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INSURANCE RATE REGULATION AND THE COURTS: NORTH CAROLINA'S "BATTLEGROUNDS" BECOMES A "HORNBOOK"

ARCH T. ALLEN, III†

Since John Ingram assumed office as the North Carolina Insurance Commissioner in 1973, there has been a running battle in the courts between Commissioner Ingram and the insurance industry over the scope of the Commissioner's rate-making authority. Despite the enactment of the 1977 Rating Law, which was intended to resolve the conflict, the battle in the courts has continued, resulting in a virtual "hornbook" of administrative law doctrine. Mr. Allen examines the "hornbook," noting the North Carolina Supreme Court's plea for further legislation in the area and praising the court for its adherence to the present legislative standards.

I. INTRODUCTION

For nearly three-quarters of a century, there has been some state regulation of insurance rates by statute. The constitutional cornerstone for this regulation was set in 1914 in *German Alliance Insurance Co. v. Lewis*¹ when the United States Supreme Court upheld Kansas' legislative regulation of fire insurance rates² as a proper means of securing rates that would be "reasonable" both to the insurer and the insured.³ Upon that cornerstone grew a structure of state regulation. The structure remained limited in scope, however, covering only certain lines of insurance and having footings in only a few states,⁴ until it was "shaken to its foundations"⁵ in 1944 by *United States v. South-Eastern Underwriters Association*.⁶ The Supreme Court's application of the Sherman Act to insurance industry rate-making promised an extensive rebuilding of the state regulatory structure,⁷ which was accommodated by Con-

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1. 233 U.S. 389 (1914).
2. "The first law to regulate property-casualty rates was adopted by Kansas in 1909." F. CRANE, AUTOMOBILE INSURANCE RATE REGULATION 55 (1961). For a discussion of other, earlier insurance regulation, including anti-compact laws, see id. at 51-54.
3. 233 U.S. at 417.
7. *Id.* at 590 (Jackson, J., dissenting).
gress' 1945 enactment of the McCarran-Ferguson Act exemption of state-regulated insurance from federal antitrust statutes.8

From the new "federal foundation"9 for state regulation, the next decade provided unprecedented developments.10 These included the industry's attempt to become exempt from federal antitrust statutes by advocating state regulation of "the very lifeblood of the industry—what it may sell and the price it may charge."11 After that decade and the commencement of extensive state regulation, one commentator concluded that state regulators "generally have exercised commendable discretion in the administration of the new power granted to them."12

Early exercise of this power caused few court confrontations.13 The call to the courts came more often in the 1960s.14 At the end of that decade, one court recognized the limited role of the judiciary in rate-making: "the making of rates for the future is legislative . . . , not adjudicatory."15 Exercise of that delegated legislative power by state regulators nevertheless can result in judicial review of the regulatory action. Regulatory resistance to rate increases in the inflationary era of the 1970s and early 1980s has increasingly confronted the courts with insurance rate cases.16

Compounding this national trend in North Carolina was the approach to insurance rate regulation taken by John Randolph Ingram as Commissioner of Insurance.17 After one of Commissioner Ingram's first efforts to impose his "own ideas of structural reformation"18 was vacated in a court challenge by insurance companies,19 he publicly denounced the companies for making "North Carolina a battleground rather than a proving ground," warned that they were "fighting a losing battle," and vowed that "we will win the war."20

The subsequent "numerous North Carolina appellate decisions . . . rebuffing

9. Donovan, supra note 5, at 12.
10. Id.
11. Id. at 11.
12. Id. at 14.
13. "There have been relatively few insurance rate cases . . . . The number of cases does seem to be on the rise, since 1950." McCullough I, supra note 4, at 382.
17. The office of Commissioner of Insurance, provided in the state constitution without specified duties, is elective. N.C. CONST. art. III, § 7(1).
the aggressive regulatory outreach" of Commissioner Ingram have provided, according to a former California Insurance Commissioner, "a virtual 'Hornbook' of administrative law doctrine on the scope of exercise of the commissioner's powers with respect to rating processes." North Carolina courts became "beset with the burden of reviewing the Commissioner's disapproval of virtually every" proposed rate increase, and the process was "stalemated by a seemingly endless cycle." Despite the enactment of the North Carolina 1977 Rating Law, reform legislation intended "to eliminate this regulatory impasse," the adjudicatory trend did not abate. The North Carolina Supreme Court in 1980 reversed and vacated four of Commissioner Ingram's orders that disapproved rate increases under the 1977 Rating Law, finding "multiple errors of such magnitude as to make remand futile."

Regardless of any regulatory "shambles," these North Carolina cases do constitute a "virtual hornbook." Indeed, one of the 1980 cases has been called a "virtual new hornbook of administrative law for North Carolina." This survey of those North Carolina cases, while avoiding technical analysis of rate-making and argument over the efficacy of either Commissioner Ingram or any particular statutory scheme of rate regulation, relates the court's responses to these regulatory confrontations; it reviews the "Hornbook."

II. PREFACE TO THE NORTH CAROLINA "HORNBOOK"— A NATIONAL PERSPECTIVE

A. An Overview of Rate-Making

Different lines of insurance are rated separately. Pricing life insurance differs from rate-making for casualty insurance, which in turn varies to some degree among its different lines. Each line of insurance presents its special

21. Roddis, supra note 18, at 393 n.15.
pricing problems,\textsuperscript{30} and texts and expert testimony detail different rate-making methodologies.\textsuperscript{31}

A common industry approach to proposing rates, however, is to allow for underwriting profit apart from investment income. In the first reported case to discuss underwriting profit, \textit{Bullion v. Aetna Insurance Company},\textsuperscript{32} the Arkansas Supreme Court distinguished the underwriting and investment undertakings of insurance companies, and made the classic characterization "that underwriting profit or loss is arrived at by deducting from earned premiums all incurred losses and incurred expenses."\textsuperscript{33} Individual companies or rate bureaus periodically propose prospective rates planned to produce sufficient premium income to provide for anticipated losses and expenses as well as for underwriting profit and contingencies.\textsuperscript{34} Records and statistics are maintained, and according to one commentator, rate levels can be adjusted "by fairly simple arithmetic."\textsuperscript{35} Another commentator finds that "few financial subjects are more complex" than insurance profits produced through the rate-making process.\textsuperscript{36} Nevertheless, "in thousands of cases that attract no particular attention, the above process works smoothly from day to day, and there is no occasion for litigation."\textsuperscript{37}

When litigation over rate-making has arisen, courts generally have avoided technical analyses of methodology and have adopted overviews of the rate-making process. The North Carolina Supreme Court's comments in its earliest encounter with rate-making are typical:

[T]he entire procedure contemplates a looking to the future.

The policy contracts fix in advance the premiums to be charged therefor by the issuing company. For the premium so fixed at the inception of the policy, the company contracts that it will pay [for a property loss, within the policy's limits]. [T]he problem for the rate maker is to determine what amount, collected as premiums at the inception of the policies hereafter to be issued, will enable the company (1) to pay losses to be incurred during the life of such policies


\textsuperscript{31} See, e.g., Order dated December 20, 1979, adopting Proposed Findings and Recommendations, \textit{In re Automobile Insurance Territorial Classifications-Effect on Rates}, California Insurance Commissioner, \textit{reproduced in II ALLIANCE OF AMERICAN INSURERS, AUTOMOBILE INSURANCE COST-BASED PRICING VERSUS SOCIAL/POLITICAL PRICING} (1980). "Many view insurance ratemaking as being a mystical, arcane process which can only be practiced (and/or understood) by the initiated. Actually, the process itself is quite simple although the procedures used can be complicated." \textit{Id.} at 6-7. "Two texts generally recognized as providing a good treatment of ratemaking procedures include . . . C. Kulp & J. Hall \textit{supra} note 29 and G. Michelbacher & N. Roos, \textit{Multiple-Line Insurers, Their Nature and Operation} (1970)." \textit{Id.}

\textsuperscript{32} 151 Ark. 519, 237 S.W. 716 (1922).

\textsuperscript{33} \textit{Id.} at 526, 237 S.W. at 718.

\textsuperscript{34} McCullough I, \textit{supra} note 4, at 382.

\textsuperscript{35} \textit{Id.}

\textsuperscript{36} Loomis, \textit{A Non-Boring Look at Insurance}, \textit{FORTUNE}, March 8, 1982, at 105, 106. Courts also have viewed the process as complex. \textit{See}, e.g., \textit{Insurance Serv. Office v. Whaland}, 117 N.H. 712, 716, 378 A.2d 743, 746 (1977) (court noting "that rate-making is a technical and highly complex process requiring much expertise"). \textit{Id.}

\textsuperscript{37} McCullough I, \textit{supra} note 4, at 383.
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. . ., (2) to pay other proper operating expenses of the company, and (3) to retain a "fair and reasonable profit."  

B. Reasonable Rates and Early Cases

After the United States Supreme Court upheld the Kansas statutory scheme for "reasonable" rates in *German Alliance Insurance Co. v. Lewis*, the Kansas Supreme Court examined the reasonableness of the regulated rates in *Aetna Insurance Co. v. Travis*. A referee had determined that reasonable rates included an allowance for underwriting profit and that five percent of the premiums was a fair underwriting profit. On appeal, the court first split on the meaning of "reasonable." On rehearing, the court restated the question: "Upon what are plaintiffs entitled to make a reasonable profit—the value of their capital stock allocated to this state, or their premiums?" The court, relying on what it deemed to be analogous utility cases, held that proposed profit should be based on present capital and surplus, not on a percentage of premiums. It noted that there was no precedent and that only two other insurance rate cases had reached state supreme courts before 1927. In the earlier of those two cases, *Bullion v. Aetna Insurance Co.*, a statute set the maximum underwriting profit at five percent, thus leaving no controversy over the definition of "reasonable" profit. In the second case, *Aetna Insurance Co. v. Hyde*, the court applied a statute providing for "a reasonable profit" and approved a profit of "five per cent on the underwriting business done, with three per cent additional for conflagration hazard." All three of these opinions implicitly approved the "reasonable" standard.

The sufficiency of the "reasonable" standard was challenged in *State v. Whitman*, a 1928 case concerning the constitutionality of a statute that pro-

41. *Id.* at 816, 257 P. at 338-40.
42. *Id.* at 811, 257 P. at 338.
44. *Id.* at 355, 259 P. at 1071.
45. *Id.* at 356-69, 259 P. at 1071-77.
46. *Id.* at 355-56, 259 P. at 1071.
47. 151 Ark. 519, 237 S.W. 716 (1922).
48. *Id.* at 521, 237 S.W. at 716.
50. 315 Mo. at 128, 285 S.W. at 68.
hibited charging any rate "which is unreasonable or which discriminates unfairly between risks." The Wisconsin Supreme Court upheld the statutory standards, and further held that the legislature may delegate to the Commissioner of Insurance the "power to determine whether rates are unreasonable and discriminatory, and . . . [the] power to establish a reasonable rate."

Courts in other early decisions impliedly approved the "reasonable" standard by applying statutory variations of that theme. Some statutes prescribed an underwriting profit allowance. Others only provided for rates that would "produce a fair and reasonable profit." In all of the early cases except the Kansas Aetna case, however, the underwriting profit approach, rather than return on capital, was specified by statute, agreed to by the parties, or sustained by the courts. Whatever the context or approach, courts concurred that the objective was "reasonableness from the viewpoint of all parties affected."

Although unseen in the early cases, another strand wove through the web of the "reasonable" rate standard. The significance of the standard soon would surpass its role in the delegation of state legislative power and its seeming subscription to the underwriting profit approach. The standard became a thin string that secured state-regulation immunity from federal antitrust statutes.

C. Antitrust and Its Aftermath

To understand rate cases, "it is necessary to trace the history of the business of insurance and the events leading up to the passage of the McCarran Act." Some early cases chronicled the initial, limited state regulation prevailing under the constitutional precedent that the issuance of an insurance policy was not a transaction within the commerce clause. Free from federal

52. 196 Wis. at 476 n.1, 220 N.W. at 931 n.1.
53. Id. at 513, 220 N.W. at 944.
54. See, e.g., New Orleans Real Estate Bd. v. Insurance Comm'n, 177 La. 1091, 150 So. 286 (1933).
antitrust restrictions on commerce, some insurers, especially casualty companies, exchanged information and participated in cooperative rate-making through regional underwriting associations. The Supreme Court in United States v. South-Eastern Underwriters Association overruled that precedent in 1944, effectively preempting state regulation of insurance rates and prohibiting cooperative rate-making by applying the federal antitrust laws to alleged conspiracies to fix insurance rates and monopolize the sale of insurance.

South-Eastern Underwriters caused industry "consternation and confusion." The National Association of Insurance Commissioners proposed Congressional action to restore state regulation of insurance. Enacted essentially as proposed, the McCarran-Ferguson Act effectively exempted the state-regulated insurance business from the key federal antitrust acts by providing that those acts apply "to the business of insurance [only] to the extent that such business is not regulated by state law."

