The Florida Senate

Interim Report 2009-104 *October 2008*

Committee on Banking and Insurance

APPLYING THE FLORIDA ANTITRUST ACT TO THE BUSINESS OF INSURANCE

Issue Description

The Florida Antitrust Act (Act) under chapter 542, F.S., complements the body of federal antitrust law[1] by prohibiting restraints of trade or commerce such as price discrimination, price fixing and monopolies. A central provision of the Act has the effect of exempting the "business of insurance" from state antitrust laws by providing that any activity or conduct exempt under Florida statutory or common law or exempt from federal antitrust laws is exempt from the Act's provisions.[2] Currently, the federal McCarran-Ferguson Act (McCarran)[3] exempts from the federal Sherman, Clayton, and Federal Trade Commission acts conduct that: (1) constitutes the business of insurance; (2) is regulated by state law; and (3) is not an agreement to boycott, coerce, or intimidate. The intent is to reserve regulation of insurance companies to the states and to allow insurers to exchange data regarding losses and other factors for the purposes of rate making and for the joint development of policy forms. According to information obtained from the National Association of Insurance Commissioners, 26 states do *not* exempt the business of insurance from their state antitrust laws. The objective of this report is to evaluate the effects of applying the Florida Antitrust Act to the business of insurance and to provide options for applying the Act to the business of insurance.

Background

Florida's Antitrust Act and the Federal Antitrust Laws

Antitrust laws are designed to ensure that there is competition within the marketplace and thus prohibit practices that greatly inhibit or eliminate competition. However, the business of insurance has never been subject to the full sweep of federal antitrust law or Florida antitrust law. Though federal antitrust legislation dates back to 1890, laws such as the Sherman Act, the Clayton Act, and the Federal Trade Commission Act[4] were not applied to the business of insurance for decades because insurance transactions were not considered part of interstate commerce.[5] In 1944, the U.S. Supreme Court ruled that insurance transactions did, in fact, constitute interstate commerce and that the federal antitrust laws were applicable.[6] In response, Congress quickly passed the McCarran-Ferguson Act (McCarran) to exempt the business of insurance from federal antitrust law so long as the insurance business in question is regulated by state law and does not constitute a boycott, coercion or

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[1] The core federal antitrust laws include these acts: McCarran-Ferguson Act, 15 U.S.C. s. 1011; Sherman Act, 15 U.S.C. s. 1-7; Clayton Act, 15 U.S.C. s. 12-27; and the Federal Trade Commission Act, 15 U.S.C. s. 41-58.

[2] Section 542.20, F.S.

[3] 15 U.S.C. s 1011 et seq.

[4] The Sherman Act declares contracts, combinations and conspiracies in restraint of interstate or foreign commerce, as well as monopolies or attempts to monopolize interstate or foreign commerce, to be illegal under certain circumstances; the Clayton Act declares anti-competitive practices such as exclusive dealing arrangements, corporate mergers, price discrimination, acquisitions and interlocking directorates to be illegal under certain circumstances; and the Federal Trade Commission Act, which created the Federal Trade Commission (FTC) to enforce aspects of the antitrust laws, prohibits unfair methods of competition and unfair or deceptive acts or practices in or affecting commerce. Federal antitrust laws are enforced by the Antitrust Division of the Dept. of Justice and the FTC.

[5] ABA Section of Antitrust Law, *Insurance Antitrust Handbook*, pg 1. (2nd Ed. 2006). *Paul v. Virginia*, 75 U.S. (8 Wall.) 168 (1869). The U. S. Supreme Court in *Paul* held that the statute regulating insurers' business in Virginia did not violate the commerce clause because insurance was not "commerce" and thus was subject only to state, not federal, regulation.

[6] *United States v. South-Eastern Underwriters Association*, 322 U.S. 533 (1944). *South-Eastern* overruled the decision in *Paul v. Virginia*, declaring insurance within Congress's constitutional authority to regulate.

intimidation.[7] The rationales for exempting insurance from the antitrust laws were to continue the ability of the individual states to regulate the insurance industry and to preserve certain insurer practices that could be found to violate antitrust law such as when multiple insurers use the services of a rating organization to calculate expected loss costs and then each use the same data to promulgate their rates or when insurers create standard policy forms.

The Florida Antitrust Act (Act) of 1980 makes unlawful "every contract, combination, or conspiracy in restraint of trade or commerce."[8] It also makes it "unlawful for any person to monopolize, attempt to monopolize, or combine or conspire with any other person or persons to monopolize any part of trade or commerce."[9] The Act is essentially a reproduction of sections 1 and 2 of the federal Sherman Act of 1890,[10] and the Florida law states that federal precedent regarding federal antitrust law is to be given great weight and consideration when interpreting the state antitrust act.[11] The Act provides that any activity or conduct that is exempt under Florida statutory or common law or exempt from the provisions of the antitrust laws of the United States is exempt from its provisions.[12]

