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ADMINISTRATIVE CONTROL OF THE TERMS OF INSURANCE CONTRACTS: A COMPARATIVE STUDY*

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* A related article published in this journal, Kimball and Pfennigstorf, Legislative Control of the Terms of Insurance Contracts: A Comparative Study, 39 Ind. L.J. 675 (1964), examined legislative and judicial control of the provisions of insurance policies. Ideally, it would have been better to publish all aspects of control of insurance policies in one article, but length as well as complexity necessitated division of the subject matter. The reader who wishes a more complete picture of public control of the terms of insurance contracts should consult the earlier article and other available literature.—Ed. Note.
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I. INTRODUCTION

This article is part of a larger research project aimed at a more complete understanding of insurance regulation. The goal of this particular article is to examine the methods of administrative control over insurance

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1. See Kimball and Pfennigstorf, Legislative Control of the Terms of Insurance Contracts: A Comparative Study, 39 Ind. L.J. 675 at n. 2 for related articles.
contract terms in various countries and to assess the effectiveness of these methods in achieving the many purposes sought to be served by insurance in a modern society.²

An administrative agency can act in three different ways with respect to the contractual relation between insurer and insured:

First, it can lay down general rules prescribing what insurers may and may not include in policies or may and may not do in settling claims. Supplementary rules may be made to prescribe procedures. This is an activity that does not differ basically from what legislatures do.

Second, it can take action to keep unlawful or otherwise injurious policies from the insurance market by enforcing the general rules provided in statutes or enunciated in its own "legislative" pronouncements. This preventive activity is the characteristic administrative task.

Third, it can interfere in individual cases where the situation of a particular policyholder calls for relief and apply to actual controversies between companies and individual policyholders rules developed through such cases or stated in advance either by the legislature or by the agency or even act without rules, solely on the basis of the apparent "equities" of the case. Activity of this kind is similar to what courts do. Action with respect to individual cases may be limited to persuasion and argument; here the activity is essentially that of a mediator.

All these types of activity exist in both American and European insurance supervision. The central activity of the departments is the second. But all three will be discussed.

II. ADMINISTRATIVE CONTROL OVER POLICY TERMS IN THE UNITED STATES

American insurance commissioners were little concerned at first with public control of the terms of the insurance contract. The introduction of standard fire policy forms in the 1870's and 1880's was the first appearance of this problem; the burden of that work was mainly borne by the companies and trade associations. But insurance department involvement with policy terms has steadily increased until today it is a substantial part of regulatory activity.

² In this study traditional legal sources—court opinions, constitutions, statutes, and official administrative materials—constituted a major part of the raw material. It was supplemented by study of files and interviews in insurance departments and by reference to such secondary sources as could be found. The raw material was voluminous. Furthermore, it was chaotic and difficult of access. Only a partial picture emerges from it, but the importance of the subject makes it useful to say as much as the sources permit. Additional investigation in department files and thorough interviews would have provided a more complete picture, but a point of diminishing returns seems to have been reached, at least for the present. Perhaps the subject would bear re-examination later.
A. Organization of Insurance Departments

American departments differ greatly in quality, size, and financial resources. The number of employees ranges from about 680 in New York to fewer than a dozen in many small states; annual budgets vary from approximately $6,000,000 in New York to less than $100,000 in a dozen or more small states.³

Some states have special sections for the examination of policy forms. New York has a “policy bureau,” Michigan a “policy examination section.” Some states have no special section; in this case life policy forms may be reviewed by the life actuarial staff. The budget allocation for review of policy forms is not easy to ascertain precisely in most states. An NAIC study in 1952 found that expenditures for policy approval seemed to run from about two to eight per cent of total budgets. New York, for example, spent about $71,000, or three and a half per cent of its budget, for its policy examining bureau; Michigan about $16,000 or approximately eight per cent.⁴ Besides the policy examination section, other staff members may be involved when improper forms are discovered—for example, during examination of companies or handling of complaints.⁵ This may lead to reexamination and sometimes to disapproval of policy forms.

The volume of work in the regulation of policy terms by American departments is immense. Large numbers of insurers are subject to regulation and though there is much uniformity in policy terms, especially among the bureau and board companies, there is enough variation to create a great deal of work. Most applications present only routine problems to the policy examination section, but a significant number raise important questions of regulatory policy. One need only think of life insurance specialty policies to demonstrate how complex and unsettled the problems can be.⁶ The number of forms processed by each state is substantial and depends very little on the population of the respective states.⁷ The number is a function partly of the number of companies sell-

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⁴ 1952 NAIC PROCEEDINGS 519, 534-40.
⁵ Special complaint bureaus investigate policyholder complaints in some states. In California, for example, the Policy Services Bureau assisted in the resolution of more than 8,400 disputes in 1960. 94TH ANN. REP'T OF THE INS. COM'M'R OF THE STATE OF CALIF. FOR 1961 29.
⁷ In 1962, for example, insurers in New York submitted for approval 10,410 forms of policies, riders, and endorsements in the fields of life, accident and health, and annuities alone. This number is fairly representative of New York's volume of work since in 1957 the number was 13,312 and in 1959 it rose to 14,733 because of the 1958 amend-
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ing insurance and partly of the particular approval requirements operative in the state. It varies greatly with the type of insurance, but it is less dependent on premium volume. Even casual reflection on available statistical information suggests the inadequacy of budget allocations for policy form regulation in view of the size of the task and complexity of the problems. Complaints of most American departments support such a conclusion. They assert that inadequate appropriations, leading to a shortage of personnel as well as to insufficient salaries, short tenure, quick turnover, and low levels of insurance knowledge and experience in the staff, make it impossible to do the regulatory job adequately. Consequently, because of lack of time the departments can review only superficially the forms which are submitted for approval.8

The National Association of Insurance Commissioners (NAIC) seeks to bring about uniformity of regulatory practices as well as of insurance legislation. Informal discussion of current problems tends to produce similarity of attitudes. So also does more formal committee deliberation on special problems, and special research projects of the NAIC also seek to produce uniformity among the states in practice.8 In connection with its model standard provisions bill for accident and sickness insurance the NAIC prepared a widely used Official Guide for the Filing and Approving of Accident and Health contracts, for the use and information of departments and insurers. Its main objective was to secure uniform interpretation and prevent the dissipation of the benefits of uniform legislation.9 Some states have adopted code provisions that embody recommendations of the Official Guide.10

B. The Activity of Administrative Agencies

1. The Rule-making Activity of Insurance Departments.

Of the provisions governing accident and health insurance. See 101ST PRELIMINARY REPORT OF THE NEW YORK STATE INSURANCE DEPARTMENT TO THE 1960 LEGISLATURE 43-44 [hereinafter referred to as N.Y. 101ST PRELIM. REPT.]. Statistics in the 1950 NAIC report showed only 6,865 submissions, 1952 NAIC PROCEEDINGS at 535. That report showed that of the 6,865 submissions 851 were either disapproved or withdrawn. For other New York disapproval figures see N.Y. 101ST PRELIM. REPT. 43, 113.

The 1952 NAIC report showed considerable variation in the number of submissions from state to state, but the New York number was not strikingly large; Illinois reported twice as many. 1952 NAIC PROCEEDINGS, at 534. Furthermore, over a twelve year period, from 1950 to 1961 the California Department reviewed 149,000 forms for disability insurance alone, the number reaching 17,246 in 1961. Calif. Ins. Dept., Ruling No. 123, File No. RH-84, May 28, 1962, p. 3.

8. 1950 NAIC PROCEEDINGS 543-44.
9. Ibid.
10. See id. at 524, and Follmann, Regulation of Accident and Sickness Insurance, in ACCIDENT AND SICKNESS INSURANCE 234-38 (McCahan ed. 1954).
Enunciation of general rules has not been a major activity of insurance departments, partly because of constitutional limitations and partly for purely pragmatic reasons. Some general rules do come out of the departments, however, whether explicitly enunciated in "legislative" action or developed as a kind of case law in the process of approving forms.

a. Constitutional Inhibitions. Broad rule-making authority met constitutional difficulties at the outset. Early standard fire policy laws empowered the insurance commissioner or some other public or quasi-public agency to prepare and promulgate a form of policy that then had to be used by the insurance companies. Some of these statutes were declared unconstitutional for improper delegation of legislative power. Thereafter states tended to prescribe standard policies or standard provisions directly by statute. Exceptionally, however, legislatures now do delegate power to prescribe whole policies or policy terms. Most such delegations would be upheld against constitutional attack at the present time if the legislature uses the magic words that provide the requisite "standard" as a guide to the administrative agency.

It is interesting that often a delegation of power to prescribe entire policies is made to some other agency than the insurance department. For example, the compulsory taxicab insurance statute of the District of Columbia gives responsibility to the Public Utilities Commission to prescribe the form, terms, and conditions of the insurance policies that will satisfy the statute; the Superintendent of Insurance then approves the policy just as he would if the legislature had prescribed the policy.

b. The Scope of Delegation. The New York Insurance law provides:

The superintendent shall have power to prescribe, in writing, of-

12. Kimball & Pfennigstorf, supra note 1, at 690-93.
13. TEXAS INS. CODE Art. 5.35 provides that the regulatory authority "shall make, promulgate and establish uniform policies of insurance"; use after promulgation is compulsory. VA. CODE ANN. 38.1-38.2 (1953) authorizes the Commissioner to promulgate standard forms of automobile insurance policies or endorsements which must be used by all companies writing automobile insurance in the state.
14. Board of Ins. Comm'rs v. Carter, 228 S.W.2d 335 (1950), upheld against attack by a policyholder an order of the board requiring use of a $100 deductible provision for windstorm, hurricane, and hail insurance. No specific statutory authority was thought necessary to support any particular clause, if the action of the board was reasonable. The case is only the latest of a series in Texas upholding such power. 1 DAVIS, ADMINISTRATIVE LAW TREATISE 101-51 (1958) deals with the state constitutional law concerning delegation which, more slowly and erratically, is following the lead of the federal law toward a more realistic position which would de-emphasize the technical delegation doctrine and put more emphasis on procedural safeguards.
ficial regulations, not inconsistent with the provisions of this chapter; ... b) effectuating any power, given to him under the provisions of this chapter, to prescribe forms or otherwise to make regulations. ... 16

This provision does not create a new power of substantive control but helps to implement the authorization given in other provisions, of which there are many. For industrial life insurance, section 163(4) gives the superintendent the power to "prescribe reasonable conditions" for the use of certain optional exclusion clauses. 17 Other sections give him the power to prescribe or alter standard provisions to meet special needs in various lines of insurance, including life, accident and health, credit life, and credit accident and health, and for various special kinds of insurers, such as cooperative insurance companies, reciprocal insurers, and fraternal benefit societies. 18 The superintendent is also given power by section 169(2), (3) to prescribe standard forms for riders, endorsements, or supplemental contracts in fire insurance. Often the statutes guide the superintendent by referring, as in section 459, to existing provisions to which the regulations shall conform "as far as practicable" or by enumerating certain things which are to be contained in the regulations. But sometimes he has considerable discretion. 19

Other states have similar statutes. The Wisconsin department, under broad authority given both by a general administrative procedure act and by the insurance statutes, has in recent years issued many rules prescribing or prohibiting particular policy terms, 20 as well as a general rule establishing a uniform filing and approval requirement for all kinds of policy forms and fixing the procedure and even setting standards for disapproval. 21 The Wisconsin Administrative Procedure Act specifies that rules may be made for three purposes: to interpret the statutes to be enforced by the agency, to prescribe forms and procedures necessary to effectuate the purposes of the statutes, and, finally, to fix general policies for the exercise of discretion granted to decide individual cases. Imposition of new substantive requirements is expressly forbidden. 22 Not-

17. For "optional" clauses, see Kimball & Pfennigstorf, supra note 1, at 698.
18. N.Y. INS. LAW, §§ 154(7), 236, 237, 368, 415(2), 459, 460.
21. WIS. ADM. CODE, INS. 6.05.
withstanding this restriction, the insurance department has prescribed
terms by rule in credit accident and health insurance without specific
statutory authorization. It is significant that this rule purports to im-
plement and interpret "applicable statutes for the purpose of establishing
minimum requirements for the transaction of credit, accident and health
insurance," while most other rules refer to specific authorizing pro-
visions.23

Under state constitutional law there is often a question respecting
the constitutionality of such rules. More frequently and more appropri-
ately there is often a serious question whether the rules exceed the statu-
tory powers granted to the department. All rules must meet this test re-
gardless of whether there is an express provision to that effect. A ruling
by which the Wisconsin commissioner attempted to achieve uniformity
in accident and health insurance by prescribing the contents of certain
clauses in a manner that went beyond the Standard Provisions Law then
in effect was held beyond his power, which was to administer the law,
not to declare it.24

The Michigan insurance statutes contain only a few special authori-
zations to make rules, mostly concerning filing and approval procedure,
accident and health insurance policies, the combination of life and dis-
ability insurance, or credit insurance forms.25 Rules issued under these
sections have been few and not venturesome.26

c. Rule-making Procedures. The process by which rules are made
varies from state to state; sometimes the insurance department procedures
are assimilated to those of other agencies, through an administrative pro-
cedure act or otherwise, and sometimes not. Often no specific procedures
are prescribed. In California, the Government Code specifies what pro-
cedures shall be followed for the promulgation of regulations by adminis-
trative agencies. When the Insurance Commissioner is specially author-
zized to issue a regulation, reference is normally made to the applicable
sections of that code.27 The procedure involves notice to interested
parties and a public hearing. An example of the delegation of rule-making
authority to the commissioner is found in a 1961 statute requiring in-
dividual hospital, medical, or surgical insurance policies to contain either
a schedule of coverages or a brief description of the policy on the face
page and also requiring a reasonable relation between the premium and

23. See Wis. ADM. CODE, INS. 3.16, 6.05.
No. 173, § 22.
27. See Calif. INS. CODE § 10293.
the benefits. The commissioner was explicitly authorized to promulgate rules and regulations to establish the standards by which judgment would be passed on any such policy. Pursuant to the authorization he called a conference in November 1961, at which it was agreed that the "brief description" requirement was the more urgent. Thereupon a hearing was held on April 30, 1962, and the commissioner formally promulgated on May 28, 1962, a regulation of seven sections concerning the "brief description" requirement. The benefits-premium relationship presented more complex and technical problems. At its November 1961 conference the Health Insurance Association of America undertook to appoint a representative committee of company actuaries to study the problems. That committee reported orally in February and formally in writing in March 1962. On the basis of the latter report the department staff prepared a preliminary draft, dated July 25, which was revised in a later draft dated August 6. This resulted in a conference between the department and a different representative group of company actuaries. Another draft of August 28 resulted, followed by industry comments and a further draft of September 13. Another informal conference was held leading to some further changes and a call for a public hearing on October 23. Finally a rule was promulgated at the end of November 1962.

In New York, the statutory provisions governing the making and promulgation of insurance department regulations are even now not complete, though in his first regulation after enactment of the general authorizing statute, in 1939, the superintendent distinguished regulations, orders, and opinions of the department. That regulation has been supplemented by more detailed provisions concerning form and recording. Usually the department conducts a hearing before a regulation is issued, giving the affected insurers an opportunity to state opinions and make objections; newly adopted regulations are made known to the affected insurers by circular. In addition, in New York (as well as Michigan and Wisconsin) the regulations are published in the official Administrative Code; there are also private collections. In Michigan, general pro-

28. Ibid.
33. See, e.g., Michelson & Goodridge, op. cit. supra note 11, at 371.
34. E.g., the Weekly Underwriter Ins. Dept Serv. covers all states in a loose leaf publication. Thus the "pigeonhole" argument often advanced against department regulations is less valid than formerly. PATTERSON, THE INSURANCE COMMISSIONER IN THE UNITED STATES 257 (1927).
visions for rule-making require filing with the secretary of state and review by the attorney general and a legislative committee;\textsuperscript{35} Wisconsin provides similar checks against abuse.\textsuperscript{36} The Wisconsin Administrative Procedure Act also provides for a declaratory judgment to challenge the validity of a regulation; if the issue arises in certain types of cases the suit must be stayed while a declaratory judgment is obtained.\textsuperscript{37}

Where the commissioner may refuse approval because a policy is "misleading," or because it does not conform to other such general standards, the question may arise whether he may use an informal bulletin or circular letter to state that certain kinds of provisions are misleading and will be disapproved, instead of issuing a general rule or regulation, with all of the cumbersomeness that procedure may involve. He would want to do it as a less burdensome, more flexible, and less permanent way of issuing a species of "regulation." If he may not use this informal procedure, as it seems quite possible to argue, then there is a curious anomaly here. The commissioner may disapprove all such policies that are submitted to him by virtue of his power to disapprove misleading contracts without ever giving advance notice, but he cannot state publicly that he intends to do so, for that would be a rule or regulation, which can be issued only in a certain way (or perhaps not at all). Perhaps if he merely stated publicly his view that most such policies are "misleading" and that companies filing them must be prepared to justify them, there would be no trouble. If his statutory power is broad enough to enact rules (and this is not always the case), it is perhaps safer to go through the procedures of formulating a rule, though how the question of compelling him to act in a certain way would be raised is not clear if he might have exercised the same power on each contract as it came along. It is doubtful if any public interest is served by requiring this greater formality.

The problem may arise particularly in connection with a ruling that a specialty policy provision is inherently misleading or that a coverage limitation of the kind contained in a special accident policy is inherently misleading.

While in earlier years agency-promulgated regulations were looked upon with doubt and suspicion, partly because of unsophisticated application of the separation of powers or nondelegation doctrine and partly because of the lack of procedural safeguards,\textsuperscript{38} they have now assumed an increasingly important position in the pattern of insurance regulation.

\textsuperscript{36} Wis. Stat. § 227.02-.041 (1963).
\textsuperscript{37} Wis. Stat. § 227.05 (1963).
\textsuperscript{38} See Davis, op. cit. supra note 14, at 101-08.
The ever larger number of regulations in the states and the scope of their contents are impressive evidence of that development.

2. The Rule-enforcing Activity of Insurance Departments.

The various activities of the insurance commissioner have not always been clearly distinguished. A statute may authorize the commissioner to prepare a uniform policy or rider, it may first prescribe standard provisions or controlling standards and then authorize him to disapprove noncomplying policies, or it may authorize him to disapprove policies without stating what standards are to govern his action. The first instance authorizes rather explicit "legislative" activity, the second only administrative implementation of legislative rules. The third seems to permit a kind of case law development of rules.

The Wisconsin Administrative Procedure Act attempts to delineate more precisely the rule-making functions of administrative officers and agencies by saying that a "rule" is not:

... an order which is directed to a specifically named person or to a group of specifically named persons which does not constitute a general class, and the order is served on the person or persons to whom it is directed by the appropriate means applicable thereto. The fact that the named person who is being regulated serves a group of unnamed persons who will be affected does not make such order a "rule"... 39

This definition does not seem to recognize the existence of a kind of case-developed "rule," analogous to our judicially developed case law. However, the commissioner's action will be deemed arbitrary unless there is a tendency to act uniformly, i.e., develop "rules." Therefore, there is at least a tacit recognition of the case-developed "rule,"—a kind of insurance department common law.

Where a statute requires standard provisions, the statute is often expressly self-executing, and the provisions are incorporated into the policy by the courts as if they had been written in; provisions contrary to the law are treated as void. 40 Under traditional doctrines the courts will so interpret the policy even without statutory prescription (that is, private law effect is given the provisions). However, the court can only act in litigated cases. This is not sufficient protection; many policyholders would acquiesce in illegal policies and unfair treatment in ignorance of their rights or because they would not take the trouble or could not pay

the cost of a lawsuit. The commissioner's preventive activity helps to keep illegal policies from being used without waiting for litigation.

a. Scope of Control. States vary widely in the extent to which they regulate different types of insurance. New York controls life and accident and health insurance forms but exercises very limited control over fire and casualty policies. On the other hand, title insurance policies must be filed with the superintendent "for his information." Such filing provides little control, though presumably flagrant violations of law could be dealt with under general powers, and publicity is always available as a sanction. The Michigan department has statutory power to review all kinds of "basic" insurance forms, as well as riders, endorsements, and some applications. Wisconsin provides by statute for control of life and accident and health insurance policies, as do most states; and recently by administrative rule the commissioner has also subjected most other lines to a general filing requirement, assuming power to disapprove objectionable forms.

Most statutes fail to distinguish between a standard form for general use and one specially designed for an individual contract. Typical language provides that "no policy . . . shall be issued . . . unless the form . . . thereof shall have been filed. . . ." It has been held, however, that slight variations in the language of non-promissory portions of a rider do not necessitate a new filing. On the other hand, the Michigan requirement for every "basic policy form" does not apply to "policies, riders, indorsements or forms of unique character designed for and used with relation to insurance upon a particular subject. . . ." Moreover, the commissioner has discretion to exempt "any insurance document or form or type thereof . . . the filing and approval of which are, in his opinion, not desirable or necessary for the protection of the public."

Generally speaking, the authority to review policy forms does not extend to supplementary forms such as the application. A federal court, applying Minnesota law, rejected the contention that under a statute re-

41. Life, accident, and health insurance forms are scrutinized with great care, N.Y. Ins. Law § 154 (containing elaborate provisions specifying when policy forms may be disapproved). For title insurance, see § 438. Endorsements and special forms for fire insurance require approval. § 169(3), (4). The basic fire form does not, but is a standard statutory policy. § 168(5), (6). In some lines forms need formal approval, without special standards for evaluation other than compliance with the statute. § 255 (various medical and hospital indemnity contracts), § 408 (insurance for the life of property).


