HJR

25

STATE OF ALASKA 1987 LEGISLATIVE SESSION
FISCAL NOTE

REQUEST:

Bill Version : HJR 25
Publish Date : HOUSE 5/6/87

Revision Date:
Title : Relating to federal regulation of the insurance industry.
Sponsor : Zawacki
Requestor : House Labor & Commerce

Agency Affected :
BRU :
Components :

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 87	FY 88	FY 89	FY 90	FY 91	FY 92
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0	0	0	0	0	0

CAPITAL	0	0	0	0	0	0

REVENUE	0	0	0	0	0	0

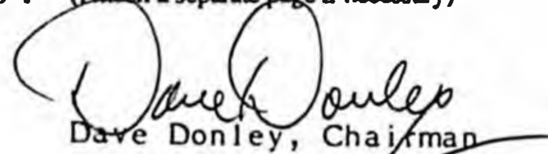
FUNDING: (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER						
TOTAL	0	0	0	0	0	0

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS : (Attach a separate page if necessary)



Dave Donley, Chairman

Prepared by : House Labor & Commerce
Phone : 465-3892
Division :
Date : 5/5/87

Approved by Commissioner :
Date :
Agency :

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STEVEN W. SILVER

ADMITTED IN WASHINGTON, D.C. *
ADMITTED IN WASHINGTON, D.C. ** AND ALASKA
ALL OTHERS ADMITTED IN ALASKA

June 2, 1987

Marc

Senator Tim Kelly
Chairman, Labor and Commerce Committee
P. O. Box 21-0001
Anchorage, Alaska 99521

Re: HJR25 - Repeal of the McCarran-Ferguson Act

Dear Senator Kelly:

HJR25 was under consideration by your committee at the end of this recent legislative session. I am writing about this resolution, on behalf of the American Insurance Association, which represents 171 property/casualty insurance companies in the United States. The AIA opposes passage of HJR25. I am enclosing a background paper which explains the McCarran-Ferguson Act. I am also enclosing a letter from the President of the American Insurance Association to Senator Metzenbaum explaining our position.

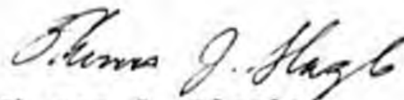
The McCarran-Ferguson Act was enacted in 1945, but the roots of state regulation of the insuance industry go back to at least 1869. The Act has a two prong effect: (1) it keeps the regulation and taxation of the insurance industry under state control (premium tax generates over Twenty-three Million Dollars annually for the State of Alaska), and (2) it allows the insurance industry certain limited anti-trust exemptions, especially in rate making activity.

The proponents of HJR25 argue that elimination of the anti-trust exemption will increase competition, thus, decrease premium rates. We believe this premise is simply wrong. The function of rate making is to take as much actuarial information as possible to establish an adequate premium (or rate) in order to cover future losses. Elimination of rate making would most profoundly affect small insurance companies who do not have in-house actuarial departments. It would also affect larger companies who plan on entering into a new line of insurance business, and must rely on established rates. Finally, it would affect joint underwriting activities to insure large projects. Without the rating function from independent rating bureaus, the smaller companies simply would not be able to compete. There would be an increased concentration in the industry and competition would likely decrease. Testimony during the House Judiciary hearing overwhelmingly indicates that the insurance industry is very competitive in Alaska.

State regulators also rely upon rate making information to monitor premium changes by the insurance companies. The National Association of Insurance Commissioners oppose repeal of the McCarran-Ferguson Act. The Independent Insurance Agents and Brokers Association and The National Conference on Insurance Legislators, also oppose repeal.

Rate making is the cornerstone of the insurance industry, which has served the public well for many, many years. Repeal of the McCarran-Ferguson Act will not increase competition and, in fact, may have just the opposite effect. I would be pleased to supply additional background information on the McCarran-Ferguson Act at the request of you or your staff.

Sincerely,



Thomas J. Slagle

cc: All Members of the Senate Labor and Commerce Committee

Senator Richard I. Eliason
Senator Rich Uehling
Senator Bettye M. Fahrenkamp
Senator Mike Szymankski

TJS#3:mb:3

ANTITRUST.

AMERICAN INSURANCE ASSOCIATION

1025 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 293-3010

January 23, 1987

The Honorable Howard M. Metzenbaum
140 Senate Russell Office Building
Washington, D.C. 20510-3502

Dear Senator Metzenbaum,

I am writing you because I am deeply concerned about some of the reasons you have advanced for repealing the McCarran-Ferguson Act. I have read your statement introducing legislation (S 80) to repeal the Act, and believe it contains many inaccuracies about the insurance market. Chief among them is the contention in the statement that repeal will promote "healthy and vigorous competition" and "improve the availability and affordability of insurance." I believe that neither contention is supportable, and I hope you will spare me a minute of your time to explain why.

The insurance industry is one of the most competitive industries in America. There are nearly 3500 companies that sell property and casualty insurance. Nine hundred companies operate nationwide, and none of them has dominant market share. The highly competitive nature of this business was recently reconfirmed by the U.S. Department of Justice, which concluded last April that "property and casualty insurance (companies) are in effective competition with each other...."

Moreover, much of this competition stems from small insurers who are able to compete effectively only because McCarran-Ferguson allows for state regulatory mechanisms through which industrywide loss data can be gathered and made available to them. Without this sharing of data, the ability of smaller companies to compete would be greatly diminished. And even the largest companies would have difficulty gathering sufficient data to appropriately price certain of their insurance products. Concentration in the industry, therefore, would undoubtedly increase.

In addition, repeal of McCarran-Ferguson would not solve insurance availability problems. More than likely, it would exacerbate them by placing in jeopardy actions to protect the public which we take for granted today. Such actions include

EDWARD H. BUDD CHAIRMAN | DeROY C. THOMAS CHAIRMAN ELECT | ROBERT J. HAUGH VICE CHAIRMAN | WILSON H. TAYLOR VICE CHAIRMAN | ROBERT E. VAGLEY PRESIDENT

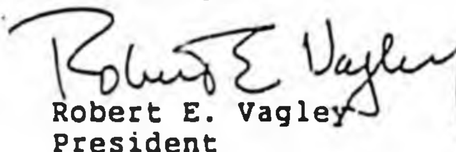
Market Assistance Plans, which help find insurance in the private market for those who are having difficulty finding it on their own. Statistical collection mechanisms and state authorized cooperative ratemaking systems also would be at risk.

Many also forget that even under McCarran-Ferguson, the insurance industry is fully accountable for improper anti-competitive activity. Boycotts, intimidation and coercion are all illegal. Moreover, all historical antitrust requirements apply to the insurance industry--the Sherman Act, the Clayton Act, the Robinson-Patman Act, and the Federal Trade Commission Act--to the extent that individual state laws do not already regulate the insurance business. Additionally, the courts have narrowly construed McCarran-Ferguson, further limiting the types of activities that are not subject to federal antitrust examination.

Repeal, therefore, would result in severe marketplace turmoil, without improving either the availability or the affordability of insurance, and without gaining anything of value for antitrust enforcement.

All Americans have a great stake in the vitality of the insurance industry. As the debate over McCarran-Ferguson progresses in the Senate, we at AIA would be pleased to provide you with whatever information you would find helpful in furthering the discussion about the way insurance markets work.

Sincerely,



Robert E. Vagley
President

REV/jlh
cc: Committee on the Judiciary

The McCarran-Ferguson Act

Proposals have been submitted in Congress to repeal or modify the McCarran-Ferguson Act. This Act gives the insurance industry certain limited exemptions from federal antitrust laws.

However, state and federal authorities who investigated the causes of the recent problems in insurance liability markets generally agree that the factors that precipitated these problems had nothing to do with antitrust law violations. Few insurance industry observers believe that repeal or modification of the McCarran-Ferguson Act would lead to reductions in the price of liability insurance or to an expansion of the market where coverage has been difficult to obtain. Repeal of the Act would, however, change the way the insurance industry is regulated because it would create the need for a federal regulatory system. This system would either exist side-by-side with the current state system, producing a dual system of regulation similar to banking regulation, or supersede the state regulatory system and eventually replace it. To make any judgment as to whether this change would benefit consumers, it is important to understand the provisions of the McCarran-Ferguson Act and how it came to be enacted.

Key Provisions of the McCarran-Ferguson Act

Public Law 79:15, known as the McCarran-Ferguson Act

after its sponsors Sens. Patrick Anthony McCarran of Nevada and Homer Ferguson of Michigan, was signed into law on March 9, 1945.

The McCarran-Ferguson Act was designed not to free insurance companies from federal antitrust laws but to ensure the preeminence of state regulation. The Act speaks of continued state regulation and taxation of the industry as being in "the public interest." Thus, no act of Congress should be "construed to invalidate, impair, and 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." Federal antitrust laws only would apply "to the extent that such business is not regulated by state law." The Sherman Act of 1890, the cornerstone of U.S. antitrust law, would always apply to cases involving boycott, coercion or intimidation.

Early Ruling Affirms Preeminence of State Regulation

State governments historically have regulated the insurance business. Although state regulation evolved slowly, the primacy of state, as opposed to federal, regulation was confirmed by a Supreme Court ruling in 1869, early in the insurance industry's development. The precedent-setting case, Paul vs. Virginia 75 U.S. (8 Wall.) 168 (1869) involved a Virginia statute that required

out-of-state insurance companies doing business in the state to be licensed. Some insurers at this time preferred the uniformity of federal regulation to the growing diversity of state regulation and, to promote their cause, they argued that their agents, specifically a Mr. Paul, should not have to obtain a license to do business in the state of Virginia. Only Congress had the power to regulate interstate commerce, they said.

The pivotal issue was whether insurance could be considered "commerce" within the definition of the Commerce Clause of the U.S. Constitution. The Court ruled that the Virginia statute was not unconstitutional because insurance "policies are simply contracts ... not articles of commerce in any proper meaning of the word."

The Paul vs. Virginia ruling, which placed insurance outside the realm of federal regulation on the basis that the sale of insurance was not commerce, remained intact for 75 years.

Reversal of Decision Leads to McCarran-Ferguson Act

Then, in 1944, in U.S. vs. South-Eastern Underwriters Association, 322 U.S. 533 (1944), the Supreme Court overturned Paul vs. Virginia. The case involved an indictment of South-Eastern Underwriters Association and its member companies for alleged violations of the Sherman Antitrust Act. Explaining that the size and importance of the insurance industry had grown immensely since 1869 when

Paul vs. Virginia was decided, the Court held that an insurer conducting a substantial portion of its business across state lines was indeed engaged in interstate commerce. Congress had not intended to exempt insurers from antitrust laws, the court said.

The South-Eastern Underwriters decision alarmed the insurance industry as well as state governments. Since the early days of insurance, both insurers and state regulators had come to realize that some cooperation in ratemaking was essential to preserve the industry's financial health. Small companies need to participate in data-sharing programs because they lack the resources and the broad data base needed to predict losses and establish adequate rates. So by 1944, setting prices in concert, within a framework of state regulation to prevent abuses, had become an accepted practice.

Insurers now faced the prospect of antitrust prosecution for ratemaking activities. State governments also would be affected by the South-Eastern Underwriters decision. They stood to lose both their developing system of state regulation and funds generated by taxes on the insurance industry. These fears were not unfounded. Following the South-Eastern underwriters ruling, some insurers did challenge state tax laws in court. Thus, both the states and insurance companies were seeking a federal remedy to deal with the situation. Within a year after the South-Eastern Underwriters Supreme Court ruling, Congress passed the McCarran-Ferguson Act.

Requirements For Antitrust Exemption

The McCarran-Ferguson Act established three requirements for antitrust exemption to apply: (1) the activity in question must fall within the business of insurance; (2) the activity must be regulated by state law; and (3) the activity must not involve boycott, coercion or intimidation. These broad requirements, especially the first one, have been the subject of much litigation. Several cases reached the Supreme Court. The decisions in these and other cases clarify and define the areas in which the insurance industry has immunity from federal antitrust laws.

1) The Business of Insurance: The meaning of the term "business of insurance" is crucial in determining what specific activities are within the scope of the McCarran exemption. In an often-cited case, SEC vs. National Securities, Inc. 393 U.S. 453 (1969), the Supreme Court declared that the "business of insurance" does not encompass every activity that insurers engage in but revolves around the relationship between insurance companies and their policyholders.

The case involved an Arizona law which gave the state's Insurance Director the authority to approve mergers between insurance companies. The SEC wanted a particular merger undone, claiming one of the companies had fraudulently

obtained stockholders' votes. The company argued the SEC had no jurisdiction. The Supreme Court ruled state regulation of the relationship between an insurance company and its stockholders was not included in the "business of insurance."

More recent U.S. Supreme Court cases have set forth a three-prong test for determining what constitutes the "business of insurance" for purposes of the McCarran Act exemption. In Group Life & Health Insurance Company vs. Royal Drug, 440 U.S. 205 (1979), the Court focused on two elements in determining what constitutes the "business of insurance": (1) the spreading and underwriting of risk; and (2) a direct connection with the contractual relationship between the insurer and insured.

The Royal Drug action was brought by 18 independent pharmacies against Blue Shield of Texas and three pharmacies that had entered into agreements to keep down the price of drugs. The Supreme Court ruled that Blue Cross's agreements to fix drug prices did not involve underwriting or spreading of risk and, therefore, did not come within the business of insurance.

In Union Life Insurance Company vs. Pireno, 458 U.S. 119 (1982), which involved the use of a peer review committee to assess the necessity of treatment and the reasonableness of medical fees submitted by claimants, the Supreme Court added the third prong, namely, that the anticompetitive practice must be limited to entities within the insurance industry, thus narrowing the McCarran-Ferguson

exemption and opening the door for any agreement between an insurance company and a third party outside the industry to be scrutinized for violation of antitrust laws.

2) Regulated by State Law: While courts have tended to narrow the scope of what is meant by the "business of insurance" under McCarran-Ferguson, court interpretations have been more liberal in deciding what kind of state regulation provides immunity from federal laws. In general, courts will not inquire into the actual effectiveness of state laws and regulations governing the insurance industry.

The Supreme Court, in FTC vs. National Casualty Co., 357 U.S. 560 (1958), decided that if a state had any appropriate legislation and authorized administrative enforcement, it was regulating within the meaning of McCarran-Ferguson. At issue was whether the FTC could order insurance companies licensed in a state to stop certain advertising practices even though the state had enacted legislation pertaining to unfair advertising by insurers. The court ruled the existing regulation sufficient to trigger immunity from federal action without regard to the effectiveness of the regulation.

The court did draw a line, however, in FTC vs. Travelers Health Association 362 U.S. 293 (1960) when called upon to determine whether a state's regulation of its domiciled companies' advertising activities in other states was sufficient regulation to invoke McCarran immunity from the FTC. In the Travelers case the FTC issued a cease and

desist order to prohibit a company licensed only in Nebraska and Virginia from making deceptive statements in circulars soliciting mail-order insurance business from customers in other states.

The Supreme Court stated that regulation meant regulation by the state in which the activity is practiced and has its impact. The Court was not willing to allow the regulatory activities of a few states to invoke McCarran immunity for the activity in all other states.

3) Boycott, Coercion or Intimidation: As mentioned earlier, one of the more important areas of antitrust immunity pertains to the industry's practice of pooling and sharing information on losses associated with various types of insurance coverages. This sharing of data enables companies to make statistically valid predictions of future losses, charge adequate rates and maintain realistic reserves. The use of industry-wide data to develop advisory rates, shared loss experience, standardized contract forms and shared underwriting are essential elements of the business of insurance which could run afoul of antitrust statutes without McCarran-Ferguson immunity.

Generally the courts have applied the boycott, coercion or intimidation provision to three types of activities: the exclusion of nonconforming competitors from the market, tie-in sales, and concerted refusals to deal.

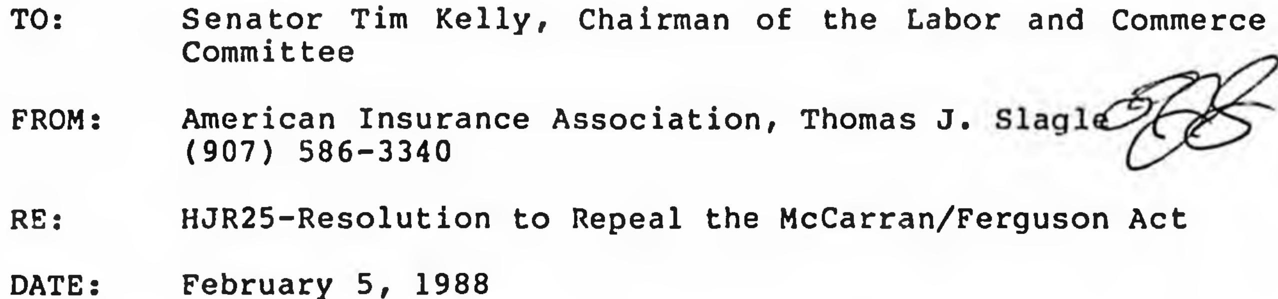
A landmark case in this area was St. Paul Fire and Marine Insurance Co. vs. Barry 438 U.S. 541 (1978) where the

Supreme Court found certain types of risk selection practices could constitute concerted refusals to deal. The Court also stated that victims of such practices need not be limited to insurance entities, substantially broadening the boycott exception. St. Paul had announced that it would not renew medical malpractice policies covering claims occurring during the term of a policy but reported after the policy expired. Other companies were alleged to have refused to write the business and Barry claimed that his allegations of a collective effort of refusal to deal should be outside of McCarran immunity. The Supreme Court held that the alleged conduct of the malpractice insurers would, if proven, constitute a boycott and the McCarran-Ferguson exemption, therefore, did not apply.

A lower court, in Fry vs. John Hancock Mutual Life Ins. Co., 355 F. Supp. 1151 (D.C. Tex. 1973) declined to give tie-ins antitrust immunity. The company had been requiring those who applied for loans to also purchase life insurance from the insurer. The court ruled that federal regulation is applicable to the sale of insurance tied in to farm loans.

These court cases exemplify the most prevalent types of disputes. Other cases have tended to refine these three areas.

MEMORANDUM



TO: Senator Tim Kelly, Chairman of the Labor and Commerce Committee

FROM: American Insurance Association, Thomas J. Slagle (907) 586-3340

RE: HJR25-Resolution to Repeal the McCarran/Ferguson Act

DATE: February 5, 1988

The American Insurance Association, represents over 180 property casualty insurance companies in the United States. Last year we joined with the Alaska Independent Insurance Agents and Brokers in opposition to HJR25. On a national level the repeal of the McCarran/Ferguson Act is opposed by the National Association of Insurance Commissioners, as well as virtually every major insurance trade group. To assist the committee in the consideration of this resolution, enclosed is a background paper on the McCarran/Ferguson Act, a letter from the President of the American Insurance Association to Senator Metzenbaum, and some information from the Insurance Services Office, the major rating association in the United States.

The McCarran/Ferguson Act was enacted in 1945 and has a two-prong effect:

1. It keeps the regulation and taxation of the insurance industry under state control.

2. It allows the insurance industry certain limited anti-trust exemptions.

The exemptions are narrowly defined and apply only to activities regulated by the state, and must involve the business of insurance. The anti-trust exemption does not apply to any activity involving boycott, coercion, or intimidation.

The function of rate making is to take as much actuarial information as possible to establish an adequate premium (or rate) in order to cover future losses. Arguably without the anti-trust exemption, the rating organizations could not give this type of advisory rate. Repeal of the McCarran/Ferguson Act would most profoundly effect small companies who do not have in-house actuarial departments and must rely on advisory rates. State regulators' also rely on this information to monitor rate changes.

Repeal of the McCarran/Ferguson Act would not increase either affordability or availability of insurance. In fact, without the use of advisory rates, many small companies would be unable to compete and there would likely be increased concentration. I would be pleased to supply the committee with additional background information. The American Insurance Association urges your vote against this resolution.

TJS/7.75
cc: Members of the Senate Labor and Commerce Committee

Enclosures:

1. Background - McCarran/Ferguson Act
2. Letter from AIA President Vagley - 1/21/88
3. Testimony from the Insurance Services Offices, Inc.

AMERICAN INSURANCE ASSOCIATION
RECEIVED

JAN 12 1988

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TESTIMONY OF MAVIS A. WALTERS

SENIOR VICE PRESIDENT

INSURANCE SERVICES OFFICE, INC.

United States House of Representatives

Committee on the Judiciary

Subcommitte on Monopolies & Commercial Law

December 1, 1987

I am Mavis A. Walters, Senior Vice President of Insurance Services Office, Inc. I am a Fellow of the Casualty Actuarial Society and a M ber of the American Academy of Acturies. I am currently a Vice President of the AAA and serve as an elected member of the Board of the Directors of the CAS.

