

FEDERAL REGULATION OF INSURANCE COMPANIES: THE DISAPPEARING McCARRAN ACT EXEMPTION

Under the McCarran-Ferguson Insurance Regulation Act (McCarran Act),¹ insurance companies have enjoyed a broad statutory immunity from certain federal laws. Although the McCarran Act provides that no federal law shall impair any state law regulating the business of insurance unless the federal law itself specifically relates to the business of insurance,² the Act does state that federal *antitrust* legislation *shall* apply to the business of insurance to the extent that such business is not regulated by state antitrust law.³ By restrictively interpreting these provisions, several recent decisions have rendered the applicability of these exemptions less certain and have thereby resurrected the specter of pervasive federal insurance regulation.

In evaluating these developments, this Note will examine the legislative history of the McCarran Act, the traditional exemption of insurance company activity from federal regulation, and the emerging judicial qualification that applicable state laws must regulate the *core* of the "business of insurance" in order to preclude federal jurisdiction.⁴

1. 15 U.S.C. §§ 1011-15 (1970).

2. The McCarran Act reads in pertinent part as follows:

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, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: *Provided*, That after June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State law. 15 U.S.C. § 1012(b) (1970).

3. *Id.*

4. Another part of the McCarran Act that has given courts trouble is the question of what is necessary to meet the requirement that the states "regulate" the business of insurance. A plaintiff trying to defeat the application of the McCarran Act may allege that the state's regulation is ineffective or that it does not provide remedies equivalent to those available under federal law. This line of cases, which will not be included in the scope of this Note, culminated in *Ohio AFL-CIO v. Insurance Rating Bd.*, 451 F.2d 1178 (6th Cir. 1971), *cert. denied*, 409 U.S. 917 (1972).

The continuing popularity of the McCarran Act with the insurance companies may be accounted for, in part, by the fact that the existence of state legislation even absent active enforcement is enough to disable federal laws that would in fact be enforced. *Id.* at 1184. Furthermore, it is not necessary for a state to provide plaintiffs with a treble-damage remedy in order to oust the Clayton Act. *Transnational Ins. Co. v. Rosenlund*, 261 F. Supp. 12, 26 (D. Ore. 1966).

EXEMPTING THE BUSINESS OF INSURANCE FROM
FEDERAL REGULATION

In 1944 the Supreme Court found the defendant insurance companies in *United States v. South-Eastern Underwriters Association*⁵ guilty of Sherman Act violations, thus upsetting the long-held judicial belief that the business of insurance did not involve interstate commerce subject to federal regulation.⁶ Because the Supreme Court in that case condemned both risk-rating and price-fixing groups,⁷ members of the industry were fearful that the emergence of vigorous price competition would threaten the financial stability of many companies.⁸ Since strictly enforced federal antitrust laws would frustrate the industry's ability to pool loss statistics,⁹ the insurance companies were also concerned that individually they would not have enough data to compute actuarially sound premium rates.¹⁰ In addition, the threat of a federal regulatory scheme which would preempt state control of the insurance business created a more immediate dilemma for the insurance industry. The insurance companies were forced either to pay state taxes and ignore the uncertainty as to the states' collection authority, or else to ignore the states' demands for payment and run the risk of losing their licenses to operate.¹¹

5. 322 U.S. 533 (1944).

6. See *Paul v. Virginia*, 75 U.S. (8 Wall.) 168 (1869).

7. G. HEATH, *INSURANCE WORDS AND THEIR MEANINGS* (8th ed. 1968) defines an insurance rating bureau as "[a]n organization which makes [premium] rates that companies charge for their policies." *Id.* at 97. The rate is "[t]he price of \$100 of insurance usually for one year. Expressed in dollars and cents or in percent." *Id.*

8. This financial stability had often been achieved at the expense of the consumer. During debate on the McCarran Act, Senator Pepper of Florida indicated that between 1931 and 1940 the members of the South-Eastern Underwriters Association had collected \$89 million of net premiums from Florida but had only paid out \$30 million in losses. 91 CONG. REC. 1479 (1945). Since the consumers of Florida were potentially one of the direct beneficiaries of the Supreme Court decision, this factor may provide an indication of why Senator Pepper was such a vocal opponent of the dilution of that decision by the McCarran Act.

9. Senator Ferguson said that he thought that every state rate-fixing authority and many state insurance laws violated both the Sherman and Clayton Acts, 91 CONG. REC. 484 (1945), although he also discussed the reasons justifying rate-fixing by insurance companies. *Id.* at 1481.

10. Insurance companies naturally preferred to be subjected to a less stringent state antitrust scheme. Senator Pepper predicted: "As a practical matter, we know that the States cannot and will not enforce these laws against these insurance companies." 91 CONG. REC. 1444 (1945). But see *Donza v. Allstate Ins. Co.*, 5 TRADE REG. REP. ¶ 74,545 (N.Y. Queens, Jan. 26, 1973) (an insured held to have a claim against an insurance company for an illegal combination under state law); *FORBES*, Oct. 1, 1973, at 50 (general description of the resurgence of state antitrust enforcement).

11. 91 CONG. REC. 478-79 (1945) (remarks of Senator Ferguson).

