

IN THE MATTER OF
THE AMERICAN HOSPITAL
AND LIFE INSURANCE COMPANY

ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION
OF THE FEDERAL TRADE COMMISSION ACT

Docket 6237. Complaint, Oct. 14, 1954—Decision, Apr. 24, 1956

Order requiring an insurance company with principal place of business in San Antonio, Tex., selling eight types of life, health, and accident policies through agents in 14 States, to cease misrepresenting the benefits of its policies through statements in brochures and application forms sent to its agents and used by them in selling the policies.

Before *Mr. J. Earl Cox*, hearing examiner.

Mr. Robert R. Sills, Mr. William R. Kearney and Mr. Joseph Callaway for the Commission.

Boyle, Wheeler, Gresham, Davis & Gregory, of San Antonio, Tex., for respondent.

FINDINGS AS TO THE FACTS, CONCLUSIONS AND ORDER

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission, on October 14, 1954, issued and subsequently served upon respondents, The American Hospital and Life Insurance Company, a corporation, its complaint, charging said respondent with the use of unfair and deceptive acts and practices in commerce in the sale of health and accident insurance policies, in violation of the provisions of the Federal Trade Commission Act.

Thereafter, respondent filed its answer and, in conjunction therewith, a motion for dismissal of the complaint on the ground that the Commission is without jurisdiction in the matter. This motion having been denied by the hearing examiner duly designated in the complaint, for the reason that the question of jurisdiction could be resolved satisfactorily only after the submission of evidence, certain testimony and other evidence in support of the allegations of the complaint were introduced before the hearing examiner and were duly recorded in the office of the Commission. No further evidence having been presented by respondent, the matter was considered by the hearing examiner upon the complaint, respondent's answer thereto, the testimony and evidence, proposed findings as to the facts and conclusions presented by counsel, and additional motions for dismissal, filed by respondent, and the hearing examiner, on

December 8, 1955, filed his initial decision in which he ordered that the complaint be dismissed.

Within the time permitted by the Commission's Rules of Practice, counsel in support of the complaint filed an appeal from said initial decision, and, the Commission, after considering said appeal, respondent's brief in opposition thereto, oral arguments of counsel, and the entire record herein, rendered its decision granting the appeal and vacating and setting aside the initial decision.

Thereafter, this matter came on for final consideration by the Commission, and the Commission, being now fully advised in the premises, makes the following findings as to the facts, conclusions drawn therefrom, and order, which, together with the aforesaid decision on the appeal shall be in lieu of the initial decision of the hearing examiner.

FINDINGS AS TO THE FACTS

1. Respondent, The American Hospital and Life Insurance Company, is a corporation, duly organized, existing and doing business under and by virtue of the laws of the State of Texas, with its principal place of business located at Pecan & St. Mary's Streets in the City of San Antonio, State of Texas. Said respondent is authorized by charter to engage in, and it does engage in, the business of life, health and accident insurance. It is licensed to conduct such business in the States of Arizona, Arkansas, Colorado, Illinois, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Missouri, New Mexico, Oklahoma, Tennessee, and Texas. Respondent's life insurance business is not involved in this proceeding.

2. Respondent maintains a substantial course of trade in commerce, as that term is defined in the Federal Trade Commission Act, in health and accident insurance, issuing policies to purchasers thereof located in each of the fourteen States in which it is authorized to do business. Among the policies so issued are those for individuals and family groups identified by respondent as follows:

- (1) American Family Accident Policy, Form A (1).
- (2) American Standard Accident Policy, Form ASA.
- (3) All American Accident Policy, Form AAA.
- (4) Income Protection Policy, Form A&H3.
- (5) Business and Professional Men and Women's Income Policy, Form BPI.
- (6) Preferred Individual Hospital and Surgical Insurance Policy, Form PRI.
- (7) American Economy Hospital and Surgical Insurance Policy, Form AE Rev.

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(8) All American Automobile Accident Policy, Form AAAA.

The substantiality of respondent's business is indicated by the fact that its premium receipts from its health and accident insurance business during the year 1953 was \$4,835,523.05 and during the year 1954 was \$5,009,184.47.

3. Respondent's health and accident insurance business is conducted through agents in the various States in which respondent is licensed. When an agent in any State other than Texas secures an application for a policy, the application is sent through the mail by the agent to respondent's home office in San Antonio, Texas, where the policy is issued. The policy is then mailed back to the agent in the other State for delivery to the purchaser.

4. A substantial number of persons who have purchased policies of health and accident insurance from respondent while living in States in which respondent was licensed to do business have later moved into States in which respondent was not so licensed. It is respondent's practice in such cases to mail to such insureds or policyholders premium notices and receipts and to receive from them premium payments renewing the coverage afforded by their policies. Premium payments so received by respondent from States other than those in which it was licensed to do business for the year 1953 amounted to \$47,305.72, and for the year 1954 amounted to \$78,417.89. To this extent respondent is regularly engaged in commerce with residents of States other than those in which it is licensed to do business.

5. In connection with and to promote the sale of each of the policies listed in paragraph 3, above, respondent prepares and issues a circular or brochure consisting of four pages. There is one exception—the circular relating to the policy Form AE Rev. consists of but a single page. The brochures are sent by respondent from its home office in San Antonio, Texas, to its agents located in the various States in which respondent is licensed, and are used by such agents, and often shown by them to prospective purchasers, as aids in selling the policies to which they refer. The first and second pages of each brochure contain advertising matter; the third page consists of an application form; and the last page either is blank or contains information helpful in determining premium rates. Upon completion of a sale, the applicant for insurance fills out, or furnishes the information for filling out, and signs the application form, which is then torn from the brochure and sent in to respondent with the proper premium payment; the agent issues a receipt for the premium received, usually on the form at the bottom of the second page of the brochure, and then leaves

pages 1 and 2 of the brochure with the applicant. Upon acceptance of the application at its home office, respondent issues the policy and transmits it to the selling agent for delivery to the insured.

6. In the brochure relating to respondent's policy, Form ASA, the following advertising statements are made:

NO AGE PROVISION terminating or reducing benefits because of increasing age. and

POLICY FORM ASA issued to Men and Women, ages 18 to 60. Only persons engaged in non-hazardous occupations are eligible and all applicants must be in good health.

The same statements are made in the brochure relating to the policy, Form AAA.

The complaint alleges that through the use of these statements, respondent represents that the indemnification provided by its policies may be continued to age 60 or for an indefinite period at the option of the insured. Such representation is false, the complaint charges, because respondent's policies are term policies and are renewable at the option of respondent only. Further, the policies are automatically terminated upon the payment of certain cash benefits.

The Commission does not construe these statements as having the meaning ascribed to them. Said statements can be reasonably read to mean only that the policies contain no provisions terminating or reducing benefits on account of increasing age and that applicants for such policies must be within the age limits specified; and the evidence is that the statements as so construed are both true. On this phase of the case the allegations of the complaint have not been sustained.

7. In the advertising section of the brochure relating to respondent's policy, Form A&H3, the following, among other boxed items, appears:

: CONFINING :		PER
: ILLNESS :		MONTH
: INDEMNITY :	\$-----	

for loss of time from illness, beginning on the fourth day and continuing for one year for each illness. (Up to two months full benefits for non-confining illness.)

Substantially similar statements are made in the brochure relating to respondent's policy, Form BPI. The record shows that the blank amount of dollars is usually filled in by the agent before or at the time he is talking to the prospect, based on the premiums paid.

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Through such statements, respondent represents, directly and by implication, that its policies provide indemnification for loss of time due to any and all sickness or illness.

In truth and in fact, respondent's policies do not so provide. The coverage under the policy, Form A&H3 is expressly restricted to indemnification for loss of time due to sickness or disease contracted and commencing after the effective date of the policy and while the policy is in force which wholly, necessarily and continuously disables and prevents the insured from engaging in any business, profession or employment for wage or profit and only for such period of time as the policyholder is regularly visited and attended by a legally qualified physician (M. D.), surgeon (M. D.) or osteopath, other than himself. Nor does the policy cover loss of time for illness due to pregnancy, miscarriage or childbirth in case of a woman policyholder, regardless of how long the policy has been in effect. The policy, Form BPI, also contains substantially the same restrictions on respondent's liability, none of which restrictions are disclosed in the sales brochures.

Respondent's representations as to the indemnification provided by its policies for loss of time due to sickness or illness are, therefore, false and deceptive.

8. Respondent's brochure relating to its policy, Form BPI, also contains the following with respect to loss of time due to accidents:

: TOTAL :		PER
: ACCIDENT :		MONTH
: DISABILITY :	\$-----	

for loss of time from accidental injury, beginning with the first day of disability and continuing for life while you are totally disabled. and

: PARTIAL :		PER
: ACCIDENT :		MONTH
: DISABILITY :	\$-----	

for loss of time from accidental injury, beginning with the first day and continuing for the period of partial disability (limit 3 months).

Substantially the same statements are also made in the advertising sections of the brochures relating to respondent's policies, Forms A&H3 and AAA.

Through such statements, respondent represents, directly and by implication, that its policies provide indemnification for loss of time due to all or any accidents.

In truth and in fact, respondent's policies do not so provide. Under the policy, Form BPI, respondent's liability for loss of time due to total accident disability is limited to accidents that shall

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within twenty days after the date of the accident wholly, necessarily and continuously disable and prevent the insured from performing each and every duty pertaining to his occupation for the first twelve months. After that time, the insured, in order to collect the indemnity, must be wholly and continuously disabled by reason of the accident from engaging in any occupation for wage or profit. Furthermore, the policy expressly limits the company's liability for loss of time due to either total or partial accident disability to such periods of time as the policyholder is under the regular care of a legally qualified physician (M. D.), surgeon (M. D.) or osteopath, other than himself. The policies, Forms A&H3 and AAA, contain similar limitations on respondent's liability, none of which limitations is disclosed in the sales brochures.

Respondent's representations as to the indemnification provided by its policies for loss of time due to accidents are, thus, false and deceptive.

9. Respondent's advertising brochure for its policy, Form AE Rev., contains the following:

*ROOM SERVICE

31 days each entry

*HOSPITAL EXPENSE

1. Operating Room
2. Anaesthetics
3. Laboratory Service
4. X-Rays
5. Dressings
6. Drugs
7. Blood transfusions

Any service of the hospital necessary to the recovery of the patient

*SURGERY

From \$3.00 to \$150.00 \$150.00

Depending on seriousness of operation

Additional Benefits

* * * MATERNITY: Up to \$-----after insurance has been in force 10 months. * * *

Through such statements, respondent represents, among other things, that said policy provides indemnity up to a maximum sum of \$150 for any operation serious enough to cost such an amount, and that the maternity benefits mentioned are in addition to payments for room service and hospital expenses.

Actually, the policy does not so provide. Under the terms of this policy, payment for surgeon's bill is in accordance with a schedule of fixed fees for different types of operations. Only six

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out of sixty-seven operations listed call for a surgeon's fee of as much as \$150. For twenty-nine of the listed operations, the surgeon's fees allowed are \$25 or less, regardless of the actual cost of such operations to the policyholder.

Said policy likewise does not provide for the payment of a maternity benefit after ten months, or at any other time, in addition to the payments provided for room service and other hospital expenses. The maternity benefit is obtainable only by payment of an additional premium over and above the regular premium provided in the policy and is covered by a supplemental agreement or rider attached to the policy. Moreover, said supplemental agreement or rider expressly provides that payment of the maternity benefit shall be "in lieu of all other benefits provided in the policy for hospital services," and it is, thus, clear that the maternity benefit, instead of being an additional benefit, as represented, is merely a substitute.

Respondent's representations to the contrary are false and deceptive.

CONCLUSIONS

1. The Federal Trade Commission has jurisdiction over all of the respondent's acts or practices alleged in the complaint to be unlawful.
2. The public interest in the proceeding is clear and substantial.
3. The use by respondent of the statements and representations, found herein to be false and deceptive, with respect to the terms and conditions of its policies of insurance, and its failure to reveal the limitations of the coverage of said policies, have the tendency and capacity to mislead and deceive a substantial portion of the purchasing public into the erroneous and mistaken belief that said statements and representations are true and to induce the purchase of said policies of insurance because of such erroneous and mistaken belief.
4. The aforesaid acts or practices of respondent as above set forth are all to the prejudice and injury of the public and constitute unfair and deceptive acts or practices within the intent and meaning of the Federal Trade Commission Act.

