

1956

## Insurance Against the Overreaching of Sovereignty

John F. X. Finn

---

### Recommended Citation

John F. X. Finn, *Insurance Against the Overreaching of Sovereignty*, 25 Fordham L. Rev. 409 (1956).  
Available at: <http://ir.lawnet.fordham.edu/flr/vol25/iss3/1>

This Article is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Fordham Law Review by an authorized editor of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact [tmelnick@law.fordham.edu](mailto:tmelnick@law.fordham.edu).

# INSURANCE AGAINST THE OVERREACHING OF SOVEREIGNTY\*

JOHN F. X. FINN†

*"We have staked the whole future of this country, not upon the power of government, far from it. We have staked the future of American civilization upon the capacity of mankind for self-government."*

—JAMES MADISON

## I. INTRODUCTION

FROM time immemorial sovereignties have reached out to regulate industries affected with a public interest. And from time immemorial industry has inquired as to the jurisdiction of sovereignty. Has it gone too far? Is government overreaching? And if so, what, if anything, can be done about it? Nowhere is the quest for answers to such inquiries more intriguing than in the twilight zones of federalism and the shadowy boundaries between state and nation.

### A. *Armstrong Committee Investigation*

Fifty years ago the sovereign state of New York reached into the life insurance industry of that state and set its house in order by the investigation and Report of the Armstrong Committee,<sup>1</sup> with specific recommendations for legislation which were duly enacted into law.<sup>2</sup> Such enactments had a profound effect, not only on New York life insurance companies but on foreign companies admitted to do business in New York and upon the insurance laws of many other jurisdictions.

In retrospect none will say that in the light of the business conditions of 1906 such a visitation of sovereignty was not wholesome and beneficial, however much there may be disagreement here and there with the rigor of one recommendation or another, or with the anachronism of continuing 1906 safeguards in modern 1956.

### B. *Temporary National Economic Committee Investigation*

In 1939, a special committee, appointed by Congress to investigate concentration of economic power,<sup>3</sup> spent considerable time examining the

---

\* Substance of a speech given by the late John F. X. Finn, former Dean, Fordham University School of Law, on August 28, 1956, at the 79th Annual Meeting of the American Bar Association.

† Coordinator of the Fordham Development Fund and Lincoln Square Project. Professor, Fordham University School of Law.

1. Legislative Insurance Investigating Committee, Report (1906).

2. N.Y. Sess. Laws 1906, c.326, at 763-830.

3. Pub. Res. 113, 75th Cong., 3d Sess. (1938).

insurance business, especially the life insurance business. Investigators combed through files of companies and insurance trade associations and numerous executives were called to Washington to testify. Although the examination set out to find whatever evils it could the dearth of evil led to a paucity of result.<sup>4</sup>

Over the years there have been other instances in which sovereignties have come into close official contact with the insurance industry. Recent examples are found in the areas of (a) investments in common stock, (b) acquisition of real estate, (c) welfare plans, (d) variable annuities, (e) taxation of life insurance companies, (f) in proposals for sovereign indemnity for a portion of industrial liability to the public arising from the construction or operation of facilities for the development of atomic energy, and (g) regulation of insurance company advertising.

*a. Investments in common stock*

Only this year, when the Connecticut General Life Insurance Company, chartered in Connecticut, and authorized to do business in New York, sought to acquire 80% of the outstanding capital stock of National Fire Insurance Company, likewise chartered in Connecticut and licensed to do business in the State of New York, the sovereignty forbade the acquisition.<sup>5</sup> The New York Attorney General wrote an opinion in which he stated that if the proposed common stock acquisition of the Fire Insurance Company by the Life Insurance Company was consummated, the Superintendent of Insurance would be acting within his authority in determining that the Life Insurance Company would not qualify to do business in the State.<sup>6</sup> This determination undoubtedly reflected the continuing influence of the perspective of the Armstrong Report<sup>7</sup> and of such a decision as *Firemen's Insurance Co. v. Beha*,<sup>8</sup> in which it was held that an insurance company, which invested in the common stock of other insurance companies a sum of money which was more than its entire surplus, had not complied with former section 56 of the New York Insurance Law<sup>9</sup> in that such investments were held not to have been of the same general character required of domestic companies. Nevertheless, the Connecticut General Life Insurance Company strenuously urged that, in its case, disallowance of so-called ineligible investments

---

4. Hearings Before the Temporary National Economic Committee of the Senate, 75th Cong., 3d Sess., pts. 10, 13, 28 (1938).

