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# The Antitrust Implications of Collaborative Standard Setting by Insurers Regarding the Use of Genetic Information in Life Insurance Underwriting

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# THE ANTITRUST IMPLICATIONS OF COLLABORATIVE STANDARD SETTING BY INSURERS REGARDING THE USE OF GENETIC INFORMATION IN LIFE INSURANCE UNDERWRITING

*Robert H. Jerry, II\**

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Whenever two or more market participants collaborate to restrain trade, the potential applicability of federal and state antitrust laws must be considered. When the collaborating parties are insurance companies, a further layer of analysis may be necessary to determine whether the activity is exempt from federal antitrust regulation. Even if the activity enjoys an exemption, state antitrust law may have different things to say about the activity. Embedded in each of these levels of analysis are many difficult and complex subsidiary questions. In short, the law of insurance antitrust is not a subject for the faint of heart.

Antitrust law often has implications in situations where its relevance is least expected, as many who have credentials as antitrust offenders know well. For example, with respect to whether insurers should surrender their option to use genetic information in life insurance underwriting,<sup>1</sup> a seemingly reasonable, innocuous suggestion might be made:

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1. As of 2002, forty-five states have some kind of statutory regulation with respect to genetic testing in health insurance, including limitations on insurer requirements that testing occur, insurer requests for information about past tests, or insurer use of the information in making eligibility or renewal decisions, setting rates, or underwriting. See 2 NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS, COMPENDIUM OF STATES LAWS ON INSURANCE TOPICS, HE-43-1 *et seq.* (2002) (compendium of laws on genetic testing for insurance coverage). Only a few of these statutes are relevant to life insurance. Arizona declares it an unfair trade practice in life insurance to consider a genetic condition in determining rates, terms or conditions of a policy, or to reject an application based on a genetic condition, unless the applicant's medical history and condition and claims experience or actuarial projections establish that substantial differences in claims are likely to result from the genetic condition. ARIZ. REV. STAT. ANN. § 20-448 (West 2002). See also CAL. INS. CODE § 10146-10149.1 (West Supp. 2002) (establishing standards for underwriting life and disability insurance on the basis of genetic characteristics); ME. REV. STAT. ANN. tit. 24-A, § 2159-C (West 2000) (stating that life insurers may not unfairly discriminate based on the results of a genetic test); MASS. GEN. LAWS. ANN. ch. 175, § 120E (West. Supp. 2002) (stating that a life insurer may not unfairly discriminate in any of the terms of the policy based on genetic information). Montana has a statute that applies to all lines of insurance, including life insurance. The law makes it an unfair trade practice to consider genetic information and imposes restrictions on use of genetic

Life insurers should voluntarily agree to place a moratorium on the use of genetic information in underwriting. Presently, no insurer makes use of such information, so now is the time to forge such an agreement, before some insurers begin to use the information and then become unwilling to forego the practice.<sup>2</sup>

But such a moratorium is essentially an agreement among competing insurers to fix one determinant of the product's price, and this restraint of trade calls into question the possible applicability of federal and state antitrust law (as well as the relevance of possible exemptions under federal or state law, or both).<sup>3</sup> This Article discusses the antitrust issues that would accompany the

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information to reject an application. MONT. CODE ANN. § 33-18-206 (2001). N.J. STAT. ANN. § 17B:30-12(f) (West Supp. 2002) (stating that life insurers may not unfairly discriminate in the application of the results of a genetic test or genetic information in the issuance, withholding, extension, or renewal of a policy); VT. STAT. ANN. tit. 8, § 4724(7)(D) (Supp. 2001) (stating that it is unfair discrimination to condition rates or renewal practices on the results of genetic testing absent a relationship between the medical information and the insurance risk). A few other states have statutes relating to informed consent in testing and refusal to issue a policy based on the sickle cell trait, a specific kind of genetic information. *See, e.g.*, N.C. GEN. STAT. § 58-58-25 (1999) (sickle cell trait); N.Y. INS. LAW § 2612 (McKinney 2000) (titled "Genetic testing written informed consent").

2. Whether life insurance companies should commit to forbear from using (or be compelled to make such a commitment, or be flatly prohibited from using) genetic information in underwriting is a difficult, controversial question. This Article takes no position on that threshold question and instead simply assumes that the question has been answered in favor of restricting insurers' use of genetic information (defined here as the results of DNA testing) in life insurance underwriting.

What constitutes "genetic information" is, of course, another extremely important question. Family history is a form of genetic information and medical files (with information from routine physical exams, blood tests, urine tests, etc.) contain genetic information, but this Article takes it as a foregone conclusion that insurers will not surrender, except under legal compulsion, the right to use family history and medical information, even if it is genetic in nature, that the industry has used in underwriting for many years. Thus, unless stated otherwise, this Article treats "genetic information" as referring to the results of DNA and RNA tests.

