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Wallace C. Tyser Jr.

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Antitrust—Insurance—Compulsory Rating Bureaus

In *Allstate Ins. Co. v. Lanier*,¹ North Carolina's statutory scheme requiring all insurance companies selling automobile liability insurance to adhere to state rates initiated by a compulsory rating bureau was upheld.² Plaintiffs, five large insurance companies doing twenty-nine percent of the total business in North Carolina, argued that because the North Carolina statute restricted competition by prohibiting lower premium rates, the statute had been pre-empted by the Sherman Act³ and the McCarran-Ferguson Act.⁴

In 1869 in *Paul v. Virginia*⁵ the United States Supreme Court held that the business of insurance was not commerce and subsequent decisions were consistent with this holding. Thus, insurance was not subject to congressional control under the commerce clause and consequently, the states regulated and taxed the business.⁶ But in *United States v. South-Eastern Underwriters Ass'n*,⁷ where there was concerted action and an agreement which fixed rates and commissions of agents, boycotts to coerce non-members to join

¹ 361 F.2d 870 (4th Cir. 1966), *cert. denied*, 385 U.S. 930 (1966).

² For the entire scheme, see N.C. GEN. STAT. §§ 58-246 to -248.8 (1965), as amended, N.C. GEN. STAT. § 58-248 (Supp. 1965). Specific provisions under attack in the principal case are N.C. GEN. STAT. § 58-247 (1965) (membership in a bureau a prerequisite to writing automobile liability insurance) and N.C. GEN. STAT. § 58-248.2 (1965) (forbidding issuance of rates not in conformity with rates made and filed by the rating bureau, but allowing for the charging of a higher rate if such rate is charged with the knowledge and written consent of both the insured and the Commissioner). Other significant sections are N.C. GEN. STAT. § 58-248 (Supp. 1965) (providing for approval or disapproval of the proposed rates from the compulsory bureau by the insurance commissioner within ninety days after submission) and N.C. GEN. STAT. § 20-309 (Supp. 1957) (requiring automobile liability insurance as a prerequisite to registration).

³ 26 Stat. 209 (1890), as amended, 15 U.S.C. §§ 1-7 (1964).

⁴ 59 Stat. 33 (1945), as amended, 15 U.S.C. §§ 1011-15 (1964).

⁵ 75 U.S. (8 Wall.) 168 (1869). Later cases were *New York Life Ins. Co. v. Deer Lodge County*, 231 U.S. 495 (1913); *Hooper v. California*, 155 U.S. 648 (1895). See generally SAWYER, *INSURANCE AS INTERSTATE COMMERCE* (1945), [hereinafter cited as SAWYER]; Powell, *Insurance as Commerce*, 57 HARV. L. REV. 937 (1944).

⁶ Although in 1944 there was state statutory regulation of rate-making in two-thirds of the states, private rate-making was not really effectively controlled. Kimball & Boyce, *The Adequacy of State Insurance Regulation: The McCarran-Ferguson Act in Historical Perspective*, 56 MICH. L. REV. 545, 546-52 (1958) [hereinafter cited as Kimball & Boyce]. See also SAWYER at 38-40.

⁷ 322 U.S. 533 (1944).

S.E.U.A., and control of ninety per cent of fire and "allied" lines, the United States Supreme Court held that insurance was subject to federal control under the commerce clause, noting that: "No commercial enterprise of any kind which conducts its activities across state lines has been held to be wholly beyond the regulatory power of Congress under the Commerce Clause. We cannot make an exception of the business of insurance."⁸ However, the court found a more flexible conception of federal-state relationship than was present in *Paul v. Virginia* because the federal regulation (the Sherman Act) did not exclude state regulation.⁹ The court said: "The argument that the Sherman Act necessarily invalidates many states laws regulating insurance we regard as exaggerated. Few states go so far as to permit private insurance companies, without state supervision, to agree upon and fix uniform insurance rates."¹⁰