ORDER

It is ordered, That respondent, The American Hospital and Life Insurance Company, a corporation, and its officers, agents, representatives, and employees, directly or through any corporate or other device, in connection with the offering for sale, sale and dis-

tribution in commerce, as "commerce" is defined in the Federal Trade Commission Act, of any accident, health, hospital or surgical insurance policy, do forthwith cease and desist from representing, directly or by implication:

1. That said policy provides for indemnification against losses due to sickness or accident, unless a statement of all the conditions, exceptions, restrictions and limitations affecting the indemnification actually provided are set forth conspicuously, prominently, and in sufficiently close conjunction with said representations as will fully relieve it of all capacity to deceive.

2. That said policy provides for payment in full or in any specified amount or for payment up to any specified amount for any medical, surgical or hospital service, unless the policy provides that the actual cost to the insured for that service will be paid in all cases up to the amount represented, or unless full disclosure of the schedule of payments for which the policy provides is made conspicuously, prominently, and in sufficiently close conjunction with said representation as will fully relieve it of all capacity to deceive.

3. That said policy provides for the payment of certain benefits in addition to other benefits when such is not the fact.

It is further ordered, That the respondents herein shall, within sixty (60) days after service upon them of this order, file with the Commission a report in writing setting forth in detail the manner and form in which they have complied with the order to cease and desist.

Commissioners Gwynne and Mason dissenting.

OPINION OF THE COMMISSION

By KERN, Commissioner:

Counsel in support of the complaint issued in this proceeding has appealed from the hearing examiner's initial decision, in which, after holding that Public Law 15 of the 79th Congress (McCarran-Ferguson Insurance Regulation Act)¹ limits the Federal Trade Commission's jurisdiction herein to respondent's activities in the State of Mississippi, he dismissed the complaint for failure of proof.

Respondent, a Texas corporation, is licensed to conduct, and does conduct, a health-and-accident insurance business in Arizona, Arkansas, Colorado, Illinois, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Missouri, New Mexico, Oklahoma, Tennessee, and Texas. It sells its health-and-accident insurance policies exclusively through licensed agents in each of those States, and its only advertising

¹ 59 Stat. 33 (1945); 15 U.S.C. 1011*ff.*

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consists of printed brochures, which it mails from its home office in San Antonio, Texas, to its agents in other States for display or distribution to prospective policyholders in the course of sales interviews. Applications secured by respondent's agents in States other than Texas are mailed to respondent's home office, where the policies are issued and mailed to the agents for delivery to the new policyholders. The complaint alleged that respondent's advertising contains various false, misleading and deceptive representations in violation of the Federal Trade Commission Act. Respondent maintains that all States in which it carries on its operations have laws that forbid it or its agents to make misrepresentations in the course of selling its insurance and that under the McCarran-Ferguson Act this is sufficient to remove it from the scope of the Federal Trade Commission Act.

Thus at the threshold of our consideration of this appeal we face an important jurisdictional question. The basis of the hearing examiner's holding that the Commission's jurisdiction extends to respondent's transactions in Mississippi alone is that each of the other States where it advertises or sells its insurance policies (saving from consideration respondent's home State of Texas, inasmuch as jurisdiction has not been asserted over respondent's business transacted wholly within that State) fully regulates the business of insurance by legislative enactment and that to the extent such regulation exists our jurisdiction has been withdrawn by the McCarran-Ferguson Act.

That statute² directly and expressly provides that after January 1, 1948, the Federal Trade Commission Act shall apply to the

² The McCarran-Ferguson Act reads in full text as follows:

An Act to express the intent of the Congress with reference to the regulation of the business of insurance

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

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

(b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: *Provided*, That after June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State law.

SEC. 3. (a) Until June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as

business of insurance "to the extent that such business is not regulated by State law." In the judgment of the examiner, the Commission's jurisdiction over the commercial activities of insurance companies is contingent upon an absence of State regulatory legislation. Implicit in that view is the proposition that the sum of jurisdiction—State and Federal—over commerce is no more than the aggregate of the several State jurisdictions. We need scarcely point out that such a concept not only neglects the exclusive Federal jurisdiction over commerce *among* the States, conferred by Section 3 of Article 1 of the Constitution of the United States, but is inconsistent with the fundamental constitutional doctrine of the separation of State and Federal powers.

We do not think that the McCarran-Ferguson Act, considered solely by its terms or along with its legislative history and judicial interpretation, admits of such a construction.

In *United States v. South-Eastern Underwriters Assn.*, 322 U.S. 533 (1944), the Supreme Court in effect overturned *Paul v. Virginia*, 75 U.S. 168 (1868), and the line of related cases, all of which were bottomed on the principle that contracts of insurance are not commerce, either interstate or *intrastate*, and declared that the conduct of fire insurance business across State lines is "Commerce among the several States" and accordingly a conspiracy to monopolize interstate trade and commerce in that business violates the Sherman Antitrust Act. At the same time the Court pointed out that, for constitutional purposes, certain activities of a business may be *intrastate* and hence subject to State control, while other activities of the same business may be interstate and subject to Federal regulation. However, the Court did not attempt to decide which State laws were applicable to the business of insurance and to what extent they were not applicable. A local insurance company which sold only within the State was clearly subject to the State laws, but

amended, and the Act of June 19, 1936, known as the Robinson-Patman Antidiscrimination Act, shall not apply to the business of insurance or to acts in the conduct thereof.

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

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

SEC. 5. As used in this Act, the term "State" includes the several States, Alaska, Hawaii, Puerto Rico, and the District of Columbia.

SEC. 6. If any provision of this Act, or the application of such provision to any person or circumstances, shall be held invalid, the remainder of the Act, and the application of such provision to persons or circumstances other than those as to which it is held invalid, shall not be affected.

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the extent to which a company doing an interstate business was subject to State laws was not made clear.

The McCarran-Ferguson Act was enacted the year following *South-Eastern Underwriters*. Its title states that it is an act to express the intent of Congress with reference to the regulation of the business of insurance. The title does not suggest that Congress was undertaking to give any additional jurisdiction to the States or to take any away; it indicates rather an intent to avoid any ambiguity arising out of the Congressional silence. It appears that the McCarran-Ferguson Act was designed to permit the States to regulate, *in the traditional manner*, the business of insurance. It was not designed to permit insurance companies to secure new business by false or misleading advertising in interstate commerce, nor was it intended as an abdication of Federal jurisdiction under the Sherman, Clayton, and Federal Trade Commission Acts over the business of insurance. Had Congress desired to remove the business of insurance from the scope of these laws, it could have done so by simply providing that for the purpose of those statutes the business of insurance across State lines should not be deemed to be "Commerce among the several States." Quite to the contrary, it expressly applied those laws to the business of insurance within certain limits.³

The first section of the Act declares that "the continued regulation and taxation by the several States of the business of insurance is in the public interest," and that "silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States." "Continued regulation" again conveys the idea that Congress did not intend to give anything to the States that they did not already possess. Silence on the part of Congress was not to be construed as imposing any barrier to State regulation. That is not to say, however, that there were to be no *other* barriers to or limitations upon State regulation: Areas in which the States could never regulate were not dealt with one way or the other.

³ The original version of the McCarran-Ferguson Act, as reported by the committees of the respective Houses of Congress, provided flatly that neither the Federal Trade Commission Act nor the Robinson-Patman Act should "apply to the business of insurance or to acts in the conduct of that business." In debate on the floor of the House the wisdom of such an exclusion was questioned (91 Cong. Rec. 1027), and the chairman of the House Committee on the Judiciary offered to propose to the Joint Committee of Conference the elimination of the exclusionary section and the inclusion of the Federal Trade Commission Act in the moratory section, thus making the Federal Trade Commission Act applicable to the insurance business, along with the Sherman and Clayton Acts, after 1947. No opposition to this proposal was voiced on the floor. The conference committee adopted the suggestion, with the result that the Federal Trade Commission Act was to apply to the business of insurance upon lapse of the moratorium.

In construing the meaning of this section, it is to be borne in mind that under the commerce clause of the Federal Constitution Congress not only has exclusive power to regulate interstate commerce but in exercising that power can even regulate *intrastate* activities which affect interstate commerce. *United States v. Wrightwood Dairy Co.*, 315 U.S. 110, 119 (1942). When Congress enters this intermediate zone and legislates fully on a given subject, the Federal statute, "*ipso facto*", supersedes existing state legislation on the same subject." *Southern Ry. Co. v. R. R. Comm., Indiana*, 236 U.S. 439, 446 (1915).

The first section must therefore mean that the continued regulation and taxation by the States of the business of insurance *to the limits of their constitutional power* is in the public interest. Certainly the States lack the power to tax or regulate purely interstate activities of insurance companies. It can only be that the section provides that State authority over *intrastate* insurance business that might affect interstate insurance business could not be disturbed by Federal legislation which did not specifically mention insurance.

We now approach the determination of the proper construction of the crucial second section of the McCarran-Ferguson Act. Subsection (a) thereof makes the business of insurance and everyone engaged therein "subject to State laws relating to the regulation or taxation of such business." This is a clear pronouncement that the *South-Eastern Underwriters* case does not dislodge State regulation of insurance.

The second section goes on to provide in subsection (b) :

No Act of Congress shall be construed to invalidate, impair or supersede any law enacted by any State for the purpose of regulating the business of insurance * * * unless such Act specifically relates to the business of insurance: * * *.

Obviously, this does not purport to give the States the power to legislate outside their jurisdiction. Nor does it interfere in any way with Federal laws covering interstate commerce over which the States could not ever claim jurisdiction, e.g., the postal statutes. See *United States v. Sylvanus*, 192 F. 2d 96, 100 (7th Cir. 1951), *cert. denied*, 342 U.S. 943 (1952). Such laws cannot impair or supersede State laws, for they do not relate to the same channels of commerce. And, under the terms of the Act, they become inoperative only if and to the extent that they impair, invalidate, or supersede State laws. *Maryland Casualty Co. v. Cushing*, 347 U.S. 409, 413 (1954).

Section 2 (b) continues:

Provided, That after January 1, 1948,* * * the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State law.

Even without such a proviso the Federal Trade Commission Act would have been applicable to those aspects of the business of insurance which are exclusively in interstate commerce, for that area was never reached by State law. They could not, therefore, be "regulated by State law." Moreover, if this proviso meant only that no action could be taken under the Federal Trade Commission Act which was in conflict with State law it was wholly unnecessary. The statute already had stated that no Act of Congress shall invalidate, impair, or supersede a State law unless it relates specifically to insurance. It is the office of a proviso "to except something from the operative effect or to qualify or restrain the generality of the substantive enactment to which it is attached." *Cox v. Hart*, 260 U. S. 427, 435 (1922). The proviso in the McCarran-Ferguson Act must therefore make the Federal Trade Commission Act an exception to the rule that no Federal law not relating specifically to insurance may supersede a State law enacted for the purpose of regulating the business of insurance. It must have been contemplated that under certain conditions the Federal Trade Commission Act might supersede a State law purporting to regulate the business of insurance but not covering all aspects thereof. In its application to the interstate phase of a transaction which cannot be regulated by State law, for example, the Federal law in one sense would supersede a State law covering the same subject matter in a different and local phase of the transaction.

The Federal and State laws in this field supplement and reinforce one another in order to provide full protection to the public. Indeed, it seems to us that such a view is not only consonant with but imperative to the preservation of the public interest in this domain. We fully subscribe to the principle that the Federal Government ought not encumber the States in wielding the maximum of their sovereign powers over the business of insurance. This we understand to be the essential aim of the McCarran-Ferguson Act. But, in the absence of a far stronger and more positive commandment than that statute lays down, we cannot be persuaded that as to the business of insurance, the Federal authority has been ousted from the interstate regulatory sphere. It surely could not have been the Congressional intent to create a legal vacuum wherein an insurance

* The so-called "moratorium" was later extended by Congress until after June 30, 1948. 61 Stat. 448 (1947).

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company would have been enabled to escape regulation of the interstate aspects of its business in cases in which the Federal and State laws did not conflict.

