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Insurance - Rate Regulation - Competitors' Standing to Seek Administrative Review of Rate Filings

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COMMENTS

INSURANCE—RATE REGULATION—COMPETITORS' STANDING TO SEEK ADMINISTRATIVE REVIEW OF RATE FILINGS—On August 6, 1958, the Antitrust and Monopoly Subcommittee of the Senate Committee on the Judiciary, headed by Senator O'Mahoney, began its investigation of the manner in which the states have regulated the business of insurance.¹ Subsequently, Senator O'Mahoney stated that the principal objectives of the hearings would be to determine from industry representatives and state insurance regulatory authorities the extent to which competition² had been preserved under the pattern of state regulation which emerged after the enactment of the McCarran Act.³ The subcommittee's investigation had been initiated by reports of concerted action by the dominant elements in the insurance industry to prevent independent companies from competing with the members of the rating bureaus on a price basis.⁴ This concerted action allegedly had taken the form of attempts by rating bureaus and their affiliated companies to challenge, both on the administrative and judicial level, the efforts of the independent companies to secure approval of lower rates.⁵ The standing of rating bureaus and their affiliated companies to challenge independent rate filings may present a substantial deterrent to successful price competition by independent companies because of the delays inherent

¹ In his opening statement Senator O'Mahoney emphasized that "[t]hese hearings mark the first step in the Sub-committee's major study of the insurance industry some thirteen years after the enactment of the McCarran Act. In enacting this legislation Congress chose to repose the principal regulatory responsibility over the insurance industry in the various states. However, Congress indicated its intention that competition should continue to be a prime regulator. The Congress now begins its examination of the manner in which the states have exercised their stewardship over the business of insurance." Quoted in Navarre, "Federal Investigation of Insurance," A.B.A. PROC., SECTION OF INSURANCE, NEGLIGENCE AND COMPENSATION LAW 13 at 15 (1958).

² "Competition is the life blood of the free enterprise system. When the McCarran Act was passed, Congress was, of course, aware that various states had approved the fixing of rates in concert through rating bureaus. Nevertheless, the legislative history makes it perfectly clear that Congress intended that competition would continue to act as a prime regulator in the insurance industry. . . . Subsequent laws enacted by the States for rate regulation reaffirmed that policy and specifically provided for variations in rates in several cases in accordance with this express declaration of policy by Congress." Statement of Senator O'Mahoney, quoted in THE WEEKLY UNDERWRITER, May 30, 1959, p. 1116:1.

³ 59 Stat. 33 (1945), as amended, 15 U.S.C. (1958) §§1011-1015.

⁴ See statement of Senator O'Mahoney, S. Hearings Before the Subcommittee on Antitrust and Monopoly of the Committee on the Judiciary on the Insurance Industry, 86th Cong., 2d sess., p. 1050 (1959) (hereinafter cited Insurance Industry Hearings).

⁵ See, generally, Statement of John A. Diemand, President of the Insurance Company of North America, Insurance Industry Hearings, p. 1121; Statement of W. Perry Epes, on behalf of the Insurance Company of North America, Insurance Industry Hearings, p. 1151.

in the administrative and judicial process. The purpose of this comment is to explore, in the light of the All-Industry pattern of regulation and the applicable public policy considerations, the right of rating bureaus and their members to such standing at the administrative level.⁶

A. *Background of the McCarran Act*

The necessity of cooperative action in the promulgation of insurance rates has long been recognized. Because the actual cost of insurance cannot be determined in advance, the industry has resorted to a collective pooling of the loss and expense experience of individual companies in an effort to secure as broad a statistical base as possible for the purpose of predicting with the greatest accuracy the costs applicable to a future period. In this respect, the substantial progress made by the insurance industry since mid-nineteenth century has been attributable, in part, to the development of the rating bureau which, as a statistical agent for its member companies, collected and combined their statistical experience and promulgated a rate structure to which the members had previously agreed to adhere. Since no single company had sufficient experience of its own, resort to the work product of a rating bureau was a practical necessity in the establishment of a rate structure. The threat of expulsion from the bureau for infractions of its rules served admirably to achieve industry uniformity in prices and coverages, thus allowing little room for independent action. Consequently, the decision in *United States v. South-Eastern Underwriters Association*⁷ that the federal government had plenary power to regulate the business of insurance carried serious implications with regard to the continued existence of a regulatory scheme which had been characterized primarily by private industry controls and only infrequently by adequate state regulation.⁸ Furthermore, the applicability to the insurance

⁶ This comment will be confined to a discussion of the question of standing at the administrative level. Although the problem of standing at the judicial level is important, the absence of pertinent pre-enactment legislative materials precludes a discussion of statutory standing at the state level conferred in terms of "aggrieved party" provisions. However, the policy considerations discussed in Part II of the comment appear equally applicable to both problems.

⁷ 322 U.S. 533 (1944). For a discussion of the South-Eastern Underwriters case, see Powell, "Insurance As Commerce," 57 HARV. L. REV. 937 (1944).

⁸ See Kimball and Boyce, "The Adequacy of State Insurance Rate Regulation: The McCarran-Ferguson Act in Historical Perspective," 56 MICH. L. REV. 545 at 546-552 (1958). For a survey of state regulation prior to the South-Eastern Underwriters case, see comment, 33 GEO. L. J. 70 (1944).

business of the Sherman Antitrust Act,⁹ which had previously been interpreted as condemning all price-fixing agreements without regard to their reasonableness,¹⁰ presaged the end of cooperative rate-making.¹¹

Shortly after the *South-Eastern Underwriters* decision¹² a bill was introduced in Congress, based on a model bill submitted by the National Association of Insurance Commissioners, which emerged in an amended form as the McCarran Act.¹³ The basic purpose of the act was expressed in section 1:

"... 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."¹⁴

⁹ 26 Stat. 209 (1890), as amended, 15 U.S.C. (1958) §§1-7. The Sherman Act was intended to afford protection against price manipulations which resulted from monopolies and combinations in restraint of trade, by declaring illegal all contracts, combinations, and conspiracies in restraint of trade or commerce, and any attempt to monopolize any part of trade or commerce with or without the use of boycotts, coercion or intimidation.

¹⁰ *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940).

¹¹ The seriousness of the situation presented by the *South-Eastern Underwriters* case is indicated by the fact that briefs amici curiae for rehearing were submitted by the attorneys general of 41 states. See Orfield, "Improving State Regulation of Insurance," 32 MINN. L. REV. 219 at 222 (1948).

¹² Even while the *South-Eastern Underwriters* case was pending before the Supreme Court the Walter-Bailey-Van Nuys Bill [S. 1362, H.R. 3269, H.R. 3270, 78th Cong., 1st sess. (1943)], which would have completely exempted the business of insurance from the federal antitrust laws, was introduced in the House. The bill passed the House [90 CONG. REC. 6565 (1944)] and was reported favorably by the Senate Judiciary Committee, but died on the calendar. See comment, 32 GEO. L.J. 66 (1943). One reason for the bill's failure to pass was a survey conducted by the Department of Justice which revealed that about one-half of the states in which rating bureaus operated made inadequate provision for the regulation of insurance companies, leaving the public virtually at the mercy of price-fixing combinations which were illegal per se under the Sherman Act. See Joint Hearing Before the Subcommittee of the Committee on the Judiciary on S. 1362, H.R. 3269, and H.R. 3270, 78th Cong., 1st sess., 55-57 (1943).

¹³ 59 Stat. 33 (1945), as amended, 15 U.S.C. (1958) §§1011-1015. The legislative proposal submitted by the National Association of Insurance Commissioners may be found in PROCEEDINGS, NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS 32 (1945) [hereinafter cited as N.A.I.C. PROC.].