Nevertheless, many feared that the foundations of state regulatory and taxing systems had been shaken,¹¹ notwithstanding a statement to the contrary by Attorney General Biddle.¹² Specifically, insurance men feared that state regulation that permitted rate-making would be declared invalid because in conflict with the Sherman Act; and state officials feared the invalidity of taxes as a burden on interstate commerce.¹³ This fear was ill-founded because *Gibbons v. Ogden*¹⁴ had held that state regulation of interstate activities was not proscribed by the commerce clause standing alone, but only when Congress had acted pursuant to the commerce clause. But much confusion was evident about the status of insurance regulation and insurance companies pressed for congressional legislation that would exempt insurance from federal antitrust laws and authorize continued state regulation.

⁸ *Id.* at 553.

⁹ See Note, 44 COLUM. L. REV. 772, 777 (1944).

¹⁰ 322 U.S. at 562.

¹¹ See Note, 46 MINN. L. REV. 1088 (1962).

¹² 90 CONG. REC. A3359, A3360 (1944).

¹³ See Kimball & Boyce at 553-54. For the specific reasons given by insurance people that state laws should remain effective, see Dirlam & Stelzer, *The Insurance Industry: A Case Study in the Workability of Regulated Competition*, 107 U. PA. L. REV. 199, 201-02 (1958) [hereinafter cited as Dirlam & Stelzer].

¹⁴ 22 U.S. (9 Wheat.) 1 (1824). Later, the United States Supreme Court ruled that as long as Congress had not pre-empted a field, the states were free to regulate. *Robertson v. California*, 328 U.S. 440 (1946). The *Robertson* case upheld state regulation of unadmitted insurers and unlicensed agents. The court held that state power to regulate insurance did not depend on the McCarran-Ferguson Act.

To clarify matters and to insure the existence of state laws which regulate insurance, Congress passed the McCarran-Ferguson Act,¹⁵ a compromise between those who wanted Congress explicitly to overrule the *South-Eastern* decision and those who felt that Congress and the states could adjust to the situation with appropriate legislation.¹⁶ Clearly, the purpose of the act was to plot the boundaries between state and federal regulation of insurance.¹⁷ Its stated purpose was that the "continued regulation and taxation by the several states of the business of insurance is in the public interest . . ."¹⁸ and, therefore, insurance "shall be subject to the laws of the several states. . ."¹⁹ A three year moratorium was declared to enable the states to enact legislation regulating insurance.²⁰

Sections 2(b) and 3(b) draw the boundary: the former provides that the "Sherman Act . . . shall be applicable to the business of insurance to the extent that such business is not regulated by State law";²¹ the latter provides that "nothing contained in this chapter shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation."²²

Section 3(b) appears to be the result of congressional fears that the practices revealed in *South-Eastern* would arise again, although clearly, the Sherman Act would already be applicable under the *South-Eastern* decision since no question of state regulation was present in that case. Justice Black, speaking for the court, said, in reference to existing state regulation: "No states authorize combinations of insurance companies to coerce, intimidate and boycott competitors and consumers in the manner here alleged. . ."²³ The language of section 3(b) appears to incorporate Black's language.

¹⁵ See Note, 46 MINN. L. REV. 1088, 1090 (1962) citing 23 CHI.-KENT L. REV. 317 (1945) for a detailed history of the McCarran-Ferguson Act.

¹⁶ See 91 CONG. REC. 1480-81 (1945).

¹⁷ Allstate Ins. Co. v. Lanier, 242 F. Supp. 73, 85 (E.D.N.C. 1965).

¹⁸ 59 Stat. 33 (1945), 15 U.S.C. § 1011 (1964).

¹⁹ 61 Stat. 448 (1947), 15 U.S.C. § 1012(a) (1964).

