

Competition and Regulation in the Insurance Sector: Reassessing the McCarran-Ferguson Act¹

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This conference was convened to consider the role of competition law in light of some modern, and some not so modern, developments in corporate structure, recognizing that the lines between private and governmental entities are, and have always been, indeterminate. As Professor Chris Sagers points out, the world has never been bipolar, neither fully regulated by government nor purely private.² The program will consider developments in six economic

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² Chris Sagers, *Much Ado About Probably Pretty Little: McCarran-Ferguson Repeal in the Health Care Reform Effort*, 28 YALE L. & POL'Y REV. 325, 333 (2010); Chris Sagers,

sectors, including insurance, financial institutions, telecommunications, transportation, health care, and energy, in light of the shifting boundaries between public and private action. Three approaches are proposed to analyze these sectors: public-private partnerships, government-sponsored enterprises, and standard-setting activities. At the outset, then, it is appropriate to assess which narrative offers the most insights for the insurance sector and to challenge the limits of the model. There is an unstated fourth paradigm, plain on the face of the statute, which explains the McCarran-Ferguson Act³ and its power. Reviewing the proposed paradigms seriatim, first, is the public-private partnership paradigm, or P3, approach.

P3, described by Professor Michael Likosky, promotes governmental and private industry cooperation, primarily in large infrastructure projects, including, among other things, highways, bridges, railways, and water supply projects.⁴ P3 projects are intended to use “modest public subsidies [that] can be used to leverage large amounts of private capital,”⁵ essentially through the lease of publicly constructed infrastructure projects to private operators.⁶ The P3 partnership model must be carefully studied to determine whether the proposed privatization offers as many benefits as are promised and whether there are worrisome hidden costs.⁷ At

Standardization and Markets: Just Exactly Who Is the Government, and Why Should Antitrust Care?, 89 OR. L. REV. 785 (2011).

³ McCarran-Ferguson Act, Pub. L. No. 79-15, 59 Stat. 33 (1945) (codified at 15 U.S.C. §§ 1011–1015 (2006)).

⁴ Michael Likosky, *Secretary Chu's Bank*, HUFFINGTON POST (July 1, 2009), http://www.huffingtonpost.com/michael-likosky/secretary-chus-bank_b_224545.html.

⁵ *Id.*

⁶ See Michael Likosky, *P3s: The Problem with Tolls*, HUFFINGTON POST (Feb. 8, 2010), http://www.huffingtonpost.com/michael-likosky/p3s-the-problem-with-toll_b_453217.html; Michael Likosky, *A Call for Excellent Public-Private Partnerships*, HUFFINGTON POST (June 17, 2009), http://www.huffingtonpost.com/michael-likosky/a-call-for-excellent-publ_b_216598.html; Michael Likosky, *A Drinking Water-Backed Economy*, HUFFINGTON POST (Mar. 23, 2009), http://www.huffingtonpost.com/michael-likosky/a-drinking-water-backed-e_b_177879.html; Michael Likosky, *Enlisting Goldman in Our Recovery*, HUFFINGTON POST (Apr. 28, 2010), http://www.huffingtonpost.com/michael-likosky/enlisting-goldman-in-our_b_554894.html; Michael Likosky, *Ed Rendell: Hardest Working Man in Infrastructure*, HUFFINGTON POST (July 22, 2009), http://www.huffingtonpost.com/michael-likosky/ed-rendell-hardest-workin_b_243272.html.

⁷ See Ellen Dannin, *Crumbling Infrastructure, Crumbling Democracy: Infrastructure Privatization Contracts and Their Effects on State and Local Governance*, 6 NW. J.L. & SOC. POL'Y 47 (2011); Letter from Ellen Dannin and Phineas Baxandall, Senior Analyst for Tax and Budget Policy at the U.S. Pub. Interest Research Grp., to Members of the

the end of the day, however, this model is most applicable to the infrastructure example, in which the government-built development project is constructed and then privatized. It offers modest insight into competition in the insurance sector because some insurance products are produced and benefits are provided by governmental entities, including, for example, flood insurance,⁸ Medicare,⁹ Medicaid,¹⁰ and Social Security.¹¹ Privatization of these programs is the subject of robust debate, but no serious P3 program has been proposed in the sector, and there are no calls, for example, for partnerships between insurance companies and governmental entities as in the infrastructure sense.

The second model, *government-sponsored enterprises*, is a similarly imperfect fit to the insurance industry. Government insurance programs exist, as we have seen, but add little to the consideration of competition in the sector.

Third, the *standard-setting model* may offer the most insights for the antitrust-specific provisions of the McCarran-Ferguson exemption for the American insurance sector. The paradigm is not novel: firms have long engaged in cooperative behavior, including organizing industry trade associations, exchanging information, and promulgating industry standards. Trade associations have been a feature of American business since early in the last century and were favored by, among others, Theodore Roosevelt.¹² Courts have

House Transp. Comm. (June 27, 2008) (contending that the hidden costs of the proposed seventy-five-year lease include lack of oversight and accountability, and ultimately provide excessive subsidies from taxpayers to the private turnpike operators).

⁸ The National Flood Insurance Program (NFIP) is a federal program administered by the Federal Emergency Management Agency (FEMA). Created in 1968, the insurance is available to private homeowners, businesses, and renters located in communities that have joined the NFIP. The insurance is sold by some ninety private insurers, but the rates are determined by the NFIP. National Flood Insurance Program Extension Act of 2010, Pub. L. No. 111-196, 124 Stat. 1352 (2010); Bunning-Bereuter-Blumenauer Flood Insurance Reform Act of 2004, Pub. L. No. 108-264, 118 Stat. 712 (2004); National Flood Insurance Reform Act of 1994, Pub. L. No. 103-325, tit. V, 108 Stat. 2160, 2255-87 (1994); Flood Disaster Protection Act of 1973, Pub. L. 93-234, 87 Stat. 975 (1973); National Flood Insurance Act of 1968, Pub. L. 90-448, 82 Stat. 572 (1968). The FEMA implementing regulations are at 44 C.F.R. §§ 187-330 (2009).

⁹ 42 U.S.C. §§ 1395-1395hhh (2006).

¹⁰ *Id.* §§ 1396-1396w-5.

¹¹ *Id.* §§ 301-1397jj.

¹² See ABA SECTION OF ANTITRUST LAW, TRADE AND PROFESSIONAL ASSOCIATIONS: AVOIDING THE ANTITRUST MINEFIELD (1994), GEORGE P. LAMB & CARRINGTON SHIELDS, TRADE ASSOCIATION LAW AND PRACTICE (rev. ed. 1971). Justice Brandeis's

recognized the procompetitive value¹³ and obvious risks¹⁴ of associations, self-regulation, and information exchanges because these activities may enhance or reduce competition, depending on the particular situation. At one extreme, a trade association may not throw the “gauzy cloak”¹⁵ of cooperation over naked cartel behavior, ranging from price fixing to market allocation. Thus, competitors that use their trade association to promulgate fee schedules have not merely set industry standards but have engaged in per se illegal price fixing.¹⁶ Information exchanges among competitors may be pro- or anticompetitive depending on a range of factors, so they are analyzed under the rule of reason.¹⁷ Another typical role of the association is

statement in *Chicago Board of Trade*, a case involving the rules and regulations of a trade association, was the first articulation of the rule of reason in antitrust analysis:

[T]he legality of an agreement or regulation cannot be determined by so simple a test, as whether it restrains competition. Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts.

Chicago Bd. of Trade v. United States, 246 U.S. 231, 238 (1918).

¹³ See, e.g., *Cal. Dental Ass’n v. Fed. Trade Comm’n*, 526 U.S. 756 (1999) (holding the rule of reason is required to analyze ethical restrictions of a professional association); *Nw. Wholesale Stationers, Inc. v. Pac. Stationary & Printing Co.*, 472 U.S. 284 (1985); *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85 (1984) (holding the need for some cooperation in a college sports association justifies the rule of reason analysis, though agreements are not necessarily legitimate under that standard); *Maple Flooring Mfrs. Ass’n v. United States*, 268 U.S. 563 (1925).

¹⁴ See, e.g., *Nat’l Soc’y of Prof’l Eng’rs v. United States*, 435 U.S. 679 (1978) (holding that an association prohibition of competitive bidding was not justified by a public health, safety, and welfare claim); *United States v. U.S. Gypsum Co.*, 438 U.S. 422 (1978) (holding that, in the criminal context, a mens rea of specific intent is required for exchange of price information); *United States v. Container Corp. of Am.*, 393 U.S. 333 (1969); *Am. Column & Lumber Co. v. United States*, 257 U.S. 377 (1921) (holding a trade association program that required reporting of sales and price data, and at which price and output restrictions were discussed, was unreasonable).

¹⁵ See *Cal. Retail Liquor Dealers Ass’n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 106 (1980) (finding that slight state involvement in the state regulation of liquor prices confirmed that the state merely acquiesced to private price fixing).

¹⁶ *Goldfarb v. Va. State Bar*, 421 U.S. 773, 781–83 (1975).

¹⁷ See, e.g., *United States v. Citizens & S. Nat’l Bank*, 422 U.S. 86, 113 (1975) (holding the exchange of price information is not per se illegal); *Container Corp. of Am.*, 393 U.S. at 336–37 (holding that relevant factors of unreasonable restraint of trade include the

the promulgation of industry standards. Private action that receives governmental acquiescence to discriminatory standards is not entitled to immunity.¹⁸ Self-regulation, on the other hand, if it comports with due process, may not raise competition issues.¹⁹ The insurance sector is characterized by data exchanges and adoption of industry standards, including, for example, model policy provisions. Whether or not particular activities are unlawful is analyzed under the rule of reason.

