Limiting McCarran-Ferguson Act's Antitrust Exemption for the "Business of Insurance": Impact on Health Insurers and Issuers of Medical Malpractice Insurance

-name redacted-
Legislative Attorney

-name redacted-
Specialist in Financial Economics

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Summary

Narrowing or eliminating the 1945 McCarran-Ferguson Act's antitrust exemption for the "business of insurance" has been pursued for many years in many Congresses, and in the 111th Congress, there have been at least four measures—three stand-alone bills, and a provision in the House health care reform bill. Unlike prior legislation to eliminate the entire exemption—currently applicable generally to the extent such business is regulated by state law—however, three of the current measures (H.R. 3596, S. 1681, and section 262 of H.R. 3962 (the House-passed health care reform bill)) are applicable only to the provision of health and medical malpractice insurance; H.R. 4626, as introduced, and as passed by the House on February 24, 2010, is applicable only to health insurance. Two of the stand-alone bills, H.R. 3596 and S. 1681, would prohibit issuers of such insurance from engaging in "price fixing, bid rigging, or market allocations in connection with the conduct of the business of providing" health or medical malpractice insurance. H.R. 4626, like Section 262 of H.R. 3962, does not specify particular, prohibited activities, mandating instead that nothing in McCarran-Ferguson shall prevent the application of the antitrust laws to the business of health [or medical malpractice] insurance.

H.R. 3596 as voted out of the House Judiciary Committee on October 21, 2009, was amended to permit the sharing of historical loss data or the "perform[ance of] actuarial services" if doing so "does not involve a restraint of trade." H.R. 4626 contains no information-sharing provisions. Hearings have been held on S. 1681, but the bill remains in the Senate Judiciary Committee; whether it will ultimately be amended to contain a provision concerning information sharing is unknown, as is the likelihood that its substance will be inserted in a final health care reform bill. Section 262 of H.R. 3962 contains language similar to the information-sharing provision in H.R. 3596, including a section to define several of the terms used. There is not currently *any* provision addressing McCarran-Ferguson in the Senate health care reform bill (H.R. 3590), passed on December 24, 2009. Due largely to the importance of information sharing to insurers, the insurance industry has cooperated in the past in a variety of ways, including sharing loss information, jointly developing policy forms and rates, operating residual market mechanisms, and participating in state guaranty funds. Some forms of cooperation, including publication of mandatory advisory rates, have already been curtailed because of antitrust concerns.

Passage of any of the measures is likely to precipitate litigation to define the scope of the prohibition and/or any remaining exemption. The precise impact on the affected portion of the insurance industry will depend critically, therefore, on future court decisions.

Notwithstanding any limitation imposed at the federal level on the McCarran-Ferguson antitrust exemption available to health and medical malpractice insurers, however, any activity that the subject insurance companies currently (or might in the future) undertake—including joint ratemaking or certain information sharing—may nevertheless remain legally permissible. The "state action" doctrine in antitrust law immunizes from the federal antitrust laws: (1) all actions of state (but not necessarily, municipal) public entities and (2) those of private entities that are "clearly articulated" and legislatively (or otherwise) mandated *or* authorized *and* are "actively supervised" by the states. Currently, all states regulate the insurance industry. The "state action" issue, then, is whether and to what extent existing state mandates or authorizations, while adequate to meet the requirements of the McCarran-Ferguson exemption, would be adequate to meet the requirements of the antitrust "state action" doctrine, which dictates both that there be a "clear articulation" of state policy, and that a state engage in "active supervision" of the private activity that occurs in response to that articulation. This report will be updated as necessary.

