Opinion No. 249.

Insurance—State Insurance—Rates—Prevailing Rate.

HELD: 1. Since the State is the

only source of state insurance there can be no "prevailing rate" in the customary sense; it must be such rate as is fixed in the usual course of business, without undue enlargement of costs and risks, and with reasonable profit in addition.

2. Suggested procedure to be followed in arriving at the rate is outlined.

February 11, 1936.

Hon. John J. Holmes
State Auditor and Ex-officio Insurance Commissioner
The Capitol

You ask what is the meaning of the following language: "* * * at the prevailing and commonly accepted insurance rate * * * " as the same is used in Section 5, Chapter 179, Laws of 1935, the pertinent portion of which section reads as follows: "There shall be paid into the State Treasury by the respective boards and officers having charge of the property insured under this Act, out of the funds from which insurance premiums have heretofore been paid, at the time such property is listed for insurance, as hereinafter provided, or within thirty (30) days thereafter, the amount of the premium for three years' insurance at the prevailing and commonly accepted insurance rate, as determined by the State Auditor and Ex-officio Commissioner of Insurance which said rate may be adjusted by the State Auditor and Ex-officio Commissioner of Insurance upon report of the Fire Marshal of any change in perils and exposures or error in classification. Insurance shall be written for three years."

The term "commonly accepted" is used to define the word "prevailing" in Funk & Wagnalls New Standard Dictionary, and without doubt it was intended that the words be construed synonymously in the statute.

"Commonly" means "usually; generally; ordinarily; frequently; for the most part." (See: Webster's New International Dictionary, Funk & Wagnalls New Standard Dictionary, and the New Century Dictionary.) It is the adverbial form of the adjective "common" which means "usual," customary, habitual," (State v. O'Conner, 49 Me. 594) "general, universal, public" (Aymette v. State, 21 Tenn. 154.)

"Prevailing" means "predominant, generally current, most widely extended." "Prevail" means "to exist widely, or be widespread, in general use or practice." (See: Webster's, Funk & Wagnalls, and New Century, supra.)

Both terms connote a widespread and uniform application. It is obvious that the legislature did not intend such a meaning, because there is no such thing as a widespread and uniform rate of insurance upon the perils enumerated in the act. Use fire for an example. While there may be a uniform base rate, upon which the other rates are built, the final rate on a specific building depends on many factors which are peculiar to the structure itself—type of construction, proximity to other buildings, the nature of use of the building, protection (which includes the personnel and equipment of fire departments, general water supply, the proximity and number of fire hydrants), and many other factors which go to make up the rate on a specific building and the final result of which is peculiar to that building.

The terms have several meanings. Both Webster's New International and Funk & Wagnalls New Standard Dictionary, define it in one sense as meaning "to be in force." It might well be argued that the legislature intended that the Commissioner of Insurance was to determine as the rate, that rate which was named by a private insurance carrier in the last policy in force prior to application for state insurance. While persuasive, this is not a satisfactory answer.

The exceptions found in the standard forms of insurance policy may not be included in the state policies. "The act declares the perils against which the insurance will be written. It provides its own method for determining the value of the property. Exceptions from the risks are not made. In the absence of statutory authority, the respondent cannot write into these policies any of the ordinary exceptions." (State v. Holmes, 47 Pac. (2d) 634.)

So far as I know, there never has

been a policy issued in this state by any private carrier, which contained the coverages (or any of them) required by the statute, without any exceptions whatever from the risks.

Therefore, there is not, nor has there been any rate of insurance **in force** by any private carrier, upon coverages—without the usual exceptions—required by the statute.

The whole program should not be left in an impasse, however, because of the ineptitude of the authors of the law in expressing their intentions. It is our duty to construe the law so as to make it effective if possible. A way to do so may be pointed out by the case of New York Oversea Co. v. China, J. & S. A. Trading Co., 200 N. Y. S. 449, 451.

In that case there was a contract to purchase a peculiar sort of paper to be specially manufactured and which could not be bought elsewhere. Oddly enough the prices were named as the "prevailing prices". In determining what were the "prevailing prices," the court said: "It is obvious that 'prevailing prices,' according to the nature of this contract, which was for paper not to be had except by special manufacture, did not relate to what is commonly or currently termed 'market price.' * * * 'Prevailing price' must mean then, since there was but one source from which to procure the paper, and it was understood that it required special manufacture, such price as was set up by that source in the usual course of business, without undue enlargement of costs, and with reasonable profit in addition."

It seems to me that there is a very strong parallel between the circumstances in that case and those in our dilemma.

The state has a thing of value to sell, and it is the only source from which it can be procured. Therefore, there can be no "market price" or "prevailing rate" in the customary sense. The method of determining the "prevailing price," as defined by the New York Court, can well be made the basis of your procedure.

I suggest that in order to arrive at the "prevailing rate" (which is synonymous with "commonly accepted rate"), you follow this procedure:

In each case start with the last rate charged by the private carrier. Theoretically, at least, this rate was fixed "in the usual course of business, without undue enlargement of costs (and risks), and with reasonable profit in addition." In the event a building was not previously insured, I think you would be justified in using the Board of Fire Underwriters' rate as a starting point.

Then add the proper charge for each additional coverage required by the law. Since the Board of Fire Underwriters' rates perhaps control a majority of the business, such rates might be used.

Since the underwriters' rates are based upon coverages with the standard exceptions, you should add such amount as would be charged by private carriers for an endorsement waiving these exceptions.

In the event the rates of the underwriters were based upon co-insurance, then so much should be adjusted as would make the rate equivalent to that charged for the same risk with 100% coverage.

It should be borne in mind that this plan should not be applied to separate buildings insured in a blanket policy or contract where a large number of risks are grouped together and insured for an aggregate sum at a single rate. That is done for the purpose of convenience and the rate is an average rate. In such cases the group rate should be broken down and each risk should be charged with such rate as it would properly bear if insured separately.