²⁰ 61 Stat. 448 (1947), 15 U.S.C. § 1013(a) (1964). United States v. Insurance Bd., 144 F. Supp. 684 (N.D. Ohio 1956) held that the Sherman Act was applicable during the moratorium.

²¹ 61 Stat. 448 (1947), 15 U.S.C. § 1012(b) (1964).

²² 61 Stat. 448 (1947), 15 U.S.C. § 1013(b) (1964). There is no lack of precedent for this "exemption" from antitrust. For a listing of statutory exemptions from federal antitrust laws, see PHILLIPS, PERSPECTIVES ON ANTITRUST POLICY 301-11 (1965).

²³ 322 U.S. at 562.

Any attempt to apply the Sherman Act to the business of insurance must, therefore, be justified by the absence of state regulation or the existence of abuses enumerated in 3(b).

In the principal case the plaintiffs did not argue that the Sherman Act had been violated by North Carolina or that the state had not regulated the business of insurance, but that the North Carolina regulatory scheme had been pre-empted by section 3(b) of the McCarran-Ferguson Act. The reason for this argument is clear. In *Parker v. Brown* the United States Supreme Court said:

We may assume for present purposes that the California prorate program, [the regulatory scheme in question], would violate the Sherman Act if it were organized and made effective solely by virtue of a contract, combination or conspiracy of private persons, individual or corporate. . . . The state in adopting and enforcing the prorate program made no contract or agreement and entered into no conspiracy in restraint of trade or to establish monopoly but, as sovereign, imposed the restraint as an act of government which the Sherman Act did not undertake to prohibit.²⁴

Specifically, this has been interpreted to mean that the Sherman Act does not apply to state regulation of insurance.²⁵ Thus, plaintiffs argued that *Parker* could be distinguished from the principal case in that, while in *Parker* there was an attempted *application* of antitrust laws to the state activity in question, here was a *pre-emption* of state law because of a violation of section 3(b) of the McCarran-Ferguson Act.²⁶ In other words, section 3(b) denotes a limitation on the *Parker v. Brown* doctrine by making the Sherman Act pre-eminent in areas of boycotts, coercions, intimidations, even where the state had regulated.

Whether there has been a pre-emption depends upon congressional intent. Specifically, plaintiffs argued that section 2(b) stand-

²⁴ 317 U.S. 341, 350, 352 (1943).

²⁵ See, e.g., *Miley v. John Hancock Mut. Life Ins. Co.*, 148 F. Supp. 299 (D. Mass. 1957), *aff'd mem.*, 242 F.2d 758 (1st Cir. 1957), *cert. denied*, 355 U.S. 828 (1957); *North Little Rock Transp. Co. v. Casualty Reciprocal Exch.*, 85 F. Supp. 961 (E.D. Ark. 1949), *aff'd*, 181 F.2d 174 (8th Cir. 1950), *cert. denied*, 340 U.S. 823 (1950); *Insurance Co. of North America v. Insurance Comm'n*, 237 Miss. 759, 116 So. 2d 224 (1959).

²⁶ (Emphasis added.) Plaintiffs further noted that the regulation in *Parker* actually conformed to the federal Agricultural Marketing Act of 1937 and the dispute was therefore between two federal statutes; thus, the case did not involve a federal-state conflict as is present in the principal case. Brief for Appellants, pp. 34-38, *Allstate Ins. Co. v. Lanier*, 361 F.2d 870 (4th Cir. 1966).

ing alone would give states *carte blanche* to regulate without fear of federal antitrust application. But section 2(b) is limited by section 3(b) which asserts the supremacy of the Sherman Act where there is "coerced" restraint of trade, whether private or state, because unless this is so, the language of the act is redundant since antitrust legislation is already applicable under section 2(b) to the extent the state has not undertaken regulation. Thus, section 3(b) denotes something further, pre-emption of state laws which establish "coercion" in restraint of trade.²⁷ North Carolina contended that the two sections do not conflict; state regulation operates as a substitute for the Sherman Act, except that it is always applicable to private boycott, coercion, etc., not to "state coercion" because Congress did not intend to create a new area of Sherman Act application beyond *Parker v. Brown*.²⁸

The court in the principal case rejected plaintiffs argument:

²⁷ Evidences of this congressional intent are the following:

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

91 CONG. REC. 1480 (1945).

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

H.R. REP. No. 143, 79th Cong., 1st Sess. 2 (1945).

