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## Will Katrina's Winds Blow Away McCarran's Antitrust Exemption?

On February 15, 2007, Senators Patrick Leahy, Arlen Specter and Trent Lott introduced the Insurance Industry Competition Act (S.618) (the same bill in the House is H.R.1081) which would repeal the federal antitrust exemption in the McCarran-Ferguson Act. The McCarran Act now provides that the federal antitrust laws apply to the business of insurance only to the extent that the business is not regulated by state law or if the conduct in question involves boycott, coercion or intimidation. The proposed Act would allow the full enforcement of the federal antitrust laws by the Justice Department, the Federal Trade Commission and private plaintiffs against insurance companies and others engaged in the business of insurance, thereby jeopardizing participation in joint industry activities regulated by state law.

The proposed Act completely eliminates McCarran's limited antitrust exemption. This limited immunity was designed to allow the individual states to regulate the business of insurance, even by authorizing joint insurer conduct if a state so desired. The proposed Act would end this exercise of federalism inherent in McCarran's accommodation of state regulation and would impose the dictates of the federal antitrust laws on the regulated business of insurance. As such, the proposed Act would subject insurance companies to possibly differing federal and state regulation of the same activities. Any clash between federal antitrust dictates and a state's regulatory system would render problematic the joint activities that the states now deem to be protective of the interest of insurance consumers and the maintenance of a healthy and efficient insurance marketplace.

### Background Of Proposed Act

In statements to the Senate Judiciary Committee, both Senators Lott and Leahy presented their bill against the backdrop of the ravaging of the Gulf Coast by Hurricane Katrina

in 2005. Senator Lott said that, before Katrina, he did not realize that "the insurance industry had a blanket exemption from our antitrust law". Senator Leahy said: "Insurers may object to being subject to the same antitrust laws as everyone else but if they are operating in an honest and appropriate way, they should have nothing to fear." But McCarran does not provide a blanket antitrust exemption for the insurance industry and the industry is not the only one that has a limited exemption from the federal antitrust laws. The McCarran exemption is not industry-wide; rather, it is an exemption only for state regulated activities within the business of insurance – those that center upon the policyholder-insurer relationship – that do not involve boycott, coercion or intimidation. Nor is the insurance industry the only industry with any antitrust exemption. The Antitrust Modernization Commission in its April 2, 2007 Report listed 26 statutory exemptions from the federal antitrust laws. And, the Supreme Court has recognized an implied antitrust immunity to prevent the federal antitrust laws from interfering with federal regulation in other industries. But defects in the proffered reasons for the Act may not imperil its chance of passage nor diminish the wide impact that the Act might have on the business of insurance. The Antitrust Modernization Commission has recommended that statutory immunities, such as that in McCarran, should be disfavored and should be allowed to continue only after a full consideration whether the conduct sought to be immunized would be subject to liability and whether the societal goal promoted by the proposed immunity should trump the consumer welfare achieved through competition.

### Nature And Impact Of Proposed Repeal

Proposals to amend the McCarran antitrust immunity are not new. Past proposals have provided for the application of the federal antitrust laws to the regulated business of

insurance, but have often established “safe harbors” for the collection and dissemination of historical loss data and determination of loss development factors, activities thought desirable to allow smaller companies to participate in certain market segments. Unlike these previous efforts to limit the McCarran antitrust immunity, the proposed Act is far reaching and unconditional in its elimination of the McCarran antitrust exemption. If passed, no aspect of the federal statutory antitrust immunity for the regulated business of insurance would survive. No “safe harbor” is provided. Under the Act, federal antitrust authorities, such as the Justice Department and the Federal Trade Commission, could regulate the business of insurance and seek to substitute federal policy for the judgments of the state concerning the proper maintenance in that state of the insurance marketplace and appropriate rates for its residents. As such, the current proposals in the Senate and the House would subject the insurance industry to possibly conflicting regulatory demands from state and federal authorities.