Both private parties and the Attorney General's Office may bring an antitrust action under the Act. [13] Any person who is injured by a violation of the Act may bring a civil suit in Florida circuit court, and the Attorney General or a state attorney[14] may bring a civil action on behalf of Florida residents to recover damages on their behalf. If the claim is successful the award is treble damages, court costs, and attorney's fees. If the Attorney General or a state attorney files suit, then all other private rights of action under the Act are suspended during the pendency of the proceeding plus one additional year.[15] Injunctive relief is also available under the Act as any person may sue for injunctive and equitable relief to prevent threatened loss or damage from a violation of the Act.[16] If successful, the plaintiff is also entitled to court costs and attorney's fees. Violations of ss. 542.18 and s. 542.19, F.S., committed by a natural person are punishable by a civil penalty of not more than $100,000 and violations committed by other persons are punishable up to $1,000,000.[17] Knowing violations or knowingly assisting in a violation is a felony punishable by a fine of up to $1,000,000 on a corporation, or if committed by any other person punishable by up to 3 years imprisonment and up to a $100,000 fine.[18]

The Attorney General has filed two antitrust actions against insurers and an insurance broker in the past two decades.[19] In 1991, Florida joined eighteen other states in a lawsuit against four of the largest insurers in the country arguing violation of antitrust law[20] by the insurers in conspiring with Lloyd's of London and other major reinsurers to boycott primary insurance companies that offered broader coverage than they favored for commercial general liability (CGL) policies.[21] As a result, many policyholders may have been forced to purchase reduced CGL coverage at exorbitant rates, while others could not obtain insurance at any price. The defendants claimed immunity under McCarran on the ground that the alleged conspiracy involved the "business of insurance." Ultimately, the United States Supreme Court found that the defendants' activities were within the business of insurance; however, the Court found that the acts constituted a boycott and were therefore outside the

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[7] 15 U.S.C. s. 1011-1015.
[8] Section 524.18, F.S.
[9] Section 542.19, F.S.
[10] 15 U.S.C. ss. 1, 2
[11] Section 542.32, F.S.
[12] Section 542.20, F.S.
[13] Section 542.22, F.S. The Antitrust Division in the Attorney General's Office files civil actions under ch. 542, F.S.
[14] The state attorney must have written permission from the Attorney General to bring a civil action.
[15] Section 542.26, F.S.
[16] Section 542.23, F.S.
[17] Section 542.21(1), F.S.
[18] Section 542.21(2), F.S.
[19] Over this same time period, the Attorney General's Office has periodically received antitrust complaints regarding insurers and has issued subpoenas to the companies based on the complaints. However, due to the McCarran-Ferguson exemption, the Office has not been able to further investigate these complaints.
[20] The lawsuit charged violations of restraint of trade and commerce in violation of the Sherman Act, the Florida Antitrust law (s. 542.18, F.S.) and the Florida Unfair Practices Act (s. 626.9541, F.S.).
[21] *Hartford Fire Insurance Co. v. California,* 113 S.Ct. 2891 (1993). The suit involved Hartford, Aetna, CIGNA, and Allstate; domestic reinsurers; two domestic trade associations; a domestic reinsurance broker and reinsurers based in London.

protections afforded under McCarran. Ultimately, the defendants paid the states $36 million and agreed to make changes to their industry practices including creating a public risk institute (the Public Entity Risk Institute or PERI) to provide risk-management education and training services to state and local governments.[22]

The Attorney General filed suit in 2006 against Marsh & McLennan (Marsh), the nation's largest insurance broker, charging antitrust and RICO violations.[23] The Marsh allegations involved illegal manipulation of insurance markets to obtain improper commissions (steering commercial business to the insurers that would pay the highest commissions) and bid-rigging resulting in higher premiums being paid by Florida governmental entities, companies and nonprofit organizations. Florida has reached settlements with four of the insurers involved (AIG, ACE, Travelers and Zurich) and three insurance brokers (Aon, Brown & Brown and Willis Group Holdings) who have paid more than $20 million to resolve the lawsuits. The case against Marsh is still pending in Leon Circuit Court.

There are four major federal exemptions that are applicable to state antitrust law as it relates to the business of insurance. First is the McCarran Ferguson Act, which exempts from antitrust laws conduct that constitutes the business of insurance to the extent that such conduct "relates to the business of insurance" and is "regulated by state law."[24] Regardless of this exception, the Sherman Act (and thus the Florida prohibitions on restraint of trade and monopolies) is applicable "to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation."[25] Thus, even conduct involving the business of insurance and subject to state regulation can still give rise to antitrust liability if it constitutes a 'boycott, coercion or intimidation."

The federal courts have created a three-prong test for determining when an act is considered the business of insurance and thus exempt from antitrust law. The courts look at "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 insurer and insured, and third, whether the practice is limited to entities within the insurance industry."[26] Courts have held that the following activities are outside the business of insurance and therefore subject to antitrust laws: agreements between health insurers and independent pharmacies limiting reimbursement to the pharmacies for drugs purchased by insureds;[27] agreements between insurers and peer review committees to review reasonableness and necessity of providers' charges;[28] title search and examination services performed by title insurance companies;[29] escrow services provided in connection with title insurance;[30] and, insurance company's policy limiting ability of insurance agents to transfer positions.[31] The courts have also declared the following acts to be within the business of insurance: reinsurance;[32] agreements limiting availability of windstorm insurance;[33] agreements among auto insurers regarding repair shop rates;[34] joint rate-setting by workers' compensation insurers for assigned risks;[35] establishment by health services benefits plan of an HMO and implementation of premium pricing practices based upon characteristics of the group insured;[36] and, utilization of a captive pharmacy by a health care insurer to fill prescriptions for insureds.[37] The state regulation requirement is met when a state has regulatory authority over an activity, regardless of whether that authority is exercised.[38]

