



Courts Narrow McCarran-Ferguson Antitrust Exemption for “Business of Insurance”: Viability of “State Action” Doctrine as an Alternative

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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 (FTC) 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. None of the bills introduced in the 109th Congress to limit or amend McCarran-Ferguson were enacted, but the issue is continuing to receive attention in the 110th Congress. Senator Leahy has introduced S. 618, a bipartisan measure to eliminate the antitrust exemption provided by McCarran-Ferguson and to restore the FTC’s authority to investigate the insurance industry. Representative DeFazio has introduced H.R. 1081, an identical, and similarly bipartisan, bill in the House. Both, however, would retain the exemption for the applicability of the FTC Act, “as it relates to areas *other than* unfair competition.” Even in the event the McCarran exemption were to be severely limited or totally eliminated, however, the state-action doctrine in antitrust law has the potential to mitigate the consequences of either. State action stands for the proposition that the federal antitrust laws do not apply to the states, nor to private individuals acting either under state order or authorization. To the extent that state regulation of insurance embodies “clearly articulated” state policy, and regulators “actively supervise” the activities of insurance companies, the industry’s antitrust exemption could actually be broadened to include actions not clearly “the business of insurance.” (Those phrases have been firmly embedded in the state-action-doctrine jurisprudence in the antitrust law for more than 25 years.) This report will be updated as needed. See CRS Report RL31982, *Insurance Regulation: History, Background, and Recent Congressional Oversight*, CRS Report RL32789, *Insurance Regulation: Issues, Background, and Current Legislation*, CRS Report RL33439, *Insurance Regulation in the United States and Abroad*, CRS Report RL33892, *Post-Katrina Insurance Issues Surrounding Water Damage Exclusions in Homeowners’ Insurance Policies*, and CRS Report RS22506, *Surplus Lines Insurance: Background and Current Legislation* for information on other issues affecting or concerning insurance regulation, including a discussion of issues surrounding the option of federal chartering and regulation of insurance companies, which would generally make the federal antitrust laws applicable to those entities opting for federal regulation.

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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.¹ In addition to preserving the states’ ability to tax insurance premiums,² 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 law³—except that the antitrust laws *are* applicable if it is determined that an insurance practice amounts to a boycott.⁴

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 ...*,”⁵ 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 legislation introduced to date in the 110th Congress, as well as some McCarran-related legislation introduced in the 109th Congress, and discuss, briefly, the possible consequences of similarly worded measures, 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 insurers issuing variable annuity contracts register them as securities under the federal securities laws,⁶ 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.⁷ The Supreme Court, reversing lower court decisions, held that neither state regulation of variable annuities nor

¹ 15 U.S.C. §§ 1011-1015.

² 15 U.S.C. §§ 1011, 1012(b).

³ 15 U.S.C. § 1012(b).

⁴ 15 U.S.C. § 1013(b).

⁵ 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).

⁶ Under a variable annuity contract, annuity payments are not fixed but vary according to the performance of an underlying investment portfolio.

⁷ *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.”

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, not a state, question.

*NationsBank v. VALIC*⁸ 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.’”⁹

Statutory Terminology in McCarran-Ferguson

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.¹⁰

“Business of Insurance”

Securities and Exchange Commission (SEC) v. National Securities, Inc.,¹¹ limited the scope of the term “business of insurance” to activities that involved only insurance companies’ relationships with their policyholders.¹² 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

⁸ 513 U.S. 251 (1995).

⁹ *Id.* at 260.

¹⁰ See, e.g., *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), and CRS Report RS21497, *Reconciling McCarran-Ferguson (Insurance) Case Law and ERISA Preemption: Kentucky Ass’n of Health Plans, Inc. v. Miller*, by Janice E. Rubin, discussing that case; *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 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).

¹¹ 393 U.S. 453 (1969).

¹² 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).

