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Insurance - Regulation - The Extraterritorial Effect of Insurance Regulation, With Particular Emphasis on New York

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COMMENTS

INSURANCE—REGULATION—THE EXTRATERRITORIAL EFFECT OF INSURANCE REGULATION, WITH PARTICULAR EMPHASIS ON NEW YORK—The past fifteen years have seen extensive examination of the process of regulation of the insurance industry. The recognition that insurance is interstate commerce[1] has caused a reappraisal of the traditional system of state regulation. This examination has been primarily oriented toward determining whether diverse regulation by the various states is adequate in the light of the possibility of centralized federal control.[2]

A basic premise used to justify state control is that the state has an interest in the protection of its citizens and that a state regulatory agency is sensitive to local abuses.[3] Therefore, when one thinks of state regulation it is natural to assume that the regulation is limited to the confines of the particular state.[4] However, for many years a number of states have imposed restrictions upon insurance companies which have been effective to regulate certain operations of the companies in other states.[5] When a state asserts extraterritorial power, in a sense, it exercises centralized control over specific aspects of the industry. With the possibility of centralized federal control over at least certain aspects of insurance, it is important to appreciate the implications of centralized control as exercised on the state level. New York has been especially active in regulation with extraterritorial effect, and it is the purpose of this comment to consider the implications of out-of-state insurance regulation with particular reference to New York.[6]

1 United States v. South-Eastern Underwriters Assn., 322 U.S. 533 (1944). See SAWYER, INSURANCE AS INTERSTATE COMMERCE (1945).

2 See, generally, McConnell, "State Regulation v. State Regulation plus Regulation by Multiple, Decentralized, Independent Federal Agencies," 1956 INS. L.J. 697; Chellberg, "Regulation of Insurance—the State-Federal Controversy," 7 DE PAUL L. REV 25 (1957); Kimball and Boyce, "The Adequacy of State Insurance Rate Regulation: The McCarran-Ferguson Act in Historical Perspective," 56 MICH. L. REV. 545 (1958).

3 Neslen, "State Insurance Supervision," 33 PROC. ASSN. OF LIFE INSURANCE PRESIDENTS, 54 at 58 (1939).

4 Critics of state regulation claim that the inability of individual states to deal with problems which cross state lines, e.g., national advertising, indicates the necessity for federal control.

5 See, generally, State Farm Mutual Automobile Ins. Co. v. Duel, 324 U.S. 154 (1945); Firemen's Ins. Co. v. Beha, (S.D. N.Y. 1928) 30 F. (2d) 539, affd. per curiam 278 U.S. 580 (1929). Cf. Factory Mutual Liability Ins. Co. v. Behan, 233 App. Div. 614, 253 N.Y.S. 562 (1931); Connecticut General Life Ins. Co. v. Johnson, 303 U.S. 77 (1938).

6 For a general discussion of insurance regulation in New York, see 4 BENJAMIN, ADMINISTRATIVE ADJUDICATION IN THE STATE OF NEW YORK (1942).

I. Basis of State Control

The power of the state to regulate the country-wide operations of foreign insurance companies stems from the state's power to exclude such companies from doing business in the state, or to impose conditions of admission which are not inconsistent with federal or state constitutional provisions.[7] Of course, this power is not unlimited. The distinguishing factor which justifies regulations with out-of-state effect is a determination that the regulation is necessary for the protection of local citizens. It has been held, for example, that a state may not prohibit a foreign insurer and the citizen of another state from entering into an insurance contract outside the state even though the policy covers property within the state.[8] It has even been said that regulatory statutes will be read not to affect a company's out-of-state operations.[9] However, a foreign insurance company has been required, as a condition of admission to a state, to deposit security to ensure the performance of obligations incurred within the state,[10] to fulfill certain reserve requirements,[11] or to have a certain amount of capital,[12] all of which affect, at least indirectly, its out-of-state operations.