Concern continued, however, and one critic observed that "no state had regulated rates for every coverage or regulated every cooperative activity sufficiently to meet the requirements of the McCarran-Ferguson law." Cooperative rate-making through the exchange of experience data by rating organizations and companies could have been curtailed under the antitrust laws. "Confronted by so great a crisis," the insurance industry, collectively through an All-Industry Committee cooperating with a committee of the National Association of Insurance Commissioners, proposed a model bill for state rate-regulatory legislation. Despite differences among companies and agents over requirements of "prior approval" or "subsequent disapproval" of

64. See Donovan, supra note 5, at 11.
65. 322 U.S. 533 (1944).
66. Id. at 539-53.
67. C. Kulp & J. Hall, supra note 29, at 964.
68. Id.
69. "The Commissioners had proposed exemption of cooperative rate-making when state-regulated, and of certain other cooperative practices, but Congress would not allow this concession." Id.
When we held in United States v. South-Eastern Underwriters Ass'n., 322 U.S. 533, that the modern business of insurance was "interstate commerce," we put it in a category which Congress could regulate and which, if our prior decisions-controlled, could not in some respects be regulated by the States, even in the absence of federal regulation. Congress promptly passed the McCarran-Ferguson Act which provided that the regulation and taxation of insurance should be left to the States, without restriction by reason of the Commerce Clause. Subsequently, by force of the McCarran-Ferguson Act, we upheld the continued taxation and regulation by the States of interstate insurance transactions.

Id. at 452 (citations omitted).
73. See C. Kulp & J. Hall, supra note 29, at 965.
74. Id. at 966.
75. Id.
proposed rates and "bureau" or "nonbureau" rates,\textsuperscript{76} the model legislation succeeded, and within a few years after enactment of the McCarran-Ferguson Act nearly every state had some statutory rate regulation.\textsuperscript{77}

Rate regulation resulting from this history and reflecting the model bill standards has survived antitrust and federal preemption attacks. In the leading case, \textit{Allstate Insurance Co. v. Lanier,}\textsuperscript{78} which arose in North Carolina, the Fourth Circuit Court of Appeals traced this history and held that the bureau-proposed, commissioner-approved mandatory rates resulted from valid state action immune from and not preempted by the antitrust statutes.\textsuperscript{79}

The North Carolina adaptation of the model legislation essentially incorporated the All-Industry Committee standards.\textsuperscript{80} Underlying the standards is the All-Industry Committee's intended "broad discretionary power,"\textsuperscript{81} limited only by the "major substantive rate standards" proposed by the All-Industry Committee and the National Association of Insurance Commissioners.\textsuperscript{82} As an antitrust aftermath, in North Carolina and elsewhere, "[a]ll of the laws, regardless of the words chosen, required that rates be reasonable, adequate, not excessive, and not unfairly discriminatory."\textsuperscript{83}

\textbf{D. Case Interpretation of the Statutory Standards}

Of the few early cases applying the standards, some are especially instructive in illustrating the breadth of the rate-regulators' discretionary powers. In \textit{Jordan v. American Eagle Fire Insurance Co.}\textsuperscript{84} the standards directed the regulator "to adjust rates only after finding existing rates to be excessive, inadequate or unreasonable."\textsuperscript{85} In addition, he had to give consideration "to a reasonable profit."\textsuperscript{86} \textit{Jordan} involved an action to enjoin enforcement of an order fixing fire insurance rates. The order was based upon a purported allowance of 5 percent underwriting profit, but the companies alleged that it would

\textsuperscript{76} "Prior approval" requires the approval of a rate or rate structure by the supervisory official \textit{before} the rate goes into effect. "Subsequent approval" allows insurers and insurer bureaus to file rates effective immediately, subject to the commissioner's right to disapprove within a stipulated number of days. Ultimately, the majority of laws adopted were of the subsequent disapproval type. \textit{Id.}

\textsuperscript{77} More than thirty states enacted laws similar to the model bill. \textit{Id.}


\textsuperscript{79} 361 F.2d at 871-73.

\textsuperscript{80} \textit{Id.}

\textsuperscript{81} C. KULP & J. HALL, \textit{supra} note 29, at 989 (quoting All Industry Comm., Casualty and Surety Rate-Regulatory Bill, Explanatory Memorandum (October 1946)).

\textsuperscript{82} \textit{Id.} (quoting National Association of Insurance Commissioners, Casualty and Surety Rate Regulatory Bill (1946)).

\textsuperscript{83} McCullough I, \textit{supra} note 4, at 381.

\textsuperscript{84} 169 F.2d 281 (D.C. Cir. 1948).

\textsuperscript{85} \textit{Id.} at 289.

\textsuperscript{86} \textit{Id.}
produce an average underwriting loss of 2.5 percent and was thus confiscatory. The United States Court of Appeals for the District of Columbia remanded because the trial court had failed to make a complete determination and findings of fact regarding the alleged confiscation. The court of appeals, however, did not question the statutory standards, and essentially equated them with a constitutional test requiring sufficient revenue for costs "and sufficient return to the equity owner to assure financial integrity of the enterprise, so as to maintain its credit and to attract capital." After expressing concern over the constitutional concepts controlling the confiscation contention, a concern arising from the Supreme Court's conclusions in Aetna Insurance Co. v. Hyde, the court added dictum questioning whether the determination of confiscation should be by consideration of the several companies separately or by the general experience of all of the companies.

That constitutional question and the implicit practical problem for rate-making have survived. Subsequent cases have clarified somewhat the constitutional concept of confiscatory rates, distinct from the application of the statutory standards. The standards have survived application to statutorily-compelled bureau rates made on an aggregate industrywide basis, rates of independent companies, and rates under more recent "open competition" laws. Intertwined in the thread of statutory interpretation, however, is a cord of constitutional concern. As expressed in Massachusetts Bonding & Insurance Co. v. Commissioner, the standards impose "the duty of fixing a rate that lies somewhere between the lowest rate that is not confiscatory and the

87. Id. at 284-85.
88. Id. at 293.
89. Id. at 289.
91. 169 F.2d at 293.
92. "The Jordan case was subsequently settled and the dilemma still remains." McCullough I, supra note 4, at 386.
95. See, e.g., State Farm Mut. Auto. Ins. Co. v. Williams, 192 So. 2d 312 (Fla. 1966).
highest rate that is not excessive."\textsuperscript{98}

In New York's first judicial review of some of the standards, \textit{National Bureau of Casualty Underwriters v. Superintendent},\textsuperscript{99} the Appellate Division noted that the standards lacked "an exact statutory formula for rate-making" and that the regulator "is not restricted to a rigid formula of his own or another's devising nor . . . is he bound to hold rules of past practice immutable."\textsuperscript{100} The New York statute primarily prescribed that rates be "reasonable and adequate."\textsuperscript{101} The Pennsylvania statute interpreted in \textit{Pennsylvania Insurance Department v. City of Philadelphia}\textsuperscript{102} provided for consideration of underwriting profit and contingencies.\textsuperscript{103} The Pennsylvania court affirmed allowance of six percent of proposed premiums for underwriting profit and contingencies, finding that the "figure is one which has customarily been used in Pennsylvania insurance rate-making, and is the amount recommended by the National Association of Insurance Commissioners."\textsuperscript{104} The court rejected an argument that underwriting profit must be calculated by a percentage of invested capital and not by a percentage of premiums, stating that the Kansas \textit{Aetna} case, which applied a return-on-capital approach to insurance rate-making, had been "generally rejected."\textsuperscript{105}

The court in \textit{City of Philadelphia} noted reasons for distinguishing between utility and insurance rate-making and distinguished the Kansas \textit{Aetna} case and two other cases supporting the view that income from the investment of unearned premiums could be included in underwriting profit.\textsuperscript{106} Nevertheless, statutory construction controlled its decision. The court concluded that "it is clear that the legislature did not intend such income to be included in the determination of 'underwriting profit.'"\textsuperscript{107} Noting that the model bill on which the Pennsylvania statute was based "contained only the word 'profit' with a footnote to the effect that the insurance industry recommended the inclusion of the word 'underwriting,'" the court found legislative adoption of "underwriting profit" as "specifically limiting the meaning of the word profit."\textsuperscript{108} The court relied on \textit{Bullion} for the "accepted meaning" of underwriting profit, and distinguished its statutory prescription for "underwriting profit" from the Kansas \textit{Aetna}'s "reasonable" rate.\textsuperscript{109} It also distinguished an early Virginia case involving a statute that referred only to "reasonable"

\textsuperscript{98} \textit{Id.} at 270, 107 N.E.2d at 811.


\textsuperscript{100} \textit{Id.} at 77-78, 174 N.Y.S.2d at 840.

\textsuperscript{101} \textit{Id.} at 76, 174 N.Y.S.2d at 839. A reasonable profit, however, was a factor to be considered in setting a reasonable rate.


\textsuperscript{103} \textit{Id.} at 248, 173 A.2d at 824.

\textsuperscript{104} \textit{Id.}

\textsuperscript{105} \textit{Id.} at 249, 173 A.2d at 824-25.

\textsuperscript{106} \textit{Id.} at 250-51, 173 A.2d at 825-26. The three cases are discussed infra text accompanying notes 109-11.

\textsuperscript{107} \textit{Id.} at 249-50, 173 A.2d at 825.

\textsuperscript{108} \textit{Id.} at 250, 173 A.2d at 825.

\textsuperscript{109} \textit{Id.}
profit and the early Missouri decision in *Aetna Insurance Co. v. Hyde*. Those cases indicated to the court "that the legislature, by adding the word 'underwriting,' intended to exclude consideration of investment income." In *American Druggists' Insurance Co. v. Commonwealth*, the first of three Virginia cases dealing with underwriting profit, the Virginia Supreme Court approved a rate set by the regulatory commission that was based on a formula which included a five percent underwriting profit allowance. The court found that a definite rate-making pattern had long been approved and used in Virginia and noted that a report made after Virginia's 1928 regulatory act was affirmed "in all respects" in the earlier Virginia case distinguished in *City of Philadelphia*. The court in *American Druggists'* noted that the report had produced a formula for establishing rates which included a five percent provision for underwriting profit and contingencies; it appeared "that this formula is the yardstick which the Commission has used since 1928 to determine whether fire insurance rates are excessive, inadequate or unfairly discriminatory." In *Harford Mutual Insurance Co. v. Commonwealth*, the supreme court held that the commission properly disregarded a company's income from investment of unearned premiums and required application of the commission's formula with a percentage factor for profit even though the applicant was a mutual company. The court noted that the approved formula in Virginia for thirty years had included the five percent factor for underwriting profit and contingencies. Later, in *Virginia State AFL-CIO v. Commonwealth*, the court did not discuss the meaning of the standard but held that the commission should consider income from investment of loss reserves as well as from investment of unearned premium reserves as a relevant factor in fixing a reasonable margin for underwriting profit and contingencies. The commission had considered income from investment of unearned premium reserves and had reduced the margin for underwriting profit and contingencies from 5 percent to 4.5 percent to compensate for that

110. *Id.* (citing *Aetna Ins. Co. v. Commonwealth*, 160 Va. 698, 169 S.E. 859 (1933)). See infra notes 113-24 and accompanying text.


112. *Id.* at 251, 173 A.2d at 826.

113. 201 Va. 275, 110 S.E.2d 509 (1959).

114. *Id.* at 277, 110 S.E.2d at 510.

115. *Id.* at 278, 110 S.E.2d at 511 (citing *Aetna Ins. Co. v. Virginia*, 160 Va. 698, 169 S.E. 859 (1933)).

116. See *supra* notes 106-12 and accompanying text. After Virginia enacted its 1928 regulatory act, the regulatory authority issued the 1928 Virginia Corporation Commission Report that was cited in both Virginia cases.

117. 201 Va. at 279, 110 S.E.2d at 511.

118. 201 Va. 491, 112 S.E.2d 142 (1960).

119. *Id.* at 495-96, 112 S.E.2d at 146. The court noted, however, that the income from investment of unearned premiums was so small as not to change the result.

120. *Id.* at 496, 112 S.E.2d at 146.


122. *Id.* at 785, 167 S.E.2d at 329.
income. In remanding the case for consideration of income on the loss reserves as well, the court noted that the commission, not actuaries or other experts, "is charged with the responsibility of fixing a 'reasonable margin for underwriting profit and contingencies.'"

In that same year, 1969, in *In re Insurance Rating Board*, the New Jersey Supreme Court held that earnings from reserves for unearned premiums and for losses were relevant to a court's decision whether to approve increased rates. The court remanded for further proceedings to develop the additional information necessary to determine "the amount an insurer should receive as a reasonable profit." The parties had used five percent of premiums for underwriting profit and contingencies, and the court "wanted to know the origin of the five percent figure and its justification."

Of course, other cases were decided during the three decades separating *South-Eastern Underwriters* and the North Carolina "Hornbook." The cases discussed above, however, are the principal cases from jurisdictions other than North Carolina that applied the model bill standards in decisions before Commissioner Ingram's incumbency. Although the standards were nearly universal, they left much room for companies, commissioners, and consumers to contest regulated rates. The only confines were the courts' concepts of reasonableness.