¹⁴ Congressional acquiescence in continued state regulation and taxation of the business of insurance has been upheld in *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408 (1946). Cf. comment, 45 COL. L. REV. 927 (1945). In authorizing the continued control of the insurance business by the states, rather than devising a federal regulatory scheme, Congress was motivated by two considerations: (1) it feared the chaos that might accompany disruption of well-established patterns of state regulation and taxation [S. Rep. 20, 79th Cong., 1st sess. (1945)]; and (2) while recognizing that insurance companies doing interstate business were, under the existing scheme of state regulation, required to conform to the highest standards set by any of the individual states, it doubted whether congressional legislation, influenced by a variety of local pressures, would produce such high

The act further provided for a three-year moratorium period during which state laws regulating or taxing insurance would not be invalidated by any Act of Congress, but that after January 1, 1948, the federal antitrust laws "shall be applicable to the business of insurance to the extent that such business is not regulated by state law."¹⁵

The legislative history of the McCarran Act suggests quite clearly that Congress, while recognizing the desirability of collaborative rate-making practices,¹⁶ appreciated the competitive restraints inherent in concerted price-fixing,¹⁷ and required as a condition of exemption from the federal antitrust laws positive and effective state regulation of the concerted price-fixing activities of rating bureaus.¹⁸ Furthermore, Congress indicated its

standards for countrywide operations. See Patterson, "The Future of State Supervision of Insurance," 23 *TEX. L. REV.* 18 at 31 (1944).

¹⁵ Section 2 (b), 59 Stat. 34 (1945), 15 U.S.C. (1958) §1012. The moratorium was later extended to June 30, 1948 [Public Law No. 238, 80th Cong., 1st sess., 59 Stat. 34 (1947)] in order to give Congress additional time to determine whether the states had been successful in their efforts to enact effective interstitial legislation. S. Rep. 407, 80th Cong., 1st sess. (1947). However, section 3 (b) added, "Nothing contained in this Act shall render said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion or intimidation." 61 Stat. 448 (1947), as amended, 15 U.S.C. (1958) §1013. Section 3 (b) has been applied in Sherman Act prosecutions for insurance boycotts. *United States v. Insurance Board of Cleveland*, (D.C. Ohio 1956) 144 F. Supp. 684; *United States v. New Orleans Insurance Exchange*, (D.C. La. 1957) 148 F. Supp. 915, *affd. per curiam* 355 U.S. 22 (1957). For discussion of the meaning of "regulated by state law" as used in §2 (b), see Kimball and Boyce, "The Adequacy of State Insurance Rate Regulation: The McCarran-Ferguson Act in Historical Perspective," 56 *MICH. L. REV.* 545 at 566-576 (1958); Morris, "Meaning of Term 'Regulated by State Law' in Public Law 15," *A.B.A. PROC., SECTION OF INSURANCE LAW* 213 (1949). See also Interim Report of the Sub-Committee on Federal Legislation of the Executive Committee of the National Association of Insurance Commissioners (June 5, 1945), *N.A.I.C. PROC.* 156 at 159 (1945).

¹⁶ "This bill would permit — and I think it is fair to say that it is intended to permit — rating bureaus. . . . I think that the insurance companies have convinced many members of the legislature that we cannot have open competition in fixing rates on insurance." Statement of Senator Ferguson during the Senate debate on the McCarran Act, 91 *CONG. REC.* 1481 (1945).

¹⁷ " . . . Congress granted the states and the industry a period of grace within which to remove abuses, to revise old laws and to enact new ones. It further provided that at the end of this period, the anti-trust laws would again apply to the business of insurance 'to the extent that such business is not regulated by state law.' Thus, to the extent that restraints of trade in the insurance industry have not been removed by state regulation, the anti-trust laws will provide the necessary corrective." Address of Manuel Gorman, Assistant Attorney General, *A.B.A. PROC., SECTION OF INSURANCE LAW* 301 at 302-303 (1946).

¹⁸ It has been argued that mere token regulation will not meet the requirements of the McCarran Act. Only adequate and effective regulation by the states will suffice. See Kimball and Boyce, "The Adequacy of State Insurance Rate Regulation: The McCarran-Ferguson Act in Historical Perspective," 56 *MICH. L. REV.* 545 at 566-576 (1958).

intention that future state regulation must effectively ensure price competition among insurers.¹⁹

B. *Reactions to the McCarran Act*

In response to the congressional invitation implicit in the McCarran Act, the Commissioners'-All-Industry Committee, composed of representatives of the National Association of Insurance Commissioners and various segments of the insurance industry, met in 1946 for the purpose of drafting model bills which would provide for positive state control of the rate-making process in both fire and casualty insurance²⁰ while preserving the competitive opportunities for those companies which did not wish to subscribe to bureau rates.²¹ The Commissioners'-All-Industry Committee, after lengthy deliberation and extensive compromise of conflicting views regarding the degree of state control required by the McCarran Act, produced two model bills for submission to the state legislatures—the Fire and Marine Rate Regulatory Bill and the Casualty and Surety Rate Regulatory Bill.²² Both

¹⁹ "Nothing in this bill [the McCarran Act] is to be so construed as indicating it to be the intent or desire of Congress to require or encourage the several states to enact legislation that would make it compulsory for any insurance company to become a member of rating bureaus or charge uniform rates. It is the opinion of Congress that competitive rates on a sound financial basis are in the public interest." H. Rep. 143, 79th Cong., 1st sess. (1945).

²⁰ Many people in the insurance industry were led to believe that cooperative rate-making would not come within the aegis of the Sherman Act if such activities were supervised by the states. Support for this belief was found in the decision in *Parker v. Brown*, 317 U.S. 341 (1943), which held the Sherman Act inapplicable to a state-controlled program regulating the price of raisins produced in California but destined for shipment in interstate commerce. This belief was further bolstered by the informal statement made by Attorney General Biddle on November 11, 1944, when he appeared before the Drafting Committee of State Officials of the Council of State Governments: "... if a group of insurance companies agreed on rates and filed them with a state commission or state body, and that body took active and definite action, made active and definite approval of those rates, in that case I think the matter would not be involved at all in the Sherman Anti-Trust Act." Quoted in Dineen, "The Rating Problem," A.B.A. PROC., SECTION OF INSURANCE LAW 104 at 105 (1945).

²¹ "In drafting these bills it was recognized that many companies desired to take independent action. It was recognized that uniformity while authorized should not be made mandatory, thereby preserving freedom of action upon the part of those who desire to take action independently." Report of the Subcommittee of the Committee on Rates and Rating Organizations, National Association of Insurance Commissioners (May 22-23, 1946), N.A.I.C. PROC. 361 at 367 (1946). For statements by the drafters having similar purport, see N.A.I.C. PROC. 122-123 (1946). Cf. Joint Report of the Committee on Federal Legislation and the Committee on Rates and Rating Organizations of the National Association of Insurance Commissioners (December 5, 1945), N.A.I.C. PROC. 94 at 100 (1946).

²² The complete evolution of these model bills can be traced in the various committee reports which are reprinted in N.A.I.C. PROC. (1946). For purposes of this comment, reference will not be made to the individual bills. Unless otherwise indicated the cited sections of the model bills are identical in each bill. However, although the problems which will hereafter be discussed are pertinent to both fire and casualty insurance, they

bills contained similar provisions and have since been enacted in substantially their original form in almost all of the states.²³

The basic standard imposed by the All-Industry Bills²⁴ is that the rates shall not be excessive, inadequate or unfairly discriminatory.²⁵ Under the typical procedure all rate filings must be submitted to the commissioner accompanied by the supporting statistical data upon which the filer relies.²⁶ However, an individual insurer may satisfy the filing requirements by becoming a member or subscriber of a rating bureau which has been licensed by the commissioner.²⁷ Since the rating bureau is authorized to make filings on behalf of its members and subscribers, they are generally bound by the bureau's filing, except that a filing by an affiliated company for a uniform percentage deviation from the bureau's rates is allowed.²⁸ Furthermore, each rating bureau

have thus far arisen only in connection with fire insurance. This may perhaps be explained by the fact that the rating bureau, both historically and at the present time, has played a far more important role in the fire insurance lines. In casualty insurance, particularly automobile liability, a large company may well be able to produce a statistically credible rate structure on the basis of its own experience, and consequently its rate filings may not be as vulnerable to attack by competitors. ZOFFER, *THE HISTORY OF AUTOMOBILE LIABILITY INSURANCE RATING* 227-231 (1959).