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 between the insurance company and the policyholder. [Only s]tatutes aimed at protecting or regulating this relationship ... are laws regulating the ‘business of insurance.’*”¹³

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.¹⁴ The United States had argued that an Ohio statute determining the order in which claims against an insolvent insurance company are to be paid¹⁵ should be preempted by the federal priority statute authorizing the payment of U.S. claims against an insolvent entity.¹⁶ 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.”¹⁷

Later decisions continued the distinction made by *Fabe* between statutes that address the “business of insurance” and may, therefore, “reverse-preempt” conflicting federal statutes, and those that will be preempted under traditional, constitutional principles. For example, *International Ins. Co. v. Duryee*¹⁸ 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.”¹⁹ The court first quoted from a 1922 Supreme Court ruling, *Terral v. Burke Const. Co.*,²⁰

[A] state may not, in imposing conditions upon the privilege of a foreign corporation’s doing business in the state, exact from it a waiver of the exercise of its constitutional right to resort to the federal courts, or thereafter withdraw the privilege of doing business because of its exercise of such right, whether waived in advance or not.²¹

And then it quoted from *Fabe* itself:

¹³ 393 U.S. at 460 (emphasis added).

¹⁴ 508 U.S. 491 (1993).

¹⁵ Ohio Rev. Stat. § 3903.01 *et seq.*

¹⁶ The Federal Priority Statute is found at 37 U.S.C. § 3713.

¹⁷ 508 U.S. at 505-506.

¹⁸ 96 F.3d 837 (6th Cir. 1996).

¹⁹ *Id.* at 838.

²⁰ 257 U.S. 529 (1922).

²¹ *Id.* at 532-33.

the Fabe Court found that the "broad category of laws enacted 'for the purpose of regulating the business of insurance ... necessarily encompasses more than just the 'business of insurance.'"²²

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.'"²³ 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 *not* limited to entities within the insurance industry.²⁴

In Gilchrist v. State Farm Mutual Auto Ins. Co.,²⁵ the United States Court of Appeals for the Eleventh Circuit appeared not to continue the *Royal Drug* reasoning. When policyholders challenged the practice of certain automobile insurers of improperly limiting the scope of insurance coverage for auto body repairs, the court distinguished some earlier decisions concerning the scope of the McCarran-Ferguson exemption. The appeals court first emphasized that *Royal Drug* (as well as a later case in which chiropractors challenged the insurance-company policy of peer reviewing chiropractic fees and practices²⁶) concerned challenges by *non-policyholders* to insurance companies' agreements with third parties. But, it noted, "Gilchrist [on the other hand] is a policyholder whose claim is that Insurers have charged excessive premiums for inferior repair work on her automobile."²⁷ That, it said, 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."²⁸

"Regulated by State Law"

Courts have almost unanimously determined that state regulation need not meet the standards of federal antitrust law in order for McCarran-Ferguson to apply, and that the federal government

²² 96 F.3d at 839, *quoting* from 508 U.S. at 505.

²³ 440 U.S. 205, 211 (1979).

²⁴ *Id.* at 211-214 (emphasis added).

²⁵ 390 F.3d 1327 (11th Cir. 2004).

²⁶ *Union Labor Life Insurance Co. v. Pireno*, 458 U.S. 119 (1982).

²⁷ 390 F.3d at 1334.

²⁸ *Id.* at 1331.

may not require "uniform state regulation."²⁹ However, whether state regulation needs to meet any particular standard to qualify as preempted "regulation" has remained a question.³⁰ In 1958, in *Federal Trade Commission (FTC) v. National Casualty Co.*,³¹ for example, the Court had already 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";³² and that the FTC could not, therefore, order the multistate-insurance-company defendants to stop using advertising that the Commission deemed false, deceptive, and misleading in violation of section 5 of the FTC Act.³³ But the Court expressly declined to examine whether the states' laws had been effectively applied, finding it sufficient that "[e]ach State in question ha[d] enacted prohibitory legislation which proscrib[ed] unfair insurance advertising and authorize[d] enforcement through a scheme of administrative supervision."³⁴ Most decisions have found it sufficient for McCarran-Ferguson "regulated by state law" purposes that state insurance departments have jurisdiction over insurance practices and the authority to act, whether they exercise their authority or not.³⁵ In 1982, however, a federal district court in Florida held that "it is essential to conduct some sort of inquiry into the adequacy and effectiveness of state legislation asserted to preempt the antitrust laws."³⁶

Agreements to "Boycott, Coerce or Intimidate": The Boycott Exception

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*,³⁷ where the Supreme Court ultimately found in favor of the latter. In *St. Paul*, doctors sued four companies that sold medical malpractice

²⁹ 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).