Under continuing pressure from a united insurance industry and many state insurance commissioners, Congress finally adopted the McCarran Act,¹² which delivered to the states a clear mandate for their continued regulation and taxation of the business of insurance. To the claim that the Act was overly generous to the insurance interests,¹³ the sponsors emphasized that this emergency measure was designed only "to remove and dissipate that chaos [in the insurance world] by enacting a law by which insurance companies will be able to abide for the time being."¹⁴ If insurance companies later used their political influence at the state level to abuse this initially favorable treatment, a future Congress could, the sponsors argued, invalidate any state laws deemed violative of the spirit of the McCarran Act.¹⁵ As no such remedial changes were ever forthcoming,¹⁶ the temporary expedient has ripened into two permanent exemptions from federal legislation.

Since almost all states have laws closely regulating the insurance industry, the first exemption authorized by the McCarran Act removes the "business of insurance" from the scope of nearly all federal laws¹⁷—other than the Clayton, Sherman, and Federal Trade Commission Acts—which do not specifically refer to the business of insurance. Congress gave the industry this "blanket" exemption in recognition of the difficulties inherent in formulating a comprehensive and lasting list of the federal legislation to be made inapplicable to the insurance industry.¹⁸

12. Act of March 9, 1945, Pub. L. No. 79-15, 59 Stat. 33. Several earlier bills to give the insurance industry relief had been introduced in the seventy-eighth session of Congress. See S.1362, 78th Cong., 2d Sess. (1944); H.R. 3270, 78th Cong., 2d Sess. (1944). However, this session of Congress ended before either of these bills could be enacted. For an informative discussion of the interaction of the insurance industry groups and Congress before the McCarran Act was passed, see Note, *A Year of S.E.U.A.*, 23 CHI. KENT L. REV. 317 (1945).

13. Congressman Bailey, who had performed the duties of the state insurance commissioner in West Virginia, labeled the McCarran Act "the most selfish and most vicious piece of proposed legislation . . . in the past decade . . ." 91 CONG. REC. 1091 (1945).

14. *Id.* at 484 (remarks of Senator Ferguson). See also *id.* at 1482-83 (remarks of Senator Pepper).

15. *Id.* at 1481 (remarks of Senator Murdock).

16. SUBCOMM. ON ANTITRUST AND MONOPOLY LEGISLATION OF THE SENATE COMM. ON THE JUDICIARY, 83D CONG., 2D SESS., REPORT CONCERNING THE TIE-IN SALE OF CREDIT INSURANCE IN CONNECTION WITH SMALL LOANS AND OTHER FINANCIAL TRANSACTIONS (Comm. Print 1955).

17. The McCarran Act has no effect on the applicability of the National Labor Relations Act, the Fair Labor Standards Act of 1938, or the Merchant Marine Act of 1920, 15 U.S.C. § 1014 (1970).

18. Senator O'Mahoney said that this provision was included so that "it would be a sort of catch-all provision to take into consideration other acts of Congress which

The McCarran Act secondly exempts the business of insurance from federal *antitrust* laws to the extent that the state involved has enacted similar legislation. This part of the bill was more controversial.¹⁹ Senator Pepper, the most vocal opponent of the bill, did not see why an insurance company should have "some sanctuary behind some immunity by which it may fix prices, may squeeze out a competitor, [or] may commit monopoly. . . ." ²⁰ Under the provisions of the Act, could not a state by its own regulation limit the extent, the effect, and the applicability of the Sherman and Clayton Acts?²¹ In response, Senator Ferguson conceded that if a state passed a law contrary to the federal antitrust laws, with the exception of a state law authorizing intimidation, coercion, or boycott,²² "then the State law would be the law."²³ Senator McCarran later explained how this exemption was supposed to work:

[T]he United States attorney to whom such [antitrust] complaint is made will then have to determine whether the particular practice complained of is regulated by State law. If State regulation has been imposed—if the State has taken effective jurisdiction of the particular practice in question—we can assume that the decision will be that the federal antitrust laws do not apply.²⁴

The exemption thus guaranteed that states could authorize the establishment of bureaus to fix insurance premium rates.²⁵

might affect the insurance industry, but of which we did not have knowledge at the time." 91 CONG. REC. 483 (1945).

19. During Senate debate, section 2(b) of S. 340, the predecessor of 15 U.S.C. § 1012(b), was amended by its sponsors to except the Sherman Act and the Clayton Act from those federal laws that would not apply to the business of insurance unless they specifically referred to it. 91 CONG. REC. 486-87 (1945). The bill, as enacted, did not emerge until the House-Senate conference report, just three days before final debate and passage in the Senate. *Id.* at 1488-89.

20. 91 CONG. REC. 1479 (1945).

21. *Id.* at 1481.

22. This refusal under the Sherman Act to allow intimidation, coercion, or boycott in any form was preserved in section 3 of the McCarran Act, 15 U.S.C. § 1013(b) (1970). Plaintiffs typically resort to this provision in an attempt to avoid application of section 2 of the Act, *id.* § 1012(b), if section 2 prevents them from getting federal jurisdiction under other sections of the Sherman Act. See *California League of Independent Ins. Producers v. Aetna Cas. & Sur. Co.*, 179 F. Supp. 65 (N.D. Cal. 1959). See also *Professional & Business Men's Life Ins. Co. v. Bankers Life Co.*, 163 F. Supp. 274 (D. Mont. 1958) (holding that since the antitrust exception referred to the Sherman Act as it existed in 1945, insurance companies would be held liable in boycott actions for treble damages, even though that part of the Sherman Act was repealed before the date of the case).