²³ Compilations of the various statutes may be found in Donovan, "Regulation of Insurance Under the McCarran Act," 15 *LAW AND CONTEMP. PROB.* 473 at 485, n. 52 (1950), and "Insurance Under the Commerce Clause—The First Decade," Report of Special Subcommittee of Committee on Regulation of Insurance Companies, A.B.A. SECTION OF INSURANCE LAW 10-13 (1954). Most of the existing statutes are products of the period following the South-Eastern Underwriters case (1945-1948) and contain at least some provisions of the model bills; it is difficult in some instances to determine whether they are or are not based on the model bills. However, the following statutes, which either require compulsory bureau membership or make no provision for rate filings, seem clearly to depart from the philosophy of the model bills. Compulsory bureau membership: D.C. Code (1951) §35.1404 (fire); La. Rev. Stat. (1950) §§1405, 1406 (fire and casualty); Mass. Laws Ann. (1950) c. 175, §113B (motor vehicle); Miss. Code Ann. (1957) §5826 (fire); N.C. Gen. Stat. (Recomp. 1950) §58-127 (fire), §53-247 (motor vehicle); Tex. Civ. Stat. (Vernon, 1952) art. 5.01 (motor vehicle), art. 5.25 (fire); Va. Code (1950) §38.1-227. No rate filings required: Cal. Ins. Code Ann. (Deering, 1950) §§1850-1860.3 (fire and casualty); Idaho Code (Supp. 1948) §41-3601 (casualty—as long as commissioner finds that reasonable competition exists); Mo. Stat. Ann. (Vernon, 1952) §§379.420 to 379.510 (casualty); Wash. Rev. Code §48.19. Independent companies are not required to file their casualty rates in Montana. Mont. Rev. Code Ann. (1947) §40-2411.

²⁴ Reference will frequently be made to the provisions of the All-Industry Bills. Unless the contrary is indicated, the reference is to the drafts of May 18, 1946, which will be found in N.A.I.C. Proc. 397-421 (1946), and 4 RICHARDS, *INSURANCE*, 5th ed., 2112, 2124 (1952).

²⁵ Section 3 (a).

²⁶ Section 4 (a).

²⁷ Section 4 (b).

²⁸ Section 7. Deviation provisions recognize the right of an insurer who is a member or subscriber of a rating bureau to sell below the average level determined by the bureau to the extent that the insurer can demonstrate that over a substantial period of time its operating expenses have been lower than the average for all companies in the bureau. Deviation filings, unlike dividends which represent retrospective price adjustments, apply price reductions at the inception of the policy period.

is required to permit any insurer to become a subscriber for its rating services,²⁹ although no individual company is required to become a member or subscriber of a rating bureau.³⁰ Consequently, any insurer may act independently of the rating bureau by making its own rate filings directly with the commissioner; but its filings, like those of the bureau, must conform to the statutory standards.³¹ Once an initial filing is made, the rates remain on file for a period varying from 30 to 90 days before they become effective, during which time the commissioner is supposed to consider the filing and its supporting information and either approve or disapprove it.³² In a majority of the states which followed the pattern of the All-Industry Bills rate filings not specifically disapproved by the commissioner become effective immediately after the expiration of the waiting period.³³ How-

²⁹ Section 6 (b).

³⁰ Section 4 (b). But cf. note 23 supra.

³¹ Section 3 (a). An insurer may also subscribe for the services of the rating bureau for some classes of insurance, while at the same time making its own independent filings for other classes of the same type of insurance. The right of "partial subscribership" has been upheld in Arizona [*Pacific Fire Insurance Rating Bureau v. Insurance Co. of North America*, 83 Ariz. 369, 321 P. (2d) 1030 (1958)] and New York [Decision of Alfred J. Bohlinger, Superintendent of Insurance, State of New York, In the matter of the Independent Fire Filing of the Insurance Co. of North America, for Dwelling Classes 009, 019, 029 and 011, September 14, 1954, affd. without opinion, *Cullen v. Bohlinger*, 284 App. Div. 963, 136 N.Y.S. (2d) 361 (1954), leave to appeal denied 308 N.Y. 1049, appeal dismissed, 308 N.Y. 886, 126 N.E. (2d) 564 (1955), appeal dismissed 350 U.S. 803 (1955)], and is pending in Washington [*Insurance Co. of North America v. Sullivan*, Supreme Court of State of Washington, Docket No. 35042].

³² Section 4 (d). The model bills provided for an initial waiting period of 15 days which could be extended by the commissioner for an additional 15-day period by giving written notice to the insurer or rating bureau that made the filing. The waiting period was intended to afford the commissioner a period in which to examine a rate filing and the statistical information upon which it was based in order to determine whether it complied with the statutory standards set forth in §3 (a).

³³ Section 4 (d) contains the so-called "deemer clause," which provides that a "filing shall be deemed to meet the requirements of this Act unless disapproved by the (commissioner) within the waiting period or any extension thereof." The maximum period during which the rates must be on file, which includes the initial waiting period and the allowable extension, before the "deemer clause" becomes operative, varies from 30 days under the model bills to 90 days in New Jersey. The waiting period and "deemer clause" provisions have been included in fire and casualty rating laws in the following states: Alaska, Arizona, Arkansas, Colorado, Connecticut, District of Columbia (casualty only), Georgia, Hawaii, Idaho (fire only), Illinois, Indiana, Iowa, Kansas (fire only), Kentucky, Maryland, Michigan, Minnesota, Montana, Nebraska, Nevada, New Mexico, New York, North Dakota, Ohio (fire only), Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Utah, Vermont (casualty only), Virginia (casualty only), Washington, West Virginia, Wisconsin, Wyoming (fire only). In a substantial group of states a proposed rate becomes effective immediately upon filing subject only to the commissioner's power of disapproval in the event he finds that at some subsequent time the filing no longer complies with the rating law: Delaware (fire and casualty), District of Columbia (casualty), Maine (fire and casualty), Massachusetts (fire and casualty), New Hampshire (fire and casualty), Ohio (casualty), Texas (casualty other than motor vehicle), Vermont (fire and casualty), Wyoming (casualty).

ever, a substantial group of states require affirmative approval before a rate filing can become effective.³⁴ The commissioner's power to disapprove a rate filing, whether made by a rating bureau, a deviator, or an independent insurer, is not arbitrary; he may not disapprove any filing if it complies with the statutory rating standards.³⁵

From this general description of the All-Industry pattern of regulation, it would seem that opportunities for price competition have been adequately assured through the provisions allowing deviation and independent filings. However, a meaningful evaluation of these opportunities is possible only after consideration of the practical administrative problems encountered by individual insurers in their efforts to compete on a price basis. In this respect, the most substantial impediment to deviation and independent filings has been the facility with which the rating bureaus have been able to challenge them on the administrative and judicial level.

I. ADMINISTRATIVE REVIEW BY COMPETITORS

A. *Deviation Filings*

Section 7 of the All-Industry Bills recognizes the right of a member or subscriber of a rating bureau to file with the commissioner a request for approval of a uniform percentage deviation from the rates filed by the rating bureau.³⁶ However, two factors diminish the utility of the deviation filing as a vehicle for strenuous competitive action. First, before the commissioner can approve the deviation filing he must give notice to the rating

³⁴ In the following states the rating laws purport to require approval by the commissioner before a rate filing can become effective: Alabama (fire and casualty), Florida (fire and casualty), Kansas (casualty), Mississippi (casualty), New Hampshire (motor vehicle), New Jersey (fire and casualty), North Carolina (casualty), Tennessee (fire and casualty). Prior approval provisions are also found in statutes which prescribe compulsory bureau membership. See note 23 *supra*. However, if the commissioner fails to approve or disapprove the filing within some specified period, usually 30 days, the filing is deemed to be approved. Therefore, these provisions appear quite similar in substance to those of the model bills.

³⁵ Section 5 (a).

³⁶ In the absence of a deviation filing, a member or subscriber of a rating bureau would be bound by the bureau's filing. Section 7. The drafters of the All-Industry Bills recognized "that any insurance rate regulatory law which unduly restricts the desire of a carrier to pass on a demonstrated economy to the insurance buyer is not in the public interest." Report of the Sub-committee on Rates and Rating Organizations (May 22-23, 1946), N.A.I.C. Proc. 361 at 370 (1946). The drafters also recognized that while deviation filings are based, under ordinary circumstances, on demonstrated savings in the expense portion of the premium dollar, under certain circumstances a more favorable loss record of an individual company might justify a deviation filing. *Ibid*.

bureau, which then has the right to be heard in opposition to the granting of the deviation.³⁷ The fact that some bureaus may have a policy of challenging all deviation applications, or at least all those which present a severe competitive threat,³⁸ suggests that the danger of lengthy and expensive administrative hearings, accompanied by the possibility of subsequent review by the courts, makes the deviation filing a potentially burdensome procedure for insurers who wish to compete with the bureau companies on a price basis.³⁹ Second, since a deviation filing is operative for only one year, its effectiveness as a competitive measure is uncertain because the rating bureau, which has the right to request annual hearings, may be able to prevent the company from keeping its deviation in continuous effect.⁴⁰ Furthermore, the necessity of justifying a deviation filing each year imposes a financial burden on the applicant which few small companies can bear. The cumbersomeness of the deviation procedure and the impossibility of obtaining and keeping deviations in effect led one major fire insurance company to withdraw from the rating bureau and file its rates, at least for certain classes of risks, independently.⁴¹

B. *Independent Filings*

The All-Industry Bills do not require the commissioner to hold a hearing before initially disposing of a rate filing.⁴² Consequently, a rate filing cannot be challenged by a competitor at

³⁷ Because the commissioner will have already approved the general rate schedule filed by the bureau, which supposedly represents the best judgment of the "experts," the applicant will have the burden of establishing that its loss or expense experience justifies the deviation. See Brook, "Public Interest and the Commissioners'—All-Industry Laws," 15 LAW AND CONTEMP. PROB. 606 at 613 (1950).

