IMPLEMENTATION OF FULL DISCLOSURE OF POLICY VALUE IN THE LIFE INSURANCE CONTRACT*

Michael D. Bernacchi†

I. Introduction

The consumer movement has grown in strength and popularity during the last decade. One of the basic tenets of this movement has been the right of the consumer to product information. Consonant with this growth, there has been an increased demand by the purchasers of life insurance policies for complete life insurance product disclosure. Such product disclosure would benefit the life insurance industry as well as the consumer in the form of increased consumer satisfaction, confidence and interest in the life insurance product. Moreover, this consumer interest is needed by the industry, for although the life insurance product is a much needed one, it suffers from insufficient consumption.

This article will attempt to provide an overview of some of the problems existant in the current state of the relationship among life insurance industry, product and consumer, and will suggest several methods by which "full disclosure of life insurance value" may be implemented as a means of alleviating many of these problems.

II. Consumer Dis-sovereignty[1]

Buyers and sellers in any given marketplace are confronted with a number of pre-sale or selection decisions[2] prior to the making of their actual decision to purchase. These pre-sale decisions require appropriate information in order to be made intelligently, and the correctness of these decisions will oftentimes determine the ultimate "rationality"[3] or utility of the final purchase decision. Of

* Copyright © 1976 by Michael D. Bernacchi.
† Assistant Professor of Marketing, University of Detroit. B.A. 1968, M.A. 1970, Drake University. Ph.D. 1973, Southern Illinois University.—Ed.

1. One of the fundamental principles upon which our economic system is founded is that the consumer is sovereign. This means that it is the consumer alone who, by the casting of his dollar votes in the marketplace, dictates those goods and services that are to survive in the economic market. For a very interesting and thought provoking discussion see J. Galbraith, The New Industrial State 211-18 (1967).

2. Brand, size, shape and color are among the almost infinite number of pre-sale or selection decisions to be made by the consumer.

3. Most basically, a "rational" purchase means that the consumer has a need, knows of his need, and is willing to buy a product if it is plainly explained how the product will fill the need. Legal authors have for sometime concerned themselves with the diminution of consumer sovereignty because of a decrease in both "rational" consumer behavior and advertisements designed to stimulate purchase of the product by providing concrete information about the product's attributes. *See Developments in the Law—Deceptive Advertising*, 80 Harv. L. Rev. 1005, 1052-53 (1967); Thain, *Consumer Protection: Advertising—The FTC Response*, 26 Food Drug Cosm. L.J. 609, 621 (1971). Unfortunately, these authors have founded their perceptions of consumer behavior on an artificial distinction between "rationality" and "irrationality" based on motivation. The implication is that consumer behavior based on love, fear, sex, pride, power, ego and emulation is "irrational." Such a

course, different products and services demand different levels of intensity of information[4] in order to sufficiently enable the consumer to make an informed purchase decision. In some instances this needed information will emanate primarily from seller sources, and in other instances from non-seller sources.[5] Both the intensity of information needed by the consumer for pre-purchase and purchase decisions, as well as the source of that information, are dictated in large measure by the nature and complexity of the product being marketed.

It should perhaps be noted at the onset that most life insurance purchasers possess very little in the way of independently generated information about the life insurance product. The average life insurance consumer is able to assess how much a policy is going to cost, the premium, and how much the "value" of the policy will be if the insured dies (*i.e.*, what the death benefit will be), but beyond that, the consumer must generally rely solely on the statements and promises made by the insurance agent.

With this point in mind, life insurance may further be characterized as being both an unsought[6] and a complex[7] good. The life insurance product is an unsought good for the reason that few consumers actively seek either its purchase or information concerning its purchase. It is a complex good largely because it is capable of serving varient purposes[8] and is marketed as such. For example, the life insurance product may be purchased solely for its protective value, or it may be purchased with an added investment-savings objective in mind. Life insurance is complex also because of how it is sold. The methods and tables used by the insurance industry to determine premiums and pay outs are confusing to the average consumer, and the task of comparing policy values almost impossible. Additionally, the sheer number of product offerings both within a given firm and among the different firms is overwhelming. Illustrative of this last point is the statistic that in 1970 there were almost 2000 firms engaged in the sale of life insurance, each firm making multiple product offerings.[9] Table I demonstrates the potential difference in offerings by com-

---

limited interpretation runs contrary to logic, for there is nothing "irrational" as such about a purchase founded on love, fear, or pride. The point is that "rationality" as it refers to consumer behavior is oftentimes a misused term. The concept itself is an individually interpretable one. It may be noted, here, that different consumers need different kinds and amounts of information in order for their purchase to be "rational," although there are certain parameters of "information need" within which almost every consumer will fall. It is in this spirit of "rationality" that the term is used. For a very enlightening discussion of "rationality," see Katona, *Rational Behavior and Economic Behavior*, 60 PSYCHOLOGICAL REV. 307 (1953).

4. Cox & Rich, *Perceived Risk and Consumer Decision-Making—The Case of Telephone Shopping*, 1 J. MARKETING RESEARCH 32 (Feb. 1964). *See generally* E. ROGERS & F. SHOEMAKER, COMMUNICATION OF INNOVATIONS 104-13 (2d ed. 1971).

5. *See generally* E. MCCARTHY, BASIC MARKETING: A MANAGERIAL APPROACH 247-79 (3d ed. 1968).

6. *Id.* at 257-58, 424, 450.

7. J. BELTH, LIFE INSURANCE: A CONSUMER'S HANDBOOK 34-35, 180-81 (1973) [hereinafter cited as BELTH]. *See also* L. GORDON & S. LEE, ECONOMICS FOR CONSUMERS ch. 21 (1972) [hereinafter cited as GORDON & LEE].