23. 91 CONG. REC. 1481 (1945).

24. McCarran, *Federal Control of Insurance: Moratorium Under Public Law 15 Expired July 1*, 34 A.B.A.J. 539, 541 (1948).

25. 91 CONG. REC. 1481 (1945).

Despite the intended breadth of the exemptions, the McCarran Act never absolutely immunized insurance companies from federal regulation. Even federal laws that did not specifically apply to the business of insurance were enforced against insurance companies, thereby circumventing the first exemption whenever (1) the federal statutes could be construed in such a manner as to obviate any conflict with state law,²⁶ (2) the insurance company failed to demonstrate that the state had actually regulated the specific matter in issue,²⁷ or (3) an insurance company claimed that the laws of its state of domicile should be given extraterritorial effect.²⁸

The insurance industry has achieved greater success in sidestepping the application of federal antitrust laws. In those cases involving Sherman Act or Clayton Act claims against an insurance company, the courts consistently dismissed federal complaints upon a showing that the appropriate state had regulatory legislation corresponding, in function if not in remedy, to the federal legislation in question. This early judicial approach to the antitrust exemption was exemplified by *Transnational Insurance Co. v. Rosenlund*,²⁹ wherein Transnational claimed that another insurance company and Transnational's own former general agent³⁰ had conspired to squeeze it out of the insurance business. Stating that the purpose of the McCarran Act was to put the full weight of congressional power behind the state schemes for regulating and taxing the business of insurance, and without inquiring as to whether or not the alleged conspiracy was part of the "business of insurance," the court construed the state's legislation liberally so as to apply it to the defendant company's alleg-

26. See, e.g., *United States v. Sylvanus*, 192 F.2d 96 (7th Cir.), cert. denied, 342 U.S. 943 (1951) (indictment for federal mail fraud held not barred by the McCarran Act because prevention of fraud not connected with the regulation of the insurance business in Illinois).

27. See, e.g., *Zachman v. Erwin*, 186 F. Supp. 691 (S.D. Tex. 1960) (defendant failed to show that the federal Securities Act of 1933 invalidated any Texas law regulating the insurance business).

28. See, e.g., *FTC v. Travelers Health Ass'n*, 362 U.S. 293 (1960) (Nebraska held not to have the power to regulate the out-of-state activities of a mail order insurance company). See also *In re Aviation Ins. Indus.*, 183 F. Supp. 374 (S.D.N.Y. 1960) (since many states did not attempt to regulate aircraft hull and casualty insurance, regulation by the domiciliary state not given extraterritorial effect).

29. 261 F. Supp. 12 (D. Ore. 1966).

30. A general agent may be defined as "an agent who supervises other agents, sometimes called 'sub-agents.' In fire insurance, usually he has the exclusive franchise for the company in a certain territory and does not solicit business direct [sic] from the public. In casualty insurance, the term describes the form of commission contract in effect between the company and the agent." G. HEATH, *supra* note 7, at 54.

edly conspiratorial activities.³¹ Therefore, the federal antitrust law was made inapplicable by the McCarran Act exemption.

THE "BUSINESS OF INSURANCE": LIMITING THE
McCARRAN ACT

During congressional debate, the term "business of insurance" as it is used in the McCarran Act received scant consideration. However, it is possible to infer from the debate that the "business of insurance" was intended to be synonymous with "insurance companies." Senator Pepper argued that "we should not give insurance *companies* immunity . . .";³² Senator Murdock stated, "Certainly the very purpose of the bill . . . is to provide that state legislatures . . . may relieve insurance *companies* from contracts in restraint of trade."³³ Further, Senator Barkley worried that state legislatures might attempt "to put insurance *companies* within the State on an island of safety from congressional regulation."³⁴ In response to these criticisms, the sponsors never declared that the bill only applied to *particular activities* of insurance companies. When Senator Pepper asked why the bill did not specify which agreements by insurance companies should be "legitimized," Senator O'Mahoney responded, "I endeavored to . . . induce the Committee of Congress to write into the law specific exemptions from antitrust law, but I was unable to prevail,"³⁵ again implying that the term "business of insurance" included all insurance company activities.

Like Congress, the courts initially assumed that there was no distinction under the Act between "insurance companies" and the "business of insurance." The only question that had to be answered before application of the McCarran Act was simply whether or not the defendant was an insurance company. The Supreme Court relied upon this threshold inquiry in *SEC v. Variable Annuity Life Insurance Co.*³⁶ Failing to qualify under the McCarran Act as insurance companies, the respondents in that case were ultimately subjected to the federal securities laws. However, unlike that part of the decision

31. 261 F. Supp. at 28. The court even held that the state of Washington anti-compact law should be construed broadly enough to include insurance contracts executed in other states but performed in Washington. *Id.*

32. 91 CONG. REC. 1444 (1945) (emphasis added).

33. *Id.* at 480 (emphasis added).

34. *Id.* at 1488 (emphasis added).

35. *Id.* at 1444.