5. — Ops. Att'y Gen. — (1956).

6. See N.Y. Insurance Law § 42.

7. Cf. the reference to "flagrant abuses" in *Guardian Life Ins. Co. v. Bohlinger*, 308 N.Y. 174, 183, 124 N.E. 2d 110, 114 (1954).

8. 30 F. 2d 539 (S.D.N.Y. 1928).

9. See note 6 *supra*.

would still leave the company in a sound financial condition as measured by New York standards, and that its proposed acquisition of 80% or more of the capital stock of the Fire Insurance Company would not be in violation of the New York Insurance Law.

Perhaps the strength of this argument is reflected in the report of the New York Joint Legislative Committee on Insurance Rates and Regulation, in which the Committee stated:

"The subject of investments is still a vital one and presents a problem which requires continuous study and examination. . . . It was not anticipated that the 1951 amendments would solve the problem for all time. The very nature of investment in a fluctuating economy dictates otherwise. . . . We feel that those advocating a new 'basket' provision should be afforded an opportunity to present their views. It may well be that some suitable amendment can be devised which will not impair the financial structure of the insurers or lessen the confidence of the insuring public in the stability of the insurance companies. . . . New problems or old problems in a new dress affecting the business of insurance have risen. All are of importance and require legislative attention if not actual legislation."<sup>10</sup>

Manifestly, the spirit of this report is one of cooperation and good will to the industry. It is the very antithesis of overreaching. That suggests the happy possibility that if in the future another *Connecticut General* case comes into focus it will be dealt with more understandingly.

#### *b. Acquisition of Real Estate*

Rarely has the clash between sovereignty and management been more vividly highlighted than in the case of *Guardian Life Insurance Co. v. Bohlinger*.<sup>11</sup> In that case the insurance company purchased real estate which it considered "an ideal spot for an investment in an office building" and it purchased the property for "rental", but with the thought in mind of designing the building so that it could be used for its accounting activities and for temporary storage of its records. The New York Superintendent of Insurance decided that the company's acquisition was not for the "convenient accommodation" of its business and accordingly refused to approve the purchase.

The administrative determination was reviewed right up to the highest court of the state and that court affirmed the Superintendent's annulment of the purchase, affirming the Appellate Division of the Supreme Court,<sup>12</sup> which had acted by a divided court. Mr. Justice Dore, dissenting in the Appellate Division, urged that although the insurance business is "affected by public interest and therefore required regulation," nevertheless, "reasonable regulation in the public interest is one thing. Man-

---

10. N.Y. Leg. Doc. No. 40 (1956).

11. 308 N.Y. 174, 124 N.E. 2d 110 (1954).

12. 284 App. Div. 110, 130 N.Y.S. 2d 705 (1st Dep't 1954).

agement and complete right to control business policy placed in the hands of a single administrator is quite another; and, if permitted, would tend to take the private property in question and make the insurance business *pro tanto* a matter of state ownership and dominion."<sup>13</sup> But the highest court held otherwise, and ruled that to the extent indicated, management policy is to be determined by the state, and not by industry.

Another facet of the *Guardian Life* case was the determination of the New York Court of Appeals that the Superintendent's ruling was not subject to more than what was called "threshold judicial review," and that the legislature in effect provided that an administrative action is not open to judicial review when it fails to say *affirmatively* that the right to such review exists. This sent the industry to the legislature for procedural relief, and as a result section 34 of the New York Insurance Law was amended as of April 21, 1956, to provide that *any* order of the Superintendent is judicially reviewable, whether or not a specific grant of judicial review is set forth in various sections of the statute.<sup>14</sup>

Turning now to an instance of supervision by sovereignty of a subject matter in which the insurance industry has a cognate though not a direct interest, we touch upon the subject of welfare plans.

