



U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

October 20, 2009

The Honorable John Conyers, Jr.
Chairman
Committee on the Judiciary
U. S. House of Representatives
Washington, DC 20515

Dear Chairman Conyers:

The Department of Justice is pleased to provide its general views on H.R. 3596, the "Health Insurance Industry Antitrust Enforcement Act of 2009." H.R. 3596 repeals the antitrust exemption in the McCarran-Ferguson Act, 15 U.S.C. 1011 et seq., for price fixing, bid rigging, or market allocations in connection with the conduct of the business of providing health insurance coverage (as defined in section 2791 of the Public Health Service Act, 42 U.S.C. 300gg-91) or coverage for medical malpractice claims or actions.

Prior to 1944, regulation of the business of insurance was seen as the exclusive province of the states. In that year, the Supreme Court held in *United States v. South-Eastern Underwriters Association*¹ that the insurance business was within the regulatory power of Congress under the Commerce Clause, and thus was subject to the antitrust laws. This decision was perceived to threaten state authority to regulate and tax the business of insurance. The McCarran-Ferguson Act was designed to return the legal climate to that which existed prior to *South-Eastern Underwriters* by specifically delegating to the states the authority to continue to regulate and tax the business of insurance. It also created a broad antitrust exemption based on state regulation. This antitrust exemption applies where three basic requirements are met: (1) the challenged activity must be part of the "business of insurance," (2) that business must be regulated by state law, and (3) the activity must not constitute boycott, coercion, or intimidation.

Repeal or reform of the broad antitrust exemption currently enjoyed by the business of insurance has been a perennial subject of interest. In 1977, a Justice Department study concluded that the insurance industry could function competitively without the protection of the McCarran-Ferguson Act. The National Commission for the Review of Antitrust Laws and Procedures recommended in 1979 that the broad exemption in the Act be replaced by narrowly drawn legislation adopted to affirm the lawfulness of a limited number of collective activities under the antitrust laws. The 1989 report of the American Bar Association Commission to Improve the Liability Insurance System contained a generally similar recommendation.

¹ 322 U.S. 533.

The Antitrust Modernization Commission recently reviewed whether the McCarran-Ferguson Act is necessary to allow insurers to collect, aggregate, and review data on losses so that they can better set their rates to cover their likely costs. The AMC found that it was not. The AMC said that insurance companies “would bear no greater risk than companies in other industries engaged in data sharing and other collaborative undertakings.” In particular, the AMC said, “[l]ike all potentially beneficial competitor collaboration generally ... such data sharing would be assessed by antitrust enforcers and the courts under a rule of reason analysis that would fully consider the potential procompetitive effects of such conduct and condemn it only if, on balance, it was anticompetitive.”² Significantly, the AMC added that “[t]o the extent that insurance companies engage in anticompetitive collusion ... then they appropriately [should] be subject to antitrust liability.”³

In addition to these reviews, this Committee and other bodies of Congress have held several hearings on the McCarran-Ferguson exemption over the years, and have introduced various bills that would eliminate the current exemption or replace it with a narrower one affording continued protection to certain procompetitive activities. The pros and cons, as well as the particulars, of legislative reform of the McCarran-Ferguson antitrust exemption have thus been thoroughly and carefully debated.

The Department is generally opposed to exemptions from the antitrust laws, whether they be industry-specific or general, in the absence of a strong showing of a compelling need. The antitrust laws reflect our society’s belief that competition enhances consumer welfare and promotes our economic and political freedoms. Exceptions from that policy should be—and fortunately are—relatively rare. Those who advocate the creation of a new antitrust exemption, or the preservation of a longstanding exemption such as that contained in the McCarran-Ferguson Act, rightfully bear a heavy burden in justifying the exemption.

The exemption has been subject to criticism as to its results. One antitrust treatise notes that under the McCarran-Ferguson Act “the presence of even minimal state regulation, even on an issue unrelated to the antitrust suit, is generally sufficient to preserve the immunity.”⁴ Indeed, the case law can be read as suggesting that the Act precludes federal antitrust action whenever there is a state regulatory scheme, regardless of how perfunctory or ineffective it may be.⁵ It is fair to say that the McCarran-Ferguson Act antitrust exemption is very expansive with regard to anything that can be said to fall within “the business of insurance,” including premium pricing

² ANTITRUST MODERNIZATION COMM’N, REPORT AND RECOMMENDATIONS 351 (2007) (footnotes omitted), available at http://govinfo.library.unt.edu/amc/report_recommendation/amc_final_report.pdf.