36. 359 U.S. 65 (1959).

dealing with the question of insurance company status,³⁷ the Supreme Court's holding that the term "business of insurance" must be defined by federal courts as a matter of federal law³⁸ has had lasting significance. In his dissent, Justice Harlan admonished that the *Variable Annuity* majority, by declaring the definition to be a matter of federal law, failed "to take adequate account of the historic congressional policy of leaving regulation of the business of insurance entirely to the States."³⁹ Nevertheless, several federal district courts immediately restricted the applicability of the McCarran Act by distinguishing "business of insurance" from other business activities undertaken by insurance companies.

In *United States v. Meade*,⁴⁰ a district court applied the Securities Act of 1933 to interstate sale of the stock of a corporation set up to operate a general insurance agency⁴¹ and to perform other activities including owning nearly all of the stock of an insurance company. Since the conduct of the general insurance agency corporation was not entirely devoted to insurance, it could not successfully claim the protection of the McCarran Act. The court observed that even the corporation's investment in an insurance company did not enable it to claim the exemption. In the court's view, "the investor in an insurance company . . . [was not] in the classification of engaging in the insurance business within the meaning of the McCarran Act."⁴² Years later, in *Hill v. National Auto Glass Co.*⁴³ another federal district court used a similar restrictive interpretation of "business of insurance," holding that the insurer's practice of placing the repair business of its claimants with certain pre-selected glass installers did not constitute "a part of the 'business of insurance' as that term is normally understood."⁴⁴

It was not until 1969 that the Supreme Court in *SEC v. National Securities, Inc.*⁴⁵ finally focused on how broadly the term "business of insurance" should be construed.

37. The Supreme Court has since flatly precluded this threshold determinative inquiry. See *SEC v. National Sec., Inc.*, 393 U.S. 453, 459 (1969).

38. 359 U.S. at 69.

39. *Id.* at 96 (dissenting opinion).

40. 179 F. Supp. 868 (S.D. Ind. 1960).

41. See note 30 *supra*.

42. 179 F. Supp. at 876.

43. 293 F. Supp. 295 (N.D. Cal. 1968).

44. *Id.* at 296. After his motion to dismiss a count of the plaintiff's complaint failed, the defendant again moved to dismiss in 1971. See text accompanying notes 74-78 *infra*.

45. 393 U.S. 453 (1969).

SEC V. NATIONAL SECURITIES, INC.

In the *National Securities* case, the Securities and Exchange Commission (SEC) initially sought to enjoin the merger of an insurance firm controlled by National Securities, Inc. and Producers Life, Inc. on the ground that National Securities had mailed allegedly misleading proxy solicitations in violation of section 10(b) of the Securities Exchange Act of 1934⁴⁶ and rule 10b-5⁴⁷ thereunder. The Commission was denied temporary relief. Shortly thereafter while the case was pending, the merger was consummated, whereupon the SEC amended its complaint in order to seek a restoration of the *status quo ante* and an accounting for the benefit of the shareholders of Producers Life, Inc.⁴⁸

In affirming the district court's dismissal of the complaint,⁴⁹ the Ninth Circuit determined that "[t]he State of Arizona [had] affirmatively asserted its power to regulate the merger of insurance companies."⁵⁰ It agreed with the district court's conclusion that the SEC's requested invalidation of a corporate merger approved by the Arizona Director of Insurance would impair the state law of Arizona. Therefore, the application of the federal securities laws was prohibited by the first exemption of the McCarran Act which protects state insurance laws from impairment by federal laws that do not specifically relate to the business of insurance.⁵¹

The Supreme Court could have reversed the Ninth Circuit on the narrow grounds that the interests of the shareholders were too incidental to the business of insurance to qualify for the McCarran Act exemption.⁵² Such a decision would have been unremarkable and in line with previous interpretations of the term "business of insurance."⁵³ Instead, the Court promulgated a new, restrictive McCarran Act standard, confining the "business of insurance" to the relationship between insurer and insured, to questions surrounding the inter-

46. 15 U.S.C. § 78j (1970).

47. 17 C.F.R. § 240.10b-5 (1973).

48. 393 U.S. at 455-56. See 10 B.C. IND. & COM. L. REV. 1024 (1969) for a discussion of the McCarran Act aspects of the Supreme Court decision. For an analysis of the securities law ramifications, see 20 SYRACUSE L. REV. 811 (1969); 47 TEX. L. REV. 1238 (1969).

49. 252 F. Supp. 623 (D. Ariz. 1966).

50. 387 F.2d 25, 31 (9th Cir. 1967).

51. 15 U.S.C. § 1012(b) (1970).

52. See text accompanying notes 40-44 *supra*. In *Meade*, the court said that the alleged conduct of these defendants is remote from the business of insurance as intended by the McCarran Act" 179 F. Supp. 868, 876 (S.D. Ind. 1960).

53. See 17 AM. U.L. REV. 554, 559 (1968).

pretation and enforcement of insurance policies, and to other activities of insurance companies that relate closely to their reliability as insurers.⁵⁴ Thus, only state statutes aimed at protecting or regulating the insurance relationship, directly or indirectly, were held to qualify as laws regulating the business of insurance.⁵⁵ The Court held that the merger approval issued by the Arizona Insurance Commissioner clearly failed to meet that test because "the State [had] focused its attention on stockholder protection [and had not attempted] to secure the interests of those purchasing insurance policies."⁵⁶ By virtue of this decision, an insurance company is now entitled to a McCarran Act exemption only when engaged in an activity which falls within the Supreme Court's restrictive definition of the "business of insurance."