Contents

Contacts

Introduction and Background

Since 1945, the McCarran-Ferguson Act[1] has provided the "business of insurance" generally with a statutory exemption, albeit one limited over the past 30 years or so by the courts, from the federal antitrust laws. Although Congress has on several occasions considered repealing the exemption in its entirety, current repeal efforts[2] are restricted to providers of health and medical malpractice insurance.[3]

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." In *United States v. South-Eastern Underwriters Ass'n.* (322 U.S. 533 (1944)), the Court held, however, 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;[4] the single exception to that immunity is the statement that nothing in McCarran-Ferguson "shall render the Sherman Act inapplicable to any agreement to [or act of] boycott, coerc[ion], or intimidat[ion]."[5] Early McCarran-Ferguson decisions mostly favored insurance companies. After 1969, however, the exemption for the "business of insurance" was generally limited to activities involving the underwriting and spreading of risk, and those surrounding insurance companies' relationships with their policyholders; agreements between insurance companies and entities outside the insurance industry were specifically not deemed any part of "the business of insurance."[6] 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.[7]

Recommendations for the repeal of McCarran-Ferguson have been voiced for a number of years, coming, for example, from the American Bar Association (ABA) and, most recently, from the Antitrust Modernization Commission (AMC), a body established by Congress to "to examine

[1] 15 U.S.C. §§ 1011-1015.

[2] H.R. 3596, H.R. 4626 (passed by the House on February 24, 2010), S. 1681; Section 262 of H.R. 3962 (health care reform bill as passed by the House on November 7, 2009).

[3] For more information on the health insurance industry, *see* CRS Report F40834, *The Market Structure of the Health Insurance Industry*, by (name redacted) and (name redacted); for more information on medical malpractice insurance, *see* CRS Report R40862, *Medical Malpractice Insurance and Health Reform*, by (name redacted), (name redacted), and (name redacted).

[4] 15 U.S.C. § 1012(b).

[5] 15 U.S.C. § 1013(b).

[6] Group Life & Health Ins. Co. v. Royal Drug Co., 440 U.S. 205 (1979), Union Labor Life v. Pireno, 458 U.S. 119, 129 (1982). *See* CRS Report RL33683, *Courts Narrow McCarran-Ferguson Antitrust Exemption for "Business of Insurance": Viability of "State Action" Doctrine as an Alternative*, by (name redacted), which discusses those and other cases that have continuously narrowed the definition of the "business of insurance."

[7] Kentucky Ass'n of Health Plans, Inc. v. Miller, 538 U.S. 329, 338 (2003).

whether the need exists to modernize the antitrust laws and to identify and study related issues."[8] The ABA has repeatedly expressed the "view that industry-specific exemptions from the antitrust laws are rarely justified, and that evidence that the exemption results in consumer benefit should exist to justify any such exemption."[9] In its chapter on "Government Exceptions to Free-Market Competition," the 2007 AMC *Report and Recommendations* cautions that the harms of an antitrust exemption be "carefully weigh[ed]" against any loss of consumer benefit.[10] With respect, specifically, to the exemption contained in the McCarran-Ferguson Act, the AMC stated that "no immunity should be granted to stabilize prices in order to provide an industry with certainty and predictability for purposes of investment or solvency."[11]

Several bills addressing McCarran-Ferguson repeal have been introduced in prior Congresses, including S. 430 (102nd Congress), the Insurance Competitive Pricing Act of 1991; and S. 618 and H.R. 1081 (110th Congress), the Insurance Industry Competition Act of 2007. They would each have modified McCarran-Ferguson as it affects every segment of the insurance industry; the measures in the 110th would also have restored the ability of the Federal Trade Commission (FTC) to conduct investigations of the insurance industry, a power limited in 1980 in section 5 of the Federal Trade Commission Improvements Act of 1980.[12]

Legislation in the 111th Congress

H.R. 3596, S. 1681

Currently, 15 U.S.C. § 1012(b) (section 2(b) of the McCarran-Ferguson Act) declares that the antitrust laws "shall be applicable to the business of insurance to the extent that such business is not regulated by State law." Since virtually all states regulate the insurance industry, the effect is to immunize "the business of insurance" generally from application of the federal antitrust laws.

