



THE ATTORNEY GENERAL OF TEXAS

AUSTIN 11, TEXAS

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ATTORNEY GENERAL

November 30, 1960

Hon. Penn J. Jackson, Chairman
State Board of Insurance
International Life Building
Austin 14, Texas

Opinion No. WW-968

Re: Duty of the Board in calculating specific premium rate for individual fire risks and related questions.

Dear Mr. Jackson:

You have asked our opinion concerning several questions pertaining to the Board's duties and responsibility with respect to fixing rates for specific risks under the provisions of Subchapter C of Chapter 5 of the Insurance Code. This subchapter charges the Board with the duty of prescribing, fixing, determining and promulgating the rates of premium to be charged and collected by fire insurance companies transacting business in this State. In the past the Board has maintained two distinct approaches to this field. Overall, the Board has promulgated certain rules by which to determine the final rate of premium for a specific risk. These rules are set forth in the Texas General Basis Schedules referred to as the GBS. On certain classes of risks the Board "publishes" the rate for specific individual risks. These "published" rates are developed by direct inspection or by analysis of factual information supplied by insurance agents or other persons with the inspection and analysis being done by the Board-employed personnel. On the other hand, many classes of risks receive no "published" rate, the Board simply promulgating the rules by which such a rate can be calculated and placing the responsibility upon the insurance company to properly calculate the rate of premium from such rules. The largest class in the unpublished category is the dwelling class while published rates are, in the main, applicable to commercial and mercantile risks. You have estimated that about 70% of the premium volume in this State is produced on risks for which there is no "published" rate. You have stated that this departmental practice is well-established, probably dating back to the enactment of the original fire insurance rating law in 1909. You have stated that some changes are contemplated in connection with this practice and that the

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questions asked are for the purpose of determining the Board's legal responsibilities in this matter. Your first two questions are:

"(1) Is the Board legally required to calculate the specific premium rate for each individual fire risk within the State, even though it has already promulgated the rules from which the calculation may be made?

"(2) If your answer to the above question is in the negative, please advise whether the Board may, in its discretion, make such calculations."

The foundation of the Board's authority in the field of fire insurance rating is found in Article 5.25 and Article 5.26 of the Insurance Code. Article 5.25 provides in part:

"The Board of Insurance Commissioners shall have the sole and exclusive power and authority and it shall be its duty to prescribe, fix, determine and promulgate the rates of premiums to be charged and collected by fire insurance companies transacting business in this State. Said Board shall also have authority to alter or amend any and all such rates of premiums so fixed and determined and adopted by it, and to raise or lower the same, or any part thereof, as herein provided. Said Board shall have authority to employ clerical help, inspectors, experts and other assistants, and to incur such other expenses as may be necessary in carrying out the provisions of this law . . ."

Article 5.26(a) provides in part:

collected by all companies transacting in this state the business of fire insurance, as herein defined, shall be exclusively fixed and determined and promulgated by the Board, and no such fire insurance company shall charge or collect any premium or other compensation for or on account of any policy or contract of fire insurance as herein defined in excess of the maximum rate as herein provided for;. . ."

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The Board and its predecessors have always considered that the authority to fix the rate of premium for a specific risk emanated from the last sentence of Article 5.29 which reads as follows:

"The Board, and any inspector or other agent or employee thereof, who shall inspect any risk for the purpose of enabling the Board to fix and determine the reasonable rate to be charged thereon, shall furnish to the owner of such risk at the date of such inspection a copy of the inspection report, showing all defects that may operate as charges to increase the insurance rate."

In our opinion this language is specific legislative recognition that the Board has the power and authority to calculate the rate for an individual risk by the procedure above outlined. Consideration of the legislative history of the fire insurance rating law leaves no doubt as to the existence of this authority. Even should we assume the language of this chapter of the Code to be ambiguous, nevertheless, the longstanding departmental practice along with apparent longstanding legislative acquiescence would require adherence to the administrative interpretation. In this connection, legislative acquiescence in this interpretation is found in the fact that annual appropriations of sizable amount have been made for many, many years for the purpose of providing the personnel and equipment necessary to perform this function of rating and publishing the rates for individual risks. For example, the last session of the Legislature appropriated in excess of \$250,000 for this purpose for the year ending August 31, 1960, and a like amount for the year ending August 31, 1961.