8. BELTH, *supra* note 7. at 180.

9. *Id.* at 57.

paring the premiums per $1000 for a man 25 years of age in ten different policies.

Table I

Premium per $1000 for Selected Types of Life Insurance Contracts for a Man at Age 25[10]				
1	2	3	4	5
10-year Renewable Convertible Term	Term to Age 65	Ordinary Life Nonpar*	Ordinary Life Par**	20-Payment Life Nonpar
$3.65	$7.30	$12.64	$17.46	$21.48
20-Payment Life Par	Life Paid Up to 65 Nonpar	Life Paid Up to 65 Par	20-Year Endow. Nonpar	20-Year Endow. Par
$29.27	$14.29	$19.42	$42.00	$47.93

*Nonparticipating in "dividends" **Participating in "dividends"

Both of these characteristics of life insurance as an "unsought" good and as a "complex" good are likely to lead the life insurance consumer to dis-sovereignty. "Consumer sovereignty"—the concept that the consumer, by his dollar votes cast in the marketplace, alone dictates those goods and services that are to survive in the economic market—presumes a level of product information sufficient for the consumer to make an informed choice. But the characteristics of life insurance as unsought and complex are likely to adversely affect the source and completeness of information made available to the life insurance purchaser. Because the life insurance product is an unsought good, the burden falls primarily on the seller-insurance agent to effect its sale. The agent's compensation is usually of the commission-bonus variety.[11] Hence, there is an incentive to make a sale that is most personally beneficial to the insurance agent—not the consumer. The agent has the means to effect such a sale because of the complex nature of the life insurance product, and because the agent has almost exclusive control over both the quality and quantity of information available for dissemination to the consumer.

One other point should be made. Table I above, while illustrating the variety in life insurance offerings, also serves to demonstrate the problem of presently using "price" (premium) as an index of value. Interestingly enough, traditional price theory assumes that price measures value.[12] This assumption, however, is only valid in the economist's perfectly competitive market—a market which is hardly descriptive of the insurance marketing structure as it

10. GORDON & LEE, *supra* note 7, at 504. There is little question but that this table is a very conservative statement of the almost infinite variety of policies offered.
11. On the life insurance agent generally, see BELTH, *supra* note 7, ch. 6.
12. GORDON & LEE, *supra* note 7, at 246-47.

exists today. One of the salient differences between perfect and imperfect markets comes in the amount, kind and cost of information available to consumers. In a perfectly competitive market, all consumers are blessed with information which is complete, correct and costless.[13] In an imperfectly competitive market, consumers are burdened with information which is usually incomplete, incorrect and costly.[14] Because price is only one of a multitude of variables affecting purchase decisions, the greater the imperfection of the total information, the less appropriate price serves as a measure of value.

Different industries within this country's economy have different degrees of competition. The agricultural industry generally exemplifies this economy's most perfectly competitive market, while the utility companies and the steel and automobile industries are among the most imperfectly competitive.[15] Unfortunately for millions of consumers of billions of dollars of life insurance,[16] a recent analysis of life insurance data[17] has demonstrated a marketplace reflecting a much higher degree of imperfect or non-competition and economic inefficiency than ever anticipated.

Compound, then, an industry with demonstrated imperfect or non-competitiveness, the fact that the industry has almost exclusive control over both the quantity and quality of information to be disseminated to the consumer, and the very real element of consumer confusion,[18] and it becomes apparent that the

---

13. *See generally* J. Carmen & K. Uhl, Marketing ch. 1 (1973); W. Cochrane & C. Bell, The Economy of Consumption ch. 1 (1956); A. Downs, An Economic Theory of Democracy 207 (1957).

14. *See* authorities cited note 13, *supra.*

15. It is often the case that a producer operating in a very competitive market is a price taker and an information giver, while his counterpart in a less competitive market is a price maker (the less the competitiveness of the environment the greater the opportunity to dictate price) and an information restricter.

16. In 1971, American consumers purchased over 26 million new life insurance policies amounting to 189 billion dollars of new life insurance. Of that total approximately 11 million policies and 132 billion dollars were attributable to ordinary insurance, 9 million policies and 8 billion dollars were attributable to industrial insurance, and 6 million policies and 49 billion dollars were attributable to group insurance. *See* Newton, *Scope and Structure of Life and Health Insurance*, in D. Gregg & V. Lucas, Life and Health Insurance Handbook 924 (1973).

17. It is important to note that there is a substantial degree of market concentration within the life insurance industry. Data from the most recent and specific study has demonstrated that there is a significant degree of concentration for ordinary, group and industrial life insurance at the state level. *See* Cummins, Denenbery & Scheel, *Concentration in the U.S. Life Insurance Industry*, 39 J. Risk & Ins. 177 (1972). This concentration has serious consumer dis-sovereignty implications. For while "market concentration" need not in any sense of the expression constrictively mean consumer dis-sovereignty, it has at least operationally meant that in the United States. Market concentration benefits accruing in the productive sector have not been proportionately passed, if at all, to the consumptive sector of the economy. The conclusion to be drawn is that the greater the degree of industry concentration, the greater the market power possessed by certain firms, and the greater the consequent diminution of both market competitiveness and efficiency. Indeed, this conclusion was drawn in the above study. There, statistical testing of the market concentration data from the life insurance industry suggested that "the degree of concentration present has a significant effect on competition and efficiency in the ordinary life insurance market." *Id.* at 199.