[22] Florida received $380,000 in fees and expenses. The bulk of the $36 million went into the creation of PERI.
[23] New York, Connecticut and Ohio also filed lawsuits against Marsh.
[24] 15 U.S.C. s. 1012(b)
[25] 15 U.S.C. s. 1013(b)
[26] *Union Labor Life Insurance Co. v. Pierno*, 458 U.S. 119, 129 (1982).
[27] *Group Life & Health In. Co. v. Royal Drug Co.*, 440 U.S. 205 (1979).
[28] *Union Labor Life In. Co. v. Pireno*, 458 U.S. 119 (1982).
[29] *Ticor Title In. Co. v. FTC*, 998 F.2d 1129 (3d Cir. 1993).
[30] *U.S. v. Title In. Rating Bureau of Arizona, Inc.* 700 F.2d 1247 (9th Cir. 1983).
[31] *Bogan v. Northwestern Mutual Life In. Co.*, 953 F.Supp. 532 (S.D.N.Y. 1997).
[32] *Hartford Fire In. Co. v. California*, 113 S.Ct. 2891 (1993).
[33] *Slagle v. ITT Hartford In. Group*, 102 F.3d 494 (11th Cir. 1996).
[34] *Proctor v. St. Farm Mut. Auto. In. Co.*, 675 F.2d 308 (D.C. Cir. 1982).
[35] *Uniforce Temp. Personnel Inc. v. National Council on comp. In., Inc.*87 F.3d 1296 (11th Cir. 1996).
[36] *Ocean St. Physicians Health Plan v. Blue Cross*, 883 F.2d 1101 (1st Cir. 1989).
[37] *Klamath-Lake Pharmaceutical Ass. v. Klamath Med. Ser. Bur.*, 701 F.2d 1276 (9th Cir. 1983).
[38] See footnote 5 at pgs. 25-28.

The second exemption to federal antitrust law is the "state action doctrine" which exempts conduct that is clearly authorized[39] and actively supervised[40] by the state.[41] In order for the active supervision requirement to be met, the conduct must be established as a product of deliberate state intervention.[42] For example, the state action exemption has been applied to immunize insurance rates set by a state insurance commissioner from antitrust challenge even in the absence of a state exemption for the business of insurance.[43] The third exemption is the *Keogh* or "filed rate doctrine" which excuses from antitrust law actions by a regulated party that are approved by the regulator when the state statutes indicate that the agency has sole authority to resolve disputes involving the regulated conduct.[44] The *Keogh* doctrine is not available if the state does not require that rates be approved. In the *Keogh* case, the U.S. Supreme Court ruled that "railroad rates, though fixed pursuant to conspiracy between carriers, have been approved as reasonable and nondiscriminatory by the Interstate Commerce Commission, [thus] a private shipper may not, under Anti-Trust Act, … recover damages."[45] The fourth exemption is the "*Noerr -Pennington* Doctrine" which applies to concerted petitioning of the government in most situations.[46]

Over the years the United States Congress has considered legislation to repeal the antitrust exemption for insurance activities granted under McCarran.[47] In 2007, a representative with the National Association of Insurance Commissioners (NAIC)[48] testified before the U.S. Senate Judiciary Committee and asked that Congress act carefully and evaluate the unintended consequences of outright repeal of the exemption because repeal risks transforming certain insurance practices that help consumers, promote competitiveness, and strengthen markets, into actionable violations of federal antitrust law. The representative recommended that Congress identify the precise offensive conduct it wanted to prohibit in guiding its consideration of this matter.

Florida's Regulation of Insurance and Florida's Unfair Trade Practices Act

Florida's Office of Insurance Regulation (OIR) under the Financial Services Commission (Governor and Cabinet) and the Department of Financial Services (DFS) under the Chief Financial Officer have broad authority to regulate the activities of insurers and agents under the Insurance Code.[49] The OIR approves insurer policy forms and rates, conducts periodic market conduct reviews, monitors insurer solvency, licenses insurers, and investigates and takes compliance or enforcement action against companies violating the Insurance Code or committing unfair or deceptive acts or trade practices under the Unfair Insurance Trade Practices Act (Practices Act).[50] The DFS regulates insurance agents and intervenes when appropriate to rehabilitate or liquidate insolvent insurance companies.