³⁸ See "Competition in the Fire Insurance Business," Statement of W. Perry Epes, given on behalf of the Insurance Company of North America, Insurance Industry Hearings, p. 1151.

³⁹ See Brook, "Public Interest and the Commissioners'—All Industry Laws," 15 LAW AND CONTEMP. PROB. 606 at 613 (1950).

⁴⁰ See "Competition in the Fire Insurance Business," Statement of W. Perry Epes, given on behalf of the Insurance Company of North America, Insurance Industry Hearings, p. 1151.

⁴¹ See "Competition in the Fire Insurance Business," Statement of John A. Diemand, given on behalf of the Insurance Company of North America, Insurance Industry Hearings, p. 1121.

⁴² This conclusion is suggested by the failure of the model bills to provide specifically for a hearing before the commissioner considers a filing. Furthermore, §4(a) provides that a "filing and supporting information shall be open to public inspection after the filing becomes effective." If a filing is not open to public inspection before it becomes effective a competitor would have no basis for challenging it. See Shield, "Some Procedural and Administrative Questions Arising Under Laws Resulting From Public Law 15," A.B.A. PROC., SECTION OF INSURANCE LAW 233 at 235 (1949).

this stage. If the commissioner disapproves the filing, either within the applicable review period⁴³ or at some subsequent time,⁴⁴ the filer, whether a rating bureau or an independent insurer, is entitled to a hearing. If, however, the commissioner approves an independent rate filing, the question arises whether a competing rating bureau or its affiliated companies have the right to challenge the rate filing on the administrative level as not conforming to the statutory standards.

Although persons whose only interest in challenging administrative action was to avoid increased competition have been denied standing in the absence of a statutory authorization,⁴⁵ where statutory provisions have purported to confer standing on a class described as "aggrieved parties" some courts have found the requisite standing to be present.⁴⁶ Thus in *FCC v. Sanders Brothers Radio Station*⁴⁷ the issue was whether an existing broadcasting station which would suffer economic injury by increased competition had standing to challenge the grant of a construction permit to a new station. The applicable statute provided for an appeal by "any person aggrieved or whose interests would be adversely affected. . . ."⁴⁸ The Supreme Court held that although

⁴³ Section 16 (a) (fire bill); §17 (a) (casualty bill).

⁴⁴ Section 5 (c), which gives the commissioner a continuing jurisdiction over all rate-filings, was designed to permit the commissioner's subsequent disapproval of a filing which previously became effective by operation of the deemer clause [§4 (d); see note 33 supra], or one which met the requirements of the rating law at the time it was approved but which subsequently failed to conform to the rating standards because of a change in the statistical or economic picture. See Report of the Sub-committee of the Committee on Rates and Rating Organizations (May 22-23, 1946), N.A.I.C. Proc. 361 at 369 (1946). Section 5 (c) provides: "If at any time subsequent to the applicable review period [the initial waiting period] . . . , the (commissioner) finds that a filing does not meet the requirements of this Act, he shall, after a hearing . . . , issue an order specifying in what respects he finds that such filing fails to meet the requirements of this Act, and stating when, within a reasonable period thereafter, such filing shall be deemed no longer effective. . . ." See *Cravey v. Southeastern Underwriters Assn.*, 214 Ga. 450, 105 S.E. (2d) 497 (1958). Under §5 (d) the commissioner's disapproval of the filing cannot be made effective retroactively.

⁴⁵ *Perkins v. Lukens Steel Co.*, 310 U.S. 113 (1940); *Tennessee Electric Power Co. v. TVA*, 306 U.S. 118 (1939). See, generally, 3 DAVIS, ADMINISTRATIVE LAW §22.04 (1958).

⁴⁶ *FCC v. Sanders Brothers Radio Station*, 309 U.S. 470 (1940); *Scripps-Howard Radio v. FCC*, 316 U.S. 4 (1942); *FCC v. NBC (KOA)*, 319 U.S. 239 (1943); *Associated Industries v. Ickes*, (2d Cir. 1943) 134 F. (2d) 694, dismissed as moot 320 U.S. 707 (1943); *Pacific Inland Tariff Bureau v. United States*, (D.C. Ore. 1955) 129 F. Supp. 472. And see *American President Lines v. Federal Maritime Board*, (D.C. D.C. 1953) 112 F. Supp. 346 (applying Federal Administrative Procedure Act). But cf. *Kansas City Power and Light Co. v. McKay*, (D.C. Cir. 1955) 225 F. (2d) 924, cert. den. 350 U.S. 884 (1955) (applying Federal Administrative Procedure Act).

⁴⁷ 309 U.S. 470 (1940).

⁴⁸ Section 402 (b) of the Communications Act of 1934, 48 Stat. 1093, 47 U.S.C. (1958) §402 (b).

the licensee had no legal right to be free from competition and the purpose of the Communications Act was to protect the public, Congress *intended* to confer a right of review upon those who might suffer economic injury as a result of the licensing of new stations because they would be the only persons who would have sufficient incentive to challenge the legality of the FCC's order.

Unfortunately, the All-Industry Bills, though conferring standing upon a class described as "aggrieved," do not clearly indicate whether the framers intended to include competitors of the rate filer within this class. At least two sections of the bills bear upon the problem:

"5 . . . (d) Any person or organization aggrieved with respect to any filing which is in effect may make written application to the (commissioner) for a hearing thereon, provided, however, that the insurer or rating organization that made the filing shall not be authorized to proceed under this subsection. If the (commissioner) shall find that the application is made in good faith, that the applicant would be so aggrieved if his grounds are established, and that such grounds otherwise justify holding such a hearing, he shall . . . after receipt of such application, hold a hearing . . . upon . . . written notice to the applicant and to every insurer and rating organization which made such filing."

"16 . . . (a) Any insurer or rating organization aggrieved by any order or decision of the (commissioner) made without a hearing, may, within thirty days *after notice of the order to the insurer or organization*, make written request to the (commissioner) thereon. The (commissioner) shall hear such party or parties . . . and . . . shall affirm, reverse or modify his previous action. . . ." (Emphasis added.)

Since the rate filer whose filing is disapproved is not entitled to demand a hearing under section 5(d), it must proceed under section 16(a) in obtaining a hearing on the order made by the commissioner without a hearing. Furthermore, the "insurer or rating organization aggrieved" within the meaning of section 16(a) appears to be one which, by the additional terms of that section, has received "notice of the order." This can refer only to the insurer or rating organization whose own filing has been the subject of the adverse order made without a hearing; consequently, section 16(a) cannot apply to competing insurers or rat-

ing organizations which do not, and are not entitled to, receive any "notice of the order" approving an independent rate filing.⁴⁹

On the other hand, the history of section 5 (d), which was intended to permit an appeal directly to the commissioner by one who was attacking the validity of the entire filing,⁵⁰ leaves doubt as to who may initiate the appeal and secure a hearing. The initial draft of the model bills prepared by the commissioners⁵¹ contained in section 4 (i) language which, as subsequently modified, was ultimately included as section 5 (d) in the final drafts submitted to the state legislatures. In their limited reference to section 4 (i) the drafters implied that its function was to provide for an *appeal by the public* to the commissioner in the event there was dissatisfaction with a rate filing.⁵² However, subsequent history suggests that section 5 (d) was intended to have wider ap-

⁴⁹ As thus interpreted, §16(a) would be consistent with the constitutional requirement of a judicial-type hearing in the rate-making process. See *Jordan v. American Eagle Fire Ins. Co.*, (D.C. Cir. 1948) 169 F. (2d) 281, where 174 insurance companies doing business in the District of Columbia sought to enjoin enforcement of a rate reduction order issued by the Superintendent of Insurance, claiming the order was constitutionally defective. The superintendent had held a hearing at which the companies were allowed to submit oral and documentary proof, but the superintendent had refused to disclose the evidence upon which his order was based. The court held that although due process required a hearing at some stage in the rate-making process, this requirement was satisfied by interpreting the District of Columbia Rating Law [D.C. Code (Supp. VI, 1940) §35-1403] as providing for de novo review in the district court. See note, 33 MINN. L. REV. 771 (1949). It would appear that where de novo review was not provided in the rating law, the constitutional right to a hearing would have to be satisfied at the administrative level. Since the drafters of the All-Industry Bills decided to leave the scope of judicial review open to the respective states [Report of the Sub-committee of the Committee on Rates and Rating Organizations (May 22-23, 1946), N.A.I.C. PROC. 361 at 375 (1946)], it may be inferred that they contemplated the possibility of review other than de novo and consequently intended to establish a procedure consistent with maximum due process requirements.

