South Carolina Law Review

Volume 7 | Issue 2 Article 6

Winter 1954

Regulation of Mail Order Insurance

Lester L. Bates Jr.

NOTES

REGULATION OF MAIL ORDER INSURANCE

I. INTRODUCTION

The problem of effectively regulating unlicensed insurers has long vexed state supervisory officials, the legislatures, and the courts. It is a problem that has not been solved nationally nor is it likely to be solved in the near future. Nevertheless, some significant developments in this field of the law indicate a gradual enlargement of the power of state government over unlicensed insurers.

Only within the last ten years has the general problem of regulating insurance become somewhat untangled. The enactment of Public Law 15 (The McCarran Act)[1] was especially important in that

1. Pub. L. No. 15, 79th Cong., 1 Sess. § 340, (March 9, 1945). "An act to express the intent of the Congress with reference to the regulation of the business of insurance.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Congress hereby declare that the continued regulation and taxation by the several states of the business of insurance is in the public interest, and that silence on the part of Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several states.

Sec. 2. (a) The business of insurance and every person engaged therein, shall be subject to the laws of the several states which relate to the regulation or taxation of such business.

(b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any state for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: *Provided,* That after January 1, 1948, the act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State law.

Sec. 3. (a) Until January 1, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, known as the Federal Trade Commission Act, as amended, and the Act of June 19, 1936, known as the Robinson-Patman Anti-Discrimination Act, shall not apply to the business of insurance or to acts in the conduct thereof.

(b) Nothing contained in this act shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation.

Sec. 4. Nothing contained in this act shall be construed to affect in any manner the application to the business of insurance of the Act of July 5, 1935, as amended, known as the National Labor Relations Act, or the Act of June 25, 1938, as amended, known as the Fair Labor Standards Act of 1938, or the Act of June 5, 1920, known as the Merchant Marine Act, 1920.

Sec. 5. As used in this act, the term "State" includes the several states, Alaska, Hawaii, Puerto Rico, and the District of Columbia.

Sec. 6. If any provision of this act, or the application of such provision to any person or circumstances, shall be held invalid, the remainder of the act, and the application of such provision to persons or circumstances other than

it removed existing doubts as to the right of the states to regulate and tax the business of insurance, and it secured more adequate regulation of such business. Additionally, it set out the province of any federal laws that might exist by providing specifically that the Sherman, Clayton, and Federal Trade Commission Acts should be applicable to insurance after June 30, 1948, ". . . to the extent that such business is not regulated by state law." The insurance companies wanted such legislation because the *South-Eastern Underwriters' Association*[2] decision had just been handed down and there was much doubt as to the actual location of the authority to regulate insurance.

In stating that the individual state had the power to regulate and in trying to make it clear that the federal government was to follow in the future, as it had in the past, the "hands off" policy, the Congress stated:

> From its beginning, the business of insurance has been regarded as a local matter, to be subject to and regulated by the laws of the several states. This view has been fostered and augmented by decisions of the United States Supreme Court for a period of more than seventy-five years, leading to the generally accepted doctrine that the business of insurance was not subject to Federal law.[3]

The states have given concrete evidence of their intent to preserve and maintain their traditional, exclusive jurisdiction in the field of insurance regulation since 1944 when the *South-Eastern Underwriters' Association* decision was rendered. All states seem to have made the important policy decisions as to the lines along which such regulation will be carried in the future, and have, through legislation, outlined during the moratorium period, as provided by Public Law 15,[4] the necessary procedures to guide the administration of these policies.

The retention of state jurisdiction will depend upon the effective-

those as to which it is held invalid, shall not be affected. Approved March 9, 1945."

See in re Sec. 1 of above: Carlisle, *The Silence of Congress*, 3 S. C. L. Q. 142 (1950).

2. 322 U. S. 533 (1944), declaring that interstate insurance transactions are commerce.

3. U. S. Code Cong. Service, 79 Cong., 1 Sess. p. 670 (1945).

4. This moratorium period was a suspension of the application of the Sherman and Clayton Acts for approximately two (2) sessions of the State Legislatures, so that the State and the Congress could consider legislation during that period. Cong. Comments.

ness of the administration of such regulatory policies. To aid the various states in the regulatory policies, the National Association of Insurance Commissioners has established patterns by which the state may form its policies. One example is the important pattern for administrative implementation of rate regulation.