43. Wis. Stat. §§ 204.31(1)(g), 206.17 (1963); Wis. Adm. Code, Ins. 6.05.

44. See, e.g., N.Y. Ins. Law §§ 154(1), 236, 408.


47. Ibid.
requiring policy forms to be filed, an application form must also be filed in order for it to be introduced in evidence where another statute provided that no statement of the insured would avoid the policy unless it was contained in a written application, a copy of which was endorsed upon or attached to the policy. The company was held free to ask what questions it liked in its application form without submitting the latter to the commissioner. Likewise, a requirement of approval of all "contracts of insurance" was held by the Kansas Supreme Court not to apply to a premium receipt admittedly not a part of the insurance contract; the commissioner was not permitted to disapprove a receipt form containing "objectionable language."

b. Prior Approval versus Subsequent Disapproval. Review may take place prior to use of a form or after it is already in use. Complete protection of policyholders requires thorough and competent prior review. Commonly the statutes forbid use of any form requiring approval until after it has been expressly approved. But indefinite suspension is normally forbidden; the commissioner "shall, within a reasonable time after the filing of any form requiring approval, notify the insurer filing the same of his approval or his disapproval of such form." Most of the states have fixed a waiting period during which the policy may not be issued and in which the department may review the form and take affirmative action to approve or disapprove it. Either express approval or expiration of the period without disapproval authorizes use of the form. The provision replacing formal approval by lapse of time is commonly known as a "deemer" clause. The deemer clause is useful to prevent or discourage overburdened insurance departments from delaying action unduly and unnecessarily. Theoretically it enables insurers to introduce new forms without having to wait unreasonably long for affirmative action when the department is not willing or able to make a prompt and thorough examination. When in 1952 a study was made for the NAIC of the control of life and accident and health insurance forms, only one state admitted enough delay in the processing of policy forms for the deemer clause to be operative. Several departments said they processed

50. See, e.g., N.Y. Ins. Law, § 154(1).
52. See, e.g., Patterson, op. cit. supra note 34, at 265-66.
the forms within the deemer period while the rest of the thirty-eight states responding to the questionnaire said they acted in periods ranging from "immediate" or "five to ten minutes" to two weeks. It seems clear that the deemer clause exerts pressure for a prompt review. There is much reason to think, however, that the review tends to be perfunctory. Once the deemer period has expired or approval has been given, further surveillance is unlikely, absent policyholder complaints or court decisions to stimulate reconsideration, since the company is entitled to act on an assumption of approval. The net result of deemer clauses may thus be less careful control than would be exercised under a subsequent disapproval system where fewer elements of estoppel are present. Some states minimize this danger by providing for an extension of the deemer period by order of the commissioner. The same effect is achieved in Michigan simply by notice to the insurer that the form is still under consideration and that issuance is not advisable. Of course, the companies are in a difficult position, despite expiration of the deemer period, if the department chooses to ignore any considerations of estoppel in transgressing the time limit for scrutiny of the form.

The deemer provision has been used more frequently in recent NAIC drafting activity. Since legislation concerning life insurance developed earlier and in the individual states, deemer provisions are less frequent there than in accident and health, where the uniform statutes played a larger role.

Simultaneous existence of general and special provisions, enacted at different times, some with and some without deemer clauses, produces frequent conflict among the provisions, to be resolved in the process of statutory construction.

c. The Technique of Control. The procedure for examining and approving policy forms differs from state to state. As a rule it is informal and not always the same; however, a few states have detailed and precise provisions, either in the statutes or in administrative regulations.

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53. 1952 NAIC PROCEEDINGS 519, 544.
54. See e.g., WIS. ADM. CODE, INS. 6.05(2) (c).
56. For instance, there is an apparent conflict between Mich. STAT. ANN. § 24.12236 (the general provision) and the special provisions of §§ 24.12236, .12242, .13606, .13620, .13638, .14040, .14430.
57. E.g., WIS. ADM. CODE, INS. 6.05. In general see 1952 NAIC PROCEEDINGS 532. Field studies were made in two American states by Mr. Pfennigstorf.
A first comparison is usually made of the submitted form with the statute and with applicable regulations to see whether formal requirements are met, whether the policies contain the required standard provisions, and whether they contain any prohibited provisions. Where a reasonable relation of premiums and benefits is required the form must be accompanied by rate schedules, experience statistics, and other pertinent data. Rules and statutes now quite generally provide that the commissioner shall inform the insurer of his objections and that the insurer shall be entitled to a formal hearing, and this is also sometimes done even when the statute does not specifically require it. Approval does not require formal action, however, and a policyholder may not question the validity of otherwise legal exceptions or other defenses solely because the policy was approved routinely by a subordinate in the department and had no special consideration by the commissioner himself.

The larger departments tend to proceed somewhat more formally, and then any tendency toward informality seems to be deemed worthy of note. Thus when the New York department called a hearing on umbrella liability policies in the spring of 1963 and asked for informal expressions of opinion from insurer representatives on the propriety of certain clauses then being submitted in such policy forms, the nature of the proceeding seemed a new enough practice to produce editorial comment in the insurance press. But one should not expect such unstructured hearings except when the department needs help in its preliminary thinking about standards for approval. Once it has formulated its position, such a meeting would be anomalous.

Quite often there are informal preliminary discussions about the admissibility of certain clauses. In doubtful cases there may be long negotiations, several revisions, and substantial research. On legal questions the department counsel or the state attorney general may be consulted. For example, in 1960, the Illinois Director of Insurance sub-

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58. For applicable administrative procedure acts, see, e.g., Wis. Stat. §§ 227.01-26 (1963). Officials are often guided by manuals and internal regulations. See, e.g., Michaelson & Goodridge, *Filing and Approval of Policy Forms*, in 6 *Examination of Insurance Companies* 367-423. Larson v. Bankers Life & Cas. Co., 64 So.2d 322 (Fla. 1953) considers the adequacy of notice of a hearing to review disapproval of policy.


61. See Michaelson & Goodridge, *op. cit.* supra note 58, at 373; Shank v. Fidelity Mut. Life Ins. Co., 221 Minn. 124, 129, 21 N.W.2d 235, 238 (1945) (upon request of insurer, commissioner made suggestion of a policy form for aviation exclusion rider). The Wisconsin regulation expressly allows submission in typed or printer's proof format for an advisory opinion prior to the formal filing. Wis. Adm. Code, Ins. 6.05(4) (c).

mitted to the attorney general the question whether filings of single limit automobile policies complied with the financial responsibility laws. In Michigan, problems of statutory interpretation and other legal questions which arise in the course of policy review and which the policy examiner hesitates to decide alone are first discussed with the appropriate division head; if doubt remains, the question is submitted to the commissioner, who may consult an assistant attorney general attached to his staff. Only a few legal problems actually reach the attorney; he does not participate as a matter of course in conferences concerning new forms of coverage.

Formal provision is rarely made for hearing from policyholders, though any strong and well-organized group of policyholders would have no difficulty in being heard. Consultation sometimes does take place, however, perhaps more often on rate questions than on policy terms.

In the few situations in which the department has power to prescribe policy terms, a special problem sometimes arises with respect to existing contracts. Of course there could be no narrowing of coverage without the consent of the insured, but when the change is a liberalization, the department may wish to give existing policyholders the advantage of the improvement. In one such case, when the new family automobile policy was developed, the Louisiana Insurance Rating Commission issued a bulletin instructing companies of the effective date of the new policy and directing the companies to interpret existing policies as affording the broader protection. The companies agreed by letter so to construe the policies, and the court upheld the broader interpretation when one company wished to back out.

d. Basic Principles of the Approval Process. The criteria that guide the commissioner in his decision to approve or disapprove a form are important objects of our inquiry. In the American context it is difficult to ascertain the criteria so far as they develop from practice within the departments, for they are seldom explicitly enunciated for the record. However, a search of the files of insurance departments, a look at published regulations or circulars, and a reading of court cases reviewing department action make it possible to suggest some prevalent criteria. Some

63. 1960 Weekly Underwriter Ins. Dep't Serv., Ill. 1, 8 (Illinois attorney general opinion of April 22 and August 12, 1960). See also 1961 Weekly Underwriter Ins. Dep't Serv., Wis. 15 (Wisconsin attorney general opinion advising the commissioner that he might disapprove as "indefinite and vague" an accident and health policy form excluding coverage "if the insured does not incur an unconditional requirement to pay").

64. In California anyone affected by an order of the commissioner may request that the question of its legality be submitted to the attorney general. CALIF. INS. CODE § 12923. For an illustration see 1959 Weekly Underwriter Ins. Dep't Serv. Cal. 39.


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are derived from statutes; a few appear to be based on general policy grounds. We first illustrate the latter, so far as they appeared in the material examined. They are hard to formulate with precision, of course, since they are seldom enunciated at all. They arise mostly when the department has the task of implementing statutes providing for approval with no indicated standards or with standards so general as to be meaningless, such as that of New York Insurance Law section 169(4), which permits the superintendent to disapprove "if he deems it for the best interest of the insuring public."

There seems to be, for example, an inclination for insurance departments to encourage enlargement of coverage and to discourage its restriction. The Louisiana handling of the new family automobile policy discussed above illustrates the tendency. Though seldom if ever based on a legislative mandate, such an inclination may be related to statutory language and justified by the department by reference to such an assumed mandate. Thus in Maine, the commissioner disapproved an automobile policy which restricted coverage to the named insured and in other ways. Keying his reasons to statutory language authorizing him to disapprove a policy which "is misleading or capable of a construction which is unfair to the assured or the public," he said the policy was misleading and unfair because it did not provide coverage in a number of specified cases where "the assured would normally expect coverage to exist." It did not matter to him that the premium was also decreased so that there did not seem to be an unreasonable relation of premiums charged to benefits conferred by the policy. The policy contained an admonition on its cover, in red letters, that it was a limited policy that would not satisfy the financial responsibility act, if the policyholder were subject to that statute. Despite the lack of a clear mandate in the law, the court upheld the commissioner's denial of approval, stating that his reasons were partly valid and partly invalid. In a dictum the court declined to approve the commissioner's view that a policy so narrow as the one in question was not permissible; the legislature had not prescribed broad coverage and apparently the court thought it would require approval of even a very narrow policy if it were not misleading in any respect. It is interesting, however, that when put to the test in this case, the court found grounds on which to uphold the administrator's action.67

Unless there is good reason to justify them, clauses that exclude portions of the coverage that would otherwise fall within the general terms of the insuring clause tend to be disapproved. For example, the Michigan department has disapproved the "intentional injury" exclusion in ac-

incident policies or double indemnity riders in life insurance. To insurer objections, the answer has been that there seemed to be no adequate actuarial or public policy reason for exclusion of intentional injury not provoked by the insured. The wish of the company did not provide adequate grounds for the exclusion.

Again, a proposal by companies to attach a nuclear hazard exclusion to the statutory standard fire policy led to extensive discussions before an NAIC committee. Only an inclination to resist contractions in coverage could make it necessary to discuss such a question at great length.\(^6\)

However, inconsistent objectives are not fully overridden—the goal of freedom of contract remains a strong motivating force. In 1962, despite evident reluctance, the West Virginia department approved a modification of the replacement cost coverage that contracted protection somewhat. The coverage still exceeded that required by the statutory fire policy and the remaining benefits seemed reasonable in relation to premiums. Freedom of contract was still a living force with the department, which could find no basis for disapproval.\(^6\)

Some principles of insurance public policy given explicit statutory recognition in contexts other than form approval are frequently applied by departments in the approval of policy forms, even if the statutes have not enunciated their applicability. Examples are the requirement of reasonableness in the relation of premiums to benefits, equity or non-discrimination, and the solvency or solidity of the insurance companies.\(^7\)

In addition to criteria developed by the departments, numerous criteria are stated in statutes. A common standard is that the form must comply with the statutes or with the law.\(^7\) Non-insurance laws may be involved, as when policies are disapproved in New York because they contain authorization for the insurer to obtain confidential information from the policyholder's physician in violation of statute.\(^7\) Explicit statement of a standard of conformity to law seems superfluous; if the commissioner has any power to disapprove policies this would be sufficient implied basis for doing so.

The commissioner must take into consideration the substantive as well as the formal requirements of the law.\(^7\) On the other hand, one

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70. See, e.g., Jour. of Commerce, April 5, 1963, p. 8.
71. See, e.g., N.Y. Ins. Law, § 154; Mich. Stat. Ann. § 24.12236(2) (1957); Wis. Adm. Code, Ins. 6.05(5) (b) (the latter also adds rules of the insurance department).
case does say that a statute providing for approval "as to form" gives the commissioner no power to review the substantive contents of a policy.\textsuperscript{74} The case is weakened by the fact that the court declined to issue an injunction against the commissioner's order to discontinue the use of the form, since the contents of the policy actually were contrary to the statute and void. This seems the likely result in all similar cases, especially since the commissioner usually has broadly stated general powers to enforce the law.

A statute that permits disapproval when the policy does not conform to generally accepted insurance practices\textsuperscript{76} seems of the same type since it merely incorporates business practice as a statutory standard. The uncertainty in such a formulation gives much freedom to the commissioner.

In the related article on legislative control, we distinguished between substantive and formal control, defining the latter in terms of the effort to provide to the policyholder full and reliable information about the coverage of his policy. Some statutory standards governing the commissioner's approval of policy forms thus seek to ensure mainly that the policyholder is informed—they seek clarity, in order that policies may not mislead or be deceptive. For example, the California commissioner may not approve a disability policy

\begin{quote}
if he finds that it contains any provision, or has any label, description of its contents, title, heading, backing, or other indication of its provisions which is unintelligible, uncertain, ambiguous, or abstruse, or likely to mislead a person to whom the policy is offered, delivered, or issued.\textsuperscript{76}
\end{quote}

This provision, comprehensively as its drafter tried to formulate it, seeks only one thing, clarity in communication. Presumably this is an objective of all insurance departments, whether or not it receives a statutory formulation.

Other statutes, while seeking clarity as the main goal, include some substantive elements. Thus, the Michigan commissioner may disapprove any policy if it

contains inconsistent, ambiguous or misleading clauses, or contains exceptions and conditions that unreasonably or deceptively

\textsuperscript{74} Great United Mut. Benefit Ass'n v. Palmer, 358 Ill. 276, 193 N.E. 146 (1934) (upholding constitutionality of statute as thus construed).
\textsuperscript{75} NEVADA REV. STAT. § 690.030 (1963).
\textsuperscript{76} CALIF. INS. CODE § 10291.5.
affect the risk purported to be assumed in the general coverage of the policy.  

The New York superintendent may disapprove any accident and health policy that contains provisions which encourage misrepresentation or are unjust, unfair, inequitable, misleading, deceptive. . . . 

The latter formula is popular and extensively used in statutes. Some regulations, such as those used in Wisconsin for all kinds of insurance forms except life and disability, specify the same standard.

Such broad language leaves much to administrative practice and the development of a kind of case law. For instance, the NAIC discussed the question whether a policy purporting to insure against so-called "dread diseases" was misleading. The Wisconsin attorney general advised the commissioner that he might prohibit the use of a clause in accident and health policies which excluded coverage for hospital and other charges "if the insured does not incur an unconditional requirement to pay therefore," since the clause is "so indefinite and vague that it is susceptible to different interpretations and misunderstandings as to whether the policy covers the insured and will pay the hospital and other charges if he shall be hospitalized in a state, county or other governmental institution, for which the insured, his relative, or guardian may have to pay." The attorney general thought such a general provision "could easily mislead or deceive the insured."

As noted, the above statutory formulations contain substantive as well as formal standards. A policy must not be "unjust, unfair, inequitable," or "unfairly discriminatory." It must not "unreasonably affect the risk purported to be assumed." In Maine, the commissioner may disapprove if the policy "is misleading or capable of a construction which..."
is unfair to the assured or the public. . . .\textsuperscript{83} In New York the superintendent has power under section 154(1) of the Insurance Law to disapprove a life insurance policy form

if in his judgment its issuance would be prejudicial to the interests of its policyholders or members or it contains provisions which are unjust, unfair or inequitable.

These broad and ambiguous terms can acquire concrete meaning only through the development of a fixed jurisprudence through insurance department practice. For example, in a recent circular letter the New York department expressed its opinion on a proposed rider form for group life and group disability insurance under which the policyholder would be obliged not to pay fixed premiums in advance but to reimburse at the end of the contract period the amount actually paid by the insurer for claims during the period, up to a certain maximum, plus an administrative and contingency charge. The letter stated that the method of subsequent payment conflicted with established principles concerning reserves and required assets and concluded, in language borrowed from the statute, that the rider was

not approvable by this Department because:

(1) the issuance of the life insurance benefit thereunder, in the judgment of the Superintendent of Insurance, would encourage misrepresentation and be prejudicial to the interests of policyholders generally and the form contains provisions which are unjust, unfair and inequitable; and

(2) to the extent that accident and health insurance benefits are involved, the form contains provisions which encourage misrepresentation and are unjust, unfair, inequitable, and contrary to the public policy of this State.\textsuperscript{84}

Another example of such case law comes from Michigan, where the department has objected to clauses in life policies which restrict the insurer's liability in cases of death caused by injuries intentionally inflicted by another person. The department admitted that it had previously approved such clauses, that they were in use in the other states with the approval of insurance departments, and that courts had treated them as valid. Nevertheless, the department asserted that the exclusion was not warranted actuarially and refused to approve it on the ground

\textsuperscript{83} MAINE REV. STAT. ch. 60, § 6 (1954). See text accompanying note 67 \textit{supra} for discussion of a case purportedly based on the statute.

that it "unreasonably affected the risk purported to be assumed."85 In the end a compromise was reached: the department approved a clause excluding intentionally inflicted injuries provoked by the insured.

In both the New York and Michigan cases the departments stated the facts and their objectionable implications and then, to give the decision a legal basis, copied the words of the statute without adequately relating the one to the other. Even so, this does provide some guidelines to prediction of future decisions of the same departments. Even judicial case law could do little more to settle the meaning of such ambiguous terms. Fortunately ambiguity is found most often in disability insurance, where there are also standard provisions laws covering the more important clauses.

The necessity of deciding whether provisions conform "in substance" or are "more favorable to the insured" also presents problems that are often difficult and that give considerable discretion to the commissioner. But despite ambiguity, practice of a department can create predictable rules. It is true that a court might overturn such rules if asked to do so; that will seldom happen because insurers find it easier to acquiesce.

One particular substantive standard which is very common authorizes disapproval if "the benefits provided therein are not reasonable in relation to the premium charge. . . ."86 This requirement establishes a form of rate regulation.87 A proper decision by the commissioner in these cases depends on competent actuarial work and sound economic judgment. In determining whether the relation is reasonable the commissioner is usually required to consider the loss experience of the applicant insurer, which is bound to submit its experience statistics and other pertinent data.88 Some commissioners have announced standards which, if met, create a presumption that the benefits are reasonable.89 There have been recent efforts to establish a loss ratio of fifty per cent as a standard in credit insurance laws in the absence of peculiar circumstances.90

87. The clause originated in the first years after the promulgation of the McCarran Act. Follmann, Regulation of Accident and Sickness Insurance, in ACCIDENT AND SICKNESS INSURANCE 38-39 (1949).
88. See, e.g., Wis. Adm. Code, Ins. 2.06(7)(c), 3.16(7)(c).
89. 1959 Weekly Underwriter Ins. Dep't Serv. Neb. 3; id., N.J. 1,7; id., W. Va. 1,5.
The elimination of diversity is an objective that insurance departments might reasonably seek. Uniformity would simplify the tasks of the departments, make it easier for policyholders to judge the comparative values of policies, and tend to suppress the kind of unfair competitive practice that depends on the use of "gimmicks." Generally, however, commissioners on the American scene have not seriously urged a requirement of uniformity, aside from the statutory standard fire policy and the standard provisions laws. But it is not an unknown goal. The Wisconsin commissioner once tried to impose substantive uniformity on disability insurers; similarly the Ohio superintendent tried to require companies to adopt certain definitions espoused by the NAIC. In neither case was the court sympathetic. On the other hand, the West Virginia department has promulgated a standard hospital service contract, and in various states there are standard automobile policies. Automobile policies approach uniformity everywhere, with department encouragement and industry self-discipline each playing a role in the approach to uniformity. Standardization is an objective that not only departments might wish to achieve. Insurance companies, too, and even brokers may gain from it, despite its disadvantages in tending to produce rigidity and inflexibility in the market. However, it has not generally been an important objective in the United States. In fact, the effort to achieve uniformity within states is often tied closely to NAIC efforts to achieve national uniformity.

e. The Extent of Discretion—Judicial Review. The commissioner is not an automaton, but neither may he act altogether as he wishes. The extent of his freedom, or "discretion," is determined by many factors difficult to trace. The limits of discretion-in-law are defined by the courts in determining the scope and manner of judicial review. However, since even when they are justified insurers tend to be reluctant to challenge the commissioner, the limits of discretion-in-fact are set by other factors and especially by the commissioner's self-restraint. One may speculate that while a lawyer-commissioner is likely to perceive clearly and conform reasonably well to the court-defined outer limits

93. See Donovan, op. cit. supra note 92.
95. See, e.g., Patterson, op. cit. supra note 34, at 259-60.
of his power, a lay commissioner may either scorn the legalistic approach and use all the power he can muster to enlarge his discretion, except so far as he is restrained by the courts or by his legal advisers, or, on the other hand, give a more literal obedience to the limits of discretion stated in his enabling statutes and interpretive cases and opinions than a lawyer would. This decisive personal element is too individual to be explored further here, but its relevance must be appreciated for realistic understanding of any aspect of the regulatory activity of insurance departments.

Problems of discretion and judicial review in insurance regulation are usually also problems of general administrative law; there is thus no reason to deal fully with them here. One could scarcely do so using only insurance cases, which are few and often agree with the commissioner on the merits, thus being equivocal on the question of discretion. 99

Some general observations are worth noting here. Where discretion is given to the commissioner, the scope of review of a commissioner's decision is limited since discretion and review have a reciprocal relation. 97 To be sure, the court may and should rely heavily on the expert knowledge, experience, and sound judgment of the commissioner; and often statutes specifically so instruct. 98 Conversely, a court may be confident that in knowledge and experience it is superior to the commissioner and disregard his determinations; occasionally a statute may expressly authorize the court to do so. Thus, in one provision, 99 the court is instructed to enforce the policy as if it were written in the statutory language "unless the court finds that its actual provisions were more favorable to policyholders at the date when the policy was issued." Despite references in related sections to the commissioner's "opinion" or "judgment" implying absolute discretion, the provision seems to deny any weight on collateral attack to the superintendent's approval. 100

When a court is not given such latitude in reviewing a commissioner's determination it still has to decide whether to overturn the com-


97. See, e.g., Wis. Stat., § 227.20(1) (1963), focusing mainly on unlawful procedure and arbitrary or capricious action.


99. N.Y. Ins. Law § 143(3).

100. In Franklin v. John Hancock Mut. Life Ins. Co., 298 N.Y. 81, 80 N.E.2d 746 (1948), the New York Court of Appeals held a suicide clause in a life insurance policy to be "obviously less favorable" to the insured and declined to give effect to the superintendent's approval.
missioner's exercise of discretion. Often a court may be influenced to some extent by the practical needs of the regulator. On the other hand, it may sometimes rely unduly on cases which deal with a different problem, such as a licensing or insolvency problem, where other considerations should be controlling. More importantly, however, the court's power to review decisions of a commission will depend on its interpretation of the extent of discretion the language of the statute allows the commissioner.