Insurance Services Office, Inc. (ISO) is a non-profit corporation that gathers, stores and disseminates aggregate statistical information to insurance regulators - as required by law-and to insurers for their use. In addition, ISO develops and assists in implementing insurance policy coverage programs that help to define and cover the risks faced by policyholders. ISO also distributes industrywide advisory insurance rate information and, where appropriate, files that information with state insurance regulators.

No property/casualty insurer can be excluded from participating in ISO. Neither can an insurer be required to join ISO. Those insurers that are ISO participants may choose the ISO products or services they wish to purchase and do not have to adhere to the advisory insurance rates or standardized coverage parts developed by ISO.

From its inception, ISO has encouraged individual insurers to make their own decisions about what insurance coverages they will provide and what insurance rates they will use.

It is important to look at the role that ISO plays in the property/casualty insurance industry today, as contrasted with insurance rating bureaus which, in most instances, existed as cartels many years ago. Those bureaus were organized along local, regional and national lines. They specialized in either property or casualty insurance for one or more lines of coverage. In most states, insurers were required by law to belong to the bureau and use the insurance premium rates and policy forms published by the bureau. An insurer had no choice. If an insurance company was affiliated for one service offered by the bureau, it was affiliated for all of them. Effectively those bureaus came to be regarded as insurance cartels.

Those days are long gone. Indeed, the cartels had died well before Insurance Services Office was formed in 1971. Today ISO's rates, rules and standardized coverage parts are all advisory; that is, ISO's participating insurers have no obligation to ISO or to each other to use them. Indeed, ISO's non-adherence policy is explicitly stated in its certificate of incorporation and by-laws. ISO's essential task is the development and dissemination of information that will assist participating insurers in making informed,

intelligent and independent decisions regarding the coverages they provide and the pricing decisions they make.

Because everything about insurance is prospective - the promise to pay in the future should in some event occur - the cost of the insurance product is not known when the policy is sold, but rather must be predicted based, in part, upon past loss experience. Their estimates of future losses are based on historical data gathered from insurance policies written in the past and from the claims paid or incurred on those policies.

Central to the process of insurance ratemaking is the availability of a reliable data base which provides information about losses paid or incurred on similar types of insurance coverages. As with all forms of statistical analysis, the larger and more consistent the statistical samples, the greater the probability that the predictions based on it are accurate. This "law of large numbers" means that, with a broad aggregate data base of loss experience, the analysis and prediction of expected losses should be - and usually are - more reliable.

The more data collected and pooled to develop benchmark statistics, the more accurate the prediction by insurers of

their future losses. This reduces the size of the contingency margin needed in insurers' rates to account for a possible error in predicting future losses and other costs.

In summary, the unique nature of the insurance product requires the pooling of data. ISO maintains such a data base. The actuarial analysis of such a data base and the development of standardized coverage parts which allow the creation of that data base are also critical elements in enhancing competition.

ISO standardized coverage parts provide benchmarks without which it would be very difficult for insurance consumers and government to make meaningful price and coverage comparisons among insurers. Standardized coverage parts provide a base from which insurers and producers can depart, tailoring endorsements to insure unique risks or target markets.

If standardized coverages did not exist, consumers would be confronted with an unintelligible array of different insurance forms. Standard coverage parts permit comparison shopping by consumers without the added confusion of incomparable coverage provisions.

Insureds benefit from the clarity that the standard benchmark coverage language achieves. Standardized, readable language helps the parties to the insurance contract have a similar understanding of the coverage purchased. The purchaser can shop for the best buy with confidence, knowing that a standard minimum level of coverage is offered by almost all insurers.

Standard" coverage parts do not mean identical coverages that cannot be customized to meet the individual policyholder's needs. For example, ISO maintains five basic coverage parts, 73 countrywide endorsements, and 118 state-specific endorsements for the Homeowners line alone. With this variety of standard coverage parts, insurers can write Homeowners insurance for an apartment renter in Brooklyn who owns a large collection of art, a condo owner in Duluth who has installed a sauna and burglar alarm and wants high levels of liability coverage, or a homeowner in Palo Alto who has a swimming pool and tennis courts - all using ISO coverage parts.

In the commercial lines of insurance, the availability of such standardized coverage parts is even more critical than in the personal lines. Commercial insureds are far more heterogeneous, requiring coverage flexibility to allow an insurer to write a policy reflecting the individual

insured's risks. Given this need to package various commercial property and liability coverages in a variety of ways, the need for a selection of standardized coverage parts becomes critical. As a result, for the Commercial General Liability line of insurance ISO maintains 11 basic standardized coverage parts, 147 countrywide endorsements and more than 100 additional endorsements geared to specific states.

Unless data - particularly loss experience data - is collected and arrayed in some reasonably common format based on comparable provisions of coverage, it cannot be pooled or aggregated in any meaningful way.

Mountains of unrelated data are meaningless. Standardized coverage parts permit the collection of comparable statistics. This provides for a more stable and reliable data base and facilitates analysis, including the more accurate forecasting of future costs for ratemaking.

Forecasting credible insurance rates requires that actuaries develop meaningful classifications, gather reliable data for each of those classes (groupings of risks with similar loss characteristics), and monitor the relationship of loss experience from class to class to determine that the relationship is fair and reasonable. Standardized coverage parts greatly assist in the collection of an accurate data

base for risk classes and therefore assist in the actuarial forecasting of insurer loss experience.

Data quality work performed by ISO and its participating insurers is not an academic exercise. It is in the insurer's own best interests to make certain that the data reported to ISO is accurate, because this data serves as the basis on which insurers can make informed pricing decisions.

For most insurers, raw data for most lines of business and most states isn't enough. If no advisory benchmark rate or prospective loss cost projections/reflecting both industry experience and the actuarial forecasting of that experience were available, the result would be less competition and higher prices in the marketplace. Many small and medium-sized insurers would ultimately be forced out of markets where they do not have a significant market share of the business. Even large well established insurance companies would be inhibited from entry into new geographic areas or lines or insurance.

Historical data can provide a good picture of past costs but give little information about future costs without additional analysis, including the use of professional judgement.

Developing meaningful pricing information from an aggregate data base involves not only actuarial formulas, but also the research skills and expertise to apply proper judgment. Data in the fine detail necessary for pricing a policy for a particular type of risk within a specific geographic territory can fluctuate greatly for even the largest insurer. Actuarial analysis-loss development, trending, etc. of a pooled data base permits the estimation of underlying costs in spite of the random fluctuations that can appear in actual insurance losses. The more credible loss costs can then be projected into the future.

Only a few insurers enjoy a market share large enough to permit them to develop rates based solely on their own loss experience and actuarial analysis.

In addition to a fragmented market, the type of risks insured by commercial insurers are not homogeneous, for there is an extraordinary variety of disparate risks in commercial insurance. An insurer with 5% of the overall market will likely be writing policies for many different kinds of businesses. Commercial general liability insurance, for example, can be provided for more than 1,000 distinct classes. These classes range from hardware stores to schools to hotels to coal mines.

Competition is so significant, market share so fragmented among the companies writing commercial insurance, and commercial risks so disparate that probably no insurer in business today could price its product credibly without access to aggregate industry experience. Small market shares do not give individual companies enough statistical experience to generate credible statistical samples for specific risk classifications or the resources to employ large actuarial staffs. Therefore, the need for a large data base of experience for actuarial forecasting of industrywide loss costs is even more critical.

ISO promotes price competition among insurers and focuses on developing information to assist participating insurers in making their own informed, intelligent and independent decisions about the insurance rates they use. Insurers regularly depart from ISO's advisory rates in keeping with their individual corporate objectives and strategies.

By improving insurer's ability to forecast the true costs of their products more accurately, and by introducing economies of scale in the development of coverage parts and actuarial forecasting, ISO confers benefits to the insurance-buying public through lower costs, greater competition and more product innovation.

Alaska State Legislature
House of Representatives

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REPRESENTATIVE
JIM ZAWACKI
DISTRICT 7

MEMBER
COMMUNITY & REGIONAL AFFAIRS COMMITTEE
LEGISLATIVE BUDGET & AUDIT COMMITTEE
FINANCE SUBCOMMITTEE

M E M O R A N D U M   February 5, 1988

TO: Senator Tim Kelly, Chairman
Senate Labor & Commerce Committee

FROM: Representative Jim Zawacki

SUBJ: HJR 25

The intent of HJR 25 is to support efforts in Congress to amend the McCarran-Ferguson Act enacted in 1945 which exempts the insurance industry from federal antitrust laws.

The broad antitrust immunity enjoyed by the insurance industry under the McCarran-Ferguson Act is both undesirable and unnecessary. The exemption is undesirable because, by blunting some forms of competitive behavior, it denies consumers the best array of insurance services at the lowest possible cost. The exemption is unnecessary because application of the antitrust laws is in no way inconsistent with either desirable industry cooperation or effective state regulation.

There have been two objections raised by the insurance industry to this resolution. One, it is argued that support of HJR 25 would remove or subordinate the primacy of states' regulatory role as regulator of the industry. This is not so. HJR 25 was drafted to address this concern. Senator Howard Metzenbaum, the original sponsor of the federal legislation, has testified that his intent was not to alter state regulatory primacy. The Senate Antitrust Committee in Washington, D.C. has made it clear that there is no intent to

alter the primacy of state regulatory authority over the industry. Two, is the assertion that the repeal of the antitrust exemption will restrict information pooling that assists the industry in accurately estimating how much they are likely to pay out in the future. Again, this is not so. HJR 25 specifically recognizes the need for the industry to pool and analyze the past claims they have paid; the more claims they can analyze, the more accurate their estimates of future payouts will be.

I was asked by the Citizens Coalition for Tort Reform to introduce this resolution. The Coalition has reviewed this issue closely and determined that it is in the consumers' best interests to repeal this special privilege to the insurance industry. The Coalition has found that there is strong bipartisan support to amend the McCarran-Ferguson Act and that the position of the insurance industry to retain this exemption is not logical or in the best interests of the consumer.

Thank you.

Representative Jim Zawacki
February 5, 1988

The following is SUPPORT for amending the McCarran-Ferguson Act. The documentation is in your file. The pertinent information is highlighted from each report for your review.

Citizens Coalition for Tort Reform

Discussion Draft - McCarran-Ferguson Act Amendment, Senator Howard Metzenbaum

S.80, Congressional Record, Senator Metzenbaum, January 6, 1987

Federal Trade Commission, Daniel Oliver, Chairman February 18, 1987

National Association of Attorney Generals

National Conference of State Legislatures

National Insurance Consumer Organization

U.S. Presidents:

-the Ford Administration exhaustively studied the insurance industry and concluded that price competition in the insurance industry, without McCarran Act antitrust protection, would be in the public interest.

-similarly, President Carter's National Commission for the Reform of Antitrust Laws and Procedures, composed of the nation's leading antitrust experts, concluded 18-2 that McCarran-Ferguson's broad antitrust immunity should be repealed.

-the Reagan Administration supports repeal of the broad McCarran-Ferguson antitrust exemption, as Federal Trade Commission Chairman Dan Oliver recently testified before the Senate Commerce Committee in February 1987.

Introduced: 5/15/87
Referred: Rules

5-0861B

Original sponsors: Zawacki, Navarre,
Gruenberg, et al.

1 IN THE HOUSE BY THE JUDICIARY COMMITTEE

2 CS FOR HOUSE JOINT RESOLUTION NO. 25 (Judiciary)

3 IN THE LEGISLATURE OF THE STATE OF ALASKA

4 FIFTEENTH LEGISLATURE - FIRST SESSION

5 Relating to federal regulation of the
6 insurance industry.

7 BE IT RESOLVED BY THE LEGISLATURE OF THE STATE OF ALASKA:

8 WHEREAS the McCarran-Ferguson Act, enacted in 1945, exempts the insur-
9 ance industry from federal antitrust laws and allows insurance companies to
10 fix prices; and

11 WHEREAS this antitrust exemption results in fixed rates for many types
12 of insurance; and

13 WHEREAS repeal of the exemption from antitrust regulation would still
14 allow the insurance industry to exchange past cost data and allow accurate
15 forecasting of future claims; and

16 WHEREAS, even if the exemption were repealed, the individual states
17 would continue to be able to regulate insurance rates and competition and
18 could continue to allow anticompetitive activity by insurance companies as
19 an expressed state policy; and

20 WHEREAS both the National Conference of State Legislatures and the
21 National Association of Attorneys General have passed resolutions calling
22 for repeal of the insurance industry exemption from antitrust laws; and

23 WHEREAS a significant portion of the insurance industry has indicated
24 support for changes in the immunity granted by the McCarran-Ferguson Act;

25 BE IT RESOLVED by the Alaska State Legislature that the United States
26 Congress is respectfully requested to amend the McCarran-Ferguson Act in
27 order to subject the insurance industry to antitrust regulation.

28 COPIES of this resolution shall be sent to the Honorable Ronald
29 Reagan, President of the United States; the Honorable George Bush, Vice-

1 President of the United States and President of the U.S. Senate; the Honor-
2 able Joseph R. Biden, Jr., chairman of the U.S. Senate Committee on the
3 Judiciary; the Honorable Jim Wright, Speaker of the U.S. House of Represen-
4 tatives; the Honorable Peter W. Rodino, Jr., chairman of the U.S. House of
5 Representatives Committee on the Judiciary and the Subcommittee of the
6 Judiciary on Monopolies and Commercial Law; and to the Honorable Ted
7 Stevens and the Honorable Frank Murkowski, U.S. Senators, and the Honorable
8 Don Young, U.S. Representative, members of the Alaska delegation in Con-
9 gress.

HJR 25

CITIZENS COALITION FOR TORT REFORM

907-561-6250

March 24, 1987

Representative Jim Zawacki
PO Box V
Juneau, Alaska 99811

Representative Zawacki,

This is to confirm our request that you cause to have introduced a House Joint Resolution in support of efforts by Congress to amend the McCarran-Ferguson Act, which exempts the insurance industry from federal antitrust laws.

As we have discussed not only have the past three Presidents of the United States supported such amendments, but a host of national organizations have recently passed resolutions supporting this action. The National Conference of State legislatures and the National Association of Attorneys General are just two examples of national groups that support amendment of the law.

Two concerns have been raised by the insurance industry that must be addressed in the body of a resolution.

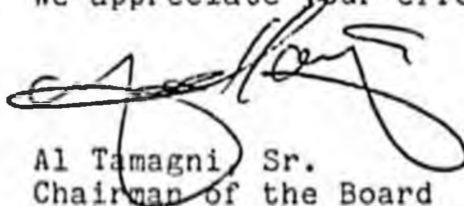
1. Individual states must be able to continue their regulatory role of the industry.

2. The insurance industry must still be allowed to exchange past cost data and allow accurate forecasting of future claims.

Additional information on the efforts in Washington, D.C. will be forwarded to you upon receipt, including a new Senate bill that specifies the amendments, that is now in final draft.

We believe the insurance industry, except for the two exceptions we have noted, should be subject to the same laws as other businesses. We believe the insurance consumer and all consumers will benefit from this action and that there will be greater competition in the industry.

We appreciate your efforts in this area of reform.



Al Tamagni, Sr.
Chairman of the Board

P.O. Box 201668 • Anchorage, Alaska 99520

The Informer

Citizens Coalition for Tort Reform

Weekly Update

April 10, 1987

RESOLUTION CALLS FOR AMENDMENTS TO FEDERAL ANTITRUST LAW

HOUSE JOINT RESOLUTION 25

Bipartisan group sponsors reform of federal regulation of insurance industry

HJR 25 was introduced by a bipartisan group of House members concerned with insurance reform. Representatives Zawacki, Navarre, Gruenberg, Martin, Shultz and Taylor introduced HJR 25 at the request of the Coalition.

The intent of HJR 25 is to support efforts in Congress to amend the McCarran-Ferguson Act (1945) which exempts the insurance industry from federal antitrust laws.

Two objections have been raised by the insurance industry to this Joint Resolution, they are:

1. Support of HJR 25 to repeal or amend the McCarran-Ferguson Act would remove or subordinate the primacy of states regulatory roll over the insurance industry.

Not so. HJR 25 has been specifically drafted to address this concern. Already the Senate Antitrust Committee in Washington, D.C. has made it clear that there is no intent to alter the primacy of state regulatory authority over the industry. Senator Howard Metzenbaum, the original sponsor of the federal legislation has testified that his intent was not to alter state regulatory primacy and has asked the committee to adjust the original bill to ensure that this is clear. Support for HJR 25 does not alter the primacy of state regulatory authority.

2. Repeal of the antitrust exemption will restrict information pooling that assists the industry in accurately estimating how much they are likely to pay out in the future.

Again, Not so. HJR 25 specifically recognizes the need for the industry to pool and analyze the past claims they have paid - the more claims they can analyze the more accurate their estimates of future payouts will be.

Why is the Coalition calling for repeal of the antitrust exemption and support of House Joint Resolution 25?

Last year, during debate on tort reform legislation, the issue of the McCarran-Ferguson exemption from antitrust was raised by the opposition. The Coalition has reviewed this issue closely and determined that it is in the consumers best interest to repeal this special privilege to the insurance industry. The Coalition found strong bipartisan support for amendment to the McCarran-Ferguson act and that the position of the insurance industry to retain this exemption was not logical or in the best interests of the consumer.

The Coalition has extensive materials in support of and in opposition to the proposed amendment of the McCarran-Ferguson Act. This information, including copies of resolutions by the NFIB, The National Conference of State Legislatures, The National Association of Attorneys General and statements by the Chairman of the Federal Trade Commission, is available upon request. Just call the Executive Director at 561-6250.

907-561-6250

P.O. Box 201668 • Anchorage, Alaska 99520

THE CITIZENS COALITION FOR TORT REFORM

represents a broad cross-section of Alaskan businesses, professions and local governments. They include:

Alaska Air Carriers
Alaska Association of Manufacturers
Alaska Broadcasters Association
Alaska Chapter, American Institute of Architects (AIA)
Alaska Dental Society
Alaska General Contractors
Alaska Chapter, American Optometric Association
Alaska Movers Association
Alaska Oil Marketers Association
Alaska Rental Association
Alaska Section, American Society of Civil Engineers
Alaska Society of Professional Engineers
Alaska State Health Associaiton (Hospitals)
Alaska State Medical Association
Alaska Support Industry Alliance
Alaska Truckers Association
Alaska Visitors Association
Ancnorage Board of Realtors
Anchorage Restaurant and Beverage Association
Cabaret Hotel and Restaurant Retailers
Childbirth Educators
Daycare Operators Association
Fairbanks North Star Borough
Financial Managers
Kijik Native Corporation
Hotel and Motel Association
Insurance Brokers and Agents Association
Nurse Midwives Association
Pension Consultants
Professional Physical Therapists Association
Risk Management Association
Southern Association of Life Underwriters
Providence Hospital

NOW IT'S YOUR TURN TO HELP

INSURANCE CRISIS
Affects Every Alaskan!

THE CITIZENS COALITION FOR TORT REFORM

P.O. Box 201668
Anchorage, Alaska 99520
(907) 561-6250

DISCUSSION DRAFT

100th CONGRESS

1st Session S.____

IN THE SENATE OF THE UNITED STATES

Mr. Metzenbaum introduced the following bill; which was read twice and referred to the Committee on the Judiciary

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A BILL

To amend the McCarran-Ferguson Act to limit the federal antitrust exemption of the business of insurance, to reaffirm the continued state regulation of the business of insurance, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Insurance Competition Improvement Act of 1987".

FINDINGS AND DECLARATION OF PURPOSE

Sec. 2.(a). The Congress finds and declares that--

(1) the continued regulation and taxation by the several States of the business of insurance is in the public interest; and

(2) the Federal antitrust laws comprise an essential component of congressional policy in favor of competition and consumer protection, and the current broad exemption from the antitrust laws afforded the insurance industry has weakened competition and adversely affected consumers of insurance.

(b). It is the purpose of this Act to promote price competition among insurers by modifying the current antitrust exemption of the business of insurance.

AMENDMENTS TO THE MCCARRAN-FERGUSON ACT

Sec. 3 (a) Section 1 of the Act entitled "An Act to express the intent of the Congress with reference to the regulation of the business of insurance", approved March 9, 1945 (15 U.S.C. 1011; known as the McCarran-Ferguson Act), is amended by striking out the period and inserting in lieu thereof the following: "; but that a continued broad exemption of the business of insurance from the federal antitrust laws is not in the public interest.".

(b) Section 2 of that Act (15 U.S.C.1012 (b)), is amended by striking out all after "insurance" the second place it appears and inserting in lieu thereof a period.