⁵⁰ This conclusion is suggested by the following language in section 5 (d): "If, after such hearing, the (commissioner) finds that *the filing does not meet the requirements of this act*, he shall issue an order specifying in what respects he finds that *such filing does not meet the requirements of this act*. . . ." Emphasis added. Section 9, the so-called "Appeal by Insured" section, was intended to apply to the situation where an individual insured was dissatisfied with the manner in which the rate schedule was applied to him. See Report of the Sub-committee of the Committee on Rates and Rating Organizations (May 22-23, 1946), N.A.I.C. PROC. 361 at 371 (1946), where the drafters stated that §9 "has a different purpose . . . from section 5 (d). That subsection enables any person aggrieved to challenge the over-all propriety of any particular filing whereas this section enables an assured to challenge the manner in which such rating system has been applied in connection with the insurance afforded him." See also Shield, "Some Procedural and Administrative Questions Arising Under Laws Resulting From Public Law 15," A.B.A. PROC., SECTION OF INSURANCE LAW 233 at 234-239 (1949).

⁵¹ The initial draft was dated October 24, 1945, and may be found in N.A.I.C. PROC. 103-120 (1946).

⁵² "This section also enables the public to obtain a hearing first from the company or rating organization which made the rate and thereafter from the commissioner in the event there is dissatisfaction with the rate." N.A.I.C. PROC. 124 (1946). This comment would appear to refer more appropriately to §9. See note 50 supra.

plication. In the January 18, 1946, draft of the model bills prepared by the commissioners it was provided that any person or organization aggrieved by the action of the commissioner with respect to any filing might make written request to the commissioner for a hearing thereon.⁵³ The All-Industry Committee's draft, on the other hand, purported to limit the right to request a hearing to an insurer, a rating organization or an insured person.⁵⁴ The following statement by the drafters indicates an intent to adopt the more expansive language suggested by the commissioners:

"Your Committee was of the opinion that the suggestion advanced by the All-Industry Committee resulted in *too great a restriction* and that any aggrieved person should have the right to request a Commissioner to grant a hearing."⁵⁵

At any rate, section 5 (d) was intended at the very least to confer the right to request a hearing on *an* insurer or *a* rating organization. Since the express language of section 5 (d) precludes the filing insurer or rating organization from proceeding under that subsection, it would seem that the insurer or rating organization referred to by the drafters must have been a competitor of the filer. Moreover, the drafters' final pronouncement before submission of the final draft of the model bills for the approval of the membership of the NAIC contained the following comment (hereafter referred to as the drafters' "final comment"):

"Subsection (d) is designed to provide relief for any person or organization aggrieved with respect to any filing. Complete machinery is established to deal with this problem. As this draft now stands, the rating organization, the insurer, the Commissioner and the buyer are all provided with the means of dealing with any defect in the rate structure."⁵⁶

Section 5 (c) gave the commissioner a continuing jurisdiction over the rate structure with authority to act if at any time sub-

⁵³ See Report of the Sub-committee of the Committee on Rates and Rating Organizations (April 23-26, 1946), N.A.I.C. Proc. 385 at 387-388 (1946).

⁵⁴ See Report of the Committee on Rates and Rating Organizations (March 11-14, 1946), N.A.I.C. Proc. 391 at 395 (1946); Report of the Sub-committee of the Committee on Rates and Rating Organizations (April 23-26, 1946), N.A.I.C. Proc. 385 at 387-388 (1946).

⁵⁵ Emphasis added. Report of the Committee on Rates and Rating Organizations (March 11-14, 1946), N.A.I.C. Proc. 391 at 395 (1946). See also Report of the Sub-committee of the Committee on Rates and Rating Organizations (April 29-May 2, 1946), N.A.I.C. Proc. 381 at 384 (1946).

⁵⁶ Report of the Sub-committee of the Committee on Rates and Rating Organizations (May 22-23, 1946), N.A.I.C. Proc. 361 at 369 (1946).

sequent to approval of a rate filing he found that the filing no longer met the statutory standards,⁵⁷ while presumably the buyer who challenged the over-all propriety of the rate-filing could proceed under section 5 (d).⁵⁸ Since a competing rating organization or insurer cannot proceed under section 16 (a),⁵⁹ and since no other provision of the model bills would provide it with "the means of dealing with any defect in the rate structure," the above comment would be consistent with the drafters' previously expressed intention to include a competing rating organization or insurer within the scope of the "aggrieved" party provision of section 5 (d).

Although the preceding discussion of the pre-enactment materials relevant to section 5 (d) suggests that the drafters of the model bills intended to recognize the standing of competitors, the Superintendent of Insurance took a contrary view when the issue arose recently in New York.⁶⁰ In refusing to recognize a right in a competing rating bureau to request a hearing for the purpose of challenging an independent rate filing, the superintendent interpreted the drafters' final comment as suggesting that "*the insurer*" and "*the rating organization*" therein referred to were the insurer or rating organization that made the filing, thus assuming that a member of the insured public would be the only "person . . . aggrieved" entitled to request a hearing under section 5 (d). Since section 5 (d) requires that the commissioner give notice to the applicant and to "every insurer and rating organization which made such filing" before holding a hearing, the superintendent concluded that the final comment was limited to a declaration that *at the hearing called under section 5(d)*, the rating organization, the insurer, the commissioner and the buyer would all be provided with the means of dealing with any defect in the rate structure. Furthermore, the superintendent thought it significant

⁵⁷ Section 5 (c). See note 44 *supra*.

⁵⁸ See Shields, "Some Procedural and Administrative Questions Arising Under Laws Resulting from Public Law 15," A.B.A. PROC., SECTION OF INSURANCE LAW 233 at 237 (1949).

⁵⁹ See text at note 49 *supra*.

⁶⁰ Decision of Alfred J. Bohlinger, Superintendent of Insurance, State of New York, In the Matter of Petition of New York Fire Insurance Rating Organization and Eight Individual Members for a Hearing Relating to the Fire Dwelling Rate Filings of the Allstate Insurance Company, January 27, 1955. The facts of this case are discussed fully in the text at notes 73-75 *infra*. In 1956 an amendment to the New York Insurance Law was proposed which would have recognized a competing rating organization or insurer as an aggrieved party within the meaning of §5 (d). [27 N.Y. Consol. Laws (McKinney, 1940) §186 (3)]. See Report of the Joint Legislative Committee on Insurance Rates and Regulation, State of New York, Legislative Doc. No. 40 at p. 12 (1956). This amendment was not adopted.

that the drafters' final comment referred to "*the* rating organization" and "*the* insurer," meaning the rate filer, rather than to "*a* rating organization" and "*an* insurer."