If a statute provides that policy forms need the commissioner's approval, without stating any standards, it is not clear whether the legislature intended to give him broad discretion or to deny him any. Consequently, court response to this situation has been quite varied. A New Hampshire decision seems to concede almost unlimited discretion to the commissioner. On the other hand, an Oklahoma court ruled that while such a statute confers wide discretion upon the commissioner, it is the duty of the courts to determine the limits of that discretion. Similarly, in Ohio the court said that a commissioner's discretion must be exercised reasonably and that disapproval must be based upon a violation of the statutes. By contrast both the Michigan Supreme Court and the Wisconsin Supreme Court have interpreted similar statutes to give little if any discretion to the commissioner. The Michigan court seemed to regard the duty to approve or disapprove policies as ministerial, holding that the commissioner must approve a life policy which complies with a statute enumerating both required standard provisions and prohibited provisions. The Wisconsin court went even further and expressly said that allowing the commissioner to impose requirements in addition to those set forth in the statute would unconstitutionally vest him with legis-

101. Mutual Benefit Life Ins. Co. v. Welch, 71 Okla. 59, 175 Pac. 43 (1917-18), strongly relies on North British & Mercantile Co. v. Craig, 106 Tenn. 621, 62 S.W. 155 (1901), where an insurer's license was involved.

102. Continental Cas. Co. v. Buxton, 88 N.H. 447, 191 Atl. 1 (1937). All policies written pursuant to a motor vehicle financial responsibility law needed his approval. The court held that exclusion from coverage of injuries sustained by passenger guests of the renter of an automobile was valid if approved and void if not approved.

103. Mutual Benefit Life Ins. Co. v. Welch, 71 Okla. 59, 175 Pac. 43 (1917-18). The court sustained the commissioner's disapproval of a form, initially insisting that the insurer must allege arbitrariness or fraud. On rehearing, the court qualified its language to retain the power to define the limits of the commissioner's discretion but sustained the result reached in its earlier decision.

104. Mutual Benefit Ins. Co. v. Younger, 28 Ohio N.P.N.S. 368 (1931). However, the court dismissed the insurer's petition for an injunction because the title of the policy was misleading.

Occasionally statutes seem to confer broad discretionary power on the commissioner by using ambiguous standards like "unjust," "misleading," "substantially the same," or "more favorable to policyholders," which surely are intended to give such freedom. Even more pointed, the New York superintendent may disapprove forms of supplemental contracts covering loss of rents, profits, use, or occupancy in connection with a fire policy whenever he "deems it for the best interest of the insuring public." Unlike those above, this is not an ambiguous term for him to interpret, but one that expressly gives him wide discretion. Only on constitutional grounds could a court restrict this authority to specific violations of the statute or, in the absence of arbitrariness, substitute its own opinion for that of the superintendent.

When the statutes enumerate specific grounds for disapproval, one may ask (1) whether the commissioner is free to disapprove a policy that meets all expressed requirements, and (2) whether he has power to approve a noncomplying form.

There is authority for the proposition that forms which do comply with the law must be approved—that the commissioner cannot lawfully refuse approval for his own reasons. His power is confined by the terms of the law. But to carry this doctrine out fully would make the commissioner a mere clerk.

Of course, the commissioner has no discretion to approve when specific statutory requirements are not met, if the statute is sufficiently explicit to that effect. If the company relies on approval it is sure to be disappointed. However, the same result is not necessarily reached in

106. State ex rel. Time Ins. Co. v. Smith, 184 Wis. 455, 477-78, 200 N.W. 65, 73 (1924). The courts seem to be more liberal than they formerly were in applying the requirement that the authorizing statute must fix general standards and leave only details to the determination of the agency. 1 Davis, Administrative Law Treatise 148-51 (1958).


the converse case. Sometimes by statute an approved noncomplying policy may be enforced against the insurer.\textsuperscript{111}

Even if the statute is not explicit, one’s first inclination is to think that the same result would be reached and the noncomplying policy held invalid, at least when the company relies on it. However, the careless use of the words “may” and “shall” creates interpretive problems. If the commissioner “may” disapprove a form, the wording suggests power also to approve. Other provisions, often immediate neighbors to “may” provisions, say that the commissioner “shall” disapprove or “shall not” approve a form.\textsuperscript{112} Equally interesting is a change made by the NAIC subcommittee in the model bill for credit life and credit accident and health insurance from a “may” provision to a “shall” provision.\textsuperscript{113} Under traditional canons of statutory construction, such differences are thought to exist for some reason, such as to require disapproval in one case and in the other to give discretion. However, it is doubtful that these results would be reached predictably. The reasons for which the commissioner “may” disapprove a form are often of a kind to preclude discretion. Thus, some provisions say the commissioner “may” disapprove if a policy contains provisions “contrary to law or to the public policy of this state”;\textsuperscript{114} such provisions would surely be ineffective even if approved.

Of course insurance departments do approve some nonconforming policies by mistake. The errors may be discovered when claims are denied and policyholders complain to the departments or litigation develops between insurer and policyholder. This may result in reconsideration and withdrawal of approval.

Sometimes a commissioner knowingly approves illegal policy forms. When the Wisconsin commissioner recently discovered that many forms in use did not comply with the law, he worked with a committee of insurers’ representatives to eliminate the objectionable provisions; pending

\textsuperscript{111} See, e.g., Wis. Stat. § 203.08 (1963).

\textsuperscript{112} “May” provisions are more common. See, e.g., Mich. Stat. Ann. § 24.12236 (1957); Mich. Pub. Acts 1958, No. 173, § 13; N.Y. Ins. Law § 154(1), (4); Wis. Stat. § 204.31(3)(g) (1963); NAIC model bill for credit life and credit accident and health insurance, § 7B, in 1958 NAIC Proceedings I 106, 110. For “shall” provisions, see N.Y. Ins. Law, § 154–(5), (6), (7); Wis. Adm. Code, Ins. 6.05(5). N.Y. Ins. Law § 154 provides the most startling contrast, between subsections (1) and (4) on the one hand, and (5), (6) and (7) on the other.

\textsuperscript{113} Compare 1958 NAIC Proceedings I 106, 110, § 7B with 1960 NAIC Proceedings II 479, 482, § 7B.

this revision, he continued to approve noncomplying forms like those already in use, in order to avoid discrimination among insurers. Such cases are unlikely to come before the courts for review, despite serious doubts about validity.

Sometimes a commissioner is authorized to grant an exemption from statutory minimum requirements. For instance, the New York superintendent "may approve" a disability insurance certificate which omits or modifies required provisions "if he deems such omission or modification suitable for the character of such insurance and not unjust to the persons insured thereunder. . . ." The statute raises the question whether the superintendent's order disapproving such a form might be reversed by a court on substantive grounds. The use of "may," coupled with the remaining language, strongly suggests that the commissioner has wide discretion to approve.

In summary, it may be said that the commissioner has only limited discretion-in-law in the approval of policy forms, and the extent of the discretion varies from state to state and from provision to provision of the statutes. Of course, insurer reluctance to incur the commissioner's wrath by resorting to the courts gives many commissioners a larger degree of discretion-in-fact. There seems to be a marked tendency to give him wider discretion. The shift from required provisions to be adopted "in the words prescribed" by statutes to provisions which can be replaced by language in substance equivalent or more favorable to the insured increases the commissioner's power, for he must decide, at least initially and usually finally, whether a clause is more favorable to the insured. The use of general standards without detailed specifications seems more common, too.

Judicial review of the commissioner's decisions on policy forms may occur either on direct or collateral attack. The result may vary from one kind of proceeding to another, for the attitude of a court in ruling on the validity of a term may depend upon whether an insurance company is opposed by the insurance commissioner or by its policyholder.

Direct review is quite generally available to the insurer. For example, New York has a general provision subjecting all orders and decisions of the superintendent to judicial review. Frequently the insurance provision simply adopts the state's general administrative procedure

116. N.Y. Ins. Law § 162(4).
Seldom is direct review sought by anyone other than an insurer; few complainants would have both standing to sue and an interest in attacking directly a determination of the commissioner favorable to the insurer. In one case, however, a state district attorney sought mandamus to compel the insurance commissioner to revoke a company's license for issuing profit-sharing policies in alleged violation of a non-discrimination statute. The court agreed that the contract was in violation of the statute, but declined to issue the writ, saying that the commissioner's duty was discretionary, not ministerial. It is not clear whether the court would have reviewed his decision in a more appropriate proceeding.

The procedure on direct review is usually governed by the general rules concerning the review of administrative orders, and need not be discussed here.

Collateral review occurs most often in a suit by a policyholder against an insurer where the insurer in its defense relies on a clause the policyholder asserts to be contrary to the statute. Whether the commissioner's approval will be disregarded if provisions of the policy violate the law depends on the extent of his discretion. Conversely, the courts have sometimes disregarded the lack of approval and have given effect to otherwise legal but unapproved provisions.

f. Enforcement of Orders. Violations of the commissioner's orders seldom come as open challenges to his authority. More often they are discovered only through complaints of policyholders, in the course of lawsuits, or through spotchecking forms during general examinations of insurers. Sometimes hints are given by competitors.

When violations are discovered, the commissioner's order may be enforced through a variety of administrative or public law devices; private law effect may also be given to approval, disapproval, or failure to

118. Thus Wis. Stat. § 204.31(9) (1963) refers to the provisions of Wis. Stat. 227.01-26 (1937).
119. Cole v. State ex rel. Harris, 91 Miss. 628, 45 So. 11 (1907).
121. See text accompanying note 109 supra.
122. Walters v. Western Auto. Ins. Co., 116 Kan. 404, 226 Pac. 746 (1924). In Blount v. Royal Fraternal Ass'n, 163 N.C. 167, 79 S.E. 299 (1913), a statute made it unlawful to issue life policies for an amount less than $500 unless the forms were approved by the commissioner. The court started from a presumption that the contracts were valid, placed the burden of showing nonapproval on the plaintiff policyholder, found that the burden had not been satisfied, and gave effect to limiting language in the contract. The court said that if the lack of approval were proven the policy would be unlawful and the plaintiff would recover nothing at all "except possibly upon the idea that the insured would not be in pari delicto with the company."
approve. Public law enforcement may be carried out by the commissioner, by local prosecuting attorneys, or by the attorney general; ordinarily the initiating power lies with the commissioner, who may sometimes take action himself but sometimes must stimulate prosecuting attorneys or the attorney general to action. The appropriate action may depend on the type of remedy sought, the line of insurance involved, and the state.\textsuperscript{123}

The most common penalty is the imposition of a fine or "forfeiture." In some jurisdictions this tends in practice to be a "voluntary" payment by the delinquent insurer to avoid more severe treatment, although the statutes usually provide that the forfeiture shall be in addition to any other punishment. In Wisconsin, a forfeiture up to 500 dollars may be imposed upon written consent of the insurer and without a hearing.\textsuperscript{124} In a recent New York case, a fine of 13,000 dollars was imposed after a hearing in which the matter was "settled by stipulation."\textsuperscript{125}

Though violations of the insurance law are often made criminal offenses, punishable by fine and imprisonment,\textsuperscript{126} actual imposition of criminal sanctions is unusual.

Usually the commissioner has the power to revoke or suspend the insurer's license.\textsuperscript{127} There seem to be no reported court decisions where such action has been taken to punish the use of unapproved policy forms, nor have we seen indications of unreported use of this drastic sanction. In view of the extreme adverse effects of suspension or revocation of license on the insurer's financial situation and the policyholders' security, a commissioner would be slow to take that step for such violations alone, but the power to revoke a license gives him an important weapon for negotiation.

To compel compliance with an order to discontinue use of a disapproved policy form, the commissioner usually has express authority to obtain an injunction; sometimes the statute explicitly enacts the tradi-


\textsuperscript{125} The Journal of Commerce, July 11, 1961. The fine imposed was $13,000, for the use of credit accident and health and credit life insurance forms which had not previously been filed with the department. Journal of Commerce, No 28, 1961, p. 8, reports a similar case with a fine of $5,000. For special statutory provisions see Mich. Stat. Ann. §§ 24.12866, 13480 (1957); N.Y. INS. LAW § 164(8); Wis. Stat. §§ 203.08, 203.22, 204.31(8) (1963).


tional equity limitation that the injunction must be necessary to prevent irreparable injury.\textsuperscript{128}

Issuance of a conditional license provides a curious device for policy control; one insurance commissioner qualified a license issued to a foreign company by forbidding use of a proposed policy. Despite lack of specific authority to review the form, the court refused the company's request for mandamus to compel deletion of the condition, on the ground that the policy would be, in fact, violative of the state's public policy.\textsuperscript{129}

The question whether private law relations—that is, between company and policyholder or beneficiary—are affected by the requirement of department approval is more difficult. In one case, a beneficiary sued on a life insurance policy to which was attached a war clause rider which had been refused approval by the Director of Insurance, as required by Illinois statute. The death was not covered under the terms of the rider, which excluded coverage during military service unless the policyholder received written consent from a specified official of the company and paid the extra premiums required by the company. The trial court held for the beneficiary but the appellate court reversed, refusing to give private law effect to the refusal of the Director to approve and saying that a fine or penalty might be used to enforce the order. The Supreme Court of Illinois reinstated the judgment of the trial court but put the result on the ground that the rider was indefinite and uncertain and lacked mutuality and hence was void. The court does not make its position clear about the effect of disapproval but leaves the matter in doubt.\textsuperscript{130} When the company seeks to defend a suit on the policy on the ground that it was issued without approval, it is easy to refuse private law effect thus holding the insurer liable,\textsuperscript{131} but some cases refuse it even if the insurer gets the benefit of the refusal.\textsuperscript{132} Sometimes the court seems to be denying private law effect to a valid action of the commissioner and in other cases seems to be reviewing its validity. The kind of decision being made is not always clear.

The court was in no doubt when the question was raised in New Hampshire. It gave private law effect to approval or nonapproval in a

\textsuperscript{128} N.Y. Ins. Law, \$ 35.
\textsuperscript{131} Southern Cas. Co. v. Hughes, 33 Ariz. 206, 263 Pac. 584 (1928).
declaratory judgment proceeding, though without deciding the merits since it did not appear whether the commissioner had approved. In Texas also, the court has seemed ready to give full private law effect to the commissioner's action. In a suit on a fire policy, the company relied on an exclusion clause inserted in an otherwise standard policy. The clause apparently had been submitted for approval but the insurance department had taken no action. The Supreme Court of Texas held the clause to be void, thus giving private law effect to the approval requirement. Perhaps contributing to this result is the fact that in Texas the power to prescribe entire forms has been delegated to the department and the delegation upheld.

An attempt by a policyholder to rescind a policy and recover the premium paid, on the ground that the policy was void because the form had not been approved by the commissioner, was unsuccessful in Kansas. In another case, on instructions of the Kansas commissioner, a company that had issued many unapproved policies which were allegedly discriminatory as against other policyholders, cancelled them all. The cancellation was based on a reserved power to cancel on five days notice contained in the policies, so the case did not truly test the validity of the issued policies.

g. Withdrawal of Approval. A commissioner may sometimes wish to withdraw previously granted approval. The insurer has an interest in assurance that approval once given will not be withdrawn, for commitment to a marketing program may be a substantial investment. On the other hand, inadequacy of policy examination by insurance departments and the resulting practice of approving forms perfunctorily or permitting the deemer period to lapse without review makes the power of subsequent disapproval indispensable to protect policy holders. Even in the New York department, an approved life insurance rider later had to be disapproved when it was discovered that it contained an unlawful suicide clause.

The Indiana court has held there can be no estoppel against the commissioner by approval or consent, though the significance of the case is

135. See text accompanying note 13 supra.
138. See Michaelson & Goodridge, Filing and Approval of Forms in Examination of Insurance Companies 395.
139. Department of Ins. v. Church Members Relief Ass'n, 217 Ind. 58, 26 N.E.2d 51 (1940).
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limited by the fact that the commissioner's action was regarded as ministerial. Other questions arise where he has discretion. In the absence of express statutory provision, only exceptional cases have suggested that the commissioner's decision was irreversible. Today most statutes expressly authorize him to withdraw approval previously given, if he finds that a form does not comply with the law. The grounds for withdrawal are usually the same as those for initial disapproval, including whatever discretion existed there. Usually a procedure is also prescribed. It may be more formal than that for initial disapproval and ordinarily involves at least notice and a hearing. Some departments that have no express statutory authority to withdraw approval do so anyway, relying on a general duty to enforce the law; others think they have no power to withdraw approval.

Action on forms already in use is often precipitated by a court decision or an attorney general's opinion, or a change to a stricter law. Special problems are sometimes created by such an enactment. For example, when a 1961 California statute increased the requirements for approval of individual hospital, medical, or surgical policies, requiring that benefits not be unreasonable in relation to the premium to be charged, the department estimated that at least 20,000 currently approved forms would be affected. Adequate review of those forms would have been virtually impossible. Consequently the department, after enunciating by general rule a standard of reasonableness in terms of a minimum loss ratio, worked out on a trial basis a preliminary screening procedure to enable it to handle this large volume of work. Similarly, faced with a new 1957 statute providing stricter standards which had potential effect on 32,000 forms then on file, the Texas Board of Insurance Commissioners promulgated a general rule exempting these forms from the approval requirement and then set up a procedure by which the exemption would gradually be withdrawn in order to effect an orderly review of the forms. Companies were to certify such of their forms as they thought complied with the law and spot tests by the department would then determine whether

140. Cole v. State ex rel. Harris, 91 Miss. 628, 45 So. 11 (1907), merely decided that mandamus was not available at the instance of a prosecuting attorney to compel reversal. However, the court was obviously influenced by the possible hardships to the company implicit in reversal.
142. 1952 NAIC PROCEEDINGS 529.
143. See Michaelson & Goodridge, op. cit. supra note 138.
If the commissioner decides that a kind of form previously approved by the department should no longer be approved, difficult problems may exist. Because the statutes so frequently require notice and hearing for withdrawal of approval, it seems quite likely that in the absence of special statutory enactment, any attempt to compel withdrawal on a blanket basis will fail; no withdrawal could then be made without either the acquiescence of the insurers concerned or notice and hearing in every disputed case. The number of forms subject to such a decision may lead the commissioner to conclude that it is not worth the effort to tighten his rules if he must have individual procedures for each one. Moreover, existing form files may be incomplete or at least chaotic and finding out what forms have been approved that need action may be a forbidding task. The commissioner may decide instead merely to stop approving such forms for the future and rely on the normal processes of attrition to take care of the existing problem eventually, assisted by such prodding from the department as proves possible. But disapproval for the future alone has two undesirable aspects. First it involves a certain element of discrimination among companies, though surely not discrimination that is objectionable on constitutional grounds. Second, it would discourage companies issuing policies that are no longer being approved from modifying those forms favorably to the insured in other respects, because such improved forms would not be approved.

3. The Complaint Function of the Department.

Besides the making of rules and the control of general policy terms insurance departments also intervene frequently in individual contract matters. While they have no judicial power and may not definitively decide contested cases between insurers and policyholders against the will of either party, they do encourage policyholders to submit complaints and try, by negotiation with the insurers, to solve the problems raised. Justification for such activity lies partly in the assistance it gives the department in performing its central function of approving forms and partly in the need for a flexible and summary machinery to give assistance to policyholders on matters that do not justify the expense of more formal legal proceedings.

The New York department maintains complaint bureaus in New York City and Albany with substantial staffs. In 1961 these bureaus handled 9,295 complaints concerning loss settlement or policy provisions. Most concerned automobile liability insurance and accident and health

146. State Bd. of Ins. v. Sam Houston Life Ins. Co., 344 S.W.2d 709 (Tex. 1961), describes the procedure and quotes most of the relevant statutes and regulations.
The general policy seems to be to press the companies to make payment in cases where the strict application of the provisions of the policy, although technically justified, would cause undue hardship and to induce insurers to exercise a more liberal attitude in loss settlement practice.

The procedure followed in these cases is rather informal, and the measures taken are in most instances limited to recommendations without binding force. However, the commissioner's wish is not lightly disregarded even when it is considered to be unjustified. There is some danger, in fact, that departments may induce companies to pay when a sound social policy would dictate otherwise.

Further exploration of the complaint function as it is related to policy form approval seems unwarranted, since its main focus is on loss settlement. An extensive investigation into the complaint files of one department has progressed a long way; when it is reported it will supplement this study at this point.

III. Administrative Control over Policy Terms in Europe

A. Organization of Insurance Departments

1. Germany. In 1901 the German Versicherungsaufsichtsgesetz (VAG), or insurance supervision law, created the Kaiserliches (later Reichs) Aufsichtsamt für Privatversicherung. With the collapse of Germany in 1945 the Reichsaufsichtsamt came to an end. The occupation forces established supervisory agencies, the one for the British occupation zone being in Hamburg. After formation of the West German Federal Republic in 1949, a new Bundesaufsichtsamt, or Federal Insurance Department, established in 1951, took over most of the personnel of the British Zone agency, many of whom were former staff members of the old Reichsaufsichtsamt. This preserved some continuity in regulatory practice. The main substantive rules of supervision have remained unchanged since 1901.

147. N.Y. 103rd Prelim. Rept. 108.
151. An important exception was enactment of § 81a by Gesetz zur Änderung des Gesetzes über die Beaufsichtigung der privaten Versicherungsunternehmungen und
Enforcement of the VAG and other statutes relating to insurance supervision is divided between the Federal Insurance Department (hereafter called the department) and individual state agencies, which have control mainly of local insurers of minor economic importance. Cooperation between the state agencies and the department is achieved by regular meetings to discuss regulatory policy, including such things as new policy forms. This cooperation parallels on a smaller scale that of the NAIC in the United States. Problems are fewer because there is a single common statute, because the German states are fewer in number, and because only the federal department deals with the large commercial companies.