The Practices Act prohibits various practices by insurers and agents including: boycotts, coercion and intimidation; false statements and unfair discrimination; misrepresentations and false advertising of insurance policies; defamation; unfair claim settlement practices; misrepresentation in insurance applications; illegal dealings in premiums; interlocking ownership and management; refusing to insure; and committing acts

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[39] See *Insurance Antitrust Handbook* at pg. 32; conduct is clearly authorized when the state clearly intends to displace competition in a particular field with a regulatory structure.
[40] See *Insurance Antitrust Handbook* at pg. 33*; Southern Motor Carriers Rate Conference v. United States*, 471 U.S. 48, 61-62 (1985).
[41] *Cal. Retail Liquor Dealers Association v. Midcal Aluminum Inc.*, 445 U.S. 105 (1980).
[42] *Federal Trade Commission v. Ticor Title Insurance Co.*, 504 U.S. 637 (1992).
[43] *Insurance Co. of North America v. Insurance Comm. of Mississippi*, 116 So.2d 234 (Miss. 1959).
[44] See *Insurer Antitrust Handbook* at pg. 39, 60 (2nd ed. 2006).
[45] *Keogh v. Chicago & Northwestern Railway*, 260 U.S. 156, 161-162 (1922).
[46] See footnote 5 at pgs. 34, 119-129; E. R.R. *Presidents' Conference v. Noerr Motor Freight, Inc*., 365 U.S. 127 (1961); *United Mine Workers v. Pennington,* 381 U. S. 657 (1965). This immunity applies when a restraint of trade is the product of a legislative, regulatory, or judicial decision prompted by the joint lobbying or joint litigation efforts of competitors.
[47] In 2002, Congress established the Antitrust Modernization Commission to provide an extensive report on whether antitrust laws in the United States needed to be modernized. In May 2007, the Commission issued its report stopping short of specifically recommending the repeal of the insurance antitrust exemption under McCarran. Instead, the report recommended congressional review of the exemption as well as exemptions granted to other industries.
[48] Susan Voss, Commissioner of Insurance for the State of Iowa and Vice Chair of the NAIC Financial Conditions committee.
[49] Chapter s 624-632, 634, 635, 636, 641, 642, 648 and 651 constitute the Florida Insurance Code.
[50] Part IX of chapter 626, F.S.

constituting sliding and churning. Violators are subject to a maximum fine of $5,000 for an unwillful violation, not to exceed $20,000 for all unwillful violations arising out of the same action, and a maximum fine of $40,000 for a willful violation, not to exceed $200,000 for all willful violations arising out of the same action.[51]

Insurance Antitrust Regulation in Other States

Although every state has an antitrust law, the states differ on the extent to which they exempt the business of insurance from the provisions of the state statute. Florida and other states provide a broad exemption through applying the federal antitrust exemptions to the state antitrust law. Other states exempt insurance through the application of an exemption for all regulated industries.[52] Fifteen states use statutory provisions to specifically exempt certain insurance related activities.[53] New York exempts acts regulated under property and casualty rate provisions and Maryland exempts acts that are subject to regulation or authorized by statute, while Oklahoma states that its insurance code supersedes all inconsistent laws except that insurance holding companies are subject to the state antitrust laws.[54] Twenty six states do not specifically exempt insurance from state antitrust law.[55] Though these states lack insurance antitrust exemptions, often the antitrust laws in such states are limited and have not been aggressively applied to the business of insurance. It should also be noted that insurance antitrust exemptions may still be applicable in some of these states through statutory provisions that require using federal court interpretations of federal antitrust law to construe the state act.[56]

In the past twenty years some large, heavily populated states have enacted laws to repeal or limit the application of antitrust law to insurers.[57] California specifically subjects the business of insurance to all state laws applicable to other businesses, including the state antitrust act and the state unfair business practice laws.[58] The California statute only allows limited exemptions from the antitrust laws pertaining to certain insurer and agent practices. The statute also maintains the legality of joint market arrangements created by statute or the Insurance Commissioner to ensure the availability of insurance. The activities of joint ratemaking organizations in California are greatly curtailed, as they are only allowed to collect historical data on claims or reserves from claims and engage in joint trending with other organizations, with other joint activities subject to the antitrust laws. Texas repealed its general exemption for insurance[59] that had been modeled on McCarran and replaced it with an exemption that applies only to actions required or affirmatively approved by the Texas statutes or Texas regulators.[60] New Jersey ceased applying its antitrust exemption to joint ratemaking for private passenger auto insurance other than for collecting historical information.[61] The actions of California and New Jersey appear to have been primarily aimed at curtailing the practice of joint ratemaking through rating organizations.

Findings

If the Florida Antitrust Act is applied to the business of insurance, a number of insurer practices will be subject to state antitrust law. For most insurer practices affected by the application of state antitrust law the effect will not be to make these practices unlawful, but rather to put their legality into doubt. This uncertainty is likely to be resolved in the courts absent statutory provisions explicitly authorizing or prohibiting the various insurer practices affected.

