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Courts Narrow McCarran-Ferguson Antitrust Exemption for "Business of Insurance"; Possible Congressional Response

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Summary

In *Paul v. Virginia* (75 U.S. (8 Wall.) 168 (1868)), the Supreme Court ruled that "[i]ssuing a policy of insurance is not a transaction of [interstate] commerce." *United States v. South-Eastern Underwriters Ass'n.* (322 U.S. 533 (1944)) held that the federal antitrust laws *were* applicable to an insurance association's interstate activities in restraint of trade. Although the 1944 Court did not specifically overrule its prior determination, the case was viewed as a reversal of 75 years of precedent and practice, and created significant apprehension about the continued viability of state insurance regulation and taxation of insurance premiums. Congress' response was the 1945 McCarran-Ferguson Act. It prohibits application of the federal antitrust laws and similar provisions in the Federal Trade Commission Act, as well as most other federal statutes, to the "business of insurance" to the extent that such business is regulated by State law — except that the antitrust laws *are* applicable if it is determined that an insurance practice amounts to a boycott. Early McCarran-Ferguson decisions mostly favored insurance companies. After 1969, however, the exemption for the "business of insurance" was generally limited to activities surrounding insurance companies' relationships with their policyholders. In 2003, the Supreme Court ruled that McCarran case law prohibiting the indirect application of federal antitrust (or other) laws to the "business of insurance" would no longer control with respect to those areas over which Congress has unquestionable legislative authority (e.g., ERISA, civil rights, securities), notwithstanding insurance-company involvement. Although none of the bills introduced in the 109th Congress to limit or amend McCarran-Ferguson has yet been enacted, activity surrounding, e.g., the medical malpractice insurance issue suggests the likelihood of future legislation. In addition, Senators Specter and Leahy have co-sponsored legislation that seeks, without completely abolishing the antitrust provisions of McCarran-Ferguson, to substantially limit that statute so as to continue to allow state regulation and taxation of the industry while at the same time removing most of McCarran's purported impediment to use of the federal antitrust statutes. Given that that legislation specifically allows for conduct that is the product of a state's "clearly articulated" and "actively supervised" policy, however, it would seem that it may not significantly lessen — and may actually expand — the scope of permissible activity by entities in the insurance industry. The phrases, "clearly articulated" and "actively supervised," have been firmly embedded in the state-action-doctrine jurisprudence of the antitrust law; that doctrine stands for the proposition that the system of federalism mandates that the federal antitrust laws do not apply to the states, nor to private individuals acting either under state order or authorization. Legislation that would provide the option of federal chartering and regulation to insurance companies would generally make the federal antitrust laws applicable to those entities opting for federal regulation. This report, which was based in part on the Appendix to CRS Report RL31982, *Insurance Regulation: History, Background, and Recent Congressional Oversight*, will be updated as needed. Other issues impacting or concerning insurance regulation are addressed in CRS Report RL32789, CRS Report RL33439, and CRS Report RS22506.

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Introduction

In *Paul v. Virginia* (75 U.S. (8 Wall.) 168 (1868)), the Supreme Court ruled that "[i]ssuing a policy of insurance is not a transaction of [interstate] commerce." *United States v. South-Eastern Underwriters Ass'n.* (322 U.S. 533 (1944)) held that the federal antitrust laws *were* applicable to an insurance association's interstate activities in restraint of trade. Although the 1944 Court did not specifically overrule its prior determination, the case was viewed as a reversal of 75 years of precedent and practice, and created significant apprehension about the continued viability of state insurance regulation and taxation of insurance premiums. Congress' response was the 1945 McCarran-Ferguson Act. In addition to preserving the states' ability to tax insurance premiums, McCarran-Ferguson prohibits application of the federal antitrust laws and similar provisions in the Federal Trade Commission Act, as well as most other federal statutes, to the "business of insurance" to the extent that such business is regulated by State law — except that the antitrust laws *are* applicable if it is determined that an insurance practice amounts to a boycott.