•  
*c. Welfare Plans*

A bill has been introduced in the United States Senate<sup>15</sup> which would require registration by all types of employee welfare and pension benefit plans covering 25 or more employees, and in case of employers with 100 or more employees the bill would require the filing of annual reports. This bill, called a "Disclosure Bill" rather than a "Regulatory Bill", was introduced against a factual background indicating that over 75,000,000 persons are now covered in some measure by employee welfare fund programs. Annual contributions to them total more than \$6.8 billion, and pension reserves have been piled up in the amount of \$20 million to \$25 million.<sup>16</sup>

It is true that the bill calls for disclosure by others than insurance companies, but the insurance industry must be interested in Senator Douglas' statement that:

"The agency charged with administration of the act under this bill would be the Securities and Exchange Commission, although the subcommittee found this allocation of responsibility its most difficult decision."<sup>17</sup>

---

13. *Id.* at 119, 130 N.Y.S. 2d at 713.

14. N.Y. Insurance Law § 34.

15. S.3873, 84th Cong., 2d Sess. (1956).

16. Senate Committee on Labor and Public Welfare, *Welfare and Pension Plans Investigation 2* (1956).

17. 102 Cong. Rec. 7477 (daily ed. May 17, 1956).

Similarly, the insurance industry must be interested in the fact that the federal sovereignty in the person of the SEC has been scrutinizing variable annuities.

*d. Variable Annuities*

On June 19, 1956, the Securities and Exchange Commission began a court test in the United States District Court for the District of Columbia by seeking an injunction to halt the sale of annuity policies by the Variable Annuity Life Insurance Company, with headquarters in Washington. The contention of the SEC apparently is that under variable annuity contracts the company is not obligated to pay a fixed sum periodically, as are issuers of conventional annuities, and since the company's contract calls for the periodic payment of sums varying in amount (depending upon the value of an underlying fund invested in common stocks or in other equity-type investments) the SEC claims that the company's contract is an investment contract and a certificate of interest or participation in a profit-sharing agreement within the definition of the term "security" contained in the Securities Act of 1933.<sup>18</sup> Hence the offer of sale of such a contract, according to the SEC, is subject to the registration provisions of the act. The Insurance Company contends, on the other hand, that variable annuities are a relatively new form of life insurance contract. It argues, therefore, that since it is insurance business, like every other insurance business it should be regulated in accordance with the laws of the forty-eight states and the territories, under the supervision of the insurance commissioners of those sovereign jurisdictions.

*e. Taxation of Life Insurance Companies*

*1. Federal*

On March 13, 1956, a direct impact by sovereignty upon the insurance industry was made by the enactment of the Life Insurance Company Tax Act,<sup>19</sup> which provides a tax on life insurance companies for the year 1955. It has been called a "stopgap" bill, and in this connection the Secretary of the Treasury has stated:

"I suggest that an attempt be made to develop a method of taxing life insurance companies like other business, on the basis of their entire income from all sources, with appropriate deductions for their expenses and additions to their reserves against policy contracts. . . ."<sup>20</sup>

It is estimated that the tax imposed on life insurance companies for the calendar year 1955 under this act will be \$248,000,000. If the life

---

18. 15 U.S.C.A. § 77b (1951).

19. Pub. L. No. 429, 84th Cong., 2d Sess. § 801 (March 13, 1956).

20. U.S. Code Cong. & Ad. News 1056 (1956).

insurance companies had continued to pay taxes under the formula in effect in 1954 the tax on 1955 income would have been \$197,000,000.<sup>21</sup> Hence there is an indicated increase in taxes of \$51,000,000.

## 2. State

In addition to the revenue collected from insurance companies federally, all states now impose a gross premium tax, which is, in effect, a gross receipts tax. The amount collected in 1955, from life insurance companies alone, was \$189 million, or almost double the amount paid a decade ago.<sup>22</sup>

Several states, in addition to imposing this gross receipts tax on insurance premiums, apply it also to considerations which the companies receive for annuity contracts. This is even more unfair than the heavy increase in the tax on insurance premiums. Most annuity contracts are now issued in connection with employee benefit plans and frequently this tax is greater than all the other administrative costs of the plans. Since non-insured plans are not subject to this tax, the price differential it causes tends to dry up the annuity business which the insurance companies legitimately should have, and it is encouraging employers, particularly small employers, to use self-administered plans, which frequently are not as desirable from the security viewpoint as the annuity contracts issued by the life insurance companies.