III. THE NORTH CAROLINA "BATTLEGROUND"

A. Setting The Stage For Battle

Variations of the model bill standards were long applied in North Carolina under separate statutes for bureau-proposed rates, subject to the Commissioner's prior approval, for fire and homeowners, workers' compensation, and automobile liability insurance rates. Other statutes

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123. *Id.* at 781, 167 S.E.2d at 326.
124. *Id.* at 785-86 n.13, 167 S.E.2d at 329 n.13.
126. *Id.* at 22-23, 258 A.2d at 893-94.
127. *Id.* at 21, 258 A.2d at 893.
128. *Id.*
governed other lines,133 and rates for some lines were not subject to commissioner approval or disapproval.134 The statutes were sometimes studied135 and amended,136 but were seldom the subject of judicial review.137 Prior to 1969, only two North Carolina Supreme Court opinions dealt directly with insurance rate regulation.138 Neither questioned the sufficiency of the stan-

135. Early statutes were supplemented by an expanded statutory scheme enacted in 1945, see supra notes 130-33, after a study by a Commission consisting of 15 persons and chaired by Robert H. Wettach, then Dean of the School of Law, University of North Carolina at Chapel Hill. See Report of the N.C. Comm'n on Revision of the INS. LAWS (1945). See also Wettach, The 1945 Revision of the Insurance Laws of North Carolina, 23 N.C.L. REV. 283 (1945). Under the 1945 statutory scheme, the types of insurance subject to rate regulation had been divided into five categories: life insurance; national, fire, and casualty; and miscellaneous insurance. 
dards or addressed appropriate rate-making methodology. In 1969, the North Carolina Supreme Court commented upon the standards in the first of its two rate-case decisions preceding the incumbency of Commissioner Ingram.

The 1969 case, *In re North Carolina Fire Insurance Rating Bureau*, involved the statutory standard that fire insurance rates “will produce a fair and reasonable profit.” Although the sufficiency of the standard was not under attack, some statements by the court concerning the standard became seeds for subsequent controversy and fruit for precedent. The court held that the determination of a “fair and reasonable profit” is a question of fact for the Commissioner:

The ultimate question to be determined by the Commissioner is whether an increase in premium rates is necessary in order to yield a “fair and reasonable profit" . . . . This cannot be determined without specific findings of fact, upon substantial evidence, as to (1) the reasonably anticipated loss experience during the life of the policies to be issued in the near future, (2) the reasonably anticipated operating expenses in the same period, and (3) the percent of Earned Premiums which will constitute a “fair and reasonable profit" in that period.

*In re North Carolina Automobile Rate Office*, a 1971 case, included a discussion titled “Absence of Legislative Standards.” After reciting the statutory standards that automobile liability insurance rates be “reasonable, adequate, not unfairly discriminatory, and in the public interest," Chief Justice Bobbitt noted that the statute gave the Commissioner no guidance for the determination of reasonableness. “In the absence of a legislative formula or standards, the Commissioner has had no alternative but to look to the rate-making procedures recognized in the industry and in other States.” Thus, the rate bureau and the Commissioner adopted the industry view that the reasonableness of a profit was determined by a margin for underwriting profit. The court observed that a five percent margin had been “generally approved in the industry.”

In dissent, Justice Lake, who had authored the court’s 1969 *Fire Insurance Rating Bureau* opinion, stated his view that the standards were sufficient. By analogy to public utility rate-making, he interpreted the standards to mean that rates should be sufficient to pay losses and expenses and to provide “a margin of profit sufficient to attract investors to the insurance business in com-

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140. *Id.* at 30, 165 S.E.2d at 217 (applying former N.C. GEN. STAT. § 58-131.2). See supra note 130.
141. 275 N.C. at 39-40, 165 S.E.2d at 224.
142. 278 N.C. 302, 180 S.E.2d 155 (1971).
143. *Id.* at 313, 180 S.E.2d at 163.
144. *Id.* at 314, 180 S.E.2d at 163 (citing former N.C. GEN. STAT. § 58-248.1).
145. *Id.* at 314, 180 S.E.2d at 164.
146. *Id.* at 315, 180 S.E.2d at 164.
comparison with other businesses of like risk." 147 An underwriting profit margin "can still be determined by the test of what is necessary to attract investors to this business." 148

The two opinions illustrate that it is far easier to recite the "reasonable" standard than "it is to put the statement into practice by formulating such a rate." 149 In formulating proposed rates, the supreme court in the 1969 case held that competent evidence of cost trends, including expert testimony, must be considered. Although the court held that the Commissioner must consider trend evidence, it stated that the Commissioner may determine the credibility and weight of such evidence. 150 In the 1971 decision, despite the majority's evidentiary misgivings, 151 the court affirmed the Commissioner's admission into evidence and consideration of statistical data projecting increased costs and his approval of a future rate increase. 152 Undeterred by admissibility of the statistical data, the dissent found the approved rate increase premised "upon a mere administrative declaration that the old rates are 'inadequate' and the new ones are 'reasonable.'" 153 Prophetically, the dissent discerned that on the same basis the Commissioner could also order a decrease in the rates. 154

Both the 1969 and 1971 cases subsequently were cited as fully setting forth the statutory frameworks and procedures governing regulation of those lines' rates applicable at those times. 155 The court in both cases recognized that rate regulation is an exercise of the state legislative power. "[T]he only power the Commissioner has to fix rates is such power as the General Assembly has delegated to and vested in him." 156 Nevertheless, both deferred to some degree to the Commissioner's judgment: "[T]he Commissioner of Insurance 'is a specialist in the field,'" 157 and, "in making what must be considered in large measure a policy or judgment decision, the Commissioner [has] the benefit of his own continuous study and knowledge of changing conditions." 158

147. Id. at 331, 180 S.E.2d at 174 (Lake, J., dissenting).
148. Id. at 331, 180 S.E.2d at 175.
150. 275 N.C. at 36, 165 S.E.2d at 222.
151. 278 N.C. at 320, 180 S.E.2d at 167. The majority found that much of the documentary evidence summarizing statistical data obtained from insurance companies and other sources would not be admissible under the rules of evidence applicable in a trial court and that some data regarding expenses were insufficient. Nevertheless, the court found the uncontradicted evidence sufficient to support the Commissioner's allowance of a 2.8% rate increase. Id. at 321, 180 S.E.2d at 167-68. The dissent found that the statistical data were clearly admissible even in a trial court under the exception to the hearsay rule for entries made in the regular course of business. Id. at 332, 180 S.E.2d at 175 (Lake, J., dissenting).
152. Id. at 320-21, 180 S.E.2d at 167-68.
153. Id. at 322-23, 180 S.E.2d at 169 (Lake, J., dissenting).
154. Id. at 334, 180 S.E.2d at 176 (Lake, J., dissenting).
156. 278 N.C. at 314, 180 S.E.2d at 164.
157. 275 N.C. at 35, 165 S.E.2d at 221.
158. 278 N.C. at 320, 180 S.E.2d at 167.
In 1971 and 1972 the Commissioner approved increases for automobile liability,159 automobile physical damage,160 and workers’ compensation insurance rates.161 The increases had been proposed in separate filings by the three rating bureaus then in existence. Separate statutory standards applied, including some 1971 amendments making the automobile liability standards more specific and providing for consideration of investment income from unearned premium and loss reserves.162 The state attorney general intervened in the three cases and appealed all three to the court of appeals. The attorney general argued for a return-on-capital approach, relying primarily on the Kansas Aetna case and Justice Lake’s dissent in In re Automobile Rate Office.163 The court of appeals rejected that argument, interpreting each of the statutory standards as providing for the underwriting profit approach.164 The court held, however, that the supreme court’s opinion in Fire Insurance Rating Bureau required the Commissioner to make specific findings of fact, including the percent of earned premiums that will constitute a “fair and reasonable profit.”165 In one case the court added that “a finding without more that the figure of 5% has been generally accepted in North Carolina and throughout the United States for some 20 years would not be sufficient for concluding that 5% is ‘fair and reasonable’ at this time.”166 Absent a statutory directive to consider investment income, the court clearly concluded that the phrase “fair and reasonable” refers to underwriting profit and does not include investment income.167

As 1973 began, the court of appeals was confident that the major “insurance rate making procedures in this State [had] been fully discussed.”168 Of course, the two supreme court opinions169 and the three court of appeals cases170 established precedent on many points under those procedures, but many undecided issues roamed within the realm of reasonableness. The ruler of the realm until 1972, regarded by the court of appeals as an “able and conscientious Commissioner,”171 was replaced on January 5, 1973, by Com-

163. See supra text accompanying notes 40-45 & 147-54.
164. 18 N.C. App. at 27, 195 S.E.2d at 574; 16 N.C. App. at 729, 193 S.E.2d at 435; 19 N.C. App. at 271, 198 S.E.2d at 581.
165. See supra text accompanying note 141.
166. 16 N.C. App. at 728, 193 S.E.2d at 435.
168. 18 N.C. App. at 26, 195 S.E.2d at 574.
169. See supra notes 139 & 142.
170. See supra notes 159-61.
missioner Ingram. 172

B. The Early Battles Over Motor Vehicle Classification Plans

In the first appellate case involving Commissioner Ingram, the *Merit Classification Case*, 173 hearings had been held by his predecessor regarding proposed changes in private passenger automobile liability insurance classifications. The basic rate-making process requires rate classification plans, which "serve to assure that risks with similar characteristics receive comparable price treatment." 174 Statutory amendments had mandated a particular rate classification plan and a safe-driver plan. 175 The hearings had been recessed and no order had been filed. 176 After holding office a few months, Commissioner Ingram held a brief hearing and soon thereafter issued orders. 177 One order abolished all existing classification plans for automobile liability insurance and the existing safe-driver plan, promulgating instead Commissioner Ingram's new "merit classification plan" under which all insureds would pay the same base rate but would be subject to surcharges for certain criminal motor vehicle violations. 178 The court of appeals reversed and vacated that order as unsupported by substantial evidence. No evidence had been received by the Commissioner regarding the new classification plan. "The plan was not placed in the record during any of the proceedings before the Commissioner. The plan was first seen as an exhibit attached to [the order promulgating it]." 179 Nor was the plan based on appropriate findings of fact. "Administrative declarations, however sound and noble their purpose may be, are not findings of fact." 180

Soon after his "merit classification plan" was vacated, Commissioner Ingram gave notice of and held hearings on classifications "based on the male sex and age of operators or owners of the automobiles insured" or, simply stated, young male drivers. 181 His resulting order that "no premium rate for private passenger automobile liability insurance . . . shall be based in whole or in part on the age and sex of a person insured thereunder" 182 was reversed

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173. *Id.*


176. 19 N.C. App. at 550-51, 199 S.E.2d at 481.

177. *Id.*

178. *Id.* at 549, 199 S.E.2d at 480.

179. *Id.* at 551-52, 199 S.E.2d at 482.

180. *Id.* at 552, 199 S.E.2d at 482.


182. *Id.* at 476, 209 S.E.2d at 412.
in the *First Age and Sex Case.*\(^{183}\) A statute had prescribed a particular plan\(^{184}\) under which Commissioner Ingram conceded "the age and sex of insured drivers are essential classification criteria."\(^{185}\) The court held that "by ordering the establishment of a premium rate classification plan not based in whole or in part on the age and sex of drivers, the Commissioner has exceeded the authority delegated to him by the Legislature."\(^{186}\)

The court of appeals in the *First Motorcycle Case,*\(^{187}\) applying the same statutes as the *First Age and Sex Case,* vacated Commissioner Ingram's order eliminating the existing classification plan and held that he exceeded his statutory authority in replacing it with "a one-class plan for all motorcycle operators."\(^{188}\) The vacated order contained no finding that all motorcycle drivers, regardless of age or sex and regardless of the type of motorcycle, "constitute a reasonably homogenous group sharing essentially the same hazard for liability insurance purposes."\(^{189}\)

Those 1973 and 1974 court of appeals cases, which the supreme court declined to review,\(^{190}\) chronicled Commissioner Ingram's early classification case losses on the "battleground." Following his vow to "win the war,"\(^{191}\) however, he persisted. Having failed in court, he prevailed in the General Assembly, which in 1975 enacted classification provisions\(^{192}\) for which he proclaimed pride in draftmanship.\(^{193}\) The court referred to the 1975 statutes as "House Bill 28."\(^{194}\) Those provisions and Commissioner Ingram's orders under them first reached the supreme court in *House Bill 28 Motorcycle*\(^{195}\) and *House Bill 28 Automobile.*\(^{196}\) The new provisions "in essence . . . sought to prohibit the use of age or sex as criteria" for automobile classifications and to insure that a larger proportion of premiums reflected "poor driving records" or "inexperienced drivers."\(^{197}\)

*House Bill 28 Automobile*, decided in late 1977, marked two turning points. First, it narrowed the supreme court's earlier holdings, including the

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183. *Id.* at 475, 209 S.E.2d at 411.
185. 23 N.C. App. at 478, 209 S.E.2d at 413.
186. *Id.*
188. *Id.* at 228, 210 S.E.2d at 444.
189. *Id.* at 227, 210 S.E.2d at 443.
197. *Id.*
Energy Crisis\textsuperscript{198} and 1974 Automobile Liability Filing\textsuperscript{199} cases discussed below, which interpreted the scope of the Commissioner's authority under the earlier statutes.\textsuperscript{200} Of the supreme court's five earlier holdings concerning orders of Commissioner Ingram, four had reversed his orders.\textsuperscript{201} Second, it focused on "the new proceedings" that had begun under the 1977 Rating Law and had arguably rendered moot the proceeding in House Bill 28 Automobile.\textsuperscript{202} The earlier statutes had been either repealed or substantially amended by the 1977 Rating Law,\textsuperscript{203} and a new classification plan had been filed by the new rate bureau.\textsuperscript{204} Indeed, as the court noted in a footnote, after the court's opinion was prepared but before it was filed, the Commissioner had approved the 1977 classification filing.\textsuperscript{205} The new statutory scheme was a significant turning point in North Carolina.\textsuperscript{206} The 1977 scheme substantially amended the automobile classifications of House Bill 28 but continued its age and sex prohibitions,\textsuperscript{207} perhaps prophesying Commissioner Ingram's approval of the 1977 filing. Apart from any significance of the age and sex prohibitions, House Bill 28 Automobile presents a precedential analysis of the insurance rate problems confronting the courts.