Inasmuch as "[t]he primary purpose of the McCarran-Ferguson Act was to preserve state regulation of the activities of insurance companies since it was the power of the states to regulate and tax insurance companies that was threatened after ... *South-Eastern Underwriters* ...,"[1] we first answer the questions, "What is insurance?"; and, "is it defined pursuant to state or federal law?" Then, given that the statute addresses itself to the "business of insurance," this report sets out some judicial opinions about just what does — and does not — constitute the "business of insurance," as well as state regulation of such business, and the scope of McCarran's "boycott" exception. Finally, it will note some pending McCarran-related legislation, and discuss, briefly, the bills' possible consequences, especially in light of the non-statutory state-action doctrine in antitrust law.

What Is "Insurance" and Whose Law Defines It?

In response to the Securities and Exchange Commission's insistence that

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[1] Richard Cordero, *Exemption or Immunity from Federal Antitrust Liability Under McCarran-Ferguson (15 U.S.C. 1011-1013 and State Action and Noerr-Pennington Doctrines for Business of Insurance and Persons Engaged in It*, 116 ALR FED 163, 194 (1993).

insurers issuing variable annuity contracts register them as securities under the federal securities laws,[2] the insurers asserted that McCarran-Ferguson shielded them from federal regulation, but that even if it did not, they qualified for the insurance exemptions from the federal securities laws.[3] The Supreme Court, reversing lower court decisions, held that neither state regulation of variable annuities nor their issuance by insurers qualified the annuities as "insurance." Accordingly, neither insurers nor state regulators could (1) invoke McCarran-Ferguson as a shield against federal regulation of variable annuities, or (2) qualify as beneficiaries of the insurance exclusions in the federal securities laws. Moreover, the case established that the definition of "insurance" under McCarran-Ferguson is a federal question, not a state one.

NationsBank v. VALIC[4] made a similar determination concerning the sale of fixed annuities, which are sold both by insurers and by banks. The Court agreed with the Comptroller of the Currency that in the provision of fixed annuities, "banks are essentially offering financial investment instruments of the kind congressional authorization permits them to broker. Hence, [it was reasonable to characterize the] permission NationsBank sought as an 'incidental powe [r] ... necessary to carry on the business of banking.'"[5]

Statutory Terminology in McCarran-Ferguson

"Business of Insurance". *Securities and Exchange Commission* (*SEC*) *v. National Securities, Inc.*,[6] limited the scope of the term "business of insurance" to activities that involved only insurance companies' relationships with their policyholders.[7] The merger of two insurance companies was challenged by the SEC, which alleged violations of federal securities laws, despite the merger's approval by the Arizona Director of Insurance. National Securities argued that the merger was in compliance with state law, and that the McCarran-Ferguson Act precluded application of an inconsistent federal law. The Court disagreed, holding that a state statute aimed at protecting the stockholders of insurance companies was not a statute regulating the "business of insurance": "*whatever the exact scope of the statutory term, it is clear where the focus was [in McCarran] — it was on the relationship*

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[2] Under a variable annuity contract, annuity payments are not fixed but vary according to the performance of an underlying investment portfolio.

[3] Securities and Exchange Commission (SEC) v. Variable Annuity Life Ins. Co. (VALIC), 359 U.S. 65, 68 (1959): "The question common to the exemption provisions of the Securities Act and the Investment Company Act and to s 2(b) of the McCarran-Ferguson Act is whether respondents are issuing contracts of insurance."

[4] 513 U.S. 251 (1995).

[5] *Id*. at 260.

[6] 393 U.S. 453 (1969).

[7] *See, e.g.*, Note, *The McCarran-Ferguson Act: A Time for Procompetitive Reform*, 47 TULANE L. REV. 1271, 1281 (1976). *See also*, Gary Keith Nedrow, Comment, *The McCarran-Ferguson Act's Antitrust Exemption for the 'Business of Insurance': A Shrinking Umbrella*, 43 TENN. L. REV. 329 (1976); Peter B. Steffen, Comment, *After Fabe: Applying the Pireno Definition of 'Business of Insurance' to First-Clause McCarran-Ferguson Act Cases*, 2000 U. CHI. L. REV. 447 (2000).

between the insurance company and the policyholder. [Only s]tatutes aimed at protecting or regulating this relationship ... are laws regulating the 'business of insurance.'"[8]