Each of two, identical, stand-alone bills introduced in the 111th Congress—H.R. 3596, S. 1681 (each titled the Health Insurance Industry Antitrust Enforcement Act of 2009)—would apply only to issuers of health insurance and medical malpractice insurance. Notwithstanding any provision in the McCarran-Ferguson Act, those entities would be prohibited from engaging "in any form of price fixing, bid rigging, or market allocations in connection with the conduct of the business of providing" such insurance.[13] According to Representative Conyers, the bill's sponsor, those "pernicious practices … are detrimental to competition and result in higher prices for consumers."[14] Senator Leahy's statement upon introducing S. 1681 noted that "the health

[8] P.L. 107-273, §§ 11052, 11053(1).

[9] Testimony of Ilene Knable Gotts, Chair, Section of Antitrust Law, American Bar Association, before the Subcommittee on Courts and Competition Policy, House Judiciary Committee, on H.R. 3596, "The Health Insurance Industry Antitrust Enforcement Act of 2009," October 8, 2009.

[10] Antitrust Modernization Commission, Final Report (April 2007) at 350.

[11] *Id.* at 351; *see also*, H.Rept. 111-322, Report of the House Committee on the Judiciary, on H.R. 3596 at 4-6.

[12] P.L. 96-252; the limitation is codified in the last unnumbered paragraph of 15 U.S.C. § 46.

[13] Section 3 of H.R. 3596.

[14] 155 CONG. REC. E2318 (daily ed. September 17, 2009).

insurance industry currently does not have to play by the same good-competition rules as other industries. That is wrong, and this legislation corrects it."[15]

Hearings were held in the House Judiciary Committee on October 8, 2009, and in the Senate Judiciary Committee on October 14, 2009; H.R. 3596 was reported on October 21, 2009 with an amendment to permit the collection, compilation or dissemination of historical loss data, or the performance of actuarial services to the extent that those activities do "not involve a restraint of trade." S. 1681 remains in the Senate Judiciary Committee; whether it might ultimately contain a provision concerning information sharing is unknown; its substance was not inserted in the Senate health care reform bill passed on December 24, 2009.

Section 262 of H.R. 3962[16]

The provision would amend McCarran-Ferguson itself by adding a new subsection ((c)) to 15 U.S.C. § 1013 to clarify that the "nothing contained in this Act [McCarran-Ferguson] shall modify, impair, or supersede the operation of any of the antitrust laws with respect to the business of health … or … medical malpractice insurance." In other words, the new section would carve out a subset of insurance to whom the antitrust laws would apply, notwithstanding the overall antitrust exemption for the "business of insurance" contained in 15 U.S.C. § 1012(b).[17] There is also, as in H.R. 3596 as reported, a "semi-safe harbor" for information sharing and actuarial services if engaging in those activities "does not involve a restraint of trade." The provision defines, in language similar to that inserted in H.R. 3596 as reported, the information-sharing terms, "historical loss data" and "loss development factor."

H.R. 4626

Introduced on February 22, 2010, and passed by the House on February 24, 2010, this measure (Health Insurance Industry Fair Competition Act) is unlike H.R. 3596 and S. 1681 and more like Section 262 in that it does specifically amend McCarran-Ferguson: "nothing contained in this Act [i.e., McCarran-Ferguson Act] shall modify, impair, or supersede the operation of any of the antitrust laws with respect to the business of health insurance."[18] But it is limited to "the business of health insurance" and does not address the business of medical malpractice insurance. Like S. 1681, it does not contain any specific provision related to information sharing; a proposed amendment concerning information sharing was defeated during Rules Committee consideration of the bill and again by the House on a motion to recommit.

[15] *Id.* at S9556.

[16] There is not currently any provision in the Senate health care reform bill.

[17] Effectively, H.R. 3596 and S. 1681 would accomplish the same "carve-out," but without amending the McCarran-Ferguson Act itself.