Its relatively simple holding vacated Commissioner Ingram's orders as exceeding his statutory authority by being "contrary to the provisions of House Bill 28" and lacking the "requisite specific findings of fact."\textsuperscript{208} The court described the then-existing liability insurance classifications and subclassification for a safe-driver plan, the mandates of House Bill 28, the plan proposed by the rating bureau, the plan proposed by Commissioner Ingram's staff, and the plan, "essentially his staff's," adopted by Commissioner Ingram.\textsuperscript{209} The physical damage coverage plans presented a novel and perplexing situation, but the court described the existing and proposed plans,


\textsuperscript{200} See infra text accompanying notes 235-62.


\textsuperscript{202} 293 N.C. at 394, 239 S.E.2d at 66.


\textsuperscript{204} 293 N.C. at 394 n.35, 239 S.E.2d at 50.

\textsuperscript{205} Id. at 394 n.35, 239 S.E.2d at 66 n.35.

\textsuperscript{206} See infra notes 263-65 and accompanying text.


\textsuperscript{208} 293 N.C. at 393, 239 S.E.2d at 65.

\textsuperscript{209} Id. at 375, 239 S.E.2d at 55.
including the plan adopted by Commissioner Ingram.\textsuperscript{210} The adopted plans involved surcharges based, not on insurance statistics, but on drivers' license statistics maintained by the state department of motor vehicles.\textsuperscript{211} The orders adopting the plans recited Commissioner Ingram's finding that the rating bureau plans were "unreasonable" and that the adopted plans met the statutory standards of being "reasonable, adequate, not unfairly discriminatory."\textsuperscript{212}

In attacking the orders, the rating bureau and companies followed a formula that had been used to challenge earlier orders in the Energy Crisis and 1974 Automobile Liability Filing cases. They argued that the orders exceeded statutory authority, did not contain adequate findings of fact, and were not supported by substantial evidence.\textsuperscript{213} On the statutory authority issue, the court carefully applied its earlier cases under the old rating laws and found that Commissioner Ingram had not exceeded his statutory authority because "the orders constitute an [authorized] approval in part" of the rating bureau proposal.\textsuperscript{214} The court concluded, however, that Commissioner Ingram had "exceeded his authority under House Bill 28 by establishing five instead of four primary classes in his collision order."\textsuperscript{215} The sufficiency of the findings issue was "left hopelessly confused," and because of "the evidentiary conflict compounded by the ambiguity" in the orders, the court held that "there are certain fundamental factual issues which need to be... resolved by the Commissioner as a prerequisite for any kind of meaningful judicial review."\textsuperscript{216} The issues to be resolved included "ultimate factual findings" following the 1969 formulation of In re North Carolina Fire Insurance Rating Bureau. The court stated that "simply" finding that the plans fit the familiar statutory standards, "standing alone, is insufficient."\textsuperscript{217} Regarding the evidence supporting the Commissioner's order, the court found "nothing sacrosanct about so-called 'insurance statistics,'" and held that evidence of motor vehicle license statistics was acceptable.\textsuperscript{218}

House Bill 28 Motorcycle, decided in early 1978, vacated Commissioner Ingram's 1975 order in which "he in effect abolished all primary [motorcycle] classifications on the basis of use and all safe driver type subclassifications, both prescribed in [House Bill 28]."\textsuperscript{219} The order established only two premiums: "one premium for small motorcycles and another for large motorcycles."\textsuperscript{220} The rating bureau contended that House Bill 28, although abolishing classifications based on age or sex, continued use classifications and a safe-driver subclassification plan and covered motorcycles as well as

\textsuperscript{210} Id. at 375-78, 239 S.E.2d at 55-56.
\textsuperscript{211} Id. at 372-77, 239 S.E.2d at 54-56.
\textsuperscript{212} Id. at 378-79, 239 S.E.2d at 57.
\textsuperscript{213} Id. at 385-91, 239 S.E.2d at 61-64.
\textsuperscript{214} Id. at 388, 239 S.E.2d at 62.
\textsuperscript{215} Id. at 391, 239 S.E.2d at 64-65.
\textsuperscript{216} Id. at 390, 239 S.E.2d at 64.
\textsuperscript{217} Id. at 391, 239 S.E.2d at 64.
\textsuperscript{218} Id. at 384, 239 S.E.2d at 60.
\textsuperscript{219} 294 N.C. at 64, 241 S.E.2d at 327.
\textsuperscript{220} Id.
automobiles. Stating that interpretation of House Bill 28 was "the principal and dispositive legal question," the court found the bill's "primary purpose . . . was obviously to abolish age and sex as criteria for classifying motor vehicle—both automobile and motorcycle—insurance." The court analyzed the bill's legislative history, including substantial amendment by the 1977 Rating Law and found that it "mandated" and "continues to mandate . . . not just any plan abolishing age and sex classification criteria but a plan which complied with the revised classifications as set out in the statute." The court found that Commissioner Ingram "both in this case and in [House Bill 28 Automobile] failed to promulgate a plan which complied with those revised classifications.

Because new rates had gone into effect pursuant to the 1977 Rating Law, the court decided that a remand in either House Bill 28 Motorcycle or House Bill 28 Automobile "would be futile." The orders were vacated because "rates are made prospectively, not retroactively." Nevertheless, the court observed that if evidence establishes that existing rates are excessive, the "Commissioner has the power under present provisions . . . upon proper proceedings, to reduce these rates." The classification cases appropriately ended on this note about rate reductions.

C. The Annual Battles Over Automobile Liability Insurance Rates

Commissioner Ingram's predecessor, partially approving a 1971 filing for increased automobile liability insurance rates based upon the most current available statistics, found as a fact "that the actual North Carolina underwriting experience data shows [sic] that the companies sustained an underwriting loss on automobile liability insurance in North Carolina for the years 1967, 1968 and 1969." He approved an 8.9 percent increase, reduced by reason of federal price control regulations to 7.4 percent. The increase would not have become effective until after an affirmance of the Commissioner's approval by the court of appeals in 1973, after Commissioner Ingram had taken office. In connection with his "merit classification plan," Commissioner Ingram ordered that the increase not be effected until the plan and new rates thereunder were implemented. In an additional holding, the court of appeals in the

221. Id. at 63, 241 S.E.2d at 326.  
222. Id. at 64, 241 S.E.2d at 327.  
223. Id.  
224. Id. at 68-69, 241 S.E.2d at 329-30.  
225. Id. at 70, 241 S.E.2d at 331.  
226. Id. at 70-71, 241 S.E.2d at 331.  
227. Id. at 70, 241 S.E.2d at 331.  
228. Id. at 71, 241 S.E.2d at 331.  
229. Id. at 72, 241 S.E.2d at 332.  
232. 19 N.C. App. at 549, 199 S.E.2d at 480.
Merit Classification Case vacated that order. "The present Commissioner . . . was without authority to suspend or disapprove the rates which had been duly approved and ordered into effect, in the absence of notice, hearing and appropriate findings of fact, all as required by" the applicable rating law. That decision came in late 1973, during the Arab oil embargo and the energy crisis.

The Energy Crisis Case concerned the first of the then-required annual filings by the automobile liability insurance rating bureau with Commissioner Ingram. The rating bureau's 1973 filing for its 183 member companies, based upon their experience for two years, proposed an average increase of 9.9 percent, amended to reflect the effectiveness of the earlier proposal for an average of 2.3 percent. Commissioner Ingram, after indicating that the energy crisis "could well result in a rate reduction," ordered reductions averaging 13.2 percent. He relied upon testimony of an economist who had formulated "original ideas as to how to fit the effect of the energy crisis into the ratemaking formula as it has been used in North Carolina since 1961." The supreme court vacated Commissioner Ingram's rate-reduction orders, holding them to be in excess of his statutory authority and unsupported by substantial evidence. Relying on In re North Carolina Automobile Rate Office and Allstate Insurance Co. v. Lanier, the court found "the intent of the General Assembly to vest the Rate Office with primary authority to fix, adjust and propose rates subject to the approval or disapproval of the Commissioner of Insurance." The court held that the Commissioner did not have "blanket authority . . . to consider immediate emergency situations such as the energy crisis and enter interim rate orders based thereon." The court added that before the Commissioner could order a revision under the statute, "he must first make a determination that the rates charged or filed are excessive, inadequate, unreasonable, unfairly discriminatory, or otherwise not in the public interest." In doing so, he must consider the statutory statistical prescriptions. Finding that "the gist of this controversy involves the selection of rate-making techniques that will properly account for the effects of the energy crisis," the court held that the statutory "authority and duty . . . lies primarily in the Rate Office." The "original ideas" of "an expert statistician" admittedly "not an expert in insurance rate making" were held not to support a conclusion that

233. Id. at 553, 199 S.E.2d at 482.
234. See infra text accompanying notes 235-47.
236. Id. at 194, 214 S.E.2d at 99.
237. Id. at 198, 214 S.E.2d at 102.
238. Id. at 195, 214 S.E.2d at 100.
239. Id. at 205, 214 S.E.2d at 106.
240. Id. at 202, 214 S.E.2d at 104.
241. Id. at 203, 214 S.E.2d at 105 (emphasis in original).
242. Id.
243. Id.
244. Id. at 204, 214 S.E.2d at 106.
the rating bureau "was not proceeding with due diligence in dealing with relevant factors spawned by the energy crisis." Noting that "the insurance rate-making process is an attempt to predict the future by relying in large measure upon what has occurred in the past," and analogizing its earlier approval of experience trending by "expert testimony" in *Fire Insurance Rating Bureau*, the court held that, in the absence of appropriate expert testimony for trending, Commissioner Ingram's conclusions were not supported by substantial evidence. In essence, "there was no expert testimony by anyone knowledgeable in the field of insurance ratemaking to support either the use of . . . 'original ideas' for rate-making purposes" or purported trending using "two months experience in the energy crisis as a foundation for both a rate change and a change in rate-making procedures."

The next annual automobile filing was reviewed by the supreme court in early 1977 in *1974 Automobile Liability Filing*. Questions of statutory authority centered on the same statutes applied in the *Energy Crisis Case*, which was distinguished in *1974 Automobile Liability Filing*. By ordering a 23.8 percent reduction for one coverage for which a 13.3 percent increase had been proposed, and without resorting to other statutory authority, the court found that Commissioner Ingram exceeded his statutory authority. The court upheld, however, the Commissioner's approval of a 2.5 percent increase for another coverage, for which a 22.5 percent increase had been proposed. By granting the 2.5 percent increase, the Commissioner "approved in part the filing" and thus "acted within his statutory authority if his findings and order were supported by material and substantial evidence." In answering that question, the court carefully considered the evidence, which included testimony of an insurance expert called by Commissioner Ingram's staff that formed the principal basis for the Commissioner's findings of fact. The court found substantial evidence to support Commissioner Ingram's finding, on the "ultimate question" under the *Fire Insurance Rating Bureau* formula, that the 5 percent allowance for underwriting profit and contingencies should be reduced by the 2.3 percent of earned premium reflecting annual return from investment of unearned premium and loss reserves, for a fair and reasonable underwriting profit of 2.7 percent of earned premium. In its review of a five percent supplementary reduction, the court concluded that certain "fast track" data regarding the energy crisis could be considered, but that the supporting testimony, described by the witness as "qualitative information which

