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Insurance-State Regulation-Unauthorized Insurers False Advertising Process Act

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REGENT LEGISLATION

INSURANCE—STATE REGULATION—UNAUTHORIZED INSURER'S FALSE ADVERTISING PROCESS ACT—Recent Illinois legislation subjects foreign insurers who are not authorized to do business in Illinois and who circulate false advertising there to the jurisdiction of the state courts and the State Insurance Commissioner. When the Insurance Commissioner is informed of false or misleading advertising, he is to notify the supervisory insurance official of the domicile state of the foreign insurer. If this notice does not result in the cessation of the activity, the Commissioner may proceed against the insurer under the state's Unfair Trade Practice Act.¹ Since the typical mail order insurer will not have agents or property within the state, the mere solicitation of business, by mail or otherwise, is made the equivalent of an appointment of the Insurance Commissioner as the insurer's agent for all service of process. Unauthorized Insurer's False Advertising Process Act, ILL. ANN. STAT. ch. 73, § 735.1 (Smith-Hurd Supp. 1961).

In response to the Supreme Court's decision that interstate insurance business was subject to federal regulation,² Congress passed the McCarran-Ferguson Act,³ which provided that continued state regulation of insurance was in the public interest and that federal law would be applicable only to the extent that such business was not regulated by state law. Each state, prompted by this invitation, passed legislation aimed at completely regulating the insurance industry and thereby precluding the possibility of intervention by the Federal Trade Commission or the Department of Justice. In *FTC v. Traveler's Health Ass'n*,⁴ the Supreme Court held that in order for state regulation to preclude FTC jurisdiction, it must be regulation in the state where the deception is practiced and has its impact, rather than regulatory legislation in the domicile state of the foreign insurer. This holding suggested that the states' efforts to exclude the FTC had not been wholly successful, and the decision is at least partially responsible for the interest in nation-wide passage of the Unauthorized Insurer's False Advertising Process Act (UIFAPA).⁵ The prospect of gen-

¹ ILL. REV. STAT. ch. 73, §§ 1028-41 (Smith-Hurd Supp. 1961). Each of the fifty states has enacted the equivalent of an Unfair Trade Practices Act. The Illinois version provides for a cease-and-desist order and a maximum penalty of \$500 for each violation. See also COLO. REV. STAT. ANN. §§ 72-15-1 to -13 (1953); N.Y. INS. LAW §§ 270-82.

² *United States v. South Eastern Underwriters Ass'n*, 322 U.S. 533 (1944). The Court thereby overruled the precedents of seventy-five years commencing with the decision in *Paul v. Virginia*, 75 U.S. (8 Wall.) 168 (1868).

³ 59 Stat. 33 (1945), as amended, 15 U.S.C. §§ 1011-15 (1958).

⁴ 362 U.S. 293 (1960).

⁵ The act was originally drafted by the National Association of Insurance Commissioners (NAIC) which has taken the position that every state must enact the UIFAPA if it is to be an effective extension of the Unfair Trade Practices Act and other legisla-

eral adoption of the UIFAPA poses two questions: first, whether it will enable the states to maintain exclusive control of the regulation of mail order insurance; and secondly, as a practical matter, whether it will result in the effective control of the various deceptive methods used in such advertising.⁶

Assuming the constitutionality of the UIFAPA service of process provisions,⁷ the answer to the first question is largely dependent upon the Court's ultimate interpretation of the McCarran Act provision denying federal jurisdiction where the particular state has already provided regulation. From a logical and historical standpoint it is arguable that by "regulation" Congress meant effective, workable controls, as opposed to mere legislative enactments.⁸ Although it seemed to adopt the latter alternative in *FTC v. National Cas. Co.*,⁹ the Court has modified this interpretation somewhat in the *Traveler's Health* decision.¹⁰ While equating regulation with legislation avoids the difficulties inherent in determining whether or not regulation is effective, it may well be responsible for fostering legislation directed more at excluding the FTC than at providing meaningful regulation. If this actually occurs the Court might further modify its holding in *National Cas. Co.*, especially since the majority opinion in *Traveler's Health* pointedly left open the question of whether

tion which serves adequately to regulate authorized insurers. The Commissioners also discussed the desirability of inter-state compacts or a re-definition of the concept of "doing business." See 1 NAIC PROCEEDINGS 309, 315 (1961). California, Maine, North Dakota, South Dakota and Nevada have also passed the act. See, e.g., NEV. REV. STAT. § 686.210 (1960).

⁶ For a general discussion of the forms and extent of misleading advertising, see McCarter, *Recent Misleading and Deceptive Mail Order Accident and Health Insurance Policies and Advertising*, 23 INS. COUNSEL J. 82 (1956).

⁷ It seems unlikely that the Court will find them unconstitutional as a denial of due process, for the Court has indicated that the states' interest in the regulation of insurance business within their borders warrants the application of a very liberal due process requirement. See *McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957). However, since *McGee* involved suit on an insurance contract, and the problem here is one of jurisdiction for administrative control, it is arguable that the same result should not necessarily follow. It should also be pointed out that the same provisions for substituted service which might be sufficient in this act would probably not suffice in other contexts. See *Hanson v. Denckla*, 357 U.S. 235 (1958); *Trippe Mfg. Co. v. Spencer Gifts, Inc.*, 270 F.2d 821 (7th Cir. 1959).

⁸ See 91 CONG. REC. 1444 (1945) where Senator McCarran states that only effective regulation will preclude federal intervention. It has been argued, however, that the legislative history will support either conclusion, and that practical and political considerations will influence the result. See Layne, *Multiple State Regulation of Mail Order Insurance*, 39 GEO. L.J. 422 (1951).

⁹ 357 U.S. 560 (1958).