[18] Section 2(a) of H.R. 4626, adding a new section "(c)" to 15 U.S.C. § 1013.

Discussion

The "Business of Insurance"

Immediately following the enactment of McCarran-Ferguson, the tendency of the courts was to immunize from antitrust challenge almost everything done by an insurance company. But beginning at least in 1969, a judicial trend, especially in the Supreme Court, toward focusing more particularly on the phrase, "the business of insurance," became evident: the Court said in 1969, that "whatever the exact scope of the statutory term ['business of insurance'], it is clear where the focus was [in McCarran]—it was on the relationship between the insurance company and the policyholder."[19] Ten years later, the Court left no doubt that the "business of insurance" was a not synonymous with "insurance-company activity": the "exemption is for the 'business of insurance,' not the 'business of insurers.'"[20] In 1982 the Court set out an even more restrictive definition:

> There are three criteria relevant in determining whether a particular practice is part of the "business of insurance" exempted from the antitrust laws by § 2(b) [15 U.S.C. § 1012(b)]: first, whether the practice has the effect of transferring or spreading a policyholder's risk; second, whether the practice is an integral part of the policy relationship between the insurer and the insured; and third, whether the practice is limited to entities within the insurance industry.[21]

No case has been found in which any attempt was made to argue that bid rigging is protected from antitrust prosecution by McCarran-Ferguson's grant of antitrust immunity for "the business of insurance." Indeed, it is difficult to imagine the specifics of such an argument.

Case law concerning the treatment of "market allocation" as a legitimate activity protected by the McCarran-Ferguson "business of insurance" immunity has been somewhat equivocal in the past. In *State of Maryland v. Blue Cross and Blue Shield*, a federal court noted the "paucity of authority on horizontal market allocation agreements in the insurance industry."[22] Reviewing the few cases that appeared to support the viability of a positive relationship between "market allocation" and the "business of insurance," the court found that the better interpretation dictated a likely negative relationship because market allocation is not an activity that is unique to the insurance arena. Recently, the Congressional Budget Office has noted that, "[a]ccording to State insurance regulators, State laws already prohibit issuers of health insurance and medical malpractice insurance from engaging in practices such as price fixing, bid rigging, and market allocations."[23]

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[19] *See, e.g.*, Securities and Exchange Commission (SEC) v. National Securities, Inc., 393 U.S. 453, 460 (1969), in which a merger between insurance companies, approved by the State of Arizona, was held not immunized by McCarran-Ferguson from challenge by the SEC. According to the Court, a statute aimed at protecting the stockholders of insurance companies was not a statute regulating the "business of insurance."

[20] Group Life & Health Insurance Co. v. Royal Drug Co., 440 U.S. 205, 211 (1979).

[21] Union Labor Life Ins. Co. v. Pireno 458 U.S. 119, 120 (1982).

[22] 620 F. Supp. 907, 915 (D. Md. 1985).

[23] Letter to the House Judiciary Committee dated October 23, 2009 concerning the cost of implementing H.R. 3596, printed in H.Rept. 111-322, *supra*, footnote 11, at 10.

To the extent that "price fixing" is equated with joint rate-setting, the language of several state statutes is instructive.[24] Although, for example, Oregon prohibits conspiracies among insurers "to fix, set or adhere to insurance rates," it qualifies that prohibition with "except as expressly sanctioned by the Insurance Code";[25] the Insurance Code expressly authorizes "[c]ooperation among rating organizations or among rating organizations and insurers in rate making or in other matters within the scope of this chapter …."[26] Further, the Insurance Code mandates that rates should neither be "excessive" nor "*inadequate*," defining "inadequate" as "unreasonably low for the insurance provided and that which 'endangers the solvency of the insurer' or will have the effect of destroying competition or creating a monopoly."[27]

Similarly, New Jersey dictates that "[e]very rating organization, and every insurer which makes its own rates, shall make rates that are not unreasonably high *or inadequate* for the safety and soundness of the insurer …."[28]