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245. *Id.* at 204-05, 214 S.E.2d at 106.
246. *Id.* at 205-06, 214 S.E.2d at 106-07.
247. *Id.* at 206, 214 S.E.2d at 107.
249. *Id.* at 18, 231 S.E.2d at 876.
250. *Id.* at 12, 231 S.E.2d at 873.
251. *Id.*
252. *Id.* at 24, 231 S.E.2d at 880.
253. *Id.* at 16, 231 S.E.2d at 875. *See supra* text accompanying note 141.
254. *Id.* at 15-16, 231 S.E.2d at 875-76.
should be looked upon with great care,” was not sufficient.255 The court emphasized the lack of probative force in this evidence, and pointed to the witness’ “questionable deductions” and “dubious conclusion.”256 Regarding an argument that Commissioner Ingram used “a different methodology in trending past loss experience to a future date,” the court analyzed the evidence and applied the expert-witness rule of Fire Insurance Rating Bureau.257 “Procedures and methods for trending” need not “be frozen,” and the court found that the expert’s testimony constituted substantial evidence.258 In carefully considering the evidence on trending and analyzing Commissioner Ingram’s conclusions, the court acknowledged his authority “to accept . . . the evidence and testimony,” but faulted the application.259 For instance, the court found that the adopted trend “failed to accomplish” the statutory purpose of establishing “on the basis of trends in past loss experience . . . the losses to be anticipated during the future period in which the proposed rates will be in effect.”260 Moreover, “by not applying trend factors to the unallocated loss adjustment expenses, the Commissioner failed to provide for future inflationary increases in many expense items.”261 In reaching those holdings, the court observed that “rate-making is a process which envisions a projection of past experience into the future to provide for a reasonable profit and nothing more. However, such a prognostication can hardly be expected to achieve exact precision.”262

D. The Turning Point of the Battle—1980 Insurance Case I

The first automobile filing under the 1977 Rating Law led to the first supreme court case actually applying the new statutory scheme. In 1980 Insurance Case I263 the court found that recent rate history, which included the “typical case” of Commissioner Ingram’s disapproval of a rate filing, led to “a stalemate” under the “prior approval” statutory requirements.264 In response, the 1977 Rating Law effected three “major changes,” as summarized by the court: (1) change “from a ‘prior approval’ system to a ‘file and use’ system,” consistent with “the general trend”; (2) division into “essential and nonessential lines,” the former with mandatory bureau rates and the latter with either voluntary bureau rates or individual company rates, but both under the same “basic standard . . . —rates are not to be ‘excessive, inadequate or unfairly discriminatory’ ”; (3) recoupment of losses sustained by the Reinsurance Facility, the statutory scheme for dealing with high-risk insureds in automobile lia-

255. Id. at 19, 231 S.E.2d at 877.
256. Id. at 20, 231 S.E.2d at 877.
257. Id. at 20-22, 231 S.E.2d at 878-79.
258. Id. at 22, 231 S.E.2d at 880.
259. Id. at 24, 231 S.E.2d at 880.
260. Id. at 23, 231 S.E.2d at 879.
261. Id. at 25, 231 S.E.2d at 880.
262. Id. at 26, 231 S.E.2d at 881.
264. Id. at 388-89, 269 S.E.2d at 555.
bility insurance. Commissioner Ingram had disapproved the 1977 filing for an overall increase of 6 percent, “capped” by statute at that level although a 23.2 percent increase was otherwise indicated. The court found “multiple legal errors.” First, the court found error in the Commissioner’s use of statutory authority and procedure, arising in part from his requirement that the filing data be audited. In its second, third, and fourth groups of holdings, all concerning the statutory standards for rates, the court rejected Commissioner Ingram’s conclusion that rates were “excessive” unless they reflected income on invested capital, rejected his use of a capital asset pricing model in determining the margin of allowance for underwriting profit, and approved a ten percent Facility-coverage differential found by Commissioner Ingram to be “unfairly discriminatory.” The 1980 Insurance Case I holdings are summarized in the following four subsections.

1. Statutory Authority and Procedure

Predictably and consistent with precedent under the prior rating laws, the court held that even under the 1977 file-and-use plan the filing proponent has “the burden of showing the reasonableness of the proposed increase.” It agreed that the Commissioner need not prove the unreasonableness of the filing. After a filing is made, however, fundamental fairness and statutory provisions mandate that, “when the Commissioner knows prior to the giving of public notice ‘in what respect and to what extent he contends such filing fails to comply with the requirements of [the 1977 Rating Law],’ then he must give the specifics in his notice of public hearing.” Because the Commissioner “knew the data was not audited” and because “the verification methodology was consistent with that employed in previous years,” which “had not required audited data,” he failed to give the required notice “with respect to

265. Id. at 389-91, 269 S.E.2d at 556-57. The opinion in 1980 Insurance Case I, the “new hornbook,” is preceded by an index and is organized superbly. It deals with general administrative law, and is certain to receive comprehensive commentary. See, e.g., Markham, A Powerless Judiciary? The North Carolina Courts’ Perceptions of Review of Administrative Action, 12 N.C. CENT. L.J. 21, 25 (1980). Here, however, commentary centers on rate regulation.


267. 300 N.C. at 392, 269 S.E.2d at 557.

268. Id. at 394, 269 S.E.2d at 558.

269. Id. at 396-420, 269 S.E.2d at 558-72.

270. Id. at 440-48, 269 S.E.2d at 584-88.

271. Id. at 448-53, 269 S.E.2d at 588-91.

272. Id. at 429, 269 S.E.2d at 577.


274. 300 N.C. at 454-55, 269 S.E.2d at 592.

275. Id. at 455, 269 S.E.2d at 592.

276. Id. at 457, 269 S.E.2d at 593 (quoting N.C. GEN. STAT. § 58-124.21(a) (Cum. Supp. 1981)).
the reliability of the data" in disapproving the filing. On the specificity deemed appropriate for a disapproval order, the court added dictum that the "statute requires the Commissioner to be mathematically specific in rejecting proposed rate increases and future orders should specify 'wherein and to what extent' the proposed filings are deemed improper."277

Commissioner Ingram's primary ground for disapproving the 1977 filing was that "unaudited data in an insurance rate-making hearing is unreliable and incredible."279 First, the court held that Commissioner Ingram acted within his statutory authority in requiring "that data submitted in an insurance rate-making case be audited."280 The court recognized the "established rule," said to be "in accord with well-established principles," that "the Commissioner has, in the regulation of insurance rates, only such authority as has been conferred upon him by statute."281 The cases applying the rule to restrict the authority of the Commissioner, such as the Energy Crisis Case and 1974 Automobile Liability Filing, were regarded by the court as correct "in a limited context" but were "clearly distinguishable."282 In construing statutory provisions, including one authorizing a requirement of "any other data necessary to compile statistics,"283 the court concluded that there was statutory authority for "such reasonable rules and regulations" deemed necessary to discharge the delegated statutory duties.284 Thus, the Commissioner could require "that data submitted in a rate-making case be audited."285 Within the same context, the court added that it is for the Commissioner, "in an adjudicatory proceeding, to determine the weight and sufficiency of the evidence and the credibility of the witnesses."286 It affirmed "the Commissioner's election to accord the necessary weight and credibility to the testimony of the single uncontested expert witness testifying on auditing."287 Reaffirming the Commissioner's authority to consider competent evidence other than statistical data from the rating bureau, established earlier in 1974 Automobile Liability Filing and House Bill 28 Automobile,288 the court regarded its decisions as

277. Id. at 456-57, 269 S.E.2d at 593.
278. Id. at 456, 269 S.E.2d at 592-93 (quoting N.C. GEN. STAT. § 58-124.21(a) (Cum. Supp. 1981)).
279. Id. at 394, 269 S.E.2d at 558. That credibility conclusion is distinguishable from the admissibility considerations before the court when it reviewed and reluctantly affirmed the evidentiary and statistical bases for a filing in In re North Carolina Automobile Rate Office, 278 N.C. at 320-21, 180 S.E.2d at 168. In 1980 Insurance Case I the Rate Bureau argued that "the collection of insurance statistical data is an unbelievably complex process which has been painstakingly developed and meticulously documented" and that the methods are the same "as in 47 other states." 300 N.C. at 405, 269 S.E.2d at 564-65.
280. 300 N.C. at 408, 269 S.E.2d at 566.
281. Id. at 398-99, 269 S.E.2d at 560-61.
282. Id. at 398, 269 S.E.2d at 561.
284. 300 N.C. at 400, 269 S.E.2d at 562.
285. Id. at 408, 269 S.E.2d at 566.
286. Id. at 406, 269 S.E.2d at 565.
287. Id.
288. 292 N.C. at 18, 231 S.E.2d at 876.
289. 293 N.C. at 384-85, 239 S.E.2d at 60. The court in 1980 Insurance Case I noted the remark it had made earlier in House Bill 28 Automobile that "there is nothing sacrosanct about so-
having "stressed the Commissioner's statutory ability to compel special statistical data." 290

Second, the court held that the Commissioner's attempted rule requiring audited data, although otherwise authorized, was unlawful because he violated the general administrative rulemaking requirements of the North Carolina Administrative Procedure Act. 291 Agreeing "that the Commissioner converted a rate-making case into a rule-making hearing and thereby violated" prescribed administrative procedures, the court held that the "change of policy" worked "hardship" and was an "inequity" of "striking example." 292

Under the third standard of review, the court held that Commissioner Ingram's order requiring audited data was "arbitrary and capricious" for seven specified reasons. 293 In summary, the court added, "[the] order is grossly imprecise in attempting to enunciate a substantial rule involving sweeping ramifications." 294

2. "Excessive" Rates and Income on Invested Capital

The court found error as a matter of law in Commissioner Ingram's conclusion "that the proposed rate increase was 'excessive to the extent that investment income is not properly taken into account.' " 295 Without any elaboration on the meaning of the statutory standard "excessive," the court dwelled upon the 1977 Rating Law provision for "a reasonable margin for underwriting profit." 296 Because the 1977 filing reflected investment income on unearned premium and loss reserves, the court narrowed the question "solely to consideration of investment income on invested capital." 297 The court distinguished the underwriting and investment undertakings of insurance companies, and concluded that in North Carolina neither precedent nor statutes permit consideration of investment income from invested capital instead of investment income from unearned premium and loss reserves.

Before that conclusion, the court carefully considered earlier cases. It cited without criticism the early Kansas Aetna return-on-capital case for "the

called 'insurance statistics.'" 300 N.C. at 408, 269 S.E.2d at 566 (quoting 293 N.C. at 384, 239 S.E.2d at 60).

290. 300 N.C. at 407, 269 S.E.2d at 566.


292. 300 N.C. at 409, 269 S.E.2d at 567.

293. The court held that the order was vague and uncertain because 1) it did not establish the extent to which examination of "original source documents" was required; 2) it did not specify whether the auditing had to be done by Certified Public Accountants; 3) it did not specify the degree of precision required; 4) it did not provide appellants with adequate guidelines for compliance; 5) it included no determination of the economic feasibility of compliance; 6) it included no determination whether statutory time limits could be complied with; and 7) it included no determination whether "original source data" were even available for past years. Id. at 420, 269 S.E.2d at 573.

294. Id. at 420-21, 269 S.E.2d at 573.

295. Id. at 440, 269 S.E.2d at 584.

296. Id. at 441, 269 S.E.2d at 584 (quoting N.C. GEN. STAT. § 58-124.19 (Cum. Supp. 1981)).

297. Id. (emphasis in original).
opposing view,” but found “our view consistent with that prevailing in other jurisdictions” that apply the Bullion underwriting-profit approach, such as Pennsylvania in the City of Philadelphia case. After reviewing earlier comments by Justice Lake in In re North Carolina Fire Insurance Rating Bureau where the question “was not correctly before the Court” and in In re North Carolina Automobile Rate Administrative Office where the question “was more directly addressed by Chief Justice Bobbitt,” the court passed, without comment upon Justice Lake’s dissent in the latter case, to consideration of the court of appeals cases that had rejected return-on-capital arguments based upon that dissent. In 1980 Insurance Case I the supreme court concluded that “these and other decisions establish clearly that it has never been the law in this jurisdiction that income from invested capital is to be considered in an insurance ratemaking case.”

3. “Underwriting Profit” and the “Capital Asset Pricing Model”

Although its holding on investment income foreclosed use of the “capital asset pricing model,” the court added, in apparent dictum, its disapproval of Commissioner Ingram’s adoption of the “model.” The Commissioner had “in essence rejected the traditional five percent of gross premium [allowance] and adopted a complicated, lengthy and novel formula for determining underwriting profit allowance” known as the “capital asset pricing model.” The model formula, explained in expert testimony, had received “general approval” in a 1976 Massachusetts case. It “clearly contemplates consideration of income on invested capital,” and by using “a hypothetical ‘risk free’ rate of return . . . only contemplates that the rate of return would be computed by the hypothetical assumption that the companies did so invest their funds.”

The court did “not reject the Commissioner’s formula because it is either complicated, lengthy, or novel,” and noted that he is not required to be “unimaginative,” especially “in dealing with technical and complicated matters such as that presented by this issue.” Nevertheless, it found Commissioner Ingram’s adoption of the formula “erroneous as a matter of law.”