Though the department has a large measure of independence, it is formally subordinate to the Minister of Economics. The subordination is meaningful at certain points, but not on the subject matter of this article. The president of the department is appointed for life by the Bundespräsident upon recommendation of the Minister of Economics. Average tenure has been about six years. About thirty senior officials of the department have been appointed for life by the Bundespräsident; the others are appointed by the Minister of Economics. Altogether there are about 100 discretion-exercising officials, graded in the upper levels of the civil service. Most are lawyers; the others are actuaries, economists, and accountants. In total the department employs about 250 persons. Its 1963 budget was about $1,131,300. In comparing these figures with those for the American insurance departments (New York: 680 em-

Bausparkassen vom 5. März 1937, § 4a, [1937] Reichsgesetzblatt I 269. It authorized the insurance department to demand alteration of the Geschäftsplan, or plan for doing business. Under certain circumstances § 81a empowers the department to affect existing contracts by its order.

152. BAG § 2 defines the boundary line. Prößl, VAG 37-38 provides a list of the state agencies. State agencies may have their own procedures and organization but must apply federal substantive law. BAG §§ 3, 4, 5 provide for transfer of regulatory power from the state to the federal agency or vice versa.

153. In 1959-60, three meetings dealt with topics ranging from tax problems of small mutual insurers, through new AVB for the insurance of frozen foods, to the impact of the treaty establishing the European Economic Community. Bundesaufsichtsamt für das Versicherungs- und Bausparwesen, Geschäftsbericht 1959-60, at 1-2 (hereafter referred to as Geschäftsbericht).

154. In 1901, the agency was made subject to the Ministry of the Interior. That was changed in 1917, on the creation of the Ministry of Economics. [1917] Reichsgesetzblatt 963. See also Materialien zum Versicherungsaufsichtsgesetz, Entwurf des Gesetzes (Begründung) at 91 (1900). VAG § 106 gives the minister discretion on the licensing of foreign companies, now qualified by the "freedom of establishment" provisions of the Treaty of Rome, Arts. 52-58. Text of the treaty, with commentary, may be found in Wohlfarth-Everling-Glaesner-Sprung, Die Europäische Wirtschaftsgemeinschaft (1960).

155. 1963 Geschäftsbericht 12. The industry now bears directly 9/10 of the cost, apportioned on the basis of premium receipts. VAG § 101.
ployees, $6,000,000) it must be kept in mind that in Germany examination of companies is done by independent private accounting firms employed by the companies, while American departments tend to have their own examiners. Further, the German Department engages very little in rate regulation and does not license or otherwise regulate agents.\(^{156}\)

The department is organized in eight divisions, including divisions for life, for sickness, for property, and for liability and accident insurance. Each of these operating divisions is responsible for all regulatory questions in its assigned branches of insurance, including the approval of forms; there is no general policy examination bureau.

The VAG provides for a Beirat, an advisory committee of insurance experts of various kinds, “for participation in regulation.” Its sixty members are appointed for five-year terms by the Bundespräsident upon recommendation of the Bundesrat, or Federal Council.\(^{157}\) The Beirat has both advisory and decision-making functions, including some activity in relation to approval of policy forms.

The implementing regulation for the establishment of the Federal Insurance Department created Beschlusskammern, ad hoc committees, to decide individual cases, consisting of three officials of the department and two members of the Beirat.\(^{158}\) They decide by majority vote after a hearing. In cases involving small mutual insurers and in cases where an application is to be approved, the president of the department may decide alone, by written order. Proceedings before a Beschlusskammer about contract terms are infrequent, since differences of opinion are nearly always settled by negotiation, and the final order is usually a confirmation of an agreement already reached. In such cases the decision may be made by the president alone. When an application for approval of policy terms is not to be granted in full, however, a Beschlusskammer will be called. Its decisions in turn may be reviewed by the Bundesverwaltungsgericht,\(^{159}\) a federal administrative court. Since 1952, there have been from seven to sixteen proceedings a year before a Beschlusskammer, but few have concerned policy terms.

The department has under its supervision about a thousand insurers, but the number is almost irrelevant to the amount of regulatory work performed in the control of contract terms. There are no statistics about

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156. For a survey of higher level department personnel, see 1963 Geschäftsbericht 11-12; for appointment provisions, see VAG § 90.
157. VAG § 92; Dritte Durchführungsverordnung zum Gesetz über die Errichtung eines Bundesaufsichtsamtes für das Versicherungs- und Bausparwesen, vom 25 März 1953, E 3, [1953] Bundesgesetzblatt 1:75. This Verordnung is hereafter cited as 3. DVO. It is reprinted with commentary in Prölls, VAG, at 55-86.
158. 3. DVO §§ 7, 10; see Prölls, VAG at 63, 77.
159. BAG § 10a.
the number of policy forms handled, since regulation takes a different form. The Allgemeine Versicherungsbedingungen (AVB), general policy terms, are generally developed, amended, or revised by joint action of the department and large industry groups. Approval of forms for use by single insurers is usually a matter of routine. But in Germany the development of AVB is a more important regulatory activity relative to other regulatory tasks than is the approval of policy forms in the United States.

2. France. Despite its relatively advanced economy, France was late in developing a comprehensive system of insurance regulation. But the Direction des Assurances, (hereafter called the department) is now established as a special agency within the Ministry of Finance. There are no agencies on a local level. The department is considered a technical and not a political agency, though political influence on administrative decision is not unknown.

The present staff consists of about 200 persons, including about thirty highly ranked civil servants with thorough administrative training and about 120 lower ranked civil servants with special actuarial and legal knowledge, with about thirty traveling examiners among them. Expenses, including those of the Conseil National des Assurances, are borne by the insurance industry in proportion to premium income. Until 1964 a special section of the "general affairs" division of the department handled all policy forms and other documents except life insurance forms, which because of their actuarial implications were processed in the special life insurance section. On February 1, 1964, a new organization plan was introduced by order of the Directeur des Assurances. According to the new pattern, the department is organized in three divisions: the French insurance market, the technical and financial control of insurance enterprises, and general affairs (organization, personnel, statistics, special services). Policy control is no longer counted among general affairs but among the legal and economic questions handled separately in the three sections of the first division—life insurance, marine and reinsurance, and other lines. Thus no one is occupied exclusively with policy examination, and no statistics are available about the work actually done. However, department officials think the staff is not large enough. Lack

160. Loi du 23 février 1941. Statements about France not otherwise supported by citations are based upon interviews in the department in April 1962 and July 1964 and on internal instructions in use there. The French investigations were made by Mr. Pfennigstorf. French sources for insurance regulatory law are conveniently available in Schmidt, op. cit. supra note 149.


162. Décret du 30 décembre 1938, art. 181. The new organization plan is published in 1964 ANNUAIRE DES SOCIÉTÉS D'ASSURANCES.
of personnel has made it impossible in the past to review adequately all the documents that are subject to the filing requirement. Activity was limited to policy and application forms, with other material being reviewed only exceptionally.

At the end of 1962, the department supervised 582 insurance enterprises, of which 375 were French and 207 were foreign. In order to evaluate the work load, it must be known that all kinds of documents are subject to filing and review and that each new edition of a document must be submitted. Moreover, standard forms are used less frequently than in Germany; thus many forms must be examined individually for every insurer. The situation is more nearly comparable to that in the United States. In 1950, about 250 policy forms (other than life insurance) were reviewed; in 1961, the number was 800 to 1000.

The law provides for a Conseil National des Assurances, an advisory committee analogous to the German Beirat, which was established in 1946 to replace the Conseil Superieur des Assurances created by the law of 1938. The Minister of Finance is the president of the Conseil. At first the insurance industry was not represented at all in the Conseil; since 1954 it has had seven representatives among the thirty-eight members. The others include representatives of insurers' employees, agents and brokers, policy-holders, and government.

The Conseil National has little importance for the control of policy terms. The Minister must ask its advice in certain cases but need not follow it, even on refusal or withdrawal of a license, though in this case there must be two consultations. Where the advice of the Conseil National is prescribed by law, the decision usually results from unofficial talks between department officials and the most interested and influential members of the Conseil. Even when the advice is not required by law, it is sometimes asked in order to maximize the pressure upon the insurance industry.

163. Rapport sur la Situation en 1962 des Sociétés d'Assurances. . . . 7 (1964). These figures include marine insurers but not reinsurers.
164. Loi du 25 avril 1946, art. 14-23 as amended by décret du 28 Mai 1954. In 1940 under German influence, the Comité d'Organisation des Assurances was established, with broad powers to exercise a kind of self-regulation of the insurance business. Loi du 16 août 1940. It was abolished at the end of the war, but its powers devolved upon the Minister of Finance. Ordonnance du 29 septembre 1945, art. 1-9. See also OECD, Supervision of Private Insurance in France 47 (1963), hereafter cited as OECD Statement (France). This statement was prepared for the OECD by the Direction des Assurances. The ideas governing the Comité d'Organisation seem to have influenced the functions assigned the Conseil National des Assurances by the 1946 law. Procedural rules for the Conseil National have been promulgated by the Minister. Arrêté du 28 juin 1954.
165. Décret-Loi du 14 juin 1938, art. 8.
The law also provides that the Conseil National shall submit suggestions to the Minister concerning premium rates and general policy terms. It was hoped that control would work as a stimulus to rationalize and reorganize the insurance business. A particular need for such activity was felt since the compulsory provisions of the law of 1930 leave little room for experimentation. The contribution of the Conseil National in this direction has not been highly regarded. Its suggestions have not always been practicable, and recently it has not produced any.

B. The Activity of Administrative Agencies

1. Germany.

a. Rule-making activity. The German insurance department has power to make general rules respecting insurance contracts in only two cases. First, it may make rules prohibiting the granting of special benefits to single policyholders or groups of policyholders. The department has implemented this policy against discrimination by issuing general rules defining and limiting the special benefits permitted in group insurance contracts and prohibiting such abuses in marketing practices as rebating by agents.

The second power for making general rules was created in 1940 by a Verordnung, or legislative order, authorizing the insurance department to make any existing AVB compulsory for all insurers and even applicable to existing contracts. Though the authorization was given mainly to adjust existing motor vehicle liability insurance contracts to the new compulsory insurance law, it was completely general in its terms. Sub-

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166. Loi du 25 avril 1946, art. 15.
167. See the report and opinions in 1946 Revue Générale des Assurances Terrêtres 187, 202; see also the opinion of the Minister of Finance quoted by Picard, La Nationalisation de Certaines Sociétés d’Assurances (loi du 25 avril 1946) in 1946 Revue Générale des Assurances Terrêtres 109, 112. On the other hand, when the biggest companies were nationalized, a “free sector” of smaller companies was retained for the purpose of giving free room for experiments with new forms of coverage. See the report in 1946 Revue Générale des Assurances Terrêtres 189.
170. VAG § 81(2), Satz 3. The regulations must be promulgated in the Bundesanzeiger.
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sequently it was used to make quick changes necessary during the emergency situation at the end of World War II. The new Federal Insurance Department has not exercised power under it.

Direct judicial review of such general regulations is possible only where it is alleged that the regulation violates the Grundgesetz, or federal constitution. The Bundesverfassungsgericht, or federal constitutional court, will consider constitutionality upon application of the federal government, a state government, or one-third of the members of the Bundestag, or federal legislature. Upon collateral attack, as in a lawsuit between an insurer and a policy holder, any court will disregard a regulation that exceeds the limits of the department's statutory authorization.

Very few constitutional questions have arisen in Germany respecting enactments by the national legislature. But somewhat more difficulty has arisen respecting action taken by administrative agencies to implement the statutes. For example, there has been considerable discussion whether certain administrative regulations implementing the statutes, which were introduced under the Third Reich, still have validity. The conclusion has been that regulations are not necessarily invalid simply because they come from the Nazi period, if they are not objectionable on other grounds.

The problem of improper delegation can arise under the German constitution, too. Legislative power may be delegated to the government or to a single minister, provided that the purpose, the subject matter, and the scope of the delegation are fixed in the statute. Under the present constitution, a subordinate authority like the Federal Insurance Department may not be given legislative power, though before the formation of the Federal Republic there was no such limitation.

b. Rule-enforcing Activity—Approval of Allgemeine Versicherungsbedingungen (AVB).

In German practice, the policy, or Versicherungsschein, is merely a certificate of insurance, containing a minimum of information. The detailed terms of the contract, or AVB, are separately printed.

The application of an insurance company to the German Federal Insurance Department for a license to do business must be accompanied by

175. Grundgesetz, Art. 80(1). A rule issued under this authority is called a "Verordnung." A Verordnung has prescribed the details of organization and procedure of the federal insurance department. BAG § 10, and 3 DVO.
a Geschäftsplan, or plan of operation, which explains the legal, economic, and financial bases for the proposed activity. Among other things, the Geschäftsplan contains the AVB, or general terms of the insurance contract. Amendments of the Geschäftsplan and therefore of the AVB must be approved by the department on the same principles as the original approval. Consequently, new or revised AVB must be submitted to the department and approved in order to introduce new coverage or modify old.

The statute formerly required the insurer to furnish the policyholder a copy of the AVB, either with the application or the Police. This requirement has been partly suspended in times of paper shortage, and at the present time is not compulsory in various lines, including automobile, water leakage, fire, and burglary insurance. In all cases the policyholder must be given a copy on request, but the applicability of the AVB does not depend on compliance.

Delivery of the AVB is a formal requirement, in the sense that it seeks to provide the policyholder full information about his coverage. Most formal requirements in American practice are imposed by statute, but in Germany they are imposed by the department in the exercise of its general authority.

i. Scope of the Approval Requirement. AVB constitute a specific case of a common phenomenon in Germany, the Allgemeine Geschäftsbedingungen, which are institutionalized contract terms used for mass contracts of all sorts. Of course no approval is needed for the AVB of unsupervised lines: ocean marine, transportation insurance, or reinsurance. Such AVB do exist; for example, the Allgemeine Deutschen Seeversicherungsbedingungen of 1919 are operative in ocean marine.

176. VAG § 5(2), commented on by Prölls, VAG.
177. VAG § 13. Grounds for refusal of a license are stated in VAG § 8. They include failure to protect the interests of the insured or ensure that the company’s obligations can be met continuously.
178. Prölls, VAG § 10, note 5.
179. Ibid.
181. Ibid.
182. E.g., there are Allgemeine Deutsche Spediteurbedingungen (for forwarding agencies), Allgemeine Geschäftsbedingungen der Spar-, Girokassen und Kommunalkassen (for different varieties of savings institutions), and many others.
184. The Allgemeine Deutsche Seeversicherungsbedingungen were prepared by insurers and policyholders jointly. They are treated in voluminous commentaries. See, e.g., Ritter, Das Recht der Seeversicherung (1922 and 1924) (2 volumes). Even the proceedings of the drafting commission were published as an aid to interpretation: Bruck, Materialien zu den Allgemeinen Deutschen Seeversicherungsbedingungen (1919) (2 volumes).
THE APPROVAL REQUIREMENT APPLIES ONLY TO STANDARDIZED CONTRACT FORMS. INDIVIDUAL AGREEMENTS CAN THEOREetically BE MADE WITHOUT DEPARTMENT APPROVAL, JUST AS INDIVIDUAL RIDERS AND ENDORSEMENTS ARE SOMETIMES EXEMPTED BY AMERICAN STATUTES. HOWEVER, VAG SECTION 10(3) PERMITS DEVIATION FROM APPROVED AVB TO THE PREJUDICE OF THE INSURED ONLY WHERE PECULIAR CIRCUMSTANCES WARRANT, AND THEN ONLY IF THE POLICYHOLDER IS EXPRESSLY INFORMED AND CONSENTS IN WRITING. IF THE INDIVIDUAL CONTRACT DEVIATES TO THE BENEFIT OF THE INSURED, THE RELEVANT COMPANY ASSOCIATION OR INDIVIDUAL COMPANY MAY COMPLAIN, AND THE DEPARTMENT MAY FEEL THAT THE FAVORABLE TREATMENT CONTRAVENES THE GENERAL POLICY PROHIBITING BEGUNSTIGUNGSVERTRAGE, OR CONTRACTS DISCRIMINATING IN FAVOR OF PARTICULAR POLICYHOLDERS. IT WOULD SEEM TO FOLLOW THAT PERMISSIBLE INDIVIDUAL CONTRACTS MUST BE GENUINELY INDIVIDUAL AND INDEPENDENTLY NEGOTIATED ON THE BASIS OF SPECIAL CHARACTERISTICS OF THE RISK AND NOT BE MERELY DEVIATIONS UNSUPPORTED BY JUSTIFIABLE GROUNDS. IF THE INDIVIDUAL AGREEMENT IS FREQUENTLY REPEATED ITS USE IS CONSIDERED AN AMENDMENT TO THE GESCHÄFTSPLAN AND NEEDS APPROVAL. HOW MANY INSTANCES SUFFICE TO PRODUCE THIS RESULT CANNOT BE STATED SIMPLY—IT DEPENDS ON ALL THE CIRCUMSTANCES. THE POSSIBILITY OF EXPERIMENTING WITH NEW COVERAGE THROUGH INDIVIDUAL CONTRACTS SEEMS SO LIMITED AS TO SUBJECT THE GERMAN SYSTEM TO THE REPROACH OF MAKING THE INTRODUCTION OF NEW DEVELOPMENTS CUMBERSOME AND DIFFICULT. THE POSSIBILITY OF INDIVIDUAL CONTRACTS IS FREQUENTLY REFERRED TO IN CONVERSATION AS A SAFETY VALVE OF THE SYSTEM, BUT THAT MAY BE A DEFENSE MECHANISM, ONLY PROVING THAT THE CONSERVATISM OF THE GERMAN SYSTEM IS FELT TO BE A PROBLEM. IT SHOULD BE UNDERSTOOD, HOWEVER, THAT THIS ALONE IS NOT SUFFICIENT TO CONdemN THE SYSTEM. FURTHER CONSIDERATIONS MUST BE WEIGHED. NOR IS IT EASY TO COMPARe THE DIFFICULTY OF INTRODUCING NEW FORMS IN DIFFERENT SYSTEMS—IN ADDITION TO THE FACTORS CHARACTERISTIC OF THE SYSTEM, IT DEPENDS ALSO ON THE PECULIAR CIRCUMSTANCES OF THE PARTICULAR CASE.

APPLICATION FORMS, INSURANCE CERTIFICATES, AND LIKE DOCUMENTS ARE NOT GENERALLY PART OF THE GESCHÄFTSPLAN BUT ARE STILL SUBJECT TO SOME CONTROL BY THE DEPARTMENT UNDER ITS GENERAL POWERS.

185. VAG § 81(2) AUTHORIZES DEPARTMENT RULINGS PROHIBITING SUCH DISCRIMINATION. IN ONE RECENT CASE, THE VERBAND DER SACHVERSICHERER CALLED THE ATTENTION OF THE DEPARTMENT TO THE FACT THAT A CERTAIN COMPANY HAD CONCLUDED BUSINESS INTERRUPTION INSURANCE WITH COVERAGE FOR A PERIOD OF INTERRUPTION SHORTER THAN THAT PROVIDED IN THE AVB, WITH THE PREMIUM REDUCED EVEN MORE SUBSTANTIALLY. THE DEPARTMENT DEMANDED THAT THE COMPANY AGREE TO DISCONTINUE THE PRACTICE, CALLING THE CONTRACT AN IMPERMISSIBLE BEGUNSTIGUNGSVERTRAG. THE COMPANY ACCEPTED THE UKASE WITHOUT CONCEIVING THAT ITS POSITION WAS WRONG.

186. BUT SEE 1908 VERÖFFENTLICHUNGEN DES KAISERLICHEN AUFSICHTSAMTES 111-114 FOR AN ATTEMPTED DEFINITION. (THIS PUBLICATION IS HEREAFTEr CITED AS VERÖFFENTLICHUNGEN).
ii. Sanctioning of the Approval Requirement. The approval requirement and restrictions on deviations are merely public law duties of insurers. The private law validity of nonstandard contracts is not affected by failure to conform to the demands of the statute.\footnote{187} Adherence can be compelled only by administrative means.\footnote{188} This statement does not apply, of course, to compulsory terms of the insurance contract law, which are applicable to govern the relationship whether inserted in the contract or not. Nor does it apply to the unusual cases where administrative action is effective to alter the terms of existing insurance contracts.\footnote{189}

iii. Terminology of AVB. It is difficult to carry generalization very far, for there are significant differences in insurance department procedure and attitudes among the main branches of insurance. Even terminology is not standard. To some extent the branches of the business have inherent differences; to some extent variations result from differences in the organization of the business, such as the degree to which a trade association dominates a branch of insurance; to some extent they reflect differences within the department itself, the divisions of which each handle a major branch of insurance essentially independently. Only at the top level do department officials handle more than life or property or liability or sickness insurance. At the levels where agreement is actually worked out on AVB there is opportunity for important differences to develop over a period of time.

Under the law, applications for approval of new or amended AVB are made by single insurers. However, in property and liability insurance, the process is so far dominated by the associations that in property insurance a notification of approval of AVB includes a list of the affected companies, or in liability insurance a statement to the association that the department is prepared to approve certain AVB is then followed by formal requests from individual companies, the association acting as representative, with merely pro forma approval of the AVB by the department. In sickness insurance, on the other hand, the process is less dominated by the association, and only the most general terms (called Grundbedingungen) are worked out through cooperative department-association action. These are not even "approved" in the formal sense. Negotiations are then entered into between the department and individual

\footnote{187. For a discussion of this distinction, see Kimball and Pfennigstorf, \textit{supra} note 180, at 678 \textit{passim}.}
\footnote{188. In the case discussed in note 185 \textit{supra} the department made no suggestion that existing contracts would be affected. Instead, it extracted a commitment from the company not to engage in like conduct in the future.}
\footnote{189. See note 172 \textit{supra}.}
insurance companies for the approval of AVB which include, incorporated by reference, the terms of the appropriate Grundbedingungen. This situation is affected by the fact that in sickness insurance the statute makes the tariff a part of the Geschäftsplan, to be approved as an integral part of the AVB. Life insurance falls somewhere between sickness and property insurance, probably closer to the latter, so far as association domination of the process is concerned.190

In the statutory sense, all policy terms subject to approval are AVB.191 But some are referred to by other names—the choice of name is not decisive. Thus, in liability insurance the term Besondere Bedingungen, or “special terms,” is used for stipulations applicable to specialized risks, such as the special terms for the coverage of damage on the occasion of blasting and demolition operations. In property insurance the term Sonderbedingungen is used for supplementary types of coverage, such as replacement cost coverage for dwellings. In property insurance, the term Klauseln is used for more specialized clauses. A whole schedule of Klauseln has been approved and is available for use in special situations. In both branches the term Zusatsbedingungen, or “supplementary terms,” is used as a near-synonym for Besondere Bedingungen.