Michigan also explicitly authorizes, but regulates "cooperative action among insurers in rate-making and in other matters within the scope of the insurance code." The applicable provision dictates that rates "shall not be excessive, *inadequate*, or unfairly discriminatory," but emphasizes that "[n]othing in this chapter is intended (1) to prohibit or discourage *reasonable* competition, or (2) to prohibit, or encourage except to the extent necessary to accomplish the aforementioned purpose [promotion of the public welfare], uniformity in insurance rates, rating systems, rating plans, or practices."[29]

The preceding examples illustrate that although the states, which up to this point have the greatest regulatory expertise in the insurance area, are obviously concerned with rates that are "excessive," they are at least as concerned that overly low rates may be "inadequate" to provide sufficient revenue to assure the continued solvency of companies. That consideration reflects the concern that rate payers (policyholders) continue to be served by solvent insurers able to adequately pay claims. In other words, competition that results in premium rates being set too low to assure the likely, continued viability of an insurance company, is disfavored—competition for competition's sake is not perceived to be a valid goal for the insurance industry.

Insurance Industry Cooperation

Competitors in many industries have an economic incentive to cooperate in ways, such as creating cartels or price-fixing, that could result in general inefficiency and, ultimately, harm to the consumer. This possible consumer harm is one of the underlying reasons for the antitrust laws. Due to the specific economics of the insurance industry, however, cooperation among insurers, especially in the area of information sharing, may very well result in greater efficiencies and, possibly, lower prices for consumers. Even in instances where consumer prices may not be

[24] It is not uncommon for states, either in their Insurance Codes or in regulations promulgated by their Insurance Commissions or regulators, to authorize joint rate-setting.

[25] Oregon Revised Statutes (O.R.S.) § 737.245.

[26] O.R.S. § 737.365(1).

[27] O.R.S. §§ 737.310(1), 737.310(a), 737.310(b)(A)(B) (emphasis added).

[28] New Jersey Statutes Annotated § 17:29A-4 (emphasis added).

[29] Michigan Compiled Laws Annotated § 500.2400 (emphasis added).

lowered, however, as the preceding paragraphs illustrate, there may nevertheless be offsetting benefits for consumers.

Insurance depends critically on insurers possessing a large quantity of information to allow them to judge and price risks accurately. In a theoretical world of perfect information and competition, every consumer would pay a premium that covered his risk, and the resulting overall amount paid by consumers would be the lowest possible amount that would cover the aggregate losses to the group as a whole. If insurers can pool their information, the resulting rates can more accurately reflect risk and thus be lower for consumers as a whole, although some individual consumers may pay higher rates. Small insurers particularly benefit from information sharing, as they do not have a large volume of information of their own to analyze. The theoretically perfect world, however, assumes competition between insurers that would serve to reduce premium rates; too much cooperation between insurers could dampen this competition, reducing the consumer benefit that comes from allowing insurers to share information.[30]

Insurer cooperation and information sharing revolves around advisory organizations, also known as ratings bureaus.[31] Some form of these organizations has existed for nearly as long as insurance has existed in the United States. At their most basic form, they gather data from the various insurers, aggregate and analyze this data, and provide the aggregated data back to the insurers for use in setting future rates. In practice, they have done, and continue to do, a good deal more than this. Historically, rating bureaus formulated final rates that insurers might charge for particular policies and in some cases required participating insurers to use the bureau's suggested rates. Having a central organization create insurance rates, whether mandatory or not, raised serious antitrust concerns. By the early 1990s, the main advisory organizations had ceased publishing fully formed rates. Advisory organizations continue, however, to collect, aggregate, and analyze data, providing not only historical loss data but also estimates of future loss data and future insurer expense data. Some maintain that this estimation of future data, known as "trending" raises antitrust concerns similar to those inherent in the creation of final rates.[32]