The statutes are somewhat obscure whether the Board must fix and "publish" specific rates for all fire insurance risks in the State. Even less certain is the line of division, if there be any, between the category of risks for which a specific rate is to be calculated and those for which a specific rate need not be calculated. Some insight may be gained by resort to the legislative history of the law now on the books. The present Subchapter C of Chapter 5 of the Texas Insurance Code stems almost entirely from Chapter 106, Acts 1913, p. 195, which created the State Fire Insurance Commission. Most of the language of that Act is present in its original verbiage in the present Insurance Code. In the brief period from 1909 to 1913 our insurance rate regulation was the subject of repeated legislative attention.

The initial attempt at state regulation of fire insurance rates culminated in the passage of the Fire Insurance Rating Board Act, Acts 1909, 31st Leg., 1st C.S., p. 311, Ch. 18. This Act created the Fire Insurance Rating Board and required insurance companies to file their schedules and rates with such Board for approval. The Board was authorized to reject the rates filed if either excessive or inadequate. The Board was also given the authority to publish "specific schedules of fire insurance rates which shall by said Board be deemed reasonable," but these schedules were but recommendations. The primary purpose of the measure was to prevent discrimination in rates as between insureds. (See for example the caption of this Act.) It is further clear that the two remaining enactments, the 1910 Act and the 1913 Act, were for this same purpose and that each represented an attempt to provide a better method for preventing such discrimination.

Apparently widespread dissatisfaction arose from the enforcement of the fire rating law leading to cries for repeal of the 1909 Act and a replacement with more stringent controls. *

As a result, the Legislature enacted the State Insurance Board Act which created the State Insurance Board and wiped out the former Fire Insurance Rating Board by the repeal of the 1909 Act. Acts 1910, 31st Leg., 4th C.S., Ch. 8, p. 125. The basic change from the 1909 Act was that the State Insurance Board was given the "power, authority, . . . duty to prescribe, fix, control and regulate rates of fire insurance" by making and prescribing "general basis schedules, together with rules and regulations for determining maximum specific rates therefrom," Sec. 4, 1910 Act. Again Section 11 of the Act provided:

" . . . said Board is empowered and it is . . . its duty, to prepare a system of general basis schedules, together with rules for applying the same, for determining fire insurance rates on property in this state, the said general basis schedules and the rules for applying the same to be at all times reasonable;. . ."

*See Proclamation June 15, 1910, of Governor T. M. Campbell convening Third C.S. of 31st Leg. (p. 1-General & Special Laws of Texas Third and Fourth C.S. - 31st Leg. 1910) and Message of the Governor dated July 19, 1910, to the Third C.S. of 31st Leg. (p. 4 - Id.); Proclamation of Governor T.M. Campbell convening Fourth C.S. of 31st Leg. dated Aug. 17, 1910 (p. 111 - Id.)

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Section 12 of the Act provided that after the adoption of the General Basis Schedule and the rules and regulations for applying them each insurance company should within a reasonable time file with the Board:

" . . .its application of said general basis schedules to the specific risks of the State and the specific rates obtained thereby in accordance with the several provisions of this Act; and provided further, that any one or more insurance companies may employ for the application of such general basis schedules and the making of such specific rates, the service of such experts as they may deem advisable for such purpose, but the contract or contracts of employment of such experts shall first be submitted to the State Insurance Board for its approval; provided, further, that the State Insurance Board shall have authority, and it shall be the duty of said board, personally or by its agents, to inspect and supervise the work of said experts in the application of said general basis schedules in the determination of specific rates, which rates shall be the maximum insurance rates that may be charged for insurance in this state. . . . And it shall be the duty of the expert or experts representing the insurance companies, or any insurance company in this state, to furnish at the date of inspection to the owners of all risks inspecting for the purpose of applying the general basis schedule provided for in this Act, a copy of such inspection report showing all defects that operate as charges to increase the insurance rate.

"It is further provided that the maximum specific rates so made by a company or companies. . . shall not take effect. . . until such maximum specific rates have been approved by the board. The board shall have the authority to reject said maximum specific rates so made, or any part thereof, or to alter, amend, modify, or change the same, . . . ; provided, however, that the said board shall have authority in its discretion to permit the said company or companies to apply the said schedules of basis rates to risks other than mercantile and special hazards without having first submitted the

maximum specific rates so made to said board for approval. But such rates that the board may permit any company or companies to apply without the board's approval shall always be subject to review by the board, and, by the proper showing of any policyholder or policyholders, may be reduced. . ."

