Order and opinion vacating the initial decision and remanding the case for further proceedings.

STATEMENT

BY MACINTYRE, *Commissioner:*

It is my view that the decision of the majority certainly should have provided for the receipt of further information, hearings and consideration by the parties, the administrative law judge and the Commission respecting applicable state laws and their implementation as they would relate to an acquisition or merger such as the one involved here. I would be in concurrence with the decision of the majority to that extent. The sole and threshold question before us at this time is one of jurisdiction.

The question as to whether the Federal Trade Commission has jurisdiction so as to permit it to enforce Section 7 of the Clayton Act, as amended (15 U.S.C. § 18), can be answered only after considering another Act of the Congress, the McCarran-Ferguson Act (15 U.S.C. §§ 1011–1015, March 9, 1945, c. 20, §§ 1 & 2, 59 Stat. 33, and July 25, 1947, c. 326, 61 Stat. 448), and the state regulation of insurance business as that regulation relates to acquisitions and mergers. The administrative law judge, in his initial decision filed in this case March 7, 1972, quite ably and clearly set forth and analyzed those applicable provisions of federal and state law and what various states have done toward implementing applicable state law.

It is clear that Congress through its action has intended and provided that no federal law, outside of that dealing specifically with the business of insurance and the Sherman Act, so far as it relates to boycott, coercion or intimidation, shall be construed as applicable to the business of insurance to the extent that such business is regulated by state law. Here respondent, American General Insurance Company, a multiple-line property-liability and life insurance company domiciled in the State of Texas, on or before July 1, 1969, merged with Fidelity and Deposit Company of Maryland, a property-liability insurance company specializing in the writing of fidelity and surety bonds, which was domiciled in the State of Maryland. On June 17, 1971, the Federal Trade Commission issued its complaint alleging this merger to be in violation of Section 7 of the Clayton Act, as amended, for the reason that the alleged effect of the merger "may be substantially to lessen competition or to tend to create a monopoly in the business of underwriting fidelity and surety bonds in the United States and in various state and other geographic markets * * *."

Prior thereto, the State of Maryland enacted legislation, the purpose of which is to regulate trade practices in the business of insurance in accordance with the intent of Congress as expressed in the McCarran-Ferguson Act. Also, the State of Texas enacted similar legislation under the terms of which any merger of insurance companies tending to prevent or lessen competition would be illegal. In view of these statutory provisions, the respondent submitted to the Insurance Commissioners of the States of Texas and Maryland the question as to whether they would approve the proposed merger of the American General Insurance Company and the Fidelity and Deposit Company of Maryland. The Insurance Commissioners of those two states after hearings issued their orders approving the proposed merger. Thereupon, the merger was consummated. Those actions of the States of Texas and Maryland and their Insurance Commissioners are in accord

with laws enacted in the past two and one-half years by approximately 32 states which have adopted in one form or another, the Model Insurance Acquisitions and Mergers Act sponsored by the National Association of Insurance Commissioners. Moreover, as in Maryland, respondent, American General Insurance Company, disclosed to the Texas Insurance Commissioner and to the Insurance Commissioners in each of the other 48 states in which it was licensed, the terms of its proposed merger with Fidelity and Deposit. All of these states maintain continuing state supervision of the merged company and the competitive effects thereof as provided by their state laws regulating the business of insurance.