Another primary activity of advisory organizations is the creation and filing of insurance policy forms. Insurance policy forms are complex legal documents, and, as controversies over insurance coverage for New York's World Trade Center and for buildings damaged in Hurricane Katrina have shown, many millions of dollars may ride on the interpretation of a handful of words. Joint creation of these forms allows for the sharing of the legal talent needed to create the forms, and, some would argue, promotes comparison shopping by consumers by reducing the confusion that could result from multiple policy forms being offered by different companies. Since the states generally require the filing of policy forms for state approval, using a jointly created form that has already been filed with the states significantly reduces the regulatory burden on a single insurer. The uniformity of policy forms, however, also may reduce consumer choice. If one were

[30] It is also possible that a total ban on insurer cooperation could, on the other hand, actually disserve consumers and lessen competition between insurance companies; *e.g.*, if information sharing were categorically prohibited, some small companies that require it could be forced to leave the market.

[31] The largest of these advisory organizations today are the Insurance Services Office (ISO) and the American Association of Insurance Services (AAIS) for general property/casualty insurance and the National Council on Compensation Insurance (NCCI) for workers compensation insurance.

[32] *See, e.g.*, Testimony of Robert Hunter before the Senate Judiciary Committee (http://judiciary.senate.gov/pdf/03-07-07McCarran-FergusonHearing-HunterTestimony.pdf) for an argument regarding the creation of trended data by advisory organizations. A counter argument by NCCI on the importance of trending can be found at http://www.amc.gov/public_studies_fr28902/immunities_exemptions_pdf/061101_NCCI-McCarran.pdf.

shopping for a particular policy feature that was not a part of the standard form, it might be impossible, or very costly, to find an insurance policy that would meet this particular need.

Further industry cooperation, both through the advisory organizations and other state-created mechanisms, occurs in state residual market mechanisms and state guaranty funds. Residual market mechanisms are often created to insure availability of insurance that is legally mandated, such as workers compensation or auto insurance. While such mechanisms differ significantly between states, they may have advisory organizations administering them or require some other joint action by insurers, such as splitting up high-risk insureds who are unable to find insurance in the regular market; such "splitting" might be considered market allocation. State guaranty funds are intended to protect the policyholders in the case of insurer insolvency. In general, states require insurers to join these associations, which may preclude allegations of unfair collaboration or collusion.

The Bills' "Safe Harbor" for Information Sharing

At least some of the information sharing that occurs in much of the industry would purportedly be immunized by both H.R. 3596 as reported, and section 262 of H.R. 3962. Inasmuch as both provisions specify, however, that the named, cooperative activities are expressly permitted only to the extent that they do not constitute a "restraint of trade," the exemption is, at best, a "semi-safe" harbor: on the one hand, if there is no "restraint of trade," no protection is needed; on the other, there is no protection against application of the antitrust law in the event that a cooperative activity is found to be a "restraint of trade." Moreover, in the event of a challenge (either by a private individual or the Department of Justice), a court would necessarily have to make the determination—either that the challenged activity did not amount to a restraint of trade, or, if it did, that its restrictive nature was (or was not) outweighed by some countervailing or pro-competitive result—without having been provided any guidance other than the general antitrust principles usually relied on by the courts when analyzing a practice under the "rule of reason."

Effect of State Action Exemption

Notwithstanding any limitation imposed at the federal level on the McCarran-Ferguson antitrust exemption available to health and medical malpractice insurers, any activity that the subject insurance companies currently (or might in the future) undertake—including joint ratemaking or certain information sharing—might nevertheless remain legally permissible. The "state action" doctrine in antitrust law immunizes from the federal antitrust laws: (1) all actions of state public entities[33] and (2) those of private entities that are legislatively mandated or authorized *and* are "actively supervised" by the states.[34]

[33] Municipalities' public entities, as well as municipal officials, are immune to antitrust prosecution only if states have authorized a particular activity or contemplated that it might occur (*see, e.g.*, City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389 (1978); Community Communications Co., Inc. v. City of Boulder, 455 U.S. 40 (1982)).