³ The American Bar Association of Antitrust Law shares these views, concluding recently that the “historic justification for the McCarran-Ferguson Act’s antitrust exemption appears to have lost most or all of its former appeal.” SECTION OF ANTITRUST LAW, AM. BAR ASS’N, FEDERAL STATUTORY EXEMPTIONS FROM ANTITRUST LAW 159 (2007).

⁴ 1A PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 219c, at 25 (3d ed. 2006).

⁵ See, e.g., *Ohio AFL-CIO v. Insurance Rating Board*, 451 F.2d 1178 (6th Cir. 1971).

and market allocations. As a result, “the most egregiously anticompetitive claims, such as naked agreements fixing price or reducing coverage, are virtually always found immune.”⁶

Concern over the exemption’s effects are especially relevant given the importance of health insurance reform to our nation. There is a general consensus that health insurance reform should be built on a strong commitment to competition in all health care markets, including those for health and medical malpractice insurance. Repealing the McCarran-Ferguson Act would allow competition to have a greater role in reforming health and medical malpractice insurance markets than would otherwise be the case.

In considering any alleged need for an antitrust exemption, the flexible nature of the antitrust laws as interpreted in such recent cases as *General Dynamics*,⁷ *GTE Sylvania*,⁸ *Broadcast Music*,⁹ *Northwest Wholesale Stationers*,¹⁰ and *Dagher*¹¹ must be recognized. Allegations that particular procompetitive behavior would violate the antitrust laws and thus should be exempted from their application can fail to take account of the economically sound competitive analysis that is used today to carefully circumscribe *per se* rules and fully analyze other conduct under the rule of reason. Congress has occasionally recognized a need for clarification of a proper antitrust standard or adjustment of antitrust remedies, but the flexibility of the antitrust laws and their crucial importance to the economy argue strongly against antitrust exemptions that are not clearly and convincingly justified.

There are strong indications that possible justifications for the broad insurance antitrust exemption in the McCarran-Ferguson Act when it was enacted in 1945 are no longer valid today. To the extent that the exemption was designed to enable the states to continue to regulate the business of insurance, it is no longer necessary. The “state action” defense, which had been announced by the Supreme Court in *Parker v. Brown*¹² in 1943, but was undeveloped in 1945 when the McCarran-Ferguson Act was enacted, has now been the subject of many Supreme Court opinions. This defense allows a state effectively to immunize what the antitrust laws otherwise may proscribe by clearly articulating and affirmatively expressing a policy to displace competition, and by actively supervising any private conduct that might be involved.

Moreover, the application of the antitrust laws to potentially procompetitive collective activity has become far more sophisticated during the 62 years since the McCarran-Ferguson Act was enacted. Some forms of joint activity that might have been prohibited under earlier, more restrictive doctrines are now clearly permissible, or at very least analyzed under a rule of reason that takes appropriate account of the circumstances and efficient operation of a particular

⁶ AREEDA & HOVENKAMP, *supra* note 2, ¶ 219d, at 31.

⁷ *United States v. General Dynamics Corp.*, 415 U.S. 486 (1974).

⁸ *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977).

⁹ *Broadcast Music, Inc. v. Columbia Broadcasting Sys., Inc.*, 441 U.S. 1 (1979).

¹⁰ *Northwest Wholesale Stationers, Inc. v. Pacific Stationary and Printing Co.*, 472 U.S. 284 (1985).

¹¹ *Texaco Inc. v. Dagher*, 547 U.S. 1 (2006).

¹² 317 U.S. 341.

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industry. Thus, there is far less reason for concern that overly restrictive antitrust rulings would impair the insurance industry's efficiency.

The Department supports efforts to bring more competition to the health insurance marketplace that lower costs, expand choice, and improve quality for families, businesses, and government. We know that you share this goal, and look forward to working with you and your colleagues to achieve our common objectives.

Thank you for the consideration of our views. If we can be of further assistance on this issue, please do not hesitate to contact this office. The Office of Management and Budget has advised us that there is no objection to this letter from the perspective of the Administration's program.

Sincerely,

A handwritten signature in black ink, appearing to read "Ron Weich", written in a cursive style.

Ronald Weich
Assistant Attorney General

cc: The Honorable Lamar Smith
Ranking Member