Occasionally a broker is responsible for the development of so-called Maklerbedingungen, and association prepared terms are sometimes called Normativ- or Verbands- or Musterbedingungen, or “Association Forms.”192 But all of these are AVB in the legal sense and are to be distinguished from terms not subject to approval because only to be used for particular cases.

The term Besondere Bedingungen is often used, in contrast to its use described in the paragraphs above, to describe special terms developed for use in individual contracts, and therefore not subject to approval.

Sometimes the department also approves Geschäftsplanmässige Erklärungen, “explanations of the plan of operation,” as a supplement to various AVB. Erklärungen may also be used in a less formal way, as a device for obtaining stipulations from an insurer that it will interpret its

190. VAG §§ 11, 12. On the greater diversity in life insurance as compared to property insurance, see Arnold, Förderung der Vergleichbarkeit von Versicherungsleistungen in der Lebensversicherung, in 1957 VERÖFFENTLICHUNGEN 16-18, and Bischoff, Markttransparenz der AVB in der Sachversicherung als Aufsichtsproblem des § 8(1) Ziff. 1 in Verbindung mit § 13 VAG, in 1956 VERÖFFENTLICHUNGEN 33.
192. In livestock insurance, the department itself prepared such forms. Finke, WERBUNG UND WETTBEWERB IN DER VERSICHERUNG (a looseleaf service) provides a current collection of the main AVB of all lines. Prölls, Versicherungsvertragsgesetz (14 Aufl. 1963), also comments on the most important AVB. In addition, the department has prepared standard forms of bylaws for small mutuals. 1955 VERÖFFENTLICHUNGEN 157.
contracts in a certain way. *Erklärungen* are likely to begin "We obligate ourselves to . . ." followed by a statement of a special case in which the company will pay.\(^{193}\) *Erklärungen* are to be distinguished from all *Bedingungen* since they are never intended to be a part of the contract. They are purely public law matters and are not enforced by the ordinary courts, as *Bedingungen* are when they are actually used and thus become a part of the contract. The *Erklärungen* received more detailed explanation later in this paper.

iv. The Process of Approval of AVB. All German insurers belong to associations organized according to the insurance business' main traditional divisions, which take the lead in preparing AVB. This has many advantages. There has been such an enormous investment of effort and skill in the preparation of the German AVB as to lead to doubts in some quarters about the merits of the entire process. It would be a waste of social resources to duplicate that activity unnecessarily. A description of the process through examples should prove illuminating.\(^{194}\)

The initiative in the development of new or revised AVB generally rests with the associations or with individual insurers, though occasionally it rests in the department. When insurers are thought to be using special contracts repeatedly a demand that they justify their action may lead to a new form.

The first example deals with the revision of the AVB for business interruption coverage. In July 1947, an insurance buyer, through his broker, brought to the department's attention a deficiency in a clause of the AVB for business interruption insurance. In August the department requested an opinion from the company on the risk, and the company referred the matter to a committee of the trade association. In November the latter suggested modifying the questioned clause to the benefit of the policyholder. In January 1948, the broker objected to patchwork changes and suggested a more basic revision. In February, the department asked the trade association's committee for its opinion and expressed a desire to look at premium computation methods.\(^{195}\) In March, the trade association's committee said it was willing to re-examine the whole clause at its

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193. See, *e.g.*, 1959 *VERÖFFENTLICHUNGEN* 130 for some *Erklärungen* in fidelity insurance.
194. These descriptions are based upon examination of the complete files in the offices of the Insurance Department in Berlin. The studies of files in Berlin were made by Mr. Kimball. The final results were published, as is customary, in 1955 *VERÖFFENTLICHUNGEN* 154-56 and 1962 *Veröffentlichungen* 170-75. Comments on these proceedings may also be found in 1955 *Veröffentlichungen* 153, 176-79, and 1962 *Veröffentlichungen* 192-98. See also 1921 *Veröffentlichungen* 117 for earlier revision of the general liability AVB; 1926 *Veröffentlichungen* 146 and 1929 *Veröffentlichungen* 131-41 for a major revision of fire insurance AVB.
195. Technically, premium rates in this branch are not subject to regulation.
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next meeting. Simultaneously the Deutscher Versicherungs-Schutz Verband, a protective association of insurance buyers, interpreted the clause and requested to be heard and to deal with the companies. During the remainder of 1948 there was much discussion and at least one formal trade association meeting on the question, as well as some careful thought in the department. During 1949, the project was enlarged from the revision of the one clause to a wholesale review of the business interruption AVB. During 1950 and the first half of 1951 activity consisted mainly of work on a draft by committees of the association. A printed draft in June 1951 was followed in July by face-to-face discussions between department and trade association officials. Further communications and opinions led to a new draft in August. More communications during 1952 resulted in a new draft in December 1952. During 1953 there were a number of conferences, formal and important enough to produce minutes and comments many pages in length. Some conferences were with interested noninsurance associations. A new draft appeared in December 1953. Up to this point, there had been no formal submission to the insurance department. In April 1954, a draft was submitted with a formal request for approval. Thereupon the process moved into a new phase. From this point a high level official of the department was clearly pushing the matter along. First the draft was submitted to two academic experts for opinions as members of the Beirat. One of the experts was not immediately available. When his opinion finally came in October, his suggestions led the department to call another meeting in December. This resulted in still another draft, followed by another request to everyone concerned for opinions. After receipt of these opinions, the department official wrote one of his own and again called for reactions. This exchange led to another meeting in March 1955, focussed mainly on one clause. After this meeting, the president of the department gave notice that he was ready to approve the revised AVB. Thereafter requests from individual companies for approval of AVB corresponding to the Musterbedingungen proceeded routinely and quickly.

196. Policyholders or protective associations are often involved at an early stage. See also 1958 Veröffentlichungen 134 (insurance for electrical power plants).
197. These illustrations show the utility to the proposer of delay of his final commitment to a position until he has tested the department views. See Arnold, in 1955 Veröffentlichungen 79-80.
198. Normally Beirat members are consulted, but that may be omitted in simple cases, especially where the public is already well represented. See e.g., 1952 Veröffentlichungen 56-57 (extension of fire coverage to damage caused by fluid glass in a factory).
199. For an even more expeditious method of approval see 1938 Veröffentlichungen 117-18; 1939 Veröffentlichungen 122, where the department did not inform the insurers but left that to the trade association.
Thus, approval was given nearly eight years after the discussions were first begun, though it must be noted that it was not eight years after the question was enlarged to reconsideration of the whole AVB.

The quantity of handwritten notes on letters and between the formal communications in the file, as well as the numerous changes made in draft communications, shows that department officials gave much thought to the matter. It is safe to assume that those concerned on the other sides of the question were equally diligent.

Another long and intricate proceeding took place in the approval of AVB for dwelling replacement cost coverage against fire, tapwater, and storm damage. Beginning about 1951, there was some stirring of interest in connection with these AVB; and in March 1953 the Verband der Sachversicherer, or Association of Property Insurers, proposed a substantial revision. In May there was a long commentary by a department official. The Verband then reconsidered the matter, and after first proposing delay, in July repeated its request for approval. Another opinion from the department in August led in February 1954 to a new draft, in which some of the department's suggestions were accepted and some rejected. The department raised more questions in March and also submitted the draft to six noninsurance trade associations presumably interested as insurance buyers and to members of the Beirat. Some associations disclaimed interest; others wrote lengthy opinions. In July 1954, the department wrote its comments, based on the various opinions it had received. Then the matter lay at rest for a year. In July 1955 the Verband sent a new draft with comments. This then lay at rest for three years, postponed because of a more urgent problem with related AVB. In December 1958 still another new draft appeared with a long commentary. This was sent, together with a request for opinion, to five associations and three Beirat members. Again there were responses, some of them quite long. For example, the Bundesverband der Deutschen Industrie sent a seven page, single spaced, typed opinion. A meeting of all interested persons was held in May 1960, and a new draft was forthcoming in September. There followed the familiar routine of letters to the associations and members of the Beirat, with responsive opinions. But this repeated routine was not merely circular, for another meeting in April 1961 was able to focus on narrower points of disagreement. This led to a new draft in June, followed by suggestions for the department for both edi-

200. It is customary to consult all groups or persons who may have an interest. The expressed interest is surprisingly wide-ranging. As an extreme example, on one occasion the Allgemeiner Deutscher Sprachverein, an institution for the preservation of the German language, expressed an interest in the terminology used. 1932 Veröffentlichungen 121.
itorial and substantive changes. Requests were again made for opinions, this time to some new people. One of the responses was a single spaced letter of twelve pages; another contained nine. An August draft was prepared, and a meeting was held in December, 1961. Thirty pages of notes in the department file compare the numerous suggestions, while thirteen pages of notes give the result of the December meeting. There was an exchange on a point of disagreement between the insurance association and the Bundesverband der Deutschen Industrie. The department sided with the former and the latter capitulated. In April 1962 a new draft produced only editorial suggestions in the department, and in August 1962 a final draft was formally approved.

It should not be supposed that these files represent a decade of uninterrupted activity. There were many periods when nothing was happening on either side, and seldom was activity going on in both camps at the same time. Both the officials of the department and the men in the trade associations had other important activities to pursue simultaneously.

Nor should it be supposed that all work in connection with AVB moves with the glacial speed manifested in these two. In 1949-1950 Grundbedingungen for sickness insurance took only fifteen months to produce, though the process was basically like that described above. And the partial revisions or preparation of Klauseln or other less comprehensive tasks may sometimes be done very expeditiously. It all depends on the complexity and urgency of the task and the number of persons or associations interested in the result. The process may last from a few days to ten or twelve years. 201

v. Basic Principles of the Approval Process. Though principles are seldom enunciated, and usually can only be surmised, the German fondness for theorizing makes it easier to find statements of general principles in the German than in the American literature.

The statutory grounds for denial of a license to an insurance company include failure to secure sufficiently the interests of the insured or to show that the contract obligations can be continually fulfilled. 202 From this comes the frequently repeated statement that the purpose of regulation is to protect the interests of the insured. Though there is no doubt that protection of the interests of the insured, whatever that may mean

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201. It should be apparent that speed is not a normal characteristic of the German process. Revision of fire insurance AVB took from 1925 to 1929. 1926 Veröffentlichungen 146; 1929 id. 131-41.

202. VAG § 8 (1) Ziff. 2: "Die Erlaubnis darf nur versagt werden, wenn . . . nach dem Geschäftsplan die Belange der Versicherten nicht ausreichend gewahrt oder die Verpflichtungen aus den Versicherungen nicht genügend als dauernd erfüllbar dargetan sind. . . ."
and involve; is the main thrust of this particular regulatory activity, it leads to oversimplification and failure to understand the complexity of the process if one fails to analyze the statement.

Of course any violation of law is forbidden, including alteration of the compulsory provisions of the *Versicherungsvertragsgesetz* (VVG), or insurance contracts statute; semi-compulsory provisions may be altered only in favor of the insured. But more broadly, there must be compliance with general principles of public policy. Even a quick examination of the files demonstrates at once the complexity of the purposes that are reflected in this aspect of the regulatory process. Thus, when the introduction of index clauses in insurance policies is considered, the Ministers of Economics, Finance, and Justice are sure to be unhappy if they are not kept informed. In 1926 the department refused to approve an index clause for liability insurance contracts, providing for automatic premium increases, on the ground that the index statistics used by the insurer seemed not to be sufficiently reliable and that the department lacked the power to decide a matter with such far-reaching implications in the field of economic and financial policy.\(^\text{203}\) Similarly the department expressed doubt as to insurance covering the replacement value of dwelling houses and farm buildings, because it might make the public fearful of impending inflation.\(^\text{204}\) Proposals to limit and narrow protection with respect to demolition activities were justified on the ground that under postwar conditions in Germany the existence of broad insurance coverage had led to negligence with adverse social consequences. An extension of coverage in sickness insurance was opposed on the ground that it would tend to lessen confidence in the medical profession. Objections to insurance against unexplained cash deficits were based on fear that it would encourage embezzlement and negligence in dealing with money.\(^\text{205}\)

These considerations, where not otherwise documented, were picked at random from the files of the department, without any special search, suggesting how frequently more general public policies come under consideration and how much the simple statement that the process seeks to protect the interests of the insured must be explained.

The requirement that the interests of the insured be sufficiently secured is understood to give the department wide scope to review all the circumstances of the insurer's plan, including its economic and technical

\(^{203}\) 1933 *Veröffentlichungen* 235. The insurers dropped the matter.

\(^{204}\) Zusammengefasster Geschäftsbericht über die Tätigkeit des Reichsaufsichtsamtes für Privatversicherung 1939 bis 1945, at 44-45 (Bundesaufsichtsamt für das Versicherungs- und Bausparwesen ed. 1955), hereafter referred to as 1939/45 Geschäftsbericht.

\(^{205}\) 1958/59 Geschäftsbericht 48. See also Prölss, VAG § 8, notes 9, 13.
soundness as well as the reasonableness of benefits and the danger that the policyholder may be misled. For instance, approval has been denied where there were not sufficient statistics to determine loss probability or where the small number of subscribers made sufficient spreading of the risk unlikely. 206

As Prolss has rightly pointed out, 207 the continual fulfilment of obligations is a special consideration in protecting the interests of the insured, in the longer view, as a member of the community of all policyholders. In an old case, the department objected to a group life insurance contract under which an association’s members of ages 60-65 would be insured without medical examination. 208 In deciding upon the introduction of a clause excluding suicide committed within the first two policy years, the department stated that only the interests of the community of all insured should be considered—those of individual policyholders or of small groups of policyholders must be disregarded. 209 Although the language is unjustifiably broad, the point is clear. The individual interest of the policyholder includes the long range performability of his contract, which appears in the guise of the common interest.

The problem of balancing individual and group interests (or the short and long range interests of the individual) appears repeatedly. One illustration is the treatment of suicide clauses in life insurance. In section 169, the VVG provides that the insurer is relieved of his obligation to pay if the insured commits suicide while sane. But section 178 provides that section 169 may be modified in favor of the insured. Before World War I, insurers voluntarily introduced clauses which excluded coverage only if suicide occurred within the first one or two years of the contract. Some companies proposed to abolish the exclusion altogether, but the department insisted that the contract must exist for at least a year before full payment might be made in case of suicide by a sane insured. 210 Only in industrial group life insurance, where all members of a club were compulsorily insured for burial expenses, was unlimited suicide coverage

206. Prolss, VAG § 8, note 11B.
208. 1908 Veröffentlichungen 113.
209. 1933 Veröffentlichungen 200. This was a decision on appeal of the insurer, reversing a decision which had refused approval on the ground that there was no justification for reversing a favorable development.
210. See 1913 Veröffentlichungen 94, where the department even refused to approve a clause covering suicide occurring in the first year of a credit life insurance contract. Later the department agreed that an amount not exceeding 500 Reichsmark could be paid in this case. 1928 Veröffentlichungen 113-114.
permitted. In the early 1930's, the economic crisis increased the suicide rate, whereupon in 1932 the insurers submitted revised AVB which would return to the stricter exclusion of the VVG. At first the department refused approval, suggesting that the increased suicide rate could be compensated for by extending the waiting period to five years or by limiting the amount to be paid in case of suicide. Upon appeal, the Berufungssenat, (appeals commission) of the department reversed, finding that the interest of the community of insured warranted the introduction of the stricter exclusion clause and that the other proposed remedies were not sufficient to meet the problem. The present AVB provide for full payment after three years.

Another illustration of the tension between individual and collective interests of the insured appeared during the inflation after World War I. Currency depreciation led to an increase in administration expenses that exceeded premium receipts. The department approved new AVB imposing upon policyholders the duty to pay for special services of the insurer and to bear postage expenses in case of inquiries. In industrial life insurance it became uneconomic to collect premiums in the traditional way by sending agents to policyholders' homes. Insurers tried to change the collecting system; and the department, after some argument, approved an amendment to the Geschäftsplan by which policyholders were required to pay at the insurer's office or else pay an extra fee for collection. Later the industrial insurance lines were discontinued altogether, and policyholders were asked to exchange their policies. In accident, liability, and property insurance, the department agreed with the insurers' request for voluntary premium increases, at first requiring that each policyholder agree expressly in writing. This method was soon abandoned as expensive and impractical, and it was only required that the premium bill point out in clear language that the additional payment was voluntary. However, the department declined to decide whether insurers could cancel the contracts of policyholders who refused to pay the increase, feeling that this determination came within the province of the

211. 1927 VERÖFFENTLICHUNGEN 126.
212. 1932 VERÖFFENTLICHUNGEN 121-122. Cf. the more cautious attitude of the Swiss department, which refused to approve a reduction in the suicide clause waiting period. Ein Bundesgerichtsentscheid zur Deckung des Selbstmordrisikos in der Lebensversicherung, in 23 SCHWEIZERISCHE VERSICHERUNGSZEITSCHRIFT 39 (1955).
213. 1933 VERÖFFENTLICHUNGEN 199-200.
214. 1921 VERÖFFENTLICHUNGEN 92-93.
216. 1923 VERÖFFENTLICHUNGEN 16.
217. 1920 VERÖFFENTLICHUNGEN 191. The department supported the insurers with letters to policyholders. 1920 VERÖFFENTLICHUNGEN 208-209, 1921 VERÖFFENTLICHUNGEN 11-13.
The department was reluctant to seek legislation affecting existing contract rights so long as there was hope that excess investment profits and mortality gains could close the gap. It feared that such action would alarm the public and would tend to discriminate among policyholders and lead to abusive competition. However, the department prepared amendments to the VAG which were enacted in 1923, providing for changes in existing contracts with the approval of the department. To reduce expenses, the provision requiring a copy of the AVB to be delivered to the prospective policyholder was repealed. Since 1923, the department has retained this discretion to approve changes in existing contracts.

As one aspect of protecting the interests of the insured, the department has regularly followed, or at least enunciated, a policy of encouraging constant extension and improvement of the coverage. This policy has led the department to encourage liberalization of the AVB and to resist amendments that would withdraw extensions already granted. The suicide clause already discussed provides an example. In burglary insurance, the department forced the companies to assume the burden of proving violation of the duty to protect the insured property, thus going beyond the requirements of the VVG. The department's point was that the AVB that existed when the VVG was enacted already contained similar provisions. The provisions of the law were said to be mere minima that might be altered to the benefit of the policyholder. The VVG imposed requirements consistent with insurance technique at the time of its enactment, but constantly developing techniques warrant improvements in

218. Legislation for this purpose was prepared but proved unnecessary since most policyholders paid voluntarily. 1921 Veröffentlichungen 112-113. 1921 Veröffentlichungen 91-92.
221. 1920 Veröffentlichungen 13-14.
coverage which the department is obligated to make available to policyholders.

However, the enunciated policy of encouraging greater liberality is not always manifested in practice. Or perhaps it is more accurate to say that there are countervailing policies that confine and limit the exercise of the policy of encouraging greater liberality. Such are, for example, the requirement that obligations be permanently capable of fulfilment, and the prohibition against special favors which restrains experimentation with expansions of the coverage. The former is evident in an examination of the files, where requests of companies or insurance associations to modify language of the AVB in order to make an intended exclusion more clear are often approved, despite the protests of associations representing policyholders. The files manifest a conservatism that acts as a brake on the development of new and expanded coverage. An illustration of this occurred in connection with the postwar development of a technique of property ownership similar to our condominium. In 1954 the question was raised whether the AVB for general liability insurance could not be amended to cover liability claims among the various owners in a building or by one of them against their manager when, as would be usual, they were all common insureds with the manager in a single policy. A clause in the AVB excluded claims against each other by multiple insureds in the same policy. The trade association was reluctant to extend the coverage, ostensibly on the ground that there was no liability. The department supported the association. After a year of discussion, the matter seems to have been forgotten for two years, when it was raised again and again dropped. Finally, in 1958, the question was raised a third time and after some discussion about formulation a special term was authorized by the department. The arguments against the extension seem scarcely plausible to a stranger to the system. If liability is possible, then coverage is needed and companies should be encouraged to experiment with it, as some were willing to do. If liability is not possible, then extension of coverage would cost the companies nothing and would relieve many a property owner of worry. This position was eventually reached; that it took five years to reach it on such a trivial matter is a little startling.

It goes almost without saying that the interests of the insured require clarity of expression in the insurance terms to enable him or his insurance advisers to know what he is buying. Criticism in America of the "fine print" and technicality of insurance contracts is legendary. In Germany the regulatory process has as a major objective to ensure that the insur-

222. 1959 Veröffentlichungen 135.
ance terms are models of clarity and completeness, so that the AVB provide a complete picture of the coverage, its limitations, and the obligations of the insured. If terms are copied from the statutes, they should include provisions in favor of the insured as well as of the company.\textsuperscript{223} At the same time completeness must be balanced by conciseness, for a lengthy document will not be read. When a company uses modifying clauses to the disadvantage of the insured, the department has urged that amendments be made in the AVB, rather than having the policyholder sign deviating application forms, as the statute permits for individual cases.\textsuperscript{224}

This principle of clarity of expression is reflected in an objective called \textit{Markttransparenz}, or “transparency of the market,” which, however, has even broader connotations.\textsuperscript{225} This expression is frequently used in German literature and in oral discussions of supervision problems. Examination of the files soon makes clear that it is taken seriously. No editorial change is too minor to be suggested by an official of the department, if it will increase clarity and reduce the possibility of ambiguity. After all issues of principle have been settled with respect to new AVB, serious discussion will continue on questions of language long after most Americans would consider the dispute no longer worth the trouble. For example, in a recent file dealing with revision of \textit{Bedingungen} for what we would call a disability waiver of premium coverage, the questions seriously raised and extensively discussed were whether the terms in question should be designated "Besondere" or \textit{Allgemeine Bedingungen}, and whether it was desirable to change their designation from "Invaliditatszusatzbedingungen" to "Berufs unfähigkeitszusatzbedingungen" (that is, from "invalidity" to "incapacity for carrying on one's profession"). These only illustrate the scrupulous care with which all questions of language are approached in this process. Whether Markttransparenz is worth the effort expended to provide it is an open question. There is much to be said for conceding the inherent muddiness of language and accepting a rule in which ambiguous language is interpreted in favor of the insured. But there is little doubt that the German effort does produce remarkably well constructed contractual documents. They are much clearer than ordinary German prose. Let no one think that an achievement of little significance! The possibilities for disagreement are reduced to an absolute minimum, and litigation over interpretation is correspondingly rare. So sure are the companies and associations and the

\textsuperscript{223} 1909 \textsc{Veröffentlichungen} 100, 157; 1910 \textsc{Veröffentlichungen} 83-84.
\textsuperscript{224} \textsc{VAG} § 10(3); 1911 \textsc{Veröffentlichungen} 89-90.
\textsuperscript{225} See Bischoff, \textit{op. cit. supra} note 190.
department about the meanings they have intended to communicate that contrary interpretation by a court is treated as an aberration, despite clear recognition that as a matter of power the court has the last word. A tone of indignation at the obtuseness of the court is readily observable in communications respecting such cases. Contrariwise, it is not uncommon for a court to request the department for an opinion on the meaning of the language of AVB; and the department complies confident that it knows better than the court what the language means. Courts seem to regard such help as valuable. An important part of the activity of the department consists of exchanges with the companies and associations over the meaning of existing AVB. Occasionally, the changes produce suggestions for reconsideration of the language. While the suggestions do not always bear fruit, they sometimes initiate discussions that lead to more or less thorough going reform.