[34] California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 105-106 (1980):

> The California system for wine pricing [wine wholesalers dictate prices to be charged by retailers] satisfies the first standard. The legislative policy is forthrightly stated and clear in its purpose to permit resale price maintenance. The program, however, does not meet the second requirement for *Parker* immunity. The State simply authorizes price setting and enforces the prices established by private parties. The State neither establishes prices nor reviews the reasonableness of the price schedules; nor does it regulate the terms of fair trade contracts. The State does not monitor market

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The "state action" doctrine is generally considered to have the originated in the 1943 Supreme Court opinion, *Parker v. Brown.*[35] In that case, the Supreme Court, reviewing the antitrust legality of a California prorate plan for the marketing of raisins, said it saw "no suggestion of a purpose to restrain state action in the [Sherman] Act's legislative history."[36] The Court noted that

> the state command to the [Prorate] Commission and to the program committee of the California Prorate Act is not rendered unlawful by the Sherman Act since, in view of the latter's words and history, it must be taken to be a prohibition of individual and not state action.[37]

Earlier in its decision it had emphasized that

> it is plain that the prorate program was never intended to operate by force of individual agreement or combination. It derived its authority and its efficacy from *the legislative command of the state* and was not intended to operate or become effective without that command.[38]

From the time that McCarran-Ferguson was enacted, and the "state action" doctrine was enunciated, the courts have issued a series of opinions that have, simultaneously, narrowed the scope of the McCarran-Ferguson exemption for the "business of insurance"[39] and expanded the scope of the doctrine. "State action" has developed from a narrow recognition that the Sherman Act does not (and, according to the Court, *cannot*) apply to the states as states,[40] to the broader recognition that the states might *require* (usually, although not necessarily, via statute) a private individual to take certain action or to act in a specific manner,[41] to the approval of state-authorized (even if not state-mandated) activities that would, absent such authorization violate the federal antitrust laws.[42]

(...continued)

> conditions or engage in any "pointed reexamination" of the program. The national policy in favor of competition cannot be thwarted by casting such a gauzy cloak of state involvement over what is essentially a private price-fixing arrangement. As *Parker* teaches, "a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful...."

317 U.S. at 351.

[35] 317 U.S. 341 (1943). Thus, the "state action" doctrine appeared about a year prior to United States v. South-Eastern Underwriters Ass'n. (322 U.S. 533 (1944))—the decision that created unrest concerning the continuing ability of the states to regulation insurance and provided the impetus for enactment of the McCarran-Ferguson Act.

[36] 317 U.S. at 351.

[37] *Id.* at 352.

[38] *Id.* at 350 (emphasis added).

[39] *See* section on "The "Business of Insurance"" *supra*, at pp. 3-5.

[40] In City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 400, 415 (1978), the Court noted "our national traditions and structure of federalism," and also that "[t]he Parker doctrine … preserves to the States their freedom under our dual system of federalism." The *Lafayette* Court was explaining why the antitrust laws *might* apply to municipalities (which are not sovereign), even though they would not apply to the states, which *are* sovereign.

[41] *E.g.*, Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975) (attorney's fees); Bates v. State Bar of Arizona, 433 U.S. 350 (1977) (attorney advertising).

[42] *E.g.*, Southern Motor Carriers Rate Conference v. United States, 471 U.S. 48, 60, 61 (1985): "The federal antitrust laws do not forbid the States to adopt policies that permit, but do not compel, anticompetitive conduct by regulated private entities. as long as a State clearly articulates its intent to adopt a permissive policy," that is sufficient to indicate that it contemplates the possibility of an anticompetitive action; despite the apparent interpretation of *Goldfarb*, "we do not read that case as making compulsion a prerequisite to a finding of state action immunity."