Plaintiffs also point out that Congress did not establish compulsory rating bureaus for the District of Columbia. Brief for Appellants, pp. 26-27, *Allstate Ins. Co. v. Lanier*, 361 F.2d 870 (4th Cir. 1966). For the general argument of the plaintiffs, see Bergson, *Regulation v. Competition*, 1956 INS. L.J. 703, 706-07.

²⁸ Evidences of this congressional intent are the following: "The antitrust laws do not conflict with affirmative regulation of insurance by the States such as agreed insurance rates if they are affirmatively approved by State officials." 91 CONG. REC. 1479 (1945) (President Roosevelt writing to Senator Radcliffe, quoted by Senator Pepper).

A state law relating to taxation, a law relating to regulation, for insurance, the fixing of rates, or the fixing of the terms of a contract of insurance, which might under some definition of monopoly be monopolistic, would be permitted under the pending bill; but if the State undertook to authorize a boycott, a coercion, or an intimidation, or an agreement to do any one of those three things, then it would be clearly void. . . .

91 CONG. REC. 480-81 (1945) (remarks by Senator Ferguson). Thus, it appears that North Carolina makes no distinction between private and compulsory bureaus, arguing that Congress intended to allow the states this discretion, whether or not such later practice might actually be monopolistic.

[W]e find no merit in the distinction suggested by appellants between the injunction sought in *Parker v. Brown* and the declaration of pre-emption sought here. The central question in both cases is whether a program of regulation established and actively supervised by a state is subject to the antitrust laws. Absent congressional action departing from the rule of *Parker v. Brown*, the North Carolina statutory plan is clearly valid.²⁹

The court concluded that nothing in the McCarran-Ferguson Act or its history suggest a limitation of *Parker*, that there was no delegation of sovereign authority to a private group or authorization of violations of antitrust laws, and that the purpose of the McCarran-Ferguson Act was to give full support to then existing and future systems of regulation.

While the court is correct in holding *Parker* indistinguishable from the principal case to the extent that the result hoped to be reached in both was to make state regulation ineffective, it does not answer plaintiff's arguments. For example, the court referred to Senator Ferguson to the effect that a state could institute a rating bureau, but the question is not a rating bureau per se, but whether the state can have a compulsory rating bureau with standard rates allowing no deviation in view of section 3(b). Clearly, Congress intended to allow state established rating bureaus and to permit voluntary rate-making among insurance companies. Thus, under the act, insurance companies can voluntarily join together and agree upon rates as long as there is no section 3(b) violation and the state has regulated.³⁰ Further, subsequent to the McCarran-Ferguson Act a large number of the states enacted congressionally approved "all-industry" bills, which provided for non-compulsory rating bureaus subject to commissioner approval of rates.³¹

Perhaps the court was terse because of the more detailed holding of the district court, but the district court misunderstood plaintiffs argument, thinking the suit was an attempted application of antitrust laws to a state.³² Actually, plaintiffs could have argued that

²⁹ 361 F.2d at 872.

³⁰ See notes 27-28 *supra*.

³¹ See Donovan, *Insurance—The Case in Favor of Existing Exemptions from the Antitrust Laws*, 20 FED. B.J. 56, 59-64 (1960). See generally ZOFFER, *THE HISTORY OF AUTOMOBILE INSURANCE RATING* (1959) [hereinafter cited as ZOFFER].