The fourth paradigm, which more precisely describes regulation and competition in the insurance sector, is the shifting boundary between *state* and *federal* regulation instead of a boundary between the *public* and *private* sectors. The McCarran-Ferguson Act was adopted to protect firms acting in the business of insurance from federal antitrust scrutiny, but its language and impact goes far beyond federal competition law. So broad is the exemption that the modern effect of the Act only incidentally concerns antitrust. The majority of modern cases concern reverse preemption, not antitrust immunity. Fundamentally, the Act reifies the boundaries between federal and state power; it is, at base, an allocation of power and an affirmation of the federalism paradigm. Therefore, my argument is orthogonal to the proposition of the conference that posits the fundamental distinction as lying between public and private in the insurance sector. In this sector, the distinction is between different manifestations of public power. Moreover, the defense of the antitrust boundaries is a skirmish, not the subject of the main purpose of the McCarran-Ferguson Act, which is, as ever, federalism.

My provisional conclusions are as follows: the antitrust exemption is unnecessary, but even if it were eliminated, it would have protected little. Reverse preemption, which could be viewed as mere mischief, an unintended consequence, is, in fact, at the heart of this model and exposes the points of the Act: preservation of the boundaries, allocation of power, and deference among the states and federal government.

This Article discusses, first, the antitrust immunity aspect of the McCarran-Ferguson Act, including the asserted justification for the exemption and whether it is required in the era of modern antitrust interpretation. Next, this Article discusses the legislation proposed to

market's structure, nature of the prices exchanged, and other controlling circumstances); *Cement Mfrs. Protective Ass'n v. United States*, 268 U.S. 588 (1925); *Maple Flooring*, 268 U.S. 563.

¹⁸ *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 499–500 (1988).

¹⁹ *See Silver v. N.Y. Stock Exch.*, 373 U.S. 341, 364–67 (1963).

repeal the exemption and why it has failed, and it offers comparative examples of competition and exemption in the insurance sector from the European Union. Finally, this Article concludes by returning to the first principles of the entire McCarran-Ferguson Act, which reach more broadly than antitrust and implicate the structure of federal and state authority.

I

INSURANCE AND COMPETITION: THE STATUTORY AND COMMON LAW BACKGROUND

The McCarran-Ferguson Act provides a limited exemption from the American federal antitrust laws. It is a complex and controversial doctrine that seeks to chart an appropriate balance between competition and the need of firms in the insurance industry to share information that may be competitively sensitive and to allow the firms to provide better services to their customers. Effective antitrust enforcement and information exchanges among competitors may, depending on the circumstances, promote consumer welfare. Consumer welfare is generally recognized as the touchstone and dominant goal of competition laws and enforcement.

Additionally, the analysis contemplated by the statutory scheme directly implicates the allocation of competence between the federal and state governments. Thus, the allocation of power and deference is at the center of this doctrine, and issues of federalism predominate. This facet of the American political system is relevant for other jurisdictions: whether similar antitrust exemptions are necessary in their circumstances.

Therefore, in analyzing the McCarran-Ferguson Act, this Article starts from the perspective that the competitive process usually promotes consumer welfare in the form of increased output, lower prices, and allocative efficiency, and this process may serve distributive goals. Regulation is appropriate to deal with market failures and true natural monopolies and to advance social welfare. Antitrust “exemptions should be made only where ‘compelling evidence of the unworkability of competition or a clearly paramount social purpose’ exists, and any exemptions should use the ‘least anticompetitive method of achieving the regulatory objective.’”²⁰

²⁰ ANTITRUST MODERNIZATION COMM’N, REPORT AND RECOMMENDATIONS 336 (2007) (quoting NAT’L COMM’N FOR THE REVIEW OF ANTITRUST LAWS AND PROCEDURES, REPORT TO THE PRESIDENT AND THE ATTORNEY GENERAL 177 (1979)),

This Article discusses recent developments in McCarran-Ferguson law and policy in four areas.

First, there has been considerable debate among the antitrust bar, the insurance industry, enforcement agencies, and consumer representatives on the merits and potential competitive risks of the McCarran-Ferguson exemption. The American Bar Association has long proposed a compromise position to replace the existing exemption, but this proposal, too, has never been adopted. The Antitrust Modernization Commission held extensive hearings on all aspects of substantive antitrust doctrine and enforcement, including exemptions and antitrust immunity, and it issued a report warning against excessive exemptions, but it did not recommend specific reform or repeal of the McCarran-Ferguson Act. The National Association of Attorneys General also opposes industry-specific legislation that would weaken antitrust enforcement, and it therefore supports a complete repeal of the McCarran-Ferguson exemption for the insurance industry. National consumer groups join in recommending total repeal, while the insurance industry supports a strong exemption. Finally, some have approached the federalism question directly and urge repeal of the McCarran-Ferguson Act and substitution of federal, not state, regulation of the insurance industry and ultimate preemption of federal antitrust laws in deference to a national regulatory scheme.

Second, congressional hearings have contributed to the debate. Several bills have been introduced and various committees have held periodic hearings, but no legislation has been adopted by the U.S. Congress. The general trend of proposed legislation began with recommendations to modify the scope of the immunity and the particular type of insurance products covered. Then, the trend moved toward complete repeal of the exemption. During the last Congress, there were calls for repeal and permissive federalization of insurance regulation, effectively shifting the boundaries of federal and state power, but those proposals failed to be adopted and have not been reintroduced.

Third, there have been few recent Supreme Court cases but many, and conflicting, cases from lower federal and state courts. The overall effect of these cases has been to complicate the already complex state of the law. To the extent that the McCarran-Ferguson

Act was designed to clarify the balance of state and federal power to regulate and to set a clear substantive standard, the project has failed.

Fourth, antitrust immunity is generally discouraged by international policy groups, including the International Competition Network (ICN) and the Organization for Economic Cooperation and Development (OECD). However, a modified version of the American immunity covering information exchanges among firms in the insurance industry is the subject of a block exemption of the European Commission. The original block exemption, covering four categories of agreements, was adopted in 2003 and was due to sunset in 2010, until it was partially extended to 2017. As part of its oversight responsibilities, the European Commission's enforcement agency, Directorate General for Competition of the European Commission (DG Comp), conducted a sector inquiry into the insurance sector and opened a public consultation into the need for the block exemption. DG Comp concluded, as a preliminary matter, that claims for the block exemption were unpersuasive, and it was inclined to allow the block exemption to expire and rely on the general competition rules to protect necessary and procompetitive activities in the business of insurance. However, after a thorough review, the Commission decided to renew two of the exemptions: joint collection and distribution of risk tables and studies, as well as some risk pools. Agreements on "standard policy conditions (SPCs) and security devices" were not renewed.²¹

Thus, the future of the McCarran-Ferguson Act and review of similar exemptions by other jurisdictions implicates important issues of substantive antitrust law and policy, legislative priorities, federalism concerns, and international harmonization.

II

THE DEBATE AND COMMENTARY: PRO- AND ANTICOMPETITIVE EFFECTS

The McCarran-Ferguson Act provides an absolute exemption from the federal *antitrust* liability for activities that meet three conditions: (1) the conduct must be the "business of insurance"; (2) it must be "regulated" by state law; and (3) it must not consist of "boycott,

²¹ Communication from the Commission on the Application of Article 101(3) of the Treaty on the Functioning of the European Union to Certain Categories of Agreements, Decisions and Concerted Practices in the Insurance Sector, 2010 O.J. (C 82) 20.

coercion or intimidation.”²² In an act of reverse preemption, the McCarran-Ferguson Act also provides that state laws regulating the business of insurance preempt *any other* federal law unless that federal law relates *specifically* to the business of insurance.²³

The McCarran-Ferguson Act was a direct response by Congress to a decision of the U.S. Supreme Court explicitly holding that the insurance industry and its various activities were conducted in interstate commerce and were, therefore, affirmatively subject to the prohibitions of federal antitrust law.²⁴ Thus, the McCarran-Ferguson Act constitutes an important alteration of the shape of American antitrust law, which has been identified as the “Magna Carta of free enterprise” and was dedicated to protecting competition and the competitive process over the individual competitors.²⁵

American antitrust analysis has evolved since the McCarran-Ferguson exemption was thought to be necessary to protect the insurance industry and permit it to serve its customers without fear of overzealous antitrust enforcement. By approximately the time the McCarran-Ferguson Act was adopted in 1945, the Supreme Court had created *per se* rules against horizontal price-fixing,²⁶ market allocation,²⁷ boycotts,²⁸ vertical resale price maintenance,²⁹ and tying

²² McCarran-Ferguson Act, Pub. L. No. 79-15, §§ 2–3, 59 Stat. 33, 34 (1945) (codified at 15 U.S.C. §§ 1012–1013 (2006)). The Act provides:

No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance; *Provided*, That after June 30, 1948, . . . the Sherman Act, . . . the Clayton Act, and . . . the Federal Trade Commission Act, . . . shall be applicable to the business of insurance to the extent that such business is not regulated by State law.

Id. § 2(b).

Nothing contained in this chapter shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation.

Id. § 3(b).

²³ *See id.* § 2(b).

²⁴ *United States v. Se. Underwriters Ass’n*, 322 U.S. 533, 561 (1944).

²⁵ *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 610 (1972).

²⁶ *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940).

²⁷ *Addyston Pipe & Steel Co. v. United States*, 175 U.S. 211 (1899); *see also Palmer v. BRG of Georgia, Inc.*, 498 U.S. 46 (1990); *Topco Assocs., Inc.*, 405 U.S. 596; *United States v. Sealy, Inc.*, 388 U.S. 350 (1967); *Timken Roller Bearing Co. v. United States*, 341 U.S. 593 (1951).