Granting the proposition that the state has a legitimate interest in the protection of its citizens, there are limitations on the extent to which a state may go in providing this protection. Every New York regulation which affects the out-of-state operations of a company more stringently than the law of another state involves an exercise of New York's regulatory power within the latter state. This has caused some resentment among officials of the insurance departments in states thus affected.[13] They challenge New York's

[7] Bothwell v. Buckbee, Mears Co., 275 U.S. 274 (1927); Metropolitan Casualty Ins. Co. of New York v. Brownell, (7th Cir. 1934) 68 F. (2d) 481.

[8] Palmetto Fire Ins. Co. v. Beha, (S.D. N.Y. 1926) 13 F. (2d) 500. But see Hoopeston Canning Co. v. Cullen, 318 U.S. 313 (1943). It has been held further that the state may not interfere with insurance contracts made outside the state. Rybasack v. Travelers Ins. Co., 15 N.J. Misc. 266, 190 A. 308 (1937).

[9] Federal Materials Co. v. Williams-Detwiler Co., 260 Ky. 162, 84 S.W. (2d) 3 (1935).

[10] South Carolina ex rel. Phoenix Mut. Life Ins. Co. v. McMaster, 237 U.S. 63 (1915); In re Norske Lloyd Ins. Co., 242 N.Y. 148, 151 N.E. 159 (1926).

[11] Cf. Bankers' Life Ins. Co. v. Howland, 73 Vt. 1, 48 A. 435 (1901).

[12] Barker v. Lamb & Sons, 99 Iowa 265, 68 N.W. 686 (1896).

[13] The attitude of many state insurance officials toward New York insurance regulation is summed up in the following anonymous doggerel quoted in Navarre, "Supervision of Insurance," 1955 Ins. L.J. 299 at 301: "Great is the statute of New York State:
It specifies just how to operate.
And should an insurer get too independent,
Down comes the thumb of the Superintendent. . . ."

right to determine what is necessary for the adequate protection of the citizens of forty-nine other states.[14]

An examination of various provisions of the New York Insurance Code will catalogue the areas which are typically the subject of extraterritorial regulation and may shed some light on the question whether criticism by other state officials is well taken.

The statutes which will be discussed fall into two broad categories. First, those where the regulating state has no contact with the out-of-state transaction over which it asserts its regulatory power. In such a case the basis of control rests solely in the control over the admitted insurance company. Second, where the regulating state has some contact with the out-of-state transaction and therefore has additional grounds upon which to base its assertion of control.

II. STATUTES WHERE THE REGULATING STATE HAS NO CONTACT WITH THE OUT-OF-STATE TRANSACTION

Since 1906, when the Armstrong Committee[15] revealed, among other things, the investment abuses of many of the life insurance companies of that time, New York has strictly regulated the investment of insurance companies in an effort to protect its citizens from dissipation of the insurance fund.[16] All states now have elaborate statutory provisions governing the area of "Assets, Investments and Deposits."[17] Section 90 of the New York Insurance Law[18] requires admitted foreign insurers to "comply in substance" with the investment requirements and limitations imposed upon domestic insurers which are organized to do the same kind of insurance business.[19] Very early this statute was held not to be an unconstitutional attempt to control the business of foreign companies outside the state, but a constitutional condition of admission to the state.[20]

14 From interviews with insurance department personnel in Illinois, Kansas, and New Jersey made by the author while taking part in a study of insurance regulation at the University of Michigan.

15 Report of the Joint Committee of the Senate and Assembly of the State of New York, Appointed To Investigate Affairs of Life Insurance Companies. (February 1906) (Armstrong Committee Report).

16 The first insurance company investment law was adopted in New Jersey in 1852. 1 NEW YORK INSURANCE REPORTS 17a (1950).

17 27 N.Y. Consol. Laws (McKinney, 1949; Supp. 1959) Art. V, §§70-104. See, generally, Day, "Government Regulation of Insurance Company Investments," 1954 INS. L.J. 177.