3. Another way to impose the restriction is via direct statutory regulation of insurer practices, as some states have done. *See supra* note 1. As discussed below, this approach presents no antitrust perils to life insurers. Likewise, if life insurers act unilaterally to forswear the use of genetic information in underwriting (a scenario which, at least for the present, is very unlikely to unfold), no antitrust problems are created. *See, e.g.*, *Theatre Enters., Inc. v. Paramount Film Distrib. Corp.*, 346 U.S. 537, 540 (1954) ("crucial question is whether respondents' conduct toward petitioner stemmed from independent decision [which does not violate antitrust law] or from an agreement, tacit or express"); *In re Baby Food Antitrust Litig.*,

articulation and implementation of such restrictions.<sup>4</sup>

The discussion in this Article is divided into four parts. Part I summarizes the landscape, past and present, with respect to insurer collaboration in underwriting. Part II considers whether, absent an antitrust exemption, multi-insurer agreements and collaborative insurer standard-setting with respect to underwriting violate federal antitrust law. This Part also evaluates whether insurers, to the extent potential federal liability exists, enjoy any kind of statutory or judicial exemption from federal law for such activities. Part III considers the same questions addressed in Part II but in the context of state antitrust laws. Because antitrust law, including the law of antitrust exemptions, is so vast and intricate, the discussion in this Article must necessarily be cursory in many respects. But the discussion will be detailed enough to provide a sense of the complexities involved in assessing the validity of a multi-insurer compact on the use of underwriting criteria. Finally, Part IV discusses the implications of the sometimes tentative conclusions in Parts II and III for collaborative insurer activity in this area.

## I. AN OVERVIEW OF INSURER COLLABORATION IN UNDERWRITING

There are many situations in which insurers collaborate. Insurers have long cooperated in drafting standardized policy forms, sharing data regarding the identification and quantification of risks, and collecting and disseminating loss and expense data.<sup>5</sup> There is also a long tradition of cooperation in the setting of rates in the fire and casualty lines.<sup>6</sup> For the most part, as discussed

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166 F.3d 112 (3d Cir. 1999) (escalation of prices in oligopolistic but competitive market is not enough to show violation of section 1 of the Sherman Act); *Hise v. Philip Morris, Inc.*, 46 F. Supp. 2d 1201 (N.D. Okla. 1999) (violation of section 1 was not established where a lack of evidence excluded the possibility that companies acted independently of each other for legitimate and reasonable business interest of passing costs of tobacco settlement on to consumers). If, however, life insurers should agree among themselves not to use genetic information in underwriting, a complex set of questions, which are the focus of this Article, is presented.

4. Necessarily, some of the discussion in this Article is more broadly relevant to insurer agreements in any line of insurance with respect to any kind of underwriting factor.

5. See generally THE INSURANCE ANTITRUST HANDBOOK: A PROJECT OF THE INSURANCE INDUSTRY COMMITTEE, SECTION OF ANTITRUST LAW 41-86, 113-24 (Mark F. Horning & Roger W. Langsdorf, eds., 1995) (hereafter INSURANCE ANTITRUST HANDBOOK).

6. For more discussion refer to *Memorandum from Tim Wagner on Insurance Rating Bureaus* (July 2, 2002), available at

[http://www.naic.org/1committee/Improve\\_State\\_Based\\_wg/jirfinal110300.pdf](http://www.naic.org/1committee/Improve_State_Based_wg/jirfinal110300.pdf) (last visited March 1, 2003).

in more detail below, these collaborative activities have been exempted from federal antitrust scrutiny by the McCarran-Ferguson Act.<sup>7</sup> Similar exemptions at the state level to the application of state antitrust laws have also protected these practices.<sup>8</sup>

There are, however, very few industry precedents for collaborative insurer agreement or standard-setting with respect to the use or non-use of particular underwriting criteria in setting the terms of insurance coverage or the price charged for it (or both). The absence of such examples is not surprising. If a particular underwriting factor is actuarially unsound, no compact is needed to discourage insurers from using it. If a particular underwriting factor is actuarially sound, insurers will be loathe to surrender their ability to use it in underwriting, and there is no advantage to be accrued from arranging a compact among insurers pursuant to which all agree to use the underwriting factor.

Even in the relatively rare circumstances where such a compact might be perceived to have advantages, evidence of multi-insurer collaboration is difficult to find. Until the mid-1960s, insurers used race-distinct actuarial tables in life insurance underwriting; it is probably not coincidental that race-neutral tables became the norm around the time of the enactment of the Civil Rights Act of 1964.<sup>9</sup> Information about this transformation is sparse,<sup>10</sup> but the industry probably understood that this underwriting practice would be prohibited if it were not voluntarily abandoned.<sup>11</sup> Moreover, a federal prohibition would constitute a toehold for more expansive federal regulation at a time when the industry generally preferred the existing system of state regulation. In the circumstances of the mid-1960s, it would not be surprising if life insurers agreed through some kind of industry standard or articulated “guiding principles” to abandon the use of race in underwriting, but there is no evidence of life insurers acting in concert to bring about this result.

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7. See discussion *infra* Part C.1.

8. See discussion *infra* Part C.2.

9. 42 U.S.C. §§ 1971, 1975a–1975d, 2000a–2000h (1994).