### *f. Federal Indemnity for Industrial Liability Arising from Development of Atomic Energy.*

In the atomic energy field a bill has been introduced in Congress<sup>23</sup> which would encourage and facilitate the development by industry of the peaceful use of atomic energy. This bill would authorize the Atomic Energy Commission until August 1, 1966, to enter into agreements of indemnification with those contractors whom the Commission may require to provide financial protection to cover liability claims arising out of or resulting from the radioactive, toxic, explosive or other hazardous properties of nuclear materials. It would also authorize the Commission to indemnify the contractor against such claims for sums above the amount of the financial protection required, but not in excess of \$500,000,000. The bill provides that:

“(g) In the administration of indemnity agreements entered into hereunder, the Commission shall use, to the maximum extent practicable, the facilities and services of private insurance companies and established insurance adjustment organizations and the Commission may contract to pay a reasonable compensation for such services. . . .

---

21. S. Rep. No. 1571, 84th Cong., 2d Sess. 3 (1956).

22. Institute of Life Insurance, *Life Insurance Fact Book* 53 (1956).

23. H.R. 11523, 84th Cong., 2d Sess. (1956); S.3929, 84th Cong., 2d Sess. (1956).

"(h) The Commission shall have authority to settle or approve the settlement of claims without regard to the rules of legal liability in the State of the accident, and regardless of whether liability has been established by the judgment of any court."<sup>24</sup>

This proposed legislation raises a myriad of legal problems, including possible constitutional questions with respect to the placing of a limit on total tort liability to the public on the part of a given individual or firm. In the Congressional Record the following discussion appears:

"Mr. Pastore. Is not the Senator pretty well convinced that the only way we can overcome the insurance obstacle is by government participation?

Mr. Gore. I reluctantly come to that conclusion.

Mr. Pastore. No matter how we look at it there has got to be government participation. We may as well come to that understanding as quickly as we can, and definitely advance a program which will carry out the spirit and the intent of the 1954 law.

Mr. Gore. I thank the Senator.

Mr. President, as I have said, it seems to me we have here a perfect example of the classic role of Government to do for its people that which they as individuals cannot do for themselves or that which they cannot do as well or as expeditiously for themselves. . . . This is no time for arguments about the exclusion of either the government or private enterprise from the field of reactor development. The task ahead presents a challenge which will require the full resources of both."<sup>25</sup>

Thus the spirit of this atomic energy proposal is that the sovereignty and the insurance industry work hand in hand.<sup>26</sup> Such a spirit has in the past animated many contacts between the sovereignties and the insurance industry, and by and large the sovereignties have been respectful of the fact that over the years since the Armstrong Report there has been a development of social and business philosophy characterized by a consciousness of trusteeship which is the earmark of the management of most of the great life insurance companies today.<sup>27</sup> This newly developed

24. *Id.* at (g), (h).

25. 102 Cong. Rec. 6321 (daily ed. April 26, 1956).

26. "One of the consequences of our federalism is a legal system that derives from both the Nation and the States as separate sources of authority and is administered by state and federal judiciaries, functioning in far more subtle combination than is readily perceived." Hart & Wechsler, *The Federal Courts and the Federal System*, Preface (1953).

27. See, e.g., Dowling, *Congress and Insurance*, Proceedings of the Section of Insurance Law of the American Bar Association 232 (1955); Knowlton, *Jurisdiction of the Federal Trade Commission Over Trade Practices of Insurers*, *op. cit. supra* at 248. See also Donovan, *Regulation of Insurance under the McCarran Act*, 15 *Law & Contemp. Prob.* 473 (1950). Mr. Donovan, at 491, states, "The relationship of the states and the industry is vital. Substantial dislocation would result in a dismal countrywide panorama of public hearings, charges, countercharges, injunctions, and writs. What are the principles which must prevail? In last analysis the most important is that both government and industry understand that every right is accompanied by a correlative duty. We live in an era when most talk is about rights and little about duties. The Commissioner or executive whose exclusive concern is to find his rights and assert them, does a grave disservice. Statutory requirements are im-



tradition of keen fiduciary consciousness has increased the stature of the life insurance industry and it has resulted in immeasurable benefits to the insuring public.