About 25 years after *National Securities* limited the term "business of insurance" to activities involving only insurance companies' relationships with their policyholders, the Court extended that ruling. It held, in *U.S. Department of Treasury v. Fabe*, that state laws addressing the liquidation of insurers constitute "the business of insurance" — and, under McCarran-Ferguson, preempt conflicting federal statutes — *but only* to the extent that they are necessary to protect the insolvent's policyholders.[9] The United States had argued that an Ohio statute determining the order in which claims against an insolvent insurance company are to be paid[10] should be preempted by the federal priority statute authorizing the payment of U.S. claims against an insolvent entity.[11] The Court disagreed, however,with respect to the payment of policyholder claims and payment of the administrative expenses "reasonably necessary to" the payment of policyholder claims, and said: "[t]he primary purpose of a statute that distributes the insolvent insurer's assets to policyholders in preference to other creditors is identical to the primary purpose of the insurance company itself: the payment of claims made against policies."[12]

Group Life & Health Insurance Co. v. Royal Drug Co. stands for the proposition that McCarran-Ferguson's "exemption is for the 'business of insurance,' not the 'business of insurers.'"[13] Independent retail pharmacies charged Blue Shield of Texas with price fixing in the negotiation of Pharmacy Agreements, based on which the insurance company had issued policies that facially entitled policyholders to purchase prescription drugs from any pharmacy. In reality, the independents argued, insureds were more likely to choose pharmacies that had entered into the "Pharmacy Agreements" because at those establishments (mostly larger, chain pharmacies) policyholders were required to pay only $2 for each prescription drug purchased; a "Pharmacy Agreement"-pharmacy would be reimbursed for its costs and the $2 charge would be its profit. At nonparticipating pharmacies (mostly smaller, independent stores), insureds would be expected to pay the entire cost of any drug, and then seek reimbursement from Blue Shield for 75% of the cost. The Supreme Court rejected Blue Shield's argument that the McCarran-Ferguson Act made the Pharmacy Agreements immune to prosecution under the antitrust laws, the Court emphasizing that although "the agreements between Blue Shield and the participating pharmacies ... [may] serve ... to minimize the costs Blue Shield incurs in fulfilling its underwriting obligations," they "do *not* involve any underwriting or spreading of risk," are *not* integral to the relationship between the insurer and the insured, and are

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[8] 393 U.S. at 460 (emphasis added).

[9] 508 U.S. 491 (1993).

[10] Ohio Rev. Stat. § 3903.01 *et seq.*

[11] The Federal Priority Statute is found at 37 U.S.C. § 3713.

[12] 508 U.S. at 505-506.

[13] 440 U.S. 205, 211 (1979).

not limited to entities within the insurance industry.[14]

Gilchrist v. State Farm Mutual Auto Ins. Co.,[15] however, appears not to continue the *Royal Drug* reasoning. There, when policyholders challenged the practice of certain automobile insurers of improperly limiting the scope of insurance coverage for auto body repairs, the United States Court of Appeals for the Eleventh Circuit distinguished some earlier decisions concerning the scope of the McCarran-Ferguson exemption. The appeals court emphasized that *Royal Drug* (as well as a later case in which chiropractors challenged the insurance-company policy of peer reviewing chiropractic fees and practices[16]) concerned challenges by non-policyholders to insurance companies' agreements with third parties. "Gilchrist is a policyholder whose claim is that Insurers have charged excessive premiums for inferior repair work on her automobile."[17] That is a direct challenge to the insurance policy itself, and the company's rate-making decisions, "the paradigmatic example of the conduct that Congress intended to protect by the McCarran-Ferguson Act."[18]

"Regulated by State Law". Until relatively recently, courts had almost unanimously determined that state regulation did not need to meet the standards of federal antitrust law in order for McCarran-Ferguson to apply, and that the federal government could not require "uniform state regulation."[19] However, whether state regulation needed to meet *any* particular standard to qualify as preempted "regulation" remained a question.[20] In 1958, in *Federal Trade Commission (FTC) v. National Casualty Co.*,[21] for example, the Court decided that McCarran-Ferguson "withdrew from the ... Commission the authority to regulate [insurers'] advertising practices in those States which are regulating those practices under their own laws."[22] The FTC could not, therefore, order the multistate-insurance-company defendants to stop using advertising that the Commission found false, deceptive, and misleading, thus violating the FTC Act.[23] The Court expressly declined to examine whether the states' laws had been effectively applied, finding it sufficient that "[e]ach State in

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[14] *Id.*. at 211-214 (emphasis added).