18. It has been suggested by Herbert S. Denenberg, Insurance Commissioner of Pennsylvania and a leading advocate of "truth in life insurance" legislation, that consumer confusion is both an overt and conscious policy of the life insurance industry. Denenberg

probability of price accurately reflecting value is decreased substantially. The informational need for a uniform, generally acceptable and understandable measure of value for life insurance consumers emerges in this author's mind as being of paramount importance.

III. HISTORICAL BASIS FOR STATE REGULATION

The need for the insurance product has long been recognized. It was early noted in the case of *German Alliance Insurance Co. v. Kansas*[19] that "[Insurance] is practically a necessity to business activity and enterprise. It . . . according to the sense of the world from the earliest times,—certainly the sense of the modern world,—is of the greatest public concern."[20] This is so because the insurance product serves to fulfill one of the most basic needs common to all persons—the need for security. "Security" is listed by Maslow[21] in his widely accepted and empirically validated[22] study on man's "hierarchy of needs" as one of the most important survival needs, second only to man's basic physiological needs.[23] As it relates to life insurance, this need for security takes the form of a perceived need by heads of households that they should supply some measure of financial security to surviving family members in the event of death.[24]

The regulation of this "great public concern" has traditionally rested with the states. The tenth amendment to the Constitution provides that all powers not delegated to the United States by the Constitution are reserved to the states. The power to regulate commerce among the states is, however, specifically delegated to the Congress by article I, section 8 of the Constitution. The question was early raised whether the business of insurance constituted "com-

---

strengthens his position by illustrating that even so-called "experts" have fallen prey to the confusion. *See Hearings on the Life Insurance Industry Before the Senate Subcomm. on Anti-Trust and Monopoly*, 93rd Cong., 1st Sess., pt. 3, at 1518-20 (1973).

19. 233 U.S. 389 (1914).

20. German Alliance Ins. Co. v. Kansas, 233 U.S. 389, 414-15 (1914). For further discussion of insurance as existing in the public interest, see *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533, 540 (1944); *Caminetti v. Guaranty Union Life Ins. Co.*, 52 Cal. App. 2d 330, 126 P.2d 159 (1942); *Caminetti v. State Mut. Life Ins. Co.*, 52 Cal. App. 2d 321, 126 P.2d 165 (1942); *Strand v. Bankers' Life Ins. Co.*, 115 Neb. 357, 213 N.W. 349 (1927); *State ex rel. Allstate Ins. Co. v. Bowen*, 130 Ohio 347, 199 N.E. 355 (1936); *Farmers' Gin Co. v. Armstrong*, 80 S.W.2d 448 (Tex. Civ. App. 1935); Comment, *State Regulation Under the McCarran Act*, 47 TULANE L. REV. 1069 (1973).

21. *See generally* A. MASLOW, MOTIVATION AND PERSONALITY (1954).

22. *See* Hamm & Cudriff, *Self Actualization and Product Perception*, 6 J. MARKETING RESEARCH 470 (Nov. 1969); McFall, *Priority Patterns and Consumer Behavior*, 33 J. MARKETING 50 (Oct. 1969).

23. Maslow's hierarchy of survival needs in order of importance are: (1) physiological, (2) safety, (3) belongingness and love, (4) esteem and status, and (5) self.

24. How well this need for planned financial security is in fact being satisfied by the life insurance industry in the United States raises a different question. A 1967 Consumer's Union Report revealed that "[t]he average insured head of a household with children under eighteen maintains about $12,600 of group and individual coverage. But in 46 per cent of such insured households, coverage comes to less than $10,000 and in 24 per cent it amounts to less than $5,000." CONSUMERS UNION REPORT ON LIFE INSURANCE 13-14 (1967). Even in 1967 dollars, $10,000 is an insufficient sum to financially secure any family for even a short period of time.

merce among the states" so as to be subject to federal control. This question was answered in the negative in the case of *Paul v. Virginia.*[25] In *Paul*, the United States Supreme Court indicated that interstate commerce was not involved in the issuance of a policy of insurance, and hence insurance was subject to state regulation:

> Issuing a policy of insurance is not a transaction of commerce. . . . These contracts are not articles of commerce in any proper meaning of the word. They are not subjects of trade and barter offered in the market as something having an existence and value independent of the parties to them. They are not commodities to be shipped or forwarded from one State to another, and then put up for sale. They are like other personal contracts between parties which are completed by their signature and the transfer of the consideration. Such contracts are not inter-state transactions, though the parties may be domiciled in different States. . . . They are, then, local transactions, and are governed by the local law. They do not constitute a part of the commerce between the States any more than a contract for the purchase and sale of goods in Virginia by a citizen of New York whilst in Virginia would constitute a portion of such commerce.[26]

While *Paul v. Virginia* addressed itself specifically to the issuance of a policy of fire insurance, its scope was enlarged by subsequent decision to apply to the issuance of policies of life and health insurance.[27]

It was not until seventy-five years after the decision in *Paul v. Virginia* that exclusive state regulation of the insurance business suffered its first setback. This setback came as a result of the decision in *United States v. South-Eastern Underwriters Association*,[28] where the Supreme Court upheld the power of Congress to regulate under the Sherman Anti-Trust Act[29] certain aspects of the methods by which interstate insurance companies did business. South-Eastern Underwriters Association and others had been indicted for conspiring to restrain interstate trade and commerce by fixing and maintaining arbitrary and noncompetitive premium rates on fire and other lines of insurance and for conspiring to monopolize trade and commerce in the same lines of insurance among certain states. The district court had dismissed the indictments for the reason that the business of insurance could not constitute "commerce" and therefore the defendants were not engaged in "commerce among the states" within the meaning of the Commerce Clause or the Sherman Anti-Trust Act. Reversing, the United States Supreme Court held that the power to govern intercourse among the states was vested in the Congress and available to be exercised for the national welfare as the Congress should deem necessary. When the business of insurance is conducted across state lines, held the Court, it—like any kind of commercial enterprise conducting its activities across state

