MAINE STATE LEGISLATURE

The following document is provided by the

LAW AND LEGISLATIVE DIGITAL LIBRARY

at the Maine State Law and Legislative Reference Library

http://legislature.maine.gov/lawlib

Reproduced from scanned originals with text recognition applied

(searchable text may contain some errors and/or omissions)

STATE OF MAINE

REPORT

OF THE

ATTORNEY GENERAL

For The Calendar Years

1963 - 1964

public school." Because section 37 permits an administrative unit to present a program which is supplementary to regular public school programs, it would be error to extend the import of the reference section.

JOHN W. BENOIT
Assistant Attorney General

November 5, 1964

To: George F. Mahoney, Commissioner of Insurance

Re: Division of Commissions Among Licensed Maine Insurance Agencies

Facts:

Many insurance coverages formerly supplied through the purchase of separate policies can now be obtained through the purchase of a so-called "package policy." There are insureds who purchased separate policies from different licensed Maine agencies but now find it to their advantage to purchase a "package policy" from one agency. Some of the insureds still desire to favor agencies from whom they had previously purchased separate policies. These insureds may direct the agency that writes the package policy to divide the commission on the package policy among such other agencies as the insured may designate. In many instances no actual service may be performed for the insured by an agency other than the policy writing agency.

Question:

Without violating Maine Statutes or acts of the United States Congress may commissions be divided among licensed Maine insurance agencies designated by an insured in those instances when such agencies do not issue policies or perform any other service for the insured?

Answer:

Yes.

Opinion:

The division of commissions among licensed Maine agencies without the issuance of a policy or performance of service by other than the policy writing agency is not violative of either federal or state law. In arriving at this conclusion, the first point to be decided is whether or not a division of commissions constitutes a doing of business in interstate commerce, and therefore could be subject to federal regulation. Although not stated in the given facts we are assuming that the commissions to be divided are paid by a foreign insurance company to a resident licensed Maine agency on the sale of a so-called "package policy" issued by the foreign insurance company.

In 1868, the United States Supreme Court held that insurance was not commerce and that insurance contracts were not interstate transactions even though the parties to the contracts were domiciled in different states in *Paul v. Virginia*, 75 U. S. (8 Wall) 168. This view was maintained by the United States Supreme Court until 1944 when in the Landmark Case of *U. S. v. South-Eastern Underwriters Association*, 322 U. S. 533, the Court found the South-Eastern Underwriters Association and its membership of nearly two hundred private stock fire insurance companies and twenty-seven individuals in violation of the Sherman Anti-Trust Act and held inter alia that

the commerce clause granted to Congress the power to regulate insurance transactions stretching across state lines. In reaching the conclusion that the insurance business was interstate commerce and subject to federal regulation the Court reasoned:

> " . . . . We may grant that a contract of insurance, considered as a thing apart from negotiation and execution, does not itself constitute interstate commerce. Cf. Hall v. Geiger-Jones Co., 242 U. S. 539, 557-558. But it does not follow from this that the Court is powerless to examine the entire transaction, of which that contract is but a part, in order to determine whether there may be a chain of events which becomes interstate commerce. Only by treating the Congressional power over commerce among the states as a 'technical legal conception' rather than as a 'practical one, drawn from the course of business' could such a conclusion be reached. Swift & Co. v. United States, 196 U. S. 375, 398. In short, a nation-wide business is not deprived of its interstate character merely because it is built upon sales contracts which are local in nature. Were the rules otherwise, few businesses could be said to be engaged in interstate commerce." *U. S. v. South-Eastern Underwriters Association*, supra. 546-547.

The above rational brings us to the conclusion that an agreement to divide commissions even though among licensed insurance agencies in one jurisdiction would be considered in a chain of events constituting interstate commerce.

One of the results of the *South-Eastern* decision was the passage in 1945 of the McCarran-Ferguson Act, 15 U. S. C. A. §§ 1011-1015. The purpose of this Act was to protect the continued regulation and taxation of the insurance business by the states. The Act, in light of the *South-Eastern* decision, recognizes that the federal government has a limited role to play in the regulation of insurance. The section of the McCarran-Ferguson Act which sets forth the respective roles of the federal and state governments in the regulation of insurance is as follows:

> "(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, 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. Mar. 9, 1945, c. 20, § 2, 59 Stat. 34; July 25, 1947, c. 326, 61 State 448." *15 U. S. C. A. 520, § 1012.*

Subsection B, supra, as above, limits the federal regulation of insurance to two areas.

