

CHAPTER I

INTRODUCTION

A. Application of Antitrust Law to the Insurance Industry

During the first half century of their existence, the federal antitrust laws had no application to the insurance industry because insurance transactions were not considered part of interstate commerce. Then, in 1944, the United States Supreme Court issued its watershed opinion in *United States v. South-Eastern Underwriters Association*,¹ holding that insurance transactions constituted interstate commerce and, hence, were subject to federal antitrust laws. Congress reacted to this decision the following year by enacting the McCarran-Ferguson Act,² exempting the “business of insurance” from the Sherman, Clayton, and Federal Trade Commission Acts to the extent such business was “regulated by State law” and the challenged activity did not constitute “boycott, coercion or intimidation” (the “boycott exception”).

For a number of years after the passage of the McCarran-Ferguson Act, the federal and state antitrust laws were perceived to have limited application to insurance practices. But a trio of Supreme Court decisions issued between 1978 and 1982³ restrictively interpreted the McCarran-Ferguson Act exemption. These decisions subjected insurers to increased antitrust oversight by expanding the boycott exception to the McCarran-Ferguson Act exemption⁴ and narrowing the scope of the meaning of the “business of insurance.”⁵ Subsequent lower court opinions further

1. 322 U.S. 533 (1944).

2. 15 U.S.C. §§ 1011–1015.

3. *St. Paul Fire & Marine Ins. Co. v. Barry*, 438 U.S. 531 (1978); *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205 (1979); *Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119 (1982).

4. *St. Paul Fire & Marine Ins. Co.*, 438 U.S. 531.

5. *Royal Drug Co.*, 440 U.S. 205; *Pireno*, 458 U.S. 119.

broadened the boycott exception.⁶ Although the Supreme Court reversed this trend in *Hartford Fire Insurance Co. v. California*,⁷ in which it narrowed the boycott exception, the federal antitrust laws now apply to insurers in several areas.

Furthermore, legislators at both the national and state levels have made efforts to significantly increase the insurance industry's exposure to the antitrust laws. For years, proposals have been introduced in Congress to limit the exemption the McCarran-Ferguson Act affords.⁸ Additionally, California and Texas repealed their insured-specific exemptions from state antitrust laws, and New Jersey limited its exemption for joint ratemaking in the private passenger automobile lines.⁹

Accordingly, one no longer can assume that insurance practices that would otherwise violate the antitrust laws will be exempt from both federal and state statutes. Thus, it is important for those providing antitrust compliance advice to have a basic understanding of the antitrust laws and how they apply to the insurance business absent any exemption as well as to understand the scope of the McCarran-Ferguson Act and other exemptions that may be applicable.

B. Growing Federal Oversight of the Insurance Industry

Federal intervention into the sphere of insurance regulation has expanded since the last edition of this *Handbook* in 2006.

For example, the Federal Insurance Office's long-awaited report, "How to Modernize and Improve the System of Insurance Regulation in the United States," was issued on December 12, 2013. While the report calls for greater federal involvement in the oversight of the insurance industry, the proposals for federal involvement are, at this time, still limited. It does, however, signal a view that "should the states fail to

6. See, e.g., *In re Workers Comp. Ins. Antitrust Litig.*, 867 F.2d 1552 (8th Cir. 1988).

7. 509 U.S. 764 (1993).

8. See Health Insurance Industry Antitrust Enforcement Act of 2013, H.R. 99, 113th Cong. (2013); Protecting Access to Healthcare Act of 2012, H.R. 5, 112th Cong. (2012); Insurance Industry Competition Act of 2007, S. 618, 110th Cong. (2007); Medical Malpractice Insurance Antitrust Act of 2003, S. 352, 108th Cong. (2003).

9. CAL. INS. CODE § 1861.03(a); TEX. BUS. & COM. CODE § 15.05(G); N.J. STAT. ANN. § 17:33b-31.

accomplish necessary modernization reforms in the near term, Congress should strongly consider direct federal involvement.”¹⁰

The report notes that the lack of uniformity in the state-based regulatory system imposes substantial costs.¹¹ One particularly striking observation is that “per dollar of premium, the costs of the state-based insurance regulatory system are approximately 6.8 times greater for an insurer operating in the United States than for an insurer operating in the United Kingdom.”¹² Nevertheless, the report rejects the displacement of state-based regulation because the “business of insurance involves offering many products that are tailored for and delivered at the local level” and establishing a new federal regulatory agency would be “a significant undertaking.”¹³

The report concludes “that the proper formulation of the debate at present is not whether insurance regulation should be state or federal, but whether there are areas in which federal involvement in regulation under the state-based system is warranted.”¹⁴ In this regard, the report identifies eighteen areas of “near term” reform for the states with regard to capital adequacy, insurer resolution practices, and marketplace regulation.¹⁵ The report also identifies nine areas for direct federal involvement in regulation.¹⁶

C. Purpose and Scope of This *Handbook*

This *Handbook* is intended to provide a useful guide to the antitrust laws¹⁷ as they govern the activities of insurance companies. It is not a comprehensive treatise on the antitrust laws or their application to the business of insurance. Rather, it is designed to provide an overview of the application of basic antitrust principles to the insurance industry.

10. FEDERAL INS. OFFICE, HOW TO MODERNIZE AND IMPROVE THE SYSTEM OF INSURANCE REGULATION IN THE UNITED STATES 8 (Dec. 2013) [hereinafter *FIO REPORT*].

11. *Id.* at 5.

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.* at 6–7.

16. *Id.* at 7–8.

17. For a more comprehensive discussion of the antitrust laws, see ABA SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS (7th ed. 2012).

Frequently, antitrust analysis is governed by specific facts, such as the competitive effects of a particular practice in the relevant market and the parties' business motivations. Moreover, case law and enforcement policies are continuously evolving. Finally, because this *Handbook* is confined to basic antitrust principles, many of the finer nuances of the law cannot be described. Therefore, while this *Handbook* provides useful general guidance on antitrust counseling, further research or consultation with an expert may be advisable on specific compliance issues.

D. Outline of *Handbook* and Explanation of Methodology

This edition of the *Handbook* contains some significant expansions from prior versions. Chapter II paints with a broad brush the salient features of the federal antitrust laws, with expanded discussions of some of the key issues from earlier editions. As before, the *Handbook* focuses primarily on federal antitrust laws, and the principles discussed are in general equally applicable to state antitrust laws, which typically are patterned on the federal statutes. It is important to emphasize that in states where there is no exemption comparable in scope to the McCarran-Ferguson Act, the insurance industry's exposure may be principally to state antitrust laws. Chapters III and IV are new to this edition. Chapter III provides an overview of civil antitrust litigation. Chapter IV contains an expanded discussion of applicable federal and state exceptions, particularly the McCarran-Ferguson Act.

Chapters V through XI examine whether the insurance industry's main practices—such as collective ratemaking, standardization of insurance policy forms, and joint underwriting—would be lawful absent an exemption. Chapters XII and XIII are entirely new for this edition. Respectively, these chapters outline antitrust developments within the European Union and offer some commentary on possible antitrust issues connected to the 2009 Affordable Care Act. Chapter XIV describes, in broad outline, how insurance companies and their counsel can implement an effective compliance program to minimize antitrust exposure.