18 27 N.Y. Consol. Laws (McKinney, 1949; Supp. 1959) §90.

19 See note 17 supra for citation of statutory requirements of domestic insurers.

20 Firemen's Ins. Co. v. Beha, (S.D. N.Y. 1928) 30 F. (2d) 539, affd. per curiam 278 U.S. 580 (1929).

Because life insurance companies licensed in New York hold approximately 83 percent of the total assets owned by all United States life insurance companies,[21] New York is, as a practical matter, able to exercise centralized control over life insurance company investments. Of course, more stringent regulation by other states will supersede New York's centralized control, but for the most part New York statutes impose a stricter standard than other states.[22]

The apparent nationwide effect of section 90 has been mitigated by two factors. First, the Insurance Department has been reasonable in its application of the requirement of "compliance in substance" with investment restrictions. The New York Attorney General has said that in the case of foreign insurers ". . . it may be said that the statutory investment limitations and conditions applicable to domestic insurance companies do not apply to such foreign insurers to the same rigid degree as they apply to domestic insurers."[23] Second, section 90 was amended in 1958[24] to provide that foreign insurers shall be deemed to have complied in substance with the investment requirements imposed upon like domestic insurers if after disallowing investments which do not comply with such requirements it is found that the resulting surplus to policyholders is not reduced below a level which is considered by the Superintendent of Insurance reasonable in relation to the insurers' liabilities and adequate for its financial needs.[25] It has been suggested that most foreign insurers are satisfied that this provision will enable them to continue their investment practices in line with the laws of their home state.[26]

The New York department has made an effort to consider the policies of other states by cooperating with the National Association of Insurance Commissioners, which has attempted to cen-

21 Preliminary New York Insurance Report 61 (1953), adjusted on estimated basis by Life Insurance Association of America nationwide figures for late 1953. See, generally, O'Leary, "1958 Record of Life Insurance Investments," 52 PROC. OF THE LIFE INS. ASSN. OF AMERICA 101 (1958).

22 For a discussion of the regulation of investment by other states, see Day, "Government Regulation of Insurance Company Investments," 1954 INS. L.J. 177.

23 1956 N.Y. Op. Atty. Gen. 177 at 178.

24 27 N.Y. Consol. Laws (McKinney, 1949; Supp. 1959) Art. V, §90. See, generally, Day, "Government Regulation of Insurance Company Investments," 1954 INS. L.J. 177.

25 See 1958 N.Y. STATE LEGISLATIVE ANNUAL 254.

26 Barker, "Inches and Ells, Legislative Measures and the Life Insurance Industry," 11 AMER. SOC. CHARTERED LIFE UNDERWRITERS J. 73 at 79 (1956). Cf. "Report of Committee on State Legislative and Legal Activities," 52 PROC. OF THE LIFE INS. ASSN. OF AMERICA 87 at 92 (1958).

tralize some of the functions of investment regulation.[27] A system of zone examination of companies has been established. Under the system representatives of insurance commissioners in each of six zones participate in periodic examination of larger companies. If a company operates in only one zone representatives of only that zone participate in the examination. The information gathered is made available to all of the insurance commissioners. The National Association of Insurance Commissioners has also established a central staff, under the supervision of the Committee on Valuation of Securities, which values the securities held by insurance companies.[28]

These efforts by New York to minimize the out-of-state effect of its investment regulation have not been sufficient to satisfy all of the insurance department officials of other states. Some of them contend that any extraterritorial regulation is based upon the assumption that New York legislators have superior wisdom on the subject of insurance company investments as compared with the lawmakers of other states.[29]

The financial stability of insurance companies is clearly an area of legitimate concern for states which seek to protect their insuring citizens. It is equally clear that ". . . scarcely any condition can be imposed touching the financial stability of a foreign company, which will not involve some results elsewhere. . . ."[30] New York's method of application of section 90 and the recent amendment of that provision have, in effect, reduced it to a general requirement of solvency.[31] Such a requirement is not unreasonable and the mere fact that New York is somewhat more conservative in its determination of what constitutes solvency does not justify complaints by other insurance department officials if the requirements are not too technical or too literally applied and if the companies do not feel that it unduly restricts their progress.[32]

Whereas section 90 authorizes New York regulation of insurance company investments, section 213 of the New York Insurance Law[33] goes to the other end of the business spectrum and imposes

[27] See Martin, "The NAIC and State Insurance Department Functions," 1952 INS. L.J. 583.