²⁸ *Fashion Originator’s Guild of Am. v. FTC*, 312 U.S. 457 (1941); *E. States Retail Lumber Dealers’ Ass’n v. United States*, 234 U.S. 600 (1914).

arrangements.³⁰ Interference with market prices was a particular concern, and “price fixing” was defined broadly to include uniform prices, maximum or minimum prices, and market manipulation.³¹ “[Prices] are fixed because they are agreed upon,” said the Supreme Court in *Socony-Vacuum*, and a conspiracy “formed for the purpose . . . of raising, depressing, fixing, pegging, or stabilizing the price . . . is illegal per se.”³²

Agreements among competitors to merely exchange information were also risky, depending on the kind of information, the participants, and the use of the data. Sharing information may literally constitute price fixing, it may facilitate price fixing, or it may be necessary to create a new product and satisfy consumer demand. The important issue in each situation is whether there was an agreement, express or implied, to restrain trade.³³ Direct exchanges of current or future prices between competitors themselves is most competitively risky, especially in concentrated industries, and Supreme Court opinions suggested that such exchanges could be per se illegal.³⁴ Because the insurance sector relies on data collection and dissemination, standard setting, and other joint activities, potential antitrust challenges were perceived as a threat to the industry.³⁵

The shock to the insurance industry finding itself subject to these rigid antitrust standards by the operation of constitutional jurisprudence must have been extreme. The business of insurance had a long relationship with state regulatory systems and felt a need to share statistics and data as part of its standard business practice, and states guard the boundaries of their power jealously. This customary business practice was abruptly called into question by *South-Eastern Underwriters*, and the obvious solution would have been to return to prior practice by granting an antitrust exemption and leaving state regulation in place.

Modern antitrust analysis has developed since the original enunciation of strict per se rules in cases involving horizontal

²⁹ *Dr. Miles Med. Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911), *overruled by* *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007) (holding that the rule of reason applied to vertical price restraints).

³⁰ *Int'l Salt Co. v. United States*, 332 U.S. 392 (1947).

³¹ *Socony-Vacuum Oil Co.*, 310 U.S. at 222–23.

³² *Id.*

³³ *Shaw v. Delta Air Lines, Inc.*, 430 U.S. 519, 525 (1983).

³⁴ *United States v. Container Corp. of Am.*, 393 U.S. 333, 337–38 (1969).

³⁵ *See infra* note 42 and accompanying text.

agreements. This evolution began when the Supreme Court refused to per se condemn a technical horizontal price-fixing agreement that efficiently created a new product demanded by consumers in *Broadcast Music*.³⁶ While per se condemnation remains appropriate for naked cartel behavior, the modern analysis is based more on actual competitive effects of an agreement than on rigid categories. This standard was perhaps best expressed by Justice Breyer, concurring in *California Dental*, as follows: “(1) What is the specific restraint at issue? (2) What are its likely anticompetitive effects? (3) Are there offsetting procompetitive justifications? (4) Do the parties have sufficient market power to make a difference?”³⁷

Modern understanding of the risks and benefits of data dissemination has also evolved since the early cases. Specific facts about the particular information and circumstances of the exchange are highly relevant; it is less competitively sensitive if a third party collects and disseminates the data, if it contains historical rather than current or future prices, if it is aggregated rather than identified by firm, and if there is a legitimate procompetitive purpose for the exchange.³⁸ Modern antitrust interpretation is clear: the exchange of information is not a per se violation of the antitrust laws in itself, and all of the facts should be evaluated under the rule of reason.³⁹

At the end of the day, then, modern antitrust analysis has largely evolved to the point where most of the procompetitive data collection and standard setting of the business of insurance would be justified under the modern rule of reason. Effective state regulation that mandated and actively supervised other, potentially problematic behavior would be protected by the state action doctrine. The issue for legislators and interest groups is whether or not a special exemption for the business of insurance remains necessary.

Antitrust and economic commentators have largely concluded that market competition tends to produce better economic and social outcomes than regulation by any level of government. Congress has the raw power to limit the federal antitrust laws by adopting exemptions and by granting immunity in particular cases, to particular industries, or based on general principles. However, because

³⁶ *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1 (1979).

³⁷ *Cal. Dental Ass’n v. FTC*, 526 U.S. 756, 782 (1999) (Breyer, J., concurring in part and dissenting in part).

³⁸ See *United States v. U.S. Gypsum Co.*, 438 U.S. 422 (1978); *Container Corp. of Am.*, 393 U.S. 333; *Maple Flooring Mfrs. Ass’n v. United States*, 268 U.S. 563 (1925).

³⁹ See *United States v. Citizens & S. Nat’l Bank*, 422 U.S. 86, 138 (1975).

immunities and antitrust exemptions permit firms to conspire unchecked by antitrust enforcement in the face of ineffective regulation, they should be adopted only when necessary. Congress should examine the evidence proving that an exemption is necessary and then determine whether, on balance, the exemption will protect consumer welfare and threaten less harm than competition and antitrust enforcement against illegal activities. If Congress concludes that a particular industry or market is not amenable to competition, then the traditional solution is regulation. When regulation is necessary to deal with market failures or natural monopolies, it should be efficient, effective, and carried out by the appropriate level of government.

The views of the Antitrust Modernization Commission (AMC),⁴⁰ the American Bar Association,⁴¹ state antitrust enforcers,⁴² consumer protection groups,⁴³ and insurer representatives⁴⁴ on the continued need for the McCarran-Ferguson exemption appear to diverge. The National Association of Insurance Commissioners (NAIC) testified in favor of retaining the federal antitrust exemption and leaving regulation of the insurance sector to state regulators.⁴⁵ A regime of strong oversight and regulation, in the view of state regulatory officials, would be sufficient to maintain competition and protect

⁴⁰ See ANTITRUST MODERNIZATION COMM'N, *supra* note 20.

⁴¹ See ABA SECTION OF ANTITRUST LAW, COMMENTS TO THE ANTITRUST MODERNIZATION ACT REGARDING THE MCCARRAN-FERGUSON ACT (2006), *available at* <http://www.abanet.org/antitrust/at-comments/2006/04-06/amc-McCarranFerguson.pdf>; *The McCarran-Ferguson Act: Implications of Repealing the Insurers' Antitrust Exemption: Hearing Before the S. Jud. Comm.*, 109th Cong. 96 (2006) [hereinafter *Exemption Repeal Hearing*] (statement of Donald Klawiter, Chair, ABA Section of Antitrust Law).

⁴² See, e.g., *Exemption Repeal Hearing*, *supra* note 41, at 4 (statement of Elinor Hoffman, Assistant Att'y Gen. of New York).

⁴³ See *id.* at 8 (statement of J. Robert Hunter, Director of Insurance, Consumer Federation of America).

⁴⁴ See, e.g., *id.* at 50 (statement of the Hon. Marc Racicot, President, American Insurers Ass'n); *id.* at 140 (statement of Kevin Thompson, Sr. Vice President, Insurance Services Office); Letter from Karen Ignagni, President & CEO, America's Health Ins. Plans (AHIP) to the Hon. Tom Perriello and the Hon. Betsy Markey, U.S. House of Representatives (Feb. 18, 2010), *available at* <http://americanhealthsolution.org/assets/Uploads/Blog/Letter-McCarran-Ferguson-02.18.2010.pdf>.

⁴⁵ See, e.g., *Exemption Repeal Hearing*, *supra* note 41, at 108 (statement of Michael McRaith, Illinois Director of Insurance, National Association of Insurance Commissioners); Press Release, Nat'l Ass'n of Ins. Comm'rs, NAIC Tells Antitrust Commission that McCarran Exemption Fosters Competition (Oct. 18, 2006), *available at* http://www.naic.org/Releases/2006_docs/naic_antitrust_exemption_fosters_competition.htm.

consumers, so federal antitrust enforcement would be unnecessary.⁴⁶ The states⁴⁷ and consumer groups⁴⁸ support complete repeal of the exemption, the ABA⁴⁹ recommends a new federal law protecting safe harbors, and the AMC⁵⁰ generally disapproves of industry-specific exemptions. However, all of their policy positions converge on key points:

- Competition, in the form of effective antitrust enforcement, has been critical to the success of the American market economy.
- Congress *may* displace market competition by creating antitrust exemptions and immunities but *should* do so only when convinced that the market cannot work and regulation is the best way to achieve consumer welfare goals, and regulation is a second-best solution.
- Congress has the authority under the Commerce Clause to preempt state regulation, and it should exercise that power only after consideration of issues of federalism.
- Special antitrust exemptions for specific industries are disfavored and should be granted only when necessary, should be limited, and should interfere with competition as little as possible.
- Sharing of certain data, standard setting and development of standard forms, forming joint underwriting associations, and other cooperative behavior may be important for the business of insurance and in the public interest, and they are subject to the antitrust rule of reason.
- Antitrust analysis should consider the likely procompetitive benefits and anticompetitive risks in appraising cooperative behavior in the insurance industry, and predictability and certainty are relevant considerations.

⁴⁶ See *Exemption Repeal Hearing*, *supra* note 41, at 4 (statement of Elinor Hoffman, Assistant Att’y Gen. of New York).

⁴⁷ *Id.*

⁴⁸ See *id.* at 8 (statement of J. Robert Hunter, Director of Insurance, Consumer Federation of America).

⁴⁹ See ABA SECTION OF ANTITRUST LAW, *supra* note 41.

⁵⁰ See ANTITRUST MODERNIZATION COMM’N, *supra* note 20.

III FEDERAL LEGISLATIVE DEVELOPMENTS⁵¹

Although antitrust exemptions have generally been criticized, there has been no consensus strong enough to repeal or significantly modify the McCarran-Ferguson Act in the sixty-three years since its adoption. Efforts to clarify the scope of the immunity began in the 1990s and ultimately involved multilateral negotiations, including some between segments of the insurance industry and national consumer protection groups.⁵² The goal was modest: neither total repeal nor strengthening of the immunity provisions.⁵³ The draft legislation that emerged from the multiparty negotiations, House Bill 9, would have substituted a list of safe harbors for the poorly defined McCarran-Ferguson exemption.⁵⁴ It was opposed by other segments of the insurance industry, notably small firms, that were concerned that the safe harbors were insufficient protection and would put small firms at a disadvantage compared to large companies.⁵⁵ The House Judiciary Committee passed and favorably reported the bill, but no further action was taken, and the bill failed to pass.⁵⁶

More than a decade later, safe harbor bills modeled after House Bill 9 and a variety of other approaches to deal with competitive problems in the insurance industry were introduced in the House and the Senate. Several of those recent initiatives were broader, proposing, complete repeal of the antitrust exemption or repeal and substitution of federal regulation. The antitrust repeal provision is found in a pair of bills introduced in 2007 and sent to the Senate and House Judiciary Committees for consideration. Senate Bill 618 and House Bill 1081 would have completely repealed the antitrust exemption but retained the reverse preemption language of congressional deference to state laws that regulate the business of insurance.⁵⁷ Those bills would have left the insurance industry in the

⁵¹ Or the lack thereof, shows the real, federalism meaning of the McCarran-Ferguson Act.

