business in the foreign state are checked against that state's laws.

Oklahoma, in reply to question one, said that because Oklahoma has a four per cent basic premium tax it seldom has to retaliate and is generally retaliated against. South Carolina also replied that it seldom applied its retaliatory statute as its tax rate was very near the maximum. It added that the statute was applied to brokers’ licenses but the total collected each year was not significant.

Earlier it was stated that a primary purpose of retaliatory statutes was reciprocity: We will treat your insurance companies as you treat ours. If reciprocity were refused and greater burdens imposed, these burdens would be matched by the state in retaliation. The purpose of question two was to determine whether the reciprocity had been accepted by other states; or, is there any apparent trend towards uniformity between the states as to burdens imposed on foreign insurance companies? Only two letters\(^9\) replied that any uniformity had resulted from the retaliatory statutes, while eleven said there was none, or at least no significant uniformity.\(^2\)

Commissioner Knowlton of New Hampshire stated that retaliatory statutes had the effect of pretty well keeping the tax rate constant at two per cent. The reason for this was that state legislatures hesitate to raise the tax rate because they know that domestic companies will be penalized by retaliation in other states. He also said that the statutes were creating some uniformity in connection with the deposit requirements of other states. The State Tax Assessor of Maine, Ernest H. Johnson, who administers insurance taxes, said that he was of the opinion that a "considerable degree of uniformity" has resulted from the statutes and gave the same reason as Commissioner Knowlton.

\(^9\) Form 63-20-NF, Foreign Life Insurance Company Excise Return.
\(^9\) Maine and Missouri.
The strongest statements against any resulting uniformity were those of the Florida and New Jersey commissioners. Florida stated that rather than bringing about any uniformity in the taxation of the various states, they have worked to the contrary. Commissioner Howell of New Jersey replied:

Neither the retaliatory laws nor valiant efforts of a committee of the National Association of Insurance Commissioners which struggled with this problem for several years have brought about any uniformity in the tax laws of the several states. Commissioners and those in Industry who have worked on this problem of uniformity are convinced that it is a hopeless project.

Some of the other states denying any significant uniformity as the result of these statutes did cite the trend towards uniformity in administration of security deposits. (This uniformity is gained by letting the state of incorporation handle the deposit.) Louisiana reported that while some uniformity was seen, it was difficult to tell from what source it stemmed. Arizona said that there was no uniformity among the states.

B. Effectiveness

Because of legislative intent, judicial construction or restricted application by the insurance commissioner the retaliatory statutes of several states are of severely limited scope. In Idaho and New Mexico the retaliatory statutes apply only to licenses for agents or brokers. The North Carolina statute, on the other hand, is a comprehensive one, but because of another statute is rendered ineffective as to taxes, the item generally considered the most important in a retaliatory statute. Mississippi has an unusual statutory practice whereby credit is given domestic companies for taxes paid under the retaliatory laws of other states. This statute takes away the desire of domestic insurers to keep the burdens on foreign insurers at a minimum for retaliation in other states is no detriment to them. The retaliatory statute in Alabama is considered unconstitutional due to prior decisions and an opinion of the Attorney General.

Some statutes are permissive, in that it is up to the discretion of insurance commissioners to impose retaliation. While this eliminates the bothersome problem of having to retaliate on many small items it perhaps leaves too much to the discretion of the busy insurance commissioner, who may find that no retaliation is necessary.

The effectiveness of retaliatory statutes in those states having high burdens is greatly limited, as they cannot retaliate but are generally retaliated against. These are generally states with few domestic insurers and thus are not troubled by the possibility of retaliation and can tax foreign insurers at high rates.

The practical effectiveness of the retaliatory statutes is largely dependent on

94 Miss. Code Ann. § 9537-04 (Supp. 1962). Mississippi does not have a retaliatory law.
95 See supra note 36.
96 Colorado, Kentucky, North Carolina and Washington. These statutes provide that the insurance commissioner “may” impose the same burdens, whereas all other retaliatory statutes read “shall” impose. However, the actions of the insurance commissioners show that “shall” is not as imperative as it would seem. This is due to the difficulties of making any exacting comparison between the burdens of two states. An item which would not fit into an aggregate comparison (for example, security deposits) may merely be considered as a factor in determining whether retaliation is proper.
the degree of enforcement by insurance commissioners. Retaliation is sometimes made only on the basis of the premium tax, giving little or no consideration to other burdens. The comparison of burdens must be an exact one and all factors should be taken into consideration.

C. Suggestions

The greatest problem with retaliatory statutes has been their application. Ideally, the retaliatory statute should try to cover all possible areas of disagreement. Unfortunately, most statutes do not answer questions whether the commissioner is to consider municipal taxes, or what to do if other states allow deductions not permitted in the retaliating state, or just how the respective burdens are to be computed.

It is probable that the similar statutes of Arkansas, California, Florida, Georgia, Montana, Oregon, South Dakota and Utah most completely cover the possible problems that may arise. These statutes state that “the same taxes, licenses and other fees, in the aggregate” and that the same “fines, penalties, deposit requirements or other material obligations, prohibitions, or restrictions of whatever kind, shall be imposed.” This follows the procedure adopted by most commissioners and courts, that is, grouping together in an aggregate figure for comparative purposes the taxes and fees imposed by each state. Also, it allows separate exaction and imposition of like fines, penalties, restrictions, etc., which is the only practical way to compare and retaliate for these burdens. These statutes specifically provide for what is to be done with taxes and fees other than those levied by the state, i.e. city, county, etc. They are deemed imposed within the meaning of the statute and will be considered together with taxes and fees. However, the statute is not applicable to such taxes as personal income or ad valorem, but deductions from premium taxes or other taxes allowed in the other state “on account of real estate or personal property taxes paid” are to be considered in the determination of retaliatory action.

A further question solved by these statutes is whether there must be an insurance company of the retaliating state doing business in the other state. The statutes cover exactions which “are or would be imposed” upon insurers of this state.

The California statute varies somewhat as it has detailed provisions for filing retaliatory tax information returns by insurance companies and the procedure to be followed in assessing the returns for the imposition of retaliatory taxes. Most states having retaliatory statutes require a foreign insurer to submit a retaliatory tax form on which it computes the taxes and fees a company from the retaliating state doing a similar business in the state they are from (the foreign state) would be required to pay. The California requirement of specifically putting this burden on the foreign insurance companies prevents any dispute, although the detailed procedural steps in the California statute would not be adaptable in most states.