There is no determination and it does not appear from the record before us that a determination can be made whether the merger involved here is in violation of the law of any state. Likewise, there is no determination, if indeed the evidence of record would permit one, which I doubt, that any state is unable to deal with the problem here through the exercise of its licensing powers. Moreover, it is unclear from the opinion of the majority in this case and the record before us whether any "merger activity" involving this merger has taken place outside the territorial limits of the States of Texas and Maryland. In raising that question, I hasten to distinguish the term "merger activity" from the term "effects of the merger." I do this because it seems to me that in our consideration of the problem before us, we should draw a distinction between the activity of disseminating false and misleading advertising such as was involved in the *Travelers* case, 362 U.S. 293 (1960), where the "activity" of disseminating false and misleading advertising occurred throughout various states from the "activity" of price fixing such as occurred in the *Southeastern Underwriters* case, 322 U.S. 533 (1944). In the latter, the price fixing "activity" occurred in what appears to be but perhaps a few states. However, the effects of the activity encompassed the area of various additional states. If we were to make this distinction we would be in a better position to determine whether the situation in the case before us is more analogous to the situation which was involved in the *Southeastern Underwriters* case with respect to antitrust policies than was the *Travelers* case with respect to application of laws and policies against false and misleading advertising by a mail order insurance business in interstate commerce.

Perhaps what I am trying to say is simply this: We should know and judge whether the situation before us for decision is one within our jurisdiction because (1) the "activity" complained of is extra-territorially beyond the reach of the states within which such "activity"

occurred or whether (2) it is within our jurisdiction on the basis of such activities "effects" in various additional states beyond those where the activities occurred.

The decision of the Commission also has not clearly demonstrated that Congress has not provided for this distinction through its enactment of the McCarran-Ferguson Act. Further, the Commission's decision fails to draw a distinction between the legal effects of "activities" and "effects" of the merger here so as to demonstrate that aspects comparable in the *Southeastern* case are not relevant. I am troubled because the decision of the Commission in this case has not answered these questions. We need to have satisfactory answers by the Commission and the courts so as to permit the pursuit and the effectuation of an antitrust policy consistent with the Congressional intent.

OPINION OF THE COMMISSION

BY DENNISON, *Commissioner:*

This matter is before the Commission on appeal by counsel supporting the complaint from the initial decision of the administrative law judge dismissing the matter for want of jurisdiction.

On June 17, 1971, the Federal Trade Commission, after careful consideration and deliberation, found (1) it had reason to believe the respondent had violated Section 7 of the Clayton Act, as amended (15 U.S.C. 18), by its merger with Fidelity and Deposit Company of Maryland; (2) it had jurisdiction to proceed against the respondent; and (3) that such proceeding was in the public interest. By his decision, filed March 7, 1972, the administrative law judge found, without benefit of admissions or evidence, the Commission lacked jurisdiction to rule on this merger because of the McCarran-Ferguson Insurance Regulation Act (15 U.S.C. 1011–15) (hereinafter referred to as the McCarran Act).

The issue of this appeal is succinctly stated as: Does the McCarran Act bar all Commission action where there exists state regulation? The resolution of this issue turns on either of two touchstones: (1) the extraterritorial concern of a state's insurance matters, and (2) the meaning of the term "business of insurance" as employed by the Congress.

THE MCCARRAN-FERGUSON ACT

The McCarran Act was a reaction to the *South-Eastern Underwriters* case [1] which reversed earlier case law [2] and held that insurance

[1] *United States* v. *South-Eastern Underwriters Ass'n.*, 322 U.S. 533 (1944).
[2] *Paul* v. *Virginia*, 8 Wall. 168 (1869).

transactions were subject to Federal regulation under the commerce clause. The subject of the *South-Eastern Underwriters* litigation was the antitrust implications of the rate-making combinations prevalent in the insurance industry. The year following the Supreme Court decision Congress passed the McCarran Act which provides that after January 1, 1948, the Federal Trade Commission Act shall apply to the business of insurance "to the extent that such business is not regulated by State law." [3]

Therefore, it would seem that for the statute to become operative in a given situation, affirmative findings on the following questions need be made: (1) whether the particular business is that of insurance, *i.e.*, whether the industry acts as a risk bearer for a premium,[4] (2) whether the business activity challenged relates to the act of risk bearing, (3) whether the state has regulatory authority to govern the challenged activity, and (4) whether the state's regulation is adequate.