[15] 390 F.3d 1327 (11th Cir. 2004).

[16] Union Labor Life Insurance Co. v. Pireno, 458 U.S. 119 (1982).

[17] 390 F.3d at 1334.

[18] *Id.* at 1331.

[19] *See, e.g.*, Prudential Ins. Co. v. Benjamin, 328 U.S. 408 (1946), discussed in *Application of Federal Antitrust Laws to the Insurance Industry*, 46 MINN. L.REV.1088, 1094 (n. 33) (1962).

[20] "The basic question is whether McCarran requires *effective* enforcement of a state regulatory scheme or whether state regulation without more is sufficient to preclude application of federal antitrust laws." William J. Rands, Comment, *State Regulation Under the McCarran Act*, 47 TULANE L.REV. 1069 (June 1973).

[21] 357 U.S. 560 (1958).

[22] *Id.* at 563 (footnote omitted).

[23] Section 5 (15 U.S.C. § 45) prohibits "unfair or deceptive acts ... in or affecting commerce."

question ha[d] enacted prohibitory legislation which proscribe[d] unfair insurance advertising and authorize[d] enforcement through a scheme of administrative supervision."[24] On the other hand, a federal district court in Florida held, in 1982, that "it is essential to conduct some sort of inquiry into the adequacy and effectiveness of state legislation asserted to preempt the antitrust laws."[25]

By the late 1980s, the apparent, sole requirement that states merely have on their statute books a law regulating the "business of insurance," whether or not that law was effectively enforced, was generally deemed not sufficient to activate the McCarran exemption. Lower courts continued to echo the Supreme Court's 1996 reasoning in *Travelers Health Association* (*see* note 26, *supra*). *Travelers Health* involved an Ohio statute that "effectively prohibit[ed] out-of-state insurance companies from removing cases from [Ohio] state to federal court by barring such companies from further business in Ohio." The United States Court of Appeals for the Sixth Circuit emphatically stated there, that "[t]he McCarran-Ferguson Act was not meant to protect a statute so tangentially related to insurance from the general rule of federal law supremacy."[26]

Boycott Exception: Agreements to "Boycott, Coerce or Intimidate". Whether the boycott referred to in the statute is solely a boycott of entities within the insurance industry, or a consumer-protection facet of the otherwise industry-friendly McCarran law, was addressed in *St. Paul Fire Marine Insurance Co. v. Barry*,[27] where the Supreme Court ultimately found in favor of the latter. In *St. Paul*, doctors sued four companies that sold medical malpractice insurance, alleging that one of the companies had changed its malpractice policy in a manner unfavorable to the doctors, who were then unable to take their business elsewhere because the other companies refused to sell them malpractice policies of any sort. This, the doctors charged, was the result of an unlawful conspiracy and constituted a boycott in violation of the antitrust laws. The district court held that the purpose of McCarran's "boycott" language was to protect industry members from being "black-listed."[28] The court of appeals reversed, finding that the protection of insurance consumers by the "usual reading of 'boycott, coercion, or intimidation' does not ... pose a grave danger to state authority."[29] The Supreme Court agreed, holding that the "conduct in question

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[24] 357 U.S. at 564.

[25] Escrow Disbursement Insurance Agency, Inc. v. American Title and Insurance Co., Inc., 550 F. Supp. 1192, 1199 (S.D. Fla. 1982). The Supreme Court had already limited the reach of state regulation "asserted to preempt the antitrust laws" in an action that interpreted a Nebraska statute, which prohibited "unfair or deceptive acts and practices" in Nebraska *and* in "any other State." *Federal Trade Commission v. Travelers Health Association* (362 U.S. 293, 297-299 (1960)) held that "regulated by State law" "referred only to regulation by the State where the business activities have their operative force."

[26] International Ins. Co. v. Duryee, 96 F.3d 837, 838 (6th Cir. 1996).

[27] 438 U.S. 531 (1978).

[28] The district court's language is quoted *id.* at 536.