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[51] Section 626.9521, F.S., as amended by sec. 7, chapter 2008-66, L.O.F.
[52] Iowa and Missouri are examples of states that take this approach.
[53] See *Insurance Antitrust Handbook* at pg. 37.
[54] New York Gen. Business Law s. 340(2); Maryland Code Ann., Commercial Law s. 11-203(4); Oklahoma Stat., title 36, s. 1662.
[55] Michael McRaith, Testimony of the National Association of Insurance Commissioners before the Committee on the Judiciary United States Senate Regarding State Regulation of Insurance Under the McCarran Ferguson Act (June 20, 2006).
[56] Arizona, Georgia, Nebraska, New Mexico, Oklahoma, and Oregon are states without specific insurance antitrust exemptions that direct use of federal precedent in interpreting the state antitrust law.
[57] See *Insurance Antitrust Handbook* at pgs. 40-41
[58] Cal. Ins. Code s. 1861.03
[59] Government Accounting Office, *GAO-05-816R McCarran Ferguson Federal Antitrust Exemption*, pg. 28 (2005).
[60] Tex. Bus. And Comm. Code s. 15.05(g).
[61] N.J. Stat. s. 17:33B-31

In order to fully subject the business of insurance to the Florida Antitrust Act, the legislature would have to amend exemptions referencing federal statutory law and federal court precedent. Section 542.20, F.S., exempts from the state antitrust law any activity or conduct that is exempt under Florida statutory or common law, or exempt from the provisions of the antitrust laws of the United States and thus incorporates the McCarran exemption for insurance found in the U.S. Code. Not applying s. 542.20, F.S., to the business of insurance would remove the ability of insurers to claim an antitrust exemption on the ground that the conduct in question constitutes the business of insurance, is regulated under state law, and does not constitute a boycott, coercion or intimidation. However, other immunity doctrines created by the federal courts may still be applicable due to s. 542.32, F.S., which requires that the state antitrust act be interpreted in accordance with federal court decisions. The "filed rate" doctrine which exempts from antitrust challenge rates approved by a state regulator, the "state action" doctrine which exempts acts that are permitted by state law and reviewed by state regulators, and the "Noerr-Pennington" doctrine exempting joint petitioning activities of governmental agencies are all creations of federal court decisions.

When determining if particular conduct violates the Florida Antitrust Act or the Sherman Act, the courts first determine if an insurance antitrust exemption should be applied. If no exemption is applicable, then the court will look to see whether a factual inquiry into the conduct in question is necessary to find it an antitrust violation or to determine its anticompetitive effects. If the conduct is so offensive to competition that it is "unreasonable per se" then the courts will say it is illegal without a detailed factual inquiry.[62] Practices that are per se illegal under antitrust law include price fixing,[63] tying arrangements,[64] horizontal market divisions,[65] and group boycotts.[66] If the conduct does not automatically violate antitrust law, then the conduct is evaluated under the "rule of reason." In a rule of reason analysis, the court takes a detailed look at the factual situation to determine whether the practice is an unreasonable restraint on competition because its anticompetitive effects outweigh its competitive effects.[67] Practices for which a factual "rule of reason" analysis is conducted include joint ventures, a number of vertical agreements[68] such as exclusive distributorships and dealing arrangements, territorial and customer restrictions on distributors, and forms of horizontal agreements that are not per se illegal.[69] In a rule of reason analysis the conduct in question will only be found to violate antitrust law if it actually has anticompetitive effects on the market in question, and the results of cases decided under this standard are often fact specific.

The following is an analysis of common insurance industry practices that are likely to be affected by a repeal of the insurance exemption to the Florida Antitrust Act.

Joint Ratemaking Through Rating Organizations – Joint ratemaking is one of the primary reasons that the McCarran insurance exemption was passed by Congress. The rationale is summarized by the United States Supreme Court in *Group Life & Health Insurance v. Royal Drug* where the court said, "…because it is very difficult to underwrite risks in an informed and responsible way without intra-industry cooperation, the primary concern of both representatives of the insurance industry and the Congress was that cooperative ratemaking efforts be exempt from the antitrust laws."[70] If rating organizations are made subject to antitrust law, their ratemaking activities could be considered a means of price fixing or price controls. Rating organizations operate

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[62] *All Care Nursing Service, Inc. v. High Tech Staffing Services, Inc.*, 135 F.3d 740 (Fla. 1998).

[63] See ABA Section of Antitrust Law, *Insurance Antitrust Handbook*, pg. 10 (2nd Ed. 2006). Price fixing is an agreement among two or more competitors to set the price of a product. It can also include fixing an element of a product's price if the purpose or result of that action is to significantly decrease price competition.

[64]See footnote 5 at pg. 16. Tying arrangements occur when a seller will only sell a product or service on the condition that another product or service is also purchased.

[65] See footnote 5 at pg. 11. Horizontal market divisions occur when competitors allocate territory or customers among themselves.

[66] See footnote 5 at pg. 11; *Greenberg v. Mount Sinai Medical Center of Greater Miami, Inc.*, 629 So.2d 252 (Fla. 3rd DCA 1993).

[67] See *All Care Nursing* 135 F. 3d 740.

[68] A vertical agreement is an agreement among companies in the same distribution scheme such as a manufacturer and a wholesaler.

[69] See footnote 5 at pgs. 12-16.