[28] This committee makes available the publication "Valuation of Securities" which is widely used as an investment guide.

[29] See note 13 supra.

[30] Firemen's Ins. Co. v. Beha, (S.D. N.Y. 1928) 30 F. (2d) 539 at 542.

[31] Note 26 supra.

[32] Ibid.

[33] 27 N.Y. Consol. Laws (McKinney, 1949; Supp. 1959) §§213, 213-a.

a variety of limitations upon expenses which may be incurred by life insurance companies licensed to do business in the state. For example, there are ceilings upon commissions which may be paid to agents. The restrictions apply to the nationwide operations of these companies.[34] The extent of this control becomes apparent if one considers that approximately 80 percent of the ordinary life insurance written in the United States is written by sixty-two companies who are admitted to New York.[35]

"Section 213 (formerly section 97) was put on the books in 1909 as one of the fruits of the Armstrong Committee's extensive inquiry. . . ."[36] It was designed to protect policyholders from high costs which resulted from extravagant business-producing methods.[37] The life insurance industry is considerably more conservative in its marketing policies now than it was during the 1880's and 1890's.[38] There has also been some improvement in the capabilities of other state insurance departments. In spite of this, New York continues to justify national application of section 213 by the simple assertion that its citizens are "entitled to receive life insurance written by financially sound companies at reasonable cost."[39]

This policy goes a step beyond the requirement of solvency which is used to justify New York's extraterritorial regulation of investment. Section 213 is not only aimed at ensuring that the insured will receive the protection he pays for but also that the cost of the protection will remain "reasonable." Even if one regards as invalid the argument that insurance cost should be left to the operation of competitive forces, one can question whether New York is justified in imposing its own rule on the amount of expense incurred by the insurers on business in other states. It would seem that the "reasonable cost" of insurance could be adequately ensured to New York policyholders by applying the rule only to policies written in New York. This might be accomplished by the adoption of a rate-fixing formula similar to that

34 The application of §213 to the out-of-state operations of foreign insurance companies was approved by the Attorney General of New York; 1906 N.Y. Op. Atty. Gen. 549.

35 See "Statement of Joint Legislative Committee on Insurance Rates and Regulation," 1952 N.Y. STATE LEGISLATIVE ANNUAL 287.

36 Metropolitan Life Ins. Co. v. Durkin, 301 N.Y. 376 at 381, 93 N.E. (2d) 897 (1950).

37 Ibid.

38 STALSON, MARKETING LIFE INSURANCE c. 25 (1942).

39 "Statement of Joint Legislative Committee on Insurance Rates and Regulation," 1952 N.Y. STATE LEGISLATIVE ANNUAL 287.

used in the regulation of casualty insurance.[40] However, the necessity for additional accounting and statistical procedures for New York business might be unreasonably burdensome to the companies.

Section 213 has recently been amended by liberalization of the expense limitations in an effort to adapt it to present economic conditions in the hope that it will facilitate a more efficient operation of the life insurance business.[41] The limitations imposed by the present law do not appear unreasonable and the fact that representatives of the industry participated in the drafting of the amendments[42] would indicate that there is substantial acceptance of the statute. This conclusion is further supported by the fact that industry literature has been notably devoid of criticism of the law. However, the lack of industry opposition may be a result of the fact that section 213 provides insurance executives with a convenient excuse for holding the line on commissions and other expenses. In any case consent to regulation by the regulated is not the whole story. Forty-nine other states have a real interest in the application of section 213 and yet they played no part in its drafting or amendment, nor do they have a voice in its application to their own companies.