(c) Section 3 of that Act (15 U.S.C. 1013) is repealed and amended to read as follows:

"Section 3. (a) Except as provided in subsections (b) and (c), the antitrust laws shall apply to the business of insurance or to acts in the conduct of such business. "

"(b)(1) The antitrust laws shall not be construed to prohibit any agreement, understanding, or concert of action between or among insurers, any insurance advisory organizations or their members, any individual insurers or any other persons that is limited to:

"(A) Collecting, compiling and disseminating statistical data on past losses incurred by insureds from insurers or any other source, provided that such information is made available to an appropriate state regulatory agency;

"(B) Preparing and filing policy forms and endorsements, provided that no individual insurer shall agree with any other insurer or with an insurance advisory organization to refrain from using any other forms, and provided further that no forms or endorsements that contain rate-related terms or conditions may be subject to an agreement or understanding between or among individual insurers or the members of an insurance advisory organization unless such forms are approved by and subject to the active supervision of an appropriate state regulatory agency.

"(C) Conducting research and on-the-site inspections in order to prepare classifications of public fire defenses.

"(D) Collecting, compiling and distributing information relating to fraudulent claims and other fraudulent practices, provided that the dissemination of such information is subject to the approval and active supervision of an appropriate state regulatory agency.

"(2) The antitrust laws shall be construed to prohibit any association or other combination of insurers or any insurance advisory organization from recommending, preparing, establishing or distributing any material that contains recommended premium or final rates, or procedures, formulae, guidelines, or schedules for the calculation of premium or final rates, including without limitation loss development factors, claim trending factors, claim adjustment expense factors, profit allowances, or other actuarial components (excepting reported losses and units of exposure to risk) used in the calculation of insurance rates;

"(c) Nothing in this Act or any state law shall render the antitrust laws inapplicable to any agreement to boycott, coerce, or intimidate, or to any act of boycott, coercion, or intimidation.

"(d) Insurers and other persons participating in joint underwriting, pools, or residual market mechanisms may, in

connection with such activity, act in cooperation with each other in the making of rates, rating systems, policy forms, underwriting rules, surveys, inspections, and investigations, if the joint underwriting, pools, or residual market mechanism is required by law or is approved by and subject to the active supervision of an appropriate state regulatory agency.

"(e) Nothing in this Act shall be construed to prohibit any State from establishing or approving a residual market mechanism.

"(f) As used in this section, the terms--

(1) 'advisory organization' means any organization which is comprised of, or is controlled by, one or more insurers and which prepares policy forms and endorsements for use by its members or subscribers, compiles and promulgates insurance-related statistical data, prepares and revises insurance rating plans and classification systems, and provides assistance in the preparation of insurance rates;

(2) 'antitrust laws' means the Sherman Act (15 U.S.C. 1 et seq.), the Clayton Act (15 U.S.C. 12 et seq.), and the Federal Trade Commission Act (15 U.S.C.41 et seq.);

(3) 'loss development' means an adjustment to reflect the amount an insurer will eventually pay out on policies in effect for a given year derived by multiplying the amount that has actually been paid out over a certain period of time for claims covered by a class of policies by a factor based on the pattern of payouts over time for settlements on prior years' policies;

(4) 'claim trending' means any procedure for adjusting the claims rate to reflect changes in the rate of claims per unit of exposure or per unit of insurance;

(5) 'claims adjustment expense' means the amount of any rate attributable to (i) acquisition, field supervision, and collection expenses, (ii) general expenses, and (iii) taxes, licenses and fees;

(6) 'residual market mechanism' means an arrangement, either voluntary or mandated by law, involving participation by insurers in the equitable apportionment among them of insurance which may be afforded applicants who are unable to obtain insurance through ordinary methods.

(7) 'joint underwriting' means a voluntary arrangement established on an ad hoc basis to provide insurance coverage for a commercial individually rated risk under which

two or more insurers contract with the insured at a price and under policy terms agreed upon between the insurers, or negotiated between the underwriter and the insured;

(8) 'pool' means a voluntary arrangement, other than a residual market mechanism, established on an ongoing basis, under which two or more insurers participate in the sharing of risks on a predetermined basis by means of an association, syndicate, or other pooling agreement

(9) 'final rate' means________________________________.

Sec. 4. (a) This Act and the amendments made by this Act shall become effective one year after the date of enactment.

(b) In any action brought under the provisions of the antitrust laws alleging a violation of those laws for conduct that would have otherwise been lawful pursuant to the provisions of the McCarran-Ferguson Act, no award of treble damages or criminal penalties shall be awarded against any such person for conduct by such person occuring within two years after the date of enactment of this Act.

(c) During the two year period referred to in subsection (b), no relief shall be granted against any person in an action

referred to in subsection (b) for conduct by such person during such period, if such person has, in good faith, relied upon an advisory opinion issued by the Department of Justice.

II

100TH CONGRESS
1ST SESSION

S. 80

To repeal the McCarran-Ferguson Act, and for other purposes.

IN THE SENATE OF THE UNITED STATES

JANUARY 6, 1987

Mr. METZENBAUM introduced the following bill; which was read twice and referred to the Committee on the Judiciary

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A BILL

To repeal the McCarran-Ferguson Act, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*
3 That the Act entitled "An Act to express the intent of the
4 Congress with reference to the regulation of the business of
5 insurance", commonly known as the McCarran-Ferguson Act
6 (59 Stat. 33), is repealed.
7 (b) The repeal made by this section shall be effective as
8 to conduct engaged in beginning one year after the date of
9 enactment of this Act.
10 SEC. 2. (a) In any action brought under the provisions of
11 the Clayton Act or the Sherman Act alleging a violation of
12 either such Act for conduct that would have otherwise been

(A) APPLICATION FOR REVIEW.—Any employee who is aggrieved by a violation of section 9(b) or 9(c) may, within 6 months after such violation occurs, apply to the Secretary of Labor for a review of such alleged violation.

(B) INVESTIGATION.—On receipt of such application, the Secretary of Labor shall cause such investigation to be made as the Secretary of Labor considers appropriate.

(C) ACTION.—If, no such investigation, the Secretary of Labor determines that this section has been violated, the Secretary of Labor shall bring an action in any appropriate United States district court. In any such action, the United States district courts shall have jurisdiction for cause shown to restrain violations of this section and order all appropriate relief under subsection (e) or (f).

(2) DETERMINATION BY SECRETARY.—Within 90 days of the receipt of the application filed under this subsection, the Secretary of Labor shall notify the complainant of the determination of the Secretary of Labor under paragraph (1). If the Secretary of Labor finds that there was no such violation, the Secretary shall issue an order denying the application.

(e) REINSTATEMENT AND OTHER RELIEF.—Any employee who is discriminated against in violation of section 9(b) or 9(c) shall be restored to his or her employment and shall be compensated for—

(1) any lost wages (including fringe benefits and seniority);

(2) costs associated with medical monitoring that are incurred up to the time when the discrimination is fully remedied, and

(3) costs associated with bringing the allegation of violation.

(f) CIVIL PENALTIES.—Any person that discriminates against an employee in violation of this section shall be liable for a civil penalty of not less than $1,000 or more than $10,000 for each violation.

(g) EFFECT ON OTHER LAWS.—The notification of an employee pursuant to this Act that the employee is in a population at risk and the initiation of medical evaluation and monitoring shall not constitute or in any way affect a claim for compensation, loss, or damage arising out of exposure to the occupational health hazard, except that the results of such medical evaluation and monitoring may be introduced as evidence with respect to such a claim. Notification pursuant to this Act shall not be relevant in determining whether such a claim is timely under any applicable statute of limitations.

SEC. 11. REPORTS TO CONGRESS.

(a) HAZARD COMMUNICATION STANDARD REPORT.—The Secretary of Labor shall report to Congress annually, not later than January 15 of each year, regarding implementation and enforcement of the hazard communication standard. The report shall include detailed information on—

(1) MONITORING AND ENFORCEMENT.—Monitoring and enforcement; significant areas of noncompliance; and penalties assessed and steps taken to correct the noncompliance.

(2) ENFORCEMENT.—Efforts to evaluate the hazard communication standard.

(3) EMPLOYER ASSISTANCE.—Efforts to assist employers to comply with the hazard communication standard.

(4) EMPLOYEE EDUCATION.—Efforts to educate employees to their rights under the hazard communication standard.

(5) FEDERAL COURT DECISIONS.—Efforts to comply with Federal court decisions requiring or encouraging an expanded scope for the hazard communication standard.

(b) OCCUPATIONAL DISEASE NOTIFICATION REPORT.—The Secretary shall report to Congress annually, not later than January 15 of each year, regarding implementation and enforcement of notification under this Act. The report shall include detailed information on—

(1) NOTIFICATIONS.—Numbers, types and results of notifications carried out pursuant to section 5 and 6 of this Act.

(2) RESEARCH.—Research efforts carried out pursuant to section 8 of this Act.

(3) TRAINING.—Training efforts for employees, personal physicians, and other professionals carried out pursuant to sections 7 and 8 of this Act.

(4) ENFORCEMENT.—Enforcement efforts carried out pursuant to section 10 of this Act.

(5) ASSISTANCE.—Efforts to assist employers under this Act.

SEC. 12. SUBJECTS OF FEDERAL AGENCY STUDIES.

(a) NOTIFICATION REQUIRED.—Each Federal agency that conducts epidemiologic studies on occupational disease initiated after the effective date of this act shall establish procedures for notifying the subjects of such studies of findings demonstrating that they are part of a population at risk of disease.

(b) METHOD OF NOTICE.—All occupational epidemiologic studies conducted by a Federal agency initiated after the effective date of this Act shall include in the study design specific methods for notifying living subjects or their immediate family members that they are part of a population at risk of disease.

SEC. 13. REGULATIONS.

The Secretary shall prescribe such regulations as may be necessary to carry out this Act.

SEC. 14. AUTHORIZATION OF APPROPRIATIONS.

There are authorized to be appropriated $25,000,000 for each of the fiscal years 1988 and 1989 to carry out this Act, of which $5,000,000,000 shall be available for research under section 8.

SEC. 15. EFFECTIVE DATE.

Except as may be otherwise provided in this Act, this Act shall become effective January 1, 1988, or 6 months after the date of enactment of this Act, whichever occurs first.●

● Mr. STAFFORD. Mr. President, I am joining today with Senator METZENBAUM in introducing the High Risk Occupational Disease Notification and Prevention Act of 1987.

There are several good reasons for enacting this bill.

The first is simple justice. Those whose lives, livelihoods, and health may be in jeopardy because of earlier exposures to poisonous chemicals should know it because we all deserve to know what our risks are.

Equally important, that knowledge should be shared because it can minimize or even eliminate the risk of actually contracting the disease for which a worker or his or her family may be at risk. Some diseases, especially cancers, which may be almost always fatal if undetected are significantly less fatal if found and treated early. In yet other cases, a disease may never develop if proper precautions are taken. Workers exposed to asbestos, for example, run a tenfold greater risk of dying from lung cancer if they smoke than if they do not.

In a society such as ours where the dangers of toxic chemicals are almost invariably discovered long after workers and others have been exposed, some sort of notification program is a necessity if the loss of human life is to be minimized. Exposures ought to never happen, but it is a fact of life that they do. Given that fact of life, we should establish a program such as the one proposed in this bill.

Mr. President, I urge my fellow Senators to review this bill carefully and join Senator METZENBAUM and me in cosponsoring this bill.●

By Mr. METZENBAUM:

S. 80. A bill to repeal the McCarran-Ferguson Act, and for other purposes; to the Committee on the Judiciary.

MCCARRAN-FERGUSON ACT REPEAL

● Mr. METZENBAUM. Mr. President, today I am introducing legislation to repeal the McCarran-Ferguson Act, the law which provides that the business of insurance is exempt from the Federal antitrust laws.

There is no justification for exempting the insurance industry from Federal antitrust standards. It is one of the largest and most important industries in the Nation. Virtually every individual and every business in this country must purchase insurance. Yet this essential industry is not now required to conform to the basic national policy of free competition.

How can the Congress explain to the American people why the insurance industry is exempt from Federal prohibitions against price-fixing and other anticompetitive practices when the price of insurance is skyrocketing? Promoting competition in insurance can only improve the availability and affordability of insurance. Maintaining the current antitrust exemption only restricts healthy and vigorous competition.

For some time now, we have heard the argument that the only problems in obtaining access to insurance are greedy lawyers and outrageous liability judgments. Every solution offered by the industry turns out to cut back on the rights of the victims in personal injury or other suits.

Focusing only on those injured is unfair. It's bad public policy. It is time that we took the broad public interest into account, not simply the industry's.

The current exemption for insurance arose from a unique combination of historical events. In 1869, the Supreme Court held that the business of insurance was not commerce and that insurance transactions were not interstate in character. *Paul v. Virginia*, 75 U.S. 168 (1869). This early decision took an extremely narrow view of the reach of the commerce clause.

Over the decades, the Supreme Court's interpretation of the commerce clause expanded considerably and in the early 1940's, the Justice Department challenged collusive arrangements in the industry. The Supreme Court reversed its earlier decision and found that the antitrust laws did apply to insurance. *United States v.*

South-Eastern Underwriters Ass'n, 322 U.S. 533 (1944).

The very next year, the insurance industry came to Congress and persuaded it to exempt the industry from the Federal antitrust laws. There is no doubt that this decision was undertaken in response to the argument that the industry could not adjust to the radical changes that would occur if rules of free competition were to apply rather than the extensive system of State-approved price-fixing that was in existence.

Whatever validity that argument had in 1945, it is totally unpersuasive today. Subjecting the insurance industry to the same antitrust standards that apply to other industries is completely consistent with State regulation of the industry as well as legitimate joint activities by insurance companies. Requiring insurance companies to live by the rules of free competition would not disrupt State regulatory programs. It would not prevent insurance companies from sharing information. It would not preclude State approval of rates. It would promote competition in the industry, promote lower prices and greater availability of coverage, and insure that consumers have better information about the policies they purchase.

Unlike the situation in 1945, applying Federal antitrust standards to insurance woud not undercut State regulatory policies. Almost all States have abandoned setting specific rates for insurance coverage. Instead, insurance companies have considerable flexibility in setting rates, subject to filing requirements. In addition, the Supreme Court has made clear that business conduct which is subject to a clearly articulated State regulatory scheme and actively supervised by the State is not subject to Federal antitrust law. The Supreme Court has recently held, for example, that collective ratemaking activities, permitted under a clearly articulated and actively supervised State policy, do not violate the antitrust laws. *Southern Motor Carriers Rate Conf.* v. *U.S.*, 471 U.S. 48 (1985).

Another development is the recognition by the courts that joint activities by competitors which promote competition are permissible under the antitrust laws. The courts have long held that substantial information can be shared among competitors without running afoul of the antitrust laws. More recently, the Supreme Court has clearly stated joint activities which reduce costs and enable products to be marketed more efficiently will be upheld. *Broadcast Music, Inc.* v. *Columbia Broadcasting System*, 441 U.S. 1 (1979). This principle applies to sharing information about risks, joint underwriting of large-scale projects, and other joint activities which promote a more efficient and productive insurance industry.

These considerations led the National Commission for the Review of Antitrust Laws and Procedures to recommend in 1979 that:

> The current broad antitrust immunity for the business of insurance granted by the McCarran-Ferguson Act should be repealed. In its place, narrowly drawn legislation should be adopted to affirm the lawfulness of a limited number of essential collective activities under the antitrust laws. * * *
>
> The Commission believes that the current immunity is not only overly broad, but also unnecessary: Those collective activities by insurers that are essential to the functioning of a competitive industry would likely pass muster under the traditional rule of reason analysis of Sherman Act section 1. Similarly, where collective activity or other insurance company behavior is affirmatively mandated by a State in its capacity as sovereign, and effectively supervised by independent State officials, such behavior would fall within the judicially recognized "State action" exception to the antitrust laws. (Report of the Commission, pp. 225-6)

In short, the argument that the insurance industry requires an antitrust exemption to function effectively is nonsense: The antitrust laws allow joint activities by insurance companies which are in the public interest. In contrast, the current exemption prevents the Department of Justice, the Federal Trade Commission, or private plaintiffs from challenging even blatant anticompetitive activity.

Under the current law, an agreement by insurance companies to fix prices or allocate markets could not be challenged by the Department of Justice, the Federal Trade Commission, or private plaintiffs. Not only does the current law bar these actions, but in cases where the exemption may not apply, it guarantees prolonged litigation over its applicability. For example, the FTC recently challenged particular activities by title insurance companies that allegedly restrain competition on the grounds that these activities were not really the business of insurance. *Ticor Title Insurance Co.*, D-9190. Nevertheless, the defendants have vigorously disputed the authority of the FTC to bring the case.

In addition to the problem of preventing the Government from challenging anticompetitive actions, the McCarran-Ferguson Act exempts the industry from the Federal prohibition against unfair and deceptive practices enforced by the Federal Trade Commission. Today, if an insurance company misleads consumers in its marketing of insurance, the Federal Trade Commission is in almost all cases foreclosed from acting.

In 1979, Congress went even beyond the McCarran-Ferguson Act in prohibiting the Federal Trade Commission from even studying the insurance industry without a specific request from the House or Senate Commerce Committee. This provision was enacted after the FTC had published a study which concluded that the average rate of return on the investment portion of whole life insurance was 1.3 percent. As former Chairman of the Federal Trade Commission, Michael Pertschuk, stated:

> The Commission had concluded—as many other students of life insurance marketing had also concluded—that this low level of return was directly caused by a marketing system that made it virtually impossible for a prospective policyholder—other than an actuary—to compare the interest yields of competing investment opportunities. (Testimony before Subcommittee on Monopolies and Commercial Law, House Committee on the Judiciary, May 3, 1984, pp. 3-4)

The FTC did not issue a regulation in this area. It did not propose Federal intervention at all. Instead, it distributed its report to the States and recommended that they develop a standard disclosure requirement so that the insurance industry would provide information about investment return to consumers. The Congress reacted by prohibiting the FTC from studying the insurance industry without an express request by either the House or Senate Commerce Committee. In other words, the FTC was to keep its mouth shut about problems with the insurance industry until Congress told it to speak. Former Chairman Pertschuk called this provision a "legislative prefrontal lobotomy."

The bill I am introducing today would simply apply the same antitrust standards of free competition to insurance that apply to other industries. In doing so, it would repeal the language in the McCarran-Ferguson Act which purports to rest all regulation of the insurance industry in the States. By repealing that language, my bill would not in any way do away with State insurance commissions or preclude the States from regulating insurance as they do now. Just as in many other industries, Federal antitrust laws would apply to companies which are the subject of State regulations.

The bill also provides for a delayed effective date to enable the insurance industry to review its activities for potential antitrust liability. In particular, the bill provides that the repeal of the exemption is deferred for 1 year after the date of enactment. In addition, no criminal penalties or treble damages can be assessed for 2 years. Finally, no antitrust remedy is available for 2 years if the defendant in an antitrust case has relied in good faith on an advisory opinion by the Department of Justice. These provisions provide ample time for the industry to review its activities and insure that they are in full compliance with antitrust standards.

I fully expect that the insurance industry will again argue that it cannot function under the Federal antitrust standards and that many of its current activities will be prohibited, even those which benefit the public. If the industry can show that certain defined activities which are in the public interest would actually be prohibited under the antitrust laws, then certain narrow and carefully defined exemptions may be warranted. These issues can best be pursued in through hear-

ings where the industry and other obsrvers can comment.

This industry is too big, too important to every American, to maintain an an antitrust exemption long after its initial justification has disappeared. Today, access to insurance and affordable prices have become critical problems for individuals, small business, and even governmental bodies. Insurance companies should have to operate by the rules of free competition just as other industries do.

The McCarran-Ferguson Act has long outlived whatever legitimate purpose it served. It is time to repeal it.

I ask unanimous consent that a copy of the bill be printed in the RECORD.

There being no objection, the bill was ordered to be printed in the RECORD, as follows:

S. 80

Be it enacted by the Senate and House of Representatives of the United States of American in Congress assembled, That the Act entitled "An Act to express the intent of the Congress with reference to the regulation of the business of insurance", commonly known as the McCarran-Ferguson Act (59 Stat. 33), is repealed.

(b) The repeal made by this section shall be effective as to conduct engaged in beginning one year after the date of enactment of this Act.

SEC. 2. (a) In any action brought under the provisions of the Clayton Act or the Sherman Act alleging a violation of either such Act for conduct that would have otherwise been lawful pursuant to the provisions of the Act entitled "An Act to express the intent of the Congress with reference to the regulation of the business of insurance" no award of treble damages or criminal penalties shall be awared against any such person for conduct by such person occurring within two years after the date of enactment of this Act.

(b) During the two year period referred to in this section, no relief shall be granted against any person in an action referred to in subsection (a) for conduct by such person during such period, if such person has in good faith, relied upon an advisory opinion issued by the Department of Justice.●

By Mr. METZENBAUM:

S. 81. A bill to amend the Older Americans Act of 1965 to establish the Alzheimer's Disease and Related Dementias Home and Community Based Services Block Grant; to the Committee on Labor and Human Resources.