[70] 440 US 205 at 221; United States Government Accountability Office, *Legal Principles Defining the Scope of the Federal Antitrust Exemption for Insurance B-304474*, pg. 19 (March 4, 2005).

in the property and casualty and workers' compensation lines of insurance. They calculate their rates by gathering from member insurers historic information on their past losses. The loss cost information is used to develop prospective loss costs, which are predictions of future losses. Loss costs are the primary component in ratemaking in the workers' compensation and property and casualty lines of business. If the rating organization calculates a final rate for insurers (such as the National Council of Compensation Insurance does for workers' compensation carriers in Florida) then the expected expenses and necessary profits of insurers are included with loss costs in calculating the final rate. Florida allows multiple insurers to be members of rating or advisory organizations for the purpose of making rates for most property and casualty lines of insurance other than for private passenger automobile insurance rates.[71]

If antitrust law is applied to the business of insurance, the gathering of historic data should be found permissible as trade associations in other businesses are permitted to gather historic data under current antitrust law.[72] However, calculations of prospective loss costs are likely to be found violations of antitrust law. The Sherman Act, which Florida antitrust law is modeled on, prohibits price fixing both with regard to the final price as well as any element of pricing.[73] Such acts are usually considered automatic "per se" violations of the antitrust law. If development of loss costs were examined under the "rule of reason," the practice would still be in doubt as the rating organization would have to prove that the benefits of engaging in coordinated joint ratemaking outweigh the anticompetitive effects of coordinated pricing among competitors. Calculating an end rate that insurers agree to use is per se illegal under the antitrust law as direct price fixing.[74]

In the event that antitrust law is applied to the business of insurance, the legality of practices such as loss cost and rate development by rating organizations would depend on whether the statutes specifically authorize such practices. If the Legislature determines that joint ratemaking as currently authorized by statute should continue, a specific authorization within the antitrust statute for such activities is necessary to provide clear evidence that the state antitrust laws do not apply to these activities.

Standardization of Policy Forms – Florida permits insurers to act in concert with each other to create insurance policy forms through rating or advisory organizations.[75] Currently, standardization of policy forms in Florida qualifies for the McCarran exemption and the state action doctrine due to being directly authorized and regulated by the state. The primary benefit of standardized forms is that they make it easier to gather uniform data on loss experience, which should lead to more accurate rates and pricing of insurance by rating organizations. Other potential benefits include increased consumer understanding of policy forms which arguably helps market competition[76] and greater efficiencies in the regulatory approval of forms. However, absent an antitrust exemption, policy form standardization would come under antitrust scrutiny. Widespread use of standardized forms likely reduces the different types of insurance products available for sale, could potentially be used to manipulate pricing as terms are redefined, and could be used by some members of the rating organization to create standards that favor them, to the detriment of competitors within the same organization. In the absence of an antitrust exemption for standardized policy forms, antitrust challenges to the practice would likely be decided under a rule of reason standard where the courts look at the anticompetitive effects of such practices on price and consumer choice.

Joint Collection of Underwriting Information – Groups of insurers join together to collect data on the risks they are insuring, often for underwriting purposes or to detect fraud.[77] Unless specifically prohibited by statute, such

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[71] Section 627.314(1), F.S.

[72] See *Sugar Inst., Inc. v. United States*, 297 U.S. 553 (1936); *Maple Flooring Manufacturers Assoc. v. United States*, 268 U.S. 563 (1925).

[73] See ABA Section of Antitrust Law, *Insurance Antitrust Handbook*, at pg. 49 (2nd Ed. 2006), citing: *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643 (1980)(agreement to eliminate interest-free credit); *United States v. Am. Radiator and Standard Sanitary Corp.*, 433 F.2d 174, 185-188 (3rd Cir. 1970)(agreement to limit discounts); *Plymouth Dealers Assoc. v. United States*, 279 F.2d 128, 130 (9th Cir. 1960)(agreement on cash down payment requirements and uniform trade-in amounts).

[74] United States v. South-Eastern Underwriters Assoc., 322 U.S. 533 (1944). This is the case that led to the passage of the McCarran Ferguson Act. One of indictments sought in the case was the creation of end rates by a rating organization.

[75] Section 627.314(1)(b), F.S.

[76] See ABA Section of Antitrust Law, *Insurance Antitrust Handbook*, pgs. 65-66 (2nd Ed. 2006).

[77] See *Insurance Antitrust Handbook* at pgs. 88-89

practices are permitted under current antitrust law. Regardless of the insurance antitrust exemption, the United States Supreme Court has stated that collecting customer-specific information for fraud detection purposes does not violate antitrust laws.[78] Such practices would be legal in Florida even if all insurance antitrust exemptions are eliminated. With regard to collecting data for underwriting purposes, absent antitrust immunity the practice would be analyzed under the rule of reason standard and likely be defended on the grounds that the larger pools of data gathered through joint collection result in more accurate underwriting data and thus more efficient and well informed underwriting decisions. However, absent an antitrust exemption, it is likely that insurers would be prohibited from reaching agreements on making underwriting decisions using such data, as such practices could be interpreted as anticompetitive joint action.

Joint Collection of Pricing Information – Most insurers collect data on the premium that other insurers are charging for similar products. The information can be used by an insurer to determine if its rates are competitive. However, when insurers cooperate to exchange information on pricing antitrust scrutiny arises because such information can be used in price fixing schemes. Currently the exchange of such information is generally afforded McCarran immunity on the grounds that such information is used to fix rates, which in turn greatly affects the price charged to policyholders and the contractual relationship with the insured.[79] Removal of the antitrust exemption could subject this practice to antitrust scrutiny.

