INSURANCE
Antitrust Alert

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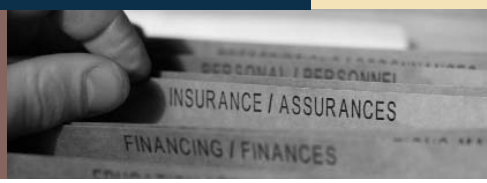

The Fate of the Insurance Industry's Antitrust Exemption in Europe is Under Review

Also in this edition:

On April 17, the European Commission announced that it was launching a formal examination to determine whether the "block exemption" from the European Commission antitrust laws that insurers currently enjoy - which provides a somewhat comparable exemption for insurer activities to that provided by the McCarran-Ferguson Act in the U.S. - should be renewed when the current exemption expires in March of 2010. At present, the block exemption provides blanket protection for insurers in Europe when engaged in (1) cooperative efforts to create standard policy terms and conditions (provided they are non-binding); (2) the exchange of statistical information utilized in risk calculations; and (3) the formation and participation in insurance pooling arrangements.

In issuing the announcement, European Commission Competition Commissioner Neelie Kroes stated that the European Commission needed to "investigate how the insurance block exemption is working in practice and whether there are sufficient grounds to renew it." Kroes further explained that, "If there are to be special rules for a particular sector, I need to be convinced that they are justified in terms of bringing real benefits to competition and to consumers." The decision to commence a formal review of the block exemption follows the issuance earlier this year of a sector report on commercial insurance practices, which questioned whether renewal of the block exemption was appropriate but expressly deferred making any recommendation on the issue at the time.

To assess this issue, the European Commission intends to solicit the views of industry participants, national regulatory and competition authorities, and consumer groups concerning how the exemption is being used in practice and its impact on the various insurance markets in Europe. The European Commission will accept these comments until the middle of July, after which it will begin drafting a report with its tentative findings. Those findings will then be published for a final round of comments. If the European Commission concludes that renewal of the exemption is

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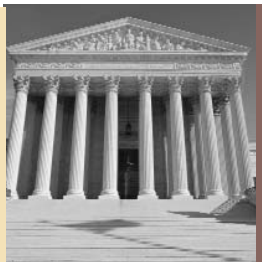

not necessary or appropriate, it intends to make that announcement in 2009 so that the industry will have sufficient time to begin modifying its business practices to conform to the new legal landscape.

House Financial Services Subcommittee Holds Hearing on Insurance Regulatory Reform; Treasury Weighs in on Optional Federal Chartering Proposal

On April 16, the House Financial Services Subcommittee on Capital Markets, Insurance and Government Sponsored Enterprises held its first hearing in 2008 and third of this Congress on insurance regulatory reform. The hearing was highlighted by the testimony of the Department of Treasury, which for the first time publicly expressed its views on S40/H.R. 3200, which would create a National Insurance Office that would regulate those insurers opting for a federal charter.

Taking a position directly at odds with state regulators, who testified that state regulation of the insurance industry has been very effective for more than 150 years and should not be disturbed, Treasury urged the Subcommittee to move forward with the pending legislation. Treasury maintained that federal oversight would provide more effective, efficient and consistent regulation for national insurers and would enhance product choice and innovation. Notably, however, as all sides acknowledge, in return for a federal charter a "national" insurer would be required to forfeit its McCarran-Ferguson Act protections.

In another new twist, Treasury also recommended that Congress take an intermediary step and establish a federal Office of Insurance Oversight, also within Treasury. This office would begin to establish a federal presence in insurance with respect to regulatory and international insurance issues. Consistent with this approach, the very next day Congressman Paul Kanjorski (D-Penn), chairman of the subcommittee, introduced H.R. 5540, the "Insurance Information Act of 2008." The legislation would create the Office of Insurance Information in the Department of Treasury, which would be tasked with collecting and analyzing data on insurance, advising the Treasury Secretary on major domestic and international insurance policy issues, and ensuring that state insurance laws remain consistent with federal insurance policy.

Sentence Imposed Upon Marsh Executives for Antitrust Violations

On April 17, New York State Supreme Court Judge James Yates sentenced former Marsh executives William Gilman and Edward McNenney to jail sentences for violating the Donnelly Act (New York's antitrust statute). The sentences bring to a conclusion the executives' year-long trial, in which they were tried for their roles in steering insurance business to favored insurers (*i.e.*, former New York Attorney General Eliot Spitzer's "contingent commission" investigation). Back in 2005, Marsh agreed to pay $850 million in restitution to policyholders to head off criminal charges against the company.