ALZHEIMER'S DISEASE AND RELATED DEMENTIAS HOME AND COMMUNITY BASED SERVICES BLOCK GRANT ACT

● Mr. METZENBAUM. Mr. President, Alzheimer's disease has been called the "Disease of the Century." Today, I am introducing a bill, "The Alzheimer's Disease and Related Dementias Home and Community-Based Services Block Grant" to provide needed support to victims of Alzheimer's disease and related dementias, and their families.

At both Federal and State hearings, professionals and families alike, described Alzheimer's as an "insidious disease; no illness is more terrifying and life-altering than Alzheimer's." It destroys its victims and damages their families.

Through demonstration projects, and activities of voluntary organizations, we have learned much about the urgent needs of our older citizens who, with age, are increasingly vulnerable to dementing disorders, and to the risk of institutionalization and total impoverishment. The risk for Alzheimer's disease increases rapidly over the age of 65, with 20 to 30 percent of those over the age of 80 afflicted.

We know that demographic data project an aging population. Rapid increases in the number and proportion of older people in the United States, especially those in their eighties and nineties confront us with a major challenge, and an urgent necessity to plan appropriately—and without delay.

There are currently close to 3 million persons with Alzheimer's disease and related disorders. Less than 60 years from now, we will face a major epidemic with that number expected to triple to 9 million.

Currently, we depend heavily on family caregivers—spouses and children—to provide long-term care for family members with Alzheimer's disease. However, projections indicate that families will be smaller in the years to come. Thus, there will be fewer caregivers available.

Mr. President, Alzheimer's disease not only imposes extreme physical and emotional hardships on the family, it creates enormous financial costs as well. These costs are already estimated at over $40 billion. Unless we begin now to provide the social supports essential for continued family caregiving, we may find our institutions and our health care system overwhelmed with increasingly large numbers of demented adults, and our Nation overwhelmed with colossal costs of hundreds of billions of dollars.

Research continues, with insufficient funds, given the magnitude of the problem. The research community appears cautiously optimistic that answers will be found. This very month, the fourth International Conference on Alzheimer's Disease is meeting in Zurich to compare research findings worldwide. There will be answers—eventually—sooner, rather than later, we hope.

However, until that happy day arrives, family caregivers will need many social supports to maintain their afflicted family members in the home.

Mr. President, my bill will delay the institutionalization so costly to families and to the nation by providing needed home and community-based services.

This bill, "The Alzheimer's Disease and Related Dementias Home and Community-Based Services Block Grant," amends the Older Americans Act which comes up for reauthorization this year.

It establishes a block grant program directed by the Administration on Aging. The grant will be made available to States on a matching formula basis, to develop a plan to provide for:

Coordination of services;

Case management and counseling to determine services needed for delaying nursing home admission;

Respite care;

Day care;

Training and counseling of family members;

Homemaker services,

Transportation, and other such supportive services that will help families maintain Alzheimer victims at home.

I urge my colleagues to join me in support of the millions of Americans suffering physical, emotional, and financial devastation as a result of this insidious and tragic disease, and the related dementing disorders.

I ask unanimous consent that the bill be printed in the RECORD.

There being no objection, the bill was ordered to be printed in the RECORD, as follows:

S. 81

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Alzheimer's Disease and Related Dementias Home and Community Based Services Block Grant Act of 1987".

FINDINGS AND PURPOSE

SEC. 2. (a) The Congress finds that—

(1) there are more than 3,000,000 individuals with Alzheimer's disease and related dementias in the United States;

(2) the cost of caring for individuals with Alzheimer's disease and related dementias is estimated at over $40,000,000 annually;

(3) over one half of the patients in nursing homes are diagnosed as patients with Alzheimer's disease or related dementias;

(4) the potential number of individuals who may have Alzheimer's disease and related dementias in their old age will overwhelm the capacity of our institutions to care for such individuals;

(5) individuals with Alzheimer's disease or related dementias often require specialized long term care services to be provided in a coordinated manner by many agencies; and

(6) providing home and community based services for individuals with Alzheimer's disease and related dementias will extend the ability of caregivers of such individuals to maintain such individuals in their home and can reduce health care costs by delaying or preventing institutionalization.

(b) It is the purpose of this Act to prevent or delay the institutionalization of individuals with Alzheimer's disease and related dementias by providing home and community based services to assist in caring for such individuals in their homes.

ESTABLISHMENT OF BLOCK GRANT

SEC. 3. The Older Americans Act of 1965 amended by adding at the end thereof t. following new title:

"TITLE VIII—ALZHEIMER'S DISEAS AND RELATED DEMENTIAS HOM AND COMMUNITY BASED SERVICE BLOCK GRANT

"AUTHORIZATION OF APPROPRIATIONS

"SEC. 801. For purpose of allotmen under section 802, there are authorized appropriated $80,000,000 for each of t fiscal years 1988, 1989, 1990, 1991, and 19

The Executive Letter

CATR REC'D

February 23, 1987 Vol. 20 No. 8

FTC, JUSTICE DEPARTMENT HIT McCARRAN-FERGUSON ACT

At a Senate Judiciary Committee hearing on the McCarran-Ferguson Act last week, Sen. Howard Metzenbaum (D-Ohio), chairman of the Antitrust Subcommittee, found broad support for proposals to amend or repeal the 1945 statute which gives the insurance industry limited shelter from federal antitrust law and confirms the primacy of state regulation of insurance. Federal Trade Commissioner Daniel Oliver charged that the McCarran-Ferguson Act "protects price fixing" by insurers and said the statute's repeal is long overdue. Charles Rule, acting head of the Justice Department's Antitrust Division, affirmed the Department's basic support for ending the antitrust exemption "if certain uncertainties can be resolved." Metzenbaum expressed willingness to revise his bill (S.80) so that it would remove only the antitrust exemption while retaining language clarifying the role of state regulation. Joining the call for repeal or revision of McCarran were representatives of the National Conference of State Legislatures and the National Association of Attorneys General. Small business and consumer groups also called for changing the law.

Insurance industry representatives told the panel that changes in the act would have had no effect on recent problems with commercial liability insurance. They also voiced concern about the costs and confusion that would come from the dual federal-state regulation of insurance that likely would follow repeal of the act. Similar concerns about repeal were voiced by representatives of the National Association of Insurance Commissioners (NAIC) and the Conference of Insurance Legislators. The NAIC came under pointed criticism from Metzenbaum for alleged financial ties and revolving door relationships with the insurance industry.

ABA ADOPTS POSITION PAPER ON TORT LIABILITY SYSTEM

The American Bar Association (ABA) adopted a position paper on the tort liability system which did not contain the significant tort reforms outlined in the draft report presented by a special ABA study commission at its annual meeting in New Orleans. The draft report called for limits on noneconomic damages in certain cases, but the House of Delegates rejected this suggestion and instead voted to go on record as opposing any caps on awards

STATEMENT

OF

DANIEL OLIVER

CHAIRMAN

FEDERAL TRADE COMMISSION

BEFORE THE

COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

CONCERNING S. 80

A BILL TO REPEAL THE McCARRAN-FERGUSON ACT

FEBRUARY 18, 1987

Mr. Chairman and Members of the Committee:

Thank you for this opportunity to comment on S. 80, a bill to repeal the McCarran-Ferguson Act. In my view, this legislation is long overdue, and its passage is unquestionably desirable as a matter of public policy. Exposing the insurance industry to the brisk winds of competition, unimpeded by any federal restraints other than the antitrust laws, can only serve to benefit consumers and promote the common welfare.

The broad antitrust immunity enjoyed by the insurance industry under the McCarran-Ferguson Act is both undesirable and unnecessary. The exemption is undesirable because, by blunting some forms of competitive behavior, it denies consumers the best array of insurance services at the lowest possible cost. The exemption is unnecessary because application of the antitrust laws is in no way inconsistent with either desirable industry cooperation or effective state regulation.

Before I develop these points, I must note three caveats. First, because the FTC Improvements Act of 1980 prohibits the Commission from studying the insurance industry without prior Congressional authorization, the Federal Trade Commission has not conducted a comprehensive review of the industry in recent years. We therefore lack detailed knowledge of current conditions. Nonetheless, what we do know from existing studies and from our enforcement activities indicates that the exemption is unjustified.

Second, although the Improvements Act constrained our authority to study insurance, it left intact our authority to

challenge conduct by insurers that is not immunized under McCarran-Ferguson. We have accepted several consent agreements prohibiting insurers' boycotts of nurse midwives,[1] and agents' boycotts of insurers.[2] An ongoing adjudication explores the charge that title insurers have fixed the price of search and examination services,[3] and our staff is investigating other industry practices that may fall outside the exemption. Because the title insurance matter is in adjudication and the other investigations are nonpublic, I cannot discuss further our current enforcement initiatives.

Third and finally, I speak only for myself, and not necessarily for the Commission or any of my fellow Commissioners. I note, however, that a majority of the Commissioners supports repeal of the McCarran-Ferguson Act.

<u>The McCarran-Ferguson Exemption Is Undesirable</u>

Mr. Chairman, I start from the premise that, in the words of the Supreme Court, "the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material

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1/ State Volunteer Mutual Insurance Co., 102 F.T.C. 1232 (1983).

2/ Independent Insurance Agents of America, Inc., C-3197 (August 25, 1986); Independent Insurance Agents Association of Montana, C-3199 (August 25, 1986); Independent Insurance Agents and Brokers of California, C-3198 (August 25, 1986).

3/ Ticor Title Insurance Co., et al., D. 9190.

progress."[4] We rely on the free market to ensure that sellers will offer products and services with the best mix of price, quality, and other characteristics that consumers demand. The purpose of the antitrust laws is to prevent unwarranted interference with competitive market forces. The McCarran-Ferguson Act exempts the "business of insurance" from antitrust scrutiny, provided the insurance activities at issue are "regulated by state law" and do not involve a boycott, coercion, or intimidation.

Exemptions from the antitrust laws are disfavored, and the Supreme Court interprets them narrowly for that reason. In construing the McCarran-Ferguson Act, the Court has limited the "business of insurance" to activities directly involved in underwriting and spreading of risk.[5] Even as narrowly interpreted, however, the Act protects from normal antitrust scrutiny many activities that may injure consumers. [Of course, the McCarran-Ferguson Act protects all manner of price fixing. Agreements among insurers to limit consumer options by using only certain policy forms and classification plans are also safe. Likewise, the Act allows insurers to divide customers and territories among themselves, and to impose uniform terms upon agents.]

4/ Northern Pacific Railway v. United States, 356 U.S. 1, 4 (1958).

5/ Union Labor Life Insurance Co. v. Pireno, 458 U.S. 119 (1982); Royal Drug Co. v. Group Life & Health Insurance Co., 440 U.S. 205 (1979).

The McCarran-Ferguson Act purports to ameliorate its adverse effects by conditioning immunity on the existence of state regulation. Unfortunately, the courts have interpreted the Act's "regulated by state law" requirement very broadly, so that even a cameo appearance by the state will cloak private action with immunity. Thus, some cases have held that the mere existence of a general scheme for insurance regulation constitutes sufficient state involvement to immunize a broad range of practices, including activities that the state has never directly authorized or even considered.[6/] Indeed, courts have held that even where the state expressly prohibits a practice, the practice is "regulated" and thus exempt.[7/] This is a bizarre way to further the interests of the states. As the National Commission for the Review of Antitrust Laws and Procedures pointed out eight years ago:

> Under the prevailing interpretation of McCarran-Ferguson, insurance company activities may be exempted from the coverage of the antitrust laws by the mere presence of a state regulatory scheme, without regard to whether these regulatory powers have been utilized to supervise the industry effectively. As a result, various types of collective insurance company behavior are, as a practical matter, wholly free from control by

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6/ Ohio v. Ohio Medical Indemnity, 1976-2 Trade Cas. (CCH) Par. 61,128 (S.D. Ohio 1976).

7/ Crawford v. American Title Insurance Co., 518 F.2d 217, 218 (5th Cir. 1975); see St. Paul Fire & Marine Insurance Co. v. Barry, 438 U.S. 531, 552 n. 24 ("prohibitory legislation" coupled with "an enforcement scheme of administrative supervision" constitutes regulation by state law).

either state regulation or the federal antitrust laws.[8/]

Mr. Chairman, I believe it is not cynical to suspect that at least some insurers have taken advantage of McCarran-Ferguson immunity to harm consumers. Indeed, a number of cases dismissed on McCarran-Ferguson grounds have involved allegations of anticompetitive activities lacking any redeeming social benefit. For example, one court dismissed a suit claiming that 31 insurers had conspired to deny compensation for lost future earnings to individuals killed in car accidents. The plaintiffs alleged that the defendant insurers had taken concerted action to conceal claimants' rights and to refuse to offer coverage for future earnings.[9/] In another dismissed suit, an asbestos manufacturer claimed that several insurers had conspired to deprive it of the full indemnification and litigation defense services that its policies provided. The suit also alleged a conspiracy to impose fraudulent policy interpretations on insureds and to limit the benefits that insurers would offer.[10/] I do not know if the plaintiffs in these cases could have proven antitrust law violations, but the McCarran-Ferguson Act denied them the chance to try.

8/ Report of the National Commission for the Review of Antitrust Laws and Procedures 226 (1979) ("NCRALP Report").

9/ Grant v. Erie Insurance Exchange, 542 F. Supp. 457 (M.D.Pa. 1982), aff'd, 716 F.2d 890 (3rd Cir. 1983), cert. denied, 464 U.S. 938 (1983).

10/ UNR Industries v. Continental Insurance Co., 607 F. Supp. 855 (N.D.Ill. 1984).

Besides encouraging attempts by insurers to fleece consumers, the McCarran-Ferguson Act wastes resources. Even when consumers win an antitrust case against insurers, they lose. It is costly for antitrust plaintiffs, including the FTC, to cut through a thicket of unfounded McCarran-Ferguson defenses.

Although repeal of McCarran-Ferguson may allow us to end some of these abuses, I do not want to leave the impression that passage of S. 80 will eliminate all anti-consumer activity in the insurance industry. Many state governments have passed laws and issued regulations that injure consumers by restricting competition.

An example may illustrate my point. Some states have prohibited insurers from establishing certain kinds of "preferred provider organizations," or PPOs. These organizations are an innovative approach to lowering health care costs. Georgia allows Blue Cross and Blue Shield to operate PPOs, but bars commercial insurers from doing so. Ohio thinks Georgia has it backwards: it bars Blue Cross and Blue Shield and other similar plans from having PPOs, but allows commercial insurers to offer them. Montana believes it has a better idea and prohibits PPOs entirely. I believe that the market will do a much better job than the states of deciding who is best able to provide PPO coverage.

I recognize that some state regulation is designed to assure insurer solvency and insurance availability. The wisdom of such regulation need not be addressed today. However, some forms of

state government interference in the insurance industry harm consumers. In other industries, the Commission has an active program of consumer advocacy. We seek to explain to federal and state regulators ways in which government regulation may disserve the public interest. Unfortunately, the "Improvements Act" hinders us from advocating consumer interests with respect to the business of insurance. I would like to see that exemption lifted, but this, too, is a matter for another day. For now, let me emphasize that while repeal of McCarran-Ferguson would help your constituents, it would not correct many other government-induced infirmities that afflict the insurance market.

The McCarran-Ferguson Exemption Is Unnecessary

According to insurers, their industry is so different from others that it deserves a special dispensation from the nation's competition laws. Of course, virtually every industry has its own problems that can be cited to support special protection from the rigors of competition. The automobile industry, like other basic industries, argues for protection from foreign competition. The beer industry presses for the right to establish exclusive dealing arrangements even in situations where they would be anticompetitive.

Fortunately, Congress has rejected many of these special interest appeals. Unfortunately, however, Congress has yielded to many others, granting antitrust immunity not only to the insurance industry, but also to agricultural cooperatives, which

often fleece consumers under the cover of marketing orders, labor organizations, certain professional sports leagues, ocean shipping conferences and others. All special interest exemptions from the antitrust laws deserve Congressional scrutiny.

Forty years ago, the insurance industry managed to persuade Congress that the McCarran-Ferguson Act was essential, both to preserve the states' autonomy to regulate and tax insurance, and to permit beneficial cooperation among insurers. The tragic irony -- for consumers -- is that McCarran-Ferguson simply is not necessary to accomplish any of those goals. States may regulate insurers with or without McCarran-Ferguson. And the forms of insurer cooperation needed for efficiency are perfectly legal under the antitrust laws.

Federalism

Insurers originally cited federalism as a justification for McCarran-Ferguson. In 1869, in Paul v. Virginia,[11/] the Supreme Court had held that insurance was exempt from federal regulation. To the industry's shock, the Court reversed itself in 1944, in South-Eastern Underwriters.[12/] That case upheld a Sherman Act indictment charging that a large group of insurers had used a rating organization to fix fire insurance premiums.

11/ 75 U.S. (8 Wall.) 168 (1869).

12/ United States v. South-Eastern Underwriters Ass'n, 332 U.S. 533 (1944).

The decision created an uproar -- or rather the insurers did. Panic ensued as insurers told their Congressmen that state taxation and regulation of insurance would no longer be constitutional. Frankly, I do not understand how anyone made these arguments with a straight face. Maybe no one ever did. And certainly today, no one would seriously argue that the antitrust exemption of the McCarran-Ferguson Act is needed to authorize state taxation or state regulation of insurance. After all, plenty of other state-taxed and state-regulated businesses are subject to the federal antitrust laws, without anyone noticing any inherent conflict.

Moreover, as the Supreme Court's 1985 Southern Motor Carriers[13] decision illustrates, the state action doctrine lives -- some would say prospers. Repeal of McCarran-Ferguson would not change the states' role as the primary regulators of insurance. Even after repeal, the states would still be able to regulate insurance -- even in ways that would harm consumers -- provided they clearly articulated a policy to displace competition and actively supervised the results.

In some states, the present legislative and regulatory framework probably would satisfy the "state action" standard. Elsewhere, however, the regulatory framework might not qualify and "state action" immunity would not attach. If those states wished to protect the anticompetitive activities that now occur,

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13/ Southern Motor Carriers Rate Conference, Inc. v. United States, 471 U.S. 48 (1985).

they would have to amend their regulatory frameworks -- and do so in public. In the process, they might have to confront openly the question of why insurance companies should be permitted to fix prices -- a practice ordinarily regarded as harmful. Whatever the result, consumers would gain from a public review of this question.

Today, insurers no longer focus very much on the sort of federalism argument that was made in 1944. Playing on the public's increasing and justified aversion to excessive federal regulation, they suggest that repeal would lead to comprehensive federal control. But they offer no support for this specter, and I would be the first to oppose it. Of course, repeal would not necessarily lead to creation of a federal insurance regulatory agency, and I would not expect Congress to embark on such an ill-advised enterprise. Repealing McCarran-Ferguson would neither prejudice state regulation nor necessitate federal regulation, and continued existence of the exemption is simply not essential as a matter of federalism.

"Ruinous Competition"

There is another argument that insurers make against repeal They claim that antitrust exposure will prevent insurers from engaging in legitimate cooperative activities. I find this argument especially wrong-headed. [Perhaps because insurers have been-free of antitrust scrutiny for so long, they have a warped view of its strictures.] But as the leader of one of the two

federal agencies that enforces the antitrust laws, I can assure you that the joint activity argument is a straw man. Enforcement agencies and courts are well aware that some forms of joint action enhance rather than restrict competition, and are quite sophisticated at distinguishing harmful from beneficial agreements.

Mr. Chairman, you can expect insurers to claim that they need immunity in order to engage in joint rate-making. They will say that price fixing preserves insurer solvency and assures that money will be available to pay off policy-holders. But numerous other kinds of firms make risky contractual commitments and manage to pay them off without setting up cartels. Moreover, state legislatures have adequate authority to address any genuine solvency problems by auditing the companies, requiring loss reserves, and establishing state guarantee funds.

Claims that competition will hurt policyholders are bogus. The evidence from other industries that have been deregulated and exposed to application of the antitrust laws demonstrates that consumers benefit from competition. The Commission is particularly familiar with the recent experience of the health professions, which have been subject to market forces for only a decade. Although doctors may be working harder for a bit less money, they are by no means starving. More importantly, their patients still receive good care, and are able to choose from a far broader array of price and service options than before.

In recent years, many states have recognized the benefits that flow from competition, and have given their insurers more freedom to set their own rates. Indeed, in Illinois, rate bureaus are limited to statistical collection and analysis. From listening to the insurers, you might suppose that insurers have gone bankrupt when deprived of their cartel, but the National Commission for the Review of Antitrust Laws and Procedures found no harmful effects.[14/] Competition poses no risk to the solvency of the vast majority of insurers.