We observe that Section 3 (a) of the McCarran-Ferguson Act is a moratory clause suspending the application of the Federal Trade Commission, Sherman, Clayton, and Robinson-Patman Acts to the business of insurance for nearly three years. If those statutes were not to "apply to the business of insurance or to acts in the conduct thereof" until January 1, 1948,** we think it logically follows that they were to apply to that business and to those acts after the prescribed date. Thus this subsection, as well as Section 2 (b), is inconsistent with any notion that the Commission's jurisdiction over the interstate aspects of the insurance business was repealed.

In withdrawing Federal jurisdiction under the Federal Trade Commission, Sherman, Clayton and Robinson-Patman Acts over the business of insurance for nearly three years, Congress apparently was attempting to eliminate arguments by insurance companies that Federal regulation alone was adequate and that State regulations were burdening interstate commerce. Congress gave the States about three years in which to define a reasonable area of State police power. Beyond that reasonable area States could not go. Regardless of whether a State regulated insurance during this time, after 1947 the Federal Trade Commission was expressly authorized to regulate it on different grounds, namely, regulating the use of the interstate channels of commerce.

Since the Court in the *South-Eastern Underwriters* case had said that insurance sold by a company in one State to a customer in another State was in interstate commerce, this type of transaction was subject to the jurisdiction of the Commission. During the moratorium, Congress intended that the Commission not exercise its jurisdiction. After that period the Federal Trade Commission Act was again to apply, to the extent that the business of insurance was not regulated by State law. Since the States were given no new jurisdiction, State law could regulate the business of insurance only to the extent possible before the *South-Eastern Underwriters* decision. And, as the Court recognized in that case, there were elements of interstate transactions which the States could not regulate.⁴

** *Ibid.*

⁴ "The power granted to Congress [by the Commerce Clause] is a positive power. It is the power to legislate concerning transactions which, reaching across state boundaries, affect the people of more states than one; to govern affairs which the individual states, with their limited territorial jurisdictions, are not fully capable of governing." 322 U. S. at 552.

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The legislative history of the McCarran-Ferguson Act supports the foregoing conclusion. We believe this legislative history shows plainly that in enacting that measure Congress was concerned only with ensuring that State laws regulating the business of insurance should not be superseded in the zone of "affecting interstate commerce" by Federal legislation not expressly relating to insurance. Thus we find in the reports of the committees of both Houses of Congress this statement:

Inevitable uncertainties which followed the handing down of the decision in the *Southeastern Underwriters Association case*, with respect to the constitutionality of State laws, have raised questions in the minds of insurance executives, State insurance officials, and others as to the validity of State tax laws as well as State regulatory provisions; thus making desirable legislation by the Congress to stabilize the general situation.

Bills attempting to deal with the problem were considered in both the House and the Senate during the Seventy-eighth Congress, but failed of enactment. Your committee believes there is urgent need for an immediate expression of policy by the Congress with respect to the continued regulation of the business of insurance by the respective States. Already many insurance companies have refused, while others have threatened refusal to comply with State tax laws, as well as with other State regulations, on the ground that to do so, when such laws may subsequently be held unconstitutional in keeping with the precedent-smashing decision in the *Southeastern Underwriters case*, will subject insurance executives to both civil and criminal actions for misappropriation of company funds. [Sen. Rep. No. 20, 79th Cong., 1st Sess., 1-2; H. R. Rep. No. 143, 79th Cong., 1st Sess., 2.]

But authority to regulate the interstate aspects of the business of insurance was to remain with the Federal Government, as can be seen from the following statement in the House Committee report, which was quoted with approval by Senator McCarran in floor debate on the bill (91 Cong. Rec. 1443):

It is not the intention of Congress in the enactment of this legislation to clothe the States with any power to regulate or tax the business of insurance beyond that which they had been held to possess prior to the decision of the United States Supreme Court in the *Southeastern Underwriters Association case*. Briefly, your committee is of the opinion that we should provide for the continued regulation and taxation of insurance by the States, subject always, however to the limitations set out in the controlling decisions of the United States Supreme Court, as, for instance, in *Allgeyer v. Louisiana* (165 U.S. 578), *St. Louis Cotton Compress Co. v. Arkansas* (260 U.S. 346), and *Connecticut General Insurance Co. v. Johnson* (303 U.S. 277) * * * [H.R. Rep. 143, 79th Cong., 1st Sess., 3.]

The three cases last cited in the foregoing excerpt all hold that a State's power to tax insurance activities is limited to transactions occurring within its boundaries. We would be hard put to account for the reference to these decisions if the purpose of the McCarran-Ferguson Act were to substitute and exclusive State power for the

Federal Trade Commission's jurisdiction over the interstate aspects of the insurance business.

We are confirmed in our belief to the contrary by the decision of *United States v. Sylvanus*, 192 F. 2d 96 (7th Cir. 1951), *cert. denied*, 342 U.S. 943 (1952), wherein the Court held that the McCarran-Ferguson Act did not abolish Federal jurisdiction under the postal laws to prosecute for mail fraud committed in the sale of insurance in a State having its own statutes regulating that business. The Court carefully distinguished the interstate and *intrastate* aspects of the defendant's deceptive practices:

[I]t cannot properly be said that this indictment has to do with the regulation of insurance business in Illinois. Rather it has to do with the question of whether defendants have used the mails in pursuance of a scheme so to manipulate their authorized regulated business in Illinois as to result in fraudulent deception of its prospective policy holders. The charge is not that the corporate charter should be ignored or that the administrative officers of Illinois may not perform their statutory duties and supervise and regulate the company's insurance business in Illinois, but goes to the use of the mails, over which the Congress has, by the Constitution, paramount power and authority. It matters not that the alleged fraudulent actors might be prosecuted under the law of Illinois. The indictment charges simply that acts of deception amounting to a scheme to defraud have been committed by defendants, in conducting their authorized business, and that defendants have availed themselves of the mails in execution or attempted execution of that scheme. It is immaterial that the fraudulent plan itself is outside the jurisdiction of Congress, *Badders v. U.S.*, 240 U.S. 391 * * *, or that the scheme charged involved a transaction forbidden by the laws of the state. *O'Hara v. U.S.*, 6 Cir., 129 F. 551.

We conclude, then, that it was not the intent of the Congress, by its passage of the McCarran Act, to surrender control of the use of the mails or to cease to authorize the federal courts to determine whether the mails have been utilized in attempted execution of a scheme to defraud and that the district court, by entertaining jurisdiction, did not interfere with regulation of the insurance company by the state but properly overruled the motions to dismiss the indictment. [192 F. 2d at 100.]

Unlike the Federal Trade Commission Act, the postal laws were not expressly brought by the McCarran-Ferguson Act to bear on the business of insurance. Indeed, that statute declares that *no* Act of Congress not specifically relating to the business of insurance shall be construed to invalidate, impair, or supersede any State law regulating that business. Yet in the *Sylvanus* decision, *supra*, the Court held that a postal statute banning a course of conduct which in its *intrastate* aspects constituted a State offense was unaffected by the McCarran-Ferguson Act.

All the more, then, under the Federal Trade Commission Act, which the McCarran-Ferguson Act made applicable to the business of insurance, there must remain an irreducible area of Commission

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jurisdiction over the interstate activities of insurance companies which cannot be reached by State law and as to which the limitation "to the extent that such business is not regulated by State law" is inoperative.

A State can revoke an insurance corporation's charter or license, thus affecting interstate commerce to some degree. To the extent necessary to enable it effectively to exercise its police power the State can take action having consequences in other jurisdictions, and the Federal Trade Commission could not prohibit such regulation. And the text and history of the McCarran-Ferguson Act leave no doubt that the power of the States to tax, or to fix rates for, insurance companies doing business within their territories was in no way to be invalidated, impaired, or superseded by Federal law. However, as we have already said, our proceeding to abate deceptive practices by such companies does not impinge on those State functions, and we do not believe that the Federal Trade Commission Act, when read in conjunction with the McCarran-Ferguson Act, can be properly interpreted to interfere with the taxing or rate-fixing powers.

By executing its statutory mandate to prevent deceptive practices in the interstate business of insurance, the Commission in no wise usurps State laws prohibiting false advertising. The Federal Trade Commission Act and the State laws are both designed to suppress deception in advertising. The Commission's action in the instant matter aids the States in their own local procedures to protect their citizenry from such excesses. The McCarran-Ferguson Act was passed to enable them to continue such regulation. *Maryland Casualty Co. v. Cushing*, 347 U.S. 409, 413 (1954).

The principle that the Commission may proceed against a practice that may simultaneously be the object of State regulation is one of long standing.⁵ Thus the Commission's orders prohibiting the interstate shipment of lottery devices to be used in selling merchandise have been universally upheld on judicial review despite the fact that such devices are not put to their intended use until they have left the channels of interstate commerce (just as the respondent's brochures are not displayed for sales purposes until they have come to rest in the hands of respondent's agent within a State). See *Seymour Sales Co. v. FTC*, 216 F. 2d 633, 635-6 (D. C. Cir. 1954), *cert. denied*, 348 U. S. 928 (1955), and cases therein cited. The idea of a field of enforcement divided between

⁵ As recently as April 2, 1956, the Supreme Court of the United States reaffirmed this principle in *Pennsylvania v. Nelson*, 350 U. S. 497, declaring that where the Federal Government had occupied the field of protecting against sedition, States were not thereby prevented "from prosecuting where the same act constitutes both a Federal and a State offense under the police power * * *."

Federal and State Governments is embedded in a number of statutes, in addition to the McCarran-Ferguson Act. Examples of these are acts dealing with the sale of liquor (the Wilson Act, 26 Stat. 313, and the Webb-Kenyon Act, 33 Stat. 699), convict-made goods (the Hawes-Cooper Act, 45 Stat. 1084, and the Ashurst-Sommers Act, 49 Stat. 494), oleomargarine (32 Stat. 193), diseased plants (44 Stat. 98), black bass (64 Stat. 845), whaling (49 Stat. 1246), prize-fight films (54 Stat. 686), and the Federal Power Act (49 Stat. 838).

In view of our foregoing consideration of the terms, legislative history, and judicial interpretation of the McCarran-Ferguson Act, we do not think the statute admits of the construction placed on it by the hearing examiner.

Respondent points out that it did not send its advertising materials to sales prospects but mailed them to its own agents in various States for local use, and that hence its advertising occurred only in *intrastate* commerce. We consider such an analysis factitious and unrealistic. Respondent's annual premium collections on health-and-accident insurance sold by its agents throughout fourteen States amount to about \$2,750,000. It employs an indisputable channel of interstate commerce, the mails, for sending advertising materials to its agents, receiving applications for insurance from them, and forwarding the issued policies to them for delivery to policyholders. The actual interview of a prospect, though it necessarily happens at a fixed geographical point within some State, cannot be isolated from the remainder of respondent's established course of dealing. By preparing its brochures and furnishing them, by mail, to its agents in various States for their use in sales presentations, respondent engages in an interstate commercial practice that must be viewed as a whole and not compartmentalized. *Consolidated Manufacturing Co. v. FTC*, 199 F. 2d 417, 418 (4th Cir. 1952).

Under the Federal Trade Commission Act, one who sells through agents in other than his home State must answer for deceptive advertising which he supplies to his agents, even though such representations are by necessity conveyed to the public within a particular State. *General Motors Co. v. FTC*, 114 F. 2d 33, 36 (2d Cir. 1940); *Ford Motor Co. v. FTC*, 120 F. 2d 175, 183 (6th Cir. 1941).

The Commission is accordingly of the opinion that the hearing examiner erred in not holding that the Commission had jurisdiction over such of respondent's practices in interstate commerce as might be found to be unfair or deceptive, irrespective of the existence of State statutes applicable to the *intrastate* elements of such practices.

We turn now to the appeal from the hearing examiner's dismissal of the complaint for lack of substantial evidence.

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Respondent was charged with falsely representing, among other things, that the indemnification provided by its policies might continue to the age of sixty, or for an indefinite period, at the option of the insured. The sole evidence adduced on this allegation consists of brochures which state as follows, or similarly:

NO AGE PROVISION terminating or reducing benefits because of increasing age,
and—

POLICY FORM ASA Issued to Men and Women, ages 18 to 60.

Only persons engaged in non-hazardous occupations are eligible and all applicants must be in good health.