---

25. 75 U.S. (8 Wall.) 168 (1868).
26. Paul v. Virginia, 75 U.S. (8 Wall.) 168, 183 (1868).
27. *See* New York Life Ins. Co. v. Deer Lodge County, 231 U.S. 495 (1913).
28. 322 U.S. 533 (1944).
29. 15 U.S.C. §§ 1-7 (1970) (originally enacted as Act of July 2, 1890, ch. 647, §§ 1-8, 26 Stat. 209-10).

lines—is subject to the regulatory power of Congress under the Commerce Clause.

Congressional reaction to the decision in *South-Eastern Underwriters Association* came quickly in the form of the McCarran-Ferguson Insurance Regulation Act of 1945.[30] The McCarran Act—unchanged after thirty years of existence—states as a declaration of policy that "the continued regulation and taxation by the several States of the business of insurance is in the public interest, . . ."[31] and in a later provision[32] states that "[t]he 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."[33] More important to this discussion, however, the McCarran Act provides that certain existing federal statutes; namely, the Sherman Act,[34] the Clayton Act[35] and the Federal Trade Commission Act,[36] shall be applicable to the business of insurance only to the extent that such business is not regulated by state law.[37] The effect of the McCarran Act is to state that, although the Congress has the power to regulate the insurance business, it will not exercise that power unless the states demonstrate an inability to do so.

IV. Implementation of Value Disclosure

The implementation of any value disclosure proposal requires a balancing of many factors. The proposal to be adopted must of course accomplish the basic goal of full disclosure of life insurance value. Beyond this, potential disruption of the life insurance industry and dislocation of existant legal principles are certainly other factors to be weighed in reaching any decision on a proposal. With this caveat in mind, several alternative regulatory schemes for implementing value disclosure in life insurance present themselves for examination. Disclosure in life insurance could be effected by: (1) self-regulation by the life insurance industry; (2) a repeal of the McCarran Act and implementation of a federal insurance law; (3) continued regulation under the McCarran Act; (4) enactment of a Life Insurance Disclosure Act or Truth in Life Insurance Act;[38] and (5) regulation under the Federal Trade Commission Act.[39]

A. *Industry Self-Regulation*

Considerable discussion has been generated about the ability of industry to successfully implement on its own such restrictions as may be necessary to

30. 15 U.S.C. §§ 1011-15 (1970) (originally enacted as Act of March 9, 1945, ch. 20, §§ 1-5, 59 Stat. 33).
31. 15 U.S.C. § 1011 (1970).
32. *Id.* § 1012(a).
33. *Id.*
34. *Id.* §§ 1-7.
35. *Id.* §§ 12-27.
36. *Id.* §§ 41-77.
37. *Id.* § 1012(b).
38. *See generally* Belth, *Price Disclosure in Life Insurance*, 1972 Wis. L. Rev. 1054.
39. 15 U.S.C. §§ 41-77 (1970).

adequately protect the public from harm.[40] This article will not consider self-regulation as a viable means of effecting value disclosure of life insurance, both for the reason that, historically, self-regulation by industry has been less than successful,[41] and for the reason that, in the personal view of this author, only through governmental regulation can greater "public interest" control of the life insurance industry come about.

B. *Repeal of the McCarran Act—Federal Insurance Law*

A second alternative available to effect full disclosure of life insurance value would be to repeal the McCarran Act and replace it with a federal insurance law containing a "full disclosure of life insurance value" provision. Such action is perhaps not as radical a suggestion as it might at first appear. As has been noted by Professor Clark:

> At the present time it is virtually an article of faith in insurance circles that the regulation of insurance has been, and must continue to be, by the states and for the states. It was not always so. In post Civil War America and through the first decade of the twentieth century, the leading insurance executives of the day were in favor of federalization of insurance supervision, federalization of insurance taxation and federal chartering of insurance companies. At that time all concerned were conscious of the fact, now largely forgotten, that the case of *Paul v. Virginia* was a test case instituted by insurance interests in a then unsuccessful attempt to effect a judicial declaration that the Commerce Clause prohibited state regulation and taxation of the business of insurance, while permitting exclusively federal regulation and taxation of the business of insurance.[42]

Increased federal regulation of the insurance business has more recently been advanced by even the draftsmen of state business corporation acts.[43] In the case of full disclosure of life insurance value, exclusive federal regulation would have the advantage of making value disclosure a complementary part of a uniform regulatory scheme, rather than a potentially misplaced provision or exception tacked on to currently existing legislation.

---

40. For an extensive survey of industrial regulation—its successes, failures and effects—see L. DAVIS, J. HUGHES & D. MCDOUGALL, AMERICAN ECONOMIC HISTORY (1965).

41. *Id.*

42. Clark, *State Regulation of "The Business of Insurance"—McCarran's Shattered Shield*, 21 DRAKE L. REV. 657 (1972) (citations omitted) [hereinafter cited as Clark].

43. A report by the New Jersey Corporation Law Revision Commission states in part as follows:

> It is clear that the major protections to investors, creditors, employees, customers, and the general public have come, and must continue to come, from Federal legislation and not from state corporation acts. Whether it be anti-trust or securities regulation, wage and hour or social security laws; bankruptcy or corporate reorganization statutes; or even controls over personnel practices provided in the Internal Revenue Code, or controls over the methods of marketing or advertising of products, provided both by statutes and administrative agencies, the means of assuring such protections must be provided by the Federal Government.