So, insurers now make an alternative argument and assert that they must pool loss data to make actuarially accurate projections. As best I can determine, their claim may well be true. Antitrust law, however, poses no impediment to the pooling of loss data. Agreements among competitors that promote competition are not unlawful.[15/] The problem arises when insurers go beyond collecting and aggregating loss data, and collectively determine rates or coverages to be offered. It is such joint rate setting or determination of coverage, and not joint data collection, that restricts competition and harms consumers. I simply do not understand why insurers cannot employ jointly collected data to determine their own rates and coverages individually.

14/ NCRALP Report, at 233.

15/ E.g., Broadcast Music, Inc. v. Columbia Broadcasting System, 441 U.S. 1 (1979).

Ever since passage of the Sherman Act in 1890, the operative premise underlying our antitrust laws has been that free markets work much better than heavily regulated markets. Firms that want special treatment for their industry should have to justify in detail any exception to the general rule. Insurers have not made a persuasive case over the past 40 years, and I doubt they will be able to do so this year. It is the duty of Congress to correct the mistaken notion that competition principles do not apply to the insurance industry.

Conclusion

There is broad agreement across the philosophical spectrum that exemptions from the antitrust laws are undesirable. As I mentioned at the beginning of my testimony, I wholeheartedly subscribe to the premise that, in the words of the Supreme Court, "unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress."16/ Perhaps even more importantly, as Mr. Justice Black went on to observe, free and unfettered competition provides "an environment conducive to the preservation of our democratic political and social institutions."17/ Free markets are the foundation of both

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16/ Northern Pacific Railway v. United States, supra, 356 U.S. at 4.

17/ Id.

our economic prosperity and our political freedom. We make exceptions to the laws that ensure free markets at our peril.

The insurance exemption from the antitrust laws, in particular, has come under increasing attack. Experience and logic demonstrate that the exemption is adverse to consumers and is unnecessary to protect legitimate industry conduct. Eight years ago, the National Commission for the Review of Antitrust Laws and Procedures called for repeal of the exemption. More recently, so has the National Association of Attorneys General. The Supreme Court has done about as much as it can to limit the scope of the McCarran-Ferguson Act. The time has come for Congress to act.

NATIONAL ASSOCIATION OF ATTORNEYS GENERAL

Nat-6-

APR 1987

Summer Meeting
Seattle, Washington
June 9-12, 1986

I.

REPEALING THE INSURANCE INDUSTRY'S
EXEMPTION FROM THE ANTITRUST LAWS

WHEREAS, The Sherman Act, the Clayton Act, and decisional law prescribe the appropriate standards of conduct for competing businesses and for individual firms acquiring and exercising market power in the United States; and

WHEREAS, those laws prohibit activities in restraint of trade that have repeatedly been shown to be harmful to the economy and injurious to consumers; and

WHEREAS, in 1944, the Supreme Court determined, in United States v. South-Eastern Underwriters Association, 322 U.S. 533, that the business of insurance constitutes commerce within the scope of the antitrust laws; and

WHEREAS, in 1945, Congress, apprehensive about the effect of South-Eastern Underwriters on the powers of states to tax and regulate insurance, adopted the McCarran-Ferguson Act (15 U.S.C. sections 1011-1015), granting the insurance industry broad exemption from most provisions of the Sherman and Clayton Acts, including the proscriptions against such anticompetitive practices as price-fixing, agreements not to compete, monopolization, mergers of dominant firms, tying agreements, and a wide range of other conduct that is unlawful for nearly every firm outside the insurance industry; and

WHEREAS, subsequent developments in antitrust law, particularly evolution of the state-action doctrine, have made it clear that nothing in the Sherman and Clayton Acts would hinder the exercise of traditional state powers of taxation and regulation, including price-regulation, making the antitrust immunity of the McCarran-Ferguson Act unnecessary for the purposes that originally motivated Congress to enact it; and

WHEREAS, it is also clear that nothing in the antitrust laws prohibits insurers from sharing information on losses in order to price their product, or from engaging in reinsurance and other risk-sharing arrangements common to the industry, making the antitrust immunity of the McCarran-Ferguson Act unnecessary to the legitimate needs of the insurance industry; and

WHEREAS, the insurance industry is critical to the national economy, with Americans paying over $140 billion per year in premiums on property/casualty insurance alone, and with insurance being a necessity for many enterprises; and

WHEREAS, serious questions have been raised about the current crisis in liability insurance and whether it may have been fostered by the industry's antitrust exemption;

NOW, THEREFORE, BE IT RESOLVED, that the National Association of Attorneys General, reaffirming its commitment to the historic right of the states to regulate and to tax insurance and its commitment to the importance of the antitrust laws to free and competitive markets, urges the Congress of the United States to repeal the special immunity from the antitrust laws granted to the insurance industry and to subject insurance companies to the rules of the competitive marketplace applicable to other firms; and

BE IT FURTHER RESOLVED, that the Association authorizes its Executive Director and General Counsel to make these views known to the Congress, the Administration, and other interested parties.

National Conference of State Legislatures Capital to Capital
May 18, 1987

NCSL on Capitol Hill

Barbaro

Marshall

Schwartz

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UNEMPLOYMENT INSURANCE

New York Assemblyman Frank Barbaro called on Congress to provide adequate funding for the Unemployment Insurance/Employment Service (UI/ES) Program.

"Unemployment insurance benefits are an entitlement," Assemblyman Barbaro said. "Therefore, reductions made in administrative funding cannot be matched by reductions in the number of people served. For that reason, administrative cutbacks necessarily imply a reduction in the quality and availability of services provided."

Assemblyman Barbaro urged support for a supplemental appropriation to restore some of the funding.

"Without a supplemental appropriation, employment security agencies in many states around the nation face staff reductions, branch office closings, degradation of service and curtailment of oversight activities," Assemblyman Barbaro said.

Oregon State Senator Larry Hill also recently testified on the Unemployment Insurance/Employment Service Program on behalf of NCSL.

NCSL contact: Chris Zimmerman, Washington

NURSING HOME REFORM

Virginia State Delegate Mary Marshall called on Congress to adopt a proposed national comprehensive nursing home reform program.

"Patients and taxpayers will benefit from the proposed nursing home reform legislation," Delegate Marshall said. "The new inspection system will look at the welfare of patients rather than the condition of the paper records. And improved training for nurses aides is probably the most important step for better care."

Because of the potential for significant increases in cost to facilities and states for compliance with the new requirements, Delegate Marshall said that the federal government should provide fiscal incentives to states and nursing facilities to implement the new requirements.

NCSL contacts: Joy Johnson Wilson, Tom Colvin, Washington

NATIONAL BELLAS HESS

North Dakota Senator David E. Nething called on Congress to overturn the Supreme Court's decision in the *National Bellas Hess* case in order to permit states to require out-of-state companies to collect sales or use taxes when such companies target the citizens of their state as a market for their goods.

"Four major reasons compel the conclusion that federal legislation is needed," Senator Nething said. "First, technologies have made major changes in corporate marketing patterns and consumer buying habits. Second, local community retailers are placed at a competitive disadvantage against those who use the state as a market but are not required to collect taxes. Third, enforcement is increasingly seen as the fairest way to insure increased revenue without imposing new taxes. And fourth, the Supreme Court's decision means that the states must look to Congress for a solution to this problem."

NCSL contact: Jon Felde, Washington

HOUSING

New Jersey Assemblyman David Schwartz urged Congress to support federal housing programs and forge a state-federal housing partnership to meet the needs of the nation's citizens.

"Congress is moving in the right direction with the continuation and creation of an important number of housing programs, which will make certain that shelter remains affordable for many Americans," Schwartz said.

Assemblyman Schwartz said, however, that in his view the legislation is too limited in the recommended funding levels and in the scope and flexibility of programs envisioned.

"This year's federal housing legislation does not meet the massive and mounting housing needs of our people, does not mount a concentrated attack on declining levels of home ownership in America, and does not adequately economize or challenge the state governments' increasing commitment to providing affordable housing."

NCSL contact: Gina Mitchell, Washington

MCCARRAN-FERGUSON

Rhode Island State Representative Jeffrey Teitz recently called on Congress to repeal the provision in the McCarran-Ferguson Act that currently provides a special antitrust exemption for the insurance industry. Teitz warned, however, that any action should not affect the section of the Act that subjects the insurance industry to regulation and taxation by the states.

"We believe that the current statute is actually impeding rather than facilitating effective state regulation of the insurance industry," Representative Teitz said. "There are three aspects to NCSL's position on the federal role in the regulation of insurance. First, we support continuation of the McCarran-Ferguson Act, specifically section 1012 (A), which subjects the insurance industry to regulation and taxation by the states. Second, we support enactment of legislation that would require all insurance companies to submit relevant data regarding their premiums, earnings and reserves to an appropriate agency of the federal government each year. Third, we urge repeal of that portion of McCarran-Ferguson which has been interpreted to exempt most aspects of the business of insurance from the federal antitrust laws."

NCSL contact: Bill Waren, Washington

FROM National Conference of State Legislatures

NAME: Insurance Data Collection

COMMITTEE: Government Operations & Regulation

TYPE OF POLICY: Consent

The adequacy and contents of property and casualty insurance data has come under increasingly serious scrutiny as state legislatures have attempted to resolve problems with affordable and available liability insurance.

To address this matter, several state legislatures have recently enacted legislation substantially expanding the data which insurers must submit when seeking rate changes. These actions demonstrate how insufficient the information necessary to evaluate rate requests is and how uneven the collection and utilization of appropriate data appears to be. Most annual reports submitted to state insurance commissioners appear to be inadequate.

Many insurers operate on an interstate basis. State regulation ought to ensure that rates are developed with sufficient and relevant background information. Rates do affect availability. Appropriate data can demonstrate relationships between the civil justice system and the costs for obtaining property and casualty insurance.

To ensure that adequate and comprehensive data is made available regularly, NCSL believes that Congress should enact legislation compelling the annual submission, to the appropriate federal agency, of data that includes, but is not limited to, the following: (a) premiums earned and written; (b) total claims paid regarding judicial dispositions, settlements and administrative/legal costs; (c) reserves; (d) individual classifications of business where premiums have increased/decreased the previous year; and (e) investment income. This data shall be submitted by classification of business and be completed on a national aggregate and individual state aggregate basis. State collection of insurance data and annual financial reporting requirements shall not be prohibited by any federal legislation. All data collected nationally by an appropriate federal agency shall be disseminated to the

NCSL further urges Congress to repeal the antitrust exemption which the insurance industry has been granted, with limited exceptions, by the McCarran-Ferguson Act of 1945. Barring comprehensive repeal, Congress ought to clarify which federal antitrust laws shall or shall not be applicable to the conduct of the insurance industry and which types of data could be shared am[illegible] insurers.

August 7, 1986

5 APR 1987

STATEMENT
OF THE
NATIONAL INSURANCE CONSUMER ORGANIZATION

ON
REPEAL OF MCCARRAN-FERGUSON ANTITRUST IMMUNITY

BEFORE THE
SENATE JUDICIARY COMMITTEE

FEBRUARY 18, 1987

by

J. Robert Hunter, President
Jay Angoff, Counsel
National Insurance Consumer Organization

121 N. Payne Street
Alexandria, Virginia 22314
(703) 549-8050

FACT SHEET ON McCARRAN-FERGUSON

I. The McCarran-Ferguson Act, enacted in 1945, exempts the insurance industry from the antitrust laws and thus allows insurance companies to fix prices. There is an exception to the exemption for boycotts, coercion and intimidation -- agreements among insurers to refuse to write insurance at any price therefore can be and have been prosecuted. See, e.g., State of West Virginia ex. rel. Brown v. St. Paul Fire and Marine Insurance Co., Civ. No. 86-C-1400, Kanawha Cty. Circ. Ct. (W. Va., filed Apr. 14, 1986); "Day care centers file insurance suit," The Denver Post, Jan. 17, 1986, at B-1. On the other hand, agreements among insurers to raise their rates in concert are not subject to antitrust prosecution. In other industries such agreements are felonies punishable by three years in jail.

II. Because of the McCarran-Ferguson Act, rates for workers compensation insurance are fixed: the National Council on Compensation Insurance, the rate making organization to which all workers compensation insurers belong, requires its member to adhere to the rates it issues. Constitution of National Council on Compensation Insurance, Art. VII (3)(c). The Insurance Services Office, the rate-making organization for liability insurers, does not expressly require its members to adhere to its rates but rather issues "advisory" rates. Yet, as a practical matter, this "advisory" rate is frequently adhered to. See National Underwriter, Sept. 6, 1985, at 82 ("what has occurred ... is a return to basic ISO rating ....")

III. There has traditionally been bi-partisan support for prohibiting price-fixing by insurance companies. For example, the Ford Administration (exhaustively studied the insurance industry and concluded that price competition in the insurance industry, without McCarran Act antitrust protection, would be in the public interest.) U.S. Dept. of Justice, The Pricing and Marketing of Insurance, at viii (1977). Similarly, in 1979 President Carter's National (Commission for the Reform of Antitrust Laws and Procedures, composed of the nation's leading antitrust experts, concluded 18-2 that McCarran-Ferguson's broad antitrust immunity should be repealed.) In its stead the Commission recommended narrowly drawn legislation to affirm the lawfulness of a limited number of esstential collective activities. The Reagan administration also (supports repeal of the broad McCarran-Ferguson antitrust exemption, as Federal Trade Commission Chairman Dan Oliver recently testified before the Senate Commerce Committee. in Feb 1987)

IV. Insurance companies could continue to pool data without McCarran-Ferguson protection.

Because most insurers have not paid enough claims in the past to accurately estimate how much they are likely to pay out in the future, they do need to get together to pool and analyze the past claims they have paid -- the more paid claims they can analyze, the more accurate their estimates of their future payouts will be. However, the joint collection and dissemination of past cost data does not violate the antitrust laws. See U.S. Dept. of Justice, The Pricing and Marketing of Insurance 91-118, and cases therein cited. And if insurers truly have doubts about the legality of pooling loss data under the antitrust laws Congress can expressly legalize such pooling without also legalizing price-fixing, as the McCarran Act does.

V. State regulation of insurance can - and should - be preserved with the McCarran-Ferguson Act repealed. In fact, the two leading organizations of state officials -- the National Conference of State Legislatures and the National Association of Attorneys-General -- have both passed resolutions calling for McCarran repeal. With McCarran-Ferguson repealed, the states would continue to regulate the insurance industry; the federal government would not regulate the insurance industry. As the NAAG put it, repealing McCarran-Ferguson would simply "subject insurance companies to the rules of the competitive marketplace applicable to other firms." NAAG Resolution I, Repealing the Insurance Industry's Exemption From the Antitrust Laws. (June 1986).

VI. Much of the insurance industry is willing to live without McCarran-Ferguson antitrust immunity. For example, the new president of the American Insurance Association, Robert Vagley, told the Journal of Commerce that the industry was willing to consider making changes in McCarran-Ferguson. And in 1979, State Farm Insurance Co. supported a bill that would substantially cut back on McCarran antitrust immunity,. Allstate and several other insurance companies have also indicated that they are willing to live without McCarran. In short, the industry's opposition to the McCarran-Ferguson exemption is probably based more on its traditional opposition to change than anything else.

NATIONAL INSURANCE
CONSUMER ORGANIZATION

March 25, 1987

Honorable Joseph R. Biden
Chairman
Senate Judiciary Committee
U. S. Senate
Washington, D. C. 20510

Dear Mr. Chairman:

Thank you for your letter of February 25. Enclosed are the answers to the questions you pose.

Question 1. The tort policy working group reviewed a number of industries and found that insurance was becoming increasingly unavailable. For example, biotechnology companies are having a difficult time in the insurance market because they are new, small companies dealing mostly in research and development in a field largely unknown to insurers. Many of our basic industries, such as oil, gas drilling and heavy manufacturing are hard pressed to find insurance at a reasonable cost as well. Is this a manufactured crisis? If so, by whom?

Answer 1. The insurance crisis -- sudden, dramatic rate increases and refusals to deal by insurance companies -- is real. It is the insurance industry's explanation for the crisis -- a purported litigation explosion -- that is manufactured. See, e.g., National Center for State Courts, A Preliminary Examination of Available Civil and Criminal Trend Data in State Trial Courts for 1978, 1981 and 1984 (April 1986); "Focusing on the Facts of the Insurance Crisis," a Report to the House Subcommittee on Economic Stabilization, by Phillip J. Hermann, Chairman of the Board, Jury Verdict Research, Inc., August 6, 1986 (JVR studies "do not support any claim of recently escalating jury awards").

The true cause of the recent insurance crisis, and a similar crisis in 1975-76, is the cyclicality of the insurance industry. Insurance rates rose dramatically in 1985-86, just as they did in 1976-77, because the insurance industry's rate of return bottomed out at about 3% in 1984 just as it had in 1975. 1/

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Explanations for the cycle vary. The most frequently cited is that the profitability of the industry tracks interest rates. When interest rates are high insurers earn high returns on the premiums they collect, their profitability rises and they begin cutting prices; when interest rates are low they earn low returns on their premiums, their profitability falls and they must raise prices. 2/ Other factors also contribute to the insurance cycle: the inelastic nature of demand for insurance; statutory barriers to entry (e.g., laws prohibiting banks from entering the insurance industry); fluctuations in exchange rates, which substantially affect the supply of reinsurance -- insurance for insurance companies -- since the reinsurance market is dominated by foreign firms; and stock prices, since although most property/casualty insurance company funds are in bonds, about 20% is in common stocks. 3/

More important than all factors but the fluctuation in interest rates, however, is the insurance industry's exemption from the antitrust laws under the McCarran-Ferguson Act. The relationship between the antitrust exemption and the insurance cycle is explained in the answer to Question 2.

Question 2. Is the insurance crisis particularly related to the insurance industry's exemption from the federal antitrust laws or federal regulation in general?

Answer 2. The insurance crisis is related to the insurance industry's exemption from the antitrust laws.

First, the antitrust exemption allows insurance companies to suddenly and dramatically raise rates in concert at the bottom of each cycle. For example, in January 1985, the Insurance Services Office apparently decided that the price-cutting of the last few years had gone far enough: ISO President Dan McNamara called a joint industry conference with the Insurance Information Institute, the industry's public relations arm, at which he emphasized that "the need for significant premium increases, especially for commercial lines, is absolute for the next three years." 4/ Then, in May 1985, ISO distributed throughout the industry a major position paper, entitled "1985: A Critical Year," which proclaimed that "the brutal price war of the last six years is over," and that "significant premium increases are needed, especially for the current commercial lines products." 5/ And the next month William O. Bailey, President of Aetna, the nation's third largest commercial liability insurer, told the National Association of Insurance Brokers that "Clearly another round of price increases is absolutely necessary for the business." 6/ Then suddenly, in the summer of 1985, insurance companies that only a few months earlier had been competing on price and ignoring the ISO "advisory" rate were tripling and quadrupling their premiums, returning to the ISO rate. 7/

Because the courts have consistently prohibited trade associations from circulating "suggested" price lists, even if the list serves only as a guide or starting point for price determination, ISO could probably not issue an advisory rate absent antitrust immunity. See Northern California Pharmaceutical Ass'n v. U.S., 306 F.2d 379 (9th Cir. 1962), cert. denied., 371 U.S. 862; Plymouth Dealers Ass'n of Northern California v. U.S. 279 F.2d 379 (9th Cir. 1969); U.S. v. Nationwide Trailer Rental System, Inc., 156 F. Supp. 800 (D. Kan. 1957), aff'd per curiam, 355 U.S. 10 (1957); Esco. Corp. v. U.S., 340 F.2d 1000 (9th Cir. 1965); Dept. of Justice, The Pricing and Marketing of Insurance 167-70 (1977). And absent antitrust immunity, ISO and insurance company executives would certainly be less likely to urge other insurance executives to raise their prices.

Second, the antitrust exemption encourages pricing below cost when interest rates are high. It is the knowledge on the part of insurance companies that, because of McCarran-Ferguson, they can get together, call a halt to price-cutting and suddenly raise their prices in concert to excessive price levels that permits their price cutting to go so far. Because of McCarran-Ferguson, they can get back in one year what they gave away in six.

The children's game of tag provides an instructive analogy. The McCarran-protected rate bureau rate functions as "home base" functions in tag. Insurers, during the competitive phase of the cycle, can ignore the bureau rate and seek market share by cutting price. The price-cuts are deeper and the duration of the price-cutting longer than would be the case in the free market because the price-cutters know that they can always return to the home base of the bureau rate. Because the bureau rate is set at a level at which the least efficient bureau member is profitable, the bureau rate will allow most insurers to earn excess profits. These excess profits attract capital, which sets the stage for the price-cutting to begin again.