Under this law the State Insurance Board promulgated the first State-authored General Basis Schedules. The general overall pattern of this first General Basis Schedules prevails in the General Basis Schedules presently in use.

Evidently this system did not prove satisfactory and in 1913 the State Fire Insurance Commission Act was passed, creating the State Fire Insurance Commission, doing away with the State Fire Insurance Board, and repealing the 1910 Act.

We think it is clearly evident from a comparison of the corresponding sections of the 1913 Act to the 1910 Act that the primary purpose of enacting the 1913 Act was to increase the duty and responsibility of the regulatory authorities to the end that rules and schedules promulgated by the Board would be properly applied in calculating specific rates. It is further evident that the primary method by which this goal was to be realized was by transferring the duty of fixing the specific rates from the companies to the Board. As previously related, Section 4 of the 1910 Act placed upon the State Fire Insurance Board the duty to "prescribe, fix, control and regulate rates of fire insurance," and to "prescribe general basis schedules, together with the rules for determining maximum specific rates." The companies were required to make the application of the rules and submit the specific rates to the Board for approval. Sec. 12, 1910 Act. Section 6 of the 1913 Act (Art. 5.25), in contrast, provided in part as follows:

"The State Fire Insurance Commission shall have the sole and exclusive power and authority, and it shall be its duty to prescribe, fix, determine and promulgate the rates of premiums to be charged and collected by fire insurance companies transacting business in this State. As soon as practicable after this Act shall take effect, the State Fire Insurance Commission shall begin the work of fixing and determining and promulgating the

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rates of premiums to be charged and collected by fire insurance companies throughout the State, and the making and adoption of its schedules of such rates. . ."

A key comparison may be made between Section 12 of the 1910 Act and Section 13 of the 1913 Act. Section 12 of the 1910 Act required the companies to apply the GBS and the Board to pass upon those specific rate applications. Section 13 of the 1913 Act (Art. 5.29) commences:

"The rates of premiums fixed by said Commission under and in pursuance of the provision of this Act shall be at all times reasonable and the schedules thereof made and promulgated by said Commission as herein provided, shall be in such form as will in the judgment of the Commission, most clearly and definitely and in detail disclose the rate so fixed and determined by said Commission to be charged and collected for policies of fire insurance."

Under the provisions of Section 12 of the 1910 Act it was made the duty of the experts of the insurance company to furnish to the owners of all risks inspected for the purpose of applying the GBS, at the date of inspection, a copy of the inspection report showing all defects that operated as charges to increase the insurance rate. The corresponding provision of the 1913 Act (Sec. 13) (Art. 5.29) provided:

"It shall be the duty of the State Fire Insurance Commission, and of any inspector or other agent or employe thereof, who shall inspect any risk for the purpose of enabling the Commission to fix and determine the reasonable rate to be charged thereon, to furnish to the owner of such risk at the date of such inspection, a copy of the inspection report, showing all defects that may operate as charges to increase the insurance rate."

We think, then, beyond question, that the Legislature by the 1913 Act intended to vest the then State Fire Insurance Commission with the power to fix specific rates on specific risks, i. e., to apply the General Basis Schedules.

Under the 1910 Act, the State Insurance Board was given the authority:

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" . . . in its discretion to permit the . . . companies to apply the . . . schedules of basis rates to risks other than mercantile and special hazards without having first submitted the maximum specific rates so made to said board for approval. But such rates . . . always be subject to review by the Board." Sec. 12, 1910 Act.

It was under this authority that the then State Insurance Board promulgated, in the then GBS, rules which specified certain risks and classes of risks for which the specific rates need not be approved in advance by the Board. Rule 335, GBS, 1911.

The corresponding provision in the 1913 Act, Sec. 13, provided:

" . . . and said Commission shall also have full power and authority to prescribe reasonable rules whereby in cases where no rate of premium shall have been fixed and determined by the Commission, for certain risks or classes of risks, policies may be written thereon at rates to be determined by the company, provided, however, that such company or companies shall immediately report to said Commission said risks so written, and the rates collected therefor, and such rates shall always be subject to review by the Commission."

