The American Antitrust Institute

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Public and Private: Are the Boundaries in Transition?

BREAKOUT SESSION SUMMARY

Insurance

Moderator:
Lawrence Mirel, Partner, Wiley Rein LLP; former Commissioner of Insurance, Securities and Banking for the District of Columbia

The McCarran Act Under Attack
Randy Stutz, Research Fellow, American Antitrust Institute

What is Public? What is Private? What is Federal? What is State-regulated?
Beth Farmer, Professor of Law, Penn State University

Summary Drafted by: Randy Stutz and Dae-Gunn Jei, Research Fellows, American Antitrust Institute

Mr. Mirel began the session by referencing Assistant Attorney General Christine Varney's remarks during her morning keynote address, in which she voiced the Antitrust Division's support for existing legislative efforts to repeal the McCarran Ferguson Act as to the health insurance industry. Mr. Mirel then introduced the primary questions for purposes of the breakout session, which included whether repeal of the Act is a good idea and whether it would benefit consumers. He described the unique attributes of insurance products, which must be priced and sold before the true cost of providing coverage can be determined, and the risk of both overpricing and underpricing. He also presented criticisms of current repeal efforts, identifying three potential drawbacks: (1) the risk that repeal would harm small and local insurers, which depend on collaborative information sharing to accurately price their products; (2) the risk that repeal would result in higher insurance premiums; and (3) the risk that repeal would lead to increased concentration in the insurance industry.

Mr. Stutz began by introducing the relevant statutory provisions of the McCarran Ferguson Act, which exempts the business of insurance from the federal antitrust laws to the extent it is regulated by state law and does not amount to boycott, coercion or intimidation. He then discussed Supreme Court interpretation of the operative statutory language and summarized recent legislative developments aimed at repealing McCarran Ferguson in part. In addition to bills introduced in the House and Senate in 2009, he described a more recent bill that would repeal the Act as to the health insurance industry only. None of the bills have passed both the House and Senate.

In response to the criticisms of repeal efforts introduced by Mr. Mirel, Mr. Stutz stressed that rule of reason analysis has developed significantly since McCarran Ferguson was enacted and suggested that court precedent involving information sharing practices is favorable to the industry. Absent McCarran protection, he also noted that States may recreate the status quo if they so choose using the state action doctrine, which differs from McCarran primarily insofar as it requires active state monitoring to trigger protection from the federal antitrust laws. He suggested that the state action doctrine is preferable to McCarran because it would create a paradigm in which either states actively regulated or the federal antitrust laws applied, which would reduce the likelihood of gaps in oversight engendered by the existing McCarran Ferguson paradigm.

Next, Mr. Stutz described the results of his research into market allocation practices by Blue Cross/Blue Shield health insurers ("the Blues"), which operate using exclusive geographical boundaries pursuant to licensing arrangements with the Blue Cross and Blue Shield Association, and which the Blues have historically defended as being exempt from federal antitrust scrutiny under the McCarran Ferguson Act. He raised questions as to whether the Blues' practices could constitute an antitrust violation absent McCarran protection, and whether they would hypothetically be reviewed under a rule of reason or *per se* standard. He then described past challenges to the Blues' market allocation system and recent evidence uncovered in an investigation by the Pennsylvania Insurance Commissioner suggesting that "Blue-on-Blue" competition would yield superior results for consumers than the existing market allocation system. He concluded by positing that the Blues' practices may receive more scrutiny in the event of McCarran repeal as to the health insurance industry, and that examining Blue-on-Blue competition may be in the public interest in the wake of the national debate concerning health care reform.

During a brief audience Q&A, one audience member commented that the new insurance exchanges being created pursuant to the Patient Protection and Affordable Care Act might indirectly facilitate more Blue-on-Blue competition.

The next panelist, Professor Farmer, called into question the characterization of the McCarran Ferguson Act during the course of the repeal debate. She urged that the Act's major feature is not antitrust, but rather the allocation of power and deference among the Federal government and the States. Indeed, Professor Farmer noted, the majority of modern cases concern the reverse preemption clause of the statute rather than the antitrust immunity clause. Parties have frequently attempted to have other, non-antitrust federal legislation not specifically directed to the business of insurance ousted in favor of State law, including where state anti-arbitral provisions conflict with a federal arbitration act and where RICO claims would be applied to insurance companies.

Although Professor Farmer suggested it would be wrong to consider McCarran repeal only in the context of changing the scope of the antitrust laws when questions of Federalism in fact predominate, she allowed that McCarran's generous grant of antitrust immunity may be overbroad and unnecessary to achieve desired procompetitive effects. She referenced the European Union's process, whereby the business of insurance was granted a block exemption from Articles 101 and 102 in 2003, but with a sunset provision that called for evaluation of the exemption prior to reenactment. The examination process resulted in a narrowing of antitrust protections for the business of insurance in the EU.

Nevertheless, Professor Farmer continued, Federalism concerns are integral to any discussion. Indeed, proposed legislation in previous Congresses, which would have allowed insurers to opt out

of state regulatory regimes and choose instead a national regulatory system, better recognized the broad shifts in the legal and regulatory landscape that a meaningful discussion of McCarran repeal should contemplate.

Mr. Mirel then opened the floor for further audience Q&A, and a lively discussion ensued about the prospects of McCarran repeal. Panelists and audience members exchanged views on what historical (failed) efforts to repeal McCarran said about the current repeal debate on the one hand, and what the political popularity of repeal and differences between past and present efforts say about it on the other. Some were quite skeptical that McCarran repeal would come to pass, while others were confident we will see action from the current Congress.

While there was fairly broad agreement in the room that McCarran repeal as to health insurance was less controversial, Mr. Mirel and others raised several important distinctions that would make for provocative discussion should repeal efforts ever reach property/casualty insurance and workers' compensation insurance.