The superintendent assumed that the drafters' final comment referred exclusively to the rights under section 5 (d) of the parties designated in the comment. His decision could also be supported by assuming that the comment referred to the rights of the designated parties under all of the relevant provisions of the model bills. Since the commissioner's authorization to deal with a defect in the rate structure rests on section 5 (c), the use of the word "draft" in the final comment could refer to the final drafts of the entire model bills, rather than to the final draft of section 5 (d). From this premise it can be argued that the drafters' statement may only express their understanding that each bill as a whole provided machinery by which the commissioner, the insured, the insurer and the rating organization could deal with a defect in the rate structure. The commissioner is entitled to proceed under section 5 (c), while the members of the insured public may presumably rely on section 5 (d), either individually or as represented by an "organization" of insureds. Consequently, the reference in the drafters' final comment to "the insurer" and "the rating organization" could comprehend the right of the filer to deal with an alleged defect in the rate structure by appearing at the proceeding initiated by the member of the insured public at which the over-all propriety of the rate filing is challenged, or it could merely refer to the filer's right under section 16 (a). Furthermore, section 16 (a), which was clearly intended to recognize the right of a rating organization to request a hearing, although limited to the rating organization which made the filing, is phrased in terms of "any insurer or *rating* organization aggrieved." On the other hand, section 5 (d), which describes the class entitled to a hearing in terms of "any person or organization aggrieved," suggests, by omission of the word "*rating*," that what was contemplated was an organization of insureds, not a rating organization.⁶¹ Similarly, the use of the word "person" in section 5 (d), rather than the word "insurer," as in section 16 (a), tends to suggest that only members of the insured public were contemplated within the meaning of section 5 (d).

⁶¹ Since §5 (d) refers to "any person or organization aggrieved" it might be argued that the use of the word "organization" in denoting the class of persons entitled to standing establishes the drafters' intention to confer this right upon a competing rating organization. However, it would be consistent with the interpretation now being advanced to argue that "organization" refers to a group of insureds, rather than to a rating organization.

That a member of the insured public should be the only person qualified as a "person . . . aggrieved" under section 5 (d) is suggested by the fact that insurance rate regulatory laws are enacted primarily for the benefit and protection of the insured public, not for the benefit of competitors. Consequently, it would not have been illogical for the drafters of the model bills to have limited the right to challenge the over-all validity of a rate filing made pursuant to the rating law to a member of the insured public. Presumably, a member of the insured public would be aggrieved by a rate filing when he was insured by the insurer who made the filing and the filing was so inadequate as to jeopardize the solvency of the filer.

Either of the above lines of reasoning, if accepted, would provide a reasonable basis for concluding that the drafters' final comment with reference to section 5 (d) conflicts with their earlier statement which *ostensibly* indicated an intention to include competitors within the class of persons or organizations entitled to request a hearing. However, the failure of the superintendent to consider the earlier comment detracts from the cogency of this conclusion, and the alternative line of reasoning is open to the same objection. Regardless of whether the history of section 5 (d) is interpreted as indicating the drafters' *apparent* intention to recognize the standing of competitors, the writer, after careful review of all pre-enactment materials, cannot avoid the conclusion that the problem of a competitor's right to request a hearing on an independent filing was not even contemplated by the drafters.⁶² The absence of a clearly-articulated recognition of the problem is no doubt attributable to the understandable failure of the drafters, because of the limited experience with independent filings prior to the All-Industry Bills,⁶³ to appreciate fully the possible implications of the regulatory pattern which they were creating.

⁶² The writer assumes that if the question had arisen the independents who participated in the drafting of the model bills would, in view of their efforts to obtain as much freedom from bureau restraints as possible, have voiced their objections, and that these would have been reported in the various committee reports or in the trade journals. The complete absence, however, of any reference to a dispute of this nature leads the writer to believe that the problem was not envisioned at the time.

⁶³ It is doubtful whether independent filings were possible at all prior to the enactment of the model bills. At this time, rating bureaus were not required to provide their services to all takers, and if the allegations in the South-Eastern Underwriters case typify bureau operations during this early period, it is doubtful whether an individual company could have filed independently for those classes as to which its own experience would have been adequate without encountering bureau refusal to supply rating services for those classes as to which no single company could make its own rates. See note 31 *supra*.

Regardless of whether an ambiguity is found to exist or it is concluded that section 5 (d) clearly does confer standing on competitors, it seems appropriate now to examine the policy considerations underlying the All-Industry pattern of regulation. If an ambiguity is present, the policy factors thus isolated will be relevant to its resolution. However, if it is concluded that section 5 (d) clearly recognizes the standing of competitors to challenge an independent rate filing, an understanding of the competing policy considerations will provide a basis for assessing the desirability of such a statutory provision.

II. POLICY CONSIDERATIONS

The question of standing involves a determination of what interests are deserving of legal protection.⁶⁴ In the context of insurance rate regulation two broad public policies demand recognition and require reconciliation:⁶⁵ (1) regulation must produce adequate rates which will assure the solvency of the insurance enterprise;⁶⁶ and (2) regulation should promote a reasonable degree of competition which will benefit the insured public through lower rates, broader coverages and better service. The drafters of the All-Industry Bills, who were familiar with the practices condemned by the Supreme Court in the *South-Eastern Underwriters* case and the congressional motives which prompted the McCarran Act, based their entire legislative program on the principle that the maintenance of competitive rates in the insurance business, to the extent consistent with company solvency, was not only in the public interest, but was required by the McCarran Act as a condition for the continued exemption of the business of insurance from the federal antitrust laws.⁶⁷ Furthermore, the

⁶⁴ See 3 DAVIS, ADMINISTRATIVE LAW §22.04 (1958).

⁶⁵ Two additional objectives of rate regulation, that the rates be neither excessive nor discriminatory between insureds presenting substantially similar risks, do not appear relevant to the present discussion.

⁶⁶ For a discussion of the reasons for regulating insurance rates which emphasizes the solvency factor, see Marryott, "Why Regulate Insurance Rates," A.B.A. PROC., SECTION OF INSURANCE LAW 305 (1946).

⁶⁷ "... we recognize that Congress in enacting . . . Public Law No. 15 did so upon the understanding that in some phases of the insurance business action in concert through rating bureaus may serve a useful public purpose; the Congressional debates prior to the enactment of . . . Public Law No. 15 amply establish that fact. This committee has proceeded upon the assumption that it was the intent of Congress that provision should be made in the State regulatory structure for companies acting individually and for companies action [sic] in concert; consequently, we have concluded to embody in our proposed drafts a declaration of principle to that effect in the hope that it will serve as a continuing reminder to the State insurance administrators charged with enforcing the law to recognize

"purpose clause" of the All-Industry Bills makes it manifest that they were intended to encourage reasonable price competition.⁶⁸ The numerous provisions in the All-Industry Bills designed to foster independent competitive action point to the same conclusion.⁶⁹

Recognition of the standing of competitors to challenge independent rate filings would undoubtedly diminish the utility of the independent filings as a vehicle for competitive action by creating a potential power in competitors to obstruct or impair the exercise of initiative by individual companies. An insurer contemplating an independent competitive filing would have to give careful consideration not only to the merits of its rate filing but also to the substantial expense which might result from lengthy administrative hearings and potential court appeals. Furthermore, although a rate filing may become effective without affirmative approval by the commissioner after being on file for a specified period of time,⁷⁰ in practice a filing is made only after a course of consultation between the filer and the commissioner in which the latter indicates the extent to which a particular filing will be acceptable.⁷¹ Hence, if competitors are permitted to challenge a filing, the independent filer would also have to consider that the value of expenditures and commitments made in reliance upon the commissioner's pre-

the proper spheres of both types of operation." Joint Report of the Committee on Federal Legislation and the Committee on Rates and Rating Organizations of the National Association of Insurance Commissioners (December 5, 1945), N.A.I.C. Proc. 94 at 99 (1946).

⁶⁸ Section 1 of the model bills provides, *inter alia*: "Nothing in this act is intended (1) to prohibit or discourage reasonable competition, or (2) to prohibit, or encourage except to the extent necessary to accomplish the aforementioned purpose, uniformity in insurance rates, rating systems, rating plans or practices. This article shall be liberally interpreted to carry into effect the provisions of this section." The drafters further stated that the "purpose clause . . . was employed to make abundantly plain that there should be ample room for initiative in the development of new ideas in the insurance business under rate regulatory statutes, and that while companies had the privilege of following the patterns set by others, they were by no means obligated to do so and had complete freedom to make patterns of their own within the framework of the law." N.A.I.C. Proc. 397 (1946). See also Report of the Sub-committee of the Committee on Rates and Rating Organizations (May 22-23, 1946), N.A.I.C. Proc. 361 at 366 (1946). Cf. Report of the Joint Legislative Committee on Insurance Rates and Regulations, State of New York, Legislative Doc. No. 46 at p. 54 (1948).