Although it is doubtful in light of the legislative history that Congress intended to distinguish between insurance companies and the "business of insurance,"⁵⁷ the result reached in *National Securities* parallels the curtailment of other federal law exemptions, such as the narrowing of the federal antitrust immunity for activities undertaken by a state.⁵⁸ Moreover, an increasing number of lower court decisions have enthusiastically embraced the spirit of the Supreme Court's *National Securities* decision.

NATIONAL SECURITIES AND ITS PROGENY

Following *National Securities*, the cases arising under the McCarran Act may be divided into two classes corresponding to the two principal operative clauses of the Act:⁵⁹ (1) cases that rely on *National Securities* to resolve a question of alleged impairment of state insur-

54. 393 U.S. at 460.

55. *Id.*

56. *Id.*

57. See notes 32-35 *supra* and accompanying text.

58. This exemption originated in *Parker v. Brown*, 317 U.S. 341 (1943), where the Court held that a state-run raisin marketing program was not within the scope of the Sherman Act. For the case law trend in this area, see 12 A.L.R. Fed. 329 (1972).

59. Several cases decided after *National Securities* (Jan. 1969) make no reference to it. See *Gerecht v. American Ins. Co.*, 344 F. Supp. 1056 (W.D. Mo. 1971) (independent insurance agents alleged that insurance companies engaged in unreasonable restraint of interstate commerce); *Sanborn v. Palm*, 336 F. Supp. 222 (S.D. Tex. 1971) (alleged tying arrangement between general insurance agent and his local agencies); *Holly Springs Funeral Home v. United Funeral Serv.*, 303 F. Supp. 128 (N.D. Miss. 1969) (alleged unfair practices of burial insurance company against unaffiliated funeral homes). Since none of these cases was concerned with the relationship of the insured and the insurer, it is likely that reference to the holding of *National Securities* would have made the McCarran Act inapplicable to these defendants.

ance law by general federal legislation and (2) cases that use *National Securities* to settle a question of federal jurisdiction under antitrust laws.

Exemptions from Federal Laws That Do Not Specifically Relate to the Business of Insurance

Whenever general federal legislation is alleged to be an encroachment upon state interests as embodied in the state insurance laws, the courts have paralleled the analysis in *National Securities*. In *Hart v. Orion Insurance Co.*,⁶⁰ for example, the application of the Federal Arbitration Act⁶¹ to the plaintiff's insurance policy might have precluded an evidentiary hearing on the question as to whether a contracted disease had affected the insured's fitness as a professional pilot. For the McCarran Act exemption to prohibit the application of the federal legislation, the insured had to show "that the Federal Arbitration Act invalidates, impairs, or supersedes a state law regulating the business of insurance."⁶² The plaintiff in *Hart* failed to make this showing, as the Tenth Circuit held that the relevant state laws did not specifically regulate the business of insurance, but rather applied generally to the methods of handling all contract disputes.⁶³ Therefore, even though the Federal Arbitration Act possibly conflicted with state laws applicable to insurance companies, the federal law did not impair a state law specifically regulating the business of insurance.

The result in this case is a good illustration of how *National Securities'* mandate to examine what a state law is regulating can reduce the potency of the exemption.⁶⁴ The *Hart* case demonstrates that it is no longer sufficient that a general state law *might be applicable* to the challenged aspect of the insurance business; the law must *specifically regulate the insurance relationship if the insurance com-*

60. 453 F.2d 1358 (10th Cir. 1971).

61. 9 U.S.C. § 1 *et seq.* (1970).

62. 453 F.2d at 1360.

63. *Id.* This part of the court's opinion relied on *Hamilton Life Ins. Co. v. Republic Nat'l Life Ins. Co.*, 408 F.2d 606 (2d Cir. 1969). The *Hamilton Life* case was argued four days before *National Securities* was handed down and was decided about a month and a half later. In a dispute between insurance companies, the *Hamilton Life* court, like the *Hart* court, held that state statutes regulating the method of handling contract disputes generally were not laws regulating the business of insurance. *Id.* at 611. Although the *Hamilton* circuit court did cite *National Securities*, there were other valid grounds set out by the district court on which the court could have decided the McCarran Act issue. See *Hamilton Life Ins. Co. v. Republic Nat'l Life Ins. Co.*, 291 F. Supp. 225 (S.D.N.Y. 1968).

64. The court did not discuss this point in its opinion, but such a conclusion can be inferred from the result reached.

pany is to be successful in claiming the McCarran Act exemption from federal regulation.