Another New York statute, passed at the same time as section 213, is now section 212 of the New York Insurance Law.[43] This section imposes a limit upon the amount of standard ordinary life insurance which a company, licensed in New York, may sell in a given year on a national basis. The original law was adopted in an effort to encourage the growth of smaller companies and to disperse economic power by limiting the rate of expansion of the largest companies.[44] The statute was held not to be a denial of due process under the Fourteenth Amendment of the Federal Constitution nor invalid under provisions of the New York State Constitution.[45]

40 For an excellent discussion of the process of rate-making, see Kulp, "The Rate Making Process in Property and Casualty Insurance—Goals, Technics, and Limits," 15 LAW AND CONTEM. PROB. 493 (1950).

41 For the genesis and development of the amendments, see "Statement of Joint Legislative Committee on Insurance Rates and Regulation," 1952 N.Y. STATE LEGISLATIVE ANNUAL 287; 1953 N.Y. STATE LEGISLATIVE ANNUAL 236; Donovan, "1954 Insurance Legislation," 1954 N.Y. STATE LEGISLATIVE ANNUAL 213.

42 See "Statement of Joint Legislative Committee on Insurance Rates and Regulation," 1952 N.Y. STATE LEGISLATIVE ANNUAL 287 at 290.

43 27 N.Y. Consol. Laws (McKinney, 1949; Supp. 1959) §212.

44 Report of the Joint Committee of the Senate and Assembly of the State of New York, Appointed To Investigate Affairs of Life Insurance Companies. (February 1906) (Armstrong Committee Report) p. 289.

45 Bush v. New York Life Ins. Co., 135 App. Div. 447, 119 N.Y.S. 796 (1909).

The present competitive balance in the life insurance business has made section 212 outmoded and unnecessary. Though the uselessness of the statute was acknowledged by a New York legislative committee in 1955, it was thought that "to repeal a statute of such long standing might involve rather lengthy consideration."[46] Instead the statute was liberally revised to permit more rapid expansion.[47] Over the years the Superintendent of Insurance has frequently suspended the limits for various companies.[48] The statute would appear to have very little practical impact upon the operations of companies, and its extraterritorial effect may be appropriately discounted.

In the area of group insurance New York has passed statutes which have a dual extraterritorial effect. Insurance companies licensed in New York are prohibited from selling policies of group life insurance[49] and group accident-health insurance[50] anywhere in the country at a premium which is lower than the rate prescribed by regulations promulgated by the Superintendent of Insurance. These laws establish minimum rates for the premium which is initially charged, applicable everywhere for companies that wish admission to New York. Most group insurance is written on a participating basis, whether it is issued by a stock or by a mutual company. Therefore, the policy provides for the payment of a dividend at the end of the policy year, based upon the loss experience under the particular policy. A New York company may, in fact, match the premium charges of companies not subject to New York law by returning to the policyholder, at the end of the year, a portion of the initial premium.[51] This possibility reduces the effect of the minimum premium requirement, but the law may still prove to be a competitive disadvantage when a New York company is dealing with a prospect who is primarily concerned with his initial cash outlay, in competition with companies not admitted to New York.

The same statutory provisions also require New York licensed companies which issue group life and accident-health policies to file with the Superintendent of Insurance schedules of commissions or other allowances paid for the sale, service, or administra-

[46] 1955 N.Y. STATE LEGISLATIVE ANNUAL 307 at 308.

[47] N.Y. Laws 1955, c. 749.

[48] See 1955 N.Y. STATE LEGISLATIVE ANNUAL 307 at 308.

[49] 27 N.Y. Consol. Laws (McKinney, 1949; Supp. 1959) §204(2).

[50] Id., §221(7) and (8).