³² The court said: "In effect, the plaintiffs insist the State has committed a violation of the Sherman Act by establishing such stringent controls upon the business of insurance as to foreclose competition. They insist the state

North Carolina had not come up to the level of regulation required to oust federal laws on the grounds that the regulation in question served no function except to permit anti-competitive activities under the guise of state control. However, this attack under section 2(b) would be difficult to prove and would be subject to the *Parker* malady already pointed out, i.e., the Sherman Act does not apply to activities which are controlled and regulated by the state.³³ Further, the courts have shown a reluctance to distinguish between effective and ineffective regulation.³⁴

The principal case appears to be the first time this pre-emption argument has been made. The case is significant because it shows again the problems the courts have in applying the McCarran-Ferguson Act to situations where there is state regulation. The problem is two-fold: whether regulation under section 2(b) is sufficient to oust federal laws, and whether state regulation is still valid in light of the argued pre-emption of section 3(b). The implicit problem is whether state regulation that is ineffective or actually conducive to anti-competitive practices is sufficient to oust federal laws which attempt to maintain competition.

For example, in *North Little Rock Trans. Co. v. Casualty Reciprocal Exch.*³⁵ the court found that Arkansas had regulated within the meaning of the act so that federal antitrust laws were not applicable. Here, private rate-making was effective unless affirmatively disapproved of by the state insurance department. Although evidence of this practice does not of itself show that it was anti-competitive, plaintiffs were not permitted to present evidence that such was the effect of the regulation.³⁶ It has further been held that even if a monopoly existed otherwise, if a state regulated, then this was permissible. In *Miley v. John Hancock Mut. Life Ins. Co.*,³⁷ insurance companies and members of the State Employees' Group Insurance Commission joined and procured an award of an insur-

is *overcontrolling* the business of insurance." *Allstate Ins. Co. v. Lanier*, 242 F. Supp. 73, 83 (E.D.N.C. 1965).

³³ The United States as amicus curiae in the district court insisted the state had failed to come up to the standard of regulation required by the McCarran-Ferguson Act. *Id.* at 83. Clearly, this argument comes under section 2(b) of the act. The United States did not join this appeal.

³⁴ See text following.

³⁵ *North Little Rock Transp. Co. v. Casualty Reciprocal Exch.*, 181 F.2d 174 (8th Cir. 1950).

³⁶ For a criticism of this case, see Note, 60 *YALE L.J.* 160 (1951).

³⁷ 242 F.2d 758 (1st Cir. 1957).

ance contract for employees of Massachusetts. The result was that ninety-five percent of the insurance was allotted to these companies while the low bid was rejected by the state. Other decisions seem also to disregard the effects of state regulation and support the position taken by the court in the principal case.³⁸

However, there may be some concern over this blanket analysis.³⁹ In *Californina League of Independent Ins. Producers v. Aetna Cas. & Sur. Co.*⁴⁰ the court held that while an agreement among defendant companies to fix commission rates could not be attacked under section 2(b) because the state had regulated (i.e., allowed co-operation among insurance companies, but not an agreement to adhere), it was intimated by the court that the activity in question could be attacked under section 3(b). On subsequent amendment of the complaint, the same court held that such a regulation did not displace federal antitrust application, even if such a result did render the McCarran-Ferguson Act "meaningless" in the price fixing area.⁴¹

³⁸ In a situation analogous to the principal case, a compulsory rating bureau which allowed no deviation in rates was upheld. The court relied on *Parker* and applied the "principle" to the state activity. However, the argument presented in this case was not pre-emption, but was an attempted application of antitrust laws. *Insurance Co. of North America v. Insurance Comm'n*, 237 Miss. 759, 116 So. 2d 224 (1959). Where a state law proscribed unfair insurance advertising and authorized a scheme of enforcement, the United States Supreme Court has held that nothing in the McCarran-Ferguson Act supports the argument that there is a distinction between regulation and legislation; the legislation in question, even though the argument was made that the statute had not been crystallized into effective administrative procedures for application to the individual case, was sufficient regulation. *F.T.C. v. National Cas. Co.*, 357 U.S. 560 (1958) (per curiam), affirming 245 F.2d 883 (6th Cir. 1957).