If insurance companies competed in a free market subject to the antitrust laws, they would not be able to suddenly call a halt to price-cutting and to sharply raise their prices in concert. Moreover, the knowledge that they could not raise prices in concert after "cashflow" underwriting would prevent them from engaging in such underwriting in the first place, and force them to carefully evaluate risks at all points on the cycle. Because interest rates will continue to fluctuate and demand for insurance will remain relatively inelastic, the insurance cycle will not completely disappear if McCarran antitrust immunity is eliminated. But eliminating that immunity will smooth out the cycle , and should therefore put an end to the insurance "crises" that recur every nine years or so.

Question 3. A number of experts, including those who participated in both the 1977 and 1979 Justice Department studies, have concluded that this industry is competitively

structured, even if individual companies do not behave competively in the context of the industry's regulatory environment. Why is repeal of McCarran-Ferguson so critical to enhanced competitiveness in the industry? Wouldn't it be enough if the states enacted tougher unfair trade or antitrust laws applicable to the industry?

Answer 3. Repeal of McCarran-Ferguson antitrust immunity is critical to enhanced competitiveness because it is the antitrust immunity which allows the competitively structured insurance industry to perform in an anticompetitive manner, as explained in the answer to question 2.

The states have not applied state antitrust laws to the insurance industry and in general have not enacted tough unfair trade laws that are applicable to the insurance industry. Moreover, as was evident from the testimony of the West Virginia Attorney-General, individual states simply do not have the resources to prosecute the insurance industry under "little FTC Acts" or "little Sherman Acts" even if they did apply to the insurance industry. As New Jersey Insurance Commissioner Ken Merin has put it, the states are simply "outmanned and outgunned" by the insurance industry. 8/ There are also those who argue, including the U.S. General Accounting Office, that state insurance commissioners often do not have what the GAO called an "arms-length relationship " with the insurance industry. 9/

Question 4. The consumer groups have testified that they favor the repeal of the exemption from the federal antitrust laws that the insurance industry enjoys under McCarran-Ferguson. However, such legislative action has often been linked with proposals for increased federal regulation of the insurance industry -- ideas such as the establishment of a federal insurance agency to review state regulation. That is a much more complicated position. Is such regulation necessary if McCarran-Ferguson is repealed?

Answer 4. No. We support repeal of the antitrust exemption for the insurance industry contained in the McCarran-Ferguson Act and the maintenance and strengthening of the national commitment to state regulation of the insurance industry.

We applaude Senator Metzenbaum's public statement that he will amend S. 80 so that it would repeal only the anti-trust exemption while maintaining and strengthening state regulation. The debate must focus on the appropriate question -- do insurance companies need to be able to fix prices? -- rather than the red herring of state versus federal regulation. With the elimination of the antitrust exemption, states could choose to deregulate and would be assured that deregulation would not lead to anticompetive behavior. On the other hand, states that chose to regulate prices would remain free to do so, under the state action doctrine.

Question 5. Would it be logical to subject insurance companies to liability under federal antitrust law without comprehensive federal regulation of the industry as a whole?

Answer 5. Yes. State-chartered banks, for example, are subject to antitrust law but are not federally regulated.

Question 6. The insurance industry argues that restricting or repealing McCarran-Ferguson would lead to great uncertainty as to what kinds of collective activities would be permissible. For example, what kinds of data would companies be able to share, or would they be able to do this at all? Would they be able to pool risks and establish joint ventures to obtain reinsurance? Aren't these legitimate concerns? How would you propose to establish some legal certainty without years of litigation?

Answer 6. The antitrust laws do not prohibit the pooling of past cost data. To the contrary, the cases clearly establish that the exchange of past cost data is lawful as long as the data are compiled and disseminated in composite form, deal exclusively with past and closed transactions, and are widely published and readily available to consumers. Maple Flooring Ass'n v. U.S., 268 U.S. 563 at 573-74, 586 (1925); U.S. v. FMC Corp., 317 F. Supp. 443, 446 (E.D. Pa. 1970); Department of Justice, The Pricing and Marketing of Insurance at 102, 116-17.

In contrast, the pooling of future pricing data clearly is prohibited by the antitrust laws.

The legality of the pooling of risks and the establishment of joint ventures to obtain reinsurance would be governed by the rule of reason. For example, an agreement among the only three insurers writing a line of business to pool that business would not normally be pro-competitive and thus would not pass muster under the rule of reason. On the other hand, a pooling agreement among several small insurers attempting to enter that same three-firm market would normally be pro-competitive, and thus legal under the rule of reason.

To the extent that insurers truly believe that the rule of reason gives them insufficient guidance as to which activities are lawful and which unlawful, Congress could write carefully drafted standards codifying the rule of reason into the law, as it did with the limited immunity for research and development joint ventures enacted in the 98th Congress.

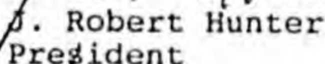
Question 7. If the Judiciary Committee were to act on this kind of legislation, wouldn't we be wiser to consider a more limited and well-defined immunity from the antitrust laws than an outright repeal of McCarran-Ferguson? Wouldn't the uncertainty that might otherwise be created actually harm consumers and make at least some kinds of insurance even harder and more expensive to obtain?

Answer 7. We support, and believe the Judiciary Committee should support, a repeal of the antitrust immunity granted by the McCarran-Ferguson Act rather than a repeal of the entire McCarran-Ferguson Act. To the extent Congress is concerned that repealing the antitrust exemption would create uncertainty that would harm consumers, Congress could write specific standards into the law. (We fail to see, however, how subjecting the insurance industry to the antitrust laws could harm consumers. We are certain that the current situation harms consumers by protecting inefficient anti-competitive behavior which costs consumers billions of dollars in inefficiencies.)

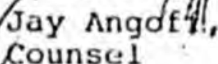
Question 8. What kinds of exceptions would consumer groups be willing to support?

Answer 8. While we do not believe that exceptions are necessary, neither do we believe that expressly permitting insurance companies to jointly collect, compile and disseminate past cost data is harmful. In addition, we believe Congress should give the insurance industry every opportunity to make its case that additional exemptions are needed, and we would welcome the opportunity to discuss with your Committee and the industry the need for any specific exemptions for which your Committee felt the industry had made a *prima facie* case.

Sincerely,



J. Robert Hunter
President



Jay Angoff,
Counsel

FOOTNOTES

1/ Insurance Information Institute, Insurance Facts: 1986-87 Property/Casualty Fact Book, at 22; Insurance Information Institute, Insurance Facts: 1982-83 Edition, at 19.

2/ E. G., "Insurers Must Take Part of the Rap," Business Week, March 10, 1986.

3/ Insurance Information Institute, Insurance Facts: 1986-87 Property/Casualty Fact Book, at 23.

4/ Business Insurance, Feb. 4, 1986, at 16.

5/ ISO and NAII, "1985: A Critical Year," at 5.

6/ Business Insurance, June 10, 1985 at 3.

7/ National Underwriter, Sept. 6, 1985, at 8, 82 ("The quick reversal in underwriting standards has been shocking . . . . What has occurred . . . . is a return to the basic ISO rating subject to a minimum 20 percent surcharge.")

8/ Journal of Commerce, July 8, 1986, at 1.

9/ See U. S. General Accounting Office, Issues and Needed Improvements in State Regulation of the Insurance Business (Oct. 1979).

The NAIC NEWS

July, 1987 — Official Newsletter of the National Association of Insurance Commissioners

Special Edition

RECEIVED
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DIVISION OF INSURANCE

Position paper states NAIC opposition to repeal or modification of McCarran

Any change would be severely detrimental to effective state regulation and the insurance-buying public.

Editor's Note: The NAIC announced its opposition to modification or repeal of the McCarran-Ferguson Act during a press conference held July 1 in Washington, D.C. NAIC President Edward J. Muhl, Vice President John E. Washburn, Superintendent James P. Corcoran (N.Y), Board Member David Thornberry (Texas), and Commissioners David N. Levinson (Del.) and Peter W. Gillies (Conn.) participated in the press conference.

At that time, the NAIC released a position paper, declaring its stance and explaining its reasoning. That paper is reprinted here in its entirety.

It is vital that the public and members of the Congress understand that repeal or modification of McCarran is not even a partial solution to the lack of affordable and available liability coverage.

As the association of the chief insurance commissioners of the 50 states, the District of Columbia and the U.S. territories, the National Association of Insurance Commissioners ("NAIC") is vitally interested in recent bills pending before the Congress to modify or repeal the limited antitrust exemption afforded the insurance industry since 1945 under the McCarran-Ferguson Act ("McCarran"). The NAIC, through its membership, has unequivocally concluded that repeal or modification of the limited exemption of McCarran would be severely detrimental to effective state regulation and the interests of the insurance-buying public.

Proposals to modify McCarran are based on the unsupported belief that such action would solve or rectify the liability insurance crisis and the unexamined assumption that the industry should be treated in the same manner as others in the free market sector. Clearly, those advocating such a change have a heavy burden to modify federal policy which has permitted states to regulate effectively the insurance industry in excess of 40 years. After careful evaluation, state insurance regulators have determined that the reasons advanced do not justify modification of McCarran. Rather, such action would further exacerbate the problems in availability and affordability and impair effective state regulation.

The crisis in affordability and availability was not caused by a lack of competition.

I. Modification or repeal of McCarran will not solve the liability insurance crisis.

The precipitating event to the current proposals for repeal or modification of McCarran is the recent insurance crisis with respect to availability and affordability of a broad range of important liability coverages.

The coalition of public interest groups, small businesses and professional associations that supports repeal of the antitrust exemption is motivated by an understandable frustration with the cost and availability of liability insurance coverages. The insurance commissioners understand the concern of the family day care operators, nurse practitioners, municipalities, small businesses and others. The NAIC believes that it is vital that the public and members of the Congress understand that repeal or modification of McCarran is not even a partial solution to the lack of affordable and available liability coverage. The issues are fundamentally unrelated.

Competitive Aspects of Insurance

Substantially everyone knowledgeable about the operation of the insurance market in recent years has concluded that at least a portion of the problem was caused by the competitive aspects of the industry. The practice of insurers severely undercutting prices in order to gain increased market share led the industry into another "cycle" in which the product was overly discounted.[2] Once insurers became aware that many of their competitors had met their price discounts and that returns were inadequate, they began to increase prices, cancel policies and refuse to provide coverages on many risks. At the same time, a substantial portion of the insurance industry, including reinsurers vital to the insurance mechanism, perceived the American civil justice system to be increasingly unpredictable, creating expanding legal doctrines of liability and awarding unforeseeably large awards. This conclusion led insurers to impose stringent underwriting criteria and to avoid providing coverage for the more hazardous and longer-tail lines, resulting in the recent crisis. Whatever one's opinion is with respect to the degree of impact of the civil justice system upon the property casualty insurance market, it is obvious that the crisis in affordability and availability was not caused by a lack of competition which a repeal or modification of McCarran would be designed to address.

Fallacious Premise of Price-Fixing

Proposals to repeal or modify McCarran also appear to rest on the fallacious premise that prices are fixed by the industry and that insurers colluded in some manner to manufacture the recent restrictions on availability and to increase prices. In most states, data is collected and interpreted by an advisory organization and transmitted to insurers in various forms, including advisory rates. The collection, interpretation, and dissemination of data are necessary since individual insurers are not sufficiently large to acquire enough data to be actuarially reliable, particularly in those types of coverages which are not widely available currently. The insurer independently prices the product, subject to regulatory constraints, and extreme price

competition continuously occurs, as in fact occurred during the recent cycle. Indeed, insurers charge uniform rates only in those states in which rates are mandated or set by regulatory agencies where variations are prohibited by state law.[3] Too stringent restrictions on sharing information necessary to formulate rates would impair competition by affording larger insurers a competitive advantage, reducing over time the number of insurers in the market.

If McCarran is repealed or modified, it is unlikely that any benefit to insurance consumers will result.

Significantly, many state legislatures and insurance regulators have attempted to address the current problems and underlying causes. States have established various pools, joint underwriting associations, and market assistance plans, with insurance industry participation on both a voluntary and mandatory basis, in order to provide a market for harder to place coverages. Additionally, legislatures have enacted changes in tort law as well as insurance regulation, including new reporting requirements on claims data and various pricing restrictions to moderate the cyclical swings.

The NAIC submits that these types of state actions are the appropriate ones to analyze and consider in attempting to resolve the constriction of the market and that repeal or modification of McCarran is not a well-reasoned response to the most recent crisis.

Such an approach will restrict regulators' flexibility and their ability to try innovative approaches to solve problems.

2. **Application of federal antitrust laws and the Federal Trade Commission Act will adversely impact the effectiveness of state regulation and the interest of the insurance-buying public.**

Some have urged that total repeal of McCarran, coupled with the standard application of antitrust principles, including the rule of reason and the state action doctrine, would permit effective state regulation as well as continued beneficial activities of the industry, while prohibiting other unspecified acts which conceivably could be anticompetitive. Obviously, such application would place regulatory action as well as insurance industry activities into total chaos and confusion, subject to years of future court interpretations. Currently, Congress appears to have abandoned this radical approach and instead is considering substantial modification of McCarran by eliminating the antitrust exemption while at the same time enacting provisions which specifically authorize certain actions deemed to be necessary or beneficial.

Any such list of permissible items will subject the regulation and operation of the insurance industry to years of uncertainty and instability due to the potential for costly litigation and conflicting judicial interpretations. The scope of activity covered by each specified item will be unclear, potentially for decades, pending court interpretations, and desirable and proper activities are likely to be omitted from any such list due to oversight. Significantly, smaller companies can least afford such uncertainty and protracted litigation and, therefore, may be at a competitive disadvantage with respect to the larger insurers.[4] Even more critical, legal uncertainty of this magnitude will impede the ability to attract capital, a particularly vital function if the industry is to provide widespread and socially necessary coverages.

Creates Regulatory Vacuum

McCarran has been in existence for more than 40 years and has been subject to numerous court interpretations throughout that period. Although one cannot predict with absolute certainty future judicial interpretations, regulators and the industry can act with some certainty under existing law. If, however, McCarran is repealed or modified, almost all state regulatory actions and frequently utilized activities in the industry will have to be analyzed to determine whether they *may* violate antitrust law or whether a specific congressional exemption *may* apply.

Moreover, such an approach will restrict regulators' flexibility and their ability to try innovative approaches to solve problems. Significantly, it is unlikely that any benefit will result to insurance consumers. For instance, voluntary joint underwriting, pooling arrangements and market assistance programs may be jeopardized by federal antitrust law enforcement or enforcement of the Federal Trade Commission Act. The combination of insurers' uncertainty as to the legal parameters within which they could safely operate on a coordinated basis, the severe penalties for an error in judgment and the practical and costly problem of arriving at an informed decision promises a substantial lessening of insurer willingness to make available needed coverage which cannot be prudently provided by a single insurer.

Whether intentionally or inadvertently, repeal or modification of the McCarran antitrust immunity ultimately promises the establishment of a substantial federal insurance regulatory role due to the creation of an insurance regulatory vacuum. The partial substitution of federal for state insurance regulation deprives the insurance purchaser of the advantages inherent in state regulation of insurance, including responsiveness at the local level to consumer complaints, experimentation and innovation and the certainty of an existing functional regulatory system in place in all states.

As the regulatory vacuum and grey areas surface, questions of proper responsibility and enforcement authority will follow. It appears that any of the contemplated changes in existing law would interject the Federal Trade Commission ("FTC"), as well as the Justice Department, into insurer activity. This may lead to the regulated industry, the insurers, attempting to evade the state regulators by seeking prior federal approval or arguing absence of state authority due to federal preemption, to the ultimate disadvantage of the insurance consumer. Inevitably, and in contradiction to assertions of its advocates, modification of McCarran necessarily will result in a strong federal regulatory role at the expense of state authority.

Published by the NAIC for insurance regulators, the insurance industry and consumer groups.
President: Commissioner Edward J. Muhl (Md.); Vice President: Director John E. Washburn (Ill.); Recording Secretary: Commissioner Fletcher Bell (Kan.)
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Member KC/IABC

3. The McCarran exemption is necessary and appropriate due to the unique nature of the insurance industry.

Some proponents of repeal or modification of the McCarran exemption have relied on the assumption that the national policy in favor of competition requires broad application of the antitrust laws. The arguments raised in support of such action are insufficient when adequately scrutinized. State regulators can agree that full application of federal antitrust laws is appropriate for most industries operating in the free market system in which a product or service is transferred or provided at the time of payment and the business is free of extensive governmental regulation. The insurance industry, however, does not fit within these parameters for the following reasons.[3]

First, the unfettered acceptance of risk is not permissible for insurance carriers because state regulators are extremely concerned with the financial soundness and solvency of companies. Unlike substantially all other industries, insurance involves the payment of a premium at the present in return for a promise to pay in the future upon the occurrence of certain contingencies which cannot always be accurately projected. State regulators have the responsibility to provide a regulatory environment protecting solvency and to assure that adequate protections exist for future payments to policyholders.

Second, state regulation with respect to pricing, forms, coverages, financial condition and other critical matters, and the need to provide or facilitate the operation of market mechanisms to offer essential coverage, substantially differentiates the insurance industry from other businesses. Assumptions which may be appropriate in other market contexts in which antitrust laws are fully applicable, in which the free market permits the business to fail with the impact falling primarily upon shareholders, and where there is an absence of thorough governmental regulation, do not apply to the regulated insurance market.

Exemption Is Limited

It should be emphasized that the insurance industry has only a *limited* exemption from the antitrust laws.[4] Moreover, other regulated industries are also exempt from or subject to different application of federal antitrust laws.[5] It is simply inaccurate to state that the insurance industry alone is exempt from full application of antitrust law.

The insurance industry has been regulated effectively by the states for more than 40 years under the existing McCarran language. Indeed, at the time that congressional action became necessary in order for state regulation and taxation of the industry to continue, the original proposal suggested a total exemption from the antitrust laws. The NAIC, however, opposed the broad exemption and advocated instead the limited exemption enacted in 1945, pursuant to which regulation has continued to the present.[6] Effective regulation will be impossible if unknown and unpredictable judicial interpretations and legal doctrines are substituted for past experience.

4. No benefit will be achieved by modification of the current antitrust exemption.

Not only would the proposals to modify or repeal McCarran not have a positive impact on the recent liability crisis, but these proposals are not necessary to authorize enforcement action against alleged collective activity of the insurance industry in refusing to provide coverage in certain states or in setting prices.

Although unable to point to any specific evidence and directly contrary to the opinion of regulators who participate in the NAIC, some critics of the McCarran exemption allege that insurers have colluded to drive up prices or to refuse to provide specified coverages. However, such alleged conduct would not be protected by McCarran. Such conduct would violate existing state laws on antitrust and unfair competition provisions in insurance codes. In addition, an agreement or act to "boycott, coerce or intimidate" is not exempt under McCarran in its present form. Moreover, under particular circumstances such a collusive agreement would not constitute, pursuant to existing judicial interpretations of the McCarran language, the "business of insurance... regulated by State Law."

It is simply inaccurate to state that the insurance industry alone is exempt from full application of antitrust law.

Finally, it cannot be overly emphasized that the business of insurance, particularly with respect to the liability coverages, is competitive under the state regulatory system. Indeed, under McCarran the insurance industry has a competitive structure given the number of competitors and the ease of entry. Although a particular type of coverage may have limited sellers at a given point in time, the number of potential sellers is several thousand. Additionally, access to the market is relatively simple as minimum capital and licensing are the basic requisites for entry.

Given the competitive structure of the industry, it is highly unlikely that insurer collusion can be successful in the marketplace even in the absence of any legal prohibition. It seems clear that modification or repeal would not result in the intended benefits but instead could have opposite, deleterious effects, including lessening competition by reducing the number of insurers currently in the market and imposing insurmountable barriers on entry into the industry.

It cannot be overly emphasized that the business of insurance, particularly with respect to the liability coverages, is competitive under the state regulatory system.

Conclusion

Among the many factors overlooked in the debate over McCarran are that we are not discussing the creation of an antitrust exemption for the business of insurance, *de novo*. That discussion already has taken place in the mid-1940s. The NAIC was there and argued against a total exemption for the business of insurance and in favor of the very limited, current exemption.

The debate concerns, then, whether to change the limited, current exemption. Given that this limited exemption has become so intertwined with effective state regulation, that competition has flourished under such a system, and, most importantly, that any change would not appear to improve affordability or availability of certain lines, but instead inject uncertainty into an industry where stability and predictability are so critical to the attraction of necessary, vast infusions of capital, McCarran should not be repealed or amended at this time.

Footnotes

[1] Moreover, NAIC believes that McCarran is essential to effective state regulation and that modification of that act will create a void which will require ever increasing federal oversight, eliminating primary responsibility of state insurance departments.