II. STATE CONTROL

The state has power either wholly to exclude a foreign insurance company from doing business within its limits or to impose on the company such terms and conditions as it may deem proper as a condition precedent to its rights to do business within the state.[5] Beyond its borders, however, the state has no jurisdiction.[6]

One method of indirectly discouraging foreign insurers from crossing their home state lines is through retaliatory legislation[7] — that is, statutes which are designed to protect domestic insurance companies from impositions which might be imposed by other states. The practical application of the statutes has been largely in the field of taxation;[8] even though usually phrased in rather broad and general terms, they are to be strictly construed.[9]

Courts have concluded that the retaliatory tax statute will be invoked only when there is a clear showing that a home company has been burdened in a foreign state in excess of the burdens which a foreign company would have in the said home state.[10]

Professor Edwin W. Patterson in his study published in 1927, entitled, *The Insurance Commissioner in the United States,* said:

> It may be confidently asserted that they [Retaliatory Statutes] 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 revenue. At the same time the retaliatory law was a weapon with which to attack the high tariff walls of other states.[11]

This is an excellent way of regulating foreign insurers, but only if the company is "doing business" in the state.

5. Sandel v. Atlanta Life Ins. Co., 53 S. C. 241, 31 S.E. 230 (1897).
6. States cannot forbid interstate ins. N. Y. Life Ins. Co. v. Dodge, 246 U. S. 357 (1918).
7. Davis, *A Review of the Retaliatory Laws,* 6 S. C. L. Q. 221 (1953).
8. OP. ATT'Y. GEN. 158 (S. C. 1935).
9. Metropolitan Life Ins. Co. v. Boys, 296 Ill. 166, 129 N.E. 724 (1920).
10. Massachusetts Mutual Life Ins. Co. v. Hobbs, 163 Kan. 289, 181 P. 2d 512, 12 CCH Life Cases 677 (1947).
11. INS. LAW JOURNAL, p. 108 (Feb. 1953).

III. "DOING BUSINESS" — DEFINED

The authority of a state regulatory body to supervise and control the activities of an insurer stems from the fact that the insurer is "doing business" in the state.[12] The South Carolina Supreme Court has repeatedly held that jurisdiction over foreign corporations exists only where the corporation is "doing business" in South Carolina.[13] The state may not impose its general insurance laws against one not "doing business" in South Carolina nor may the retaliatory legislation be put into effect against such an insurer. Consequently, the problem is to determine exactly what constitutes "doing business" in South Carolina.

As the phrase "doing business" is not defined by statute, we must first look to the decisions of the South Carolina Supreme Court for the proper scope and application of that phrase.

The question as to what constitutes "doing business" in such a manner as to make a foreign corporation subject to service of process has been considered in innumerable cases and in many of these cases the problem was not a simple one, due to the increasing complexity of our industrial society. Hence, the courts have frequently said that each case must depend upon its own facts.

It seems to be the consensus that a corporation, to come within the purview of most statutes prescribing conditions on the right of foreign corporations to do business within the state, must transact therein some substantial part of its ordinary business, which must be continuous to the extent that it is distinguished from merely casual or occasional transactions.[14]

The often cited test for "doing business," as expressed by Mr. Justice Brandeis of the United States Supreme Court, is:

> A foreign corporation is amenable to process to enforce a personal liability, in the absence of consent, only if it is doing business within the State in such manner and to such extent as to warrant the inference that it is present there.[15]

The South Carolina Supreme Court has recognized and applied the "corporate presence" theory. In *Zeigler v. Purity Mills*,[16] the

12. Hoopeston Canning Co. v. Cullen, 318 U. S. 313 (1943).
13. State v. W. T. Rawleigh Co., 172 S. C. 415, 174 S.E. 385 (1933); Wiggins v. Ford Motor Co., 181 S. C. 171, 186 S.E. 272 (1936); Zeigler v. Purity Mills, 188 S. C. 367, 199 S.E. 420 (1938); Deaton Truck Lines Corp. v. Bahson Co., 207 S. C. 226, 36 S.E. 2d 165 (1945); Hoffman v. D. Landreth Seed Co., 220 S. C. 193, 66 S.E. 2d 813 (1951).
14. 12 R. C. L., p. 69.
15. Philadelphia & Reading Ry. v. McKibbin, 243 U. S. 264 (1917).
16. 188 S. C. 267, 199 S.E. 420, (1938).

court quoted with approval from the case of *Bank of America v. Whitney Central National Bank*:[17]

> . . . jurisdiction taken of foreign corporations does not rest upon a fiction of constructive presence, but must flow from the fact that the corporation itself does business in the State in question in such a manner and to such an extent that its actual presence there at the time of service of process is established.