On the other hand, in *Gerlach v. Allstate Insurance Co.*⁶⁵ the court exempted Allstate from the application of the Federal Truth in Lending Act.⁶⁶ The plaintiff had argued that this federal law should be applied to force Allstate to disclose that the service charge on its premium installment payments included an amount allocable to interest.⁶⁷ The court rejected this argument by concluding that the service charge was part of the premium and that since the Supreme Court had stated that the fixing of premium rates was a legitimate aspect of the "business of insurance,"⁶⁸ the service charge was also part of the business of insurance. Since Florida had legislation regulating the disclosure of premium financing terms,⁶⁹ the application of the Truth in Lending Act would have impaired the state enactment; and therefore the federal legislation was barred by the McCarran Act.⁷⁰

Though the regulation of premium installment terms may arguably be closer to that core of the business of insurance, under the *Hart* interpretation of the *National Securities* case, the court might have decided that the Florida legislation applicable to the disclosure of premium installment terms merely involved the regulation of financing for all consumer transactions. That conclusion would have obviated any conflict between a federal law and a state law regulating the business of insurance, and the McCarran Act exemption would have been inapplicable. Such a result would be in accord with *National Securities'* mandate to scrutinize the actual subject matter being regulated under the guise of state insurance laws, but it would leave only a very narrow area of "pure insurance" for the states to regulate.⁷¹

The Antitrust Exemption

The second group of cases subsequent to *National Securities*

65. 338 F. Supp. 642 (S.D. Fla. 1972).

66. 15 U.S.C. § 1601 *et seq.* (1970).

67. The court discussed the McCarran Act aspect of this case in order to provide an alternative holding in case its conclusion that Allstate was not a creditor and, therefore, not subject to the Truth in Lending Act was reversed. 338 F. Supp. at 649.

68. See *SEC v. National Sec., Inc.*, 393 U.S. 453, 460 (1969).

69. FLA. STAT. ANN. 627.839(3)(b) (1972) (former section 627.1003(3)(b) (1969) was renumbered in 1972).

70. 338 F. Supp. at 649-51.

71. Since *National Securities* says that the McCarran Act protects state regulation of the relationship between the insured and the insurer, it does not seem necessary to limit this protection to only the activities that can be characterized as "pure insurance" inasmuch as this relationship is a complex one encompassing noninsurance aspects.

outlines the circumstances under which the McCarran Act exemption precludes federal antitrust jurisdiction. As has previously been mentioned,⁷² the business of insurance is exempt from the federal antitrust laws to the extent that similar state laws have been enacted. After it has been determined that the claim falls under the federal antitrust laws, the restrictive *National Securities* interpretation of the "business of insurance" necessitates a factual analysis of the insurer's activity to determine if it is part of the insurer-policyholder relationship, if it involves the interpretation of an insurance policy, or if it relates closely to the company's reliability as an insurer.⁷³ If the activity falls within this *National Securities* definition of the "business of insurance," the McCarran Act's antitrust exemption will be applicable and the court then must examine the relationship between state and federal antitrust regulation.

In several cases, the courts have been unable to find that the insurer's activity bore the necessary relation to the business of insurance. For example, despite an earlier rejection of a motion to dismiss,⁷⁴ the insurance company in *Hill v. National Auto Glass Co.* again moved to dismiss the complaint after *National Securities* had been decided. It will be recalled that Allstate Insurance Company had contended that the McCarran Act immunized from federal antitrust liability its practice of sending claimants to selected glass installers.⁷⁵ After a full review of the congressional debate on the McCarran Act, the court concluded that, while the Act protected cooperative activities between insurance companies,⁷⁶ "Congress at no time indicated an intent to give insurance companies carte blanche to operate in concert with non-insurance companies."⁷⁷ The McCarran Act was narrowly construed so that the exclusive repair contracts were held not to be part of the business of insurance⁷⁸ and thus not exempt from federal antitrust jurisdiction.

The court in *DeVoto v. Pacific Fidelity Life Insurance Co.*⁷⁹ also utilized a factual analysis to determine that the activities complained of were outside the scope of the business of insurance. The plaintiff, an insurance agent, contracted to pay \$1.25 per name for the customer

72. See note 2 *supra* & text accompanying notes 19-25 *supra*.

73. See text accompanying notes 54-56 *supra*.

74. 1971 TRADE CAS. ¶ 73,594 (N.D. Cal. 1971) (not reported in Federal Supplement Reporter).

75. See notes 43-44 *supra* and accompanying text.

76. 1971 TRADE CAS. ¶ 73,594, at 90,459 (N.D. Cal. 1971).

77. *Id.*

78. *Id.*

79. 354 F. Supp. 874 (N.D. Cal. 1973).

list of a mortgage finance company with a view toward providing the company with a mortgage protection life insurance plan for its borrowing customers. After the mortgage company abrogated the agreement by accepting another insurer's counteroffer, the plaintiff brought a restraint of trade action under the Clayton Act.⁸⁰ As to the defendant-insurer's claim of an exemption from federal antitrust regulation, the court held that "[t]he defendant's business activity attacked in the complaint is merely peripheral to the insurance business."⁸¹ Since the McCarran Act, as construed in *National Securities*, "did not purport to make state legislation supreme in regulating all the activities of insurance companies,"⁸² the alleged conspiracy in restraint of trade was clearly subject to the sanctions imposed by the Clayton Act.⁸³

The third case where the courts declined to find a McCarran Act antitrust exemption, *Fry v. John Hancock Mutual Life Insurance Co.*,⁸⁴ represents a more questionable extension of *National Securities*. In this class action the insurance company allegedly violated federal antitrust laws (1) by tying the purchase of life insurance and irrigation equipment to the making of interstate farm loans and (2) by using excessive loan valuations and high interest rates for the conspiratorial purpose of later foreclosing on the property. Unlike the courts in the two preceding cases, the *Fry* court did not attempt to rely on a factual analysis to relate the alleged unlawful activity to the business of insurance. Instead, the court ignored the antitrust exemption altogether and interpreted the seemingly inapplicable "general" McCarran Act exemption which the Supreme Court in *National Securities* had so carefully examined.⁸⁵ Under this approach, the applicable state statute, one regulating the *antitrust* aspects of insurance company

80. 15 U.S.C. § 15 (1970).