³⁹ In 1959 congressional hearings on this problem, seven senators of a subcommittee investigating antitrust matters concluded:

It is clear that section 3(b) means that State regulation under . . . [the McCarran-Ferguson Act] may not abridge the protection from coercion, boycott, or intimidation afforded by the Sherman Act. The requirement of several State statutes for mandatory bureau membership substantially lessens competition and appears to be in conflict with the McCarran Act. . . . The McCarran Act can certainly not be viewed as justifying the acts of States in compelling all insurers to be members of rating bureaus or requiring that all rates be uniform by legislative fiat.

S. REP. 831, 87th Cong., 1st Sess., pp. 77 (1961). North Carolina's bureau was singled out as clearly reprehensible to the sentiments of the subcommittee and it was suggested by the subcommittee that the Attorney General bring an action to test the validity of the bureau.

⁴⁰ 175 F. Supp. 857 (N.D. Cal. 1959).

⁴¹ *California League of Independent Ins. Producers v. Aetna Cas. & Sur. Co.*, 179 F. Supp. 65 (N.D. Cal. 1959).

Other cases have also shown concern over this problem and allowed antitrust application.⁴²

Particularly relevant is the language the court used in *Monarch Life Ins. Co. v. Loyal Protective Life Ins. Co.*⁴³ where the court had found that the state had "regulated": "In passing the McCarran Act, Congress was attempting to return primary responsibility for insurance regulation to the states; only when a state has not acted, would federal legislation become effective. Section 3(b), on the other hand, was designed to exempt certain types of cases from this general pattern of deference to state regulation; where boycotts, or agreements to boycott were concerned, the federal policy expressed through the Sherman Act to be preeminent."⁴⁴

Rate-making has the dual function of insuring adequacy of the insurance fund (to pay for the obligations of the insurance policy) and fairness of premium charges.⁴⁵ North Carolina's scheme fulfills the former by practically insuring solvency of the insurance companies. But the motorist perhaps pays higher for this protection than he should. It must be noted that this higher rate does not mean North Carolina rates are higher than rates in other states, but that rates perhaps could be lower in North Carolina if the compulsory aspect of the regulation were removed. It is common knowledge that rates in North Carolina are lower than surrounding states and the nation.⁴⁶ It may be argued that one factor causing this lower rate is the fact that jury verdicts of automobile negligence suits in North Carolina are lower than in states with more urban population. Moreover, the rates filed are based on pooled loss experience and the rate agreed upon is likely to protect the less efficient

⁴² State regulation that attempted to regulate the insurance companies extraterritorial activities was considered insufficient to oust federal jurisdiction. *FTC v. Travelers Health Ass'n*, 362 U.S. 293 (1960), *on remand*, 298 F.2d 820 (8th Cir. 1962). Even though regulation of title insurance was of the same nature as a particular provision of federal law, this was not sufficient to oust federal regulation which prevented one title company from purchasing stock of another title company in order to control the market. *United States v. Chicago Title & Trust Co.*, 242 F. Supp. 56 (D.C. Ill. 1965).

⁴³ 326 F.2d 841 (2d Cir. 1963), *cert. denied*, 376 U.S. 952 (1963).

⁴⁴ *Id.* at 844 (dictum).

⁴⁵ Kimball & Boyce at 545-46.

⁴⁶ The national average for minimum 5/10/5 liability coverage was \$69.70 and North Carolina's average was \$50.50 in 1965. South Carolina's was \$58.69 and Tennessee's was \$49.92. Many states were well above the national average. North Carolina Ass'n of Ins. Agents Memo, Feb. 1965, on file with the *North Carolina Law Review*.

member.⁴⁷ This means that the public cannot choose individual coverage, but must take "average" coverage through "average" prices or rates.