A policyholder ordinarily has difficulty in evaluating the worth of an insurance policy and comparing it with others, unless their terms are the same. Though theoretically the law permits insurers to adopt individual AVB, the value of uniformity in enabling the policyholder to know the protection he is paying for has led the department to regard uniformity as an important value. It is an aspect of Markttransparenz, for a market is hardly transparent when the relative values of related objects are concealed in their variations. Deviations from Musterbedingungen are therefore discouraged and sometimes prohibited, except where the department thinks deviation represents real progress, and not a mere "gimmick" for competitive purposes. This is true despite recognition by the department that it has no unquestioned right to compel uniformity. From the beginning of its activity the department encouraged uniformity of contract terms and applied pressure to achieve it. When it began work in 1902, AVB already existed in the major lines of insurance. When the first forms were reviewed, the department required changes from insurers using individual forms but not from insurers using the Verbandsbedingungen in order to preserve such uniformity as there was. Careful revision of all AVB was undertaken after enactment of the VVG in 1908.

226. See, e.g., 1910 Veröffentlichungen 272-74 (policyholder's coat damaged by sparks from cigar, court asked department for definition of term "fire" in AVB); 1911 Veröffentlichungen 34 (court submitted question whether clause excluding traumatic neurosis in accident policy violated moral and ethical standards). More recent illustrations appear in department files.

227. 1903 Veröffentlichungen 110. In allowing use of the old "Verbandsbedingungen" in fire and burglary insurance, the department expressed the hope that the insurers would apply objectionable clauses reasonably and not unfavorably to the insured.

228. 1910 Veröffentlichungen 79-84.
The importance of uniformity depends in large measure on the nature of the insureds. Large industrial enterprises, such as many buyers of business interruption insurance, understand forms as well as insurers, but not all small policyholders do. However, even for large buyers, uniformity is valuable to facilitate underwriting of large risks in multiple policies by numerous companies.\(^{229}\) Nevertheless, in sickness insurance, where most policyholders are small, terms vary a great deal. Complete Musterbedingungen do not even exist. This apparent anomaly is usually explained, somewhat unconvincingly, as the product of the complexity of the market for sickness insurance.

An incident in connection with the AVB of fidelity insurance shows the importance of "the transparency of the market." Insurers were divided into two camps and could not agree on uniform Musterbedingungen. In 1956 the department approved two forms, leaving it to policyholders to compare them.\(^{230}\) However, three years later, insurers and policyholder associations agreed to prepare uniform terms and asked the department to help.\(^{231}\)

vi. Extent of Discretion. We have seen that the department, in reviewing AVB, has room to exercise considerable judgment in determining whether the interests of the insured are sufficiently secured. This judgment, however, lies within the realms of fact finding and interpretation and gives the department discretion because of the lack of precision of language. In theory the license and approval of AVB may be refused only if the requirements of the VAG are not met, as in America. The insurer has a right to approval, and the department is bound to give it, if statutory requirements are satisfied.\(^{232}\) Of course the practical difficulties in court review give the department considerable freedom of movement in Germany as in America.

On the other hand, Prölss has said that the department may freely decide to approve a form even where the requirements of the VAG are not met.\(^{233}\) Thus the department approved the old association forms in fire and burglary insurance for the sake of uniformity although their terms were unfavorable to the insured.\(^{234}\) In this respect there is true discretion. Even more striking, under section 81 of the VAG the department has genuine discretion not only in the decision whether to act, but

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229. 1955 Veröffentlichungen 154. This was also a main reason for the development of the American standard policy. Kimball & Pfennigstorf, supra note 180, at 691. See also 1956 Veröffentlichungen 22.
230. 1956/57 Geschäftsbericht 43.
231. 1959 Veröffentlichungen 130.
232. Prölss, VAG § 8 notes 4, 9.
233. Ibid.
234. 1903 Veröffentlichungen 110.
also in how and how far. The section gives the department power to enforce compliance with the Geschäftspplan as well as to eliminate abuses which threaten the interests of the insured or put the business in conflict with moral standards. Under this broad provision the department can effectively control objectionable practices, including policy forms, even if they do not clearly violate specific provisions of the law or of the Geschäftspplan. A suggestion of violation from the department is usually sufficient to lead the delinquent insurer to mend its ways.

vii. Implementation of Orders. Formal disapproval of forms is rare. In most cases protracted negotiations lead to acceptable drafts; if no compromise can be reached insurers are more likely to withdraw an application than to press for a test case. Informal communications from the department, as under section 81, often produce the desired results.

The department’s range of remedies is extensive. It may issue under section 81 a formal order prohibiting the specified practice. Compliance is enforced according to general principles of administrative procedure by monetary penalties. For repeated violations, the department may prohibit further transaction of business or may appoint a receiver. Finally, directors and executives are subject to criminal punishment by imprisonment and fine if they conduct or acquiesce when their subordinates conduct business not described in an approved Geschäftspplan.

Sometimes the department approves AVB in a modified form or subject to conditions called Bedingungen. This is done when objections are raised after the form is before the Beschlusskammer (formerly Berufungsrenat) for final decision, and further delay seems unwarranted. Approval is only effective when the condition is met. The VAG also expressly permits approval accompanied by special orders called Auflagen, concerning the conduct of the business. In this case approval does not depend for validity upon compliance with the special order; it is effective at once, and the order can be enforced separately.

A Beschlusskammer proceeding has been held several times in connection with Musterbedingungun-

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236. Verwaltungsvollstreckungsgesetz vom 27. April, 1953, [1953] Bundesgesetzblatt I 157, §§ 9, 11. The amount may range from 3 to 2,000 Deutsche Mark. The order to pay becomes unenforceable if the insurer subsequently stops using the objectionable forms.

237. VAG § 87.

238. VAG § 135(1), item 4.

239. See, e.g., 1909 Veröffentlichungen 277-278; 1930 Veröffentlichungen 143-146; 1988 Veröffentlichungen 22, 35-37.

240. VAG § 8(3), and Pröll, VAG § 8 note 2.
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gen for life insurance. This is necessary as matter of law if the department does not approve the AVB in full. For unexplained reasons, some measure of disagreement has remained at a point where the department thinks decisions should be reached. A Beschlusskammer is called, holds a hearing, and makes a formal decision. In one such case, involving double indemnity coverage, there was disagreement over the extent to which disputed questions in claims practice should be settled by a panel of doctors instead of by the regular courts. The company appealed from the Kammer decision to the Administrative Court which affirmed the department’s decision.

The possibility of approving AVB conditionally has provided an additional and useful enforcement device. The department has sometimes made it a condition of approval that companies submit stipulations concerning the application of certain provisions of the contract to specified cases. These stipulations, called Geschäftsplanmäßige Erklärungen, are then considered part of the Geschäftsplan. Failure to follow them leads to administrative sanctions. Geschäftsplanmäßige Erklärungen have been required for approval of almost every form of contract in matters of technical and financial nature (for example, special loss reserves) and of formal nature (for example, size and form of printing of documents or reference to certain dangerous provisions of the contract). In general, they are used to lay down rules which are too detailed or too complex to insert in the AVB. The formulae and schedules for cash surrender values in life insurance provide illustration. Favorable developments can also thus be made available for the insured without a time consuming amendment to the AVB. In this way fire insurers added coverage against damage caused by falling aircraft, without extra charge. But the department will not permit changes to the detriment of the policyholder in this way; they require actual amendment of the AVB.

Geschäftsplanmäßige Erklärungen create only public law obligations of the insurer and give the policyholder no claim. He may not even know of the stipulated benefits. For that reason the department states that they ought to be used only temporarily and only if the benefits are

241. 3 DVO § 7.
242. See, e.g., 1952 Veröffentlichungen 121-122.
243. 1910 Veröffentlichungen 81; 1957 Veröffentlichungen 58.
244. 1936 Veröffentlichungen 84; 1937 Veröffentlichungen 83. Similarly, personal property insurance (Hausratversicherung) was extended voluntarily and without extra premium a year before the contract was altered. 1953 Veröffentlichungen 176. See also 1954 Veröffentlichungen 16, 53, 130.
not of substantial economic importance.\textsuperscript{246}

In some cases, the department has not obtained \textit{Erklärungen}, but has simply expressed an expectation that the insurers will voluntarily follow department principles, extending new benefits to old contracts, treating policyholders equally, and assuming a liberal attitude in cases of underinsurance.\textsuperscript{247}

viii. Withdrawal of Approval and Revision of AVB. No express provision in the law specifies whether the department may withdraw its approval if it decides that it erred in granting it. Legal writers generally answer affirmatively. It matters little, however, since section 81a of the VAG expressly authorizes the department to demand amendments to the \textit{Geschäftsplan} before any more contracts issue, whenever it seems necessary for the protection of policy holders. No conditions of exercise of this authority are stated, but it seems the only valid reason for demanding a change would be that the AVB could not be approved if newly submitted. To allow any other reason to suffice would permit the limitations of the approval section to be wholly displaced by section 81a.\textsuperscript{248} However, innovations and changes in circumstances may make adequate terms inadequate.

Section 81a was added in 1937, and there are few reported cases where the department has based an order on it. Even before 1937, the department frequently requested changes in the \textit{Geschäftsplan} in the exercise of general supervisory authority, obtaining from the insurers temporary \textit{Geschäftsplanmässige Erklärungen} and eventually amendments to the AVB. For instance, when in 1932 the Reichsgericht, or supreme court, construed industrial accident insurance AVB, which in general exclude infections acquired in the course of employment, to cover those infections acquired by health service personnel from a patient’s coughing, the department asked all accident insurers to submit \textit{Geschäftsplanmässige Erklärungen} adopting the interpretation.\textsuperscript{249}

A second provision of section 81a authorizes the department itself to change or repeal a \textit{Geschäftsplan} when necessary for the protection of the interests of the insured; such changes are to affect existing contracts.\textsuperscript{250} During the war this authority was exercised by the department,

\textsuperscript{246} \textit{Ibid.}; 1956 \textsc{Veröffentlichungen} 215.

\textsuperscript{247} 1958 \textsc{Veröffentlichungen} 3-4 (coverage of replacement value in personal property insurance extended to clothing and linen). In this case the overall decrease of losses warranted the extension of coverage without additional charge, and possible danger to solvency was not in question.

\textsuperscript{248} See \textsc{Prölls}, VAG § 81a note 1.

\textsuperscript{249} 1938 \textsc{Veröffentlichungen} 102-03. Subsequent judicial extension led to a revision of the clause. 1939/1945 Geschäftsbericht 26.

\textsuperscript{250} "Wenn es zur Wahrung der Belange der Versicherten notwendig erscheint,
and after the war by the various state insurance departments. While at first it was used merely to make the benefits of new AVB available to the holders of already existing contracts or to produce necessary amendments to the bylaws of mutual insurers which were unable to gather a quorum for ordinary action, it became, as time went on, a means of regulating the insurance contract by unilateral administrative order, mostly used to adjust contracts to the quickly changing situations of the war and post-war periods. In these orders, the interests of the insurance fund were often preferred to those of the individual policyholder. When the economic situation stabilized, this broad power and its exercise met increasing criticism. The various insurance departments then took the position that the power was created, and should be used, only for extraordinary situations where ordinary means were too slow.\(^\text{251}\)

The Federal Insurance Department has adopted this restrictive view and has refrained from using the power. An example of its restraint is a circular letter to health insurers requesting them to waive the waiting period requirements of the AVB in certain cases. The letter stated that it was without binding force as an administrative order and that the department had chosen this form of action rather than that of a formal order because of its reluctance to apply section 81a.\(^\text{252}\)

ix. Judicial Review. All department orders are subject to direct judicial review. Where the president of the department has decided alone, any person affected by the order may appeal to a *Beschlusskammer*.\(^\text{253}\) All *Beschlusskammer* decisions, original as well as on appeal, may be challenged before the *Bundesverwaltungsgericht*, or federal administrative court, the highest court for administrative matters.\(^\text{254}\) Its procedure is regulated by general statute. If the department has discretion but has acted arbitrarily or otherwise abused its power, the court may reverse and remand the case but may not issue its own order. However, where the department's decision is not discretionary, as in control of AVB under section 8, the court may replace the department's judgment


\(^{253}\) 3 DVO § 8. Selection of members of the *Beirat* and procedures are fixed by 3 DVO §§ 10-20.

\(^{254}\) BAG § 10a. A *Beschlusskammer* decision is often merely a confirmation of results reached by compromise. See, e.g., 1903 *Veröffentlichungen* 98. For a particular case in which a *Beschlusskammer* decided on AVB, see 1958 *Veröffentlichungen* 35-37.
with its own. The needs and interests of the policyholder, the touchstone under section 8, can be reviewed by the court and its own views substituted for those of the department. In a recent case the department declined to approve an accident form providing that the question whether death was caused by accident should be decided exclusively and finally by a panel of physicians. The department thought this provision detrimental to policyholders by denying them access to the ordinary courts. When the company challenged the decision, the Bundesverwaltungsgericht thoroughly discussed the interests of the policyholders and dismissed the company’s appeal.255

Orders of the department are stayed pending decision of the court, absent circumstances requiring immediate enforcement.256 Litigation of this kind is rare, however. In 1957-1958 six proceedings before the administrative court on all kinds of matters were reported; in 1958-1959 there were four; in 1959-1960, only three. In 1962 only two proceedings were initiated.257

In suits between insurer and policyholder the courts must give effect to the agreed terms unless they conflict with the compulsory provisions of the VVG, which are self-executing, or private law provisions governing the legal relations of the parties. Agreed terms must be enforced by the courts whether specifically mentioned in the contract or not; non-conforming provisions are unenforceable against the policyholder. Approval of the AVB and the Geschäftsplan does not in itself affect the contractual relationship, since they are matters of public law. Express approval of a clause by the department does not prevent a court from avoiding it as contrary to law or to public policy, according to general principles of contract law. Nor does lack of approval by itself invalidate the contract.258

Where the department has the exceptional power to make orders or regulations immediately affecting the rights and duties of the parties to the contract, courts must enforce the contractual changes thus effected. If the department, under section 81a of the VAG, changes AVB affecting existing contracts, existing contracts are forthwith governed by the

256. On review, see BAG § 10a, and Verwaltungsgerichtsordnung vom 21. Januar 1960, [1960] Bundesgesetzblatt I 17. General review of administrative acts by an independent court system was introduced after World War II. Before that no appeal lay to a court; the insurers could only appeal to a Berufungssevenat, composed of three department officials (among them the president), two Beirat members, and two judges of existing courts.
258. Reichsgericht, judgment of June 1, 1937, 155 Entscheidungen des Reichsgerichts in Zivilsachen 138; Prölls, VAG § 10 note 8.
new provisions, whether or not the insurer has amended the forms. Thus, in cases between insurers and policyholders, courts have not reviewed administrative acts. Direct, not collateral, attack in the special administrative tribunals is the normal avenue for review of administrative orders, except for such serious defects as that the order is capricious.

It is in a sense the converse of section 81a that the department has and exercises a power to act in individual cases to protect companies against policyholders. Section 89 of the VAG confers upon the department the power to issue orders temporarily prohibiting payments on insurance contracts of any kind where this is necessary to prevent the financial failure of the insurer. In life insurance, the department may reduce permanently the amounts owed by the insurer to the policyholders, either all or a specified group, in order to preserve the insurer's solvency. The department exercised this authority during the inflation of the early 1920's and after World War II.

c. The Complaint Function of the Department.

Like the American insurance departments, the German department has no power actually to decide disputes between insurer and policyholder over contract terms. Complaints of policyholders are examined in the department to find out whether there are violations of public law duties to be handled by administrative action; for this purpose the insurer is usually asked to state its opinion on the case. The complaining policyholder is sometimes advised to seek relief in court if the company does not pay. Both parties are usually informed of the department's opinion. Complaints have decreased recently. While in 1952-53, 11,706 complaints and inquiries were submitted, there were only 7,026 in 1959-60. In 1962, the department received 3,813 complaints and 2,434 inquiries. Of the complaints, 989 concerned life insurance, 1,182 health insurance, and 1,370 liability, accident, and motor vehicle insurance. In addition, many policyholders asked the department for information personally or

261. The department used this power for the first time during World War I when a company insuring against the risk of compulsory army service (a form of coverage aimed primarily at meeting the financial needs of dependents) got into financial difficulties. A temporary suspension of discounted advance payments was sufficient to prevent failure. 1915 Veröffentlichungen 86. For further examples see Starke, Die Anordnungen der Versicherungsaufsichtsbehörden nach den §§ 81, 81a, 89 VAG, in 1 Fünfzig Jahre Materielle Versicherungsaufsicht nach dem Gesetz vom 12. Mai 1901, 73, 101-03.
262. See Arnold, in 1953 Veröffentlichungen 71-72.
by telephone.\textsuperscript{263}

2. France

a. Rule-making Activity. The rule-making power of the French department is not extensive. Moreover, it is no easier here than it is in Germany or the United States to decide when such a power exists.

Constitutional doctrine has been uncertain in France during the years of transition since World War II. Rules for administrative control of insurance have been established by government decree based on extraordinary delegation, more than by the parliament. Even the officials of the Direction des Assurances are in doubt where the powers of the government end. The law of June 14, 1938, enacted by the \textit{reglement d'administration publique}, or governmental regulation, of December 30, 1938,\textsuperscript{264} confers upon the government broad powers to fix the details of the policy approval requirement.

The Minister of Finance is authorized to impose upon insurance companies the use of \textit{clauses types de contrat},\textsuperscript{265} or standard policy clauses, but the power has not yet been exercised. Department officials regard the provision as one established under extraordinary circumstances, conferring authoritative powers where cooperation is imperative; as a result they hesitate to apply it.\textsuperscript{266} They think that conferences held during the approval procedure provide a more flexible and less arbitrary method of control.

However, this power has exceptionally been used to exert pressure upon individual companies, as well as upon associations, during the approval process in cases where most companies have already complied with the department's suggestions. In only four cases has the department threatened the application of this power in a written communication. Three of these letters were directed to insurers' associations. In the letters the department insisted that the associations adopt its view and referred to the \textit{ordonnance} of September 29, 1945,\textsuperscript{267} without expressly threatening to exercise the authority. The fourth letter (in 1954) was directed to an automobile insurer which had submitted a policy excluding coverage for damage to the car when operated by an unlicensed driver. The department insisted that the exclusion was too broad and pointed to the fact that other companies had adopted the more liberal view and that if the company resisted the department would be forced to exercise the

\begin{itemize}
\item \textsuperscript{264} Décret du 30 décembre 1938, based on loi du 14 juin 1938, art. 3.
\item \textsuperscript{265} Ordonnance du 29 septembre 1945, Art. 8.
\item \textsuperscript{266} See OECD Statement (France) 39.
\item \textsuperscript{267} See note 265 supra.
\end{itemize}
authority to impose a standard form. Although the department did not prevail, no further action was taken in any of the four cases.


i. Scope of the Filing Requirement. Under an administrative regulation promulgated in 1938, five copies of all printed material which is to be distributed to the public or to policyholders must be submitted to the Minister of Finance, who is authorized to prescribe modifications to make the forms comply with the law. This provision is understood to prohibit issuance of documents which have not been previously submitted. From the text it would seem that some affirmative department action must precede use of the document. This seemed to be the official view in 1962. According to internal instructions of that time, documents were to be examined carefully, and the company informed by formal letter that there were no objections. In 1964, however, the attitude was more liberal. Department officials now emphasize the second portion of the provision giving the department authority to prescribe modifications without creating a duty to do so. Thus the department is now considered free to decide whether to review certain documents at all. By this view, inactivity of the department permits use of a new form, without implying approval of its contents. In practice this is like the deemer provisions of American statutes.

Though all kinds of documents must be filed, control in practice has been concerned with the general policy terms; the other documents are seldom reviewed because of lack of personnel. In fact, forms other than policies are not even submitted by the companies, and the department has not enforced compliance.

The French concept of conditions générales des polices, or general policy terms, is very much like the German concept of AVB. In internal instructions for the staff, the law is said to be applicable to stipulations and clauses which are used regularly (more than ten times a year in individual contracts or more than once a year in group contracts), whatever their designation or placement or manner of reproduction may be, in contrast to conditions particulières, which are not subject to control. But the department has not fully achieved even the review of general

268. Décret du 30 décembre 1938, Art. 181:
"Les sociétés ou assureurs doivent, avant usage, communiquer au ministre des finances, qui peut prescrire toutes rectifications ou modifications nécessitées par la réglementation en vigueur, cinq exemplaires des conditions générales de leurs polices, propositions, bulletins de souscription, prospectus et imprimés, destinés à être distribués au public ou publiés ou remis aux porteurs de contrats ou adhérents. . . ."
policy forms. For instance, companies still decline to submit group insurance contracts even if applied more than once a year. Also, marine, transportation, and fidelity insurers decline to submit policy forms to the department.