Where a policy of insurance was applied for, issued, and delivered in New York and the only transaction in this state was the mailing of premiums and the receiving of a new premium receipt book, this was not sufficient to subject the insurance company to the jurisdiction of the state courts.[18] This case is illustrative of South Carolina's applying the "corporate presence" theory to determine whether an insurance company is "doing business."

IV. REGULATION WHEN "DOING BUSINESS" — STATUTES

Now that we have determined, to some extent, the yardstick to be used to answer the question of whether an insurance company is "doing business," we must look to the methods used by South Carolina to regulate foreign mail order insurance companies "doing business" in this state. This is accomplished by statute.[19]

The primary mode of regulation is through the issuance of licenses to do business in the state.[20] Of course, if a company is "doing business" and is not licensed, there are severe penalties imposed by statute. If an insurance company is licensed but commits some unauthorized act, the Insurance Commissioner may immediately revoke its license[21] or wait until the existing license expires and refuse to renew.

Another method of regulation is by requiring companies to pay license fees and taxes.[22] Here again we enter the realm of retaliatory legislation. Where a foreign insurance company has sought and obtained the privilege of carrying on its business in a state, it will be regarded, as to the business transacted there, as domiciled and sub-

17. 261 U. S. 171 (1923).
18. Sanders v. Columbian Protective Ass'n., 208 S. C. 152, 37 S.E. 2d 533 (1946).
19. CODE OF LAWS OF SOUTH CAROLINA, 1952 §§ 37-1 to 37-1222.
20. CODE OF LAWS OF SOUTH CAROLINA, 1952 §§ 37-70, 37-110; State v. McMaster, 94 S. C. 279, 77 S.E. 401 (1912).
21. Doyle v. Continental Ins. Co., 94 U. S. 535 (1877).
22. CODE OF LAWS OF SOUTH CAROLINA, 1952 §§ 37-121, 37-124, 37-125.

ject to the same obligations and liabilities as domestic corporations.[23] In addition, South Carolina imposes a premium tax on foreign insurers, though no premium tax is imposed on domestic insurers. This has been upheld by the United States Supreme Court.[24]

An additional facet of regulation is the Insurance Department's requirement that the insurer deposit money, securities, or bonds.[25] It has been held that the Insurance Commissioner may elect any one or a combination of the three above deposits.

V. REGULATION WHEN NOT "DOING BUSINESS"—UNAUTHORIZED INSURER'S ACT

The rules by which the Insurance Commissioner may supervise the regulation of insurance companies "doing business" in this state have been discussed. Now the problem of one *not* "doing business" in South Carolina must be faced.

Prior to 1943, in South Carolina, a foreign insurance company not "doing business" was judgment proof. At this time, the Uniform Unauthorized Insurer's Act was proposed in South Carolina.[26] This act, or as it is now known in South Carolina, the Insurance Law, is a similar, though somewhat improved, version of the original Uniform Unauthorized Insurer's Act.[27] This original act was approved by the National Conference of Commissioners on Uniform State Laws in 1938. It was also recommended and approved by the National Association of Insurance Commissioners and the Section of Insurance Law of the American Bar Association. Five states[28] have adopted a bill similar to the one recommended above. The Insurance Law[29] was, for all practical purposes, an act regulating mail order insurance companies not "doing business" in South Carolina. True, they were not "doing business" in South Carolina but actually they were selling insurance to people in South Carolina and were

23. Cravens v. N. Y. Life Ins. Co., 148 Mo. 583, 50 S.W. 519, 71 AM. ST. REP. 628, 53 L.R.A. 305 (1899), *aff'd* 178 U. S. 389 (1900).