As far as the insurance companies themselves are concerned, they are severely limited in competing, even though they can make dividend returns and give better service.⁴⁸ And the argument has long been made that where there is strong state regulation as here, there is a tendency to have rates entangled with politics.⁴⁹ Nevertheless, in some ways the insurance companies collectively benefit. The scheme, which includes compulsory liability insurance, creates greater demand and this, in theory, promotes growth. But if there is greater demand, there are also factors generating greater cost—tendency toward more claims, the assigned risk plan,⁵⁰ and greater administrative costs because of complying with the regulations. Thus, if these factors are present, then all, not only some, of the insurance companies should share in this burden, i.e., by pooling possible losses with the requirement of strict uniformity in rates.⁵¹

Whether North Carolina's plan is of more benefit to the insured than to the insurer is not readily discernible, but it can safely be said that the plan does not effectively promote a significant level of competition. The best result would be one that protects the policyholder while allowing a healthy degree of competition among the

⁴⁷ See HENSLEY, *COMPETITION, REGULATION AND THE PUBLIC INTEREST IN NONLIFE INSURANCE* 87 (1962) [hereinafter cited as HENSLEY]. For the theory of rate-making, see ZOFFER 4-5. For the mechanics of rate-making, see CASUALTY ACTUARIAL SOCIETY, *AUTOMOBILE INSURANCE RATE MAKING* (1961).

⁴⁸ However, this form of competition is largely ineffective because dividend rates are uncertain, the buyer loses the use of his money during the period between premium and dividend, and the seller dislikes this method because it means increased costs. HENSLEY at 96. For an analysis of these ways of competing, see O'CONNOR & DAUER, *AN ANALYSIS OF CURRENT COMPETITIVE AUTOMOBILE INSURANCE PLANS* (1961).

⁴⁹ Although most states have financial responsibility laws, only three states have compulsory liability insurance as a prerequisite to registration: *Massachusetts*, MASS. ANN. LAWS ch. 90, § 1A (Supp. 1965) and MASS. ANN. LAWS ch. 90, §§ 34A-J (1954); *New York*, VEHICLE AND TRAFFIC LAW § 312 (1960); *North Carolina*, N.C. GEN. STAT. § 20-309 (Supp. 1957). Of these states, North Carolina and Massachusetts have laws requiring no deviations from set rates. *Allstate Ins. Co. v. Lanier*, 242 F. Supp. 73, 82 (E.D.N.C. 1965). Texas also prohibits deviation. *Ibid.*

⁵⁰ N.C. GEN. STAT. § 20-276 (1953) provides for an "equitable apportionment among such insurance carriers." Assigned risk is the granting of insurance to those who otherwise would be uninsurable or whose rates would be higher.

⁵¹ See S. REP. NO. 831, 87th Cong., 1st Sess. 68 (1961).

insurers.⁵² Alternatives to the plan in question seem closer to this goal. For example, if rate deviation were allowed, competition would be enhanced.⁵³ Solvency requirements could be established for entry into the market to insure enough reserves for policy coverage.⁵⁴ Assuming the argument that rating bureaus are necessary in the nonlife field is still maintainable (life insurance companies have legally established mortality tables to determine rates), the question is whether compulsory bureaus are necessary.⁵⁵ Most states have non-compulsory bureaus and allow for deviation in rates.⁵⁶ And if in fact such deviation still protects the solvency of the insurers and does indeed promote competition, then the argument for non-compulsory bureaus is persuasive.⁵⁷ Even in this situation, insurance companies are protected against rising costs because the market place would provide for higher rates. Of course, scrutiny of this higher price seems to be in the public interest. Whatever the alternatives may be, if insurance is to be regulated in regard to rates and solvency, this should not be support for broad exemptions from laws such as the Sherman Act which attempt to maintain competition.