First, the court observed that “consideration of income from invested capital is not presently allowed by North Carolina law. Obviously, striking such an in-
tegral part of the formula causes it to fall in its entirety."\textsuperscript{310} Second, to assume "a hypothetical 'risk free' rate of return" when statutes authorize "ten different categories of investments" even for reserves would be "inconceivable" and would "clearly violate" legislative intent, making "a mockery of the statute."\textsuperscript{311}

Moreover, the court found adoption of the formula to be "arbitrary and capricious."\textsuperscript{312} The court concluded that Commissioner Ingram "based his new formula solely on the basis of the testimony of" an employee of the Massachusetts insurance department and a 1976 decision of the Supreme Judicial Court of Massachusetts, which had generally affirmed the approach.\textsuperscript{313} With deference to both the witness and that decision, the court found that Commissioner Ingram "has simply copied a complicated equation of an experiment in another state without proceeding with the careful and deliberate manner that had been employed in that state."\textsuperscript{314} After finding "significant distinguishing factors" in the Massachusetts case and noting that court's "several criticisms" of the formula's rationale, the court concluded: "The point is simply that the Commissioner . . . did nothing more, in adopting a complicated and novel formula for determining underwriting profit, than listen to one employee of an insurance department in a sister state which is refining the policy adopted and which was given only limited approval by" its appellate court.\textsuperscript{315}

4. "Unfairly Discriminatory" Rates and the Reinsurance Facility

The Reinsurance Facility, a 1973 statutory creation,\textsuperscript{316} also submitted a filing under the 1977 Rating Law. As summarized by the court, "the Facility represents a pool which insures [automobile liability] risks which companies determine they do not want to individually insure."\textsuperscript{317} The filing proposed that rates for risks covered through the Facility "be 10% higher than the proposed rates for risks voluntarily retained" by the companies.\textsuperscript{318} Commissioner Ingram concluded, and the court of appeals agreed, that the ten percent rate differential was unfairly discriminatory.\textsuperscript{319} The supreme court, however, applying the whole record test, held that there was insubstantial evidence in the record to support the Commissioner's findings and conclusions of unfair

\textsuperscript{310} Id.
\textsuperscript{311} Id. at 450-51, 269 S.E.2d at 589.
\textsuperscript{312} Id. at 451, 269 S.E.2d at 590.
\textsuperscript{313} Id.
\textsuperscript{314} Id.
\textsuperscript{315} Id. at 453, 269 S.E.2d at 591.
\textsuperscript{317} 300 N.C. at 424, 269 S.E.2d at 575. Before statutory authority for the Facility was enacted in 1973, Commissioner Ingram attempted to effect a similar pool by administrative order, but his plan was enjoined. See North Carolina Auto. Ins. Plan v. Commissioner of Ins., 73 CVS 2053, General Court of Justice, Superior Court Division, Wake County, North Carolina. The Facility's predecessor assigned risk plan was upheld in Jones v. State Farm Mutual Auto. Ins. Co., 270 N.C. 454, 155 S.E.2d 119 (1967).
\textsuperscript{318} 300 N.C. at 422, 269 S.E.2d at 574.
\textsuperscript{319} Id. at 423, 269 S.E.2d at 574.
discrimination.320

The statutory standards for separate Reinsurance Facility rates, authorized by 1977 amendments, are familiar: "Rates shall be neither excessive, inadequate nor unfairly discriminatory."321 By special provision, however, all Facility ‘rates shall be on an actuarially sound basis and shall be calculated, insofar as is possible, to produce neither a profit nor a loss.’322 They ‘shall not include any factor for underwriting profit on Facility business, but shall provide an allowance for contingencies.’323 There is a statutory ‘strong presumption’ that they ‘are neither unreasonable nor excessive.’324

Applying the whole record test under the statutory substantial evidence standard of review, the court carefully considered the statistical comparisons of Facility and voluntary risk policyholders. It found the record ‘replete with evidence indicating that the proposed differential for the rate increase between ceded and voluntary business is actuarially justified.’325 It noted that Commissioner Ingram had ‘made no findings with respect to the statutory standard ‘actuarially sound,’’ and subsequently found that the ‘plain legislative intent is that Facility rates can be higher than those for the voluntary market if a higher Facility rate is actuarially indicated.’326 The court’s central conclusion on the issue was, therefore, “that the Commissioner failed to consider material and substantial evidence concerning the actuarial soundness of the statistics add that the findings which the Commissioner made, while supported by the evidence, are legally irrelevant.”327

That conclusion could not be overcome by arguments of “unfair” discrimination under the statutory standard.328 Regarding the statutory standard, however, the court predicted “that until clear guidelines are established either by the Legislature or by the Commissioner, confusion will continue to abound over the phrase ‘unfair rate discrimination.’”329 Finding that “the phrase is not defined in our statutes nor, for that matter, in the model laws and is a source of continuing controversy,” the court invited a policymaking “formula for . . . fairness” as a cure for the “vagueness now present.”330

In the context of Commissioner Ingram’s “battleground,” as the first and controlling case under the 1977 Rating Law, 1980 Insurance Case I represents the turning point of the battle. It is the precedent for rate-making procedure under the 1977 Rating Law, and is the most definitive North Carolina decision to date on the meaning of the familiar standards for all lines. Moreover, the

320. Id. at 430-34, 269 S.E.2d at 578-81.
322. Id.
323. Id.
324. Id.
325. 300 N.C. at 431, 269 S.E.2d at 579.
326. Id. at 434, 269 S.E.2d at 580.
327. Id. at 433, 269 S.E.2d at 580.
328. Id. at 434-35, 269 S.E.2d at 581.
329. Id. at 437, 269 S.E.2d at 582.
330. Id. at 438, 269 S.E.2d at 583.
E. The Battle Over Recoupment Surcharges on the Facility Front

In 1981, the supreme court in *State ex rel. Hunt v. North Carolina Reinsurance Facility*\(^1\) resolved a "crucial" issue: whether recoupment surcharges imposed by the Reinsurance Facility are rates required to be filed with the Commissioner. The Commissioner, joined by the Attorney General and Governor in an action against the Facility and its 293 member insurance companies, sought to enjoin collection of the two initial recoupment surcharges commenced by the Facility in 1980. One surcharge, pursuant to 1977 statutory amendments associated with the 1977 Rating Law, was to recoup Facility losses of $31.4 million for its 1978 fiscal year.\(^2\) The other surcharge, pursuant to a 1979 amendment, was to recoup a reduction in Facility income resulting from a requirement that rates charged to statutorily defined "clean risks" ceded to the Facility do not exceed rates charged to "clean risks" insured in the voluntary market.\(^3\) The surcharges were imposed as percentages of premiums on automobile insurance policies issued during a year after imposition. The first surcharge was 18.6 percent of the premium on all policies ceded to the Facility, and the latter was 1.1 percent of the premium on both ceded and voluntary-market policies.\(^4\) The Commissioner contended that the surcharges were rates to be filed with him in accordance with the 1977 Rating Law, under which they arguably would be subject to his disapproval power.\(^5\)

The supreme court limited its decision to the single issue whether the surcharges are "rates" within the statutory meaning.\(^6\) Neither "rates" nor "rate" is defined by the applicable statutes.\(^7\) Nevertheless, no specific authority supported the Commissioner's contentions.\(^8\) The supreme court, viewing the separate statutory provisions as part of a single scheme, held as a matter of statutory interpretation that "the Legislature intended the 'rates' to have a single and consistent meaning throughout and that 'rates' does not encompass within its definition, for any purpose, including filing and review, the types of surcharges challenged here."\(^9\)

The court also found other reasons for that interpretation. First, noting that the terms "rate" and "premium" are used interchangeably in the statutes, the court added that they have well-established definitions as expressed in a

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\(^1\) 302 N.C. 274, 275 S.E.2d 399 (1981) [hereinafter referred to as *Recoupment Surcharges Case*].

\(^2\) Id. at 286, 275 S.E.2d at 404.

\(^3\) Id. at 287, 275 S.E.2d at 404-05.

\(^4\) Id.


\(^7\) 302 N.C. at 287, 275 S.E.2d at 405.

\(^8\) Id.

\(^9\) Id. at 289, 275 S.E.2d at 406.
leading insurance text. The court noted record evidence on the meaning of "rate," and quoted a common dictionary definition: "the amount of premium per unit of insurance or exposure." Earlier opinions had referred to "premium rates."

The court repeated its In re North Carolina Automobile Rate Office enunciation of the components of casualty insurance premiums and summarized the factors enumerated in the 1977 Rating Law to be considered in establishing rates. Recognizing that rate-making is a prospective process, the court relied upon House Bill 28 Motorcycle, the Energy Crisis Case, and In re North Carolina Fire Insurance Rating Bureau: "We have said on numerous occasions that the purpose of the rate-making process is to ensure that premiums are adequate to cover anticipated losses and anticipated expenses and to allow a reasonable profit." The process is "an attempt to predict the future." Thus, although the factors enumerated in the 1977 Rating Law indicate that "past loss experience may be considered, it is relevant only to the extent of predicting future events." The court found nothing in the rate-making statute "which indicates that past losses themselves constitute a component of the rate." The recoupment surcharges, however, generally are retroactive and "can be determined by simple mathematical computation" of past conditions. The surcharges, authorized for recoupment of past losses, are not future rates.

The court recognized that the Facility had suffered tremendous financial losses pursuant to the statutory scheme. Indeed, in the first five years from its 1973 inception, the Facility had lost over $109 million. Just before these initial surcharges became effective, the Facility's approximately $13.6 million available for payment of claims was being exhausted at a rate of approximately $3 million per month. Thus, without the recoupment surcharges, the Facility's funds soon would have been exhausted.

In upholding the surcharges for recoupment of those losses resulting from the "serious inadequacy of Facility rates," the court may have saved the Facility and the rate-making statutory scheme from challenges that they were unconstitutionally confiscatory. In defense of the recoupment surcharges, some of the Facility's member companies had challenged the constitutionality, absent recoupment, of the Facility and the rate-making statutory scheme, as well

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340. Id. at 289, 291, 275 S.E.2d at 407 (citing C. KULP & J. HALL, supra note 29, at 765).
341. Id. at 292, 275 S.E.2d at 407.
342. Id. at 291, 275 S.E.2d at 407 (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1884 (1971)).
344. 302 N.C. at 291, 275 S.E.2d at 407 (quoting 278 N.C. at 312, 180 S.E.2d at 162-63).
345. Id. at 294, 275 S.E.2d at 408-09.
346. Id. at 291-92, 275 S.E.2d at 407.
347. Id. at 291, 275 S.E.2d at 407.
348. Id. at 293, 275 S.E.2d at 408.
349. Id. at 286, 275 S.E.2d at 404.
351. 302 N.C. at 294, 275 S.E.2d at 409.
as the six percent "cap" on automobile insurance rate increases.\textsuperscript{352} The companies, which had borne earlier Facility losses, would continue to bear the Facility losses absent recoupment.\textsuperscript{353} With recoupment, their confiscatory-rate challenges would be effectively eliminated, just as an earlier challenge had been effectively mooted by the 1977 amendments.\textsuperscript{354}

The \textit{Recoupment Surcharges Case} represents more than just another serious conflict between the companies and the Commissioner; it is a significant symptom of underlying ills. It arose after years of inadequate rates and millions of dollars of resulting Facility losses\textsuperscript{355} and reflected both the compounded complexity of imposing a six percent "cap"\textsuperscript{356} on rate increases in a market confused by "clean risks"\textsuperscript{357} concepts and the prohibition of consideration of high-risk young male drivers in automobile insurance rate-making classifications.\textsuperscript{358} The decision is important in other ways as well. Procedurally, the case is significant because the court decided it upon plaintiffs' appeal from an order denying their motion for a preliminary injunction and because the opinion silently avoided some complex issues.\textsuperscript{359} Substantively, it pro-

\textsuperscript{354} Before enactment of the 1977 amendments, the Facility and four of its member companies commenced a civil action challenging the application of the rating laws and the Facility Act as allegedly resulting in confiscatory rates. \textit{North Carolina Reinsurance Facility v. Ingram}, Civil Action No. 77-0034-CIV-5 (E.D.N.C.). The plaintiffs dismissed the action in 1978.
\textsuperscript{355} \textit{See supra} note 350 and accompanying text.
\textsuperscript{356} \textit{See supra} note 266 and accompanying text.
\textsuperscript{357} \textit{See supra} notes 333-34 and accompanying text.
\textsuperscript{358} \textit{See supra} notes 181-87 and accompanying text.
\textsuperscript{359} 302 N.C. at 280, 275 S.E.2d at 400-01. The supreme court decided the case on a single substantive issue and expressed no opinion regarding the propriety of issuing a preliminary injunction or whether the appeal should be dismissed as interlocutory because it was from denial of a preliminary injunction. "Sufficient to say that pursuant to our supervisory and discretionary power we find the procedural context of the matter before us to be such that we can adequately deal with the substantive issue presented in a controversy which is obviously demanding of prompt resolution." \textit{Id.} at 283, 275 S.E.2d at 402. Some defendants challenged the standing of the Governor, the Commissioner, and the Attorney General to contest the constitutionality of the recoupment surcharge amendments because plaintiffs sought to establish standing based only upon the rights of the using and consuming public. Those defendants, however, did not challenge the standing of the Commissioner or the Attorney General to seek a declaratory judgment interpreting the amendments. They also sought to have the Governor dismissed on the grounds that he was not a real party in interest and that no statute allows him to bring such an action in the name of the State for the use and benefit of another. Appellees' Brief, at 138-46; Defendant-Appellants' New Brief, at 20-25, \textit{State ex rel. Hunt v. North Carolina Reinsurance Facility}, 302 N.C. 274, 275 S.E.2d 399 (1981). \textit{Compare} \textit{State Farm Mut. Auto. Ins. Co. v. Ingram}, 288 N.C. 381, 218 S.E.2d 364 (1975), with \textit{State ex rel. Comm'r of Ins. v. Vines}, 274 N.C. 486, 164 S.E.2d 161 (1968). \textit{See also} \textit{Winslow v. Morton}, 118 N.C. 486, 24 S.E. 417 (1896); \textit{James v. Hunt}, 43 N.C. App. 109, 258 S.E.2d 481 (1979).
vides unique precedent for surcharges, although the court applied statutes it said were "confusing and unwieldy."\textsuperscript{361}

\textbf{F. The Battles On Other Fronts}

In the entire "Hornbook," one rating statute was sufficiently clear for the supreme court to sustain Commissioner Ingram's action.\textsuperscript{362} The case involved a special statutory provision for a ten percent discount from premium for mobile-homeowner policies with approved tie-down provisions.\textsuperscript{363} The Commissioner approved the proposal of the rating bureau that the discount be applied to the total basic premium. One company argued that the discount should be applied only to that portion of premium applicable to wind-loss perils, which arguably are more affected by a tie-down.\textsuperscript{364} The supreme court sustained the Commissioner's approval of the bureau filing.\textsuperscript{365} The decision rested upon an interpretation of the statutory provision for the premium discount, and is of limited significance. The case involved a legislative mandate "to decrease the premium by ten percent,"\textsuperscript{366} and is distinguishable from other decisions dealing with determinations of rates that would yield a fair and reasonable profit.