⁵² Craig A. Berrington, *Congress, Once Again, Debates Insurers' Antitrust Exemption Under McCarran-Ferguson Act*, 22 LEGAL BACKGROUNDER 1, 3 (2007), available at <http://www.wlf.org/upload/05-25-07berrington.pdf>.

⁵³ *See id.*

⁵⁴ *See* Insurance Competitive Pricing Act of 1991, H.R. 9, 102d Cong. (1991).

⁵⁵ Berrington, *supra* note 52.

⁵⁶ *Id.*

⁵⁷ Insurance Industry Competition Act of 2007, S. 618, 110th Cong. (2007); H.R. 1081, 110th Cong. (2007).

same position as other American industries with respect to antitrust enforcement: the antitrust laws do not preempt state law. States may protect private firms from antitrust liability under the state action doctrine if the state affirmatively expresses the will to do so and actively supervises the activity.

Other proposals were considerably more nuanced; Senate Bill 1525 provided limited immunity for medical malpractice insurance unless the firms had engaged in bid rigging, price fixing, or market allocation, which are among the most serious kinds of anticompetitive conspiracies.⁵⁸ Another modified repeal bill, the Insurance Competitive Pricing Act of 2005, would have maintained an exemption from the federal antitrust laws for activities in the business of insurance regulated by state law *except* for price fixing, market allocation, tying arrangements, or monopolization.⁵⁹ The proposed modifications of the exemption were much broader than the McCarran-Ferguson Act's current exclusion for boycott, coercion, and intimidation, which remains in the proposed bills.⁶⁰ The list of nonexempt activities nearly swallows the exemption, apparently covering every antitrust violation except, possibly, nonprice vertical restraints and mergers, so the bill amounted to a repeal of the exemption.⁶¹ Senate Bill 2401 additionally carved out three safe harbors: areas in which covered insurers may engage in collective action and be exempt from antitrust enforcement.⁶² The safe harbors resemble the ABA's list of recommended information-sharing practices: collecting and distributing historical loss data, making loss development factors based on historical data, and performing actuarial services that do not restrain trade.⁶³ Agreement on trend factors is specifically excluded from information exchange and data manipulation that are otherwise permitted.⁶⁴

⁵⁸ Medical Malpractice Insurance Antitrust Act of 2005, S. 1525, 109th Cong. § 2 (2005).

⁵⁹ Insurance Competitive Pricing Act of 2005, H.R. 2401, 109th Cong. § 2 (2007).

⁶⁰ *Cf.* McCarran-Ferguson Act, Pub. L. No. 79-15, § 3(b), 59 Stat. 33, 34 (1945) (codified at 15 U.S.C. § 1013(b) (2006)) ("Nothing contained in this chapter shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation.").

⁶¹ H.R. 2401 § 2.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

Finally, Senate Bill 2509 made the most radical and far-reaching proposal to change the current regulatory situation. That approach would have taken back insurance regulation from the states, offered an optional national regulatory system, and eliminated federal antitrust immunity.⁶⁵ That approach was premised on the view that the modern insurance industry is truly interstate, if not global, in nature, and therefore, continued state regulation is inefficient and ineffective. The cosponsors, writing in *The Wall Street Journal* on September 23, 2008, warned that “[l]etting this 19th-century regulatory model govern a 21st-century global marketplace” is dangerously fragmented and risky for insurance consumers, shareholders, and the financial system itself.⁶⁶ Citing the recent failure of AIG, the senators and representatives who cosponsored Senate Bill 2509 and a companion house bill warned that individual state regulators could not competently oversee firms that cross state and national borders.⁶⁷ For example, the article pointed out that AIG had 209 subsidiaries, but only twelve were within the jurisdiction of New York State regulators. According to the bills’ sponsors, New York’s power was too weak to reach the entire company; it failed, and the failure of AIG resulted in an \$85 billion federal bailout.⁶⁸ The bills would have permitted, but not required, insurers to vacate their state charters and be rechartered as a national insurer, a national agency, or a “federally licensed insurance producer.”⁶⁹ These new national entities would have been subject to uniform federal regulation in the form of a commissioner of national insurance, which is more completely defined in the proposed legislation.⁷⁰ All state regulation, including “licensing, examination, reporting, regulation, or other supervision relating to the sale, solicitation, or negotiation of insurance, to the underwriting of insurance, or to any other insurance operations” would be eliminated.⁷¹ As a consequence of ending state oversight, the national entities would have lost their antitrust exemption under the McCarran-Ferguson Act, except for an important

⁶⁵ National Insurance Act of 2006, S. 2509, 109th Cong. (2006). The companion House bill was H.R. 6225, 109th Cong. (2006).

⁶⁶ John Sununu et al., Op-Ed., *Insurance Companies Need a Federal Regulator*, WALL ST. J., Sept. 23, 2008, <http://online.wsj.com/article/SB122212967854565511.html>.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ S. 2509 § 1102(b).

⁷⁰ *See id.* § 1102.

⁷¹ *Id.* § 1125(a).

safe harbor. The new exemption would have protected “the development, dissemination, or use of standard insurance policy forms (including, standard endorsements, addendums, and policy language), [and] activities incidental thereto, by National Insurers, National Agencies, and federally licensed insurance producers.”⁷²

This approach to the McCarran-Ferguson Act recognized that the fundamental nature of the Act was to allocate power between states and the federal government. This allocation included the antitrust exemption for the business of insurance to the extent that it was regulated by the state and did not constitute boycott, coercion, or intimidation,⁷³ but it went further to reverse-preempt other federal legislation that does not specifically relate to the business of insurance in favor of state insurance law.⁷⁴

In the 110th Congress, the Senate Judiciary Committee held a hearing on Senate Bill 2401 and on the more limited Senate Bill 1525,⁷⁵ and it heard testimony from several representatives from a variety of interest groups.⁷⁶ Unsurprisingly, representatives from the American Insurance Association,⁷⁷ Insurance Services Office,⁷⁸ and National Association of Insurance Commissioners⁷⁹ opposed repeal of the McCarran-Ferguson immunity and described the necessity for legal certainty, the benefits of information exchange, and the value of state regulation. A representative of the American Bar Association⁸⁰ recommended repeal of the exemption and substitution of a set of safe harbors in accord with the longstanding ABA policy. Finally, a representative of a state antitrust enforcement bureau, the New York Attorney General’s Office,⁸¹ and the insurance specialist of the

⁷² *Id.* § 1702(a)(1).

⁷³ McCarran-Ferguson Act, Pub. L. No. 79-15, §§ 2(b), 3(b), 59 Stat. 33, 34 (1945) (codified at 15 U.S.C. §§ 1012(b), 1013(b) (2006)).

⁷⁴ *Id.* § 2(b).

⁷⁵ Medical Malpractice Insurance Act of 2005, S. 1525, 110th Cong. (2007).

⁷⁶ *The McCarran-Ferguson Act: Implications of Repealing the Insurers’ Antitrust Exemption, Hearing Before the S. Comm. on the Judiciary*, 109th Cong. (2006).

⁷⁷ See *Exemption Repeal Hearing*, *supra* note 41, at 50 (statement of the Hon. Marc Racicot, President American Insurers Ass’n).

⁷⁸ See *id.* at 140 (statement of Kevin Thompson, Sr. Vice President, Insurance Services Office).

⁷⁹ See *id.* at 108 (statement of Michael McRaith, Illinois Director of Insurance, National Association of Insurance Commissioners).

⁸⁰ See *id.* at 96 (statement of Donald Klawiter, Chair, ABA Section of Antitrust Law).

⁸¹ See *id.* at 4 (statement of Elinor Hoffman, Assistant Att’y Gen. of New York).

Consumer Federation of America⁸² recommended complete repeal of the McCarran-Ferguson Act and reliance, if necessary, on the state action doctrine to protect legitimate activities in the insurance industry.

With the expiration of the 110th Congress, at noon on January 4, 2009, the 111th Congress has considered only limited repeals of the McCarran-Ferguson Act and has adopted none. Senate Bill 3217,⁸³ introduced by Senator Patrick Leahy, would have repealed the McCarran-Ferguson antitrust exemption only for health insurers. That bill is similar to, but broader than, Senator Leahy's 2009 proposed legislation, Senate Bill 1681.⁸⁴ House Bill 4626,⁸⁵ the Health Insurance Industry Fair Competition Act, also ending the McCarran-Ferguson antitrust exemption for health insurers, passed 406 to 19 on February 24, 2010.⁸⁶ House Bill 3962⁸⁷ would have repealed the McCarran-Ferguson antitrust exemption for price fixing, market allocation, monopolization, or attempted monopolization.

Efforts to repeal or modify the McCarran-Ferguson antitrust exemption have been sporadic and ineffective in the sixty-three years since its adoption. However, the modest flurry of recent activity, including committee hearings, suggests that federal legislation may again move to the fore. The fear of expansive antitrust interpretation that motivated the original exemption should be lessened by three developments. First, modern antitrust law treats most information exchanges and procompetitive horizontal agreements under the rule of reason, so it should not chill necessary coordinated activity;⁸⁸ second, private acts done pursuant to an affirmatively expressed and actively supervised state program of regulation are protected by the state

⁸² See *id.* at 8 (statement of J. Robert Hunter, Director of Insurance, Consumer Federation of America).