REPORT OF THE NEW JERSEY CORPORATION LAW REVISION COMMISSION ix (1968), noted in Clark, *supra* note 41, at 658.

C. *Continued Regulation Under the McCarran Act*

A number of authors[44] have commented favorably upon the durability of the McCarran-Ferguson Insurance Act of 1945[45] because of its relative vitality after almost three decades. This durability should not, however, lull one into the complacent belief that the Act bespeaks near perfect legislation. As a matter of record, the McCarran Act in general, and section 1012[46] in specific, have engendered critical comment in many legal publications.[47]

The fundamental inquiry in any analysis of the McCarran Act is whether the public interest is effectively being served by the continued regulation of the business of insurance by the several states. Section 1012 expressly recognizes the paramount position of state regulation. Yet as noted earlier, the public is for all practical purposes precluded from a meaningful evaluation of alternative life insurance policies. Since the insurance industry itself, as well as its regulation by the states, has been clothed with the public interest by the Supreme Court[48] as well as by the McCarran Act[49] itself, there has been virtually no discussion as to whether the public interest either has been or is now being effectively served by the specific provisions of the Act. The critical distinction to be drawn in this regard is that while the "public interest" has been continually offered as a justification for state regulation, courts have done so without questioning the utility of the justification.[50]

The absence of any decisive analysis of this public interest justification by the courts is perhaps explained by the recognition that such relates to the evaluation of policy formation[51] and offers an acceptable rationale within a legal context which, thus far, has been acceptable at face value without challenge. Thus, the courts can quite easily avoid a difficult and, at least tangentially so, complex legislative policy determination. It would seem logical, therefore, to avoid discussion of such an intangible concept.[52]

---

44. W. YOUNG, INSURANCE 34-35 (1971); Comment, *State Regulation Under the McCarran Act*, 47 TULANE L. REV. 1069 (1973).

45. 15 U.S.C. §§ 1011-15 (1970).

46. Section 1012 provides:

> 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 . . . [Sherman Act, Clayton Act 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.

Id. § 1012.

47. *E.g.*, Note, *Insurance Regulation and Antitrust Exemptions: McCarran-Ferguson, The Boycott Exception, and the Public Interest*, 27 RUTGERS L. REV. 140 (1973); Comment, *State Regulation Under the McCarran Act*, 47 TULANE L. REV. 1069 (1973).

48. United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533, 540 (1944); German Alliance Ins. Co. v. Kansas, 233 U.S. 389, 415 (1914).

49. 15 U.S.C. § 1011 (1970).

50. *See, e.g.*, Eckenrode v. Life of Am. Ins. Co., 470 F.2d 1 (7th Cir. 1973); Lewis v. Manufacturers Cas. Ins., 107 F. Supp. 465 (W.D. La. 1952).

51. *Developments in the Law—Deceptive Advertising*, 80 HARV. L. REV. 1005, 1024-25 (1967).

52. The real danger in using the "public interest" in justification of state regulation is

Another meaningful justification for avoiding a specific public interest discussion within the context of the McCarran Act is that it is possible to indirectly reach the question of state regulation in the public interest through construction of section 1012(b) (providing for the superseding of state regulation by federal regulation "to the extent that such business is not regulated by state law"). That is, if one permissively construes whatever the state does as appropriate state law regulation under the McCarran Act, then, in effect, the given state action has been upheld as promoting the "public interest." On the other hand, if one strictly construes the kind of state action needed to fall within the definition of state law, it has been effectively determined that the state's actions, or lack of them, have not been in the public interest. This vehicle permits a public interest determination without ever requiring the rigor of formally embarking upon it.

In effect, the courts have interpreted "not regulated by state law" in a variety of ways so as to permit the appropriate federal governance when seemingly it has been deemed necessary. It has been suggested that three different issues have been discussed under the McCarran Act in construing the phrase "not regulated by state law:"

(1) the necessity under the Act of the various states enforcing their legislation;

(2) the jurisdictional boundaries and limitations placed upon the various states; and

(3) the application of the term "insurance" or "business of insurance" to a variety of factual situations.

First, the question of state enforcement has arguably left open the question of whether state regulation per se is exclusive or whether only *effective* regulation will suffice. For example, in *California League of Independent Insurance Producers v. Aetna Casualty & Insurance Co.*,[53] the court found, in essence, that any time a state statute exists, it is sufficient to preclude federal regulation regardless of the utlization of that statute.[54] It is apparent that this interpretation of the McCarran Act provides a strong incentive for increased federal regulation of the insurance industry. Assume, for example, that in State Y the insurance industry possesses a lobby powerful enough to influence legislation establishing a State Board of Insurance Regulation whose sole function is to regulate the entire gamut of insurance activity located in that state. Under *California League* it is readily apparent that the mere creation of

---

the problem of determining what is in the "public interest." This determination is further complicated by the oftentimes abusive use of the term "public interest" as a smoke screen for engendering righteous indignation. Brian Barry in "The Public Interest," 38 PROCEEDINGS OF THE ARISTOTELIAN SOCIETY 12 (Supp. I) (19—) has observed that "when discussing concrete issues, the public interest is more popular than justice, fairness, equality or freedom."

53. 175 F. Supp. 857 (N.D. Cal. 1959).