*g. Regulation of Insurance Company Advertising*

In 1868 it was decided in *Paul v. Virginia*,<sup>28</sup> that an insurance policy is not an article of commerce, and that, therefore, the business of insurance is not subject to federal regulation. In 1944 this result was reversed in *United States v. Southeastern Underwriters Association*,<sup>29</sup> in which Mr. Justice Jackson, dissenting stated:

"This Court only recently recognized that certain former decisions as to the dividing line between state and federal power were illogical and theoretically wrong, but at the same time it announced that it would adhere to them because both governments had accommodated the structure of their laws to the error. It seemed a commonsense course to follow them, and I think similar considerations should restrain us from following a contrary and destructive course now. . . ." <sup>30</sup>

Immediately after the *Southeastern* decision, a vigorous debate ensued, and there were many who believed that whether or not Mr. Justice Jackson was right in urging that the courts should "accommodate the structure of their laws" to erroneous legal theory, nevertheless a statute should be passed to clarify for all time the views on state regulation which he expressed. Accordingly, in 1945, the very next year after the *Southeastern* decision, Congress enacted, and the President signed, the McCarran-Ferguson Act, or so-called "Public Law #15",<sup>31</sup> manifestly intending to crystallize dissenting views such as those of Mr. Justice Jackson into statutory law.

On April 27, 1956, the Federal Trade Commission by a 3 to 2 decision (or vote of 3 to 3, if we could count the ballot of the Commission's examiner) in *Matter of the American Hospital and Life Insurance Company*,<sup>32</sup> decided that it could pry between the lines of the McCarran Act

---

portant, but equally important is awareness of the principle as a necessary rule of conduct for fair play. The Commissioner may have the right to issue an order, but he has a duty not to do so until he has given to those affected fair notice and an opportunity to be heard. The insurer may have the right by 'flash filing' to issue a policy which cannot be set aside, but it has the duty not to do so when it knows that indefensible discrimination will result. Government and industry meet only through men. Intensive state regulation of an interstate industry presents tremendous human problems, delicate and taxing. They will be resolved only by good faith, an appreciation of the problems faced by the other man, and fairness blessed with a touch of charity."

28. 75 U.S. (8 Wall.) 168 (1868).

29. 322 U.S. 533 (1944).

30. *Id.* at 589.

31. 15 U.S.C.A. § 1011 ff (1955).

32. — F.T.C. —, 3 CCH Trade Reg. Rep. ¶25,954 (1956).

and establish in the Federal Government a control over insurance that, in the light of the statute as written, the common man cannot understand and the common lawyer cannot justify.

The opinion of the majority of the Commission in the *American Hospital* case is a clear overreaching by the federal sovereignty. Any fair reading of the McCarran Act indicates that by it Congress has deliberately subjected the business of insurance to the laws of the several states and specifically excluded interference by the Federal Trade Commission unless the insurance business "is not regulated by state law."<sup>33</sup>

The strained advocacy of the majority opinion unfortunately makes one look askance at the six volume report of the Federal Trade Commission on the status of state regulation of insurance, even though it is an objective study properly undertaken to determine the extent of the Commission's responsibilities.<sup>34</sup>

---

33. See Dowling, Congress and Insurance, Proceedings of the Section of Insurance Law of the American Bar Association 232, at 233 (1955). Cf. Anderson, Extra-territorial Operation of Insurance Regulatory Statutes, Proceedings of the Section of Insurance Law of the American Bar Association 250 (1954).

34. The majority opinion itself recognizes that a state can revoke an insurance corporation's charter or license. Further, it admits that under the police power a state can take action having consequences in other jurisdictions, and the Federal Trade Commission could not prohibit such regulation. Finally it concedes, at ¶ 35,842 that "the test and history of the McCarran-Ferguson Act leave no doubt that the power of the states to tax or to fix rates for insurance companies doing business within their territories was in no way to be invalidated, impaired or superseded by federal law."

The overreaching of the majority opinion in the *American Hospital* case reaches its apogee in its citation of *Commonwealth v. Nelson*, 350 U.S. 497 (1956), as supporting its contention. *Commonwealth v. Nelson* squarely held that the federal government has the sole power to punish sedition. There is in one of its preliminary paragraphs the sentence quoted in a footnote to the majority opinion in the *American Hospital* case, to the effect that the states are not prevented from prosecuting where the same act constitutes both a federal and a state offense under the police power.