[2] Significantly, the insurance marketplace is made up of thousands of insurers acting independently and cannot be viewed as a single entity or utility. Although many of these insurers engaged in irresponsible, cut-throat competition, it is also true that certain insurers acted prudently, refused to discount prices to unreasonable levels, and as a result lost market share.

[3] Some insurance consumers and members of Congress apparently have concluded that the transmission of advisory rates is the equivalent of industry price fixing which should be prohibited through repeal of McCarran. The commissioners' experience demonstrates that in the liability coverages insurers do not adopt the advisory rates. Instead, after considering their own experience, the competitive market, the advisory rates and all other data, insurers select their own prices for their products, except where the state regulator establishes the maximum or only proper price. Further, the trend in states has been away from the dissemination of advisory rates as provided by the NAIC model legislation with respect to competitive rating for liability insurance. NAIC 1983 Property and Liability Model Alternative Competitive Pricing and Appropriate Support Systems Act, Section 12, *NAIC Model Laws, Regulations and Guidelines*.

[4] Indeed, some of the larger interstate insurance carriers may favor repeal or modification of McCarran, since such action would give them a significant competitive advantage over their smaller competitors.

[5] Indeed, even those calling for modification implicitly recognize the significant differences of the regulated insurance industry from other sectors of the economy because they also concede that enumeration of permissible activities must be included as exemptions to the antitrust laws if McCarran is modified. Many proponents of change have simply failed to consider the adverse consequences of amending McCarran.

[6] Under McCarran, actions are protected from antitrust attack only if the activity constitutes the "business of insurance" and only to the extent that it is "regulated by State Law." 15 U.S.C. Section 1012(b). The exemption has been narrowly interpreted by court decisions. Further, the Sherman Antitrust Act is explicitly applicable to any agreement with respect to or action of boycott, coercion or intimidation. 15 U.S.C. Section 1013(b).

[7] *See, e.g.*, 12 U.S.C. Sections 1828, 1842; 49 U.S.C. Section 10706; 15 U.S.C. Section 21.

[8] *Group Life & Health Ins. Co. v Royal Drug Co.*, 440 U.S. 205, 219 n. 21 (1979).

NAIC

1125 Grand Ave., Suite 1900
Kansas City, MO 64106

Property/Casualty
Release No. 24
July 13, 1987

A.M. Best Company
Oldwick, N.J.
201-439-2200

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JUL 14 1987
DEPARTMENT OF COMMERCE
& ECONOMIC DEVELOPMENT
INSURANCE

McCarran-Ferguson Repeal Sought by Legislators But Commissioners Say "Not in Public Interest"

A half dozen of the best and brightest of state insurance commissioners came to Washington trying to talk sense to legislators who seem bent on repeal of the McCarran-Ferguson Act, regardless of whether it will help or impede managing insurance industry problems.

First, five commissioners sounded off before the House Energy and Commerce subcommittee that has jurisdiction over insurance. Then, a group from the National Association of Insurance Commissioners leaders met the press to explain why repeal of the McCarran-Ferguson Act would not be in the public interest.

The morning session, with Rep. James Florio (D-N.J.) in the chair, was an almost amazing coming together of minds. With commissioners ranging from the staunchly "let the state do it" mentality of New York Superintendent of Insurance James P. Corcoran to Minnesota Commissioner of Commerce Michael A. Hatch, who has been campaigning for a broader federal role, there was unanimity on two key ideas. The commissioners agreed that solvency is their major problem. And they also favor federal legislation in the areas of product liability law reform and environmental liability.

From here, though, the agreement breaks down. Mr. Hatch argues that if the federal government enacts product liability law reform, it also should have the right to supervise premiums for insurance coverage. Mr. Corcoran, David Levinson, insurance commissioner of Delaware, Kenneth D. Merin, commissioner of insurance of New Jersey and John E. Washburn, Illinois commissioner and vice president of the NAIC, strongly disagreed.

Mr. Hatch says solvency regulation should be done on a national scale because an individual commissioner cannot tell an insurer to raise rates when necessary—"we would just be subsidizing sales in other states." But Mr. Washburn said the NAIC was far ahead of the federal government in creating screens to indicate companies in trouble, collecting data and disbursing information to commissioners nationwide. He told Rep. Matthew Rinaldo (R-N.J.), "I'm not sure how the federal government could help us on this."

Begging for Relief

Mr. Merin argued that state regulation of insurance is becoming so intense that he expects in five years to have insurance companies begging Washington to relieve them from the burden of state-by-state regulation. Mr. Levinson argued that the federal government should put some money into the NAIC and imbue it with any authority it is lacking to allow the state commissioners "to solve the problems of interstate insurance fraud, anti-competitive behavior and solvency oversight."

Mr. Corcoran suggested there is room for a federal role in the areas of pollution liability and product liability. These activities cannot obtain necessary insurance, not because of inefficient state regulation, he said, but rather because there is a "lack of insurance capacity to provide for the potentially staggering and unpredictable costs of the coverages involved." The federal government needs to play a part in the pollution liability crunch, he said, because "waterways and air carry our environmental problems from one region to another and even from country to country."

Mr. Merin wants the federal government to study "the feasibility of creating a federal reinsurance program for high-risk pollution and toxic substance risks, with risk management and safety engineering principles clearly spelled out."

(continued)

Mr. Corcoran pointed out that the Jones Commission in New York found a need for federal solution to product liability. "A product manufactured in one state may be sold anywhere. Here, inability to predict the ultimate costs of the liability which may flow from the manufacture or distribution of a product makes the pricing of insurance coverage exceedingly difficult. As a result, manufacturers are unable to intelligently price their products, and whole industries—such as sporting goods—move abroad."

Reinsurance Regulation

Mr. Merin noted that New Jersey is proposing closer regulation of the "reinsurance practices of companies doing business in the state" and suggested there may be a federal role in oversight of international reinsurance. The New Jersey Department has asked the state legislature to pass a resolution asking for a federal study of reinsurance "to determine the effect on the balance of payment deficit of the alien reinsurance market."

This study also should look at the need for a stronger reinsurance market in the United States. Along with this, the study should determine whether the new tax law "is acting as a disincentive to placing long-tail reinsurance business with U.S. companies." The study should look at the need for federal licensing of alien reinsurers, and standards for transacting reinsurance business.

Another study should be implemented, Mr. Merin said, "to determine the extent stock ownership aggravates industry cycles by forcing insurance company management to take the short-term versus long-term view—i.e., the need for impressive shareholder dividends each quarter might cause a stock company to engage in the potentially dangerous practice of cash flow underwriting more readily than a mutual insurer."

He also wants the federal government to investigate the possibility of barring corporate conglomerates from owning property/casualty insurers. He explained, "A number of recent insurance company problems may have been exacerbated due to the purchase of insurance companies by large noninsurance conglomerates."

Mr. Corcoran picked up on this theme at the NAIC press conference, telling reporters that a lot of the blame for insurance problems stems from the deregulation policies of the federal government. He argued that the best way to prevent "outrageous insurance costs" and "outrageous civil justice costs" is regulation. State insurance commissioners are regulating, trying to become accountable for cash flow underwriting, he said, but a lot of the problem was caused by lack of federal regulation of truckers and the environment.

The NAIC released a paper expressing strong opposition to changes in the McCarran-Ferguson Act. "The NAIC believes it is vital that the public and members of Congress understand that repeal or modification of McCarran is not even a partial solution to the liability insurance crisis. The issues are fundamentally unrelated." Maryland Commissioner Edward J. Muhl, president of the NAIC, said. The report notes that "proposals to modify McCarran are based on the unsupported belief that such action would solve or rectify the liability insurance crisis and the unexamined assumption that the industry should be treated in the same manner as others in the free market sector."

The McCarran-Ferguson Act grants regulation of insurance to the states and also is the source of the insurance industry's antitrust immunity. Those who believe that the liability insurance crisis was caused by lack of competition in the industry "are patently in error," Connecticut Insurance Commissioner Peter W. Gillies told reporters. Mr. Corcoran said he is concerned that repeal or modification of McCarran-Ferguson will "fog regulatory jurisdiction" so the state will find some of its actions preempted.

David Thornberry, a member of the Texas State Insurance Board, argued that insurance is different than other industries because not only are shareholders hurt by insolvency, but policyholders as well. Thus, insurance is in a "unique" situation and cannot be treated the same as other industries without policyholders, he said.

The commissioners do not want modification of McCarran, as suggested by some, to allow for a laundry list of permissible activities while the main antitrust exemption is lifted. Smaller companies would not be able to stand this ambiguity, Commissioner Corcoran said, and this could lead to less competition, rather than more.

Mr. Muhl added that the focus on McCarran in Congress is all wrong because "one of the causes of the liability crisis has been extreme competition." He argued that "controlled regulation," not competition, is needed to deal with the liability crisis.

—By [illegible] Correspondent

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BY CECIL L. PEARCE

Separating Fact From Fiction

During the past year, legislation has been introduced in the U.S. Congress to repeal the McCarran-Ferguson Act or amend it by taking away the insurance industry's limited antitrust exemption. The debate surrounding McCarran-Ferguson should come as no surprise to the insurance industry, especially after the public outcry that came during the last insurance cycle. In the last 18 months, Congress undoubtedly has heard many complaints from constituents regarding the availability and affordability of insurance. As a result, moves to repeal or amend McCarran-Ferguson have increased and several congressional hearings have been called addressing the subject.

If the insurance industry is to convince Congress that the McCarran-Ferguson Act should remain intact, several myths will have to be dispelled.

Myth No 1: Repealing McCarran-Ferguson would increase competition. There is a perception on Capitol Hill that it was a lack of competition that was in part the cause of the insurance crisis and repeal of McCarran-Ferguson would solve this problem. The truth of the matter is that the insurance industry is one of the most competitive in the United States. There are currently more than 3,000 licensed insurance companies doing business in this country. Intense competition was a key component fueling the price war of the early 1980s. While we don't oppose additional competition, we also cannot let Congress base public policy on the misconception that competition is lacking in the insurance industry.

Repeal of the McCarran-Ferguson Act will hurt, not help, insurance buyers.

Myth No. 2: One of the causes of the insurance crisis is price fixing, and this could be prevented by repealing McCarran-Ferguson. The truth is that the McCarran-Ferguson Act does not allow price fixing, and if insurance companies engaged in such practices, they would be penalized accordingly. Furthermore, the Antitrust Division of the Justice Department has said publicly that it has found no basis for charges that collusion in the insurance industry led to the crisis in liability insurance. Division officials said the market for property/casualty insurance rendered collusion difficult or even impossible.

Myth No. 3: State governments have failed to respond to the insurance problem. In fact, state governments and state insurance commissioners across the country have worked hard and responded effectively to the insurance crisis. First, insurance commissioners in many states established market assistance plans to help the public find coverages they might not otherwise have been able to. The insurance industry cooperated with the commissioners to provide this service. During the past year and a half, almost every state legislature has debated the need for tort reform and insurance reform. Many state legislatures accepted the argument for tort reform and the demand by society that our civil justice system be restored to one based on fault and not simply on who has the money to pay. State legislatures also have adopted a variety of

Cecil L. Pearce is director of state government affairs for the Independent Insurance Agents of America.

PHOTOGRAPH BY KATHERINE LAMBERT

insurance reforms to correct some of the practices within the industry. These include regulations concerning midterm cancellations and advance notice of nonrenewals, among others. In short, state legislatures identified correctly the two key items affecting the insurance problem: insurance reform and tort reform.

THE BENEFITS

Before making any decisions about the McCarran-Ferguson Act, Congress must understand the benefits it provides to the public. For example, the McCarran-Ferguson Act allows insurers to share loss data, which is necessary for small and medium-sized companies to set premium rates and compete effectively in the marketplace. If McCarran-Ferguson is repealed, sharing loss data would no longer be allowed, and smaller companies would be forced out of the business. Consequently, insurance would be less available. Many consumers have benefited from such programs as automobile assigned risk plans and the FAIR plans that provide property insurance. Because these programs involve cooperative efforts within the industry, it is doubtful that such programs could continue if McCarran-Ferguson were repealed.

Another cooperative effort involves state guaranty funds. If an insurer becomes insolvent, other companies are required to pay the insolvent company's liabilities. This cooperative effort now costs insurance companies millions of dollars each year. If McCarran-Ferguson is repealed, this safety net might be gone as well.

During the next 18 months that the 100th Congress is in session, it will decide whether to repeal or amend McCarran-Ferguson. Congress will make this decision based on its understanding of the causes of the insurance problem. Proponents of altering McCarran-Ferguson argue that the insurance crisis was caused by a lack of competition, price fixing and inadequate state regulation. If Congress enacts public policy based on these misunderstandings, then we can expect inadequate and misguided answers from Capitol Hill. Furthermore, it will be the insurance buying public that ultimately will pay the price for a misguided federal policy.

This is no time to sit on the sidelines and expect someone else to carry the ball. The proponents of repealing McCarran-Ferguson would like nothing more than to see this industry brought under direct federal regulation. This issue requires insurance agents and companies to work cooperatively in a process of educating Congress on the benefits of retaining McCarran-Ferguson. Every insurance agent and insurance company executive must be willing to participate in the political process by contacting his or her congressman by letter and personal visit in this effort. As insurance professionals it is our responsibility to help shape public policy in the best interest of our clients, the insurance consumer.

The public policy that will be shaped by Congress will in large measure be determined by the grass roots effort of our industry. The Washington bureaucrats are betting the insurance industry doesn't have the strength to mount an aggressive grass roots campaign to stop federal intervention. Will the insurance industry prove them wrong? ■

D·I·V·I·D·E·N·D

Mason, Lloyd, Humbert & Haight, the firm that loves to litigate. Good morning.

July 31, 1987 JOURNAL OF COMMERCE JULY 31, 1987

Repeal Support Withdrawn

State Lawmakers Shift Position on McCarran

By C.A. CARPENTER
Journal of Commerce Staff

Some state lawmakers do support state insurance regulation afterall.

The National Conference of State Legislators, meeting in Indianapolis this week, voted to abandon its 1986 position urging Congress to repeal parts of the federal McCarran-Ferguson Act.

The act, adopted by Congress and signed by President Roosevelt in 1945, serves as the basis for state regulation of the nation's 5,000 insurance companies.

It grants the business of insurance a limited exemption from the federal antitrust laws, but doesn't apply to cases involving boycott, intimidation or coercion.

Now some federal lawmakers have expressed second thoughts about the status quo, with repeal of the exemption being proposed in Washington by Sen. Howard Metzenbaum, D-Ohio, and Rep. Don Edwards, D-Calif.

By a 14-6 vote, the state legislative group's business, labor and regulation committee made up of 20 members rejected a motion to continue support for repeal of the exemption.

The motion to continue that support was introduced by Illinois Rep. Woods Bowman, D-Cook County, and some lobbyists at the meeting warned that the group's vote still could be overturned at the last minute. But they weren't aware of any such movement Thursday.

'The job we have done stands up against the job the federal government has done in regulating other businesses.'

— Rep. Irving H. Levin
Rhode Island

"The job we have done stands up against the job the federal government has done in regulating other businesses," crowed Rhode Island Rep. Irving H. Levin.

The Cranston Democrat made his appeal as president of the National Conference of Insurance Legislators. That group, based in Brookfield, Wis., represents state legislators who have chaired or chair insurance committees across the country. It operates independent of the National Conference of State Legislators, which is based in Denver.

"No way am I ready to go home and tell my constituents that I voted to turn the job over to the same folks who run the U.S. Post Office and the IRS," Rep. Levin urged.

He argued that federal antitrust laws haven't helped other businesses to flourish, such as makers of cars, TVs and silicon chips. He added that federal banks are failing at six times the rate of insurers.

Rep. Levin was joined in his appeal by Indiana Sen. Richard W. Worman, R-Leo; Wisconsin Sen. Jerome Van Sistine, D-Green Bay; Ohio Sen. David L. Hobson, R-Springfield; and New York Sen. Donald M. Halperin, D-Brooklyn.

The New York delegation was split, with Rep. Frank Barbarro, D-New York City, voting to continue support for repeal.

The 14 states voting against repeal included Indiana, Wisconsin, Connecticut, Ohio, New Hampshire, Maine, Michigan, Georgia, Iowa, Kansas and North Dakota. The states supporting repeal were Illinois, Texas, Delaware, New Mexico, Idaho and Washington.

RESOLUTION No. 2

RECEIVED
MAY 1 4 1987
DEPARTMENT OF COMMERCE
& ECONOMIC DEVELOPMENT
DIVISION OF INSURANCE

State Regulation of Insurance

WHEREAS, state regulation of insurance is more responsive to the needs and desires of state citizei.:; and

WHEREAS, the McCarran-Ferguson Act leaves the regulation of the insurance business to the several states; and

WHEREAS, repeal of the McCarran-Ferguson Act would lead to a loss of authority by the states to regulate the insurance business; and

WHEREAS, even though 50 states independently regulate the insurance industry, they do work with and through organizations such as the Conference of Insurance LEgislators and the National Association of Insurance Commissioners to address common needs and problems; and

WHEREAS, the regulation and taxation of the business of insurance is being effectively administered by state regulatory authority;

NOW, THEREFORE, BE IT RESOLVED that the Conference of Insurance Legislators supports the continuation of state regulation of insurance and oppose repeal or amendment of the McCarran-Ferguson Act; and

BE IT FURTHER RESOLVED that a copy of this resolution be sent to the President of the United States, the members of the United States Senate and House of Representatives; and

BE IT FURTHER RESOLVED that a copy of this resolution be sent to the state legislative insurance Committee chairpersons of each state urging adoption of a similar resolution.

Alaska State Legislature

Committees:

Chair-State Affairs
V. Chair-Judiciary
Telecommunications
Special Ethics
Legislative Council
Finance Subcommittee for the University of Alaska
Joint Committee on Economic Recovery

P.O. Box V
Juneau, Alaska 99811
(907) 465-4947

REPRESENTATIVE FRAN ULMER

M E M O R A N D U M

February 24, 1988

TO: Senator Tim Kelly, Chair
Senate Labor & Commerce Committee

FROM: Representative Fran Ulmer

SUBJECT: House Bill 287

I am writing to request that you schedule a hearing for House Bill 287, "An Act relating to students' entitlement to unemployment compensation credit and benefits".

This bill has the support of the Department of Labor and has encountered no opposition from any group or individual.

Attached is a brief description of the bill and other background information. Please let me know if you need any additional information.

Attachments

/v

Alaska State Legislature
House

Official Business

P.O. BOX V
State Capitol
Juneau, Alaska 99811

M E M O R A N D U M

January 26, 1988

TO: All Members of the House

FROM: Representative Fran Ulmer

SUBJECT: House Bill 287

House Bill 287 was introduced last year to remedy an inequity in the employment security act (unemployment insurance). This bill would allow an individual who has been working full-time, while pursuing an academic education, to qualify for unemployment benefits if the worker became unemployed because of a layoff or job elimination.

When AS 23.20.378 was enacted into law in 1980, the intent was to prohibit individuals from quitting their jobs to go to school full-time while drawing unemployment benefits.

House Bill 287 would permit only those few individuals who have been going to school full-time while working full-time to receive unemployment benefits if their source of income was suddenly terminated. The individual would still have to meet all the other statutory requirements in order to receive benefits. These individuals are currently unfairly penalized under existing law.

Thank you for your favorable consideration.

Bill No. Title — Committee Substitute for House Bill 287 (FIN) am

Date — February 4, 1988

"An Act relating to student's entitlement to unemployment compensation credit and benefits."

Contact:
Joe Sitton
465-2712

Eileen Plate
465-2700

Committee Substitute for House Bill 287 (FIN) am provides for the payment of unemployment insurance benefits to individuals who have been working full-time while attending school and who are laid off from work. Under present law, a person who is taking 10 or more credit hours of classes is not eligible for unemployment insurance benefits, without exception.

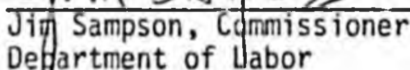
The provisions of this bill remedy an inequity in the law that denies benefits to persons who have demonstrated that school attendance does not affect their availability for work or their ability to work full-time and attend school.

The Department's understanding is that the intent of the existing law is to prevent persons from voluntarily leaving their jobs and attending school to an extent that the school attendance precludes the likelihood of their obtaining work. Those persons who have demonstrated that school attendance does not interfere are, therefore, unfairly penalized under the current law.

The Department agrees that the exceptional claimant whose availability is unimpaired by school attendance should not be arbitrarily disqualified from receiving unemployment insurance benefits.

The Department supports the provisions of Committee Substitute for House Bill No. 287 (FIN) am.