[29] 555 F.2d 3, 9 (1st Cir. 1977).

accords with the common understanding of a boycott":[30] if Congress had intended to limit the scope of the boycott exception to industry members, the Court said, it would have done so explicitly.[31]

In *Hartford Fire Ins. Co. v. California*,[32] however, a divided Court — differentiating between "conspiracy" and "boycott," refused to find for the nineteen states which alleged that the practices of several U.S. and foreign insurers — acting to force other insurers to sell only policies with terms similar to those in the defendants' policies — violated the antitrust laws. It distinguished between a true *boycott* (which the Court defined as a concerted refusal to deal on matters *unrelated or collateral to* the insurance contract at hand) and a McCarran-protected mere concerted refusal to deal on certain contract terms deemed to be central to the insurance contract, but noted that absent McCarran-Ferguson, either would violate the antitrust laws:

> A conspiracy is a combination of two or more persons acting in concert to accomplish a common unlawful purpose. ... Of course as far as the Sherman Act (outside the exempted insurance field) is concerned, concerted agreements on contract terms are unlawful. ... The McCarran-Ferguson Act, however, makes that conspiracy lawful ... unless the refusal to deal is a 'boycott.'[33]

The scope of McCarran-Ferguson protection — the statute's applicability in instances in which insurance companies are actors in an area in which the federal government clearly has not ceded its regulatory authority to the states — has been addressed numerous times, both by the Supreme Court and the lower federal courts. Generally, it has been found that federal statutes are not trumped by McCarran except where the "business of insurance" is directly involved, or where a state insurance regulatory scheme or state insurance administration would be adversely affected.[34]

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[30] 438 U.S. at 552.

[31] *Id*. at 550.

[32] 509 U.S. 763 (1993).

[33] *Id*. At 783, 803, 809-810 (citations omitted). *Hartford* was quoted or cited in, e.g., Slagle v. ITT Hartford, 102 F.3d 494, 499 (11th Cir. 1996) ("In terms of the McCarran-Ferguson Act, the term 'boycott' means more than just 'an absolute refusal to deal on any terms.'" *Quoting, Hartford*, 509 U.S. at 801); and in N.J. Auto. Ins. Plan v. Sciarra, 103 F.Supp. 2d 388, 407 (D.N.J. 1998) ("... at most, [plaintiffs'] allegations [that involuntary insurance plan insurers' refusal to sanction certain methodologies] constitute a concerted refusal to deal except on certain terms, and not a boycott, as explained by the United States Supreme Court in *Hartford*.")

[34] *See, e.g.*, CRS Report RS21497, *Reconciling McCarran-Ferguson (Insurance) Case Law and ERISA Preemption: Kentucky Ass'n of Health Plans, Inc. v. Miller*. *See, also*, Kentucky Ass'n of Health Plans, Inc. v. Miller, 538 U.S. 329 (2003) (case law interpreting the McCarran-Ferguson Act no longer to be used to inform decisions concerning the applicability of ERISA (Employee Retirement Income Security Act of 1974) to state laws that regulate insurance); Humana, Inc. v. Forsyth, 525 U.S. 299, 310 (1999) (McCarran does not preclude application of federal law when such application "does not directly conflict with state regulation" or "frustrate" state policy); Moore v. Liberty Nat. Life Ins. Co., 267

(continued...)

Possible Implications of Legislation in the 109th Congress Concerning McCarran-Ferguson

Two of the bills pending in committee (S. 1525, Senate Judiciary; H.R. 3359, House Judiciary, House Energy and Commerce) would, notwithstanding McCarran-Ferguson, prohibit commercial insurers who provide medical malpractice insurance from "price fixing, bid rigging, or market allocation in connection with" such provision. Joint rate setting, generally accepted as a method of establishing premium rates, has long been considered valid as a McCarran-Ferguson "business of insurance" activity, and many states explicitly authorize it.[35] The courts' increasingly narrow interpretation of "the business of insurance" would, however, even absent such language, arguably exclude at least the latter two activities.

