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Davis: A Review of the Retaliatory Laws
A REVIEW OF THE RETALIATORY LAWS

Retaliatory laws are those statutes pertaining to insurance which are a part of most of the states' regulatory systems. These laws are a sort of tariff¹ thrown around a state's borders to protect the domestic companies within and to insure fair treatment of these companies in other states. They are also the price of admission for foreign companies seeking to do business in the states.

Their existence dates back at least a hundred years.² While their principal application is in the field of insurance, there are evidences of retaliatory statutes in several other spheres.³ With regard to the insurance statutes there are retaliatory laws in some thirty-seven states today.⁴ The phraseology and effects of these statutes vary from state to state, but their ultimate effect seems clear enough—that is, they are “. . . designed to protect insurance companies from discriminations and impositions which might be made against them by other states.”⁵ A typical statute is that of South Carolina which states:

Whenever the laws of any state of the United States shall require of insurance companies chartered by this state and having agencies in such other state, or of the agents thereof, any deposit of securities in such state for protection of policy holders or otherwise in any payment of penalties, certificates of authority, license fees or otherwise, greater than the amount required for such purposes from similar companies of other states by the then existing laws of this state, all similar companies of such states establishing or having therefore established an agency or agencies in this state shall make the same deposit for like purpose with the commissioner and pay to the commissioner, for penalties, certificates of authority, license fees, filing fee or any other fee, an amount equal to the amount of such charges imposed by the laws of such state upon companies of this State and the agencies thereof.⁶

1. Patterson, E. W., *THE INSURANCE COMMISSIONER IN THE UNITED STATES* (1927).

2. Statutes of New Hampshire (1852), cited in *Haverhill Insurance Company v. Prescott*, 42 N. H. 547, 80 Am. Dec. 123 (1861).

3. Examples are: decedent's estates, registration and taxation of motor vehicles. See "Reciprocal and Retaliatory Statutes", note 43 *HARV. L. REV.* 641 (1929).

4. Leavey, H. H., "Retaliatory Laws in the United States", *INSURANCE LAW JOURNAL* (February, 1953).

5. *Massachusetts Mutual Life Ins. Co. v. Knowlton*, 94 N. H. 409, 54 A. 2d 163 (1947).

6. *CODE OF LAWS OF SOUTH CAROLINA*, § 37-132 (1952).

While it might appear at first glance that such statutes were enacted for revenue measures, the courts in interpreting these statutes have held the tax feature not to be the primary purpose behind the retaliatory law, despite the amount derived therefrom.⁷ In fact, one court has recently declared that the success of the statute depends on how little is collected under its terms rather than how much.⁸ The essential function is generally said to be the prevention of unfavorable discrimination against domestic companies by other states exercising their taxing powers.⁹ As one court has put it, ". . . [t]he so-called retaliatory clauses in insurance statutes are not in fact retaliatory provisions, but are clauses based upon principles of comity, and are designed to create substantial equality of burdens upon foreign and domestic corporations."¹⁰ The object of these laws was defined in another jurisdiction as achieving reciprocity by statute.¹¹

In sharp contrast is another court's opinion which speaks of the object as being retaliatory, not the obtaining of reciprocity by statute, and holding that such retaliatory legislation must be strictly construed.¹² An Ohio court said: ". . . reciprocity expresses the act of interchange of favors between persons or nations; retaliation, that of returning evil for evil, disfavor for disfavor."¹³

In elaborating on the coverage of these laws most courts generally hold that they must be strictly construed¹⁴ and are not to be applied in any situation that is not within the scope of such an enactment. This construction is usually justified on the basis that the laws are penal or quasi-criminal in nature. Nor are these statutes to be invoked until it appears that inequitable discrimination has been clearly established.¹⁵

Constitutionality

It was first thought that retaliatory statutes were unconstitutional,

7. *Pacific Mutual Life Ins. Co. v. Lowe*, 354 Ill. 398, 188 N. E. 436, 91 A. L. R. 788, Ann. 795 (1933).

8. *Commonwealth v. Fireman's Fund Ins. Co.*, 369 Pa. 560, 87 A. 2d 255 (1952).

9. *Home Indemnity Co. of New York v. O'Brien*, 104 F. 2d 413 (6th Cir., 1946).

10. *Employers Gas Co. v. Hobbs*, 152 Kan. 815, 107 P. 2d 715 (1941).

11. *Phoenix Ins. Co. v. Welch*, 29 Kan. 672 (1883). *Bankers Life Co. v. Richardson*, 192 Cal. 113, 121 Pac. 586 (1923).