⁸³ Restoring American Financial Stability Act of 2010, S. 3217, 111th Cong. (2010).

⁸⁴ Health Insurance Industry Antitrust Enforcement Act of 2009, S. 1681, 111th Cong. (2009).

⁸⁵ Health Insurance Industry Fair Competition Act, H.R. 4626, 111th Cong. (2010).

⁸⁶ Exemptions: House Passes Repeal of Exemption for Health Insurers on Bipartisan Vote, 98 *Antitrust & Trade Reg. Rep.* (BNA) 232, (Feb. 26, 2010).

⁸⁷ Preservation of Access to Care for Medical Beneficiaries and Pension Relief Act of 2010, H.R. 3962, 111th Cong. (2010).

⁸⁸ *Texaco Inc. v. Dagher*, 547 U.S. 1 (2006); *Cal. Dental Ass'n v. FTC*, 526 U.S. 756 (1999); *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85 (1984); *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1 (1979).

action doctrine;⁸⁹ and third, the Noerr-Pennington doctrine exempts acts of government petitioning.⁹⁰ Finally, the ongoing financial crisis may encourage Congress to review the balance of federal and state authority in the business of insurance. Congress may, under the Commerce Clause, choose to preempt any state activity in a field, and the evolution of the business of insurance from a local to an international industry may persuade Congress that the balance should be realigned in the federal favor.

IV

JUDICIAL DEVELOPMENTS

The McCarran-Ferguson Act provides:

(a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

(b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: *Provided*, That after January 1, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State Law.⁹¹

The text of the McCarran-Ferguson Act thus establishes two different exemptions from federal regulation. Section 2(a) and the first clause of section 2(b) deal with both classic and reverse preemption, while the second clause of section 2(b), following “*Provided*,” is a classic preemption provision dealing only with antitrust law. This latter provision is the antitrust immunity provision. These sections are related and use common terms and concepts (i.e., “business of insurance” and “regulated by the State”) but arise in different legal contexts. The first, or classic, reverse preemption issue

⁸⁹ *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621 (1992); *Cal. Retail Liquor Dealers Ass’n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980); *Parker v. Brown*, 317 U.S. 341 (1943).

⁹⁰ *Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508 (1972); *United Mine Workers of Am. v. Pennington*, 381 U.S. 657 (1965); *E. R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961).

⁹¹ McCarran-Ferguson Act, Pub. L. No. 79-15, § 2, 59 Stat. 33, 34 (1945) (codified at 15 U.S.C. § 1012 (2006)).

is the subject of the vast majority of modern cases, while the antitrust immunity provision arises relatively less frequently. To the extent that American courts disagree as to the proper interpretation of the common concepts, the result will be confusion in the meaning of both.

Under the Supremacy Clause of Article VI of the Constitution, Congress has the power to enact federal laws that override and preempt state statutes. Such preemption may be express, by explicit language in a federal statute,⁹² or implied, where the state and federal statutory schemes conflict irreconcilably.⁹³ In addition, Congress may create a comprehensive system of federal regulation that completely occupies the field and ousts state law and regulation.⁹⁴ These comprehensive federal regulatory schemes preempt the states from legislating in the field, even if particular state laws do not conflict with federal law or policy.⁹⁵ It has long been recognized, however, that federal antitrust laws were not intended to preempt state antitrust laws and that federal antitrust regulation does not pervasively occupy the field and exclude state antitrust activity.⁹⁶ Indeed, several state antitrust laws preceded the federal legislation,⁹⁷ and members of the 1890 Congress that passed the Sherman Act envisioned the federal antitrust law as a supplement to state antitrust enforcement.⁹⁸

The McCarran-Ferguson Act first declares a “reverse preemption” rule, providing that states have the power to legislate and regulate in the field of insurance and that, as a general matter, federal statutes will not preempt state laws that regulate the “business of insurance.”⁹⁹ However, reaffirming classic preemption standards, the McCarran-Ferguson Act then provides that a federal statute that “specifically

⁹² *Shaw v. Delta Air Lines*, 463 U.S. 85 (1983).

⁹³ *McDermott v. Wisconsin*, 228 U.S. 115 (1913).

⁹⁴ *See, e.g., Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947).

⁹⁵ *Id.*

⁹⁶ *E.g. California v. ARC Am. Corp.*, 490 U.S. 93, 101 (1989); *Exxon Corp. v. Governor of Md.*, 437 U.S. 117, 131–33 (1978); *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 495 (1949).

⁹⁷ David Millon, *The First Antitrust Statute*, 29 WASHBURN L.J. 141, 141 (1990) (“Kansas enacted the first general antitrust law in 1889. No less than eleven other states passed various forms of antitrust legislation before Congress approved the Sherman Act in 1890.”).

⁹⁸ 21 CONG. REC. 2457 (1890) (statement of Mr. Sherman) (“[The Sherman Act was to] supplement the enforcement of . . . statute law by the courts of the several States . . .”).

⁹⁹ McCarran-Ferguson Act, Pub. L. No. 79-15, § 2, 59 Stat. 33, 34 (1945) (codified at 15 U.S.C. § 1012 (2006)).

relates to the business of insurance” does preempt the state law on the same subject.¹⁰⁰ The overall effect of this section grants states wide discretion to regulate the insurance sector unless specifically trumped by federal law concerning the sector. Congress chose not to legislate to the full extent of its commerce power over the business of insurance, but rather to defer to states in their regulatory role, with the option of preemption by specific federal statute in the insurance field.¹⁰¹

This section of the McCarran-Ferguson Act does not address the applicability of federal antitrust law to the insurance industry. First, the Sherman,¹⁰² Clayton,¹⁰³ and Federal Trade Commission Acts¹⁰⁴ do not “specifically” relate to insurance or any other industry. Moreover, the Supreme Court has long held that the federal antitrust laws were not intended to preempt, and do not preempt, state law.¹⁰⁵

Recent cases on the McCarran-Ferguson Act fall into two categories. First, many claim immunity from the federal antitrust laws under section 2(b) of the McCarran Act.¹⁰⁶ Second, the majority of recent cases involve claims of “reverse preemption,” in which parties attempt to use the McCarran-Ferguson Act to have other, non-antitrust federal law claims dismissed in favor of state law.¹⁰⁷

The antitrust immunity found in the second clause of section 2(b), which effectively operates as preemption and a clawback provision, applies to the business of insurance only to the extent that the business of insurance is *not* regulated by the states. Thus, Congress may specifically regulate insurance and preempt state laws governing the insurance sector. If, however, the states are regulating the business of insurance, the federal antitrust laws are reverse-preempted by state regulation. The antitrust exemption legislates in the negative, providing that the insurance sector is subject to federal antitrust law only if the state has chosen not to regulate. This exemption also

¹⁰⁰ *Id.* § 2(b).

¹⁰¹ *See id.*

¹⁰² Sherman Antitrust Act, ch. 647, 26 Stat. 209 (1890) (codified as amended at 15 U.S.C. §§ 1–7 (2006)).

¹⁰³ Clayton Antitrust Act, Pub. L. No. 63-212, 38 Stat. 730 (1914) (codified as amended at 15 U.S.C. §§ 12–27, 29 U.S.C. §§ 52–53 (2006)).

¹⁰⁴ Federal Trade Commission Act, Pub. L. No. 63-203, 38 Stat. 717 (1914) (codified as amended at 15 U.S.C. §§ 41–58 (2006)).

¹⁰⁵ *See* cases cited *supra* note 96.

¹⁰⁶ *See infra* notes 115–123 and accompanying text.

¹⁰⁷ *See infra* notes 124–132 and accompanying text.

contains a savings clause; though the Act grants an antitrust exemption, that exemption does not cover the substantive antitrust violations of boycott, coercion, or intimidation.¹⁰⁸

In short, Congress may choose to federalize the field and regulate the insurance industry in whole or in part. If Congress acts in such a manner, it must do so “specifically.”¹⁰⁹ Congressional power to do so is clear; Congress has the authority under the Commerce Clause to legislate. Interpretation of the Commerce Clause evolved significantly during the twentieth century, and that realignment of federal and state power led directly to enactment of the McCarran-Ferguson Act. As the definition of commerce was originally construed narrowly by the Supreme Court, even insurance was held not to constitute commerce. Therefore, states were free to legislate on the business of insurance unhampered by federal preemption.¹¹⁰ By the time of the *South-Eastern Underwriters* case in 1944, the definition of “commerce” was expanding. It finally reached its apex in cases holding the Civil Rights Act of 1964 constitutional as a proper exercise of congressional power under the Commerce Clause,¹¹¹ before it was restricted again in 1995.¹¹² Even modern constitutional jurisprudence would, however, recognize that the business of insurance is an activity in commerce and subject to federal regulation.

The McCarran-Ferguson Act anticipated this development and reserved for the federal government the power to oust state regulation of insurance entirely. If Congress did so, state regulation would be preempted and the antitrust exemption would evaporate because the business of insurance is exempt from the antitrust laws only “to the extent that such business is . . . regulated by State law.”¹¹³

The Act is not a model of clarity and uses the terms of art “business of insurance” four times and “such business” twice in section 2, and it refers to state “regulation” three times, but the Act fails to define these crucial terms.¹¹⁴ Therefore, it is left to the courts to define those terms, to explain the reach and limits of a convoluted

¹⁰⁸ See McCarran-Ferguson Act, Pub. L. No. 79-15, § 3(b), 59 Stat. 33, 34 (1945) (codified at 15 U.S.C. § 1013(b) (2006)).

¹⁰⁹ See *id.*

¹¹⁰ See *Paul v. Virginia*, 75 U.S. 168, 184–85 (1868).

¹¹¹ *E.g.*, *Heart of Atlanta Motel v. United States*, 379 U.S. 241, 259 (1964); *Katzenbach v. McClung*, 379 U.S. 294, 298 (1964).

¹¹² See *United States v. Lopez*, 514 U.S. 549, 567–68 (1995).