81. 354 F. Supp. 876-77.

82. *Id.* at 877.

83. Nonetheless, the defendant's motion for summary judgment was granted because the plaintiff had been unable to establish the necessary interstate activity or to prove the existence of an unreasonable restraint of trade. *Id.* at 878.

84. 355 F. Supp. 1151 (N.D. Tex. 1973).

85. See notes 52-56 *supra* and accompanying text. Having lost on the claim of a McCarran Act exemption, the defendant may have a difficult time escaping liability if the case is tried on the merits. *Fortner Enterprises v. United States Steel Corp.*, 394 U.S. 495, 509 (1969), makes it clear that when deciding restraint of trade actions, credit will not be treated differently in principle from other goods and services. In this case the plaintiff had to buy prefabricated homes as a condition of being allowed to purchase the tying product—credit. The *Fortner* decision would seem to undercut the vitality of *United States v. Investors Diversified Serv.*, 102 F. Supp. 645 (D. Minn. 1951), which held that there was no violation of the Clayton Act where the defendant tied the selling of insurance on the mortgaged property to the making of mortgage loans because money was not a commodity as that term is used in the Clayton Act.

lending, was held to be no more closely related to the "business of insurance" than the *National Securities* statute, which required extensive disclosure pursuant to insurance company mergers. The court explained that both of these state statutes were inappropriate to support a McCarran Act exemption because "[n]either type of statute attempts to regulate activities which center upon the relationship between the insurance company and the policyholder"⁸⁶ The *Fry* court thus denominated the state statute an antitrust rather than an insurance regulation.⁸⁷ Then the court summarily rejected the insurance company's contention that the McCarran Act specifically provided that state antitrust regulation supersedes the federal laws, by saying that the court had already determined that the activities complained of were not part of the business of insurance.⁸⁸ Thus, under this rationale, a state antitrust statute by its very nature could never pass the threshold qualification as a state statute regulating the "business of insurance."

The opinion neglects to explain this abrupt conclusion. It is possible that the court thought that its discussion of how the state laws regulated antitrust matters instead of the business of insurance was sufficient. If this interpretation of the opinion is correct, the court's approach was entirely inappropriate. The court's inquiry into the subject matter of a state law that has been characterized as insurance regulation belongs in a case involving the first McCarran Act exemption; that exemption protects state laws which regulate the business of insurance from impairment by federal laws that do not specifically relate to the business of insurance. However, in the *Fry* case the only issue was the applicability of federal *antitrust* laws. To be entitled to the McCarran Act exemption from those laws, the litigant must prove that the state has corresponding antitrust legislation. Because it misapplied *National Securities*, the court in *Fry* ruled out any possibility that the defendant insurance company might prove that the state had enacted the antitrust regulation required by the McCarran Act exemption. The apparent reasoning of the court would seem to have the effect of completely nullifying the antitrust exemption of the McCarran Act.⁸⁹

86. 355 F. Supp. at 1153.

87. The court explained:

[I]t is clear that any state statutes purporting to regulate the antitrust aspects of insurance company lending (aside possibly from loans to policyholders to finance premiums) would be antitrust regulation rather than insurance regulation. *Id.*

88. *Id.* at 1154.

89. The implication of the *Fry* decision (that antitrust laws and laws regulating

If the court had made a factual analysis of the lending activity, it might have considered that, while credit insurance was necessary for the lender's reliability, it did not follow that the insurance purchased by the borrower necessarily had to be sold by the same lender. On the other hand, the court could have easily concluded that the required purchase of life insurance was related to the security of the loans. Since the ability of an insurer to collect its loans would influence its reliability as an insurer, the company might have argued that the activity should be included within *National Securities'* definition of the "business of insurance." This position would be consistent with the several cases that have upheld McCarran Act exemptions on the grounds that the activities complained of were related to the reliability of an insurer.⁹⁰

The cases that have focused on the insurer's reliability as a basis for upholding the McCarran Act antitrust exemption are instructive in showing how an activity can be fitted within the restrictive *National Securities'* definition of the term "business of insurance." In *Travelers Insurance Co. v. Blue Cross*,⁹¹ a hospital contract that allowed Blue Cross to pay lower hospital rates on behalf of its insureds was subjected to a federal antitrust attack.⁹² The court upheld the contract, applying the McCarran Act antitrust exemption on the strength of the close relationship of the hospital contract to Blue Cross' reliability as an insurer.⁹³ In *Commander Leasing Co. v.*

the business of insurance are mutually exclusive sets) is contradicted by the very wording of the antitrust exemption. Since the McCarran Act says that 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 U.S.C. § 1012(b) (1970), the Act clearly contemplates many situations where the two conditions will coexist. See note 2 *supra*.

Because *Fry* was only an opinion on a denial of a motion to dismiss a complaint, it is too early to conclude that it will have much effect on judicial interpretation of the McCarran Act. It might be noted, however, that the district court recognized that its decision involved "a controlling question of law as to which there is substantial ground for difference of opinion." 355 F. Supp. at 1155. Accordingly, the court granted the parties the right to seek an immediate appeal from its order under 28 U.S.C. § 1292(b) (1970). *Id.* On April 25, 1973, however, the Fifth Circuit declined the opportunity to hear this appeal. Telephone conversation with the Clerk of Court, 5th Cir., June 21, 1973.