Residual Market Plans – A residual market plan consists of multiple insurers cooperating to write policies for risks that cannot obtain coverage in the regular market. Absent an antitrust exemption, residual market plans would be analyzed under the rule of reason and likely would not violate antitrust law because such arrangements do not harm competition in the private market due to the fact they take on risks that the private market refuses.[80]

Insurance Agents – In the absence of antitrust immunity, concerted actions by multiple insurance agents, multiple insurers with regard to agent practices and fees, and agreements between companies and agents could raise antitrust concerns. Some actions would be found per se unlawful price fixing. Examples of such conduct include competing agents agreeing to demand certain commissions from insurers, an agreement among agents to not rebate commissions (rebating commissions is authorized by Florida law[81]), or a group boycott of certain insurers by independent agents. Similarly, multiple insurers working in concert to limit agent compensation would be per se illegal.

A number of agreements between insurers and independent agents that do not involve price fixing are subject to a rule of reason analysis to determine whether an antitrust violation has occurred. Common insurance industry practices that would be analyzed under a rule of reason analysis include exclusive agent relationships and contracts that limit the market in which the agent may sell the insurer's policies.

Insurer/Provider Relationships – Insurers often negotiate the reimbursement level paid to providers of insured services (such as physicians or automobile repair shops). Currently, the McCarran exemption is not applicable to a relationship between an insurer and a third-party provider of non-insurance goods because the relationships are not considered the business of insurance.[82] Relationships between insurers and providers are considered vertical agreements and analyzed under the rule of reason to determine if they violate the Sherman Act prohibitions against restraints of trade and monopolization. Most courts have concluded that an insurer may negotiate favorable pricing and terms, but may not fix prices or restrict the provider's practices beyond those in the immediate transaction.[83]

Court precedent also indicates that monopolization does not occur when an insurer with a large portion of the market negotiates lower prices with providers.[84] Insurers are also permitted to selectively contract with certain

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[78] *Cement Manufacturers Protective Assoc. v. United States*, 268 U.S. 588 (1925).
[79] See *id* at pg. 64; *In re Workers' Comp. Ins. Antitrust Litigation*, 867 F.2d 1552, 1556 (8th Cir. 1989).
[80] See *Insurance Antitrust Handbook* at pgs. 79-80.
[81] Section 626.572, F.S.
[82] See *Royal Drug*, 440 U.S. 205 (1979).
[83] *Quality Auto Body, Inc. v. Allstate Ins. Co*. 660 F.2d 1195 (7th Cir. 1981).
[84] See *Insurance Antitrust Handbook*, pg. 107.

providers to the exclusion of others[85] so long as the insurer does not have a monopoly or a substantial amount of power in the relevant market.[86] If an insurer has substantial market power, then the courts will look to see if their contracting practices create undue obstacles for competitors or make it difficult for competitors to enter a market. Agreements among multiple insurers when dealing with providers are generally given closer scrutiny than the insurer-provider relationship. It is per se unlawful price fixing under antitrust law for insurers to agree to fix the reimbursement amounts given to providers.[87] Multiple insurers also cannot refuse to deal with providers absent specific authority allowing them to act as a purchasing cooperative. Because antitrust immunity is often not applicable to dealings between insurers and providers, eliminating the exemption is unlikely to affect insurer practices in this area.

Boycotts – Boycotting is a prohibited practice under current Florida antitrust laws as boycotts do not qualify for the McCarran exemption and are unlikely to qualify for other exemptions unless the practice in question is specifically authorized by statute or is based on a rate approved by a regulator. The United States Supreme Court in *Hartford Fire Insurance Co. v. California*[88] has defined a boycott for purposes of antitrust law when parties, "in order to coerce a target into certain terms on one transaction…refuse to engage in other, unrelated or collateral transactions with the target."[89] In a boycott, "unrelated transactions are used as leverage to achieve the terms desired."[90] This is different than a "cartelization" where parties acting in concert in an attempt to force an outside party to agree to certain terms, has the effect of reducing competition in the marketplace. Thus, group concerted action designed to force another party to do a certain thing does not constitute a boycott. Concerted action among parties is often prohibited under the Sherman Act and thus would be prohibited under the Florida antitrust laws. However, in the insurance context concerted action often does not qualify for the McCarran boycott exemption and thus does not violate the state antitrust law. Therefore, eliminating the insurance exemption could subject such concerted action to a rule of reason analysis as to whether it violated that state antitrust law. If the concerted action entailed price fixing or constituted a market allocation scheme then it would be per se unlawful.

An example of the difference between a boycott and concerted action can be seen in *Slagle v. Hartford*[91], a case in which the plaintiff alleged that insurers belonging to the Florida Windstorm Underwriting Association[92] (FWUA) engaged in price fixing of windstorm coverage by a joint refusal to write windstorm coverage in certain geographic areas of the state, thus forcing customers to buy windstorm coverage from the insurers via the FWUA at higher rates. The court affirmed a judgment on the pleadings on the part of the defendant insurers, finding for the defendant insurers despite interpreting the facts in the plaintiff complaint as being true and interpreting in the most favorable light possible on behalf of the plaintiffs. The court ruled that the plaintiff alleged that the defendant insurers, "conspired to fix prices at an unlawful rate, but as clearly announced in *Hartford*, a conspiracy to charge an inflated price is not a 'boycott.'" The plaintiff "simply fails to allege that the appellees are using 'unrelated transactions'…as leverage to achieve the terms desired. Accordingly…the facts alleged…do not come within the boycott exception to the McCarran Ferguson Act."