There is no question the respondent and the acquired company are insurance companies and that fact is acknowledged.[5]

THE BUSINESS OF INSURANCE

The second issue is whether the challenged activity (the merger) relates to the "business of insurance." Section 2(b) of the McCarran Act preempts Federal jurisdiction only to the extent that the business of insurance is regulated by state law. In *Securities and Exchange Commission* v. *National Securities, Inc., et al.*,[6] the Supreme Court focused upon the question of what encompassed the "business of insurance" as used in Section 2(b). In that action the SEC brought suit against the defendant-insurance company alleging violation of Section 10(b) of the Securities Act of 1934 in connection with fraudulent misrepresentations in proxy statements sent to shareholders. The defendant questioned the SEC's jurisdiction citing the McCarran Act and noting the fact the Arizona Director of Insurance had approved the merger. The Supreme Court, reversing the circuit court, held that:

> The McCarran-Ferguson Act was an attempt to turn back the clock, to assure that the activities of insurance companies in dealing with their policyholders would remain subject to state regulation. As the House Report makes clear, "[i]t [was] 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." HR Rep No. 143, 79th Cong. 1st Sess, 3 (1945).

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[3] Section 2(b) of the Act.

[4] *Epmeier* v. *United States*, 199 F. 2d 508, 510 (1952).

[5] Count 2 of the complaint; Initial Decision, Findings 1 and 2.

[6] 393 U.S. 453 (1969).

Given this history, the language of the statute takes on a different coloration. The statute did not purport to make the States supreme in regulating all the activities of insurance *companies;* its language refers not to the persons or companies who are subject to state regulation, but to laws "regulating the *business* of insurance." Insurance companies may do many things which are subject to paramount federal regulation; only when they are engaged in the "business of insurance does the statute apply." Certainly the fixing of rates is part of this business; that is what South-Eastern Underwriters was all about. The selling and advertising of policies, FTC v National Casualty Co. 357 US 560 (1958), and the licensing of companies and their agents, cf. Robertson v. California, 328 US 440 (1946), are also within the scope of the statute. Congress was concerned with the type of state regulation that centers around the contract of insurance, the transaction which Paul v Virginia held was not "commerce." The relationship between insurer and insured, the type of policy which could be issued, its reliability, interpretation, and enforcement—these were the core of the "business of insurance." Undoubtedly, other activities of insurance companies relate so closely to their status as reliable insurers that they too must be placed in the same class. But whatever the exact scope of the statutory term, it is clear where the focus was—it was on the relationship between the insurance company and the policyholder. Statutes aimed at protecting or regulating this relationship, directly or indirectly, are laws regulating the "business of insurance."[7]

The Court has defined the Congressional use of the term "business" as explicitly meaning the *activity* or *practice* of the companies comprising the insurance industry which centers around the contract of insurance.[8] Since the challenged merger does not affect the contractual relationship of the companies to their insureds, it is not a part of the "business of insurance" as that term has been interpreted.

Respondent argues, however, that the merger is one of the "other activities of insurance companies that relates so closely to their status as reliable insurers" that it too must be considered a part of the business (practice) of insurance. Two factors are relevant to this point. First, the merger prohibited by the Clayton Act is not so closely related to the business of insurance as to affect its reliability, *vis-a-vis* its policyholders. The thrust of Section 7 is concerned with the interests of the public at large in the protection and preservation of competition (not with the more limited interest of policyholders in the security of their investment). If the financial strength of one of the merged companies was so precarious as to jeopardize the policyholders of the other, the state concern for the protection of policyholders would be exclusive. Second, neither the Clayton Act nor the Commission's actions in any way interfere with a state's regulatory scheme. The existence of the Clayton Act or the Federal agency do not preclude Maryland or Texas from protecting the private interests of the

[7] *Id.* at 459–60.