But for all practical purposes, there is no such situation in the field of sedition whatever and the Court's opinion in *Commonwealth v. Nelson* squarely so indicates. The fields of sedition and insurance are not at all comparable. That of sedition is occupied by federal statute. Insurance could be a matter of federal cognizance, but the McCarran Act turned it back to the states. There is no comparable statute that turns the regulation of sedition back to the states. To cite the case of *Commonwealth v. Nelson* for the contention of the majority's opinion in the *American Hospital* case, is to cite it improperly, as is manifest from Chief Justice Warren's opinion in *Nelson*, at 500, 501, 504.

In the supplemental dissenting opinion of Commissioner Mason in the *American Hospital* case, emphasis is placed upon the importance of following the directive of Congress in giving to the states control of the insurance business. Commissioner Mason particularly points out that the following matters are matters for state rather than federal supervision: (a) insurance companies' advertising, (b) approval of policy forms, (c) establishment of rates, (d) maintenance of reserves, (e) regulation of agency commissions, and (f) "the countless other components of the internal management of any single company or companies."

## II. THE ESSENCE OF SOVEREIGNTY—THE SUPREMACY OF THE PEOPLE

To the English philosopher, Thomas E. Hobbes, in 1651, there was no such thing as popular sovereignty. He conceived the state as "an artificial man", and "of greater stature and strength than the natural", wholly supreme over the natural man, even though it was for his protection and defense that the "Leviathan" state was intended.<sup>35</sup>

Other philosophers have been emphatic that sovereignty is and necessarily must be in the people, that even kings are the servants of the sovereign people; that "the King is under God and the law"; and that each man who makes up the commonalty of man has rights. Some philosophers went so far as to expound the doctrine that if these rights were violated even by a person calling himself with a royal name that person usurped sovereignty and was worthy of death.<sup>36</sup>

Alexander Hamilton wrote that the judicial power is a brake on legislative power; and that this does not imply superiority on the part of the judiciary: but

" . . . only supposes that the power of the people is superior to both; and that where the will of the legislature declared in its statutes, stands in opposition to that of the people, declared in the Constitution, the judges ought to be governed by the latter (the Constitution) rather than the former (the statutes)."<sup>37</sup>

This "revolutionary doctrine" is built into the Declaration of Independence in the sentences which state that all men "are endowed by their Creator with certain unalienable rights" and that "Governments are instituted among men deriving their just powers from the consent of the governed."

The complexities of federalism lead to philosophical and constitutional problems in which black and white are frequently blended into many shades of gray. It serves no useful purpose here to catalogue all of the permutations and combinations of legal difficulty which are presented by the existence of the forty-nine sovereignties. Suffice it to suggest in paraphrase the thought back of a sentence written in 1874:

"While each (federal sovereignty and state sovereignty) should firmly maintain the

35. Everyman's Edition, *Leviathan* 1, 143 (1950). See *Leviathan Bound-Sovereign Immunity in a Modern World*, address by William Harvey Reeves, prepared for delivery at the International Bar Association, Oslo, Norway, July 23-28, 1956. Cf. *United States v. Maurice*, 26 Fed. Cas. 1211, No. 15747, at 1216 (C.C.D. Va. 1823); 1 *Blackstone, Commentaries*, c. 18; *Republic of China v. National City Bank*, 348 U.S. 356 (1955).

36. "No man shall attack another in his home, neither the king nor any other man. If the king does this, the arrow shall be sent forth through all the shires, and (men shall) go upon him and slay him, if they are able to seize him; and if he escapes he shall never be allowed to return to the land." Larson, *The Earliest Norwegian Laws: The Frostathing* 278 (1935).

37. *The Federalist* No. 78, at 398, (Beloff ed. 1948) (Hamilton).

essential powers belonging to it, it cannot be forgotten that the coordinate parts constitute one brotherhood whose common trust requires a mutual toleration of the occupancy of what seems to be a 'common because of vicinage' bordering the domains of each."<sup>38</sup>

And then to recall the language of the 10th Amendment to the Constitution:

"The powers not delegated to the United States by the Constitution nor prohibited by it to the states, are reserved to the states respectively, or to the people."<sup>39</sup>

This explicit recognition of the supremacy of the people re-echoes the ancient doctrine of the "inalienability of sovereignty".<sup>40</sup>

### III. THE EQUILIBRIUM OF POLARITY BETWEEN THE STATE AND THE FEDERAL

Quite apart from situations in which a constitutional design calls for a joint administration of a concept by the federal nation and a state (for example, the Prohibition Laws), the general impression gained from a reading of the cases is that much apparent inconsistency is saved by recourse to the doctrine of polarity.