[51] This readjustment of the rate of premium is approved by 27 N.Y. Consol. Laws (McKinney, 1949; Supp. 1959) §§204(2), 221(9).

tion of group policies.[52] The companies are prohibited from paying remuneration anywhere in the country in excess of the rates last filed in New York. The object of this requirement is to make available for public scrutiny complete data on the marketing cost of various group policies.[53] This facilitation of public awareness is not undesirable; however, it introduces a certain amount of price rigidity into the market. At any rate this requirement does not seriously infringe upon the regulatory prerogatives of other states in that basically it is only a requirement that information be furnished.

The most recent entrance of New York into the scene as a nationwide regulator was in 1953 when section 226 of the New York Insurance Law was enacted.[54] This section confers authority upon the Superintendent of Insurance "to issue reasonable regulations prescribing standards for the equitable allocation of income and expenses of life insurers as between investment expenses and insurance expenses."[55] It has the effect of allowing the superintendent to establish uniform accounting procedures for life insurers. The statute was formulated by a Joint Committee of the Life Insurance Association of America and the American Life Convention which conferred with the Superintendent of Insurance.[56] It would seem, therefore, that the finished product was probably palatable to the industry, though it does still encroach upon the regulatory prerogatives of other states. Indeed, the governor acknowledged that the statute was designed to "inure to the benefit of policyholders throughout the nation. . . ."[57]

As with some other regulations the application of the requirement of national accounting regulations established by the New York superintendent could undermine the work of the National Association of Insurance Commissioners, which is attempting to establish uniform reporting procedures through its Committee on Blanks. However, the New York superintendent seems to be try-

[52] 27 N.Y. Consol. Laws (McKinney, 1949; Supp. 1959) §§204 (4), 221 (7). Until 1955 this section of the law was circumvented by some companies who paid "excessive service fees ostensibly for the administration of the group." See 1955 N.Y. STATE LEGISLATIVE ANNUAL 300. This was remedied by N.Y. Laws 1955, c. 650, which requires the filing of schedules of all compensation paid for the sale, service, or administration of group policies.

[53] See 1955 N.Y. STATE LEGISLATIVE ANNUAL 300 at 301.

[54] 27 N.Y. Consol. Laws (McKinney, 1949; Supp. 1959) §226.

[55] 1953 N.Y. STATE LEGISLATIVE ANNUAL 239 at 240.

[56] Ibid.

[57] Dewey, "Governor's Memoranda on Bills Approved," 1953 N.Y. STATE LEGISLATIVE ANNUAL 334 at 351.

ing to harmonize his instructions with those of the National Association of Insurance Commissioners.[58]

In line with a traditional policy of maintaining separation of underwriting powers, New York many years ago adopted a rule which is now embodied in section 42 (3) of the New York Insurance Law.[59] This rule conditions the authority of a foreign insurer to do business in New York upon the insurer's restriction of its national business to the kinds of business which it is authorized to transact in New York. Appleton's rule, as the restriction became designated,[60] was designed to protect the insuring public by requiring that foreign insurers "shall not expose their assets to ruin by the doing of kinds . . . of business which are deemed too hazardous for New York companies."[61]

Constitutional attacks upon the rule based upon the invalidity of the assertion of control over out-of-state business[62] and the impairment of the obligation of contracts[63] have been rejected.

The rule preserved for many years the distinction between the underwriting fields of fire and marine companies on the one hand and casualty and surety companies of the other, not only for New York operations, but for all operations of companies admitted to New York. However, in 1946 New York eliminated this division and began allowing casualty and surety companies and fire and marine companies to write any kind of insurance other than life insurance, annuities, title insurance and insurance of the life of property.[64] This development of multiple underwriting powers eliminated most of the impact of Appleton's rule.

Another provision of section 42 having extraterritorial effect is section 42 (5), which requires that foreign insurers comply substantially with any requirement or limitation of the New York Insurance Law that is applicable to domestic insurers, and which, "in the judgment of the superintendent is reasonably necessary to protect the interests of the people of [New York]."[65] Although

[58] See 1956 N.Y. STATE LEGISLATIVE ANNUAL 277 at 278.