H.R. 2400 would establish a Commission — the Emergency Malpractice Liability Commission (EMLIC) — to "examine the causes of soaring medical malpractice premiums and propose a comprehensive strategy to alleviate the impact of the crisis" there; and submit a report of its findings to Congress, which is to hold hearings on the report within six months after it is received. Among the Commission's mandates are to "investigate and determine whether a causal relationship exists between skyrocketing malpractice insurance premiums, jury awards, decreased accessibility and affordability of health care; and the increase in the number of physicians moving, quitting or retiring from practices ...." The bill is pending in the House Energy and Committee.

S. 2401 (House Judiciary), unlike the preceding bills, applies without reference to any specific line of insurance. It would amend the law to clarify that the antitrust

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[34] (...continued)
F.3d 1209 (11th Cir. 2001) (civil rights/antidiscrimination laws); In Re MetLife Demutualization Litigation, 156 F.Supp.2d 254 (E.D.N.Y. 2001) (securities acts); Patton v. Triad Guar. Ins. Corp., 277 F.3d 1294 (11th Cir. 2002) (Real Estate Settlement Procedures Act).

[35] McKinney's Consolidated Laws of New York, Insurance Law § 2301, e.g., states: "The purpose of this article is to promote the public welfare by regulating insurance rates to the end that they not be excessive, inadequate or unfairly discriminatory, to promote price competition and competitive behavior among insurers, to provide rates that are responsive to competitive market conditions, to improve the availability and reliability of insurance and *to authorize and regulate cooperative action among insurers within the scope of this article.* (Emphasis added). Section 2316, which sets out several prohibited, anti-competitive practices of insurance entities, including the making of agreements to restrain trade (§ 2316(a)(3)), nevertheless states in subsection (c) that "[n]othing in this section shall be construed as applying to or prohibiting cooperative action authorized and regulated under this article." Illinois law, e.g.., declares the purpose of its Insurance Code to be the regulation of "trade practices in the business of insurance in accordance with the intent of Congress as expressed in [15 U.S.C.A. §§ 1011 *et seq.* (McCarran-Ferguson Act)]." 215 Ill. Cons. Stat. (ILCS) 5/421. Exceptions to the prohibitions set out in the Illinois Antitrust Act include "the activities (including, but not limited to, the making of or participating in joint underwriting or joint reinsurance arrangement) of any insurer, ...) to the extent that such activities are subject to regulation by the Director of Insurance of this State ...." 740 ILCS 10/5(5).

laws *are* generally applicable, except with respect to the smallest entities in the insurance industry, to such activities as price fixing (e.g., currently permissible joint rate setting), geographic market allocation, "tying the purchase of insurance to the sale or purchase or another type of insurance," or monopolization of "any part of the business of insurance." Contracts or conspiracies for the purpose of joint collection of historical loss data, however, would be explicitly permitted. Again, however, given their narrowing definition of the "business of insurance," courts are not likely to find such activities as market allocation, tying, or monopolization protected by McCarran-Ferguson from the application of the antitrust laws.

Senator Specter, together with Senators Leahy, Lott, and Landrieu, introduced S. 4025, "Insurance Industry Antitrust Enforcement Act of 2006," to "subject the insurance industry to Federal antitrust law."[36] The bill would amend § 2(b) of McCarran-Ferguson (15 U.S.C. § 1012(b)) to clarify that the federal antitrust laws would be applicable to the business of insurance "except to the extent [that] the conduct of a person engaged in the business of insurance is undertaken pursuant to a clearly articulated policy of a State [and] that is actively supervised by that State; ..."[37] Those words appear to represent a tacit acknowledgment of two things: first, that the original purpose of McCarran-Ferguson was to assure the ability of the states to regulate the business of insurance; and second, the existence of the state action doctrine in antitrust law. That doctrine might easily afford immunity from prosecution under the federal antitrust laws to both (a) the narrowly interpreted "business of insurance" protection provided by McCarran-Ferguson, *and* (b) any other activity of insurance companies that the states choose to authorize and actively regulate.