Polarity is defined as "the mutual dependence of opposing principles", i.e., the mutual attraction and concurrent mutual repulsion of opposing forces. As they mutually attract and repel, they ultimately gravitate into stable relationship, which prevents the equivalent of nuclear explosion and chaos.<sup>41</sup> Emerson, in his Essay on *Compensation*, said long ago:

"Polarity, or action and reaction, we meet in every part of nature. . . . Though no checks to a new evil appear, the checks exist, and will appear. If the government

38. *Brown v. Turner*, 70 N.C. 93, 102 (1874).

39. U.S. Const. Amend. X.

40. See Reisenberg, *Inalienability of Sovereignty in Medieval Political Thought* (1956).

41. ". . . the principle of polarity should help us to avoid both the identification of law with justice and also their complete divorce. To say that the law is always just is to do violence to the fact that all sorts of outrageous villains and villainies have prospered under it while some of our noblest heroes have had to revolt against it. That in the long run justice will triumph in the law is a matter of faith not of knowledge." Cohen, *My Philosophy of Law*, in *Credos of Sixteen American Scholars* 41 (1941).

Similarly Professor Paul A. Freund in his Foreword to Powell, *Vagaries and Varieties in Constitutional Interpretation IX* (1955) stated: "The antinomies of constitutional law will yield to the principle of polarity, which finds elements of validity in opposed propositions and seeks to harmonize them through judgment in a particular context."

In *Republic of China v. National City Bank*, 348 U.S. 356, 360 (1955) the Court stated: "The claims of dominant opinion rooted in sentiments of justice and public morality are among the most powerful shaping-forces in lawmaking by courts. Legislation and adjudication are interacting influences in the development of law. A steady legislative trend, presumably manifesting a strong social policy, properly makes demands on the judicial process." This is but polarity between the legislative and the judicial.

is cruel, the governor's life is not safe. If you tax too high, the revenue will yield nothing. If you make the criminal code sanguinary, juries will not convict. If the law is too mild, private vengeance comes in. If the government is a terrific democracy, the pressure is resisted by an over-charge of energy in the citizen, and life glows with a fiercer flame."<sup>42</sup>

The cases readily yield glimpses of philosophical polarity at work in the federal-state system.

One interesting recent decision is that of *United Automobile Workers v. Wisconsin Employment Relations Board*.<sup>43</sup> There the Supreme Court held that an act of Congress will not be interpreted so as to leave a state powerless to avert emergencies involving fear or loss occasioned by coercion and destruction without compelling directions to such effect. An order of the State Labor Relations Board had been issued and it was enforced by the Wisconsin Circuit Court and the State Supreme Court. The Supreme Court of the United States held, however, that while the company under review was subject to the NLRB, nevertheless the NLRB was not the exclusive method of controlling violence, even against employees. "The state interest in law and order precludes such interpretation. . . . The states are the natural guardians of the public against violence. It is the local communities that suffer most from the fear and loss occasioned by coercion and destruction. We would not interpret an Act of Congress to leave them powerless to avert such emergencies without compelling directions to that effect. We hold that Wisconsin may enjoin the violent union conduct here involved."<sup>44</sup>

In a dissenting opinion the Chief Justice and Justices Douglas and Black observed "We retreat from *Garner* . . . and open the door to unseemly conflicts between state and federal agencies when we sustain what Wisconsin has done here."<sup>45</sup> Nevertheless the Court did "retreat". The suggestion is ventured that the Supreme Court retreated in order not to upset the equilibrium of polarity between the state and the federal. In other words, the preservation of such equilibrium is vital to our national welfare, and decisions such as that in the *American Hospital* case should not be allowed to destroy it.

#### IV. INSURANCE AGAINST THE OVERREACHING OF SOVEREIGNTY: CARRY THE CASE TO THE PEOPLE AND TO THE LEGISLATURE

The basic concept of the insurance business over the years has been indemnity against loss and hardship. And no one is more solidly the object or beneficiary of insurance than the common man. Hence when

42. Emerson, *Essays*, 1st Series 96 (1876).

43. 351 U.S. 266 (1956).