¹⁰ Since regulation by the domicile state, if exercised, would be effective, the possibility of less than full use of this power would seem to be the only logical basis for a distinction between regulation of that type and regulation by the state of "impact." *FTC v. Traveler's Health Ass'n*, 362 U.S. 293 (1960).

or not legislation in states where advertising is received will divest the FTC of jurisdiction.¹¹

Even if the Court continues to disregard the effectiveness of legislation in drawing the jurisdictional line, the problem must be faced in another respect. The same factors which the Court *might* consider in determining whether or not state regulation is effective and therefore exclusive, *must* be considered in answering the question of whether or not the UIFAPA will assure adequate means of coping with the manifold problems of regulating mail order insurance. Regulation incapable of enforcement is mere chimera. The Unfair Trade Practices Acts generally provide for a cease-and-desist order and a penalty for non-compliance. The state may sue on its own statute in the domicile state, or it may first reduce the penalty to a judgment in its own courts and sue on it in the insurer's domicile. Whether or not enforcement is possible depends on the extent to which the tendency persists to deny full faith and credit to foreign penal statutes and to foreign judgments based on penal statutes.¹² By inference the Supreme Court has limited the exception to criminal statutes,¹³ and there is no logical reason for its perpetuation. The Court has recognized the states' interest in the regulation of insurance in deciding other issues,¹⁴ and it probably would hesitate to render these endeavors meaningless as a regulatory tool on the strength of this attenuated doctrine. Since the Constitution does not forbid states to enforce judgments of sister states based on penal statutes, interstate compacts requiring the enforcement of such judgments are a possibility. However, the National Association of Insurance Commissioners has discouraged such a proposal, not on the grounds that it would be ineffective, but because a request for congressional consent would supposedly be inconsistent with states' contention that they are capable of regulating insurance without any interference by the federal government, because the Supreme Court would have the power to pass on the meaning and validity of such a compact, and because it is less likely to be universally adopted.¹⁵ Much of this reasoning seems to be predicated

¹¹ The dissent in *Traveler's Health* disputes the assertion by the majority that there is any question to leave open: "Yet even if such legislation proved abortive as a practical matter . . . such legislation would nonetheless presumably exclude Federal Trade Commission jurisdiction, unless we were to depart from our holding in *FTC v. National Casualty Co.*, to the effect that it is the *existence* of state regulatory legislation, and not the *effectiveness* of such regulation, that is the controlling factor." *FTC v. Traveler's Health Ass'n*, *supra* note 10, at 305 n.4.

¹² See, e.g., *Wisconsin v. Pelican Ins. Co.*, 127 U.S. 265 (1888). Generally laws are classified as penal when the recovery provided for is not determined by the injury suffered, and when liability is not dependent upon whether or not the plaintiff was prejudiced by the defendant's non-compliance. Comment, 25 U. CHI. L. REV. 187, 188 (1957).

¹³ *Milwaukee County v. M. E. White Co.*, 296 U.S. 268 (1935); *Huntington v. Attrill*, 146 U.S. 657 (1892).

¹⁴ See text accompanying note 8 *supra*.

¹⁵ 1 NAIC PROCEEDINGS 309, 315-16 (1961).

on the assumption that securing *exclusive* state regulation is of more vital concern than securing *effective* regulation.

Even if all legal obstacles to effective state regulation are removed, a practical problem remains: many of the states lack the ability to deal effectively with the evil this statute purports to control.¹⁶ To be truly effective the regulation must be prospective, eradicating misleading advertising and policies before the insured are injured. While FTC procedures are prospective,¹⁷ most states act primarily on a complaint basis.¹⁸ Inadequate budgets, small staffs, and dated administrative machinery constitute severe limitations on the ability of smaller states to regulate satisfactorily,¹⁹ and there is no present indication of any major attempt to remedy these conditions. Since the protection of the public should be of more concern than the exclusion of the FTC, much might be said for a co-operative system in which the states continue their traditional regulatory and licensing activity but allow the FTC to combat the problem of restraining advertising of mail order companies before it causes injury. Unfortunately co-operation along these lines appears politically impossible²⁰ and in the final analysis the interests of those likely to be injured by the deceptive practices of mail order insurers appear to weigh less than the demand for freedom from federal intervention. The concept of due process must initially be stretched to allow this type of state regulation,²¹ and the extension of state jurisdictional power is unobjectionable only if it actually serves to benefit citizens. Thus, the individual states will have the responsibility of bridging a potential gap between the intended effect of the legislation and its practical impact, and of proving that their jurisdictional triumph was not their citizens' loss.

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¹⁶ See, e.g., Kimball, *The Regulation of Insurance Marketing*, 61 COLUM. L. REV. 142 (1961); Note, *Regulation of Insurance Advertising Practices: A Jurisdictional Inquiry*, 67 YALE L.J. 452 (1958).

¹⁷ See McCarter, *supra* note 6, at 100-01.

¹⁸ Note, *Regulation of Insurance Advertising Practices: A Jurisdictional Inquiry*, 67 YALE L.J. 452, 459 (1958).

¹⁹ Kimball, *supra* note 16, at 142, 199.

²⁰ Until the Court declared that the business of insurance was commerce in the *South Eastern Underwriters Ass'n* case, 322 U.S. 533 (1944), the states alone had been responsible for insurance regulation. The various state insurance commissioners and staff members naturally feel that they have a vested interest in maintaining state hegemony in this area. Their arguments in support of maintaining complete control often do not rest on a reasoned comparison of state and federal regulation, but rather on references to the seemingly inherent evils of centralization as compared with the manifest justice of states' rights. See McConnell, *State Regulation v. State Regulation Plus Regulation by Multiple, Decentralized, Independent Federal Agencies*, 1956 INS L.J. 697.

²¹ See note 7 *supra*.