The executives faced the possibility of up to four years in prison, and that is the sentence that prosecutors sought. However, Judge Yates instead chose to sentence them to 16 weekends in jail, five years probation and 250 hours of community service. While the sentence is much lighter than the current average

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criminal sentence for violating the federal antitrust laws (which now exceeds 30 months), the sentences vividly demonstrate that jail time will also be imposed for violations of state antitrust laws. Finally, also over the objection of prosecutors, Judge Yates agreed to stay the execution of the sentences pending their appeals.

Connecticut Attorney General Wins Significant Ruling From State Supreme Court

In early April, the Connecticut Supreme Court issued a precedent-setting decision concerning the limits of the Connecticut attorney general's authority under the Connecticut Antitrust Act (Conn. Gen. Stat. §35-24 *et seq*.). The case, *State of Connecticut v. Marsh and McLennan Companies*, (Conn. S.Ct. 2008), required the court to determine whether the state's antitrust law provided the attorney general with "*parens patriae*" authority to recover damages for harm caused to the "general economy" of the state. Reversing the trial court, the Supreme Court held that such damages were indeed recoverable.

At the trial court level, Marsh argued, and the trial court agreed, that the Connecticut Antitrust Act was required to be interpreted in accordance with federal antitrust law. Thus, because under the federal antitrust laws a state may not pursue a *parens patriae* action for damages caused to its general economy (as the U.S. Supreme Court held in *Hawaii v. Standard Oil*, 405 U.S. 251 (1972)), such claims were similarly excluded under the state antitrust law. However, the Connecticut Supreme Court disagreed. The court held that "blind adherence to all things federal" was not required, and given that the Connecticut Antitrust Act expressly provided for the recovery of damages for harm caused to the general economy of the state, that provision trumped the general principle that the Connecticut Antitrust Act should be interpreted in harmony with federal law.

The Connecticut attorney general hailed the decision as "groundbreaking" and one that "provides Connecticut with a unique and powerful weapon on behalf of [its] citizens when illegal business practices damage Connecticut's economy." The case now returns to the Superior Court, with the Connecticut attorney general seeking to prove that Marsh's alleged steering of insurance to preferred insurers caused Connecticut businesses to pay 15 to 20 percent more for excess casualty insurance coverage, and that but for this unlawful conduct that money would have circulated throughout the state's economy.

Legislation That Would Repeal Virtually All of the Insurance Industry's Antitrust Exemption in Florida Moves Forward

On April 16, the Florida Senate approved Senate Bill 2860, which would make sweeping reforms to the manner in which property insurers are regulated in the state. Among its most significant provisions, SB 2860 would amend the Florida Antitrust Act to eliminate virtually all aspects of the insurance industry's current exemption from the state's antitrust laws. Other provisions in the bill would increase insurer penalties for violations of the state Insurance Code, require insurers to obtain prior approval from the state for rate increases (doing away with the current "use and file" procedure), and require state approval of insurer plans to engage in large-scale policyholder nonrenewals. Insurance Commissioner Kevin McCarthy lauded the bill, while industry representatives have claimed that the legislation "could

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have a dangerous and chilling effect on the private insurance market" in the state.

As to the antitrust provisions, § 542.20 of the Florida statutes currently provides that any activity or conduct that is exempt from the federal antitrust laws is also exempt from the Florida antitrust laws. Accordingly, the federal exemption that insurers enjoy pursuant to the McCarran-Ferguson Act, 15 USC §1012 *et seq.*, exempts them from the Florida state antitrust laws as well. However, SB 2860 would amend § 542.20 to expressly provide that this general exemption does not apply to the business of insurance. Instead, insurers would be provided a far more limited exemption, exempting only activities by a rating organization to collect data on claims, losses and expenses and permitting such organizations to file rates and advisory rates with the Florida Office of Insurance Regulation. Notably, however, the new law would not permit private rights of action for insurer violations of the Florida Antitrust Act. Enforcement would be limited to actions by the Florida attorney general or state attorney.

The legislation now moves over to the Florida house, where it is expected to be closely scrutinized and highly debated. At present, the prospects for passage of the legislation are unclear and the close of the legislative session is fast approaching.