We do not believe that these two statements, separately or together, particularly in the absence of assertions of lifetime duration or any other definite period of coverage, can be reasonably read as meaning more than that respondent's policies contain no provisions terminating or reducing benefits on account of increasing age and that applicants for such policies must be within the age limits specified. It is true that respondent's accident-and-health policies are term contracts renewable at the option of the company on the premium data. However, nothing to the contrary is expressed or reasonably implied in the aforequoted statements and we therefore discern therein no capacity or tendency to deceive. We uphold the hearing examiner's dismissal of the complaint in this respect.

Respondent was next charged with falsely representing that its policies provide indemnification for all illness or accidents. To prove this charge there were introduced respondent's brochures containing broad, general representations, of which the following are typical:

(CONFINING)	
(ILLNESS)	PER
(INDEMNITY)	\$_____MONTH

for loss of time from illness, beginning on the fourth day and continuing for one year for each illness. (Up to two months full benefits for non-confining illness.)

Total

Accident_____per month

Disability

for loss of time from accidental injury beginning with the first day of disability and continuing for life if you are totally disabled.

Partial

Accident_____per month

Disability

for loss of time from accidental injury, beginning with the first day and continuing for period of partial disability (limit 3 months).

In conjunction with the foregoing there were introduced copies of respondent's policies containing conditions substantially limiting the illness and accident benefits advertised. The examiner found that the charges in this regard were not supported by substantial evidence, not for the reason that the representations were not proved nor that the terms of the policies did not materially limit the advertised benefits, but for a number of other reasons which are in our judgment unsound and contrary to controlling precedent.

The examiner attached great weight to the fact that the brochures in question included a statement to the effect that benefits therein described "are subject to the terms of the policy issued." We are not in accord with the examiner's view that such a notice is sufficient to correct erroneous impressions given by the representations "CONFINING ILLNESS INDEMNITY—\$-----per month for loss of time from illness, beginning on the fourth day and continuing for one year for each illness," or "TOTAL ACCIDENT DISABILITY—\$-----per month for loss of time from accidental injury, beginning with the first day of disability and continuing for life while you are totally disabled." Respondent's vice-president, W. C. Murphy, testified that an agent's sales kit consisted of the sales brochures, a rate book, "and, I guess, a fountain pen," and that respondent's agents are not required to carry sample policies with them. These sales brochures consist of an application form and a receipt form for the initial payment. These facts lead us to believe that many applicants do not see sample policies before executing formal applications for respondent's insurance. We consider this circumstance significant. In the context of the sales presentation, in the course of which the prospect has little or no opportunity to inspect a sample policy, the sales brochure, we are convinced, clearly has the tendency and capacity of misleading as to the extent of coverage. We disagree with the examiner's statement that if the prospect would read the entire page he would see that all benefits are subject to the terms of the policy and then if interested he would naturally inquire of the agent as to the terms. Rather it is our view that the brochure functions as a self-contained piece of advertising that of itself is likely to induce a prospect to purchase respondent's insurance.

Furthermore, we do not believe that the prospective purchaser is under any obligation to investigate the extent to which respondent's unrestricted representations of coverage for illness or accidents are untrue. "Under repeated decisions, the purchaser is entitled to rely upon the representations made. He need not distrust what is told him. * * * It goes without saying almost that it is extremely

difficult for a layman to understand the terms and conditions of such policies as these, but whether the applicants did or did not read and understand the policies is beside the point." *United States v. Sylvanus*, 192 F. 2d 96, 105 (7th Cir. 1951) *cert. denied*, 342 U.S. 943 (1952).

If the busy or careless businessman is entitled to protection from deceptive printed forms, even though an attentive, careful person would not be deceived thereby, *Independent Directory Corp. v. FTC*, 188 F. 2d 468, 470, 471 (2d Cir. 1951), it does not devolve upon respondent's prospects to ascertain the extent to which respondent's advertising may or may not exaggerate or falsify. The Federal Trade Commission Act is violated if the first contact or interview is secured by deception even though the true facts are made known to the purchaser before he enters into the contract to purchase. *Carter Products, Inc. v. FTC*, 186 F. 2d 821, 824 (7th Cir. 1951).

Another questionable premise in the examiner's reasoning is that "any reasonably intelligent person considering the purchase of health and accident insurance would be expected to know that health and accident policies do not ordinarily cover all illnesses and all accidents, regardless of their nature or time of origin or occurrence." Apart from the fact that the Federal Trade Commission has the duty to protect not only the "reasonably intelligent" but also the ignorant, the unthinking, the credulous, and the inexperienced, *Charles of the Ritz Dist. Corp. v. FTC*, 143 F. 2d 676, 679 (2d Cir. 1944), we question whether the fact asserted by the examiner to be common knowledge—if it be a fact—is generally known even to the "Reasonably intelligent." It is certainly not beyond the realm of actuarial conceivability, not to say possibility, that in these United States in the mid-twentieth century insurance could be written which would afford protection against all illness and all accidents.

The examiner noted that no proof of actual deception was offered and declared, "Absence of such evidence justifies a presumption that none existed." Despite his disclaimer of reliance on such a presumption, it evidently was one of the considerations impelling him to dismiss these charges. This is manifest error. It was firmly established long since that actual deception of the public need not be shown in Federal Trade Commission proceedings and that representations having a capacity to deceive are unlawful. *Charles of the Ritz Dist. Corp. v. FTC*, *supra*, 143 F. 2d at 680.

The initial decision devotes considerable space to three decisions of the Supreme Court of Mississippi, all involving private litigation, in which that Court accorded a more liberal interpretation

to the conditions contained in accident and health policies similar to those here than their literal intendment would seem to justify. He concludes from these holdings that the conditions are not so burdensome as to render untrue respondent's broad representations.

The decisional law of a single State is no sure guide to the interpretations that other States may place on respondent's policies. What is more, the fact that a policyholder may eventually prevail over a respondent in an appeal from a jury trial does not rectify the deception inhering in the sales practices whereby he was induced to purchase the insurance. He may be discouraged by the literal terms of the policy from seeking legal redress. We do not consider that the fact that if he perseveres to his State supreme court he may succeed in winning an interpretation of respondent's policy more favorable to him than the language literally warrants is a substitute for the protection assured him by the Federal Trade Commission Act.

The hearing examiner discusses at some length the reasonableness of the restrictions that respondent attaches to its illness and accident benefits. This is, of course, not germane to the question of whether respondent's representations tend to deceive and mislead.

There remain for discussion two other charges dismissed by the examiner. It was alleged that respondent had represented its hospital-and-surgical-expense policy to provide for the payment of \$150 for any operation serious enough to justify such a surgeon's fee. The evidence shows that respondent disseminates a one-page advertisement which, among other things, states that the policy provides for—

SURGERY	
from \$3.00 to \$150.00	\$ 150.00
depending on seriousness	
of operation	

The policy to which this refers sets out a long schedule of the various amounts payable for specified types of surgical operations. Sixty-seven different benefits are enumerated. A mere six of these amount to \$150: operations for removal of a portion of the lung, removal of kidney, removal of a portion of the vertebra, removal of entire prostate or thyroid gland, and cutting into the cranial cavity.

Only \$25 is allowed for removal of tonsils and adenoids. Appraising this advertisement as it is likely to be read by unsuspecting, incautious members of the purchasing public, we gain the impression that the policy will indemnify up to a maximum sum of \$150 for any surgical operation serious enough to cost such an amount.

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Thus, if a tonsillectomy cost \$50, we would think it reasonable to expect that one insured by the policy would be protected to that extent. The advertisement is therefore deceptive and misleading in that it promises benefits which the policy does not corroborate.

Lastly, it was charged that respondent falsely represented that its hospital-and surgical-expense policy would pay maternity benefits in addition to room service and hospital expense.

On the advertisements for this type of policy, following a listing of the benefits of room service, hospital expense, and surgery, there is shown as one of the "Additional Benefits:"

Maternity: Up to \$-----after insurance has been in force for 10 months.

We would have difficulty in reading the foregoing as anything less than a representation that the maternity benefit is in *addition* to the other benefits provided by the policy. In actuality, however, the maternity benefit is provided for in a rider wherein it is specified that the maternity benefit shall be "in lieu of all other benefits provided in the policy for hospital service." Thus, far from being an *additional* benefit, it is only a *substitute* benefit, and the representation in regard thereto is hence at material variance with the facts. We believe that the type of misconception that such advertising as this can engender in the minds of couples seeking to provide financially for the birth of children is especially vicious. There can be no question that it is a patent deception to describe as "additional" a benefit which excludes participation in other benefits, directly following a broad representation that hospital and surgical expenses are covered.

In view of the foregoing, the initial decision is vacated and set aside, and our findings as to the facts, made on consideration of the whole record including the initial decision, and conclusions and order to cease and desist will be issued in lieu thereof.

Commissioners Gwynne and Mason dissent.

JOINT DISSENTING OPINION OF CHAIRMAN GWYNNE
AND COMMISSIONER MASON

We are unable to agree with the views expressed in the majority opinion. The reasons for our dissent are: first, the opinion completely ignores the intent of Congress in adopting Public Law 15 (McCarran Act); second, it would return the insurance business to the uncertainty and confusion which followed the decision in *U.S. v. South-Eastern Underwriters Association*, (1944) 322 U.S. 533. It was to remove this uncertainty and confusion that the McCarran Act was adopted.

Prior to the decision in the *South-Eastern Underwriters* case, regulation of insurance was recognized as a problem for the re-

spective states. This was partly because the Supreme Court of the United States in a long line of decisions from *Paul v. Virginia*, 8 Wall. 168, to *New York Life Insurance Company v. Deerlodge County*, 231 U.S. 495, had held that the business of insurance was not commerce.

Although the business of insurance was not subject to regulation under the commerce clause, it was universally recognized as a business affected with a public interest. Consequently, the states found few obstacles to regulating it to the fullest extent and in the manner the respective legislatures thought to be for the public good in their particular states. These laws took the form of determining who should engage in the insurance business within the state boundaries, the terms under which the business might be conducted, regulation as to rates to be charged (even to the extent of fixing them, or permitting representatives of insurance companies to do so under state supervision). The right of the states to levy tax and license fees, even discriminating against foreign insurance corporations, was also recognized. See 44 C.J.S. p. 518; *LaTourette v. McMaster, Insurance Commissioner*, 244 U.S. 465.

Had these regulations been directed at the usual industry engaging in interstate commerce, many would have run counter to paramount Federal authority. For example, the many discriminatory taxing programs were not in accord with decisions of the Supreme Court relating to interstate commerce generally. Certain state rate regulations were contrary to the philosophy of Federal antitrust laws. No conflict arose, however, because it had been settled that the business of insurance was not interstate commerce.

This does not mean that the insurance business and the states in regulating it were free from all Federal constitutional and statutory provisions. They were, of course, subject to such constitutional restraints as the due process clause, the exclusive right of Congress to establish post offices and post roads [*U.S. v. Sylvanus* (1951), 192 F. 2d 96] and many others. In fact they were, and still are, subject to all restraints properly imposed by paramount power, except as that power elects to exempt them.

In regulating insurance, states act under that great reservoir of power known as the police power. There are, of course, jurisdictional limitations on the exercise of that power. It may be directed only at activities within the state. It has never been claimed that the states may operate directly in that phase of regulation known as the flow of commerce. Nor by no stretch of the imagination can it be said that the McCarran Act intended to give any such power.

In 1944 in the *South-Eastern Underwriters* case, the court reversed its holdings of 75 years standing and concluded that the business of insurance was interstate commerce. It was also specifically held that it was subject to the Sherman Act.

The immediate effect of this decision was to bring the business of insurance and the laws of the various states regulating it under the paramount power of the Federal antitrust laws. Because of the inconsistency previously referred to, this created considerable uncertainty and confusion in the insurance field, of which Congress took immediate cognizance.

Confronted with this emergency, Congress had several alternatives:

(1) It might take no action and allow the antitrust statutes to be superimposed on the existing state systems of regulation and taxation. This would create great confusion as to the legal boundaries between Federal and state control, which confusion could only be lessened, bit by bit, as courts made decisions on specific problems.

(2) It might write a comprehensive law for Federal regulation of insurance,—a law which would provide new methods for many matters theretofore handled by the states, and which might make such changes in the application of existing antitrust laws to the peculiar business of insurance as experience had indicated might be necessary.