¹¹³ McCarran-Ferguson Act § 2(b).

¹¹⁴ *Id.* § 2.

statute, and to seek to follow the congressional will in allocating state and federal power.

The “business of insurance” has been litigated both in the antitrust immunity and reverse preemption contexts. In the antitrust immunity context, the term is interpreted broadly. Courts continue to employ the three-part *Royal Drug*¹¹⁵ and *Pireno*¹¹⁶ tests to define “business of insurance,” and recent cases have not altered these factors.¹¹⁷ Therefore, lower courts must determine, on a case-by-case basis, whether or not challenged activity constitutes the “business of insurance,” considering (1) whether the activity involves underwriting or a spreading of risk, (2) whether it involves a relationship between the insurer and the policy holder, and (3) whether the activity involves entities within the insurance industry.¹¹⁸ Writing standard form contracts and agreements and refusing to deal except on those contracts is “the business of insurance.”¹¹⁹ Dealings with joint underwriting organizations, whether through referral or concerted refusals not served outside the joint underwriting association, constitute the “business of insurance.”¹²⁰ Workers’ compensation-rating organizations, health maintenance organizations and health maintenance look-alike programs are all entities in the “business of insurance.”¹²¹ On the other hand, arranging third-party services has been held not to be the “business of insurance.”¹²² Federal courts have held that the “business of insurance” includes rate setting, marketing, and pricing, but it does not include steering, bid rigging, or bank-issued debt cancellation contracts.¹²³

The extent of the “business of insurance” also arises in non-antitrust reverse preemption cases. This provision reverses the usual rule of federal preemption in the business of insurance to protect state

¹¹⁵ Grp. Life & Health Ins. Co. v. Royal Drug Co., 440 U.S. 205 (1979).

¹¹⁶ Union Labor Life Ins. Co. v. Pireno, 458 U.S. 119 (1982).

¹¹⁷ See, e.g., Hartford Fire Ins. Co. v. California, 509 U.S. 764, 782 (1993).

¹¹⁸ *Pireno*, 458 U.S. at 129.

¹¹⁹ See SEC v. Nat’l Sec., Inc., 393 U.S. 453, 460 (1969).

¹²⁰ *Arroyo-Melecio v. Puerto Rican Am. Ins. Co.*, 398 F.3d 56 (1st Cir. 2005).

¹²¹ *Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355 (2002).

¹²² *Pireno*, 458 U.S. 119; Grp. Life & Health Ins. Co. v. Royal Drug Co., 440 U.S. 205 (1979).

¹²³ See *Arroyo-Melecio*, 398 F.3d 56; 9 EARL W. KINTNER & JOSEPH P. BAUER, FEDERAL ANTITRUST LAW § 70.5 (1989).

regulation of that sector and to prohibit implied preemption.¹²⁴ In this context, defendants typically argue that the federal regulation does not relate to the business of insurance, so it should be preempted in favor of state law.¹²⁵ State anti-arbitral provisions have been used to reverse-preempt a federal arbitration act in one federal court,¹²⁶ but an international arbitration treaty was not used in that way in another.¹²⁷ Continued confusion or conflict among the courts in defining the “business of insurance” reduces certainty and predictability, which could adversely affect procompetitive information sharing and other joint activities in the insurance sector.

Federal laws may regulate the business of insurance unless they “invalidate, impair, or supersede” state laws in the sector.¹²⁸ If the federal law has that prohibited effect, then the state laws regulating the business of insurance reverse-preempt federal non-antitrust law.¹²⁹ The Supreme Court recently defined the standard for interference with a two-part test: (1) there must be a direct conflict between federal and state law, and (2) the federal law must frustrate or interfere with the state policy or administration.¹³⁰ The Supreme Court permitted RICO claims against insurance companies because there is no direct conflict and because the federal remedy did not impair the state remedial scheme.¹³¹ Lower federal courts have applied this standard to hold that a federal prosecution of an insurance executive for health care fraud was not reverse-preempted by Oklahoma’s insurance regulations because there were no direct conflicts between state and federal criminal laws, and federal banking laws permitted banks to sell insurance, though state laws prohibited

¹²⁴ U.S. Dep’t of the Treasury v. Fabe, 508 U.S. 491, 507 (1993) (“[The McCarran-Ferguson Act] overturns the normal rules of preemption.”); *id.* at 507 n.7 (“[N]o existing law and no future law should, by mere implication, be applied to the business of insurance.” (quoting 91 CONG. REC. 1487 (1945) (statement of Mr. Mahoney))).

¹²⁵ See, e.g., *Certain Underwriters at Lloyd’s, London v. Simon*, No. 1:07-cv-0899-LJM-WTL, 2007 WL 3047128 *1, *6–7 (S.D. Ind. Oct. 18, 2007).

¹²⁶ *Goshawk Dedicated v. Portsmouth Settlement Co. I*, 466 F. Supp. 2d 1293 (N.D. Ga. 2006).

¹²⁷ *Safety Nat’l Cas. Corp. v. Certain Underwriters at Lloyd’s, London*, 543 F.3d 744 (5th Cir. 2008).

¹²⁸ McCarran-Ferguson Act, Pub. L. No. 79-15, § 2(b), 59 Stat. 33, 34 (1945) (codified at 15 U.S.C. § 1012(b) (2006)).

¹²⁹ *Id.*

¹³⁰ *Humana, Inc. v. Forsyth*, 525 U.S. 299, 310 (1999).

¹³¹ *Id.* at 311 (holding that civil RICO claims were not precluded by the McCarran-Ferguson Act).

such sales.¹³² The *Humana* standard gives Congress more power to “interfere” with state insurance regulation and limits the reverse preemption effect. This relatively robust standard could bleed into the antitrust immunity section of the McCarran-Ferguson Act and require state regulation to be active and substantive in order to protect the insurance sector from federal antitrust liability.

V

INSIGHTS FROM COMPARATIVE COMPETITION LAW: THE STATUS OF SPECIFIC IMMUNITY FOR THE INSURANCE SECTOR

International antitrust laws and exemptions offer insights into the antitrust-specific exemption embodied in the McCarran-Ferguson Act, and they offer a useful comparison. The European Union, now comprising twenty-seven member states, was founded as the European Economic Community, creating a common market by the Treaty of Rome in 1957.¹³³ Competition policy was recognized in the founding documents as central to the success of the European project and the antitrust provisions.¹³⁴ Articles 101 and 102 have been interpreted as generally consistent with the American antitrust laws. Whether or not the European Union is properly described as a federal system, a similar allocation of power exists between the European Union and its member states, each with respective areas of competence.¹³⁵ Competition law enforcement had originally been the

¹³² *United States v. Redcorn*, 528 F.3d 727, 736 (10th Cir. 2008).

¹³³ Treaty Establishing European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11.

¹³⁴ Treaty on European Union Consolidated Versions of the Treaty on European Union and the Treaty on the Functioning of the European Union, March 30, 2010, 2010 O.J. (C 83) 1 [hereinafter *European Constitution*]. Formerly Articles 81 and 82, the Treaty was revised and renumbered with the Treaty of Lisbon. This document is sometimes referred to as the *European Constitution*.

¹³⁵ See Consolidated Version of the Treaty on the Functioning of the European Union, May 9, 2008, 2008 O.J. (C 115) 47. Title I identifies areas of Union competence and shared competence. *Id.* at 50. For example, Article 3 provides that the Union has exclusive competence in the areas of customs union, monetary policy for the member states that have adopted the euro, common commercial policy, international agreements, and competition rules for the functioning of the internal market, among other areas. *Id.* at 51. Article 4 provides that shared competence is exercised in the areas of the internal market, social policy, consumer protection, transport, and energy, among other areas. *Id.* at 51–52; see also *European Constitution*, *supra* note 134, at art. 4 (“Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties.”); ELEANOR FOX & DANIEL CRANE, *GLOBAL ISSUES IN ANTITRUST AND COMPETITION LAW* 424 (2010).

province of the Commission, which had exclusive authority to investigate and enforce the competition articles of the treaty, to promote liberalization of regulated industries, and to enforce the treaty articles limiting state aid.¹³⁶ The Directorate General for Competition of the European Commission (DG Comp) reformed its enforcement system in 2003, and it now authorizes national enforcement agencies to enforce, and national courts to apply, the European Union's competition articles as well as national antitrust laws.¹³⁷ The Commission is also responsible for investigating economic sectors to determine their competitive strength and for granting block exemptions under the competition statutes.¹³⁸ The structure of Article 101, concerning agreements, resembles an American rule of reason analysis (with some important European characteristics). The Commission must determine first whether the agreement is "caught," or covered, by the prohibitions in Article 101(1) and then whether the agreement is exempt under Article 101(3) because the competitive benefits outweigh the threatened harms.¹³⁹

There was never any serious question whether the European competition laws apply fully to the business of insurance. The Commission stated in its Second Report on Competition Policy that the insurance sector was covered by the full range of the European Unions antitrust laws, and it rejected objections that the industry was not suited to competition and would devolve into destructive competition leading to failures and insolvency.¹⁴⁰ The critical prerequisite for application of Article 81 is that the agreement affect trade between EU member states, so European courts never considered whether "the business of insurance" operates "in commerce" or whether the Commission had competence to enforce in that sector. The answer is clearly in the affirmative.

However, as discussed above, the business of insurance has certain characteristics that require special consideration in antitrust analysis.

¹³⁶ Council Regulation 17/62, First Regulation Implementing Articles 85 and 86 of the Treaty (now Articles 101 and 102), 1962 O.J. (13) 204 (EC).

¹³⁷ Council Regulation 1/2003, on the Implementation of the Rules on Competition Laid Down in Articles 81 and 82 of the Treaty, 2003 O.J. (L 1) 1.

¹³⁸ *Id.* at 5.

¹³⁹ European Constitution, *supra* note 134, art. 101, at 88.

¹⁴⁰ EUROPEAN COAL & STEEL CMTY. ET AL., SECOND REPORT ON COMPETITION POLICY 60–62 (1973), available at http://ec.europa.eu/competition/publications/annual_report/ar_1972_en.pdf.