⁶⁹ E.g., independent rate filings are allowed; affiliation with a rating bureau is not required; deviations from bureau rates are permitted; rating bureaus must permit all authorized insurers to subscribe to their services; all material data on rates are to be matters of public record and open to public inspection for the use of independents as well as rating bureaus; and the commissioner is given continuing supervision over the internal affairs of the rating bureau at the request of an individual member or subscriber who is not satisfied with the bureau's action with respect to a rate filing.

⁷⁰ Section 4 (d). But see note 34 *supra*.

⁷¹ See Report of the Joint Legislative Committee on Insurance Rates and Regulation, State of New York, Legislative Doc. No. 46 at 72-73 (1948).

vious assurance of approval⁷² may be jeopardized by the opportunity of its competitors to re-open the question of the validity of the filing.

On the other hand, the interest of the insured public in preserving company solvency through adequate rates is apparent. The position of a competing rating bureau and its affiliated companies is also entitled to consideration. If the independent filing approved by the commissioner is in fact inadequate, members and subscribers of the rating bureau are subjected to unfair competition since both bureau and deviation filings must conform to the statutory standards. Therefore, if section 5 (d) is interpreted as affording a right to a hearing only to an insured person or organization of insureds, the rating bureau and its affiliated companies are left without a means of remedying the situation. Moreover, it is unlikely that any member of the insured public would have sufficient financial incentive to assert his rights.

The problem of resolving these conflicting interests arose recently in New York when the New York Fire Insurance Rating Organization (NYFIRO) and eight of its member companies petitioned the New York Insurance Department for a hearing on a rate filing for dwelling classes filed by the Allstate Insurance Company which was 20 percent below the bureau rates.⁷³ A hearing was initially called in response to the petition, but it was terminated upon motion by Allstate on the ground that neither NYFIRO nor its member companies were aggrieved within the meaning of the applicable provisions of the New York Insurance Law.⁷⁴

⁷² In connection with a new rate filing an insurer must distribute the rating information in the form of manuals to all of its agents and brokers so that the new rates can be passed on to the public. Consequently, an insurer would not incur the expenses of printing and distribution without first obtaining approval of the new rate schedules in advance of actual filing.

⁷³ NYFIRO alleged that the Allstate filing was inadequate, unreasonable and unfairly discriminatory because Allstate had no previous experience for these classes in the state. Allstate had based its filing on a combination of two factors: (1) the loss element included in the NYFIRO filing for dwelling classes; and (2) an expense element based on a projection of its expenses attributable to automobile insurance (which it had written in New York since 1932) to its anticipated fire insurance business. NYFIRO further alleged upon information and belief that the Allstate filing would produce an underwriting loss if made on behalf of the bureau or its members or subscribers, that it was made solely for the purpose of giving Allstate an unfair competitive advantage, and that Allstate was subsidized by its parent, Sears, Roebuck & Company, in a manner not permitted by the New York Insurance Law.

⁷⁴ 27 N.Y. Consol. Laws (McKinney, 1940) §186 (3) and 186-b. Although the language of these provisions differs slightly from that of §§5 (d) and 16 (a) of the model bills, the commissioner treated them similarly in view of the legislative purpose to incorporate "those basic provisions set forth in the model rating bills not found in the New York law. . . ." New York Insurance Department, 88th Preliminary Report of the Superintendent of Insurance to the 1947 Legislature, p. 9. See Decision of Alfred J. Bohlinger,

Subsequently, the Superintendent of Insurance, in a written opinion,⁷⁵ affirmed the previous dismissal on the grounds that

"(1) it would be inconsistent with the general purposes of the model bill and the New York amendments to permit a rating organization and its affiliated companies to intervene in a proceeding involving an independent rate filing, since such intervention would have the effect of a restraint on competition in pricing practices of their competitor, and (2) the specific provisions of the model bill and the New York amendments do not intend that such rating organization and its affiliated companies shall have the standing of an aggrieved party so as to entitle them to a hearing before the . . . Superintendent of Insurance with respect to an independent filing of rates of a competitor."⁷⁶

On the other hand, in *National Capital Ins. Co. v. Jordan*,⁷⁷ the court, relying on *FCC v. Sanders Brothers Radio Station*⁷⁸ and cases which extended its rationale,⁷⁹ held that a competing insurance company did have standing to challenge the validity of

Superintendent of Insurance, State of New York, In the Matter of Petition of New York Fire Insurance Rating Organization and Eight Individual Members for a Hearing Relating to the Fire Dwelling Rate Filings of the Allstate Insurance Company, January 27, 1955, at 16.

⁷⁵ Decision of Alfred J. Bohlinger, Superintendent of Insurance, State of New York, note 74 *supra*. The issue was held moot on appeal. *Cullen v. Holz*, 2 Misc. (2d) 486, 152 N.Y.S. (2d) 163 (1956), *affd.* 7 App. Div. (2d) 718, 181 N.Y.S. (2d) 163 (1959), leave to appeal *den.* 7 App. Div. (2d) 841, 182 N.Y.S. (2d) 324 (1959).

⁷⁶ In a letter dated March 3, 1955, NYFIRO requested the new superintendent, who had since succeeded Superintendent Bohlinger, to commence hearings on the Allstate filing on his own initiative as provided by §186(3) of the New York Insurance Law. On rehearing the Allstate filing was approved, but at a level for dwelling classes which was approximately 15% below the NYFIRO rates. Decision of Leffert Holtz, Superintendent of Insurance, State of New York, In the Matter of Independent Filing of Fire Rates by Allstate Insurance Company on Initiative of Hon. Leffert Holz, Superintendent of Insurance, July 1, 1955, *affd.* sub nom. *Cullen v. Holz*, 7 App. Div. (2d) 718, 181 N.Y.S. (2d) 163 (1959), *affd.* 6 N.Y. (2d) 971, 161 N.E. (2d) 392 (1959). However, in so holding the appellate division concluded in a memorandum opinion that NYFIRO and its member companies were aggrieved parties, despite the fact that the hearing at which they appeared had been called by the superintendent upon his own initiative after an announcement that the hearing was not to be considered an adversary proceeding. This latter case may perhaps be distinguished from the situation where the competitor seeks to initiate administrative action by requesting a hearing in its own right on the ground that once a competitor is permitted to appear before the administrative agency it acquires sufficient standing to challenge the administrative determination in the courts. Compare Matter of Bullis v. DuMond, 274 App. Div. 951, 83 N.Y.S. (2d) 452 (1948), *affd.* 276 App. Div. 882, 93 N.Y.S. (2d) 779 (1949), with Matter of Dairymen's League Co-Operative Assn. v. DuMond, 282 App. Div. 69, 121 N.Y.S. (2d) 857 (1953), app. dismissed 306 N.Y. 595, 115 N.E. (2d) 825 (1953).

⁷⁷ (D.C. D.C. 1957) 148 F. Supp. 317.

⁷⁸ 309 U.S. 470 (1940). See text at note 47 *supra*.

⁷⁹ *Scripps-Howard Radio v. FCC*, 316 U.S. 4 (1942); *Associated Industries v. Ickes*, (2d Cir. 1943) 134 F. (2d) 694, dismissed as moot 320 U.S. 707 (1943).

an order of the Superintendent of Insurance approving a deviation filing. The court, though presented with a statute not of the All-Industry type,⁸⁰ did not purport to rest its decision on this distinction, but was unable to attribute to the legislature a construction of the rating law which would leave competing insurance companies "without statutory right of redress against capricious, arbitrary, or unwarranted acts of the Superintendent, however flagrant, in connection with deviation application. . . ."⁸¹

It would also be possible to predicate standing on the doctrine of "private attorneys general" enunciated by a series of Supreme Court cases.⁸² Since few members of the insured public would have sufficient incentive to inspect an independent filing to determine its conformity with the rating standards, it could be argued that a competitor of the filer should have standing to challenge the validity of an independent filing as a representative asserting the rights of the insured public.⁸³ On the other hand, it can be argued that the Commissioner of Insurance, who is the executive officer to whom the responsibility for administering the rating law has been delegated, is an adequate representative of the public interest.⁸⁴ As head of a specialized department he is

⁸⁰ D.C. Code (1951) §§35-1401 to 35-1409, though requiring that all insurance companies authorized to do business in the District become members of the rating bureau, recognizes that a company may deviate from the rates promulgated by the bureau after filing the deviation with the bureau and the superintendent, and securing the latter's approval. Provision is made for an appeal to any court of competent jurisdiction by "any person aggrieved" from any order, ruling, proceeding or action of the superintendent.