(3) It might recognize and continue existing or future state regulation by removing the obstacles to that regulation which had been called into being by the decision that the business of insurance was interstate commerce.

Congress chose the latter course and expressed its choice by the adoption of the McCarran Act. The general purpose of this legislation was to meet the problems created by the *South-Eastern Underwriters* case. The plan for meeting this problem is clearly expressed in the law. It may be reduced to a simple statement as follows: The Congress declares that the continued regulation and taxation by the states of the business of insurance is in the public interest and shall remain, with two exceptions, namely, (1) this Act shall not render the Sherman Act inapplicable to agreements to or acts of boycott, coercion or intimidation, and (2) that after June 30, 1948 (but not before), the Sherman Act, the Clayton Act and the Federal Trade Commission Act shall be applicable to the business of insurance, but only to the extent that such business is not regulated by state law. Thus, in any case, the jurisdictional question may be quickly and certainly resolved by finding the answer

to a simple question, namely, is there state regulation to meet the particular problem presented by the facts.

That this is the proper interpretation of the law is indicated by the following: (1) the wording of the statute itself, (2) the legislative history, (3) events which transpired immediately following passage of the law, (4) decisions of the courts interpreting the McCarran Act.

It is, of course, well settled that the power of Congress under the commerce clause is broad and is also paramount. It includes the right to regulate, or even prohibit, the flow of things across state lines, the right to regulate the instrumentalities by which commerce is carried on, and also the right to regulate activities, wholly within the state, which affect interstate commerce. The power to regulate the so-called flow of commerce covers every species of movement of persons and things, whether for profit or not; every species of communication; every species of transmission of intelligence, whether for commercial purposes or otherwise; every species of commercial negotiations, which, as shown by the established course of business, will involve sooner or later an act of transportation of persons or things, or the flow of services or power across state lines. (See the *Analysis of the United States Constitution* as prepared by the Legislative Reference Service. Library of Congress, and cases cited.)

The great power of Congress to regulate matters wholly within the state but affecting interstate commerce is well settled in *U.S. v. Darby* (1944), 312 U.S. 100, in which the court held that the payment of substandard wages wholly within a state affected commerce and could be prohibited.

Going with these great powers, and a necessary corollary to them, is the right of Congress to determine where and when these powers are to be used. Thus, it may decline to exercise certain powers; and it may condition its refusal to exercise them on the fact of regulation by the states.

This is exactly what Congress was seeking to do in the McCarran Act. Much of the fallacy of the reasoning in the majority opinion springs from a refusal to recognize this obvious fact. The majority would decide the issues in this case by applying principles which admittedly were applicable following the decision in the *South-Eastern Underwriters* case. They conveniently ignore the fact that the purpose of the McCarran Act was to prevent the application of these principles.

For convenience, and before discussing the law in detail, the McCarran Act is set out here in full text:

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

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

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

SEC. 3. (a) Until January 1, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, and the Act of June 19, 1936, known as the Robinson-Patman Antidiscrimination Act, shall not apply to the business of insurance or to acts in the conduct thereof.

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

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

SEC. 5. As used in this Act, the term "State" includes the several States, Alaska, Hawaii, Puerto Rico, and the District of Columbia.

SEC. 6. If any provision of this Act, or the application of such provision to any person, or circumstances, shall be held invalid, the remainder of the Act, and the application of such provision to persons or circumstances other than those to which it is held invalid, shall not be affected.

While the title to a statute is not, strictly speaking, a part of the law, nevertheless, it is interesting to note that the title is "To express the intent of the Congress with reference to the regulation of the business of insurance."

Immediately after the enacting clause, occurs the following:

That the Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, * * *.

This is a clear and positive declaration of Congressional policy, which cannot be read out of the law. It expressly points out the character of state regulation and taxation which is in the public

interest. It is the "continued regulation". In the past, the states have done all the regulating so far as the commerce clause was concerned. That was to carry on, with the exceptions expressly provided for, and which will be discussed hereafter. There is nothing in this statement or in the entire Act which justifies the interpretation that the regulation contemplated was to continue only by the grace of the Federal Trade Commission.

Speaking on this subject in *Prudential Insurance Company v. Benjamin*, 328 U.S. 408, the Supreme Court of the United States had this to say:

Obviously Congress' purpose was broadly to give support to the existing and future State systems for regulating and taxing the business of insurance. This was done in two ways. One was by removing obstructions which might be thought to flow from its own power, whether dormant or exercised, except as otherwise expressly provided in the Act itself or in future legislation. The other was by declaring expressly and affirmatively that continued State regulation and taxation of this business is in the public interest and that the business and all who engage in it "shall be subject to" the laws of the several States in these respects.

Moreover, in taking this action Congress must have had full knowledge of the nation-wide existence of state systems of regulation and taxation; of the fact that they differ greatly in the scope and character of the regulations imposed and of the taxes exacted; and of the further fact that many, if not all, include features which, to some extent, have not been applied generally to other interstate business. Congress could not have been unacquainted with these facts and its purpose was evidently to throw the whole weight of its power behind the state systems, notwithstanding these variations.

* * * * *

* * * it clearly put the full weight of its power behind existing and future State legislation to sustain it from any attack under the commerce clause to whatever extent this may be done with the force of that power behind it, subject only to the exceptions expressly provided for.

That a declaration of policy by Congress will be given weight by the courts is well settled. See *U.S. v. Darby*, 312 U.S. 100.

Continuing, the statute further provides:

* * * and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.

Some of the powers granted to Congress by the Constitution are either expressly, or by necessary implication, exclusive and cannot be exercised by the states, even though Congress has taken no action thereon and has remained silent on the subject. The power to declare war is an example. Under the commerce clause, the line between Federal and state authority cannot be so precisely drawn. This is particularly true in the field of state activities which may or may not have a prohibited effect on interstate commerce. The

supremacy of the Congress, when properly exercised in this field, is clearly recognized. A difficult problem arises where the powers of Congress are allowed to lie dormant, that is, when Congress is silent on a given subject. Should its silence be construed as a reservation of its power, which will bar any state regulation; or will it be considered as consent to state action until Congress has spoken? This question has arisen many times and has received a variety of answers, depending upon the circumstances of the particular case.

The question of silence of Congress is not involved in this case. The Congress evidently thought it might be raised, and intended to make its position clear. The inclusion of the above quoted clause indicates how thoroughly Congress has considered this matter and how determined it was to remove all possible barriers to its declared policy of state regulation.

Section 2 (a) provides:

The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

When used in this connection, "subject to" means "subordinate to", "obedient to". *Shay v. Roth*, Calif. (1923), 221 P. 967; *Davis v. City of Los Angeles* (1890), 24 P. 771.

In a long line of cases from *Paul v. Virginia* to *New York Life Insurance Co. v. Deerlodge County*, insurance companies have challenged their subjection to state regulatory or taxing laws. The Supreme Court, however, consistently rejected this defense on the theory that the business of insurance was not interstate commerce.

When the Supreme Court in *South-Eastern Underwriters* reversed its decision, this defense became good, and the business of insurance was subject to state laws, only to the extent that such laws did not interfere with paramount Federal power under the commerce clause. In Section 2 (a) Congress clearly showed its intention to remove the barrier of its own paramount power and thus make the business of insurance subject to state laws, notwithstanding the decision in *South-Eastern Underwriters*.

Section 2 (b) provides:

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

Stronger language to give state laws "top billing" could hardly be imagined. The clause beginning with "unless" is particularly significant. While Congress had not legislated directly concerning the insurance business, it had done so with reference generally to interstate commerce and with reference to persons and corporations engaged therein. The antitrust laws are examples. Congress in Sec. 2 (b) said none of these laws (except as indicated in the proviso) shall apply to the business of insurance, unless such law specifically relates to insurance. It recognized: first, that insurance has some problems peculiar to that industry; second, that many states had adopted regulatory systems tailored to the insurance business in their boundaries; and, third, that any attempt to superimpose the general laws regulating commerce on these systems would create great confusion.

The proviso applies only to the provision immediately preceding it. *Dahlberg v. Young* (1950) Minnesota 42 N.W. 2nd 570. It provides an exception to the general statement preceding it, which exception is that the three Acts named therein shall, after January 1, 1948, apply to the business of insurance,—but only to the extent that such business is not regulated by state law. This proviso was adopted to answer criticism of the original House bills, which provided simply that certain laws shall not apply to the business of insurance or to acts in the conduct of that business. In other words, in the original bills, the House proposed to wash its hands of the whole matter, regardless of whether any particular state had provided regulation. The final version, which was accepted by the House without objection, simply conditioned Federal withdrawal from the field on the fact that the particular state had provided regulatory laws. In view of the strong stand taken by the House in favor of continued state regulation, it does not seem reasonable that it would have accepted, without question, this final version, if (as claimed by the majority) such version set up concurrent jurisdiction, with the Federal power paramount to the state power.

What Congress had in mind is further illustrated by Section 3 (a) which provides that until January 1, 1948, the antitrust laws should in no event apply to the business of insurance. The majority claim that the purpose of this moratorium was to give the states time "in which to design a reasonable area of state police power. Beyond that reasonable area, states could not go."

That view is based on a misconception of the state police power. That power was reserved to the states by the Constitution. It is not up to the Congress to determine whether it is exercised reason-

ably. Whether exercised reasonably or not, this power is subject, at all times, to the paramount power of the Federal government under the commerce clause and other constitutional provisions not involved here; and in case of conflict, the question is resolved by the Federal government and not by the states. The whole purpose of the McCarran Act was to express the Congressional intent that the barrier of paramount power under the commerce clause was to be removed in the event that the states did adopt regulatory laws. The purpose of the moratorium was to give the states time to adopt such laws. Failing to do so in any particular area, the Federal power would still remain.

Section 3 (b) provides:

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

The *South-Eastern Underwriters* case involved a boycott by a number of insurance companies operating in several states. The Congress concluded that the paramount power of the Federal government in such cases should remain.

The fact that Section 3 (b) is in the law is a strong argument against the interpretation urged by the majority. If the McCarran Act left the Federal government and the states with concurrent powers (in which the Federal power would necessarily be paramount), why was it necessary to include Section 3 (b)?

The legislative history of the McCarran Act strongly supports our interpretation of the jurisdictional feature.

While the *South-Eastern Underwriters case* was pending in the Supreme Court, bills were introduced in the House, providing for the unqualified exemption of insurance from the Sherman and Clayton Acts. Thereafter, and after considering suggestions by representatives of the National Association of State Insurance Commissioners, and also by representatives of the insurance industry, bills were introduced both in the House and Senate, which bills, with some minor modification, eventually became the McCarran Act. In some respects, these bills further limited the control of Congress, as, for example, in the inclusion of the Federal Trade Commission Act. In other respects, the Federal authority was broadened to retain control, in all cases where state regulation did not exist. The law, as finally passed, is clear on this point; regulation shall remain in the states with the exception of the boycott situation, and with the exception of those situations where a state either did not or could not adopt the necessary regulations.

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There is literally no evidence to the contrary. Note the following excerpts from the Senate debate.

SENATOR MURDOCK. And it is intended that on the expiration of the moratorium, the Sherman Act, the Clayton Act, and the other acts mentioned will again become effective, except —

SENATOR McCARRAN. Except as the states themselves have provided regulation.

* * * * *

SENATOR PEPPER. States may determine whether or not the Sherman and other acts become applicable to the business of insurance?

SENATOR McCARRAN. Yes.

What was done after the adoption of the McCarran Act indicates that the persons concerned had no doubt about the meaning of the Act. The National Association of State Insurance Commissioners prepared a model code for the regulation of the insurance business in accordance with the directions of Congress. This code has been adopted by a majority of the state legislatures. Other states have adopted laws which in effect are equivalent.

It is difficult to understand why these actions should have been taken if the parties thereto thought that the net result would leave the law as it was just prior to the McCarran Act, which is the contention of the majority in this case.

The McCarran Act has been considered in four Federal court cases. In none of them, did the court experience any difficulty in determining what the McCarran Act meant. In the *Sylvanus* case, the court said:

It is clear, we think that by this legislation, the Congress established a public policy upon the part of the national government to refrain from interference with the regulation and taxation of insurance companies by the several States.