S. 2509, introduced by Senators Sununu and Johnson, would, with certain exceptions, make the federal antitrust laws applicable to federally licensed insurance producers "to the same extent as other businesses are subject to such laws," and would retain the McCarran-Ferguson "business of insurance" exemption "to the extent that such insurers and producers are subject to State law."[38]

The State Action Doctrine and its Relevance to McCarran Immunity

The state action doctrine, first enunciated by the Supreme Court in *Parker v. Brown*,[39] has come to stand for the proposition that federalism dictates that the antitrust laws are not applicable to the states. It has, over the years since 1943, been interpreted, clarified and expanded to the point that it now confers antitrust immunity not only on the states *qua* states (including state agencies and officials acting in their official state capacities), or those private individuals who act in furtherance of state-directed activity, but also on those who act pursuant to state-sanctioned, but not

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[36] Statement of Senator Specter accompanying introduction of S. 4025, 152 CONGRESSIONAL RECORD S10712 (September 29, 2006).

[37] Section 2(3) of S. 4025, adding § 1012(b)(1).

[38] S. 2509, §§ 1702(a), 1702(a)(2).

[39] 317 U.S. 341 (1943).

necessarily mandated, courses of action. Its essence is captured in the two-part test set out in *California Retail Liquor Dealers Ass'n v. Midcal Aluminum Inc.*[40] There, the Court made clear first, that the challenged restraint must be "one clearly articulated and affirmatively expressed as state policy" (most generally via legislatively enacted statute), and second, the policy must be "actively supervised" (i.e., enforced) by the State itself.[41] It is, thus, apparent that, since at least 1980, "regulated by state law" has been a prong of the judicially created state action doctrine in antitrust law, a doctrine which was developing simultaneously with McCarran-Ferguson case law.

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[40] 445 U.S. 97 (1980).

[41] *Id*. at 105.

Conclusion

State action immunity from prosecution under the federal antitrust laws for entities acting at the behest or authorization of a state regulatory scheme — so long as that scheme is envisioned by the state legislature in "clearly articulated" language, and so long as the state exercises sufficient "active supervision" over the authorized but possibly anticompetitive activities of private entities — has steadily been expanded since the doctrine was first announced in 1943. The expansion of state-action immunity has occurred as a parallel development to the narrowing of McCarran-Ferguson immunity for activities constituting the "business of insurance." Although virtually every state maintains some form of insurance regulation, whether existing state regulation of the insurance industry is sufficient to satisfy the "active supervision" prong of *Mical* may not, however, always be clear or assured.[42]

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[42] *See, e.g.*, discussion, *supra*, at pp. 4-5, "Regulated by State Law." According to the authors of the ABA SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS (5th ed. 2002), "The intensity and specificity of state regulation needed to qualify for McCarran Act immunity is less than required for the state action doctrine." At 1373. For example, after the Federal Trade Commission refused to find that the practice of setting rates for title searches constituted the "business of insurance" for McCarran purposes, and so violated § 5 of the FTC Act (15 U.S.C. § 45, which prohibits unfair or deceptive practices, in or affecting commerce) (In the Matter of Ticor Insurance Company, Final Order and Opinion, 112 F.T.C. 344 (1989)), the Supreme Court decided the case on state action grounds (Federal Trade Commission v. Ticor Title Ins. Co., 504 U.S. 621 (1992)). In addition to being dismissive of any McCarran immunity for the insurance-company actions, the Supreme Court found that not all of the state regulatory regimes in question met the doctrine's requirements (particularly those with so-called "negative option" schemes under which the filed joint rates not disapproved were deemed to be approved): *"The mere potential for state supervision is not an adequate substitute for a decision by the State. ...* we decline to formulate a rule that would lead to a finding of active state supervision where in fact there [is] none. Our decision should be read in light of the gravity of the antitrust offense, the involvement of private actors throughout, and the clear absence of state supervision. *We do not [, however,] imply that some particular form of state or local regulation is required to achieve ends other than the establishment of uniform prices."* (504 U.S. 621, 638, 639) (emphasis added).

Another commentator believes that McCarran-Ferguson was enacted precisely "because Congress must have felt that the amount of regulation required to trigger state action immunity was an inadequate protection. ... In other words, McCarran necessarily requires less [state] regulation than the State Action doctrine requires to trigger some kind of limited immunity." Phil Goodin, Note, *Keeping the Foxes from Guarding the Henhouse: The Effect of Humana v. Forsyth on McCarran-Ferguson's Exemption for the Business of Insurance*, 86 IOWA L. REV. 979, 984 (March 2001).