54. *See also* Ohio AFL-CIO v. Insurance Rating Bd., 451 F.2d 1178 (6th Cir. 1971); North Little Rock Transp. Co. v. Casualty Reciprocal Exch., 181 F.2d 174 (8th Cir.), *cert. denied*, 340 U.S. 823 (1950); Miley v. John Hancock Mut. Life Ins. Co., 148 F. Supp. 299 (D. Mass.), *aff'd per curiam*, 242 F.2d 758 (1st Cir.), *cert. denied*, 355 U.S. 823 (1951).

the Board would preclude federal regulation of any of the activities of insurance in that state.[55]

The second basic problem facing effective state regulation of life insurance activity within a given state is to what extent state regulation of insurance activity precludes federal regulation of that same activity to the extent that it reaches beyond the borders of the state. One indication of the effective control which the Federal Trade Commission may have is the case of *Federal Trade Commission v. Travelers Health Association.*[56] In *Travelers Health*, a Nebraska statute purported to prohibit deceptive practices in Nebraska or "in any other state." In reversing the circuit court determination setting aside an FTC cease and desist order, the Supreme Court stated that a state statute could not deprive the residents of other states of the protection afforded by the Federal Trade Commission Act. The thrust of this decision was that the McCarran Act could—and did in fact—reach the activities involved, except as to those which were practiced or had their impact in Nebraska, and which were reached by the laws of that state. The same rationale was applied in *United States v. Chicago Title & Trust Co.*,[57] where the Illinois federal district court held that the McCarran Act was not effective to shield the application of section 7 of the Clayton Act[58] from an insurance operation having a multi-state impact. The essential reasoning of the court was that the Clayton Act must control because of the fact that of the ten states affected, only four had laws sufficiently comparable to section 7 of the Clayton Act to warrant a finding that the state law could effectively sanction the insurance activity in question.

The final inroad—judicially created for the most part—in the preclusion of the application of the McCarran Act as a shield for the regulation of life insurance by the states arises in the use of the term "insurance" or "business of insurance." The basic issue in this regard concerns the willingness of the courts to apply a narrow or restrictive definition to the terms[59] so as to evade the strictures of the McCarran Act's proclivity toward state regulation.[60]

---

55. *See* Ohio AFL-CIO v. Insurance Rating Bd., 451 F.2d 1178 (6th Cir. 1971).

56. 362 U.S. 293 (1960).

57. 242 F. Supp. 56 (N.D. Ill. 1965).

58. 15 U.S.C. § 7 (1970).

59. In prior years the United States Supreme Court has interpreted the phrase "business of insurance" to include: 1) the fixing of rates (*United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944)); 2) the advertising and selling of policies (*FTC v. National Casualty Co.*, 357 U.S. 560 (1958)); and 3) the licensing of companies and their agents (*Robertson v. California*, 328 U.S. 440 (1946)).

Yet, on the other hand, federal courts have restrictively construed the "business of insurance" to exclude such situations where mail fraud and maritime law have been involved. See *United States v. Sylvanus*, 192 F.2d 96 (7th Cir. 1951), *cert. denied*, 342 U.S. 943 (1952), and *Maryland Casualty Co. v. Cushing*, 347 U.S. 409 (1954), respectively.

And in a much discussed decision the United States Supreme Court in *S.E.C. v. National Securities, Inc.*, 393 U.S. 453 (1969), very restrictively construed the "business of insurance" to only include the contract of insurance.

The point of this discussion is that the courts have laid the groundwork with a variety of "business of insurance" interpretations to be able to construe that phrase as permissively or as restrictively as they desire.

60. Comment, *State Regulation Under the McCarran Act*, 47 TULANE L. REV. 1069, 1081 (1973). *See also* S.E.C. v. National Sec. Ins., 393 U.S. 453 (1969); S.E.C. v. Variable Annuity Life Ins. Co. of America, 359 U.S. 65 (1959).

In *SEC v. National Securities*[61] the Supreme Court restricted the definitional limits of the business of insurance to a term of art describing those acts which orbit the relationship between the insured and the insurer. Included were such activities as advertising, selling, licensing to ensure reliability and ratemaking. The remaining gamut of corporate activities were held to be within the reach of the SEC in its regulatory capacity. It would appear to be fairly logical to presume that if an activity is subject to the regulatory control of the SEC it would be subject as well to the control of the Federal Trade Commission. This would occur because the basic theory behind both SEC and FTC regulatory authority emanates from the same Congressional policy and authority.

A further example of the dichotomy between the insurance business and the business of insurance is illustrated by the opinion in *Maryland Casualty Co. v. American General Insurance*,[62] where the court held that the McCarran Act exemptions did not prevent intervention by the Justice Department to prevent prospective mergers.[63] The courts seem to have considered that such activity was not within the sphere of "business of insurance" as defined by the Act and was not therefore exempt from federal regulation.

The conclusion to be drawn from this is that if the distinction is to continue to be viable between the insurance business and the business of insurance, then it is likely that an increasing number of activities will become part of the insurance business by judicial fiat making them subject to federal regulation. This is especially likely if states continue to provide minimal regulation while the industry takes advantage of such regulatory deficiencies.

In sum, therefore, there are three varying opportunities which enable the federal government to achieve greater control. Such greater federal control would be desired when the existing state regulation or its absence has not been or is not "in the public interest." Hence, the fulfillment of the public interest must be the basis for permitting or excluding federal control.