[8] Note, *Insurance Mergers and the Clayton Act*, 78 Yale L.J. 1404, 1411 (1969).

respondent's policyholders. "The paramount federal interest * * * [in halting economic concentration] is in this situation perfectly compatible with the paramount state interest in protecting policyholders." [9]

The enterprise aspect of the "business of insurance" has often been distinguished from the activity aspects. For example, in the trademark area, notwithstanding the McCarran-Ferguson Act and the fact the Texas Board of Insurance Commissioners had authority to prevent infringing trade names, the circuit courts held the Federal Trademark Act (15 U.S.C. §§ 1051–1127) was controlling.[10]

Consequently, we find that the business of insurance for which regulation by a state may preempt Federal jurisdiction does not include mergers or other combinations of enterprises engaged in the activity of selling insurance.

LIMITATIONS ON STATE REGULATION

The Commission has previously reviewed the jurisdictional perimeters of state action under the McCarran Act. In an earlier case, the Commission stated:

> In the judgment of the [administrative law judge] 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.[11]

"No regulation of the proposed acquisition * * * under [state] statutes can be adequate or effective because of territorial limitations of [the state's] regulation." [12] This finding by the district court in a Section 7 case concisely denotes the limits of the McCarran Act.

In the case now under consideration neither Texas nor Maryland (the home states of the acquiring and acquired companies) are in a position to determine the implications or impact of this merger on the national competitive condition of the insurance industry. Indeed, it is possible for an approving state's interest to be contrary either to the national interests or to problems in the insurance industry nationally.

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[9] *S.E.C.* v. *National Securities*, 393 U.S. at 463.

[10] *Sears, Roebuck & Co.* v. *All States Life Ins. Co.*, 246 F. 2d 161 (5th Cir. 1957), *cert. denied*, 355 U.S. 894. See also, *United States* v. *Sylvania*, 192 F. 2d 96 (7th Cir. 1951), *cert. denied*, 342 U.S. 943 (federal mail fraud statute).

[11] *The American Hospital & Life Insurance Company*, 52 F.T.C. 1100, 1109 (1956).

[12] *Maryland Casualty Co.* v. *American General Insurance Co.*, 1964 Trade Cases ¶ 71,188 (D.D.C. 1964).

In determining the interest the states were to preempt under the McCarran Act, the legislative history makes clear Congress did not intend one state, even the insurance company's home state, to control those aspects of its business which affects many states or an industry as a whole. Senator Ferguson, one of the sponsors, stated: "This bill would not permit such an agreement, because no State law could allow a monopoly to exist outside the State." [13] This position is logical; the interests of a single state are more parochial and those considerations of the national competitive condition of the insurance industry may be considered as somewhat irrelevant by a particular state. The Supreme Court in a Commission matter appears to embrace this limited application of the Act.[14]

While not a merger case, the *Travelers*' Court drew into question the nationwide competitive situation of an industry. *Travelers* concerned the advertising practices of a mail order insurance company sending advertisements to all parts of the country. The facts indicated that *Travelers* was licensed in the States of Virginia and Nebraska, and that Nebraska's insurance law prohibited unfair and deceptive practices in their conduct of the business of insurance in "any other state, territory * * * country or district." The court of appeals reversed the Commission's cease-and-desist order, finding the McCarran Act had preempted Federal jurisdiction.[15] The Supreme Court in reversing that decision stated:

> [W]e are asked to hold that the McCarran-Ferguson Act operates to oust the Commission of jurisdiction by reason of a single State's attempted regulation of its domiciliary's extraterritorial activities. But we cannot believe that this kind of law of a single State takes from the residents of every other State the protection of the Federal Trade Commission Act. In our opinion the State regulation which Congress provided should operate to displace this federal law means regulation by the State in which the deception *is practiced and has its impact* (emphasis added).[16]

Since, in the case before us the alleged illegal restraint "is practiced and has its impact" in every state; upon the competitive status of the industry as a whole, the regulation by Texas and Maryland cannot deny the protection of the Clayton Act and the Federal Trade Commission to citizens of the other forty-eight states. The consideration of this merger by the regulators of insurance in Texas and Maryland, no matter how thorough,[17] is insufficient to protect all citizens of this country from the evil which may result from the merger of two national