The focus of federal antitrust enforcement would likely be on state authorized joint activities of insurance companies. Not only will the joint rating activities of rating bureaus be scrutinized, but issues may arise with respect to the gathering and dissemination of loss statistics, the determination of loss development factors and the determination of pure premiums. In addition, joint development of uniform policy forms may be subject to challenge. Other joint activities of insurance companies authorized by state law will also be subject to challenge. In most states, residual market mechanisms are organized and serviced by the joint action of insurance companies. That joint action can involve joint rate filings and joint assignments of risks within the state. The states have also authorized other joint insurance company conduct. For instance, by the establishment of guaranty funds the states have provided that insurance companies will jointly

pay and adjust claims under policies issued by insurers that have become insolvent.

#### Legal Justification For Joint Activities

The legitimacy of all joint activities would be called into question by the proposed Act. Each insurance company would need to determine its willingness to participate in state authorized joint activities based on its individual appetite for antitrust risk. In the analysis to be conducted, there are few, if any, bright line tests that could provide ready comfort and assurance that participation in joint activities would be lawful under the federal antitrust laws. However, certain justifications of these joint activities would remain:

- ◆ **No Restraint of Trade.** In applying the federal antitrust laws, courts and enforcement agencies have recognized that competitors can legitimately engage in joint activities if those activities do not diminish competition. Thus, if the combined activities of competitors do not restrain trade, (e.g., the combination provides services to a market segment that would otherwise not be served), no antitrust violation would be found. Many of the joint activities authorized by state law are not designed to restrict competition. These activities might be continued in the face of the Act.
- ◆ **State Action Doctrine.** Even if the joint conduct was thought to be anti-competitive, the federal antitrust laws may not apply under the State Action Doctrine. This doctrine, developed outside the insurance context, recognizes that a state may determine that some aspect of its local economy should be regulated rather than be governed by the forces of competition. However, in order for the State Action Doctrine to apply, two principal conditions must be satisfied. The

first is that the challenged joint activity must be “one clearly articulated and affirmatively expressed as state policy.” The second is that the policy must be actively supervised by the state itself.

- ◆ **Noerr-Pennington Doctrine.** The Noerr Pennington Doctrine is designed to provide protection for joint activity aimed at producing government action. Thus, if the restraint of trade complained of is the product of a legislative, regulatory or judicial decision prompted by the joint efforts of competitors, Noerr-Pennington may shield the joint conduct from application of the federal antitrust laws.
- ◆ **Filed Rate Doctrine.** This principle of administrative law originally precluded attempts by rate payers based on contract or tort theories to pay less than a rate filed with and approved by a regulatory authority. This principal was extended to bar federal antitrust claims seeking damages based on a rate other than the filed and approved rate. Thus, the Filed Rate Doctrine might preclude a private treble damage action claiming that the filed and approved rate resulting from the joint activity of competitors was too high. However, the Filed Rate Doctrine may not restrict federal government litigation against use of the jointly determined rates.

Though the Act does not purport to directly address any of these court-recognized exemptions and immunities, many of them are themselves under attack. The Antitrust Modernization Commission has urged that all immunities and exemptions be narrowly construed, has criticized certain applications of the State Action Doctrine, and has called upon Congress to limit the scope of the Filed Rate Doctrine.

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## Conclusion

The proposed Act and the Report of the Antitrust Modernization Committee signify a growing hostility to the McCarran antitrust exemption and other exemptions and immunities that might justify state-regulated joint activities. The care needed to traverse the resulting antitrust minefield should be evident.

### ***ABOUT THE AUTHORS***

Joseph E. Coughlin is a partner who has defended insurance industry participants in antitrust cases and has advised them on antitrust issues. He has written and spoken on antitrust topics, including those arising from the McCarran-Ferguson Act. John C. Gurley is a partner with extensive experience in all areas of corporate insurance, including regulatory issues.