³⁰ "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). That is not surprising, according to the authors of the ABA SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS (5th ed. 2002) (hereinafter, ABA ALD), given that the "objective of the McCarran Act was to preserve existing forms of state regulation, which typically involved" the delegation of administrative power, in state insurance codes, to insurance departments or commissions. At 1373.

³¹ 357 U.S. 560 (1958).

³² *Id.* at 563 (footnote omitted). See also, *Federal Trade Commission v. Travelers Health Association* (362 U.S. 293, 297-299 (1960)), in which the Supreme Court had earlier limited the reach of state regulation "asserted to preempt the antitrust laws"; *Travelers Health* had involved interpretation of a Nebraska statute, which prohibited "unfair or deceptive acts and practices" in Nebraska and in "any other State." the Court held that "regulated by State law" "referred only to regulation by the State where the business activities have their operative force." (362 U.S. at 301-302).

³³ Section 5 (15 U.S.C. § 45) prohibits "unfair or deceptive acts ... in or affecting commerce."

³⁴ 357 U.S. at 564.

³⁵ See, e.g., *Arroyo-Melecio v. Puerto Rican American Insurance Co.*, 398 F.3d 56, 66, note 7 (1st Cir. 2005); In re Insurance Antitrust Litigation, 723 F.Supp. 464, 474 (N.D. Cal. 1989), quoting, *Feinstein v. Nettleship Co.*, 714 F.2d 928, 933 ("It is not necessary to point to a state statute which gives express approval to a particular practice; rather, it is sufficient that a state regulatory scheme possess jurisdiction over the challenged practice.")

³⁶ *Escrow Disbursement Insurance Agency, Inc. v. American Title and Insurance Co., Inc.*, 550 F. Supp. 1192, 1199 (S.D. Fla. 1982).

³⁷ 438 U.S. 531 (1978).

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.”³⁸ 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.”³⁹ The Supreme Court agreed, holding that the “conduct in question accords with the common understanding of a boycott”:⁴⁰ if Congress had intended to limit the scope of the boycott exception to industry members, the Court said, it would have done so explicitly.⁴¹

In *Hartford Fire Ins. Co. v. California*,⁴² 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.’⁴³

Recent Legislation Concerning McCarran-Ferguson

Two bills that would “end the insurance industry’s exemption from the requirements of [the antitrust] laws,”⁴⁴ by amending the McCarran-Ferguson Act have been introduced thus far in the 110th Congress. The identical bills—S. 618 (Leahy, with the co-sponsorship of Senators Specter, Lott, Reid, and Landrieu) and H.R. 1081 (DeFazio, with the co-sponsorship of Representatives Taylor, Jindal, Melancon, Alexander, and Jones [NC])—would specify that the Federal Trade

³⁸ The district court’s language is quoted *id.* at 536.

³⁹ 555 F.2d 3, 9 (1st Cir. 1977).

⁴⁰ 438 U.S. at 552.

⁴¹ *Id.* at 550.

⁴² 509 U.S. 764 (1993), *aff’g in part, rev’g in part, the appeal of* In re Insurance Antitrust Litigation (footnote 35, *supra*); the appeal, which *reversed* the district court decision on grounds other than the ones decided there, is found at 938 F.2d 919 (9th Cir. 1991).

⁴³ *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*.”)

⁴⁴ Senator Leahy, remarks upon introducing S. 618. 153 CONGRESSIONAL RECORD S2045 (February 15, 2007).