90. See, e.g., *Travelers Ins. Co. v. Blue Cross*, 481 F.2d 80 (3d Cir. 1973); *Commander Leasing Co. v. Transamerica Title Ins. Co.*, 477 F.2d 77 (10th Cir. 1973).

91. 481 F.2d 80 (3d Cir. 1973), *cert denied*, 42 U.S.L.W. 3352 (Dec. 11, 1973) (No. 73-602).

92. *Id.* at 82. One of the grounds of the appeal was that general state supervision of insurance activities is not enough to activate the McCarran Act exemption.

93. The other part of the holding was that "the interrelationship of hospital payments and subscribers' rates was such that Blue Cross' arrangement with hospitals

Transamerica Title Insurance Co.,⁹⁴ the court used a similar rationale in holding that the examination of real estate titles in preparation for the issuance of title insurance was so closely related to the defendant's reliability as an insurer that the McCarran Act antitrust exemption should apply.⁹⁵

In the future the test of whether an activity is related to the reliability of an insurer may become a common means of circumventing the restrictive effect of the *National Securities* decision. Nearly every activity that reduces risk or improves the financial condition of an insurance company can arguably be related to its reliability as an insurer. Although it will be difficult to distinguish the degree to which various activities affect reliability, the restrictiveness of the McCarran Act antitrust exemption as interpreted in *National Securities* might still be preserved. The Court might, for example, establish a stringent "but for" test that would require the insurance company to show that but for the activity complained of, the financial stability of the company would be substantially and immediately affected.

CONCLUSION

Since the current political climate apparently favors business regulation,⁹⁶ Congress is unlikely to set aside the restrictive *National Securities* judicial interpretation of the term "business of insurance." Nor is it likely that the courts will reach a speedy resolution of the existing confusion because the definition of that term is a federal question that must await the gradual development of federal common law.

Thus far the judicial interpretations have generally improved a plaintiff's chances of bringing an action against an insurance company under federal law. Insurance companies will be particularly vulnerable to treble-damage actions against several prevalent industry practices. Plaintiffs most likely will challenge the practice of condi-

should be considered part of the 'business of insurance.'" *Id.* at 83. (The Third Circuit was reciting the district court's conclusion with approval).

94. 477 F.2d 77 (10th Cir. 1973).

95. *Id.* at 83. For the \$5,000 title insurance policy involved in this case, the insurance premium was only \$14, while the service charge for title examination was \$61. This split of income suggests that the sale of insurance was only incidental to the primary activity of title examination. Using the rationale of *United States v. Meade*, 179 F. Supp. 868 (S.D. Ind. 1960), the court could have said that a substantial part of the company's activity in the case was not devoted to insurance and therefore was outside the scope of the McCarran Act. See text accompanying notes 40-42 *supra*.

96. See, e.g., Occupational Safety and Health Act of 1970, 29 U.S.C.A. §§ 651 *et seq.* (Supp. 1973); National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321 *et seq.* (1970).

tioning a loan on the purchase of insurance from the lender.⁹⁷ A variation of this theme confronted the *Fry* court. A second type of case would involve a restraint of trade action brought by a group of independent insurance agents against an insurance company.⁹⁸ Because of the successful market penetration of companies like Allstate Insurance that sell to retail customers through company employees, the companies using independent agents have already been forced to make some adjustments, such as the reduction of commissions, that have led to discord with the independent agents. Because of the restrictive interpretation of the term "business of insurance," insurance companies can expect that they will now have to litigate many federal cases that previously could have been dismissed on the strength of the McCarran Act exemption. Moreover, with the revitalization of state antitrust regulation,⁹⁹ the insurance industry may become increasingly less eager to escape federal jurisdiction of antitrust claims against them. Uniform regulation of the national insurance business may ironically become a *more* attractive alternative than the strict enforcement of a variety of state antitrust schemes.

97. Insofar as consumer loans are concerned, this practice is no longer legal in the states that have adopted section 4.109 of the Uniform Consumer Credit Code. See Davis, Etter, Blythe & Freund, *The Regulation of Consumer Credit Insurance*, 33 LAW & CONTEMP. PROB. 718, 727 (1968).

98. See, *eg.*, *Nassau County Ass'n of Ins. Agents v. Aetna Life & Cas. Co.*, 345 F. Supp. 645 (S.D.N.Y. 1972) (alleged "illegal coercion, illegal intimidation, illegal restraint of trade, all of which are in violation of the Clayton Act, the Sherman Act, the McCarran-Ferguson Act"); *Gerecht v. American Ins. Co.*, 344 F. Supp. 1056 (W.D. Mo. 1971) (alleged violation of Sherman Act in conspiring to eliminate competition in sale of insurance and the employment of independent agents); *California League of Independent Ins. Producers v. Aetna Cas. & Sur. Co.*, 175 F. Supp. 857 (N.D. Cal. 1959) (alleged conspiracy to restrain trade by companies' agreement to decrease rate of commission paid to automobile insurance agents).

99. See note 10 *supra*.