In *Maryland Casualty Company v. Cushing* (1953), 347 U.S. 409, the Supreme Court said:

Even the most cursory reading of the legislative history of this enactment (McCarran Act) makes it clear that its exclusive purpose was to counteract any adverse effect that the court decision in the *South-Eastern Underwriters* case might be found to leave on state regulation of insurance.

The Court then quotes from House Report No. 143, 79th Congress, 1st Session, as follows:

It is not the intention of Congress in the enactment of this legislation to clothe the states with any power to regulate or tax the business of insurance beyond that which they had been held to possess prior to the decision in the *South-Eastern Underwriters* case.

A clearer and more concise statement of the extent of the McCarran Act, and also its limitations, could hardly be found.

In *North Little Rock Transportation Co. v. Casualty Reciprocal Exchange* (1950), 181 F. 2d, 174, the Court said:

The purpose of the McCarran Act was to permit the States to continue the regulation of the business of insurance, unhampered, to the extent provided by the Act, by Federal legislation relating to interstate commerce. See *Prudential Insurance Co. v. Benjamin*, supra, p. 429 of 328 U.S.

In view of what was said by the Supreme Court about the effect of the McCarran Act in the *Prudential Insurance Co.* case and the case of *Robertson v. People of State of Calif.*, 328 U.S. 440, 449, 461, there is no need for discussing the validity or effectiveness of the McCarran Act. A ruling that it is invalid or ineffectual, we think, would be absurd.

The *Prudential Insurance Company* case is directly in point. There, the Prudential company challenged a statute of South Carolina which imposed on foreign insurance companies as a condition of doing business within the state, an annual tax of 3% of premiums on business done in the state without reference to transactions, whether interstate or local. It should be noted that the case did not involve purely intrastate matters, which the majority claim is the limit of the McCarran Act's effectiveness. This state tax was clearly discriminatory, affected interstate commerce, and would ordinarily have been stricken down. However, it was not, and the reason given was that a state tax or regulation discriminating against interstate commerce which would be invalid under the commerce clause, in the absence of action by Congress, may be validated by the affirmative action of Congress consenting thereto. The only difference between the Prudential case and the one at bar is that the former deals with state taxation and the latter with state regulation. The McCarran Act covers both.

The majority view of jurisdiction under the McCarran Act is entirely different. They say the McCarran Act "was designed to permit the states to regulate, *in the traditional manner*, the business of insurance." They obviously do not mean they are permitted to regulate it as they did prior to the *South-Eastern Underwriters* Case, because their decision in this case asserts the paramount power of Federal laws over those of the states.

No law of Congress was necessary to give the states a right to carry on activities within their own borders, designed to regulate insurance. That is covered under the police power, guaranteed to the states by the Constitution. Just as Congress with reference to powers under the commerce clause, state legislatures may exercise these powers or not as they choose, subject only to their own and the Federal Constitution. The real problems arise when the exercise of these powers come in conflict with the commerce clause.

There, the Federal power is paramount. *Parker v. Brown*, 317 U.S. 34. *Southern Railway Company v. Railroad Comm. of Indiana*, 236 U.S. 439. But, as was pointed out in the latter case, Congress could have circumscribed its regulation so as to occupy a limited field." This intention to occupy a limited field is the very essence of the McCarran Act.

Just how far the majority would go in disregarding this intention is well illustrated in the case at bar. For example, suppose a state having the model code should decide that certain advertising disseminated therein did not violate the law. Nevertheless, the Federal Trade Commission asserting its paramount power to regulate the flow of commerce into the state comes to an opposite conclusion. Or suppose the state officials held the advertising was illegal, while the Federal Trade Commission held to the contrary. The majority decision does not recognize state regulation; it destroys it.

The cases cited do not support the majority position. Of course, the Federal government, under the commerce clause, may regulate the flow of lottery devices into a state, regardless of state laws on the subject. The reason is that Congress has never enacted in the lottery field an equivalent of the McCarran Act. It requires a violent stretching of the imagination to find any support in the *Sylvanus* decision. There, the defendant was indicted under a statute prohibiting the use of the mails to defraud. The power of Congress in mail fraud matters does not depend on interstate commerce; it is based on the exclusive Constitutional right to control the mails. Prior to the South-Eastern Underwriters case, immediately after and prior to the McCarran Act, and under the McCarran Act, the result would have been the same. As the Court well expressed it, "This indictment does not have to do with the regulation of the insurance business in Illinois. Rather it has to do with the question of whether defendants have used the mails in pursuance of a scheme so to manipulate their authorized regulated business in Illinois as to result in fraudulent deception of its prospective policy holders. The charge is not that the corporate charter should be ignored or that the administrative officers of Illinois may not perform their statutory duties and supervise and regulate the company's insurance business in Illinois, but goes to the use of the mails over which Congress has by the Constitution paramount power and authority."

The McCarran Act arrests the overriding power of the Federal government under the commerce clause as it affects insurance, where

the states have regulatory laws. Nowhere does the Act express any intention of doing the same with the power to regulate the mails, the power to enforce due process, or the many other constitutional powers.

To us, the conclusion is inescapable that under the majority view, the McCarran Act accomplished nothing. Courts will not presume that a statute was meant to have no effect. On the contrary, it will be presumed that the legislative body intended to make some change in existing laws, particularly where the whole history shows they intended to remedy what they thought was an existing evil. This rule is usually applied in situations where the over-all intent is not clearly expressed in clear language.

Here, the majority would reverse these well-known rules of statutory construction in order to prove that Congress accomplished nothing. They, in effect, rewrite portions of the McCarran Act as follows:

That the Congress hereby declares that paramount regulation and taxation by the Federal government of the business of insurance, rather than the continued regulation and taxation thereof by the several states, is in the public interest.

Section 2. (a) The business of insurance, and every person engaged therein shall be subject to the laws of the several states which relate to the regulation or taxation of such business, only to the extent that such laws do not conflict with the paramount Federal power under the commerce clause.

Section 2. (b) Any act of Congress, whether it specifically relate to the business of insurance or not, shall be construed to invalidate, impair or suspend any law enacted by any state for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, whenever the state law conflicts with such act of Congress. The Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance regardless of any state regulation on the subject.

II

Our second objection to the majority opinion is that it would return the insurance business to the confusion into which it was plunged by the South-Eastern Underwriters decision. The nature and extent of that confusion was well expressed by the dissenting judges. The late Mr. Chief Justice Stone said:

* * * And in view of the broad powers of the federal government to regulate matters which, though not themselves commerce, nevertheless affect interstate commerce, *Wickard v. Filburn*, 317 U. S. 111; *Polish Alliance v. Labor Board*, *supra*, there can be no doubt of the power of Congress if it so desires to regulate many aspects of the insurance business mentioned in this indictment.

But the immediate and only practical effect of the decision now rendered is to withdraw from the states, in large measure, the regulation of insurance and to confer it on the national government, which has adopted no legislative policy and evolved no scheme of regulation with respect to the business of insurance. Congress having taken no action, the present decision substitutes, for the varied and detailed state regulation developed over a period of years, the limited aim and indefinite command of the Sherman Act for the suppression of restraints on competition in the marketing of goods and services in or affecting interstate commerce, to be applied by the courts to the insurance business as best they may.

In the years since this Court's pronouncement that insurance is not commerce came to be regarded as settled constitutional doctrine, vast efforts have gone into the development of schemes of state regulation and into the organization of the insurance business in conformity to such regulatory requirements. Vast amounts of capital have been invested in the business in reliance on the permanence of the existing system of state regulation. How far that system is now supplanted is not, and in the nature of things could not well be, explained in the Court's opinion. The Government admits that statutes of at least five states will be invalidated by the decision as in conflict with the Sherman Act, and the argument in this Court reveals serious doubt whether many others may not also be inconsistent with that Act. The extent to which still other state statutes will now be invalidated as in conflict with the commerce clause has not been explored in any detail in the briefs and argument or in the Court's opinion.

The late Mr. Justice Jackson said:

The states began nearly a century ago to regulate insurance, and state regulation, while no doubt of uneven quality, today is a successful going concern. Several of the states, where the greatest volume of business is transacted, have rigorous and enlightened legislation, with enforcement and supervision in the hands of experienced and competent officials. Such state departments, through trial and error, have accumulated that body of institutional experience and wisdom so indispensable to good administration. The Court's decision at very least will require an extensive overhauling of state legislation relating to taxation and supervision. The whole legal basis will have to be reconsidered. What will be irretrievably lost and what may be salvaged no one now can say, and it will take a generation of litigation to determine. Certainly the states lose very important controls and very considerable revenues.

The recklessness of such a course is emphasized when we consider that Congress has not one line of legislation deliberately designed to take over federal responsibility for this important and complicated enterprise. * * *

It is impossible to believe that Congress, if it ever intended to assume responsibility for general regulation of insurance, would have made the antitrust laws the sole manifestation of its purpose. Its only command is to refrain from restraints of trade. Intelligent insurance regulation goes much further. It requires careful supervision to ascertain and protect solvency, regulation

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which may be inconsistent with unbridled rate competition. It prescribes some provisions of policies of insurance and many other matters beyond the scope of the Sherman Act.

Also it requires sanctions for obedience far more effective than the \$5,000 maximum fine on corporations prescribed by the antitrust laws. Violation of state laws are commonly punishable by cancellation of permission to do business therein—a drastic sanction that really commands respect.

The accident and health insurance industry is a large and important one; yet, it is a small part of the business of insurance. This case, under Section 5 of the Federal Trade Commission Act, involves only a matter of advertising. But Section 5 is a comprehensive section which covers many things, such as combinations and restraints under the Sherman Act and at common law, price fixing, and many other things which the Federal Trade Commission might hold to be unfair methods of competition.

As has been frequently said, insurance is a business effected with a public interest. Many years of regulation in 48 states have developed the fact that insurance has some problems peculiar to the business. One is the necessity of maintaining an industry whose financial ability to meet obligations accruing many years in the future will not be undermined by short term considerations. Consequently, the states have asserted their right to regulate the financial policies of the companies licensed to do business in their states, to demand the deposit of certain reserves, to regulate and even limit competition, to fix rates, etc. Some of the regulations permit, or even require, cooperative action among insurance companies which could easily be contrary to the philosophy of the Federal antitrust laws.

In this connection, the majority opinion says:

However, as we have already said, our proceeding to abate deceptive practices by such companies does not impinge on those state functions, and we do not believe that the Federal Trade Commission Act can be properly interpreted to interfere with the taxing or rate-fixing powers.

We have already called attention to the breadth and extent of the Federal power to regulate the flow of commerce and also to the extensive power under the "affecting interstate commerce" theory to regulate matters entirely within the state which were once thought to be far removed from Federal authority. In *South-Eastern Underwriters*, the Supreme Court called attention to the many activities of a modern insurance company which involved or affected interstate commerce as we now know it. Such activities are necessarily centered in a home office. From there and to there, flows a constant stream of advertising brochures, policies, applications, statements, rate schedules, directions, etc. These have to do

with all the activities of the insurance business and are not restricted to advertising.

In this case, jurisdiction is based on the admitted fact that the respondent sent bundles of advertising matter into states where it was licensed to do business. Actual dissemination of the advertising occurred entirely within the state. Except for the McCarran Act, it is clear this limited proof would sustain paramount Federal jurisdiction. Just how the majority arrive at the conclusion that similar proof would not sustain Federal jurisdiction in taxing and rate-making matters is not clear.

In fact, the decision in *North Little Rock Transportation Co. v. Casualty Reciprocal Exchange*, *supra*, is to the contrary. That case involved an appeal from a summary judgment of dismissal of a treble damage suit. The dismissal was based upon a determination that the fixing of rates by the National Bureau of Casualty Underwriters for casualty insurance written in the State of Arkansas by the members and subscribers of the Bureau is not violative of the Sherman Act, as amended. The Court adopted the findings of the District Court, one of which was:

3. In the absence of public regulation or Congressional exemption, the price fixing activities of the Bureau involved in this case would constitute a violation of the Sherman Act. 85 F. Supp. 961, at p. 964.

The Circuit Court of Appeals affirmed the holding of the District Court that the McCarran Act permitted the State of Arkansas to continue the regulation of insurance in the matter of rate fixing, which regulation, without the McCarran Act, would have violated the Sherman Act.

