

Michigan Law Review

Volume 57 | Issue 2

1958

Insurance - Federal Regulation - Authority of Federal Trade Commission to Regulate False Advertising by Insurance Companies as Affected by the McCarran-Ferguson Act

Charles C. Moore S.Ed.
University of Michigan Law School

Follow this and additional works at: <https://repository.law.umich.edu/mlr>



Part of the [Antitrust and Trade Regulation Commons](#), [Commercial Law Commons](#), [Consumer Protection Law Commons](#), [Insurance Law Commons](#), and the [Marketing Law Commons](#)

Recommended Citation

Charles C. Moore S.Ed., *Insurance - Federal Regulation - Authority of Federal Trade Commission to Regulate False Advertising by Insurance Companies as Affected by the McCarran-Ferguson Act*, 57 MICH. L. REV. 289 (1958).

Available at: <https://repository.law.umich.edu/mlr/vol57/iss2/9>

This Recent Important Decisions is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

INSURANCE—FEDERAL REGULATION—AUTHORITY OF FEDERAL TRADE COMMISSION TO REGULATE FALSE ADVERTISING BY INSURANCE COMPANIES AS AFFECTED BY THE McCARRAN-FERGUSON ACT—Petitioner, the FTC, issued cease and desist orders¹ prohibiting respondent health and accident insurance companies, doing business in interstate commerce, from disseminating allegedly false and deceptive advertising through the medium of local agents. These orders, issued pursuant to the FTC act,² sought to proscribe such activity both in states that had statutes prohibiting unfair and deceptive practices and in states that did not. The Courts of Appeals for the Fifth³ and Sixth⁴ Circuits concluded that the FTC had no authority to regulate such advertising in states which had prohibitory legislation. On certiorari to the United States Supreme Court, *held*, affirmed per curiam. The state insurance legislation in this case precludes regulation by the FTC because of the provision in the McCarran-Ferguson Act of 1945 which allows FTC regulation of insurance only “to the extent that such business is not regulated by State law. . . .”⁵ *Federal Trade Commission v. National Casualty Co.*, 357 U.S. 560 (1958).

Following the Supreme Court decision in *United States v. South-Eastern Underwriters Association*,⁶ which upheld federal regulation of the insurance business on the ground that insurance was “commerce” within the meaning of the commerce clause of the Constitution, Congress enacted the McCarran-Ferguson Act.⁷ It was the intent of Congress, by passage of this statute, to consent to continued regulation and taxation of the insurance business by the states.⁸ In asserting its authority also to

¹ For background on the issuance of these orders, see McAlevey, “Present Status of State Regulation of the Accident and Health Business,” 1956 *INS. L. J.* 39; Fraizer, “Federal Trade Commission Jurisdiction?” 22 *INS. COUNSEL J.* 467 (1955).

² 38 Stat. 717 (1914), 15 U.S.C. (1952) §§41-51.

³ *American Hospital and Life Ins. Co. v. FTC*, (5th Cir. 1957) 243 F. (2d) 719.

⁴ *National Casualty Co. v. FTC*, (6th Cir. 1957) 245 F. (2d) 883.

⁵ 59 Stat. 33 (1945), as amended, 15 U.S.C. (1952) §§1011-1015. The pertinent provisions of the act are as follows:

“ . . . [T]he Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.

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

“(b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, . . . unless such Act specifically relates to the business of insurance: *Provided*, That after June 30, 1948, . . . the Federal Trade Commission Act . . . shall be applicable to the business of insurance to the extent that such business is not regulated by State law. . . .”

⁶ 322 U.S. 533 (1944).

⁷ Note 5 *supra*.

⁸ The constitutionality of such consent was upheld in *Prudential Insurance Co. v. Benjamin*, 328 U.S. 408 (1946), where the Supreme Court held that the intent of Congress was to sustain state legislation pursuant to this act “from any attack under the com-

regulate, the FTC in the principal case raised two interpretative questions under the McCarran Act. The first of these was whether Congress had intended to foreclose federal regulation of interstate insurance as a supplement to state action in light of the territorial limitations on state power to regulate an interstate business. The Supreme Court effectively by-passed this question, however, by resting its decision on the fact that state regulation was here permitted because respondents' advertising programs required distribution by local agents. Although jurisdictional limitations on effective regulation of interstate insurance activities are at present a severe barrier to adequate state control,⁹ some states have enacted reciprocal regulatory legislation in an effort to overcome these problems.¹⁰ At least one state legislature has even sought to supplement its unfair insurance practices legislation through an act designed to regulate false advertising by unauthorized foreign insurers.¹¹ If similar statutory schemes are widely enacted and withstand constitutional attack, they would seemingly provide an effective means of state regulation of interstate insurance practices. If this proves to be true, it should greatly influence any subsequent