12. *Metropolitan Life Ins. Co. v. Boys*, 296 Ill. 166, 129 N. E. 724 (1920).

13. *State ex rel Atty. Gen. v. Fidelity & C. Ins. Co.*, 49 Ohio St. 430, 31 N. E. 658, 162 L. R. A. 611, 34 Am. St. Rep. 573 (1892).

14. *Bankers Life Ins. Co. v. Richardson*, note 10 *supra*; *Metropolitan Life Ins. Co. v. Boys*, note 12 *supra*.

15. *Massachusetts Mutual Life Ins. Co. v. Knowlton*, 94 N. H. 409, 54 A. 2d 163 (1947).

and as such they were attacked on several different grounds.¹⁶ The objection that the retaliatory laws violated the constitutional provision for equal protection of the laws was disposed of by the holding that this tax was in reality a license fee imposed on foreign corporations for doing business in the state, and that until a corporation qualified by meeting this condition it is not a ". . . person within the jurisdiction of the state to which the clause as to equal protection of the laws would apply."¹⁷ A subsequent argument was made that such laws were unconstitutional as delegating the retaliating states' legislative power to the legislature of the state being retaliated against. The answer generally made to this contention is that it is a valid use of the legislative power to enact a law which is made dependent upon a contingency.¹⁸ One state court did sustain this argument in finding its statute unconstitutional.¹⁹ The contention was made that the law levies different fees on different members within the same class, but this has been rejected.²⁰ Another defense raised was that the taxes paid were in violation of the constitutional requirements of equality and uniformity. The courts have in all decisions overruled this objection.²¹

It was believed that if insurance contracts ever became subject to the laws of interstate commerce, the retaliatory laws among the different states would be declared unconstitutional.²² Prior to 1944 insurance was not commerce according to the United States Supreme Court.²³ In a historic reversal, the Court said that insurance transactions were commerce and when conducted across state lines were interstate commerce.²⁴ This decision had tremendous repercussions, for, until this time, governmental regulation of the insurance industry had been exercised by the state under the ruling that insurance was not subject to interstate commerce. All this past history of experiences in control and supervision seemed lost. Congress inter-

16. "Constitutionality, Construction, Operation and Effect of Retaliatory Statutes Against Foreign Corporations Doing Business Within State", 91 A. L. R. 795 (1934).

17. *Fire Association of Philadelphia v. New York*, 119 U. S. 110 (1886), affirming 92 N. Y. 311, 44 Am. Rep. 380 (1883).

18. *Home Ins. Co. v. Swigert*, 104 Ill. 653 (1882).

19. *State v. Fireman's Fund Ins. Co.*, 223 Ala. 134, 134 So. 858, 77 A. L. R. 1486 (1931).

20. *Home Insurance Co. v. Swigert*, note 18 *supra*.

21. *State ex rel Baldwin v. Insurance Co.*, 115 Ind. 257, 17 N. E. 574 (1888); *Clay v. Dixie F. Ins. Co.*, 168 Ky. 315, 181 S. W. 1123 (1916), overruling *Western & S. L. Ins. v. Comm'n.*, 133 Ky. 292, 117 S. W. 376 (1909); *Commonwealth v. Fireman's Fund Ins. Co.*, 369 Pa. 560, 87 A. 2d 255 (1952).

22. "Retaliatory Taxation of Insurance Companies". 27 VA. L. Rev. 686 (1941).

23. *Paul v. Virginia*, 8 Wall (U. S.) 168 (1868).

24. *U. S. v. South-Eastern Underwriters Association*, 322 U. S. 533 (1944).

vened the next year by passing the McCarran Act²⁵ which provided, in effect, for the restoration of governmental controls to the states. In the interim there was uncertainty as to the status of insurance regulation. Many states attempted to relinquish their controls by equalizing taxes between foreign and domestic insurance companies²⁶ under an anticipated federal interference. This threat was dissipated, however, by another Supreme Court decision in which the Court held that South Carolina could impose a tax upon a foreign insurance company as a condition for doing business within the state, even when no tax was required of the domestic companies.²⁷ Following on the heels of this decision came several insurance cases²⁸ before the Court in which the constitutionality of the retaliatory tax statutes was sustained. As a result of the McCarran Act and these later cases, the states once more had the support and the authority to continue regulation and taxation of the insurance business.²⁹