After the passage of the 1913 Act, the 1915 GBS, published by the new State Fire Insurance Commission, contained a rule corresponding to Rule 335, GBS, 1911, which provided in part:

"Application must be made for all ratings and such ratings do not take effect until promulgated, except as specified below.

"Companies, their special and local agents, are permitted to rate, and such rates are not required to be promulgated, the following classes when not exposed, or when exposed solely by Special Classes, as shown on pages 65 to 69, both inclusive:" (classes mentioned)

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This system of exclusion of certain specified classes has been maintained from that date to the present.

Therefore, it is our opinion, in answer to your first two inquiries, that the Legislature intended to place upon the Board the primary responsibility of calculating the specific rate for individual risks. At the same time, the Legislature has provided that there may be certain exceptions where the Board may allow the companies to make the actual calculation under rules promulgated by the Board. The discretion in selection is left with the Board but we do not believe that in the exercise of that discretion the Board can properly abdicate its specific rate application function in its entirety or exercise such function in a token manner.

Before responding to the third and fourth questions, some additional facts must be set forth. Rate books, showing "published" rates for each city and town in Texas are now being printed and distributed by the State Board of Insurance. These books are distributed free to licensed companies upon request. Recording agents are furnished free copies of the rate book for the towns or cities in which they reside. As new "published" rates are developed, supplements to the rate books are printed, and distributed on the same basis as the original books. This free distribution is made weekly, thus enabling a current list of published rates on the risks within a city or town. Your third and fourth questions are as follows:

"(3) If the Board does make such calculations, either to satisfy legal requirements or by way of exercising a discretionary power, does the Board then have a legal obligation to make the specific rates available to insurance companies and agents?

"(4) If the Board must furnish these specific rates to insurance companies and their agents, what fees or costs, if any, must the Board collect?"

The only provision of the Insurance Code directly pertinent to these questions is the language of Article 5.29 which reads in part as follows:

"The said Board in making and publishing schedules of the rates fixed and determined by it shall show all charges, credits, terms, privileges and conditions which in anywise affect such rates, and copies of all such schedules shall be furnished by said Board to any and all companies affected by this subchapter applying therefor, and the same shall be furnished to any citizens of this State applying therefor, upon the payment of the actual cost thereof. . ."

In view of the legislative history of the fire rating laws and in particular the changes made in this Section from the 1910 Act (Sec. 11) to the 1913 Act (Sec. 13), there is no doubt in our minds that this language covers the specific or "published" rates.

However, we are faced with some uncertainty regarding the extent of the authority of the Board to make a charge for the furnishing of this material. Article 5.29 requires the Board to furnish the material on application either by a company affected by the fire rating law or by any citizen of the State. Gramatically speaking, the phrase "upon the payment of the actual cost thereof" could either modify both of the previous clauses or only the clause relating to citizens of this State. Because of the previous legislative history of this section we are inclined to the view that the Board is required to furnish this material free of charge to companies mentioned but is empowered to collect the cost of the material when furnished to others. Section 11 of the 1910 Act provided:

". . . provided, that such schedules and the rules for applying the same shall be furnished by said board to any and all insurance companies affected by this Act applying therefor; and the same shall be furnished to any citizen of this state applying therefor upon the payment of the actual cost thereof."

It is, of course, true that the meaning of legislative enactments are not strictly controlled by the form of punctuation used by the Legislature. However, it appears to us that the Legislature would not have referred to insurance companies and citizens of the State separately unless a distinction were intended. This difference in treatment is understandable.

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as insurance companies since the 1910 Act have been assessed the cost of the administrating of the fire insurance rating laws. (See Art. 5.49) There is no specific mention in Article 5.29 of the agents of insurance companies and it is our opinion that the Board is only required to furnish the material in question to the agents on the same basis as to other citizens of the State.

SUMMARY

While the Board is legally authorized and it is its duty to calculate the specific premium rate for individual fire risks within the State, it is within its discretion to determine whether it shall do so with respect to any particular class of risk. However, in the exercise of that discretion the Board cannot abdicate its specific rate application in its entirety or exercise such function in a token manner. The Board, upon application, must furnish, free of cost, copies of the specific rates so fixed to companies subject to the fire insurance rating laws but is required to do so on application of agents who are citizens of this State only upon the payment of the actual cost.

Respectfully submitted,

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