Options

Antitrust laws exist for the purpose of maintaining competition in trade and commerce through the prohibition of anticompetitive practices. The exemption from antitrust laws granted to the business of insurance exists primarily

[85] See *Insurance Antitrust Handbook*, pg. 110; *Cont'l Orthopedic Appliances, Inc. v. Health Ins. Plan,* 956 F. Supp. 367, 373 (E.D.N.Y. 1997); *Barry v. Blue Cross,* 805 F. 2d 866 (9th Cir. 1986).
[86] See *Insurance Antitrust Handbook*, pg. 110-111; *Stop & Shop Supermarkets Co. v. Blue Cross & Blue Shield*, 239 F. Supp.2d 180, 193 (D.R.I. 2003).
[87] *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219 (1948).
[88] 509 U.S. 764 (1993).
[89] *Hartford Fire Ins. v. California*, 509 U.S. 764 (1993).
[90] *Uniforce Temp. Personnel v. National Council on Compensation Ins., Inc.,* 87 F.3d 1296, 1300 (11th Cir. 1996).
[91] 102 F.3d 494 (11th Cir 1996).
[92] The association was the insurer of last resort in Florida for homeowners who could not find windstorm insurance on the private market. Property insurers licensed in Florida were required to be members of the FWUA and provide windstorm coverage to eligible applicants unable to obtain coverage in the private market. The various member insurers would pay for the association's losses on a proportionate basis. The FWUA was abolished with the establishment of Citizens Property Insurance Company.

to preserve insurer practices that are considered beneficial to the insurance market. These beneficial practices primarily include permitting the pooling of data to allow insurers to benefit from a broader base of information to spread risk and set rates and allowing insurance consumers to accurately and more easily compare products from different companies by permitting the creation of standard policy forms. The antitrust exemption has been narrowed through judicial interpretations of the definitions of the "business of insurance," "regulated by state law," and "boycott, coercion or intimidation." Not maintaining the exemption would likely result in litigation by placing insurers in the untenable position of being subjected to litigation under the Florida Antitrust Act for activities either approved or authorized under Florida's insurance code. Removing the exemption would also allow private parties, along with the Attorney General, to initiate causes of action against insurers under the Act.

However, policymakers may believe that the current exemption for the business of insurance is broader than is necessary and may want to add protections from anticompetitive behavior that may not be currently prohibited or effectively prevented. In doing so, the Legislature should first determine what insurer practices specifically authorized by the Insurance Code are likely to be affected (by removing the exemption) and whether such practices should be preserved. In particular, current laws allowing multiple insurers to be members of rating or advisory organizations for the purpose of making rate and form filings for most lines of property and casualty insurance should potentially be overridden or limited due to application of the state antitrust laws to the business of insurance, depending on how the legislation was written and interpreted by the courts. Rather than relying on judicial interpretation, the Legislature should evaluate the merits of current insurance regulations as to rates and forms and determine whether the regulatory system serves to increase competition or otherwise benefit insurance consumers and amend the provisions as appropriate. Other laws that may come under scrutiny are those that allow or require insurers to participate in joint underwriting associations for providing insurance to persons unable to obtain coverage in the voluntary market. Pending any reexamination of their merits, the Legislature should identify such laws or authorized practices as "safe harbors" that would not be prohibited by state antitrust laws.

Alternatively, or in addition to a specific list of "safe harbor" practices, the Legislature should provide that any practice that is expressly or clearly authorized by the Insurance Code and actively supervised by the Office of Insurance Regulation or the Department of Financial Services is allowed under the state antitrust laws. This would, in effect, codify the "state action doctrine" that the courts have followed in interpreting the federal antitrust laws and which might be applied even without codification, due to the state antitrust law's requirement to follow common law interpretations of the federal antitrust laws. The Legislature should specify that state regulation of insurance rates and other insurance practices does not exempt the business of insurance from state antitrust laws, but only protects conduct that is expressly authorized and actively supervised by the state. A general exemption such as this would still rely on judicial interpretation of particular insurance practices that would be subject to state antitrust laws, but would have the benefit of including practices that the Legislature may inadvertently omit in enacting an exclusive list.

A specific or general protection of authorized insurance practices would still allow for application of the state antitrust laws to collusive and anticompetitive insurance practices that are more broadly protected under the current federal and state antitrust laws. For example, collusion among insurers or agents with regard to rates, products, policy provisions, or market allocations may be conducted outside of the rating organization or regulatory process, yet may not be considered to be acts of "boycott, intimation, or coercion" that are currently prohibited. As previously described, the courts have defined a "boycott" as using unrelated transactions as leverage to achieve the terms desired. Merely acting as a "cartel" to force an outside party to agree to certain terms is not necessarily a boycott. Such concerted actions that have the effect of reducing competition in the marketplace would potentially be prohibited by a broader application of the state antitrust laws to the business of insurance.