In other words, over the years since its first iteration, the doctrine has 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 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.*:[43] first, the challenged restraint must be "clearly articulated and affirmatively expressed as state policy" (most commonly, although not necessarily, in a legislatively enacted statute); second, the policy must be "actively supervised" and subject to enforcement by the state itself.[44]

Conclusion

Currently, all states regulate the insurance industry, giving rise to potential McCarran-Ferguson immunity. If McCarran-Ferguson antitrust protection for "the business of insurance" were, in fact, curtailed or abolished (whether generally, or for a subset including health and medical malpractice insurance), lawsuits challenging some insurer-cooperation practices as violations of the federal antitrust laws would be likely. If all of the cited examples of cooperation[45] were found to be in violation, it would necessitate major changes in the operation of insurers, particularly small insurers which do not have large pools of information from their own experience. Should additional data be unavailable to small insurers in some way, further consolidation in the insurance industry as small insurers merge in order to gain the competitive advantage of additional information is a likely, albeit, ironic, possibility. That outcome, however, is only one of a range of possibilities. Many of the cooperative activities that insurers engage in, but that could be prohibited by H.R. 3596, S. 1681, H.R. 4626, or section 262 of H.R. 3962 (e.g., joint rate-setting), might nevertheless be found to be permissible under the "state action" doctrine; or found not to be violations of the antitrust laws at all, even without the protection of either McCarran-Ferguson or the "state action" doctrine.

In the event that any insurer practices *are* determined to be violations of the antitrust laws, the issue in the absence of (some or all) McCarran-Ferguson immunity, likely would be whether and to what extent existing state mandates or authorizations, while adequate to meet the requirements of the McCarran-Ferguson exemption, would be adequate to meet the more rigorous requirements of the antitrust "state action" doctrine. Inasmuch as "state action" immunity is available only if a state "clearly articulates" a state policy that mandates or contemplates anticompetitive conduct, *and* engages in the "active supervision" of any private activity that occurs in response to that articulation, it is at least questionable whether a general scheme of insurance regulation would be sufficiently specific to allow successful invocation of "state action."[46] That issue, too, would likely be subject to extensive litigation.

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[43] 445 U.S. 97 (1980). *See* footnote 34, *supra.*

[44] *See* CRS Report RL33683, *Courts Narrow McCarran-Ferguson Antitrust Exemption for "Business of Insurance": Viability of "State Action" Doctrine as an Alternative*, by (name redacted), for a brief analysis of that doctrine as it pertains to the insurance industry.

[45] *See* section on "Insurance Industry Cooperation," *supra*, at pp. 5-6.

[46] For example, the conclusion of the U.S. Court of Appeals for the Ninth Circuit, that "[i]t is not necessary to point to a state statute which gives express approval to a particular practice; … it is sufficient that a state regulatory scheme possess jurisdiction over the challenged practice" allowed the court to find that a medical malpractice company's decision to offer insurance only to members of a county medical association qualified as the "business of insurance" (continued...)

Author Contact Information

(name redacted)
Legislative Attorney
[redacted]@crs.loc.gov, 7-....

(name redacted)
Specialist in Financial Economics
[redacted]@crs.loc.gov, 7-....

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and eligible, therefore, for McCarran-Ferguson immunity (although non-members could not purchase the company's insurance, members were free to purchase insurance from another source, thus allowing the court to find no violation of the "boycott" exception in McCarran) (Feinstein v. Nettleship Co. of Los Angeles, 714 F.2d 928, 933 (9th Cir. 1983)). That conclusion was endorsed by the U.S. District for Maryland in its ruling concerning "market allocation" (State of Md. v. Blue Cross and Blue Shield Ass'n., 620 F.Supp. 907, 920 (D.C.Md., 1985)). Whether unexercised "jurisdiction over [a] challenged practice" would satisfy *Midcal's* "clear articulation" standard is not yet known.