Commission Act "as it relates to unfair methods of competition"⁴⁵ would, in addition to the Sherman Act⁴⁶ and Clayton Act,⁴⁷ be applicable to the "business of insurance," thus eliminating the phrase "to the extent that such business is not regulated by State law."⁴⁸ Both would, however, specify that the Federal Trade Commission Act, "as it relates to areas *other* than unfair methods of competition"⁴⁹ would continue to be applicable to the "business of insurance to the extent that such business is not regulated by State law."⁵⁰

Both measures would delete 15 U.S.C. § 1013, in which the 79th Congress (1) made the antitrust laws inapplicable to the "business of insurance" until June 30, 1948; but (2) specified, at the same time, that the antitrust laws *would* nevertheless be applicable to boycotts, coercion, or intimidation, or agreements to create or further those activities.⁵¹ Also, they would each restore the authority of the Federal Trade Commission, pursuant to its 15 U.S.C. § 46(a) powers, to investigate the insurance industry;⁵² that authority was removed in 1980 by section 5 of P.L. 96-252, Federal Trade Commission Antitrust Improvements Act of 1980, except to the extent that such studies were specifically requested by Congress. Lastly, each would permit the Department of Justice and the FTC to "issue joint statements of their antitrust enforcement policies regarding joint activities in the business of insurance."⁵³

⁴⁵ The FTC Act is codified at 15 U.S.C. §§ 41 *et. seq.* Section 5 (15 U.S.C. § 45) contains the Commission's "unfairness" jurisdiction.

⁴⁶ 15 U.S.C. §§ 1-7.

⁴⁷ 15 U.S.C. §§ 12 - 27.

⁴⁸ Section 2(a)(1)(A) of each bill, amending 15 U.S.C. § 1012.

⁴⁹ Section 2(a)(1)(B) of each bill (emphasis added).

⁵⁰ It is noted that the bills' insertions, as prescribed, would result in a run-on sentence as there is no punctuation specified between the first insertion ("as it relates to unfair methods of competition," presumably ending with "the business of insurance"), and the second, which makes the FTC Act, "as it relates to areas other than unfair methods of competition" applicable to the business of insurance "to the extent that such business is not regulated by State law." It is further noted that it might be preferable to not retain the phrase, "That after June 30, 1948": as the bills' are currently drafted, the new provision would read, "[t]hat after June 30, 1948, the [antitrust laws] and ... the Federal Trade Commission Act ... as it relates to unfair methods of competition shall be applicable to the business of insurance." From that date to the date of enactment of any proposed change, the antitrust laws were, in fact, *not* applicable to the "business of insurance."

⁵¹ Section 2(a)(2) of each bill. If the antitrust laws are fully applicable to the "business of insurance," there would be no need for a "boycott exception."

⁵² Section 2(b) of each bill. 15 U.S.C. § 46(a) allows the Commission

[t]o gather and compile information concerning, and to investigate from time to time the organization, business, conduct, practices, and management of any person, partnership, or corporation engaged in or whose business affects commerce [except with respect to banks, savings and loans, credit unions, or common carriers, each of which is regulated by an independent agency].

⁵³ Section 3 of each bill. Other examples of policy statements or guidance jointly issued by the FTC and the Antitrust Division of the Department of Justice include "Antitrust Guidance—Hurricanes Katrina and Rita" (issued September 27, 2005); "Statements of Antitrust Enforcement Policy in Health Care" (first promulgated in 1993 and revised in 1996); and "Antitrust Guidelines for Collaborations Among Competitors" (issued in April 2000):

To provide guidance to business people, the Federal Trade Commission ("FTC") and the U.S. Department of Justice ("DOJ") (collectively, "the Agencies") previously issued guidelines addressing several special circumstances in which antitrust issues related to competitor collaborations may arise. But none of these Guidelines represents a general statement of the Agencies' analytical approach to competitor collaborations. The increasing varieties and use of competitor collaborations have yielded requests for improved clarity regarding their treatment under the antitrust laws.

(continued...)

The Senate bill was addressed in March 7, 2007, hearings before the Senate Judiciary Committee, "The McCarran-Ferguson Act and Antitrust Immunity: Good for Consumers?" Hearings before the House Judiciary Committee have not yet been scheduled. The House bill has also been referred to the House Energy and Commerce and Financial Services Committees "for consideration of such provisions as fall within the jurisdiction of the committee concerned."