In cases focusing upon the determination of "reasonable" rates, the Commissioner has lost on all fronts. Accompanying the automobile insurance decision in 1980 Insurance Case I were 1980 Insurance Case II\textsuperscript{367} involving a subsequent automobile insurance filing, 1980 Insurance Case III\textsuperscript{368} involving a homeowners' insurance rate filing, and 1980 Insurance Case IV\textsuperscript{369} involving a workers' compensation insurance rate filing. All arose under the 1977 Rating Law, were decided the same day as and at least partially were controlled by 1980 Insurance Case I. Earlier, these separate lines of insurance had fought on separate fronts\textsuperscript{370} in court battles with the Commissioner, where they equally were frustrated by delays, but ultimately they were as successful as the automobile insurance line.\textsuperscript{371}

Not all lines of insurance are subject to rate regulation. For instance, credit life insurance rates were not subject to rate-making authority when

\begin{footnotes}
\item[360] \textit{See} McCullough II, \textit{supra} note 4.
\item[361] 302 N.C. at 298, 275 S.E.2d at 411.
\item[364] 292 N.C. at 245, 232 S.E.2d at 417.
\item[365] \textit{Id}. at 250, 232 S.E.2d at 419.
\item[366] \textit{Id}. at 248-49, 232 S.E.2d at 418-19.
\item[370] \textit{See supra} notes 132-34.
\end{footnotes}
Commissioner Ingram began hearings to examine them. His resulting order, setting "maximum premium rates for credit life insurance at approximately one-half the prevailing premium rates then being charged," was appealed by affected companies. The court of appeals rejected Commissioner Ingram's argued authority, which was based upon analogy and "custom and practices" of former Commissioners, and vacated the order. The court of appeals held that nothing in the statutes granted Commissioner Ingram the express or implied authority to set rates for credit life insurance. The court cited two early rate-making decisions, In re North Carolina Automobile Rate Office and In re North Carolina Fire Insurance Rating Bureau, for the basic rule that rate-making authority "must be conferred by statute" with "sufficiently clear standards."

In these two insurance rate-making decisions, the supreme court had questioned the sufficiency of the familiar statutory standards. Those concerns, slumbering somewhat during intervening decisions, reawakened in 1977 in 1980 Insurance Case I and the Recoupment Surcharges Case. Despite those expressions of dissatisfaction with the standards, the supreme court did not decide the issue in the only direct challenge to the sufficiency of those rate-making standards. The challenging case, Hartford Accident and Indemnity Co. v. Ingram, concerned a statute empowering the Commissioner to establish rates for health care liability insurance at an initial stage simply on the basis of the latest available statistical data. Subsequent rate changes, also to be established by the Commissioner, were subject to the familiar standards of being "reasonable, adequate, not excessive, not unfairly discriminatory and in the public interest." The statute also prescribed parameters for those standards, including a provision for anticipated losses and expenses and "a fair and reasonable underwriting profit" taking into consideration investment income from unearned premium and loss reserves. The trial court found the statutory standards insufficient for setting rates for the main subject of the statute, medical malpractice liability insurance. The sufficiency of the standards was not determinative in the supreme court's decision that held

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373. Id. at 8, 220 S.E.2d at 410.
374. Id. at 9-10, 220 S.E.2d at 414.
375. Id. at 9, 10, 220 S.E.2d at 411-12.
376. 278 N.C. at 315, 180 S.E.2d at 164; 275 N.C. at 29, 165 S.E.2d at 217.
378. 300 N.C. at 437, 269 S.E.2d at 577.
379. 302 N.C. at 298, 275 S.E.2d at 401-02.
382. Id.
383. Id.
the statute unconstitutional on a broader basis.385

Hartford nevertheless has significance in the rate-making context. It arose during the mid-1970s' "medical malpractice insurance crisis."386 In North Carolina and nationally, companies writing medical malpractice liability insurance began withdrawing from or limiting their underwritings in that market.387 Many issues were involved nationally,388 but in North Carolina inadequate rates and Commissioner Ingram's refusal to approve proposed rate increases and a policy form change precipitated a "crisis"—the possible withdrawal from the market of the company writing a high percentage of the coverage.389 At Commissioner Ingram's urging,390 the General Assembly enacted a statute requiring general liability insurers to write medical malpractice insurance.391 In consolidated proceedings brought by 346 general liability insurers, the supreme court held that the state could not constitutionally compel them to write medical malpractice insurance.392 It is the leading case on the issue of compelling an insurer to write another line of insurance.393

The court rejected as an answer to the basic constitutional objection the statutory provision that rates "be 'reasonable' and 'adequate' and sufficient to yield 'a fair and reasonable underwriting profit' over and above 'anticipated losses' and 'anticipated expenses.'"394 Fulfillment of that statutory promise was not certain because "the losses and expenses 'anticipated' by the Commissioner in the establishment of premium rates may easily prove substantially less than those actually incurred."395 This one-sentence dictum deals with two broad but distinct dimensions of Hartford. Interrelated in this context, they are the potential denial of due process, both procedurally and substantively, because of regulatory bias396 resulting in inadequate or confiscatory rates.397

385. 290 N.C. at 467, 226 S.E.2d at 508.
386. During the crisis, highly publicized especially in California and New York, some doctors publicly threatened not to treat patients unless the doctors obtained the malpractice insurance they desired. See, e.g., Newsweek, June 9, 1975, at 58-65.
391. See note 381 supra.
392. 290 N.C. at 467, 226 S.E.2d at 508. The court held that the requirement violated the due process clause of the federal Constitution and the equal protection clause and prohibition against the deprivation of one's liberty except by law of the land in the North Carolina Constitution.
394. 290 N.C. at 469, 226 S.E.2d at 506.
395. Id.
Hartford implicitly recognized the potential bias of the ratemaker or regulator whose approval is required for rate changes. The companies anticipated the argument that they had not exhausted their administrative remedies and, in their direct challenge to the statute, alleged that they had inadequate remedies for establishing rates that were not confiscatory. They alleged that Commissioner Ingram would act not as a quasi-judicial adjudicator in establishing rates but as an advocate of rates that were inadequate. In an initial temporary restraining order and subsequent preliminary injunctions enjoining enforcement of the statute, the trial court agreed that the companies had inadequate administrative remedies. At trial, the companies' evidence included copies of Commissioner Ingram’s press releases and speeches, his “Consumer News,” and a chronology of all insurance rate cases heard by him. The trial court found a “history of inaction or delay in action on major rate and rate related filings.” Neither the trial court nor the supreme court, which noted the record’s “disturbing clarity” regarding past rate inadequacy, reached the related issue whether Commissioner Ingram’s bias had contributed to continuation of the rate inadequacy. Thus, Hartford’s implicit recognition of regulatory bias may be of only limited significance. Indeed, the supreme court later passed over similar bias arguments. In 1974 Automobile Liability Filing, however, an administrative appeal rather than a direct attack with record evidence such as in Hartford, the supreme court rejected arguments that Commissioner Ingram had acted with unconstitutional bias as a consumer advocate. Nevertheless, the court has since recognized the Commissioner’s and the companies’ “polarization of views.”

The issue of confiscatory rates was also present in both Hartford and 1974 Automobile Liability Filing. The trial court in Hartford made findings of fact and conclusions of law regarding rates it adjudged to be confiscatory. The supreme court noted that portion of the judgment in its statement of the case, but did not, in connection with its broader holding, confront the confiscation issue. In its subsequent disposition of the administrative appeal in 1974 Automobile Liability Filing, in which the record lacked direct evidence of

398. Record at 10-11.
399. Id. at 11.
400. See, e.g., Hartford Accident & Indemnity Co. v. Ingram, 75 CVS 4191, General Court of Justice, Superior Court Division, Wake County, North Carolina. The temporary restraining order and preliminary injunctions were not appealed and were not parts of the record on appeal in Commissioner Ingram's appeal from the final judgment.
401. Record at 108, Exhibit 27.
402. Id., Exhibit 28.
403. Id., Exhibit 26.
404. Id. at 298.
405. 290 N.C. at 469, 226 S.E.2d at 506.
407. 292 N.C. at 27, 231 S.E.2d at 881.
408. That recognition was as recent as 1980 Insurance Case I, 300 N.C. at 18, 269 S.E.2d at 410.
409. Id. at 108, Exhibit 27.
confiscation comparable to that in *Hartford*; the supreme court stated that it found nothing in Commissioner Ingram's order that subjected the companies to confiscatory rates. The court's limited comments on confiscation are significant, however, because the subject has rarely been reached in insurance rate-making cases.

In the rate-making context, *Hartford's* significance arises from its implications. It may point to answers on the issues of bias and confiscation. Its implicit recognition of regulatory bias may lead to a finding of bias in the continuing rate-making battle. Moreover, the trial court's confiscatory rate conclusions, including a definition of confiscatory rates that was neither disapproved nor disclaimed by the supreme court despite its other dicta, may extend a controlling influence should the confiscation issue arise again.

**IV. THE "HORNBOOK" AND CONCLUSIONS**

The early "reasonable" standard and its refined model bill rate-making standards have survived the North Carolina battleground, but they are battle scarred by the North Carolina Supreme Court's skepticism over their sufficiency as statutory standards. Like a battered string instrument, the standards still can be heard if tuned: one string, now perhaps worn thin, sounding state-regulation immunity from the federal antitrust laws; a loose string for the intended broad discretionary power of the Commissioner; and tighter ones for attuning the Commissioner to his statutory authority. They play the basic battletune for all marchers on the rate-making battleground. With Commissioner Ingram and the companies marching to the beats of different drummers, the courts have been called upon to orchestrate. The musical metaphor matches the "harmonious scheme" that the supreme court attuned from parts of the statutes, and underscores a court's correct role in the conflict—a judicious conductor, interpreting the battletune, but never writing the music or singing a battlecry. In that role, the courts have reached for a familiar baton, the statutory provisions for scope of judicial review.

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412. 292 N.C. at 27, 231 S.E.2d at 881.
413. See *supra* note 93.
Rates that do not allow plaintiffs, individually or collectively, to receive income from the writing of a line of insurance, including medical malpractice insurance, sufficient to pay the losses and expenses incurred thereby, which rates thereby cause losses to plaintiffs that can be covered only from the other property of each, are confiscatory rates constituting deprivation of property without due process of law, in violation of the Law of the Land Clause, Article I, Section 19 of the Constitution of North Carolina, and the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States.
415. See *supra* note 93.
416. See *supra* notes 376-79.
All of the North Carolina "Hornbook" cases applied specified standards of judicial review. The supreme court pointedly has related its holdings to the standards. Both the separate rate-case standards and the general provisions of the North Carolina Administrative Procedure Act have been

418. Appeals from the Commissioner's orders are pursuant to two statutory provisions; N.C. GEN. STAT. §§ 58-9.3, 58-9.4 (Cum. Supp. 1981). G.S. 58-9.3 applies in non-rate and classification cases, with appeals to the Wake County Superior Court, and G.S. 58-9.4 applies to rate and classification cases, with appeals to the court of appeals. The standards of judicial review are similar for both types of appeal. See infra notes 420 & 421. The different appellate jurisdictions have caused some difficulty for appellants. Compare North Carolina Auto. Rate Admin. Office v. Ingram, 35 N.C. App. 578, 242 S.E.2d 205 (1978) (affirming superior court judgment reversing Commissioner Ingram's order where superior court had jurisdiction), with North Carolina Fire Ins. Rating Bureau v. Ingram, 29 N.C. App. 338, 224 S.E.2d 229 (1976) (vacating superior court restraining order, because appeal was solely to the court of appeals, which noted that proper remedy was to seek writ of supercedeas from it). See also American Guar. Liab. Ins. Co. v. Ingram, 32 N.C. App. 552, 233 S.E.2d 398 (1977), cert. denied, 292 N.C. 729, 235 S.E.2d 782 (1977) (affirming superior court order restraining Commissioner Ingram from enforcing rules promulgated by him); North Carolina Auto. Rate Office v. Ingram, 30 N.C. App. 596 (1976) (unpublished order vacating superior court order because appeal was solely to the court of appeals, in which the court of appeals noted that it has the power to issue such writs as it considers necessary to prevent substantial injustice pending perfection of an appeal); North Carolina Auto. Rate Office v. Ingram, 29 N.C. App. 421, 224 S.E.2d 308 (1979) (unpublished order vacating superior court restraining order, because appeal was solely to the court of appeals).