24. CODE OF LAWS OF SOUTH CAROLINA, 1952 §§ 37-122 and 37-124; Prudential Ins. Co. v. Benjamin, 328 U. S. 408 (1946), *affirming* 207 S. C. 324, 35 S.E. 2d 586 (1945).

25. CODE OF LAWS OF SOUTH CAROLINA, 1952, § 37-184; Boynton v. Consolidated Indemnity & Ins. Co., 180 S. C. 270, 185 S.E. 731 (1936).

26. On February 24, 1943, Senator W. P. Baskin of Lee County introduced for the first time in the Senate a proposed law similar to the Uniform Unauthorized Insurer's Act.

27. UNIFORM UNAUTHORIZED INSURER'S ACT, CODE OF LAWS OF SOUTH CAROLINA, 1952, §§ 37-261 to 37-272.

28. Ark., La., N. C., S. C., S. D. Note: Four of the five are deep Southern States.

29. The Insurance Law was drafted by the Honorable D. D. Murphy, who subsequently became the South Carolina Insurance Commissioner, and Senator Baskin.

being permitted to defraud the people by any method to which they might take a fancy.

Formerly, an insurer could say to an insured, or to his beneficiary, in case of a controversy respecting liability under a policy, that the issue between them could be settled in only one of two ways: first, by accepting the insurer's contention, or second, by suing the insurer in its own bailiwick. It takes little imagination to perceive that in such a situation the insured or his beneficiary would be at a distinct disadvantage, especially if the amount involved should be small and the distance great. The coercive influence of such an attitude on the part of an insurer in most cases would result in an insurer having its own way.[30]

By the adoption of the Insurance Law in South Carolina the above situation was virtually eliminated. In this Act an effective provision for the service of process on unauthorized insurers was provided.[31]

30. Storey v. United Ins. Co., 64 F. Supp. 896, 11 CCH LIFE CASES 489 (E. D. S. C., 1946).

31. CODE OF LAWS OF SOUTH CAROLINA, 1952, §§ 10-426 and 37-265:
"§ 10-426. Service of process on unauthorized insurer.
Service of process on the Insurance Commissioner as the agent of an unauthorized insurer pursuant to § 37-265 shall be made by delivering and leaving with the Commissioner or some person in apparent charge of his office two copies thereof and the payment to him of such fees as may be prescribed by law. The Commissioner shall forthwith mail by registered mail one of the copies of such process to the defendant at its last known principal place of business and shall keep a record of all process so served upon him. Such service of process is sufficient if notice of such service and a copy of the process are sent within ten days thereafter by registered mail by the plaintiff's attorney to the defendant at its last known principal place of business and the defendant's receipt or a receipt issued by the postoffice with which the letter is registered, showed the name of the sender of the letter and the name and address of the person to whom the letter is addressed and the affidavit of the plaintiff's attorney showing a compliance herewith are filed with the clerk of the court in which such action is pending on or before the date the defendant is required to appear or within such further time as the court may allow. But no plaintiff or complainant shall be entitled to a judgment by default, a judgment with leave to prove damages or a judgment pro confesso under this section until the expiration of thirty days from the date of the filing of the affidavit of compliance."
"§ 37-265. Commissioner agent for service of process on unauthorized insurers.
The issuance and delivery of a policy of insurance or contract of insurance or indemnity to any person in this State or the collection of a premium thereon by any insurer not licensed in this State, as herein required, shall irrevocably constitute the Commissioner and his successors in office the true and lawful attorney in fact upon whom service of any and all processes, pleadings, actions or suits arising out of such policy or contract in behalf of such insured may be made."
The State in the exercise of its legislative power had the right to define what acts occurring in the State would constitute the transacting of business therein so long as the definition was not arbitrarily unreasonable and did not do violence to the truth. Storey v. United Ins. Co., Note 30, *supra*.

As a practical matter, most insurers will pay a just claim when this method is used. If they do not, and the amount involved is small, the insured will usually "give up." It would not be rare, under these circumstances, for the cost of collecting to exceed the recovery.

Because insurance is vast in its outreach and of an aleatory character — that is, promising much for a little now, upon the happening of a contingency — it is necessary that it be stringently regulated. Further, the insurance policy, the product sold to the public at large, has become an easy trap for the unwary by virtue of its decidedly technical, legal language which few insured care to read and even fewer can understand.