merce clause." (Emphasis added.) *Id.* at 431. Since the Benjamin case, only three Supreme Court decisions have construed the McCarran Act: *Travelers Health Assn. v. Virginia*, 339 U.S. 643 (1950) (state permitted to order a foreign mail-order health insurer to cease and desist from further offerings or sales of certificates of insurance until it complied with the state's blue-sky law by consenting to suit by service of process on the Secretary of State); *Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 U.S. 310 (1955) (in the absence of applicable federal admiralty statutes, states allowed to regulate marine insurance); *Maryland Cas. Co. v. Cushing*, 347 U.S. 409 (1954) (states not granted the power to pass valid statutes regulating marine insurance that conflict with federal admiralty statutes). Several lower courts have construed the McCarran Act, among them the Court of Appeals for the Eighth Circuit in *North Little Rock Transportation Co. v. Casualty Reciprocal Exchange*, (8th Cir. 1950) 181 F. (2d) 174, cert. den. 340 U.S. 823 (1950) (see note 12 *infra*); and the Court of Appeals for the Seventh Circuit in *United States v. Sylvanus*, (7th Cir. 1951) 192 F. (2d) 96, which held that Congress did not intend by the McCarran Act to surrender to the states the power to prosecute persons using the mails to defraud.

⁹ 67 *YALE L. J.* 452 at 460 (1958).

¹⁰ Some states prohibit unauthorized foreign sales by insurers incorporated in the state. See, e.g., *Ohio Rev. Code Ann.* (Page, 1954) §3905.44; *Ore. Rev. Stat.* (1955) §736.645. Other states prohibit only domestic insurance companies from engaging in unauthorized foreign sales where the foreign state has enacted reciprocal legislation. See, e.g., *Wash. Rev. Code* (Supp. 1957) §48.07.150. Most states have enacted the Unauthorized Insurers Process Act designed to facilitate suits by or on behalf of insureds or beneficiaries under contracts with unauthorized foreign insurers by designating the state insurance commissioner as the insurer's agent for service of process. See, e.g., *Kan. Gen. Stat. Ann.* (1949) §40-2001. See also 67 *YALE L. J.* 452 (1958).

¹¹ *N.D. Rev. Code* (1943; Supp. 1957) c. 26-09 A. This act is entitled the Unauthorized Insurers False Advertising Process Act. For a strong argument in support of the constitutionality of this act, see McCarter, "Recent Misleading and Deceptive Mail-Order Accident and Health Insurance Policies and Advertising," 1956 *Ins. L. J.* 247 at 256. By contrast, the Unauthorized Insurers Process Act, note 10 *supra*, is not intended to regulate but is merely intended to facilitate suits by or on behalf of insureds or beneficiaries under contracts with unauthorized foreign insurers.

determination by the Supreme Court of whether Congress did intend to foreclose all federal regulation of interstate insurance.

The second interpretative problem raised by the FTC in the principal case dealt with the intended meaning of "regulation" as used in the McCarran Act. Did Congress mean to equate "regulation" with "legislation," in the sense that mere *enactment* of regulatory statutes by the states would suffice to satisfy this requirement? Or was "regulation" intended to mean actual regulation in fact, either through application of the local statutes to individual cases or through establishment of an adequate state organization operating in a regulatory capacity? Only one prior case has considered this problem.¹² Its holding that mere enactment of legislation was the equivalent of "regulation" is inconclusive on the question here presented, as there was apparently no argument made in that case that legislation alone was not effective regulation. While in the instant case the Court recognized that there might be some difference in definition between "regulation" and "legislation," it nevertheless held that, at least where no argument was made that the legislation was mere pretense, the legislation here involved satisfied the "regulation" requirement of the McCarran Act.¹³ Although congressional intent as to the possible distinction between legislation and regulation is not readily discernible, it seems clear that some difference was intended.¹⁴ The equation made by the Supreme Court could prove unfortunate for advocates of state regulation, as consumer pressures may dictate congressional intervention if state legislation does not prove to be effectively enforced. On the other hand, the threat of possible FTC jurisdiction could itself induce effective state enforcement of its regulatory legislation.

Charles C. Moore, S.Ed.

¹² *North Little Rock Transportation Co. v. Casualty Reciprocal Exchange*, note 8 *supra*. The court upheld a summary judgment of dismissal of a policyholder's action for treble damages under the Sherman Act. The fact that the State of Arkansas had enacted rate regulatory legislation under the McCarran Act insulated the company from civil liability under the Sherman Act.

¹³ Legislation identical with or substantially similar to this act has been enacted in nearly every state. For citations to state statutes, see 67 *YALE L. J.* 452 at 465, n. 54 (1958).

¹⁴ 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). Although regulatory machinery in many states has been enacted, it is not yet adequately enforced. 67 *YALE L. J.* 452 at 459 (1958).