D. *Truth in Life Insurance Act*

Consonant with the consumer movement, there have been a number of consumer information or consumer disclosure proposals made with respect to various consumer transactions: Truth in Lending;[64] Truth in Packaging and Labeling;[65] Truth in Advertising;[66] and Truth in Pricing.[67] An additional

61. 393 U.S. 453 (1969).
62. 232 F. Supp. 620 (D.D.C. 1964).
63. *See also* United States v. Chicago Title & Trust Co., 242 F. Supp. 56 (N.D. Ill. 1965).
64. Consumer Credit Protection Act, 15 U.S.C. §§ 1601-65 (1970).
65. Fair Packaging and Labeling Act, 15 U.S.C. §§ 1451-61 (1970).
66. Federal Trade Commission Act, 15 U.S.C. §§ 41-77 (1970). When first enacted in 1914, section 5 of the Act prohibited only "unfair methods of competition." Application to advertising was made on the theory that an advertisement soliciting the purchase of goods is an unfair method of competition when the advertisement contains false representations. *See* Gimbel Bros. v. FTC, 116 F.2d 578 (2d Cir. 1941). Section 5 was later amended to extend

piece of consumer information legislation aimed directly at value disclosure of life insurance policies may be most consistent both with the current consumer movement and with current legislative trends. Implementation of such a Truth in Life Insurance Act could be initiated either by amendment to the McCarran Act,[68] or by enactment of separate legislation.

E. *Federal Trade Commission Act*

As noted, the McCarran Act specifically makes applicable to the business of insurance the Federal Trade Commission Act to the extent that such business is not regulated by state law.[69] Section 5[70] of the Federal Trade Commission Act states that "[u]nfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful."[71] That section further provides that whenever the Federal Trade Commission has reason to believe that any business is using any unfair or deceptive practice in commerce, it shall proceed against that business "if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public."[72] It is section 5 of the Federal Trade Commission Act which would serve as the nexus for full disclosure of life insurance value under this alternative regulatory proposal.

False or deceptive advertising is within the proscription of section 5 of the Federal Trade Commission Act prohibiting unfair or deceptive acts or practices.[73] The case for Federal Trade Commission jurisdiction over the business of insurance in the area of value disclosure of life insurance would closely parallel the Commission's basis for regulatory jurisdiction over advertising. In order for advertising to be subject to Federal Trade Commission jurisdiction, three requirements must be met: (1) the advertisement must be found to have been made "in commerce";[74] (2) there must be reason to believe that the

---

to "unfair or deceptive acts or practices in commerce." For discussion of the FTC's involvement with advertising, see *Developments in the Law—Deceptive Advertising*, 80 Harv. L. Rev. 1005, 1024-25 (1967); Millstein, *The Federal Trade Commission and False Advertising*, 64 Colum. L. Rev. 439 (1964); Note, *The Regulation of Advertising*, 56 Colum. L. Rev. 1019 (1956).

67. Some consumer advocate groups have been requesting—and some consumer oriented supermarkets have been implementing—"unit pricing" schemes (cents per pound for all brands). D. Rothschild & D. Carroll, Consumer Protection 715 (1973).

68. Since few states have demonstrated an interest, let alone an ability, in effecting full disclosure of life insurance value, any proposed federal regulation in the area would not violate the rule of self-restraint imposed by Congress on itself in the McCarran Act. *See generally* text accompanying notes 29-36, *supra*.

69. 15 U.S.C. § 1012(b) (1970).

70. *Id.* § 45.

71. *Id.* §45 (a)(1).

72. *Id.* § 45(b).

73. Giant Food, Inc. v. FTC, 322 F.2d 977 (D.C. Cir. 1963), *cert. denied*, 376 U.S. 967 (1964).

74. Unfortunately, "in commerce" as used in the Federal Trade Commission Act was not given the same broad scope as the term "affecting commerce" found in both the Interstate Commerce Act, 28 U.S.C. § 2101 (1970), and the National Labor Relations Act, 29 U.S.C. § 152(7) (1970). In *FTC v. Bunte Bros.*, 312 U.S. 349 (1941), the Supreme Court held that the Federal Trade Commission's authority did not extend to practices in

advertisement constitutes an unfair method of competition or an unfair or deceptive act or practice; and (3) the Commission proceeding in respect to the advertising practice must be to the interest of the public. The requirements of section 5, if applied to extend Federal Trade Commission jurisdiction over life insurance value disclosure, would be easily met. First, with respect to the interstate commerce requirement, the chances that an insurance company would neither involve itself in interstate commerce nor substantially affect interstate commerce by value disclosure incidental to the issuance of its policies are very slight. Secondly, a very strong case can be made that the withholding from the consumer by the life insurance industry of meaningful information concerning life insurance is an unfair and deceptive practice. Lastly, the identification of the "public"[75] as the present and future consumers of the life insurance product whose rights to an informed product choice[76] are being protected would easily satisfy the "public interest" requirement.

V. Elements of Proposal

It has previously been mentioned that the life insurance product is a complex good.[77] Whichever vehicle for effecting disclosure of life insurance value is chosen, the complexity of life insurance may be reduced—and hence consumer evaluation of available alternatives enhanced—if the proposal adopted provides for: (1) product uniformity or standardization,[78] and (2) a standardized measure or ratio of insurance policy benefits to price (premium).[79]

A. *Standardization*

There can be little question but that policy standardization would substantially reduce the product complexity which is a major source of consumer confusion in life insurance. But it must be admitted that, viewing the different perspectives concurrently, product standardization not only fails to singly solve the problem of life insurance complexity, but also has distinct drawbacks.

A strong argument can be made that policy standardization does a disservice to consumers in that it eliminates some insurance policies which serve

---

intrastate commerce despite their substantial effect on interstate commerce. However, the subsequent enactment of the Wheeler-Lea Amendments, Act of March 21, 1938, 52 Stat. 111 and recent cases have all provided a more expansive construction of "in commerce." *See* Holland Furnace Co. v. FTC, 269 F.2d 203 (7th Cir. 1959); Asheville Tobacco Bd. of Trade, Inc. v. FTC, 263 F.2d 502 (4th Cir. 1958); Mueller v. United States, 262 F.2d 443 (5th Cir. 1958); Shafe v. FTC, 256 F.2d 661 (6th Cir. 1958). For an interesting discussion of the FTC and its jurisdictional struggle, see *Developments in the Law—Deceptive Advertising*, 80 Harv. L. Rev. 1005, 1022-23 (1967).