Mechanics

The necessary events which invoke the use of the statute may arise in a variety of ways, depending, of course, on the state statute. It may be merely a law passed in another state.³⁰ Since these laws presuppose that there are two states involved, namely the state retaliating (R) and the state retaliated against (A), there must necessarily be three parties involved, the third being the insurance company or companies caught in the middle. In order for A state's insurance company to be admitted to state R, the restrictions imposed by the legislature of state A would have to be compared to those of State R. This comparison may be done by either of two methods, the aggregate, or the item-by-item comparison. The aggregate method is a compilation of the total burdens imposed by a state, including taxes, fees, charges, licenses, etc. The item-by-item approach is merely a comparison of one particular item between the two states involved. Some states require the use of the aggregate method by statute.³¹ State R's insurance commissioner will accordingly conduct the comparison and if state A's restrictions, taxes, and impositions

25. 59 Stat. 34, c. 20; 15 NSCA, §§ 1011-1015 (1945).

26. Ekern, G. L., "The Regulation of Insurance", *INSURANCE LAW JOURNAL* (June 1951).

27. *Prudential Insurance Company of America v. Benjamin*, 328 U. S. 408 (1946).

28. *In re Insurance Cases*, 328 U. S. 822 (1946).

29. Freedman, Warren, *RICHARDS ON THE LAW OF INSURANCE*, § 50 (5th Ed. 1952).

30. *Phoenix Insurance Company v. Welch*, 29 Kan. 672 (1883).

31. *ILLINOIS INSURANCE CODE*, § 444.

total more than state R's, or if any comparable item is more severe, depending upon the method employed, then the insurance company seeking admittance from state A will be taxed that difference.³²

Interpretations vary as to what items and restrictions should be included in these comparisons. Among the more generally included items are: deposit of securities for the protection of policy holders, penalties, licenses, premium taxes, and various charges. Whether municipal taxes should be included is an unsettled question, although the present tendency seems to be to include this item in comparison.³³ This issue will be considered in connection with the next section of this note.

Present Problems

The retaliatory laws have raised many interesting and complicated problems which have had widespread ramifications. It is to be kept in mind in dealing with these applications of retaliatory laws that not only are there two governments involved, but others also are vitally interested in their decisions. None of these controversies are ever distinct and isolated since each state is peculiarly affected by another state's actions, and, of course, insurance companies domiciled in each respective state are also vitally affected.

One recent problem arose when the Ohio legislature passed a law permitting the state to monopolize the workmen's compensation insurance business in the state. Its effect was to exclude all private companies whether they be foreign or domestic insurers. An immediate reaction came from Pennsylvania where Ohio companies were writing workmen's compensation insurance. The Pennsylvania Insurance Commission decided to invoke the state's retaliatory law and deny licenses to the Ohio companies on the ground that Ohio's action of excluding Pennsylvania's companies came within the meaning of the word "prohibition", specifically mentioned in the pertinent statute. On appeal to a reviewing court, the order was reversed. The court was of the opinion that the act of Ohio did not constitute a prohibition since Ohio accords no favoritism to the domestic companies nor any discrimination against foreign insurers. In discussing the interpretation of the statutory term "prohibition", the court thought that even though the Ohio framers intended a literal construction of that term in the statute, still it was not within the spirit or intention of retaliatory law.³⁴ The legislature, apparently dissatisfied with the

32. *Employers Casualty Co. v. Hobbs*, 149 Kan. 774, 89 P. 2d 923 (1939).

33. *John Hancock Mutual Life v. Pink*, 276 N. Y. 421, 12 A. 2d 529 (1938).

34. *Farm Bureau Mutual Automobile Ins. Co. v. Neel*, 55 Dauph 325 (Pa. 1945).

ruling, in the session following the decision amended the statute in such a way that companies coming from states with such monopolistic workmen's compensation acts would be denied licenses in Pennsylvania. This feeling later died down and a subsequent amendment was passed in the legislature to restore the statute to its original form.

Whether municipal taxes should be included within retaliating impositions is a subject of recent litigation in several states and the courts are divided on the point. The jurisdictions which hold that it should be included in retaliatory calculations go on the assumption that municipalities are political subdivisions of the state³⁵ and that the taxes by these bodies can be connected to the state's program through the authority of the state's enabling act.³⁶ In contrast is a recent Massachusetts decision which holds that municipal taxes should not be included in the state's burden because these payments of taxes are conditions of doing business in these cities but not in the state.³⁷ Connecticut, New Jersey, and Maryland have gone so far as to pass statutes to insure that municipal taxes be included in these retaliatory provisions.