APPROVED:



Jim Sampson, Commissioner
Department of Labor

POSITION PAPER/Department of Labor

STATE OF ALASKA
1988 LEGISLATIVE SESSION

BILL VERSION: CSHB 287 FIN (AM)
PUBLISH DATE: ______

FISCAL NOTE

REQUEST:

Revision Date: ______
Title: "An Act relating to students' entitlement to unemployment compensation"
Sponsor: Ulmer and Kohonen
Requestor: Senate Labor and Commerce

Agency Affected: ALL
BRU: ALL
Components: All

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 88	FY 89	FY 90	FY 91	FY 92	FY 93
PERSONAL SERVICES		30.0	30.0	30.0	30.0	30.0
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0	30.0	30.0	30.0	30.0	30.0

CAPITAL						

REVENUE						

FUNDING: (Thousands of Dollars)

	FY 88	FY 89	FY 90	FY 91	FY 92	FY 93
GENERAL FUND		21.0	21.0	21.0	21.0	21.0
FEDERAL FUNDS						
OTHER		9.0	9.0	9.0	9.0	9.0
TOTAL	0	30.0	30.0	30.0	30.0	30.0

POSITIONS:

	FY 88	FY 89	FY 90	FY 91	FY 92	FY 93
FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary)

Prepared by: Joe Sitton, Director
Division: Employment Security
Phone: 465-2712
Date: 2/03/88

Approved by Commissioner: Jim Sampson
Agency: Labor
Date: 2/03/88

Distribution (by preparer):
- Legislative Finance
- Legislative Sponsor
- Requestor
- Office of Management and Budget
- Impacted Agency(ies)

page ___ of ___

Fiscal Note Analysis
CSHB 287 FIN (am)

This bill would pay unemployment benefits to individuals who attend school if they became unemployed while both attending school and working at least thirty hours a week.

There would be a cost to the State if state employees became unemployed and qualified under this bill for unemployment benefits. Under existing law, the State reimburses the Unemployment Insurance trust fund for benefits paid to its employees. We estimate that fifteen employees a year would qualify for benefits. At an average benefit of $2,000 each, this would equate to $30,000 a year.

Since approximately 70% of the state operating budget is general funds, we estimate that $21,000 (70% of $30,000) of general fund money would be used while $9,000 would be other funded. Other funds include federal, inter-agency, user fees, etc.

Alaska State Legislature

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V. Chair-Judiciary
Telecommunications
Special Ethics
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Attachments

/v

SENATOR KELLY

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R. E. ROBERTSON (1885-1961)
M. E. MONAGLE (1902-1985)
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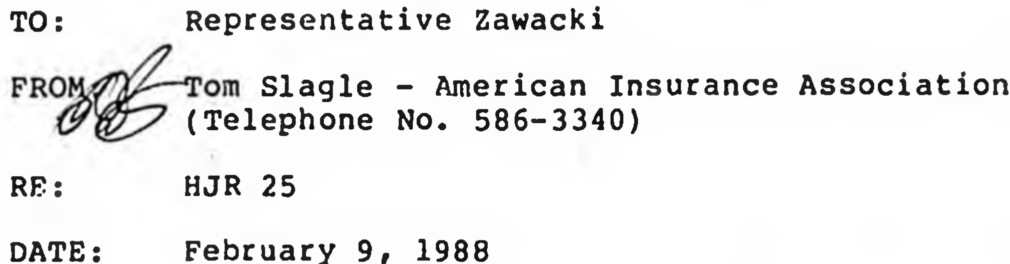
M E M O R A N D U M



TO: Representative Zawacki

FROM: Tom Slagle - American Insurance Association
(Telephone No. 586-3340)

RE: HJR 25

DATE: February 9, 1988

At the Senate Labor & Commerce hearing on 2/5/88, you asked, "Where is the opposition to this resolution?" I testified that virtually every major insurance trade association in the United States opposes repeal or amendment to the McCarran-Ferguson Act. I am enclosing a statement from John Bulbolz, President and Chief Executive Officer of the Secura Insurance Company, that was presented before the Subcommittee on Monopolies & Commercial Law of the Committee on the Judiciary of the United States House of Representatives (12/1/87). Mr. Bulbolz represents the following trade associations:

Alliance of America Insurers
American Insurance Association
American Council of Life Insurance
Health Insurance Association of America
Independent Insurance Agents of America
National Association of Casualty and Surety Agents
National Association of Independent Insurers
National Association of Life Underwriters
National Association of Mutual Insurance Companies
National Association of Professional Insurance Agents

Amendments to the McCarran-Ferguson Act are also opposed by the National Association of Insurance Commissioners. Last

year, on the House side, there was extensive testimony in opposition to this resolution by Alaska agents and brokers. Apparently the Commerce & Labor Committee with the National Conference of State Legislators has abandoned their position urging repeal of parts of the federal McCarran-Ferguson Act.

From the industry's viewpoint, the bottom line is that the proposed amendments to the McCarran-Ferguson Act will not increase competition; and repeal of the anti-trust exemptions, invite federal intervention into regulating the industry.

TJS:knA.24
Attachments
cc: Members of the Senate Labor and Commerce Committee

July 31, 1987 JOURNAL OF COMMERCE JULY 31, 1987

Repeal Support Withdrawn

State Lawmakers Shift Position on McCarran

By C.A. CARPENTER
Journal of Commerce Staff

Some state lawmakers do support state insurance regulation afterall.

The National Conference of State Legislators, meeting in Indianapolis this week, voted to abandon its 1986 position urging Congress to repeal parts of the federal McCarran-Ferguson Act.

The act, adopted by Congress and signed by President Roosevelt in 1945, serves as the basis for state regulation of the nation's 5,000 insurance companies.

It grants the business of insurance a limited exemption from the federal antitrust laws, but doesn't apply to cases involving boycott, intimidation or coercion.

Now some federal lawmakers have expressed second thoughts about the status quo, with repeal of the exemption being proposed in Washington by Sen. Howard Metzenbaum, D-Ohio, and Rep. Don Edwards, D-Calif.

By a 14-6 vote, the state legislative group's business, labor and regulation committee made up of 20 members rejected a motion to continue support for repeal of the exemption.

The motion to continue that support was introduced by Illinois Rep. Woods Bowman, D-Cook County, and some lobbyists at the meeting warned that the group's vote still could be overturned at the last minute. But they weren't aware of any such movement Thursday.

> 'The job we have done stands up against the job the federal government has done in regulating other businesses.'
>
> — Rep. Irving H. Levin, Rhode Island

"The job we have done stands up against the job the federal government has done in regulating other businesses," crowed Rhode Island Rep Irving H. Levin.

The Cranston Democrat made his appeal as president of the National Conference of Insurance Legislators. That group, based in Brookfield, Wis., represents state legislators who have chaired or chair insurance committees across the country. It operates independent of the National Conference of State Legislators, which is based in Denver.

"No way am I ready to go home and tell my constituents that I voted to turn the job over to the same folks who run the U.S. Post Office and the IRS," Rep. Levin urged.

He argued that federal antitrust laws haven't helped other businesses to flourish, such as makers of cars, TVs and silicon chips. He added that federal banks are failing at six times the rate of insurers.

Rep. Levin was joined in his appeal by Indiana Sen. Richard W. Worman, R-Leo; Wisconsin Sen. Jerome Van Sistine, D-Green Bay; Ohio Sen. David L. Hobson, R-Springfield; and New York Sen. Donald M. Halperin, D-Brooklyn.

The New York delegation was split, with Rep. Frank Barbarro, D-New York City, voting to continue support for repeal.

The 14 states voting against repeal included Indiana, Wisconsin, Connecticut, Ohio, New Hampshire, Maine, Michigan, Georgia, Iowa, Kansas and North Dakota. The states supporting repeal were Illinois, Texas, Delaware, New Mexico, Idaho and Washington.

NCSL COMMERCE AND LABOR COMMITTEE VOTE ON CONTINUING THE 1986 REGULATION IN FAVOR OF REPEAL OF McCARRAN-FERGUSON

Those voting in support of the industry's position (that is against the resolution).

State	Delegate
Alabama	Representative Perry Hooper Senator Chip Bailey
Colorado	Senator Claire Traylor
Connecticut	Representative Jose C. Adamo
Georgia	Representative Mary Jane Galer
Indiana	Senator Richard Worman
Iowa	Senator James D. Wells
Kansas	Representative Lawrence Wilbert Senator Dan Thiessen Senator William Mulich
Maine	Representative Bradford Boutilier
Maryland	Delegate Mary Boergers (Vice Chair)
Michigan	Senator Nick Smith (R-Addison)
New Hampshire	Representative Leo Fraser Representative Patricia Foss
North Dakota	Representative Richard Kloubec
Ohio	Senator David Hobson
Wisconsin	Representative Susan Vergeront Senator Jerome Van Sistine

Those voting in opposition to the industry's position (that is in favor of the resolution)

State	Delegate
Delaware	Senator Robert Connor
Idaho	Senator Lee Stoker
Illinois	Representative Woods Bowman (Chair) Senator Glenn Poshard
New Mexico	Representative Pauline Eisenstadt
Oregon	Senator Larry Hill
Washington	Senator Eugene Lux (Vice Chair)

The delegation from New York split on the issue with Senator Donald Halprin voting against the resolution and Representative Frank Barbaro voting for the resolution.

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Report of the 1987 NCSL Nominating Committee

The NCSL By-Laws note that the President-Elect shall succeed automatically to the Presidency. Therefore, no action is required for Senator Ted Strickland, President of the Colorado Senate, to succeed to the office of NCSL President. Speaker Irv Stolberg of Connecticut automatically succeeds to the office of Immediate Past President.

For President-Elect we nominate Senator Samuel Nunez, Jr., President of the Louisiana Senate.

For Vice President we nominate Representative Lee Daniels, Minority Leader of the Illinois House of Representatives.

For at-large legislator membership on the Executive Committee we nominate the following legislators:

Representative Bob Anderson, Minnesota
Senator Paul "Bud" Burke, Majority Leader, Kansas
Representative Fran Carlton, Florida
Senator Arnold Christensen, President of the Senate, Utah
Assemblyman Jim Costa, California
Representative Lois DeBerry, Assistant Majority Leader, Tennessee
Representative Pauline Eisenstadt, Majority Caucus Chairwoman, New Mexico
Representative Art Hamilton, Minority Leader, Arizona
Representative Shirley Hankins, Washington
Senator Joseph W. Harrison, Majority Floor Leader, Indiana
Senator Grant Jones, Texas
Representative Gibson "Gib" Lewis, Speaker of the House, Texas
Senator Tarky Lombardi, Jr., New York
Representative Jane Maroney, Delaware
Representative Robert O'Donnell, Majority Whip, Pennsylvania
Representative Patricia Skinner, New Hampshire
Representative Calvin Smyre, Administration Floor Leader, Georgia
Representative Alma Stallworth, Michigan
Representative Patrick Sweeney, Majority Whip, Ohio
Assembyman James R. Tallon, Jr., Majority Leader, New York
Senator Rose Ann Vuich, California

The legislative staff members of the Nominating Committee nominate the following legislative staff persons to serve as staff officers and members of the Executive Committee:

Staff Chair: John Andreason, Director, Legislative Budget Office, Idaho
Staff Vice Chair: Betty King, Secretary of the Senate, Texas

Terry Anderson, Director, Legislative Research Council, South Dakota
Douglas Brown, Director, Legislative Drafting Office, Colorado
Bob Craig, Director, Senate Services and Security, Oklahoma
Sally Diamond, Director, Legislative Council, Maine

Sylvia Duke, Administrative Assistant to the Senate President, Louisiana
James Heckman, Deputy Director, House Fiscal Agency, Michigan
Phil Leone, Director, Joint Legislative Audit and Review Commission, Virginia
Christine Minnehan, Senate Federal Relations Coordinator, California
Chester Nelson, Jr., Legislative Budget Analyst and Auditor, North Dakota
Patrick O'Donnell, Clerk of the Legislature, Nebraska
Donald Rhodes, Director, Legislative Counsel Bureau, Nevada
William Russell, Chief Legislative Counsel, Vermont
John Turcotte, Director, Joint Committee on Performance Evaluation and
Expenditure Review, Mississippi
Jeffrey Wice, Special Counsel to the Speaker of the Assembly, New York

AMERICAN INSURANCE ASSOCIATION
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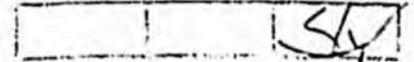
JAN 13 1988



STATEMENT

of

John S. Bubolz
President and Chief Executive Officer
SECURA Insurance Co.
Appleton, Wisconsin

representing

Alliance of American Insurers
American Insurance Association
American Council of Life Insurance
Health Insurance Association of America
Independent Insurance Agents of America
National Association of Casualty and Surety Agents
National Association of Independent Insurers
National Association of Life Underwriters
National Association of Mutual Insurance Companies
National Association of Professional Insurance Agents

before the

SUBCOMMITTEE ON MONOPOLIES AND COMMERCIAL LAW

of the

COMMITTEE ON THE JUDICIARY

of the

UNITED STATES HOUSE OF REPRESENTATIVES

December 1, 1987

Mr. Chairman, members of the subcommittee, repeal or change of the McCarran-Ferguson Act as proposed by H. R. 2727, will mean fewer companies and less competition, which will be harmful to the marketplace and consumers. Contrary to what proponents of this legislation have said, repeal will do nothing to help relieve availability/affordability problems. Repeal will also mean the unwarranted imposition of dual federal/state regulation. The McCarran Act should not be repealed or changed.

I am John S. Bubolz, President and Chief Executive Officer of SECURA Insurance, Appleton, Wisconsin, founded in 1900 by my grandfather. I am a member of the Board of Governors of the National Association of Independent Insurers, a property/casualty trade association of 540 insurance companies. I also serve on the advisory board of the Small Business Administration and was a delegate to the White House Conference on Small Business in 1986. This year SECURA will write approximately $120 million in premiums in six states, up from $106 million last year.

In addition to speaking to my own small insurance company, I also am pleased to represent the following insurance trade associations: the Alliance of American Insurers, the American Insurance Association, the American Council of Life Insurance, the Health Insurance Association of America, the Independent Insurance Agents of America, the National Association of Casualty and Surety Agents, the National Association of Independent Insurers, the National Association of Life Underwriters, the National Association of Mutual Insurance Companies, and the National Association of Professional Insurance Agents.

Repeal or modification of McCarran would be particularly harmful to small companies like mine. My company would either be forced out of business, or we would have to merge with another competing company, or we would be forced to make pricing determinations with inadequate information.

In the future, small companies like SECURA would be deprived of industry data upon which to base rates in many lines, and we would have two choices -- to somehow rely on pricing determinations made by larger companies or to risk insolvency by setting rates without the benefit of adequate statistical supporting data.

NAII recently released a report of a 22-company McCarran-Ferguson Task Force which found five major implications for the industry and the public it serves in the event of repeal of the McCarran Act.

They are as follows:

(1) Regardless of how skillfully any bill was drafted or how many "safe harbors" of permissible activities were included, repeal would create an inescapable and damaging transition period.

(2) The industry would contract, resulting in fewer competitors, higher prices for the public, less choice of products, less innovation; eventually, the insurance business would fall into the hands of a few giant companies.

(3) Litigation would burgeon to test the boundaries of every safe harbor and every aspect of the business.

(4) A costly and confusing system of dual federal-state regulation would ensue, but ultimately complete federal control would supplant state regulation.

(5) Reinsurance would dry up, particularly for smaller companies, hastening their disappearance from the market.

Small to medium-sized insurance companies like mine serve a very important purpose in the insurance marketplace.

We have been steadfast providers of insurance to homeowners and small-business owners whether the market is "soft" or "hard." We have been able to fulfill that role because of the cooperative activities we may pursue under the McCarran-Ferguson Act. Elimination or change of the antitrust exemption resulting in prohibitions against that activity would limit our ability to play the same role in the future or to expand our capabilities.

Our presence makes the insurance marketplace extremely competitive, which is an important benefit to the consumer.

The following figures attest to the degree of competitiveness within our industry.

There are about 3,500 companies in the business, with new entrants coming in almost daily. Only one company comes close to having 10% of market share. The top five companies write less than 25% of the business, and the top ten write less than 40%. Companies like mine, with under 1% of the market write more than 43% of the business.

The limited antitrust exemption provided by the McCarran Act permits joint collection and sharing of loss data and other essential information so that companies can make intelligent, predictive judgments about possible future losses and adequately price their insurance products to protect company solvency for policyholders. The exemption also permits pooling agreements and sharing of hard-to-place jumbo risks vital to the efficient operation of the insurance market.

Any change in the McCarran-Ferguson Act, including the enumeration of specific acts which might be exempt, would result in uncertainty in the law, which would take decades to resolve in the courts. This uncertainty would make the predictability necessary for the pricing of insurance to ensure solvency impossible. These risks would manifest themselves in costs borne by consumers.

Such an approach also would stifle innovation and harm small insurance companies which have been creative forces in the industry. New legislation to amend the act would continually be required to permit companies to continue their innovative traditions. Thus, changing the McCarran Act would be a detriment to insurers, small businesses and to consumers generally.

Insurance is a unique business because, unlike other businesses, insurers never know the true cost of their product until all claims are presented and resolved. Thus, insurers price before knowing costs, whereas, others evaluate costs first, and then price products. Insurers must make educated projections about future losses, economic factors, legal standards and a variety of other variables, and they often must wait years to find out if they were right or wrong. As a result, insurers must act jointly to gather every scrap of data available in order to make educated estimates.

While I am speaking primarily for the property/casualty insurance industry, I also am representing the American Council of Life Insurance at this hearing.

Small life insurers perceive the principal problem associated with repeal or change of the McCarran immunity is uncertainty. What types of joint activity will be expressly permitted? What types will be permitted by implication? Which joint activities will be challenged in court? Who will prevail? Will the Federal Trade Commission attempt to preempt state insurance regulation as it did in the late 1970's? Will the states respond to the threat of federal preemption by enacting rigid anti-competitive regulations?

Life insurers would expect to see a major legal challenge to at least three fundamental joint activities: (1) the sharing of actuarial data; (2) the operation of state guaranty funds; and (3) the reinsurance process. All of these joint activities are much more important to small life insurers than to large ones.

Thus, the limited antitrust exemption provided by the McCarran Act is essential to a healthy, competitive insurance market.

To say, as some industry critics charge, that under the McCarran Act insurers sit around a table and collectively set prices is false and demonstrates a total misunderstanding of how the industry and the law operates. For one thing, the intense competition within the industry would not permit such activity to occur.

For another, the McCarran Act provides insurance companies with a limited exemption from federal antitrust laws (i.e., Sherman, Clayton and FTC Acts), when engaged in the "business of insurance," if they are so regulated by the states. Courts have taken a restrictive view of the scope of the "business of insurance," which limits the exemption further. In addition, Federal laws prohibiting boycotts, coercion or intimidation still apply to insurers, as do general federal corporate laws dealing with taxes, labor relations, pension plans, and so forth.

The McCarran Act also recognizes a long-standing commitment by the Congress to a system of state (rather than federal) regulation of the insurance business. By virtue of the McCarran Act, states police the pricing practices of insurers and provide for consumer protection regulation generally, rather than the federal government.

I have attached to my statement an NAII booklet describing how state insurance regulation works. State regulation of insurance has served consumers' interests for years. The industry is highly competitive, as numerous studies have shown. At the same time, consumers' interests in prompt and fair handling of claims, along with regulation for solvency, are efficiently carried out by insurance regulators closest to the consumers being served--at the state level. Repeal of the McCarran Act would result in a dual system of federal-state regulation which would be duplicative, confusing, costly, and unnecessary.

Finally, I would be remiss if I did not mention that a large part of the property/casualty insurance industry's recent problems stem from the tort liability crisis around the country. Changes are needed in our legal system to bring back predictability and stability. As it stands now, the tort liability system is out of control. Insurers are losing the ability, particularly in many commercial lines, to adequately predict the future loss costs for the products they sell today. The impact has been devastating to business and consumers, particularly smaller concerns.

Insurers are working very hard with the business community, and others, in <u>state</u> coalitions seeking to correct this situation through <u>state</u> level tort reform. In addition, we are working with insurance regulators and the business community to resolve specific problems in troubled lines through market assistance plans, voluntary pools and other programs. Some progress is being made, but much work remains to be done.

Repealing the McCarran-Ferguson Act will not help alleviate availability and affordability problems which are occurring in some lines of insurance. A 1986 Justice Department report provides support for our position. The Department of Justice Task Force Report on Tort Reform found little evidence the current crisis is a result of regulatory failure (either in the sense of insufficient, inadequate, or ill-conceived regulation) and no evidence that the industry's antitrust immunity is a significant factor on availability/affordability.

In conclusion, therefore, we think repeal or change of the McCarran Act will result in a less competitive marketplace and inefficient regulatory system which will be harmful to competition and consumers. Repeal will mean an industry now made up principally of many small companies will become more and more concentrated until a few big companies will dominate the marketplace. For these reasons, we urge the committee not to repeal <u>or</u> make any changes in the McCarran Act.

* * *