In all these cases the insurers evidently violate the law. And yet the Direction des Assurances has taken no measures to enforce compliance. There seem to be two reasons for this lenient policy. The first is lack of adequate staff, and the second is that the department desires to preserve a cooperative relationship with insurers. This deficiency in effective control may be one of the reasons for the current changes, the results of which cannot yet be determined.

As a result of incomplete review resulting from failure to file forms, the department failed for years to detect an objectionable practice by which, between 1945 and 1955, insurance companies used premium receipts to announce contract modifications respecting the insured sum, the premium rate, or the benefits granted. Often improvements in coverage were combined with a premium increase; most policyholders paid the new premium rate without objection. In 1952, an article in an insurance law periodical described this practice and mentioned that it was contrary to a provision of the law forbidding modifications of the insurance contract except by an agreement signed by both parties. Despite this fact, the practice did not come to the attention of the policy examination section before 1956; the department then acted promptly, issuing a circular stating that such modifications were unlawful in principle but would be tolerated because of their simplicity and efficiency, provided certain conditions were satisfied.

ii. The Process of Review. Although the regulation requires only that copies of the documents be submitted to the Minister of Finance before they are issued, it has been understood that the insurer might not use the forms before the Minister of Finance had taken definite action, thus in effect establishing an express approval requirement similar to those in the United States. Elaborate internal instructions regulated the procedure to be followed. Because of the striking change in the interpretation of section 181, the instructions are now being revised; the work began in early 1964 and will probably not be finished before the spring of 1965. The new instructions will certainly change the internal jurisdiction in view of alterations in the department's organizational pattern. There will also be some change in the types of documents to be

270. See note 268 supra.
reviewed. Probably attention will be focused on certain lines of insurance, leaving others alone. But there is not likely to be much change in the procedure of review or in the goals the department seeks. Therefore, it seems useful to describe the system as it has been operating.

Most forms are submitted by individual insurers for their own use, but standard forms are sometimes submitted either by an association of insurers (Groupement Technique) or by one company representing several companies. If forms that have once received approval are printed uniformly with a blank space at the top of the first page, on which the individual company stamps its name, they may be used by any company without further review; if a company reprints the form for its own use, new filing is necessary.

In practice, standard forms are not used as frequently as in Germany. A standard fire policy form, developed and repeatedly revised by the association of fire insurers with the advice and consent of the Minister and in cooperation with policyholder representatives, is used almost universally for industrial risks. But only one fourth of the companies used the standard form for ordinary risks; the rest developed forms of their own. Recently, however, a set of standard policy forms covering house owners' and tenants' risks have been developed by joint action of the department and insurers' associations, without participation of policyholders. In marine and transportation insurance, almost all companies use English standard forms. There are standard policy forms prescribed by law or by administrative order in compulsory liability insurance lines and in cinema insurance. In the other lines, no standard policy forms exist, although in accident insurance and miscellaneous risks considerable similarity may be found. The process of drafting or revising standard policy forms seems to be painstaking and cumbersome, less so than in Germany but more so than in the United States. A multitude of drafts, revisions, and negotiations was necessary before the present edition of the standard fire policy form was finished.

271. The Ligue des Assurés, founded in the beginning of the century, was very active in the drafting of the first standard fire policy form in 1912 while later revisions were pushed mainly by the department. For details, see Besson, Les nouvelles conditions générales de l'assurance contre l'incendie, in 1941 Revue Générale des Assurances Terrestres 376-391; Deschamps, Les nouvelles conditions générales de la police-incendie (M.F. 1959), in 1959 Revue Générale des Assurances Terrestres 273-315.

272. For new standard policy terms, see 73 Bulletin Administratif des Assurances 53-139 (1963).


274. Deschamps, op. cit. supra note 271, at 274.

275. Id. at 314.
In most lines of insurance, the officials of the Direction des Assurances have developed model policies and model clauses to use as examples of sound drafting and as a basis for informal suggestions to insurer representatives.

According to the internal instructions in effect until 1964, a preliminary review to determine whether the insurer is licensed for the particular line of insurance and whether the documents are complete must be made within three days of receipt of a filing by the department. If the insurer is not licensed, it must be informed at once; where the documents are incomplete, the insurer must be asked to submit the missing parts within five days. The drafts are reviewed by lower rank civil service officials. The internal instructions say that final review must be completed within a month from the date of receipt. Where this deadline cannot be met, an appropriate superior official must be informed, unless the insurer expressly agrees to further delay.

After review, the insurer is notified of the department’s objections or observations. The internal instructions expressly state that notification shall be effected by direct and personal conversation rather than by writing in order to avoid misunderstandings and to achieve a faster and more complete exchange of views. This is usually done through a conference between department officials and insurer representatives.

Since the Minister of Finance is understood to be authorized, under the regulation of 1938, only to impose those modifications that are required by law, he may only enforce his views with respect to clauses that do not comply with compulsory provisions of the law. Theoretically, these provisions are self-executing (that is, they will be enforced by the courts as private law rules). However, practical implementation of these provisions requires administrative control, since few cases would get to the courts if policyholders were not aware that their rights were not limited to the terms contained in the printed contract form. In the internal instructions, this set of legal requirements is called the domaine réglementaire. However, the criticism of forms is not limited to the domaine réglementaire but also extends to other principles, called the domaine général. Here, as acknowledged in the instructions, the insurer is not bound to accept the opinion of the department, whose officials must rely on persuasion. The instructions provide for different degrees of persistence according to the importance of the objection. In the most important cases, if the insurer refuses to modify the form, the department’s opinion will be argued at a higher level by a superior official before the form will be approved without the requested change. Where the objections are of less importance, they are raised only by the policy examiner
but are repeated once or twice. At the lowest level of importance, the department's position is merely suggested but not pressed if the insurer does not agree. The internal instructions deal with all lines of insurance and all kinds of problems that may arise in the course of policy examination and state the kind and the degree of objections to be raised in various cases. As a result of conferences between insurer and department officials, the insurer submits a modified draft which is reviewed and discussed in the same manner until agreement is reached. Agreement seems generally to be achieved, the internal instructions emphasizing the importance of persuading insurers rather than giving authoritative commands, even in the domaine réglementaire.

Unlike the German Bundesaufsichtsamt, the French Direction des Assurances does not officially ask the advice of other persons about control of policy forms. Department officials consider themselves to be the experts; they feel that no one else can see the full implications of the problems. In rare cases, law professors of the University of Paris are consulted on difficult legal problems, but unofficially and privately.

The final decision of the Minister of Finance is communicated to the insurer by a letter stating that there are no objections against the proposed form but making it clear that this means little more than a momentary absence of objections. The Minister of Finance thus remains free to raise further objections later. The insurer is asked to put the date of the approval letter on the printed forms, in order to identify approved forms. Finally, at this point the insurer is asked to submit five copies of the printed forms to comply literally with the regulation.

Where an insurer has declined to comply with a suggestion in the domaine général, it is often repeated in the letter of approval, as an indication that approval is granted reluctantly and a reminder that the department adheres to its position. This réserve de principe has mainly psychological significance; it is also thought to lessen to some degree the discrimination between companies that have complied and those that have not.

iii. Basic Principles of the Approval Process. The bases for objections are stated in detailed instructions worked out for all lines of insurance. For the domaine réglementaire it is asked whether the contract provisions comply with the compulsory provisions of the law as interpreted by the courts. Although these provisions are part of the contract, deviating clauses notwithstanding, it is considered important that there be no deviations, since few cases get to the courts.

276. Loi du 13 juillet 1930, Art. 2, provides that all provisions are compulsory with few exceptions. See Kimball & Pfennigstorf, supra note 273, at 719-20.
Within the domaine général, the department seeks to realize a number of principles which, although not embodied in the law, are considered to be important for the protection of the policyholder.

Some defects result from gaps in the protection the policies purport to give. For instance, if a tenant's liability insurance policy enumerates the statutory provisions from which the tenant's responsibility for damages may arise, and one provision is omitted without reasonable explanation, the department will insist that the gap in coverage be filled.

Some defects result from construction problems. For example, there will be objection to incomplete clauses which are likely to raise difficult problems of construction. The internal instructions also call for objections when policy clauses are inconsistent, as where general policy terms provide for one effective date and some particular provisions provide for another or where the title of a policy and its contents are inconsistent. For example, a title promises "unlimited coverage" but the policy contains numerous exclusions or there are inconsistencies between the application and the policy. In combined policies covering multiple risks, conditional clauses or exclusions may be justified for a particular risk but are extended, perhaps inadvertently, to coverages where they are inappropriate. For example, a clause respecting locked doors may seem reasonable for burglary insurance but anomalous if applied to fire and personal liability protection in the same policy.

Review within the domaine général also seeks to avoid ambiguity.

Finally, the department will object to clauses which it thinks contain unjustified disadvantages to the policy holder. An example would be a premium index clause written in such a manner that its effect was doubled. This reflects a point of view akin to the German department's effort to obtain a constant extension and improvement of the coverage.

iv. Power to Disapprove Concerted Action of Companies. The Minister of Finance is authorized to forbid the implementation of insurer agreements on general contract terms, as well as on premium rates, business organization, competition, or financial policy. Such agreements must be communicated to the Minister of Finance and may not take effect if he opposes them within one month. He may also oppose them later, after consultation with the Conseil National des Assurances. This provision has the same history and raises the same difficulties as the power to impose standard clauses. It is used only reluctantly by the department. Few agreements are even submitted to the department, and even those that are submitted are seldom disapproved.

One instance of disapproval was the case of an agreement of auto-

mobile liability insurers for a general increase in premium rates. This decision by the Minister of Finance was politically motivated by his interest in opposing price increases in general rather than by considerations of insurance economics. As a result, automobile liability rates became insufficient, and the companies sustained heavy losses. In order to allow the companies to recover from these financial reverses, the Minister of Finance corrected his error by expressly approving a premium increase to be implemented in a way contrary to generally applied principles by a contract modification through stipulations in the premium receipts that payment of the increased premium was acceptance of the modification. Previous instructions and circulars of the department had expressed the view that such procedure was contrary to the law allowing contracts to be modified only by agreement signed by both parties of the contract.  

Nevertheless, the department had formerly approved such practices subject to conditions; these changes, involving an increase in premium without significant addition to coverage, were approved also.

v. Implementation of Orders and Judicial Review. Infractions of the law of June 14, 1938, and of the regulations based upon it, may be punished by fine. Until now, only one person has been fined because of a violation of article 181 of the implementing government regulation of December 30, 1938. The department is slow to enforce compliance with the law, preferring to maintain friendly cooperation rather than to apply coercive measures.

All orders of the Minister of Finance are subject to review before the Conseil d'Etat for violation of law. However, the efforts of the department to maintain friendly relations with insurers, emphasizing persuasion rather than compulsion, has made review unnecessary; there has not been a single case since the establishment of administrative control.

c. The Complaint Function of the Department. Complaints of policyholders and others are treated by the section of the department having jurisdiction to license companies. There is a steady flow of complaints, perhaps half of them unjustified. The procedure is much like that followed in Germany. Where a complaint shows that certain policy provisions are being construed in a way prejudicial to policyholders, the policy examination section is notified so it can ask for a modification of the contract terms. Emphasis on persuasive measures has kept any formal or systematic "jurisprudence of complaints" from developing in France.

278. See text accompanying note 269 supra.
IV. COMPARATIVE OBSERVATIONS AND CONCLUSIONS

Many of the ways in which a legal system confines and channels the contracts constituting the matrix of a complex financial institution such as insurance are so subtle as to defy detection; none are susceptible of accurate measurement. A comparison of systems then adds a new dimension to the problem, for the data from different systems does not fall into neat parallel classifications. Disparate patterns emerge from the raw material and touch only at certain points. But even the differences are illuminating. Despite the inherent limitations of such a study and the inevitable subjectivity of judgment, there may be considerable suggestive value in such conclusions as can be reached from this article and from the earlier related one.\textsuperscript{279}

A recent incident suggests the nature of the problem created by competing insurance policies with different provisions of varying merit. Health insurance coverage is offered to the New York public by almost two hundred different organizations, from commercial insurers to independent medical service groups. Most of these insurers offer a variety of contracts, so that any purchaser of health insurance might have several hundred potential policies to buy. In 1961, the Sloan Institute of Hospital Administration at Cornell University began a study to determine the feasibility of rating or grading such policies on their benefits and other provisions, to guide the general public. In 1964, interim publication intended to report progress in developing the rating technique led to public controversy.\textsuperscript{280} Newspaper stories produced consternation in insurance circles, because it was widely assumed that a final rating was being given not only to the hundred policies used but indirectly to insurance companies.\textsuperscript{281} The report makes clear how difficult it is to buy wisely. Still one view sees this diversity as desirable, leading to much experimentation, with an opportunity to develop, eventually, the coverages best for the public. Follman expresses this point of view:

> Each type of insurer has its distinct approach, providing the buyer of insurance the opportunity to choose the kind of plan best suited to his needs. While the resulting heterogeneity can, at times, present an impediment to a ready, simplified understanding of the subject, it is necessary to recognize that many aspects and concepts of private health insurance are rela-

\textsuperscript{279} Kimball & Pfennigstorf, \textit{supra} note 273.
\textsuperscript{280} Young, \textit{A Study of Health Insurance Policies Available in New York State for the Purpose of Developing a Procedure for their Evaluation and Grading} (1964).
\textsuperscript{281} See, \textit{e.g.}, Insurance Advocate, Aug. 8, 1964, p. 25.
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tively recent, that some must still be looked upon as experimental, and that this form of insurance, like medical care itself, must remain in a dynamic state of evolution . . . The keen competition that exists among insurers of all types in the United States has spurred experimentation to devise new and broader coverages and approaches. It has made private insurers responsive to changing needs and to the rapid evolution that proceeds in the provision of medical care.282

Others, including the authors of the Sloan Institute study, express doubt:

The effect on the public has been, however, to create a state of confusion, because of the bewildering diversity of insurance benefits and policy provisions which confronts the average person as he examines a policy. In most cases, he is not able to determine the type of protection, or the extent of coverage, that he or his family needs; he does not understand the significance or the effect of the restrictive clauses; he is unaware of important omissions in particular policies. As a result, this average person is unable to decide in a rational manner what kind of policy to buy; he cannot make an accurate evaluation of his rights and benefits under a given policy, nor is he able to make a valid comparison of his rights and benefits under one policy with those offered in another.

Frequently, he reaches his decision to buy or reject a policy on the basis of the premium cost, or of one single feature or another in a policy (such as the size of the maximum benefit), only to discover, when illness strikes, that his coverage is of the wrong kind, or is grossly inadequate, or that the generous maximum allowances stated in the policy are hedged about with restrictive clauses which effectively negate a large part of the expected benefits.283

Although health insurance is more complicated than most coverages, the problems of other lines differ only in degree. Basically the issue is how far the law should police the insurance market. The values of experimentation and of freedom of contract compete with the pressing need of the policyholder for protection or, at least, for information. Somehow the policyholder should be enabled to make an intelligent choice.

There can be little quarrel with any of these goals; the problem is

282. Follmann, Medical Care and Health Insurance, at 117 (1963).
283. Young, op. cit. supra note 280, at 3.
one of balancing the conflicting goals or objectives of insurance regulation. They are too numerous and too complex to be treated exhaustively here. We sketch only those with direct relevance to control of contract terms.\footnote{Kimball, *The Purposes of Insurance Regulation: A Preliminary Inquiry in the Theory of Insurance Law*, 45 Minn. L. Rev. 471 (1961), examines the problem extensively.}

A. Objectives of Control.

1. Freedom of Contract. To the extent that it is effective, any regulation of the content of the insurance contract impairs the freedom of the parties to determine the terms themselves. In this century, freedom of contract has lost its place as a preferred goal of the legal system. Most insurance men think of insurance as performing a public service, and objections to control of policy terms are usually put in terms of the need for experimentation and flexibility. Though freedom of contract is now only one goal among several, it still cannot be ignored; it creates one of the basic conflicts to be resolved by the makers of statutes, who must weigh the advantages of restrictive legislation against the impairment of freedom.

Of course, in practice freedom of contract may mean only the freedom of one party to dictate terms. Inequality of bargaining power has been a main justification for the prescription of contract terms in all countries.\footnote{Woodson, J., concurring in State *ex rel. Merchants Reserve Life Ins. Co. v. Revelle*, 260 Mo. 112, 168 S.W. 697, 699 (1914).} But in insurance, large policyholders customarily deal on even terms with insurers; sometimes they may even have an advantage. Moreover, though the small policyholder can not negotiate he can shop around; if the market is competitive, any product will be provided if desired by enough people at an adequate price. Also equality in bargaining power, lost in the relationship between insurer and individual policyholder, is re-established on a higher level when policyholders in combination deal with insurers. In Germany at least, groups of policyholders play some role in the formation of AVB.

Freedom of contract is both a value in itself and a means of preserving the values of invention and experimentation. The contrasting dangers of speculative innovations and of stagnation present to legislatures and commissioners a difficult conflict of values. Choice or reconciliation of them requires careful evaluation of the practical consequences. Instances we have seen are the fate of the New York law prescribing standard life policy forms, abolished three years after enactment because it curbed un-
duly the improvement of coverage, and the modern practice of allowing statutory standard provisions to be replaced by provisions more favorable to the insured. One may also point to the proposal to replace detailed statutory requirements by a broader discretionary power in the insurance commissioner so that he can intervene where he must but leave the majority of insurers free from harassment. In Germany freedom for development was explicitly weighed when the legislature conferred general powers instead of regulating all details by statute. But the administrative agency continues to face this conflict. Study of the German approval of AVB shows explicit concern with the problem, though the German department seems not to give enough weight to the need for freedom to experiment.

2. Substantive Protection of the Policyholder.
   a. Solidity of the Insurer. The most important goal of insurance regulation as a whole is the preservation of the solidity of companies in the long term interest of the policyholders as a group. This objective appears in many forms, such as the solidity or solvency of the insurer or its capacity to perform its obligations. Under the name of the Gefahren-gemeinschaft, or "community of insureds," this objective has received some explicit recognition in German regulation of contract terms. Elsewhere, too, though less often explicitly mentioned as an objective and sometimes ignored by courts, it plays an important role, mostly as a limiting factor, for regulation in the interest of the individual policyholder (that is, his short run interest in maximum coverage for minimum cost) cannot be allowed to prejudice unduly the interest of the community of all policyholders (which is also the individual policyholder's long run interest) in the preservation of a solvent going concern. Sometimes, with inadequate thought, the objective is expressed as one of preserving the financial soundness and economic strength of the insurance industry or even the "interests of the insurer," but the real aim is to see that the industry is not disabled from performing its necessary social function.

290. Read, in 1931 NCIC PROCEEDINGS 67.
which cannot be achieved without financially sound insurers. This aim necessitates adequate premiums. Inadequate premiums do more harm to policyholders than excessive premiums. This aim also suggests the exclusion of bad risks. The German department has upheld the insurer's right to cancel health insurance contracts after a sickness indicating a great likelihood of heavy future claims on the ground that a general prohibition of such cancellations would serve the few bad risks to the prejudice of all other policyholders. Like arguments have been used to justify suicide clauses in life insurance and clauses excluding neurosis in accident insurance. On the other hand, contemporary American developments respecting cancellability tend to ignore the interests of the "insured community."

b. Protection of the Policyholder vis-a-vis the Company. In view of the weak position most policyholders have relative to the insurer, regulation is concerned with the *aequum et bonum* of the contract, i.e. the legal system may seek to insure that insurance companies treat the whole body of policyholders "reasonably" or groups of policyholders "equitably" by applying only appropriate classifications or individual policyholders "fairly" in the application of contract terms.

In the United States, great weight is placed on the "reasonableness" of the contract—it is a main purpose of rate regulation, for example. There is much less interest in Europe in insuring that benefits and premiums bear a reasonable relation to one another.

Another aspect of "reasonableness" more relevant here is protection of the policyholder against contracts which do not give him the kind or amount of coverage he may reasonably expect, because conditions and exclusions provide the insurer with technical defenses. This has been an important factor in the supervision of insurance contracts from the beginning, both in the United States and in Europe. The Michigan statute of 1881 expresses it in two points: "fairness and equity" in general and, in particular, the "avoidance of conditions, the violation of which by the assured would, without being prejudicial to the insurer, render the policy void or voidable at the option of the insurer."

Measures taken include the prohibition of certain exclusions from the scope of coverage, the granting of grace periods and nonforfeiture benefits, control of procedures in making application, in cancelling, and

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291. 1930 Veröffentlichungen 120.
292. See notes 210-13 supra and accompanying text.
293. Kimball, supra note 284, at 486.
294. Mich. Pub. Acts 1881, No. 149, § 2. It should be noted that the term "fairness" in this statute is what we have called "reasonableness." It is only important that the terms be used consistently within a given framework.
in settling losses. The question is less whether the benefits promised correspond to the premium paid (a deficiency remedied most easily by a reduction of premiums), than whether the contract gives the policyholder the protection he needs. Considerations of "reasonableness" may be ground for objection, despite an appropriate premium rate, if the policy contains far reaching exclusions or unwarranted qualifications of coverage.

The principle of reasonableness usually operates through statutory minimum requirements, but it has more extensive application. Thus the German insurance department, under its general power to see that the interests of the insured are sufficiently secured, has pursued a policy of improving coverage beyond the statutory minima. This power is broader than that conferred upon many American commissioners to disapprove "unjust" or "unfair" provisions. Many American courts seem unlikely to sustain a commissioner's order requiring more generous coverage than is fixed by statute, but there is a discernible inclination for insurance departments to encourage expansion and resist contraction of coverage, even if the legal power to do so is doubtful. Similarly the French department has no weapon but persuasion to oppose to unjustified exceptions and exclusions, in the domaine général, but it persuades if it can.

In the United States the related goal of providing "equity" (that is, of preventing discrimination against classes of policyholders) is also extensively sought. In life insurance, persons who belong in the same group in respect to age and health may not be treated differently. In Germany, a right of the insured to be treated without discrimination is particularly established for mutual associations as a consequence of the membership concept. German stock companies have no express duty not to discriminate. Where the statute forbids the granting of special advantages or benefits in connection with a particular insurance contract, it does so mainly to promote fair competition, rather than equitable treatment of policyholders, though the latter objective is not irrelevant. In general, however, questions of equity are left to management to decide.