Fortunately for the insured as well as the insurer, few companies are still so unscrupulous as to require strict regulation. Nevertheless, all companies must be regulated and this regulation must be equitable to all. South Carolina has adopted just such legislation in its Unauthorized Insurance Act. This act provided, generally, for the service of process upon such companies transacting business in this state (as set out above); a defense that may be made by such companies; a penalty for the violation of the provisions of the Act; and it made uniform the law regarding this subject.

VI. FEDERAL "REGULATION"

It has been observed that, with the passage of time, regulation by the federal government of the business of insurance will expand and grow far beyond present concepts of such control. This encroachment has been gradual, but in recent years has accelerated. The federal government has, in some circumstances, entered the field of insurance as an insurer.[32] The social security statutes have a direct incidence upon insurance companies and their employees, and further, federal statutes dealing with income and estate taxes bear directly and vitally upon insurance companies, their employees, and policyholders.[33]

It has been advocated by some, this writer not being one, that mail order insurance should also be regulated by the federal government. There is a misconception existing today that the federal government is "regulating" this branch via the Federal Trade Commission; but upon further inquiry it is seen that this Commission is more of a directory organization and cannot regulate by virtue of Public Law 15.[34]

32. Governmental War Risk Insurance upon the lives of persons.
33. 19 APPLEMAN, INSURANCE LAW AND PRACTICE §§ 10741-10809 (1946).
34. See note 1 *supra*.

The Federal Trade Commission is somewhat analogous to a police force rather than a city council. They can make no laws of regulation and can only direct trade practices of mail order insurance companies. In furtherance of the Federal Trade Commission's directory capacity, it, with the co-operation of the National Association of Insurance Commissioners, held a Trade Practice Conference in May of 1949. At that time, proposals for rules were received from all interested parties in a public hearing. They were given an opportunity to present their views, suggestions, and objections. These views were received by the Commission, given consideration, and twenty-four rules regarding mail order insurance were promulgated by the Conference. The rules apply to advertising and sales promotion of all kinds of insurance offered by companies selling without agents licensed in the state of sale. The violation of these twenty-four rules were considered unfair methods of competition; and, since March 5, 1950, these rules have been enforced.

VII. CONCLUSION

There is certain to be more regulation of the insurance business. The day of unfettered, uncontrolled mail order insurance is at an end, and the time may soon come when mail order insurance will no longer be permitted, and when all insurers must be licensed in each state in which they solicit insurance. If the states are not successful in dealing with the problem of adequate regulation of mail order insurers, the federal government will have no alternative but to take over, for the public will demand and receive from government — state or federal — protection against the evils attendant with unauthorized insurance.

The attempts to give the federal government control over mail order insurers were defeated when in 1935, 1941, and 1943, the Hobbs Bills — which would have made it unlawful to use the mails to solicit, negotiate, or effect insurance in states where the insurers were not licensed — were presented to Congress.

There can be improved regulation of mail order insurance through interstate co-operation looking to adoption of a compact or reciprocal agreement among groups of states facing mutual problems and through the adoption by the states of uniform and model legislation. The question as to which of the plans should be attempted first is difficult to answer. As a practical matter, adoption of the uniform laws as recommended by the National Association of Insurance Commissioners should first be attempted. Using these laws as a basis, interstate co-operation could then be practiced.

When speaking of interstate co-operation, it is recommended that an Interstate Insurance Commission be created by formal compact. It would carry both prestige and a degree of permanence that might not result from a more informal agreement. If formal, the state legislatures would be more willing to aid in encouraging the program financially, while the federal government would probably go on record as favoring such a compact. This would give the compact the binding force of federal law as well as state law. It should be noted that one hundred per cent co-operation of the states is not even necessary. It could begin with as few as four states entering into the compact, with, of course, an "open end" provision in order that other states might subsequently be admitted. This Commission could then work toward a reciprocal agreement whereby a state would penalize an insurer domiciled in it for operating in another state via the mails or in any unauthorized manner. By setting up this Interstate Insurance Commission, the states would ultimately be regulating insurance in every phase and would make any further federal regulation or encroachment unnecessary. If the states were to form such a Commission, the consensus is that the federal government would not attempt to interfere even where it had a technical right.

LESTER L. BATES, JR.