It is our conclusion that the majority opinion would bring tremendous confusion in the insurance industry and would open the door wide to complete Federal control. We are not discussing the relative merits of Federal versus state control. All we say is that the decision belongs to Congress and not to a Federal bureau.

The hearing examiner, after applying the jurisdictional tests to which we subscribe, concluded that in all states in which respondent was licensed to do business, except Mississippi, state regulation did exist. The hearing examiner then considered the alleged illegal advertising in Mississippi and concluded that it did not violate the Federal Trade Commission Act.

We have repeatedly pointed out that, under the McCarran Act, the Federal Trade Commission has some jurisdiction in the business of insurance. Within that jurisdiction, and in performance of duties imposed by Congress, 41 complaints have been issued. Where the Commission has jurisdiction, we would hold insurance companies to a high degree of responsibility in their dealings with the public.

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Consequently, we do not approve of some of the statements made by the hearing examiner in his consideration of the advertising in question.

However, that matter is not now before us. Since the filing of the initial decision, Mississippi had adopted the model code, effective as of February 29, 1956.

The law governing such a situation is clearly expressed in *United Corporation, et al. v. Federal Trade Commission* (1940), 110 F. 2d 473, as follows:

And since the power of the Federal Trade Commission is purely regulatory and not punitive, it is clear that jurisdiction must exist at the time of the entry of its order. Jurisdiction at the time of the commission of acts objected to as unfair trade practices or at the time of the filing of the complaint with regard thereto is not sufficient; for the order to be entered does not relate to past practices or determine rights as of the time of the filing of the complaint, as in an action at law, but commands or forbids action in the future.

In *Chamber of Commerce of Minneapolis, et al. v. Federal Trade Commission* (1926), 13 F. 2d 673, the Court said:

"As the orders of the Commission are purely remedial and preventative, the effect thereof is entirely in the future. Therefore, the jurisdiction of the Commission should, in this respect, be measured as of the time of the order rather than as of the filing of the complaint or as of the hearing thereon."

It thus appears that in every state involved in this case, state regulation now prevents further action by the Commission.

In accordance with the views expressed in this dissent, we would deny the appeal and dismiss the complaint.

ADDITIONAL VIEWS OF COMMISSIONER MASON

The issue here resolves itself basically into that ever fundamental question—states' rights versus centralized government.

Our problem is not the determination of which philosophy is right—that is a legislative function. Our sole duty is to determine which road Congress has directed us to follow in the instant matter.

In my opinion, if the rationale on which the majority bases its decision in this case stands, it must of necessity follow that the Federal Government has almost unlimited control over the management of the insurance business.

This would apply not only to false advertising of health and accident policies, the present center of our attention in 41 cases, but would include all other aspects of the business of insurance, such as the approval of policy forms, the establishment of rates, the maintenance of reserves, the regulation of agency commissions, and

the countless other components of the internal management of any single company or companies.

To transfer in one fell swoop the control of every phase of the business of insurance, whether regulated or not by state law, to the Federal Government when crossing state lines is to flout the expressed intent of Congress.

IN THE MATTER OF
CLOVER FARM STORES CORPORATION ET AL.

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION
OF SEC. 2 (c) OF THE CLAYTON ACT

Docket 6444. Complaint, Nov. 8, 1955—Decision, Apr. 24, 1956

Consent order requiring 27 wholesale grocery firms, their wholly owned service corporation, and its subsidiary, to cease discriminating in price in violation of Sec. 2 (c) of the Clayton Act as amended, through receiving and accepting from sellers, brokerage and other compensation for services commonly rendered by independent brokers which Clover replaced in many transactions between sellers and respondent wholesalers.

Before *Mr. Abner E. Lipscomb*, hearing examiner.

Mr. Edward S. Ragsdale and *Mr. Cecil G. Miles* for the Commission.

Mr. Newell Blair, of Washington, D. C., and *Mooney, Hahn, Loeser, Keough & Freedheim*, of Cleveland, Ohio, for respondents.

COMPLAINT

The Federal Trade Commission, having reason to believe that the parties respondent named in the caption hereof, and hereinafter more particularly designated and described, have violated and are now violating the provisions of subsection (c) of Section 2 of the Clayton Act (U.S.C. Title 15, Sec. 13), as amended by the Robinson-Patman Act, approved June 19, 1936, hereby issues its complaint, stating its charges with respect thereto as follows:

PARAGRAPH 1. Respondent Clover Farm Stores Corporation, hereinafter sometimes referred to as respondent Clover, is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Ohio, with its principal office and place of business located at 2135 Columbus Road, Cleveland, Ohio.

It is wholly owned and controlled by a group of wholesale grocery firms, all or substantially all of which are the respondents listed in Paragraph Three. Said respondent was incorporated in Ohio on August 1, 1947, although the business had been operated under the same corporate name as a Delaware corporation by substantially the same owners and along similar lines for many years prior to its incorporation in Ohio.

PAR. 2. Respondent The Lane-Lease Co., Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Ohio, with its principal office and place of

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business located at 2135 Columbus Road, Cleveland, Ohio. It is wholly owned and controlled by respondent Clover and hereinafter a reference to respondent Clover is to be interpreted as including respondent The Lane-Lease Co., Inc. Said respondent was incorporated in Ohio on November 16, 1940, although the business had been operated as a Delaware corporation under a somewhat similar name (The Lane-Lease Company) by substantially the same owners and along similar lines for many years prior to respondent's incorporation in Ohio.

PAR. 3. Each respondent named below is a corporation which is organized, existing, and doing business under and by virtue of the laws of the state specified, and whose principal office and place of business is located at the address shown, opposite its name:

Respondent	State of incorporation	Location of principal office and place of business
The Bayer-Gilliam Company.....	Pennsylvania.....	Alley K and 10th St., Tyrone, Pa.
Fox Grocery Company.....	Pennsylvania.....	300 McKean Ave., Charleroi, Pa.
The John Blaul's Sons Company.....	Iowa.....	600 1st St. SE., Cedar Rapids, Iowa.
W. E. Osborn Company.....	Pennsylvania.....	8th St. and 5th Ave., New Brighton, Pa.
Jos. A. Goddard Company.....	Indiana.....	215 West Seymour St., Muncie, Ind.
Frey & Son, Inc.....	Maryland.....	1401 Cherry Hill Rd., Baltimore, Md.
Consolidated Foods, Inc.....	New Hampshire.....	375 West Hollis St., Nashua, N. H.
Krenning-Schlapp Grocer Company.....	Missouri.....	3800 North Broadway, St. Louis, Mo.
Jageman-Bode Company.....	Illinois.....	1704 East Jefferson St., Springfield, Ill.
The F. J. Beasley Co.....	Ohio.....	91 West Union St., Athens, Ohio.
M. B. Glackin, Inc.....	Pennsylvania.....	143-47 North Duke St., York, Pa.
Guyer & Calkins Company.....	Illinois.....	Spring St. and Liberty Ave., Freeport, Ill.
Arthur J. Hanson Company.....	Wisconsin.....	411 11th Ave., Ashland, Wis.
The Horner-Gaylord Company.....	West Virginia.....	601 Baltimore St., Clarksburg, W. Va.
David Kirk Sons Company.....	Ohio.....	180 East Sandusky St., Findlay, Ohio.
Layton & Company, Inc.....	Delaware.....	Division St. and Pennsylvania RR., Dover, Del.
The Leedom & Worrall Company.....	Pennsylvania.....	200-202 Center Ave., Butler, Pa.
Peter G. Lennon Company.....	Illinois.....	114 Lafayette St., Joliet, Ill.
J. B. Maltby, Inc.....	New York.....	99 Chestnut St., Corning, N. Y.
Northern Sales Company, Inc.....	Maine.....	74 Bangor St., Houlton, Maine.
Plumb & Nelson Company.....	Wisconsin.....	716 Buffalo St., Manitowoc, Wis.
The Theo Poehler Mercantile Company.....	Kansas.....	701 East 8th St., Lawrence, Kans.
Rice Lake Grocer Company.....	Wisconsin.....	16 East Messenger St., Rice Lake, Wis.
E. T. Smith Co.....	Massachusetts.....	203 Summer St., Worcester, Mass.
Standard Wholesale Co., Inc.....	Rhode Island.....	63-65 Long Wharf, Newport, R. I.
Waples-Platter Company.....	Texas.....	1819 Jones St., Fort Worth, Tex.
Wilcox Brothers Grocers Inc.....	New York.....	472 West 1st St., Oswego, N. Y.
Barrow Grocery Company, Inc.....	Virginia.....	Blackstone, Va.

Said respondents are the wholesale grocery firms referred to in Paragraph One and are sometimes hereinafter referred to as respondent members.

PAR. 4. Respondent Clover is now, and continuously since its organization in 1947 has been, engaged in acts and practices which facilitate transactions or purchase and sale of food products, grocery products, grocers' supplies, and grocers' equipment between sellers of such products and respondent members who purchase such food and grocery products for resale to retail grocery stores and who purchase such supplies and equipment for their own use and for resale to retailers.

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In most of such transactions the member respondents order directly from and are invoiced by the sellers; but in others the member respondents order from and are invoiced by respondent Clover which is invoiced by the sellers.

Said acts and practices of respondent Clover consist in part of making arrangements with the sellers to sell products under brands which are owned by respondent Clover; of designating such sellers as approved suppliers; of listing such sellers in a book supplied by respondent Clover to respondent members; and of urging respondent members to buy directly from such sellers. Respondent Clover engages in substantially similar acts and practices with respect to the same and other sellers as to products sold under brands owned by the sellers.

Most of the transactions are between sellers and respondent members located in different states; and most of the products involved in such transactions are shipped across state boundaries.

PAR. 5. In engaging in the acts and practices above alleged respondent Clover is performing services commonly rendered by independent brokers which respondent Clover replaces in a large number of such transactions of purchase and sale.

In consideration for such acts and practices, many of the sellers pay or grant to respondent Clover, and respondent Clover receives and accepts from such sellers, sums of money as brokerage and as allowances and discounts in lieu of brokerage.

Prior to about 1953 such sums were typically a percentage of the purchases of respondent members. Subsequently many sellers, at the instance and request of respondent Clover, paid lump sums, the amounts of which were the same or approximately the same as theretofore paid on a percentage basis.

In some transactions where the seller invoices respondent Clover and it invoices respondent members, the payment takes the form of a discount which is in lieu of brokerage.

PAR. 6. The funds received by respondent Clover as brokerage and as allowances and discounts in lieu thereof are used by it, together with other funds received by it from respondent members, to pay its operating expenses. When such funds exceed expenses in any year, the excess or part thereof may be, and often is, distributed to respondent members as patronage dividends.

PAR. 7. For many years prior to 1947, respondent Clover's corporate predecessor, referred to in Paragraph One, engaged in the same business as respondent Clover as above alleged.

PAR. 8. The acts and practices of respondents and of each of them, as hereinabove alleged and described, violate subsection (c)

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of Section 2 of said Clayton Act as amended by the Robinson-Patman Act.

INITIAL DECISION BY ABNER E. LIPSCOMB, HEARING EXAMINER

On November 8, 1955, the Federal Trade Commission issued its complaint in this proceeding, charging the Respondents with violation of subsection (c) of Section 2 of the Clayton Act as amended by the Robinson-Patman Act, approved June 19, 1936, by receiving and accepting, directly or indirectly, commissions, brokerage or other compensation, or allowances or discounts in lieu thereof, from many of the various sellers from whom they purchase food and grocery products, grocers' supplies and grocers' equipment in commerce for their own accounts for resale.

Thereafter, on February 3, 1956, Respondents filed with the Commission their answer to said complaint, and on March 5, 1956, Respondents Clover Farm Stores Corporation and The Lane-Lease Co., Inc., by Grant A. Mason, their President and Treasurer, and Gladys S. Clark, their Assistant Secretary, and all the other Respondents herein, except Respondent The John Blaul's Sons Company, by their counsel of record, Samuel G. Wellman and Newell Blair, entered into an agreement with counsel supporting the complaint, and, pursuant thereto, submitted to the Hearing Examiner an Agreement Containing Consent Order To Cease And Desist, supported by formal statements of consent thereto and authorization therefor by all the wholesale member Respondents entering into said Agreement by their counsel, Samuel G. Wellman and Newell Blair, and an Affidavit executed by Attorney Samuel G. Wellman, attesting to the formal consent by all wholesale member Respondents to the form of the proposed consent cease-and-desist order contained in the agreement.