Another problem which has been the source of litigation is the passing by a state of a tax or license which affects life insurance companies. Would this imposition be considered by a retaliating state as affecting all insurance companies coming from the former state or just the life insurance companies? To be kept in mind are the applicable statutes which generally read ". . . from similar companies from other states." One state has answered this by saying that such a situation applies only to like companies.³⁸ There are states that have broadened their statutes to require retaliation against all insurance companies regardless of the line engaged in by the company. Such statutes could prove to be catastrophic if their results were carried to an extreme.

Conclusions

After a hundred years or more of experience with retaliatory laws, what can be said for their achievements? There seems to be no doubt that such laws are generally believed to be necessary since they are enacted in over three-quarters of our states. Whether they have obtained their objectives, which was said to be the equalization of

35. *Life & Casualty Ins. Co. v. Coleman*, 233 Ky. 350, 25 S. W. 2d 748 (1930).

36. *John Hancock Mutual Life v. Pink*, note 33 *supra*.

37. *Fireman's Fund Ins. Co. v. Commissioner*, 325 Mass. 386, 90 N. E. 2d 668 (1950).

38. *Fidelity & Deposit Co. v. Brown*, 92 Vt. 390, 104 Atl. 235 (1918).

taxes payable and prevention of discrimination, is uncertain. It can be said, however, that these laws are potent, whether in use or not, and it is not to be believed that, because there seems to be a scarcity of litigation nowadays concerning such laws, they have suddenly fallen into obscurity. Their latent authority defies such an opinion.

The constitutionality of the retaliatory statutes has been bitterly contested, especially on the grounds that they were in violation of the equal protection of the laws and were an unlawful delegation of legislative power. But with few exceptions their constitutionality has been sustained. After the *South-Eastern Underwriters Association* decision, state retaliatory laws unquestionably impeded interstate commerce and were invalid until Congress passed the McCarran Act permitting the states to continue to regulate and tax the business of insurance, even though it was interstate commerce.

In determining the operative features of the retaliatory laws special attention should be given to the precise wording of the statute. In several cases one word has played a key part. For instance, the words "prohibition",³⁹ "obligations"⁴⁰ and several other such words have called for special interpretation by the courts. There is definitely a burden upon the insurance commissioner to fully understand another state's theory and practice before resorting to the use of these retaliatory laws.⁴¹ The method of the computation must be carefully selected so as not to prejudice any of the parties and to make it possible to stay within the confines of the statutes. Two methods of comparison have been used by the different insurance commissioners, namely the aggregate and the item-by-item methods of computation. The aggregate method has enjoyed the widest use.

The present problems illustrate the character of the controversies throughout the country. The action may be over the construction of a statute, the imposition of a tax or fee, or may represent a new legislative enactment which has as its purpose the exclusion of certain types of policies. Exclusion, or "prohibition," constitutes one of the most serious threats in invoking the retaliatory statutes. Through the years there have been cases where the entire business from one state has been excluded from doing business in another.⁴² The cases have represented in varying degrees the type of discrimination which is so repugnant to the commerce clause,⁴³ no matter how forthright

39. *Farm Bureau Mutual Automobile Insurance Company v. Neel*, Note 34 *supra*.

40. *Commonwealth v. Fireman's Fund Ins. Co.*, Note 21 *supra*.

41. Note 4 *supra*.

42. *Talbot v. Fidelity and Casualty Co.*, 74 Md. 536, 22 Atl. 395 (1891).

43. *S. C. Highway Dept. v. Barnwell Bros.*, 303 U. S. 177 (1937).

or ingenious.⁴⁴ Fortunately not many cases involving retaliatory statutes go to this extent.

What can be said for the continued use of these laws looking back over a century of application, litigation, and experience? Can it be said that the retaliatory statutes are necessary to any state's regulatory systems and control and that they are really beneficial to the domestic insurers and the general public? There can be little doubt that this poses a very difficult question, especially since these laws have become an integral part of our regulatory system. That is not to say, however, that their continued existence is beyond question or that the present day situation lacks any need for reform. We have progressed through these laws from a stage of isolated states with high tariff barriers thrown around them for the protection of domestic insurers to a modern-day development of interstate cooperation created by the vast and complex needs of a constantly changing society. Whether the retaliatory laws are to survive will depend greatly on this continued cooperation among the states and the judicial sanction left to their use by the courts.

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44. *Best and Co. v. Maxwell*, 311 U. S. 454 (1940).