⁸¹ 148 F. Supp. 317 at 320.

⁸² Thus, in *Scripps-Howard Radio v. FCC*, 316 U.S. 4 at 14-15 (1942), the Court, in explaining the *Sanders* case, stated: ". . . these private litigants have standing only as representatives of the public interest. . . . That a court is called upon to enforce public rights and not the interests of private property does not diminish its power to protect such rights. . . . [T]he rights to be vindicated are those of the public and not of the private litigants." See also *FCC v. NBC (KOA)*, 319 U.S. 239 (1943); *Associated Industries v. Ickes*, (2d Cir. 1943) 134 F. (2d) 694, dismissed as moot 320 U.S. 707 (1943). See, generally, 3 DAVIS, ADMINISTRATIVE LAW §22.05 (1958).

⁸³ In *Sanders Brothers Radio Station v. FCC*, 309 U.S. 470 at 477 (1940), the Court, in recognizing the competitor's standing, stated: "Congress . . . may have been of opinion that one likely to be financially injured by the issue of a license would be the only person having a sufficient interest to bring to the attention of the appellate court errors of law in the action of the Commission in granting the license."

⁸⁴ In *American Surety Co. v. Jones*, 384 Ill. 222, 51 N.E. (2d) 122 (1943), the court held that insurance companies authorized to do business in Illinois had no standing, under an "aggrieved party" provision, to challenge an order of the Director of Insurance granting a renewal license to a Lloyds insurer. "The Director of Insurance is an executive officer of the State and his acts as such officer are final and will not ordinarily be disturbed by the courts. The Illinois Insurance Code provides standards which must be met by every company seeking a certificate of authority to do business in Illinois. It is the duty of the Director to see that those standards are met before such a certificate is issued or renewed by him. Courts cannot assume to perform the duties and powers vested in the Director, nor to determine whether or not he has acted wisely. If the Director fails in the performance of his duty he is in the same position as any other public official who

under a duty to see that the standards of the rating law have been met before approving a rate filing, and his decision is entitled to great weight. Consequently, in view of the countervailing policy of promoting reasonable competition in the insurance business, it may be desirable to restrict the reviewability of his decision approving an independent filing to those to whom the legislature has clearly granted that right.

CONCLUSION

The policy of promoting reasonable competition in the insurance business contemplates lower rates by forcing companies to operate in a more efficient and economical manner. If insurance companies are able by collaborative action and dilatory and harassing tactics to prevent competitive activity, the public interest will not be served. Furthermore, since the *South-Eastern Underwriters* case the Federal Government's plenary power over the business of insurance has not been questioned. Consequently, if the respective states fail to provide the regulatory climate conducive to "competitive rates on a sound financial basis" which was contemplated by the McCarran Act, the threat of federal intervention in the regulation of the insurance business may become more real than imaginary.⁸⁵ Where the standing of a rating bureau or competing insurer to challenge an independent filing is recognized, the situation is pregnant with possibilities of abuse. Litigation instigated by combinations of competitors is easily

improperly exercises the power given him by statute." 384 Ill. 222 at 231-232, 51 N.E. (2d) 122 (1943). Cf. *City of New York v. New York Tel. Co.*, 261 U.S. 312 (1923); *Matter of Dairymen's League Co-Operative Assn. v. DuMond*, 282 App. Div. 69 at 74, 121 N.Y.S. (2d) 857 (1953), app. dismissed 306 N.Y. 595, 115 N.E. (2d) 825 (1953).

⁸⁵ The Antitrust Division of the Department of Justice, acting at the request of Senator O'Mahoney which followed hearings on aviation insurance held during the summer of 1958, recently convened a Federal Grand Jury in New York to investigate alleged antitrust law violations in the aviation underwriting field. See *JOURNAL OF COMMERCE*, Jan. 20, 1960, p. 1: 4. In response to the recent hearings held before the Senate Antitrust and Monopoly Subcommittee, the National Association of Insurance Commissioners has established a special subcommittee [The Subcommittee to Review Fire and Casualty Rating Laws and Regulations] to study and evaluate present rating laws "with particular reference to various items which have at one time or another been aired and were in fact studied by the U.S. Senate anti-trust and monopoly sub-committee." See *THE NATIONAL UNDERWRITER*, Nov. 20, 1959, p. 1. The following statement by Vestal Lemmon, representing the National Association of Independent Insurers, illustrates quite clearly the position of the independents with regard to the "aggrieved party" provisions of the model bills: "To make it unmistakably clear that it is the insurance departments and not private interests who are actually regulating our business, we believe the NAIC should take a firm stand in opposition to recognition of any right in one segment of the industry to obstruct rate filings of their competitors in hearings and litigation." *THE NATIONAL UNDERWRITER*, Nov. 27, 1959, p. 29.

susceptible of misuse for the purposes of harassing the independent filer and frustrating its efforts to pass on price savings to the insured public. On the other hand, both the insured public and the competitors of the independent are vitally interested in making certain that competition, if it exists, is on a sound financial basis.

Where regulation of insurance rates is truly effective and is of the quality contemplated by the sponsors of the McCarran Act—where the Commissioner of Insurance has a competent and well-trained staff capable of scrutinizing the rate filings of independent companies, and has the time to do so—the commissioner can, in fact, be said to represent the public interest adequately. It can reasonably be presumed that he has given careful consideration to the independent rate filing. In this situation the interests of the rating bureau or other competitors in making certain that the independent filing satisfies the statutory standards would appear subordinate to the policy of promoting reasonable competition. But where the commissioner, either through insufficient funds, inadequately trained staff, or lack of time, is unable to give careful consideration to an independent rate filing⁸⁶ which becomes effective automatically by virtue of a “deemer clause,” it may be sound policy to allow the rating bureau to challenge the independent filing as a representative of its own and the public interest.⁸⁷

It is suggested that the problems involved in securing judicial resolution of the competing policy considerations indicate the desirability of an ad hoc legislative reappraisal of the effectiveness of rate regulation in the various states. The determination whether the present regulatory scheme, as actually administered, adequately

⁸⁶ Kimball and Boyce, “The Adequacy of State Insurance Rate Regulation: The McCarran-Ferguson Act in Historical Perspective,” 56 MICH. L. REV. 545 at 556-565 (1958), suggest that while in some states rate regulation is adequate and complete, in a substantial number a systematic and constant surveillance over rates is lacking. For a thorough analysis of the adequacy of insurance rate regulation in a smaller state, see Kimball and Hansen, “The Utah Insurance Commissioner: A Study of Administrative Regulation in Action,” 5 UTAH L. REV. 429 at 440-449 (1957), 6 *id.* 1 at 17-22 (1958). A similar study of the Montana Insurance Department is as yet unpublished: Kimball and Conklin, “The Montana Insurance Commissioner: A Study of Administrative Regulation in Action.” Cf. KIMBALL, INSURANCE AND PUBLIC POLICY, c. 3, §4 (to be published by the Univ. of Wis. Press in 1960).

⁸⁷ The preceding discussion of policy considerations is obviously applicable to deviation filings and raises the further question whether the restrictions on the utility of the deviation filing found in the model bills [see text at notes 37-40 *supra*] are justified in view of their stated objectives to promote competition and encourage the exercise of initiative by individual companies. Compare text at notes 37-40 *supra* with notes 36 and 68 *supra*.

assures competitive opportunity consistent with protection of the public interest is essentially one for the legislature, not the courts. Thus, where the commissioner adequately represents the public interest, the legislature should not recognize the standing of competitors to challenge independent rate filings; but where the legislative evaluation discloses that the commissioner is unable to protect the public from the danger of inadequate rate filings a statutory provision recognizing the standing of competitors under section 5 (d) may be justified. In the latter situation, the responsibility for preserving competitive opportunity will rest with the commissioner and will depend upon his right to require competitors to comply with the "good faith" requirements of section 5 (d). If, however, a legislature chooses the latter alternative, it must understand that the recognition of the standing of competitors is but a temporary ameliorative which is justified only by the present state of inadequate regulation. Such a choice will not absolve the legislature from its affirmative obligation under the McCarran Act to provide adequate and effective regulation as a condition of continued exemption of the business of insurance from the federal antitrust laws.

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