Although the primary purpose of Congress was to return responsibility of insurance regulation to the states, the McCarran-Ferguson Act expresses a congressional intention to keep the Sherman Act applicable. The real question is whether the federal policy of competition promoted by the Sherman Act outweighs the policy of allowing wide discretion by the states in their choice of devices to regulate insurance. And viewed in this light, the court's decision is perhaps all that one could expect since courts have generally shown a

⁵² See Michels, *Insurance—The Case Against Broad Exemptions From the Antitrust Laws*, 20 FED. B.J. 66, at 72-73 (1960); Dirlam & Stelzer at 211-15.

⁵³ The North Carolina plan did allow for deviation in rates until the law was amended in 1961 by the present N.C. GEN. STAT. § 58-248.2 (1965).

⁵⁴ See HENSLEY 38-66.

⁵⁵ *Contra*, Brook, *Public Interest and The Commissioners*, 15 LAW & CONTEMP. PROB. 606 (1950).

⁵⁶ The majority of states permit independent filing of rates; other states provide that companies must affiliate with a bureau and attempt to compete. See HENSLEY 97. The bureaus spoken of are usually national, such as the National Association of Independent Insurers, and provide the necessary information for the setting of rates. See ZOFFER 72-73. For a listing of states that have compulsory bureaus and standard rates set by the states in regard to all fields of insurance, see *Allstate Ins. Co. v. Lanier*, 242 F. Supp. 73, 82 (E.D.N.C. 1965).

⁵⁷ For an analysis of how effective rate-making is in the various states, see S. REP. No. 831, 87th Cong., 1st Sess. (1961).

reluctance to allow federal "interference" with state regulation, the underlying thought being that insurance is still basically a matter for local regulation. Since Congress created uncertainties under the act, Congress should remedy them.

WALLACE C. TYSER, JR.

Civil Procedure—Discovery of Liability Insurance

In the recent case of *Cook v. Welty*,¹ the United States District Court for the District of Columbia held that the plaintiff, in an action brought to recover damages for personal injuries arising out of an automobile accident, should be granted discovery by deposition or interrogatories of the existence and coverage of defendant's liability insurance.²

Federal courts, and state courts that have procedural rules similar to the Federal Rules of Civil Procedure are almost evenly divided on whether automobile liability insurance is discoverable. This problem is relevant in North Carolina because a new code of civil procedure has been proposed by the General Statutes Commission and will be considered by the 1967 North Carolina General Assembly.³

Deposition and discovery under the Federal Rules are encompassed by Rules 26 to 37.⁴ Rule 26(b) delimits the scope of this discovery.⁵ It provides:

¹ 253 F. Supp. 875 (D.D.C. 1966).

² *Id.* at 878.

³ GENERAL STATUTES COMMISSION, PROPOSED NORTH CAROLINA RULES OF CIVIL PROCEDURE (1966), [hereinafter cited as PROPOSED RULES.] The Proposed Rules are based on the Federal Rules of Civil Procedure and correspond numerically to rules of the Federal Rules.

⁴ FED. R. CIV. P. 26-37.

⁵ Whether discovery is by deposition (FED. R. CIV. P. 26, 30), interrogatories (FED. R. CIV. P. 33), or by production of documents and things for inspection, copying, or photographing (FED. R. CIV. P. 34), Rule 26(b) delimits the scope of examination both in the Federal Rules and the Proposed Rules for North Carolina. FED. R. CIV. P. 33-34 provide:

[RULE 33] Interrogatories may relate to any matters which can be inquired into under Rule 26(b). . . .

[RULE 34] the court . . . may . . . order any party to produce and permit the inspection and copying . . . of any . . . documents . . . which constitute or contain evidence relating to any of the matters within the scope of examination permitted by Rule 26(b). . . .

Welty involved a motion to compel defendant to respond to questions asked while taking a deposition. It was stipulated by the parties that the issue would also arise if interrogatories covering the same subject matter had been served.