[59] 27 N.Y. Consol. Laws (McKinney, 1949) §42 (3).

[60] This restriction became known as Appleton's Rule because it developed to a large degree while Superintendent Appleton was in office.

[61] 27 N.Y. Consol. Laws (McKinney, 1949) §42, Historical Notes: Ins. Dept. Revision Note.

[62] Firemen's Ins. Co. v. Beha, (S.D. N.Y. 1928) 30 F. (2d) 539, affd. per curiam 278 U.S. 580 (1929).

[63] People v. Seddon Underwriting Co., 140 N.Y.S. 466 (1912).

[64] N.Y. Laws 1946, c. 669.

[65] 27 N.Y. Consol. Laws (McKinney, 1949) §42 (5).

this provision grants broad discretionary powers to the superintendent to determine whether to grant or revoke a license, the power is not unlimited.[66] It has been held that the superintendent's licensing power does not include authority which the legislature has refused to grant expressly.[67] Thus one must revert to an examination of specific statutory provisions already discussed to determine the extent of the powers of the superintendent to assert extraterritorial regulation.

III. STATUTES WHERE THE REGULATING STATE HAS SOME CONTACT WITH THE OUT-OF-STATE TRANSACTION

The statutes previously discussed represented an assertion of control by one state over transactions taking place in another state under circumstances where the state asserting the control had no actual contact with the out-of-state transaction. There are other statutes which have out-of-state effects, but they do not infringe as seriously upon the legislative and administrative prerogatives of other states since the regulating state has at least some contact with the transaction affected by the regulation.

Two of these statutes have provoked some controversy. They are (1) the direct action statutes and (2) the resident agent laws. These statutes are not peculiar to New York and can therefore be discussed in the context of general state regulation.

The most extensive type of direct action statute provides an injured party with a right of direct action against the insurer of the party who is alleged to have caused the injury.[68] These statutes go a step beyond the older type of statute which allows direct action only if a judgment against the insured is first obtained and sub-

[66] Limiting the discretion of the superintendent by requiring that referral of a license be "in the interest of the people" is not an unconstitutional delegation of legislative power. Cf. Federal Radio Comm. v. Nelson Bros. Bond & Mortgage Co., 289 U.S. 266 (1932); N.Y. Central Securities Co. v. United States, 287 U.S. 12 (1932). A statute allowing the superintendent to refuse licenses "in his discretion" has been upheld. Stern v. Metropolitan Life Ins. Co., 169 App. Div. 217, 154 N.Y.S. 472 (1915), affd. mem. 217 N.Y. 626, 111 N.E. 1101 (1916).

[67] Northwestern National Ins. Co. v. Pink, 288 N.Y. 359, 43 N.E. (2d) 442 (1942), note, 43 COL. L. REV. 105 (1943).

[68] This provision has been adopted in three states: *Louisiana,* La. Rev. Stat. (1950) tit. 22, §655; *Wisconsin,* Wis. Stat. Ann. (1957) §85.93; *Rhode Island,* R.I. Gen. Laws (1958) §27-7-2. Rhode Island allows direct action only if the insured is not available for service of process.

sequently goes unsatisfied.[69] Constitutional attack upon this type of legislation has been unsuccessful.[70]

A direct action statute has extraterritorial effect in that it applies the policy of the regulating state to transactions which have substantial contacts with other states.[71] It is important to note that these statutes provide a right for the protection of the citizens of the legislating state which can be asserted only within the state. The statutes do not purport to affect the rule prohibiting direct action as applied in other states but leave this determination to the legislative bodies of those states.[72]

Resident agent laws have been enacted in all states.[73] They require certain types of insurers to issue policies which cover risks within the state through local agents, even though the policy is written out-of-state.[74] These laws, like the direct action statutes, provide for some local control over transactions which may take place outside the state. Whereas one is designed for the protection of local policyholders, the other is aimed at protecting local agents from out-of-state competitors who have not had to submit to the control of the regulating state.[75] While local preferences may not be economically desirable because they tend to erect tariff barriers between states,[76] when looked at from the standpoint of their extraterritorial effect they are justifiable. The regulating state has an interest in the risk which is insured. This provides it with an additional contact with the transaction which is not present when a state is imposing its legislation upon other states merely

69 See comment, 29 ST. JOHN'S L. REV. 280 (1955). The constitutionality of the older type statute was upheld in Merchants Mutual Automobile Liability Ins. Co. v. Smart, 267 U.S. 126 (1925).