75. *See* Osborn v. Ozlin, 310 U.S. 53 (1940); Hartford Live Stock Ins. Co. v. Gibson, 256 Ky. 338, 76 S.W.2d 17 (1934); Metropolitan Life Ins. Co. v. Lillard, 118 Okla. 196, 248 P. 841 (1926).

76. *See* Message on Consumers' Protection and Interest Program, H.R. 364, 87th Cong., 2d Sess. (1962).

77. *See* text accompanying note 7, *supra*.

78. *See* E. McCarthy, Basic Marketing: A Managerial Approach 269 (3d ed. 1968).

79. *See* Belth, *Price Disclosure in Life Insurance*, 1972 Wis. L. Rev. 1054, 1066-68.

to add the kind of flexibility and variety required to meet the wide range of needs of different families and individuals. It must be granted that standardization will generally sacrifice variety and that some consumers may very well be disadvantaged by this. However, it must be realized that the vast majority of life insurance consumers know very little about their policies. Indeed, they are often unaware of such basic facts as whether their policies are term or cash value policies. Viewed from this perspective, a lessened number of types of life insurance policies will result in a more total societal benefit.[80]

Even if there are fewer life insurance policies available, however, the problem of life insurance complexity is not solved. The task of evaluation still rests with the consumer. The life insurance consumer, though confronted with numerically fewer policies, must still be able to judge policy value. Accomplishment of this task can only come about with the help of value disclosure techniques which reduce policy complexities to common comprehensible elements. It should here be stated that while this author feels that term, ordinary and endowment policies should be reducible to common values by a general formula, their identities as separate classes of policies should be retained.

B. *Standard Measure of Benefits to Price*

Value disclosure of life insurance has recently received the attention of consumer advocates and insurance experts alike.[81] In a number of works Professor Belth[82] has made price-value disclosure proposals, constructing in much detail and with great precision formulae for the development of a standard measure of ratio of insurance policy benefits to price (premium). Among the key variables which would be reducible for comparative valuation are: (1) price (premium); (2) value of death benefits; (3) value of non-death benefits; (4) dividend rates; (5) opportunity costs (alternative investment opportunities);[83] (6) cash value accumulation; (7) notes of lapse or cancellation; (8) mortality rates; and (9) added costs (administrative and sale expenses, profits, etc.). While these value disclosure proposals and key variables are far from being exhaustive of the possibilities, their recommendation can serve as a stimulus to further work in the area.

At the heart of the "standard measure of benefit to price" provision is the desired element of price competition[84] —more importantly, of "information

80. Economists have long been concerned about the theory of "the welfare of everyone." For an introduction to the basic concepts of "welfare economics" see P. SAMUELSON, ECONOMICS 609-18 (1967).

81. Senator Phillip Hart, Ralph Nader, Virginia Knauer, Herbert Denenberg, and Joseph Belth are among those who have called for life insurance value disclosure. To this end, the Senate Subcommittee on Anti-Trust and Monopoly has just completed a series of hearings on the life insurance industry. As a consequence of these hearings, it is expected that Senator Hart will in the very near future sponsor a "Truth in Life Insurance" bill.

82. *See* Belth, *Price Disclosure in Life Insurance*, 1972 WIS. L. REV. 1054, 1062-69 and authorities cited therein.

83. *See* P. SAMUELSON, ECONOMICS 443, 444, 533 (1967).

84. *See* Cummins, Denenberg & Scheel, *Concentration in the U.S. Life Insurance Industry*, 2 J. RISK & INS. 177 (1972).

competition," realizing that price is a basis for relating all other types of information. Direct price competition would mean that those life insurance policies priced too high, or otherwise unable to meet the competition, would lose popularity and suffer from informed consumer cancellation.

While it may be argued that a perfect measure of price and value is unlikely to be found, and that anything short of a perfect measure would itself cause consumers to make incorrect decisions, still such attempt would far exceed that which is available now, and any potential harm to the consumer could be minimized if the life insurance industry would act to prevent those incorrect decisions by special consumer education promotions or programs. Further, while the adoption of a common measurement policy may cause some short-run dislocation of and restructuring by the life insurance industry, in the long run resistance to life insurance offerings would be lessened due to easily understood price comparisons, and the industry would reap a multitude of benefits in the form of increased consumer satisfaction. Consumer confidence would be restored in product offerings because of credible industry-wide measurement methods, and life insurance agents—long received as "hucksters" —would assume their proper roles as professional advisors and consultants.

VI. Conclusion

Life insurance purchasers are generally unaware of how they should compare values of specific policies, and tend to assess policy value on the basis of a comparison between the death benefits received, and the amount of premiums paid. Consonant with their right to product information, however, consumers should have the opportunity to compare values of the various life insurance products in more meaningful ways. Life insurance fulfills a valid human need which presently appears to be under satisfied in the aggregate. To aid in satisfying this need, a uniform value measurement of life insurance policies is required. Such a measure is most capable of being made uniformly applicable to the insurance industry through federal legislative adoption of one of several possible proposals. It is suggested that those members of the life insurance industry who embrace the concept of product disclosure and undertake its implementation will be rewarded by increased consumer satisfaction, confidence and interest in the life insurance product.