Two of the bills in the 109th Congress that remained pending in committee (S. 1525, Senate Judiciary; H.R. 3359, House Judiciary, House Energy and Commerce) would have, notwithstanding McCarran-Ferguson, prohibited 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.⁵⁴ The courts' increasingly narrow interpretation of "the business of insurance" would, however, arguably exclude at least the latter two, specified activities, even absent such language; similarly, such language in future bills would not likely be necessary to enable courts to find, for example, that bid-rigging or market allocation are outside the scope of McCarran protection.

H.R. 2400 would have established 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 would have been obligated to hold hearings on the report within six months after it was received. The Commission would have been directed, for example, 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 remained pending in the House Energy and Commerce Committee.

H.R. 2401 (House Judiciary), unlike the bills discussed above, would have applied without reference to any specific line of insurance. It would have amended McCarran-Ferguson to clarify that the antitrust laws *would* be generally applicable, except with respect to the smallest entities in

(...continued)

The new Antitrust Guidelines for Collaborations among Competitors ("Competitor Collaboration Guidelines") are intended to explain how the Agencies analyze certain antitrust issues raised by collaborations among competitors. Preamble to Guidelines, at 1.

All of the Guidelines are reachable from a page on the Antitrust Division's website, <http://www.usdoj.gov/atr/public/guidelines/guidelin.htm>.

⁵⁴ 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).

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 the courts' narrowing definition of the "business of insurance," they would not be likely, in any event, 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."⁵⁵ The bill would have amended § 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; ..."⁵⁶ Those words appeared to represent tacit acknowledgment that (1) the original purpose of McCarran-Ferguson was to assure the ability of the states to regulate the business of insurance; and (2) 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 have made, with certain exceptions, the federal antitrust laws applicable to federally licensed insurance producers "to the same extent as other businesses are subject to such laws," and would have retained the McCarran-Ferguson "business of insurance" exemption "to the extent that such insurers and producers are subject to State law."⁵⁷

The State Action Doctrine and its Relevance to McCarran Immunity

The state action doctrine, first enunciated by the Supreme Court in *Parker v. Brown*,⁵⁸ 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 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.*⁵⁹ There, the Court made clear first, that the challenged restraint must be "one clearly articulated and affirmatively expressed as

⁵⁵ Statement of Senator Specter accompanying introduction of S. 4025, 152 CONGRESSIONAL RECORD S10712 (September 29, 2006).

⁵⁶ Section 2(3) of S. 4025, adding § 1012(b)(1).

⁵⁷ S. 2509, §§ 1702(a), 1702(a)(2).

⁵⁸ 317 U.S. 341 (1943).

⁵⁹ 445 U.S. 97 (1980).

state policy” (most generally via legislatively enacted statute), and second, the policy must be “actively supervised” (i.e., enforced) by the State itself.⁶⁰ 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.

Conclusion

As McCarran-Ferguson immunity for activities constituting the “business of insurance” has steadily been narrowed since the act’s passage in 1945, and legislative action toward limiting or abolishing the exemption entirely has increased, the doctrine of state action immunity from prosecution under the federal antitrust laws has steadily been expanded since the doctrine was first announced in 1943. Presently, 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—become the equivalent of “derivative beneficiaries” of the states’ own immunity from prosecution under the federal antitrust laws. 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.⁶¹

⁶⁰ *Id.* at 105.

⁶¹ *See, e.g.*, discussion, *supra*, at pp. 4-5, “Regulated by State Law.” “The intensity and specificity of state regulation needed to qualify for McCarran Act immunity is less than required for the state action doctrine.” ABA ALD at 1373. For example, in at least one case decided at the administrative level using a McCarran analysis, and judicially using a state action analysis, although both opinions came to essentially the same conclusion—certain writers of title insurance were found to have violated federal prohibitions, the state action analysis also faulted the quality and quantity of state “regulation.” 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) (*see* In the Matter of Tigor 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. Tigor 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 also 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).

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