At the same time counsel for Respondents submitted a Motion To Dismiss Complaint As To One Respondent, The John Blaul's Sons Company, stating therein that said company had, on January 1, 1955, prior to the issuance of the complaint herein, ceased to be a stockholder-member of Respondent Clover Farm Stores Corporation, and, by about June 30, 1955, had been fully dissolved and its assets distributed. Therewith counsel for Respondents also submitted an Affidavit executed by Theo F. Blaul, the last acting president of The John Blaul's Sons Company, attesting to those facts. In view thereof, and of the fact that counsel supporting the complaint does not oppose the granting of said motion, the complaint herein will be dismissed as to Respondent The John Blaul's Sons Company.

Decision

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Respondents are identified in the agreement as follows:

Each Respondent named below is a corporation which is organized, and doing business under and by virtue of the laws of the state specified, and whose principal office and place of business is located at the address shown opposite its name:

Respondent	State of Incorporation	Location of principal office and place of business
Clover Farm Stores Corporation--	Ohio-----	2135 Columbus Rd., Cleveland, Ohio
The Lane-Lease Co., Inc. -----	Ohio-----	2135 Columbus Rd., Cleveland, Ohio
The Bayer-Gillam Company -----	Pennsylvania----	Alley K and 10th St., Tyrone, Pa.
Fox Grocery Company -----	Pennsylvania----	300 McKean Ave., Charleroi, Pa.
W. E. Osborn Company -----	Pennsylvania----	8th St. and 5th Ave., New Brighton, Pa.
Jos. A. Goddard Company -----	Indiana-----	215 West Seymour St., Muncie, Ind.
Frey & Son, Inc. -----	Maryland-----	1401 Cherry Hill Rd., Baltimore, Md.
Consolidated Foods, Inc. -----	New Hampshire----	375 West Hollis St., Nashua, N. H.
Krenning-Schlapp Grocer Company -----	Missouri-----	3800 North Broadway, St. Louis, Mo.
Jageman-Bode Company -----	Illinois-----	1704 East Jefferson St., Springfield, Ill.
The F. J. Beasley Co. -----	Ohio-----	91 West Union St., Athens, Ohio
M. B. Glackin, Inc. -----	Pennsylvania----	143-47 North Duke St., York, Pa.
Guyer & Calkins Company -----	Illinois-----	Spring St. and Liberty Ave. Freeport, Ill.
Arthur J. Hanson Company -----	Wisconsin-----	411 11th Ave., Ashland, Wis.
The Hornor-Gaylord Company ----	West Virginia----	601 Baltimore St., Clarksburg, W. Va.
David Kirk Sons Company -----	Ohio-----	130 East Sandusky St., Findlay, Ohio
Layton & Company, Inc. -----	Delaware-----	Division St. and Pennsylvania R.R., Dover, Del.
The Leedom & Worrall Company--	Pennsylvania----	200-202 Center Ave., Butler, Pa.
Peter G. Lennon Company -----	Illinois-----	114 Lafayette St., Joliet, Ill.
J. B. Maltby, Inc. -----	New York-----	99 Chestnut St., Corning, N. Y.
Northern Sales Company, Inc. ---	Maine-----	74 Bangor St., Houlton, Maine
Plumb & Nelson Company -----	Wisconsin-----	716 Buffalo St., Manitowoc, Wis.
The Theo Poehler Mercantile Company -----	Kansas-----	701 East 8th St., Lawrence, Kans.
Rice Lake Grocer Company -----	Wisconsin-----	16 East Messenger St., Rice Lake, Wis.
E. T. Smith Co. -----	Massachusetts----	203 Summer St., Worcester, Mass.
Standard Wholesale Co., Inc. ----	Rhode Island----	63-65 Long Wharf, Newport, R. I.
Waples-Platter Company -----	Texas-----	1819 Jones St., Fort Worth, Tex.
Wilcox Brothers Grocers Inc. ----	New York-----	472 West 1st St., Oswego, N. Y.
Barrow Grocery Company, Inc. ---	Virginia-----	Blackstone, Va.

Respondents admit all the jurisdictional facts alleged in the complaint and agree that the record herein may be taken as if findings of jurisdictional facts had been duly made in accordance with such allegations.

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Order

Respondents, in the agreement, waive any further procedure before the Hearing Examiner and the Commission; the making of findings of fact or conclusions of law; and all of the rights they may have to challenge or contest the validity of the order to cease and desist entered in accordance therewith. All parties agree that the answer heretofore filed by all Respondents shall be considered as having been withdrawn, and for all legal purposes it will hereafter be so regarded; that the record on which the initial decision and the decision of the Commission shall be based shall consist solely of the complaint and the agreement; and that the agreement is for settlement purposes only and does not constitute an admission by Respondents that they have violated the law as alleged in the complaint.

The agreement sets forth that the order to cease and desist contained therein shall have the same force and effect as if entered after a full hearing, and may be altered, modified or set aside in the manner provided for other orders; and that the complaint herein may be used in construing the terms of said order.

After consideration of the charges set forth in the complaint, the agreement, the documents appendant thereto, hereinabove cited, and the provisions of the proposed order, the Hearing Examiner is of the opinion that such order will safeguard the public interest to the same extent as could be accomplished by an order issued after full hearing and all other adjudicative procedure waived in said agreement. Accordingly, in consonance with the terms of the aforesaid agreement, the Hearing Examiner accepts the Agreement Containing Consent Order To Cease And Desist; finds that the Commission has jurisdiction over the Respondents and over their acts and practices as alleged in the complaint; and finds that this proceeding is in the public interest. Therefore,

It is ordered, That Respondents Clover Farm Stores Corporation, a corporation, and The Lane-Lease Co., Inc., a corporation, their officers, directors, agents, representatives and employees, directly or through any corporate or other device, in connection with the purchase of food products, grocery products, grocers' supplies and grocers' equipment, or other merchandise, in commerce, as "commerce" is defined in the Clayton Act, do forthwith cease and desist from:

Receiving or accepting, directly or indirectly, from any seller, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, upon any purchase made by Respondents Clover Farm Stores Corporation, a corporation, or The Lane-Lease Co., Inc., a corporation, for resale

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to their stockholder members, or upon any purchase made by any of said members.

It is further ordered, That the Respondents, The Bayer-Gillam Company, a corporation, Fox Grocery Company, a corporation, W. E. Osborn Company, a corporation, Jos. A. Goddard Company, a corporation, Frey & Son, Inc., a corporation, Consolidated Foods, Inc., a corporation, Krenning-Schlapp Grocer Company, a corporation, Jageman-Bode Company, a corporation, The F. J. Beasley Company, a corporation, M. B. Glackin, Inc., a corporation, Guyer & Caulkins Company, a corporation, Arthur J. Hanson Company, a corporation, The Hornor-Caylord Company, a corporation, David Kirk Sons Company, a corporation, Layton & Company, Inc., a corporation, The Leedom & Worrall Company, a corporation, Peter G. Lennon Company, a corporation, J. B. Maltby, Inc., a corporation, Northern Sales Company, Inc., a corporation, The Theo Poehler Mercantile Company, a corporation, Plumb & Nelson Company, a corporation, Rice Lake Grocer Company, a corporation, E. T. Smith Co., a corporation, Standard Wholesale Company, Inc., a corporation, Waples-Platter Company, a corporation, Wilcox Brothers Grocers, Inc., a corporation, and Barrow Grocery Company, Inc., a corporation, their respective officers, directors, agents, representatives, and employees, directly or through Clover Farm Stores Corporation, a corporation, or The Lane-Lease Co., Inc., a corporation, or any other corporate or other device, in connection with the purchase of food products, grocery products, grocers' supplies and grocers' equipment, or other merchandise, in commerce, as "commerce" is defined in the Clayton Act, do forthwith cease and desist from:

Receiving or accepting, directly or indirectly, from any seller, or from Respondents Clover Farm Stores Corporation, a corporation, or The Lane-Lease Co., Inc., a corporation, or from any other agent, representative, or other intermediary, acting for or in behalf or subject to the direct or indirect control of said buyer Respondents, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof upon any purchase made by said member Respondents, or for them by Respondents Clover Farm Stores Corporation, a corporation, or The Lane-Lease Co., Inc., a corporation, or any other such intermediary.

It is further ordered, That the complaint, insofar as it relates to Respondent The John Blaul's Sons Company, a corporation, be, and the same hereby is, dismissed.

DECISION OF THE COMMISSION AND ORDER TO FILE
REPORT OF COMPLIANCE

Pursuant to Section 3.21 of the Commission's Rules of Practice, the initial decision of the hearing examiner shall, on the 24th day of April, 1956, become the decision of the Commission; and, accordingly:

It is ordered, That respondents Clover Farm Stores Corporation, a corporation, The Lane-Lease Co., Inc., a corporation, The Bayer-Gillam Company, a corporation, Fox Grocery Company, a corporation, W. E. Osborn Company, a corporation, Jos. A. Goddard, a corporation, Frey & Son, Inc., a corporation, Consolidated Foods, Inc., a corporation, Krenning-Schlapp Grocer Company, a corporation, Jageman-Bode Company, a corporation, The F. J. Beasley Company, a corporation, M. B. Glackin, Inc., a corporation, Guyer & Calkins Company, a corporation, Arthur J. Hanson Company, a corporation, The Hornor-Gaylord Company, a corporation, David Kirk Sons Company, a corporation, Layton & Company, Inc., a corporation, The Leedom & Worrall Company, a corporation, Peter G. Lennon Company, a corporation, J. B. Maltby, Inc., a corporation, Northern Sales Company, Inc., a corporation, The Theo Poehler Mercantile Company, a corporation, Plumb & Nelson Company, a corporation, Rice Lake Grocer Company, a corporation, E. T. Smith Co., a corporation, Standard Wholesale Company, Inc., a corporation, Waples-Platter Company, a corporation, Wilcox Brothers Grocers, Inc., a corporation, and Barrow Grocery Company, Inc., a corporation, shall within sixty (60) days after service upon them of this order, file with the Commission a report in writing setting forth in detail the manner and form in which they have complied with the order to cease and desist.

IN THE MATTER OF
WILSON TOBACCO BOARD OF TRADE, INC., ET AL.

Docket 6262. Order and opinion, Apr. 25, 1956

Denial of leave to intervene in cross-appeals from hearing examiner's initial decision to applicant having a substantial private controversy with respondents.

Before *Mr. Frank Hier*, hearing examiner.

Mr. Rufus E. Wilson for the Commission.

Lucas, Rand & Rose, Gardner, Connor & Lee, Mr. Chas. B. McLean and Carr & Gibbons, of Wilson, N. C., *Battle, Winslow & Merrell*, of Rocky Mount, N. C., *Blackwell, Blackwell & Canady*, of Winston-Salem, N. C., and *Sanders, Gravelle, Whitlock & Markey, Diamond & Brylawski and Howrey & Simon*, of Washington, D. C., for respondents.

ORDER DENYING APPLICATION FOR LEAVE TO INTERVENE

An application having been filed by C. B. Renfro, of Wilson, North Carolina, requesting leave to intervene in this proceeding for the purpose of filing a brief amicus curiae and participating in oral argument before the Commission on the pending cross-appeals from the hearing examiner's initial decision; and

The Commission having determined, for the reasons set forth in the accompanying opinion, that the request should not be allowed:

It is ordered, That the aforesaid application for leave to intervene be, and it hereby is, denied.

Commissioner Kern not participating.

ON APPLICATION FOR LEAVE TO INTERVENE

By *SECRET*, Commissioner:

This matter is before the Commission upon an application, filed by C. B. Renfro, requesting leave to intervene in this proceeding for the purpose of filing a brief amicus curiae and participating in oral argument before the Commission. The application is unopposed by counsel in support of the complaint, at least insofar as filing brief is concerned, but is resisted by respondents.

The complaint charged the respondents, the Wilson Tobacco Board of Trade, Inc., and its member warehousemen, with an unlawful conspiracy to suppress competition in the sale and purchase of leaf tobacco on the Wilson, North Carolina, tobacco market. The con-