3. Public Policy in General.

The requirement of solidity is not the only one to interfere with or support freedom of contract. Various public policy objectives can be involved. Contract-regulating provisions may control competition in the marketplace, not only among insurers but in other economic fields. Ethical or moral objectives are relevant, as in prohibiting unrestricted

295. E.g., Wisconsin regulations prescribe that policies may be disapproved if they are "unfairly discriminatory." Wis. Adm. Code, Ins. § 6.05(5)(a).
296. VAG § 21, and Prölls, VAG § 21 notes 1, 5.
297. Id., § 81 note 13.
coverage of suicide in life insurance or coverage that would encourage fraud or criminal offenses. Any public policy may, in a proper case, have an impact upon the legal control of policy terms. Thus, the New York department issued a circular letter prohibiting inquiries about the race, creed, color, or national origin of anyone dealing with insurance companies, whether it was done by the companies themselves or by credit agencies working for them.299

Preservation of vested rights is an important value in most legal systems and is imbedded in the constitutions of some, such as the United States. Here control of policy terms can not generally interfere retroactively with existing contracts, though there are exceptions, such as the commonly enacted depression statutes that suspended or authorized an official to suspend the payment of cash surrender values or the making of policy loans by life insurance companies and extended the time for payment of premiums.300 The broadest power of this kind exists in Germany, but identical public policy considerations have kept the German department from exercising it since the difficult days after World War II.

Is such reluctance to interfere with existing contracts justified? "The essential mutuality of all insurance,"301 as recognized in the German Gefahrenengemeinschaft, or community of the insured, sometimes justifies intervention for the protection of the common interest, just as it represents a countervailing policy to the policy of protection of the individual policyholder vis-à-vis the company.

Why do legal systems seem to differ so much in the goals sought? The major disagreement seems to be in the weight accorded freedom of contract. In Holland and England it seems to rank above all other values and there is almost no interference with contract terms; in Germany, France, and the United States it is outweighed by other values. This may represent less an ideological difference than special circumstances in the insurance markets of Holland and the United Kingdom that make freedom to compete for international business an important goal of the state. For any western state where international insurance activity is small relative to the total, the balance of values would probably come out much as in the United States, Germany, and France. It is noteworthy that in the United States the most effective pressure to free contract

300. KIMBALL, INSURANCE AND PUBLIC POLICY 189 (1960). The statutes were not necessarily constitutional, but that issue did not arise. But cf., Home Building & Loan Ass'n v. Blaisdell, 290 U.S. 398 (1933), upholding a depression-born mortgage moratorium statute against a challenge based on the contracts, due process, and equal protection clauses of the U.S. Constitution.
301. PROCEEDINGS, FIRE UNDERWRITERS' ASS'N OF THE NORTHWEST, 1896, at 29, 32.
terms from control has come in connection with the international and interstate aspects of the business, where restrictions on freedom of contract can be most felt as an impediment to the smooth flow of commerce.

B. The Methods of Administrative Control

Among the countries discussed here there is great similarity in the objectives sought by the law. There is less similarity in the methods of achieving them.

1. Transparency of the Market.

A fundamental dichotomy reflects the difficulty of balancing conflicting values in regulation of policy terms. The objectives of solidity and protection of the policyholder vis-à-vis the company would lead to compulsion; the goal of freedom of contract and the desirability of maintaining flexibility and permitting creative experimentation would lead to reluctance to compel. One possible way to reconcile the objectives is to seek what the Germans call Markttransparenz, or transparency of the market. The market should be such that the buyer can make a rational choice. This requires essentially that the competing products in the market should be comparable. It comprehends a variety of related but separable ideas. Thus, disclosure of full information about the contract prior to its formation is important. Clarity of terms is essential, and uniformity is helpful. Each of these deserves separate mention.

2. The Role of Disclosure and Formal Requirements. Often a sophisticated buyer can protect himself better than the law can protect him, provided he has adequate information in advance of contract formation, though the complexity of insurance contracts raises some doubts about disclosure's adequacy as a complete solution. Only a few systems, notably that of the United Kingdom, have been satisfied with it. But it is used everywhere as a supplementary device.

Disclosure can also be compelled after contract formation to facilitate enforcement of whatever contract rights the policyholder may have. These "formal" requirements compel inclusion of certain provisions in the contract or prescribe the way they should be included. Though they come too late to aid the policyholder in deciding whether to buy, they enable him to know and protect his rights better.

Formal requirements are utilized rather generally in the systems examined, but in different ways. France prescribes by statute that certain provisions be printed with prominence in the contract. In Germany, statutes do not require disclosure, but insurance departments compel it under their general powers.

302. Kimball & Pfennigstor, supra note 273, at 688-90 passim.
It is doubtful if formal requirements or disclosure can be more than a supplement to compulsion for policing the terms of insurance contracts. Even in a competitive market the ordinary policyholder is deceived or misled too easily for competition to lead to rational choices; the problems arising from life insurance specialty policies demonstrate this point conclusively.\(^3\)

b. Uniformity and Clarity. Uniformity of terms is corollary to the fundamental goal of protection of the policyholder vis-à-vis the company. Like disclosure, it aims at rational choice. Uniformity also has value in simplifying the regulatory task. Without substantial uniformity the job of the German department would become impossible because of the cumbersomeness of its procedure. For different reasons there also is a tendency toward uniformity in the United States. Standard fire policies sought to simplify loss settlement where different insurers were involved; this may also be the aim of provisions authorizing the commissioner to make endorsements uniform. Some degree of uniformity is also produced by standard provisions laws. But in general, the American commissioner is not entitled to demand uniformity.\(^0\) The differences in the power granted to the regulatory agency, the structure of the industry, and the methods of control produce a result unlike the German one. No substantial pressure towards uniformity is exercised in France either.

It would be easier to produce uniformity if it were clearer what should be compelled. If the desirable attributes of a particular kind of insurance coverage were settled, then it would be desirable to compel all companies to conform to them in order to render competition meaningful. Since the most meaningful comparison is a price comparison, the elimination of all other variations has a certain obvious advantage. On the other hand, such compulsion presents dangers. First, competition in forms can help produce the best possible coverage. Second, some coverages—specifically health insurance—are still experimental; and premature constraint prevents development. Perhaps reasonable flexibility and room for competition could be coupled with reasonable freedom in the market if standard provisions were developed for most policy terms, leaving only a limited number of points on which competition would be free; in those areas there should be an obligation to point out clearly how one policy differs from others.

Transparency of the market presupposes clarity of expression. In America, this is an objective of insurance regulation, though less self-

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304. *Supra*, text at note 91.
consciously formulated and less assiduously sought than in Germany.

In general, the requirements that affect mainly the format of the preliminary negotiations and the form or language of the contract rather than its substantive content do not conflict with the principle of freedom of contract. This is a good reason to prefer them to substantive compulsion. The conflict with freedom of contract is much more substantial in the case of the uniformity requirement since it does more than merely seek effective communication.


In the United States, a determination whether the task of regulating national policy forms can be done better at the federal or at the state level will certainly be the most negligible of factors in a high political decision whether to continue state regulation of insurance or to change to a national system. Nevertheless, the place where control is exercised is relevant to its success and to the choice of the most appropriate techniques of control. Some of the special problems of insurance regulation in the United States arise from the fact that control is at the state level. For example, the fact that it may take months or even years to get a new form approved in all states militates against inventiveness and experimentation, especially with respect to large interstate risks where it would most naturally take place. Thus in order to make the system of state control work without damage to business enterprise, there is considerable pressure toward freeing at least the interstate risks from the necessity of form regulation. A system of national control would eliminate that particular difficulty. Moreover, elimination of duplication of effort would also be a net gain in a single national system. A national agency would make possible a substantial upgrading of the caliber of personnel involved in insurance regulation. We think we can see a striking difference between the average quality of decision-making personnel in American and European insurance regulatory agencies, the advantage being clearly on the European side. No doubt an important reason is the wider choice the European agency has in obtaining staff members, since the entire country can be drawn upon. This is a factor of importance to form regulation, for to do that job well requires both knowledge of the insurance business and some legal sophistication.

Elimination of duplication of regulatory activity, upgrading of personnel, and elimination of the special problems created by interstate activity in a federal system would be the principal advantages to the process of form regulation of a shift to a national regime of control. A national control agency would make feasible the larger investment of time in each form that is characteristic of the German system by reducing greatly the
total volume of work. However, the German system should not be adopted without considerable modification, despite the merit in its emphasis on and achievement of substantial clarity in contract terms.

Variation in the statutorily required provisions of contracts and in judicial construction of contracts also creates difficulty for a nationally operating business. The degree of success attending the effort to achieve uniform legislation about contract provisions emphasizes the problems caused by diversity in this sphere and also shows how much cooperation can accomplish when the states share a language and to a marked degree a common legal system.

In the Common Market, however, the tenacity of existing institutions, so long as they work well enough to be tolerable, together with the difficulties created by disparity of language and of legal systems, will undoubtedly delay even this solution. How far the American states have come in solving the problem of insurance regulation in a federal system can best be appreciated by looking at the problems Europeans have yet to solve in "harmonizing" their laws enough to make a greatly enhanced volume of international insurance business practicable.

There is more formality in the German process than in the American. This manifests itself first in the clear distinction between public law and private law measures for control of insurance policy terms. It appears again in the organization and procedures of the insurance department. Whereas the typical American insurance department, however skillfully organized and managed, operates informally and flexibly, the German department is highly structured and formal. Organization and procedure is in part statutory, and the remainder is explicitly set out in formal implementing *Verordnungen* or legislative orders. Though informal negotiation plays a part in German regulation, the process is carried out before the backdrop of a formal power structure that lies in plain sight. Formality of organization and procedure is undoubtedly one of the factors responsible for the particular way in which German regulation has developed. Though each insurance company is obligated to submit each contract for approval, this submission is necessarily a routine matter, since the elaborate and formal procedure for approval of AVB would be impossible for hundreds of individual submissions. American filings are also handled to some extent in groups by bureaus and boards, but not as completely as German filings are. The number of filings that must actually be examined and individually approved in the United States is much larger than in Germany. Thus when one American commissioner recently proposed to his staff that approval of policy forms containing a

certain kind of provision be withdrawn, the difficulty of locating all such policies (within a single minor branch of the business) was one of the important practical considerations involved in the department staff discussion.

In part the less formal and structured American process reflects greater flexibility and adaptability; in part lesser efficiency and adequacy. Except in our largest states, regulation is less well financed and staffed than in Germany, with fewer professional staff members of high quality. Though control of policy terms is a legal job, it is done in most American departments without using lawyers. In the United States the work would be too routine to attract qualified professionals even if salaries were larger. In Germany it is possible to have lawyers deal with this problem because they have higher status and because the work is structured to have intrinsic interest. The American system would be better if lawyers were more extensively used.

The personal characteristics of the insurance commissioner, perhaps derived partially from the nature of his training, affect the way insurance regulation develops. For example, in Germany (as in New York) the commissioner has traditionally been a lawyer. This tends to focus the department attention on the desirability of a regularized procedure. Lawyers have other faults but they tend not to be arbitrary. Actuaries as commissioners would have somewhat different characteristics, former agents still others. The German commissioner is usually promoted from the civil service, while the American commissioner tends to be a political appointee. This also would have an effect, though an unpredictable one. In the United States where there is more flexibility, less professionalism in the department, and more frequent change of commissioners than in Germany the effect of the commissioner's personality would tend to be increased, though his lesser competence (where it is less) and the more frequent change (in some states) would tend to lessen the effect.

There is a striking contrast in the level of participation of academic personnel in regulation. In Germany institutionalized procedures lead to extensive use of academicians. Seldom are new AVB approved in Germany without participation of and advice from one or more distinguished teachers. In France, though structural similarity of the legal profession and the high status of academic personnel would make it easy to make effective use of such people, they are in fact rarely used. It is not surprising that in the United States academic personnel have seldom been used; the times may be changing, but the few exceptions are not frequent enough to prove it for the state level, though recent appointment of a professor as commissioner in Michigan is suggestive.
General inadequacy of American insurance departments has led legislatures to play a larger role in the control of insurance contracts here than in Europe. There the legislature did little more than (1) state a framework of insurance contract law, which in the United States has been developed by the courts, and (2) set up machinery for administrative regulation. The German insurance contract code is largely *ius dispositivum* because in enacting it the legislature could rely upon a functioning and effective insurance department with broad powers; specific legislative control of contracts was less necessary. Like ours, the French insurance contract statute contains much more *ius cogens* than the German because the French department was not yet established at the time of enactment.

In the United States the legislature tinkers frequently with the law of insurance contracts. The result is a jumble of unsystematic legislation. In view of the constant legislative involvement, it is curious that there appears at first glance to be greater scope for rule-making by American insurance departments than by the German, which appears to have no such power. But this is illusory. The approval of AVB is, in effect, the promulgation of general rules governing contract contents. Thus in fact, if not in theory, the German department exercises more rule-making or "legislative" power than American departments, for in fact, if not in theory, the department promulgates standard policies in most fields after negotiation with the insurers and consultation with experts.

One reason the German method is more systematic than the American is that approval of AVB is only one illustration of a general technique used widely for various contracts of adhesion in Germany. By contrast, there is great variation in the United States even in insurance, with each line subjected to a different kind and intensity of control. There may be statutory standard policies in one field, standard provisions in another, standard provisions accompanied by administrative control in a third, and administrative control based on general standards or no standards in a fourth. Though uniformity of procedure and rule is not always a virtue, there is reason to think that it is in this case. While it could be argued that the American techniques are better adapted to the special problems of particular lines of insurance, on the whole it is our feeling that the American diversity reflects mainly historical accident and lack of system in the development of insurance law.

Despite the relative constancy and system in German form approval, there are numerous variations among the different lines of insurance. The organization of the department is an important causal factor, as are
the differences in the problems of the various branches of the industry. In Germany the real work of policy form control is done by the staff members of particular sections, who deal as specialists with individual lines of insurance. Differences develop that reflect differences of personality more than any real difference between lines of insurance. In the United States, policy approval is decentralized only occasionally; ordinarily one policy approval section handles the entire matter. Differences result from various causes: divergent statutes, economic differences between fields, and historical accident.

3. Rigidity in the Insurance Market. In scope of control there is considerable difference among the systems. The German distinction between general policy conditions which must be approved and special policy conditions which need not be is not always found in the United States; in some states all policies must be approved before being used. In practice, however, there is often dispensation from the general requirements and there are a number of statutes that authorize it. The power to dispense is important for flexibility in the insurance market.

The possibility for experimentation and variation that seems to exist in Germany is qualified by prohibition of discriminatory contracts; in fact the special policies for individual cases seem not to be extensively offered. There is probably more flexibility in the United States, if one focuses on a single state. Apart from interstate operations, the American system is less cumbersome than the German, especially because the deemer clause puts pressure on insurance departments to deal expeditiously with policy approval problems. The German system does not have this compulsive device.

Insurance companies do not seem to regard the German regulation as excessively burdensome in this field, but some brokers do. We are inclined to agree with the brokers. Though the system has many virtues, it is a burden that the German insurance business should not have to carry unmodified in the coming decades; without change the process may prove to be a handicap to German companies seeking to compete in more flexible markets as international business increases.

If an insurance company needs to receive approval from most American insurance departments before it can make a policy available to an insured with wide ranging commercial operations, there may be long delay. Some departments may even hold out adamantly and never give permission. Thus, apparently Michigan was once a lone hold out on an exclusion of intentional injury in disability policies or double indemnity clauses in life insurance; the fact of its loneliness did not seem to persuade the department. If approval is possible at all, however, it is not likely to
take so long as the decade it may take to get approval of new AVB in Germany. Still it is long enough to discourage many policyholders and send them abroad to Lloyd's or to other "surplus lines" insurers.

When larger public problems are in issue, the time may be shortened. When Mutual of Omaha introduced a Senior Security Policy in 1959 the importance of the outcome in helping to solve a major social problem led insurance departments to cut red tape to a minimum. Forty days after the results of experiments in a few states proved the feasibility of the plan, the new policy was on the market in all states. Such expeditious approval can be expected only rarely, however. Normally, the approval process is so time-consuming that many insurance men regard it as one of the major problems of the insurance business.

C. Summary

The techniques of control in the European and American systems are quite divergent, even when their goals are equally comprehensive. The German and American systems, for example, seek and achieve much the same objectives. The divergences seem at first to be very great, but the main differences are in technique and not in either goal or achievement. The differences appear greater if one looks only at legislative or administrative control than when one contemplates the whole. The bureaucratic machinery of the German administrative agency is systematic though unduly cumbersome and has resulted in a highly institutionalized procedure for the close control of general policy terms. The very cumbersomeness of the procedure has necessitated use of the techniques in such a way as to make it unnecessary that they be used frequently. Thus actual approval of AVB has come to be routine, the department concerning itself with the development of standard AVB. Though the German department has, in theory, no power to make general rules, that is what the department does in fact. In the United States, the main focus of control is also upon the development of rules, with the approval process itself tending to become routine. However, in the United States the rules are developed in a multiplicity of ways not paralleled in Germany. Standard policies and standard provisions specified by the legislature, standards created by the legislature but not formulated in precise terms, standards created by the insurance department under rule-making authorization, and standards applied by the department though never formulated all contribute to the development of a body of rules that is unsystematically stated and not always easy to find but that does determine what will and

will not be approved. Only if the insurance company desires to go beyond the established patterns and create something new do problems arise. Then there must be negotiations with the insurance department similar to though less formal and systematic than those engaged in by a German insurer that wishes to depart from the standard AVB.

The obvious weakness of the German system is its cumbersomeness, which results in an undesirable rigidity. This weakness is, in effect, an exaggeration of the system's greatest virtue, its insistence upon transparency of the market, which follows upon exemplary insistence on clarity of expression and a substantial measure of uniformity. Hopefully, these virtues need not be discarded; a better balance should be sought and should be attainable. It is easy to overestimate the cumbersomeness of the German system, however. There are techniques, such as geschäftspannmässige Erklärungen, for acting quickly when that seems necessary. Moreover, the price of cumbersomeness is not necessarily paid by the policyholder, who can solve his problems by buying in a freer foreign market, while domestic companies lose a part of their business. In a sense, the value of protecting the "interest of the policyholder" is in competition with the value of a thriving domestic insurance market. Forming judgments here is difficult and the authors are not entirely agreed on the extent to which the cumbersomeness of the German procedure is the basis for criticism of the German system.

Lack of system is probably the greatest weakness of American control. Rigidity is far less apparent than in Germany on an individual state level, though multiplication of jurisdictions gives the entire system a degree of rigidity that is undesirable for interstate risks. Efforts to reform and improve the American system of policy control should probably be directed toward the adoption of the more desirable aspects of the German technique, the great emphasis upon clarity of expression and enough uniformity to provide a "transparent" market, and the more systematic and formal method that better informs people who must deal with the department. The deliberateness of the process should be avoided, however. Industry organizations might be used more systematically, as they are in Germany.

From these suggestions follow our notions of the direction in which movement is necessary to create a system better than either the American or the German. It would be a system in which the care and thoroughness in the development of standard AVB that are central to the German system were used to develop individual clauses to go into a storehouse from which they might be drawn, as needed, to build up a policy. If (1) the German focus were shifted from whole policies to individual clauses, and
(2) the system permitted more alternatives, much of the objection to it would disappear. Not all clauses should be treated alike. Uniformity of technical terms like notice clauses is highly desirable; competition is better directed to other questions like scope of coverage and price. With respect to the latter matters freedom to compete is important; on other clauses control does no harm. All clauses should be drafted with the utmost care to say exactly what is intended; once the drafting has proved satisfactory it should not be changed until it no longer serves the purpose. But there should be alternative permissible formulations so the company is not strait-jacketed. The objective of clarity should not be used as an excuse for stifling competition, as it tends to be in both systems (but especially in the German). Competition is a better regulator, on the whole, than insurance departments and it should be used to the maximum extent possible.

At the conclusion of the earlier article, we observed that despite the technical divergence among the systems, "when viewed in their totality they seem to accomplish much the same purpose." We think that this conclusion emerges more clearly from an examination of both legislative and administrative control than from either alone. For example, the American statutory control of insurance policy terms is all or nearly all ius cogens, while the German is mostly ius dispositivum. But when administrative control is included as a part of the picture, there is more balance, for in America there is less compulsion at the administrative level than in Germany.

An even better illustration of the point comes from a comparison of the German and the French systems. The existence of a going and effective system of administrative control when the German Insurance Contracts Act was under consideration removed the pressure to enact a substantial number of compulsory provisions. In France, on the other hand, there was no effective insurance department in operation, and the Insurance Contracts Act is full of ius cogens.

In making the above point, we do not wish to be understood as saying that all systems will produce the same result in a given fact situation. This is demonstrably not the case. There are important differences from one system to another. What we do say is that the systems are responding to similar pressures and that when the whole picture is seen, there is far less divergence in result than when only part of it is seen. German and American statutes look quite unlike. The unsystematic character and bad drafting of American state legislation are proverbial. Ad hoc solutions lead to a virtual chaos of confused and conflicting provisions. On the other hand, European statutes tend to be systematic and purposeful.
Moreover, administrative control is unlike in the United States and Germany. But in both countries there is, in the end, substantial public control over the terms of insurance contracts, and the control points in the same direction and largely achieves the same objectives. In many instances, the details of the results are the same. In both places, there is as much control as seems to be needed; in the opinion of many people there is far too much.

The matter is extremely complicated and facile answers are not satisfactory answers. On the whole, however, we do think that any change should be in the direction of more freedom, not more control. This is not because more control could not theoretically achieve sound goals. It is because, relative to the means available for its performance, the task is too complex. Engulfed in a tidal wave of forms, the American approval process tends to become mechanical and superficial; overwhelmed by the goal of perfection of complex documents, the German process permits—no, encourages—the development of an inflexible market. One goal (perhaps it is only a necessity) of insurance law is economy of means. It is unsound and in the end destructive to impose tasks on regulatory agencies that they cannot handle. This danger has too often been courted in insurance regulation—and notably in the approval of policy forms. But there is now some awareness of the problem and a greater tendency than ever before to try to accommodate the regulatory tasks selected for performance to available resources.