Recognizing these special needs, the Commission granted two individual exemptions in 1990 to permit insurance industry cooperation and then granted a block exemption for the entire industry in 1992.¹⁴¹ That exemption expired in 2003 and was replaced with another block exemption, which was due to expire in 2010 if not renewed.¹⁴² The McCarran-Ferguson Act, by comparison, does not have an expiration date, and it was adopted by the national legislature rather than the federal antitrust enforcement agencies, the Department of Justice, and the Federal Trade Commission.¹⁴³

The 2003 block exemption regulation for insurance (BER) followed a Commission determination¹⁴⁴ that cooperation among insurers was necessary to share data, to calculate costs, to agree on coverage, and to standardize forms and that these agreements were likely to benefit consumers and competition. In contrast to the general grant of immunity under the McCarran-Ferguson Act, the European BER protected six specific kinds of agreements.¹⁴⁵ These protected agreements included joint calculation of average costs for specific risks, cooperation in studying the potential impact of external conditions on future claims, joint creation of optional standardized policy forms, joint data collection and distribution of profitability models, voluntary insurance and reinsurance groups, and various technical specifications.¹⁴⁶ The BER specified detailed conditions that must be met for firms to be protected under the exemption, and it explicitly excluded other categories of agreements from the exemption.¹⁴⁷

As part of the BER sunset provision, the Commission was required to report to the European Parliament and Council on the operation of

¹⁴¹ Commission Regulation 3932/92, of 21 Dec. 1992, on the Application of Article 85(3) of the Treaty to Certain Categories of Agreements, Decisions and Concerted Practices in the Insurance Sector, 1992 O.J. (L 398) 7.

¹⁴² Commission Regulation 358/2003, of 27 Feb. 2003, on the Application of Article 81(3) of the Treaty to Certain Categories of Agreements, Decisions and Concerted Practices in the Insurance Sector, 2003 O.J. (L 53) 8.

¹⁴³ See 15 U.S.C. § 1012 (2006).

¹⁴⁴ Council Regulation 1534/91, on the Application of Article 85(3) of the Treaty to Certain Categories of Agreements, Decisions and Concerted Practices in the Insurance Sector, 1991 O.J. (L 143) 1 (EC).

¹⁴⁵ Commission Regulation 358/2003, *supra* note 142, at 11–12.

¹⁴⁶ *Id.*

¹⁴⁷ See *Financial Services: Overview*, EUROPEAN COMM'N, http://ec.europa.eu/competition/sectors/financial_services/overview_en.html (last visited Mar. 6, 2011).

the block exemption and to make recommendations for future reenactment, amendment, or elimination.¹⁴⁸ This multiyear process was structured as a multistage official consultation. The Commission began in 2007 by soliciting the views of the national competition agencies of the member states. It then expanded its review into a public consultation process, soliciting views and recommendations of interest groups most likely to be affected, including consumer organizations, national antitrust agencies, stakeholders, and industry representatives, in April 2008, closing in July 2008.¹⁴⁹ Thereafter, the Commission issued a report¹⁵⁰ and a working document,¹⁵¹ followed by a further public meeting to discuss the need for and the specific requirements of insurance immunities.¹⁵² Issuing a final report on a commission inquiry into the insurance sector and previewing the consultative process on the soon-to-expire BER, the Commission warned that it “has yet to be persuaded that the Regulation—which treats the insurance industry differently to other industry sectors—is still necessary. However, it will review the

¹⁴⁸ Council Regulation 1534/91, *supra* note 144.

¹⁴⁹ By the close of this stage of the process in 2008, sixty comments had been received, including comments from, among others, Association of British Insurers (ABI), Italian Insurance Association (ANIA), Portuguese Association of Insurers (APS), l'Association Française de l'Assurance, European Federation of Insurance Intermediaries (BIPAR), European Insurance and Reinsurance Federation (CEA), Central Union of Marine Underwriters (CEFOR), Czech Insurance Association, Danish Insurance Association (DIA), Fire Protection Association, German Insurance Association (GDV), Hellenic Association of Insurance Companies, Lloyd's Market Association, National Bank of Slovakia, Austrian Insurance Association (VVO), and Dutch Association of Insurers (VIV). See *Financial Services: Public Consultation on Insurance Block Exemption Regulation*, EUROPEAN COMM'N, http://ec.europa.eu/competition/consultations/2008_insurance_ber/index.html (last visited Mar. 6, 2011).

¹⁵⁰ *Report from the Commission to the European Parliament and the Council on the Functioning of Commission Regulation (EC) No. 358/2003 on the Application of Article 81(3) of the Treaty to Certain Categories of Agreements, Decisions and Concerted Practices in the Insurance Sector*, COM (2009) 138 final (Mar. 24, 2009) [hereinafter *Final Report*], available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2009:0138:FIN:EN:PDF>.

¹⁵¹ *Commission Staff Working Document Accompanying the Report from the Commission to the European Parliament and the Council on the Functioning of Commission Regulation (EC) No. 358/2003 on the Application of Article 81(3) of the Treaty to Certain Categories of Agreements, Decisions and Concerted Practices in the Insurance Sector*, SEC (2009) 364.

¹⁵² See *Financial Services: Review of Functioning of Commission Regulation 358/2003, the Insurance Block Exemption Regulation*, EUROPEAN COMM'N, http://ec.europa.eu/competition/sectors/financial_services/events/insurance_ber.html (last visited Mar. 6, 2011).

matter definitively in a report in March 2009.”¹⁵³ While advising the market participants to be prepared for the block exemption to sunset, the Commission reiterated that industry practices would simply be subject to the ordinary rules that apply to every other industrial sector, and procompetitive practices would continue to be found legitimate.¹⁵⁴ Then DG Comp Commissioner Neelie Kroes affirmed that “[i]f there are to be special rules for a particular sector, I need to be convinced that they are justified in terms of bringing real benefits to competition and to consumers.”¹⁵⁵ The general approach was comprehensive, seeking to evaluate whether any special antitrust immunity continued to be required and, if so, with respect to which specific business practices. The Commission explained its approach:

The primary original objective of the BER no longer exists since the adoption of Council Regulation (EC) No 1/2003 of 16 December 2002 which applies to all sectors including insurance. Companies and associations must now assess for themselves whether their agreements are compatible with Article 81. Only a few sectors currently have a specific BER and the review process has shown that they have ceased to be necessary in some sectors, such as maritime and air transport, for which they have not been renewed. As a result, the Commission approached the analysis in the insurance sector by asking the following key questions:

- a. Do issues in the insurance sector make it “special” compared to other sectors and therefore lead to an enhanced need for cooperation?
- b. If so, does this enhanced need require a legal instrument to protect or facilitate it?
- c. If so, what is the most appropriate legal instrument, i.e. the current BER, amended renewal or guidance?¹⁵⁶

¹⁵³ Press Release, European Comm’n, Competition: Commission Issues Final Report on Business Insurance Sector Inquiry, IP/07/1390 (Sept. 25, 2007).

¹⁵⁴ Press Release, European Comm’n, Competition: Final Report of the Sector Inquiry into Business Insurance: Frequently Asked Questions, Memo/07/382 (Sept. 25, 2007).

¹⁵⁵ Press Release, European Comm’n, Antitrust: Commission Examines Use of Insurance Block Exemption Regulation, IP/08/596 (Apr. 17, 2008). The specific issues of interest to the Commission include (1) whether, and in what circumstances, the block exemption is used; (2) whether there are industry-specific conditions in the insurance industry that make it different from other sectors that do not have individual block exemptions; (3) whether the block exemption creates any anticompetitive effects; and (4) whether eliminating the block exemption would make the industry more difficult to supervise or impose a burden on antitrust enforcers. *Id.*

¹⁵⁶ Press Release, European Comm’n, Antitrust: Commission Preliminary Views on the Renewal of Insurance Block Exemption Regulation, IP/09/470 (Mar. 24, 2009).

The block exemption consultation process took a full two years of consultation and evaluation, including a sector inquiry, and it finally concluded in 2010 when the BER was partially renewed. Such a critical inquiry serves the goals of antitrust policy, first, by recognizing that broad exemptions are neither necessary under modern analysis nor ordinarily warranted by the nature of a particular industry and, second, by narrowly limiting the scope of any exemption. At the close of the inquiry, the Commission struck a balance and retreated from complete exemption to a more nuanced regulation, reached against the backdrop of an important industry, which comprised primary and reinsurers and accounted for some 375 billion euros in premiums annually.¹⁵⁷ Among the areas of particular concern were the coinsurance and reinsurance sectors generally.¹⁵⁸ In addition, the “best terms and conditions” clauses were flagged as a potential issue because such clauses and practices could tend to raise and stabilize premium prices.¹⁵⁹ The Final Report criticized a variety of practices but did not identify any as specifically illegal under the European Union’s competition law.¹⁶⁰ Instead, the report concluded by warning members of the insurance sector that it would continue to monitor competition and invite firms to consult further about the value of the practices.¹⁶¹ Notably, however, the Sector Report highlights the sector block exemption and warns that “[i]nsurers should be prepared . . . for the possibility that the BER might not be renewed.”¹⁶²

Ultimately, the Commission was partially convinced, and it chose to renew two of the four categories of agreements that had been covered by the 2003 BER: (1) joint compilations, tables, and studies and (2) coinsurance or reinsurance pools.¹⁶³ Exemptions for standard policy conditions and security devices were not renewed.¹⁶⁴

¹⁵⁷ *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions—Sector Inquiry Under Article 17 of the Regulation*, at 2, COM (2007) 556 final (Sept. 25, 2007).

¹⁵⁸ *Id.* at 4–5.

¹⁵⁹ *Id.* at 4.

¹⁶⁰ See *Final Report*, *supra* note 150.

¹⁶¹ *Id.* at 8–9.

¹⁶² Press Release, European Comm’n, *supra* note 154, at 4.