44. *Id.* at 272.

45. *Id.* at 276.

sovereignty overreaches, the recourse of the industry and of the bar generally should be back to the people and to their representatives in the legislature.

The author ventures to suggest the following specific subjects for immediate legislative action:

1. The majority opinion in the *American Hospital* case should be met head on by an amendment to the McCarran Act.

One possible amendment would be along the line of that incorporated in the Walter Bill.<sup>46</sup> That bill would have made the federal anti-trust laws and related laws completely inapplicable to the insurance business. But Congress did not enact the Walter Bill. Instead, in the following year, it passed the McCarran Act. Since the Federal Trade Commission, however, by the majority decision in the *American Hospital* case in 1956, has attempted its bizarre gloss upon the statute, it may well be that Congress will be quick to make assurance doubly sure by spelling out the language of the statute explicitly.

2. There should be a re-examination of the laws by which the State of New York regulates out-of-state activities of out-of-state insurance companies. Complaint has been made that New York has been overzealous in the extent to which it has exercised its police power in the protection of its own citizens by the imposition of far-reaching conditions precedent to the operation in New York State by out-of-state life insurance companies.<sup>47</sup> In the limitation of expenses of such companies, New York has even dealt with the pattern of commission payments which such companies must follow in other states in the sale of insurance to citizens of other states through agents resident in other states.<sup>48</sup> There is doubt that such detailed extra-territorial regulation bears any close relationship to the financial ability of those out-of-state companies to meet their obligations in New York. As Mr. Anderson has stated, ". . . as this national regulation of insurance by New York is extended further, it becomes a serious threat to our system of state supervision."<sup>49</sup>

3. Support should be given to legislation which will substantially reduce the oppressive taxes now borne by insurance.

The general federal and state statistics, which indicate how crushing are the tax burdens upon life insurance, have been noted above. The generality can be made most striking by a specific example:

Had I the good fortune to be a citizen of Texas and to invest \$100 in out-of-state life insurance protection for my small family, Texas would require over three dollars

---

46. H.R. 3270, 78th Cong., 1st Sess. (1943).

47. See, e.g. Anderson, *supra* note 33.

48. N.Y. Insurance Law §§ 213, 213a.

49. Anderson, *supra* note 33, at 260.

of my \$100 to be paid to the State Treasury by way of gross premium tax. This payment represents a direct increase in the cost to me of my life insurance. Over a thirty year period that increase in cost amounts to one full annual premium. The tax is a recurring one, which has to be repaid during every single year of the life of the policy.

This homely example serves to point up the startling fact that when life insurance company taxes are increased by millions of dollars such increases, at least in participating insurance, are going to be paid out of the pockets of the policyholders, to whom life insurance is a savings mechanism. And that is true for both state taxation and federal taxation as well. Inevitably, taxes are going to be paid out of funds available for the distribution of dividends to mutual policyholders. Is it not discriminatory to tax such savings when there is no comparable tax on the savings bank balances of individual depositors in savings banks?

Further, the effect of overtaxation upon the private purses of the men and women who are stockholders of insurance companies is going to be drastic. It needs no actuary to draw this conclusion, in view of the figures cited above to the effect that a decade ago the total amount collected by the states alone upon only life insurance premiums was about half the sum of approximately \$189 million collected by the states in such taxes in 1955. These figures were with respect to life insurance premiums alone and did not include taxes on fire insurance premiums, casualty insurance premiums, workmen's compensation premiums or any other kind of insurance premiums. Nor did they include any taxes on real estate or any licenses or fees.

We need not labor the obvious. It is imperative to the industry and to all its clients that at the very next legislative sessions insurance be granted ample tax relief.

#### CONCLUSION

Other flaws in the tax laws and in laws affecting the insurance industry and its clients will readily come to mind, whether in the fields of stock investments, acquisition of real estate, welfare plans, the taxation of life insurance companies, or otherwise. Such flaws are instances of the overreaching of sovereignty, whether witting or unwitting. Insurance against such overreaching is to be found in recourse to the people and to their legislative representatives. The time to act is now.