[13] 91:2 Cong. Rec. 1481 (1945) (Remarks of Senator Ferguson).
[14] *Federal Trade Commission* v. *Travelers Health Assoc.*, 362 U.S. 293 (1960).
[15] 262 F. 2d 241 (8th Cir. 1959).
[16] *Id.* at 296.
[17] 362 U.S. at 297–98.

insurance companies. We therefore not only find that neither Texas nor Maryland have regulations effectively reviewing the effects of insurance mergers on the industry as a whole, but find it impossible for any state to have such regulation.

CONCLUSION

Immunity from the antitrust laws is not lightly implied.[18] The only antitrust immunity found in the McCarran Act is section 2(d) which provides that they shall not be applicable to the extent that the insurance business is regulated by state law. The Commission is bound to carefully scrutinize any alleged exemption or immunity to the laws it is charged to enforce. Should the illegal activity fall without the exemption or immunity, the Commission not only can, but must act. Here the McCarran Act does not give, nor was it intended to give, the immunity asserted by respondent and found by the administrative law judge. As the Supreme Court noted in reviewing the limited immunity provided by the McCarran Act:

> Suffice it to say that even the most cursory reading of the legislative history of this enactment makes it clear that its exclusive purpose was to counteract any adverse effect that this Court's decision in United States v. South-Eastern Underwriters Assoc., 322 U.S. 533, might be found to have on State regulation of insurance.[19]

The merger activity complained of in this Section 7 matter was not one of the "adverse effects" of the *South-Eastern Underwriters* case. Consequently, we find that neither the language of the statute nor the legislative history indicate that the Commission has been preempted from challenging this merger.[20] Accordingly, the initial decision is reversed. An appropriate order remanding this matter to the administrative law judge for further hearings not inconsistent with the above accompanies this opinion.

ORDER VACATING INITIAL DECISION AND REMANDING CASE TO ADMINISTRATIVE LAW JUDGE

This matter having come on to be heard upon the appeal of counsel supporting the complaint from the administrative law judge's initial decision filed March 7, 1972; and

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[18] *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 348 (1963).

[19] *Maryland Casualty Co.* v. *Cushing*, 347 U.S. 409, 413 (1954).

[20] Inasmuch as we found that (1) merger activity was not a part of the business of insurance, as that term is used in the McCarran Act, and (2) state regulation could not have extraterritorial effect, it is unnecessary for us to determine the efficacy or adequacy of the state regulatory agencies herein involved. *See, Ohio AFL–CIO* v. *Insurance Rating Board*, 451 F. 2d 1178 (6th Cir. 1971), *cert. denied*, 409 U.S. 917 (1972).

The Commission, for the reasons stated in the accompanying opinion, having determined that said initial decision should be vacated and the case remanded to the administrative law judge;

It is ordered, That the aforesaid initial decision be vacated and set aside.

It is further ordered, That this case be remanded to the administrative law judge for further proceedings not inconsistent with the views expressed in the aforesaid opinion; That after such proceedings have been terminated the administrative law judge shall forthwith make and file a new initial decision based on the record as then constituted.

Chairman Kirkpatrick not participating. Commissioner Dixon concurs only in that section of the opinion entitled "Limitations on State Regulation," and for that reason, concurs in the order vacating the initial decision and remanding the case to the administrative law judge. Commissioner MacIntyre's position is that the decision of the majority certainly should have provided for the receipt of further information, hearings and consideration by the parties, the administrative law judge and the Commission respecting applicable state laws and their implementation as they would relate to an acquisition or merger such as the one involved here. He would concur with the decision of the majority to that extent and for the reasons set forth in his separate statement.

JAMES CARPETS, INC., ET AL.

Docket 8876. Order and opinion, Dec. 11, 1972

Order and opinion denying interlocutory appeal of denial of respondents' motion