¹⁶³ Commission Regulation 267/2010, on the Application of Article 101(3) of the Treaty on the Functioning of the European Union to Certain Categories of Agreements, Decisions, and Concerted Practices in the Insurance Sector, 2010 O.J. (L 83) 1.

¹⁶⁴ *Id.*

The Commission's process is particularly sound. Instead of approaching the exemption piecemeal, the Commission took a deliberate approach, preparing and disseminating a questionnaire, holding hearings and taking written comments, and following up as the review proceeded.¹⁶⁵ The review was essentially *de novo*; it was, in the Commission's words, a "first principles" approach to determine whether any of the individual exemptions were still valid.¹⁶⁶ Instead of presuming that the business of insurance is unique, the Commission inquired:

- (a) whether the business risks or other issues in the insurance sector make it 'special' and different to other sectors such that this leads to an enhanced need for cooperation amongst insurers;
- (b) if so, whether this enhanced need for cooperation requires a legal instrument such as the BER to protect or facilitate it; and
- (c) if so, [whether the current BER] is the most appropriate legal instrument¹⁶⁷

Even without the block exemption, concerted industry practices, data exchanges, production of optional standardized forms, and other agreements among insurers would not necessarily violate the European antitrust laws. In this respect, the European law is comparable to the American law; agreements that are procompetitive and appropriately limited would likely be legal under modern rule of reason analysis, even if they are not protected by broad antitrust immunity. The Commission underlined the risk of leaving an unnecessary and overbroad exemption in place:

There is a risk that the BER inadvertently exempts some restrictive conduct. For example, this may be the case in certain markets for security devices, which are artificially closed to competition by collective non-recognition of these devices by insurers.

Common standards aid switching between insurers, but at the same time there is a potential for abuse. This is the problem with form-based exemptions such as the BER, and explains why there

¹⁶⁵ Press Release, European Comm'n, *supra* note 154.

¹⁶⁶ *Communication from the Commission on the Application of Article 101(3) of the Treaty on the Functioning of the European Union to Certain Categories of Agreements, Decisions and Concerted Practices in the Insurance Sector*, 2010 O.J. (C 82) 20. The communication states that "a specific legal instrument such as a BER should only be adopted if cooperation in the insurance sector is 'special' and different to other sectors which do not benefit from a BER (i.e. most sectors currently)." *Id.*

¹⁶⁷ *Id.*

should be as much scope as possible for an effects-based approach consistent with the need for legal certainty.¹⁶⁸

VI

INTERNATIONAL BENCHMARKING

The European approach to a broad, sector-specific exemption from the antitrust laws is consistent with the modern approach and benchmarks of international organizations. The ICN is a virtual organization of the more than ninety national competition authorities and enforcement agencies worldwide.¹⁶⁹ This organization serves as a forum for competition advocacy, organizes training programs for new agencies, and works to promulgate consensus on substantive and procedural antitrust issues.¹⁷⁰

The ICN is now just a decade old, and it has focused its early work on antitrust issues that are most important and likely to gain broad agreement. However, the interface between competition and regulation was addressed at the third annual meeting, held in Seoul in 2004, and the ICN Regulated Sectors Working Group produced reports on competition in a variety of regulated sectors. The Working Group acknowledged the potentially productive role of regulated industries in market economies, but it recommended that regulation be limited to situations of market failure because “regulation and antitrust enforcement pursue distinct aims and affect different aspects of business conduct.”¹⁷¹ In addition, the report points out that “[t]he solution to ‘exempt’ regulated sectors from the application of antitrust rules has been progressively abandoned in most countries also as a result of technical progress allowing competition in natural monopoly environments.”¹⁷²

The business of insurance is probably not such a “natural monopoly.” Technical progress in evaluating data should make the sector function more efficiently, to the benefit of consumers, but it has not yet created new products or business forms to compete in the

¹⁶⁸ Press Release, European Comm’n, *supra* note 154, at 5.

¹⁶⁹ INT’L COMPETITION NETWORK, ICN FACTSHEET AND KEY MESSAGES (2009), available at <http://www.internationalcompetitionnetwork.org/uploads/library/doc608.pdf>.

¹⁷⁰ *Id.*

¹⁷¹ ANTITRUST ENFORCEMENT IN REGULATED SECTORS WORKING GRP., INT’L COMPETITION NETWORK, REPORT TO THE THIRD ICN ANNUAL CONFERENCE 3 (2004), available at <http://www.internationalcompetitionnetwork.org/uploads/library/doc377.pdf>.

¹⁷² *Id.*

sector.¹⁷³ Therefore, regulation and some form of antitrust immunity to make the regulation work in these sectors are more justifiable. The ICN generally favors effective antitrust enforcement to increase consumer welfare, supplemented by regulation as appropriate to deal with market failure.¹⁷⁴

The OECD has provided sophisticated analysis and recommendations on competition laws of individual states and on broad policy issues. A 1998 policy roundtable on competition and the insurance industry surveyed the state of law and regulatory issues in OECD countries and made some relevant recommendations for more effective competition policies.¹⁷⁵ The majority of countries reported that their antitrust laws applied without exemption to the insurance sector but that special characteristics and requirements of the insurance industry were considered in evaluating particular cases.¹⁷⁶ Overall, experts concluded that any restrictive industry practices must improve the market and benefit consumers.¹⁷⁷ In particular, information sharing and agreements on coinsurance and reinsurance were generally considered efficient and legitimate, depending on the circumstances of each agreement.¹⁷⁸

The OECD found that the majority of jurisdictions with “modern antitrust laws” analyzed agreements in the insurance sector on a case-by-case basis under the rule of reason.¹⁷⁹ The report noted that “[c]ountries with older competition laws tend to have older, overly-broad legislative exemptions for the insurance sector. Reform in such countries will involve replacing these broad exemptions with targeted, case-by-case approaches on the same basis as occurs in other industries.”¹⁸⁰

¹⁷³ *Id.*

¹⁷⁴ *See id.* at 2–5.

¹⁷⁵ *See* COMM. ON COMPETITION & POLICY, ORG. FOR ECON. COOPERATION & DEV., POLICY ROUNDTABLES: COMPETITION AND RELATED REGULATION ISSUES IN THE INSURANCE INDUSTRY 11 (1998), *available at* <http://www.oecd.org/dataoecd/34/25/1920099.pdf>.

¹⁷⁶ *Id.* at 10–11.

¹⁷⁷ *Id.* at 7.

¹⁷⁸ *Id.* at 10–11.

¹⁷⁹ *Id.* at 11.

¹⁸⁰ *Id.*

CONCLUSION

The most serious issue surrounding the McCarran-Ferguson Act and other legislative grants of antitrust immunity is that such laws may act as a “one-way ratchet” by expanding but not limiting the scope of the exemption.¹⁸¹ The McCarran-Ferguson Act has been criticized from all sides since its adoption more than sixty years ago. Consumer agencies and state attorneys general argue for total repeal, the Antitrust Modernization Commission deplors antitrust exemptions generally and recommends limited use, and the American Bar Association urges replacement with a more limited exemption tailored to modern antitrust learning.¹⁸² Representatives of the insurance sector argue the necessity for various joint activities and a broad immunity protecting their collective action.¹⁸³ There is real force to these claims, but the McCarran-Ferguson Act’s generous immunity may be overbroad and unnecessary to achieve those procompetitive benefits. Nevertheless, once embedded in the law, exemptions are difficult to remove despite criticism of the immunity, confusion among the courts, and proffers of compromise. Congress has not demonstrated serious commitment to reform the McCarran-Ferguson Act, and it gave only limited attention to the issue until a recent flurry of proposed legislation. The draft legislation varies widely and includes efforts to narrow the immunity, to repeal it altogether, and in one creative new approach, to preempt state authority over the industry and impose optional federal regulation. It is too soon to predict whether any of these proposals for reform will be adopted, but the testimony of various stakeholders at the single hearing was sharply divided despite important developments in antitrust analysis that protect core cooperative activity under the rule of reason.

Legal, financial, economic, and social issues invariably interrelate. The business of insurance is not alone in facing economic challenges, but it has been particularly affected. This crisis was anticipated by

¹⁸¹ This approach comes from *Katzenbach v. Morgan*, 384 U.S. 641 (1966), a Voting Rights Act case holding that Congress had the power under Section 5 of the Fourteenth Amendment to halt New York City’s use of a state literacy test. The Court stated that Congress had wide discretion to carry out the rights guaranteed by the Amendment. *Id.* at 651 n.10. Footnote 10 clarified the reach of congressional authority, stating that Congress had the power to expand rights but not to decrease them, the so-called “one-way ratchet.” *Id.*

¹⁸² See *supra* notes 20, 40–43 and accompanying text.

¹⁸³ See *supra* notes 44–45 and accompanying text.

and motivated the proposed legislation that would have both repealed the McCarran-Ferguson antitrust exemption and affirmatively preempted state regulation of the business of insurance for those global firms that choose a national regulatory system. Such a dramatic change to the current legal and regulatory landscape was a provocative response and deserves serious discussion. It should not be underestimated as merely changing the scope of antitrust law or tinkering with exemptions. Preemption of a historic, state-regulated field, even if partial, would alter the longstanding pattern of state regulation over an important economic sector, and it would challenge the allocation of power and deference between the states and federal roles. American stakeholders (the ABA, state attorneys general, consumer groups, and insurance organizations and firms) and international organizations have made important contributions to the McCarran-Ferguson antitrust immunity discussion. At the end of the day, however, some consensus can be found: antitrust laws are a consumer-welfare prescription, antitrust exemptions should be narrowly construed and adopted when necessary to remedy market failures, and data dissemination and other agreements in the business of insurance are likely procompetitive when analyzed under the rule of reason. The insurance block exemption in Europe was a mixed result, but in the absence of more consensus on a particular option, the one-way ratchet describes the status of antitrust immunity in American antitrust law—once an exemption has been granted and embedded in the law, it is likely to remain.