420. N.C. GEN. STAT. § 58-9.6 (Cum. Supp. 1981) provides for scope of review in appeals pursuant to id. § 58-9.4 as follows:

(a) On appeal the court shall review the record and the exceptions and assignments of error in accordance with the rules of the Court of Appeals, and any alleged irregularities in procedures before the Commissioner, not shown in the record, shall be considered under the rules of the Court of Appeals.

(b) So far as necessary to the decision and where presented, the court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning and applicability of the terms of any action of the Commissioner. The court may affirm or reverse the decision of the Commissioner, declare the same null and void, or remand the case for further proceedings; or it may reverse or modify the decision if the substantial rights of the appellants have been prejudiced because the Commissioner's findings, inferences, conclusions or decisions are:

(1) In violation of constitutional provisions, or
(2) In excess of statutory authority or jurisdiction of the Commissioner, or
(3) Made upon lawful proceedings, or
(4) Affected by other errors or law, or
(5) Unsupported by material and substantial evidence in view of the entire record as submitted, or
(6) Arbitrary or capricious.

(c) In making the foregoing determinations, the court shall review the whole record or such portions thereof as may be cited by any party and due account shall be taken of the rule of prejudicial error. The appellant shall not be permitted to rely upon any grounds for relief on appeal which were not set forth specifically in his notice of appeal filed with the Commissioner.

(d) The court shall also compel action of the Commissioner unlawfully withheld or unlawfully or unreasonably delayed.

(e) Upon any appeal, the rates fixed or any rule, regulation, finding, determination, or order made by the Commissioner under the provisions of this Chapter shall be prima facie correct.


The court may affirm the decision of the agency or remand the case for further proceedings; or it may reverse or modify the decision if the substantial rights of the
applied to the extent they are consistent, but the Administrative Procedure Act controls. The standard foremost on each battlefront has been whether Commissioner Ingram's actions were in excess of statutory authority. His reach has exceeded his grasp, as each quest for substantive rate-making power has been rebuked by the courts. Procedurally, however, his power extends to broad areas of admissibility and credibility of evidence and to basic rulemaking. Of course, proper proceedings and procedures are required.

petitioners may have been prejudiced because the agency findings, inferences, conclusions, or decisions are:

1. In violation of constitutional provisions; or
2. In excess of the statutory authority or jurisdiction of the agency; or
3. Made upon unlawful procedure; or
4. Affected by other error of law; or
5. Unsupported by substantial evidence admissible under G.S. 150A-29(a) or G.S. 150A-30 in view of the entire record as submitted; or
6. Arbitrary or capricious.

If the court reverses or modifies the decision of the agency, the judge shall set out in writing, which writing shall become a part of the record, the reasons for such reversal or modification.

423. Id.
426. See, e.g., State ex rel. Comm'r of Ins. v. North Carolina Auto. Rate Admin. Office, 293 N.C. 365, 239 S.E.2d 48 (1977) (the House Bill 28 Automobile case). "Insurance data compiled by the . . . [rate bureau], insofar as it is shown to be reliable and fairly compiled is valuable and should be considered. The Commissioner may also consider evidence, otherwise competent, from other sources." Id. at 384-85, 239 S.E.2d at 60.
427. See, e.g., State ex rel. Comm'r of Ins. v. North Carolina Fire Insurance Rating Bureau, 292 N.C. 471, 234 S.E.2d 720 (1977). "The credibility of evidence, . . . and the weight to be given such evidence, are to be determined by the Commissioner." Id. at 489, 234 S.E.2d at 730. But "the Commissioner may not act arbitrarily, rejecting as untrustworthy, for no stated or apparent reason, uncontradicted testimony or data submitted through competent and unimpeached witnesses." Id. In that case, there was no evidence in conflict with that presented by the rating bureau and there was no cross-examination of witnesses testifying for its filing. The tables were turned in 1980 Insurance Case I, in which the rate bureau did not contest the single expert witness, a member of Commissioner Ingram's staff, testifying on auditing of data. 300 N.C. at 405, 269 S.E.2d at 564. Under the whole record test for determining whether substantial evidence supports the Commissioner's findings, the appellate court may nevertheless reverse the Commissioner's order. See id., 269 S.E.2d at 564-65. An example occurred in 1974 Automobile Liability Filing, in which the supreme court rejected findings based upon what it regarded as "questionable deductions" on driving habits. 292 N.C. at 20, 231 S.E.2d at 877. They related to the witness' "dubious conclusion that a man who becomes intoxicated in his abode will remain in his house." Id.
428. See State ex rel. Comm'r of Ins. v. North Carolina Rate Bureau, 300 N.C. 381, 400-04, 269 S.E.2d 547, 561-63 (1980) (1980 Insurance Rate Case I). "[W]e think it without question that our Legislature intended for the Commissioner of Insurance to promulgate such reasonable rules and regulations as he deems necessary to discharge the functions of his office . . . ." Id. at 400, 269 S.E.2d at 562.
429. Id. at 408, 269 S.E.2d at 566.
but Commissioner Ingram generally has neither provided nor followed them.\textsuperscript{430} The courts have found the Commissioner's orders to be "unsupported by material and substantial evidence in view of the entire record."\textsuperscript{431} They have found his orders to be "arbitrary or capricious."\textsuperscript{432}

Nevertheless, the courts have not, as suggested by another commentator,\textsuperscript{433} "displayed an uncharacteristic willingness to 'control and direct' the operations of" Commissioner Ingram.\textsuperscript{434} Even the court of appeals' strongest criticism of the Commissioner did not suggest control,\textsuperscript{435} as the supreme court's softening of the criticism made clear.\textsuperscript{436} In the rate cases with the most compelling arguments for extraordinary relief, the Commissioner's actions were not controlled and directed by the courts.\textsuperscript{437} The closest semblance to court control over the Commissioner's actions has come not in rate cases with

430. See, e.g., id. at 408-19, 269 S.E.2d at 566-73.
431. See, e.g., id. at 430-34, 269 S.E.2d at 580.
432. See, e.g., id. at 420-21, 269 S.E.2d at 573.
433. Markham, supra note 265.
434. Id. at 25.
435. See State ex rel. Comm'r of Ins. v. North Carolina Fire Ins. Rating Bureau, 30 N.C. App. 549, 228 S.E.2d 264 (1976), aff'd in part, rev'd in part, 292 N.C. 471, 234 S.E.2d 720 (1977) (homeowner's insurance "deemer" clause case). The court of appeals had found unchallenged and uncontradicted evidence supporting a proposed increase of an existing rate that had been shown to be "unfair and confiscatory." 30 N.C. App. at 558, 228 S.E.2d at 270. It then acted as follows:

Since the record on appeal discloses persistent procrastination, unfairness, and partisan procedures and decisions on the part of the Commissioner, we, in the exercise of the inherent power of the court, do not invalidate the effected 16.2% rate increase by the Rating Bureau. We, therefore, continue in effect this rate increase until the Commissioner of Insurance performs his statutory duty in further proceedings and fixes premium rates for homeowners insurance which will produce a fair and reasonable profit and no more.

Id.

436. The supreme court, "without impugning the motives of the Commissioner, and without intent to express concurrence in the characterization by the Court of Appeals of his actions and inactions with reference to this and other rate filings . . . ." 292 N.C. at 490, 234 S.E.2d at 730, took another approach:

The Court of Appeals was in error in continuing in effect the rates proposed in the filing "in the exercise of the inherent power of the court." Neither the Court of Appeals nor this Court has the inherent power to fix rates of insurance premiums. These are fixed by the filing of the Bureau, pursuant to the "deemer provision" in G.S. 58-131.1, subject to the authority of the Commissioner, by a properly supported order, issued after a hearing as prescribed by the statutes, to approve or disapprove such rates in whole or in part, and if they are disapproved in whole or in part, to fix for the then future the rates to be charged.

The order issued by the Commissioner disapproving the filing here in question does not so comply with the statutory procedures in the respects above set forth and, therefore, the judgment of the Court of Appeals vacating that order is hereby affirmed. The consequences of the filing and set into effect by the "deemer provision" remain presently in effect and will so remain in effect until change by a lawfully issued order of the Commissioner or by a further filing.

Id. at 493, 234 S.E.2d at 732 (emphasis added).
direct appeal to the appellate division but in two other settings with initial appeals to the superior court; both cases involved arbitrary or capricious actions by the Commissioner and appropriate judicial relief. At all appellate levels, even amid confusing situations, the courts have exercised their jurisdiction carefully.

Moreover, in sweeping dicta in its most recent rate-related case, the Recoupment Surcharges Case, the supreme court displayed its disdain for "disputes . . . far too numerous" and "this unfortunate trend to administer the insurance laws of our state before the Courts." Lamenting this "piecemeal construction," the court noted that "during the past eight years, the appellate division has issued over thirty opinions resulting from actions before the Commissioner of Insurance." "[A]lmost quarterly decisions from the judicial branch of government are required." To cure this extensive litigation, the court has not presumed to control and direct the Commissioner, but has prescribed a legislative expression of "intent in language which is crystal clear." The court continues to conclude, even after the 1977 Rating Law, "that legislative revision appears to offer more likelihood of future harmony."


439. In Occidental Life Ins. Co. v. Ingram, 34 N.C. App. 619, 240 S.E.2d 332 (1977), the court of appeals upheld a mandatory injunction issued by the superior court requiring Commissioner Ingram to approve a plan submitted by an insurance company for exchange of its stock for the stock of a holding company. The court of appeals affirmed findings that Commissioner Ingram had acted arbitrarily and capriciously in disapproving the plan of exchange, when he failed even to read the petition for weeks, rendered a decision only when compelled to do so by another court order, based his order on findings totally unsupported by any evidence, and refused to make favorable findings that were "fully supported by a mass of convincing and uncontradicted evidence." 34 N.C. App. at 635, 240 S.E.2d at 469. "If, as here, he acts arbitrarily, petitioners are not left helpless, nor are the courts powerless to grant them appropriate relief." Id. at 636, 240 S.E.2d at 470. Under the Administrative Procedure Act, N.C. GEN. STAT. § 150A-51 (Cum. Supp. 1981), "the court is given the power not only to reverse but also to modify a final agency decision if the substantial rights of the petitioners may have been prejudiced because the agency findings or conclusions are arbitrary and capricious." Id. at 637, 240 S.E.2d at 470 (emphasis added). In North Carolina Life & Accident & Health Ins. Guar. Ass'n v. Ingram, 79 CV 2577, General Court of Justice, Superior Court Division, Wake County, North Carolina, appeal dismissed, N.C. Court of Appeals, No. 8010SC537, July 8, 1981, the Guaranty Association elected a person to fill a vacancy on its Board of Directors and, as required by statute, submitted the election to Commissioner Ingram for his approval. Commissioner Ingram disapproved the election without giving any reasons, and, after discovery and a request for an administrative hearing or declaratory ruling, refused to hold a hearing or to issue a declaratory ruling. The superior court found that the disapproval was arbitrary and capricious. It reversed the order of Commissioner Ingram disapproving the election, and ordered that "said election shall be deemed approved by the Commissioner of Insurance" and that the person "shall be allowed to serve as a member of the Guaranty Association Board of Directors pending any appeal of this Court's order." Record on Appeal, at 65. The matter became moot and the appeal was dismissed.

440. See supra note 418.

441. 302 N.C. at 296-97, 275 S.E.2d at 410.

442. Id. at 296, 275 S.E.2d at 410.

443. Id. at 296-97, 275 S.E.2d at 410.

444. Id. at 298, 275 S.E.2d at 411.

445. Id. at 296, 275 S.E.2d at 410.
Whatever “formula” or “clear and unmistakable language” the General Assembly may write at the supreme court’s suggestion, the cases between Commissioner Ingram and the companies likely will continue despite the courts’ disdain for them. Should appropriate relief not be available at the appellate division in administrative rate cases, inadequate rates may result in direct challenges of allegedly confiscatory rates, posing problems of proof, and judicial power. Perhaps the “Hornbook” will add new chapters on confiscation, regulatory bias, judicial remedies, and possible federal preemption. In any event, the “Hornbook” likely will grow. Indeed, as the supreme court said in 1980 Insurance Rate Regulation, 13 FORUM 416 (1978).
ance Case I, "resolving such disputes is, of course, the proper function of the appellate courts." 457