The first area of regulation comes into operation when there is federal enactment specifically relating to the business of insurance and there is no proviso that state regulation would take precedence.

The second area of regulation is encompassed by federal enactments covering situations where there has been a lack of regulation by state law and the federal acts are made applicable to the extent that such insurance business is not regulated by state law. The McCarran-Ferguson Act may require three steps to be taken to establish whether or not an insurance practice is violative of federal or state law. The first of these steps falls into the first area of federal regulation set forth in 15 U. S. C. A. § 1012, subsection b. This step is to determine whether or not there has been a violation of a federal act which specifically relates to the business of insurance and has no proviso as to the precedence of state law. We have found no such federal act with a provision prohibiting the practice of the division of commissions among licensed agencies where no services are rendered by one or more of the licensed agencies.

Therefore, it is necessary to take the second step and determine whether or not there is a state law regulating the insurance practices in issue. We are not unmindful of R. S. Maine, 1954, chapter 60, § 298 which deals with discrimination or rebates on premiums for fire or liability insurance. In most jurisdictions a rebate statute does not apply to an agreement whereby commissions are to be divided among others than the insured, as between insurance brokers. *5 Couch on Insurance 2d 567*, § 30: 53. A careful reading of § 298 indicates that the State of Maine is in accord with most jurisdictions and this situation does not apply to a division of commissions among licensed Maine agencies. We are also of the opinion that R. S. Maine 1954, chapter 60, § 273-K, subsection 3 is not applicable to the given fact situation.

Having satisfied ourselves that there is no state statute regulating this insurance practice a third step must be taken. This third step falls into the second area of regulation encompassed by federal enactments. 15 U. S. C. A. § 1012, subsection b, supra, provides in effect that after June 30, 1948 the Sherman Act, as amended, the Clayton Act, as amended and 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. We have checked these three acts as amended and have found no section to be applicable to the given facts situation. We are not unmindful of 15 U. S. C. A., § 13 (c) which reads as follows:

> "(c) It shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or to an agent, representative, or other intermediary therein where such intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control, of any party to such transaction other than the person by whom such compensation is so granted or paid."

This section is a portion of the Robinson-Patman Anti-Discrimination Act, which Act was an amendment to the Clayton Act. 15 U. S. C. A. § 13 (c) is section 2 (c) of the Robinson-Patman Act. The following is an explanation of this section in a publication of the Joint Committee on the Continuing Legal Education of the American Law Institute and the Amerian Bar Association.

> "Section 2 (c) is commonly known as the 'brokerage section.' It prohibits the payment by a seller of any compensation in the nature of a brokerage or commission for or on the sale of goods, or any allowance or discount in lieu thereof, to the buyer or to a buying agent, broker or other intermediary acting for the buyer or subject to his control. The buyer is also prohibited from receiving such commissions or discounts." *Price Discrimination and Problems under the Robinson-Patman Act*, 2d Revised Edition, June, 1959, at pages 2 and 3.

It is clear that this section relates to transactions between sellers of goods and buyers, their agents, broker or other intermediary acting for the buyer or subject to his control. This section cannot be applicable to the given fact situation because a licensed Maine insurance agency having performed no personal services and having received a portion of the commission is neither the buyer, the buyer's agent, a broker or other intermediary acting for the buyer or subject to his control.

We are satisfied that there is no federal or state regulation preventing the practice of dividing commissions on a package policy among licensed agencies even though one or more agency will have performed no service.

JEROME S. MATUS
Assistant Attorney General

November 17, 1964

To: Ernest H. Johnson, State Tax Assessor

Re: Taxation of Bean Property in A 2 Grafton, Oxford County

Facts:

State of Maine, grantee, purchased a certain lot or parcel of land in an unorganized township from Ervin Bean, grantor, on which there is a building. The grantor reserved the building on the premises which was to remain the grantor's personal property and reserved to the grantor and his spouse, a so-called life interest in the premises. There is also included in the deed five restrictions which are as follows:

1. No additional building, nor additions to the existing building, are to be erected without written permission of the State of Maine, its successors or assigns, acting through the State Park and Recreation Commission.
2. The premises are not to be used for commercial purposes but only for residential purposes. Renting the building for residential use is deemed to be a commercial purpose.
   Violation of this restriction shall immediately forfeit the right of the grantor and surviving spouse to occupy said premises.