70 Watson v. Employers Liability Assurance Corp., 348 U.S. 66 (1954), note, 64 YALE L.J. 940 (1955).

71 See Speidel, "Extraterritorial Assertion of the Direct Action Statute: Due Process, Full Faith and Credit and the Search for Governmental Interest," 53 N.W. UNIV. L. REV. 179 (1958).

72 The general implications of this statute have been exhaustively written upon and a reiteration of these discussions is beyond the scope of this paper. See Speidel, note 71 supra, for a particularly good article. See also comment, 29 ST. JOHN'S L. REV. 280 (1955) and note, 53 MICH. L. REV. 879 (1955).

73 See note, 37 COL. L. REV. 681 (1937). Typically the statutes also require that the local agent is to receive the full commission or at least a designated share thereof.

74 See, e.g., 27 N.Y. Consol. Laws (McKinney, 1949) §130. The constitutionality of the resident agent laws was upheld in Osborn v. Ozlin, 310 U.S. 53 (1940).

75 The resident agent laws were "sponsored by strong organizations of insurance agents. . . ." Note, 37 COL. L. REV. 681 (1937).

76 See note, 54 HARV. L. REV. 1062 (1941).

because the insurer is licensed to do business in the regulating state.[77]

IV. CONCLUSION

Extraterritorial insurance regulation by various states, particularly New York, has existed for some time.[78] It is possible that the recognition of insurance as commerce[79] has limited the grounds upon which a state may deny an insurance company a license. A showing of a more reasonable relationship between the regulation and the interest sought to be protected may be required in order to avoid the pitfall of an unreasonable burden upon interstate commerce. However, the most recent opinions of the Supreme Court indicate that, particularly in the light of the McCarran Act,[80] the power of the states to impose regulation as a condition of granting a license is not significantly diminished.[81]

As indicated by the discussion of the New York Insurance Law, the extent of New York's extraterritorial regulation is less than a superficial reading of the statutes would indicate. Nevertheless, New York and, to a lesser extent, some other states do have an effect on a national basis. The areas where centralized control is asserted by a single state which has no contact with the out-of-state transaction could perhaps be regulated by the federal government to which other states, if dissatisfied, would have recourse through their congressional representatives. Or, alternatively, states asserting extraterritorial regulation might be forced to withdraw from exercising centralized control by the threat of the assertion by the federal government of its paramount power to regulate insurance.

Bartlett A. Jackson, S.Ed.

77 Despite this contact with the transaction personnel of various insurance departments have indicated their disapproval of the resident agent laws. From interviews with Insurance Department personnel in Illinois, Kansas and New Jersey made by the author while taking part in a study of insurance regulation at the University of Michigan.

78 Conflicting state insurance laws were complained of as early as 1904. See Fouse, "State Regulation of Insurance," 24 AMER. ACADEMY OF POLITICAL AND SOCIAL SCIENCES 69 at 72 (1904).

79 United States v. South-Eastern Underwriters Assn., 322 U.S. 533 (1944).

80 59 Stat. 33 (1945), 15 U.S.C. (1958) §§1011-1015. This act revested the power to regulate insurance in the various states, provided the state exercises this power. For a discussion of the act, see 164 A.L.R. 500 (1946).

81 Prudential Ins. Co. v. Benjamin, 328 U.S. 408 (1946); Robertson v. California, 328 U.S. 440 (1946).