10. See Robert H. Jerry, II & Kyle B. Mansfield, *Justifying Unisex Insurance: Another Perspective*, 34 AM. U. L. REV. 329, 352 n.139 (1985) (discussing the transformation with citation to some contemporary commentaries on insurer practices).

11. From time to time, evidence of race-based pricing turns up in the market, which is surprising given the opprobrium with which it is held. See Jim Connolly, *NAIC Acts on Race-Based Premium Rates*, NAT'L UNDERWRITER (LIFE-HEALTH), June 19, 2000, at 3; *Minority Policyholders Win Settlement From Unitrin on Race-Based Premium*, 12 ANDREWS INS. COV. LITIG. REP. 13 (May 17, 2002).

Likewise, when some insurer trade organizations went on record opposing the use of sexual orientation in underwriting in the mid-1980s, one might have anticipated that some insurers would collaborate to implement the public positions of the organizations to which they belonged. There is, however, no evidence that this occurred. When the AIDS epidemic emerged in the mid-1980s, the largest single group of AIDS victims were gay men with same-gender sexual experiences. Many insurers responded by attempting to identify the sexual orientation of applicants for the purpose of excluding all gay men from their risk pools, even though the overwhelming majority of gay men would never become AIDS victims.<sup>12</sup> In 1985, the National Association of Insurance Commissioners<sup>13</sup> appointed an Advisory Committee on AIDS; this committee undertook to draft guidelines relating to appropriate underwriting practices. The Committee worked on draft "Medical/Lifestyle Questions and Underwriting Guidelines" throughout 1986, and the NAIC approved the Guidelines at its December 9, 1986 meeting. The Guidelines forbade life and health insurers from inquiring into an applicant's sexual orientation or using sexual orientation in the underwriting process and also condemned the use of factors such as gender, marital status, living arrangements, occupation, beneficiary designations, medical history, and zip code or other territorial identifiers as substitutes for questions about an individual's sexual orientation.<sup>14</sup> The Health Insurance Association of America (HIAA) and the American Council on Life Insurance (ACLI), two associations of insurance companies that were represented on the Committee, supported the Guidelines.<sup>15</sup> There is no evidence, however, of any agreement among

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12. See Benjamin Schatz, *The AIDS Insurance Crisis: Underwriting or Overreaching?*, 100 HARV. L. REV. 1782, 1783-88 (1987).

13. The National Association of Insurance Commissioners (NAIC) is an association of the chief regulatory official of the fifty states, the District of Columbia, and the United States territories. It was organized in 1871. Through its staff and various committees, it proposes model laws and regulations for possible adoption by the states, studies problems of insurance regulation, gathers and distributes information on regulatory problems, and maintains financial data for the purpose of detecting insurer insolvency at an early stage. See ROBERT H. JERRY, II, UNDERSTANDING INSURANCE LAW § 23[b], 127-28 (3d ed. 2002).

14. See NAIC MODEL LAWS, REGULATIONS & GUIDELINES, Medical/Lifestyle Questions and Underwriting Guidelines, §60-1 et seq. (1988, 2002).

15. In December 1986, the two associations submitted a joint report explaining the associations' opposition to prohibitions on HIV testing of applicants by insurance companies. This report also endorsed the model guidelines. See Health Insurance Association of America & American Council of Life Insurance, Statement to the Health Insurance Committee of the National Association of Insurance Commissioners on Acquired Immunodeficiency Syndrome

insurance companies to refrain from particular underwriting practices with respect to HIV testing or from the use of sexual orientation in underwriting.<sup>16</sup>

Thus, although insurers collaborate in many aspects of the insurance business, there is little precedent for insurer collaboration with respect to underwriting criteria. How the antitrust laws would apply to this kind of concerted conduct, if it were to occur, is discussed in the next section.

## II. THE FEDERAL ANTITRUST LAWS AND ANTICOMPETITIVE INSURER CONDUCT

### *A. Overview: The Federal Antitrust Framework*

The federal antitrust statute with the most relevance to the insurance industry is the Sherman Act, the substance of which rests in two brief but sweeping provisions enacted by Congress in 1890. Section 1 is the “restraint of trade” provision; it is relevant to many kinds of collaborative conduct, including horizontal restraints among competitors. Section 1 states: “Every contract, combination . . . or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is . . . illegal.”<sup>17</sup> Section 2, the “monopoly abuse” provision, states: “Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony . . . .”<sup>18</sup> The presence of monopoly power (classically defined as “the power to control prices or exclude competition”)<sup>19</sup> is not enough to make out a violation of section 2; rather, the offender must possess monopoly power plus engage in

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(AIDS) and the Recommendations of the NAIC Advisory Committee on AIDS, Dec. 9, 1986 (unpublished report) (on file with the author).

16. The Advisory Committee’s December 9, 1986 report records broad support by all members of the Committee, including the industry representatives, for the proposition that inquiries into sexual orientation or use of sexual orientation as an underwriting factor were inappropriate “and should not be allowed.” The Report also clearly records that industry representatives were opposed to any restrictions on prior test history or to prohibitions on testing for underwriting purposes. The Advisory Committee was never able to reach a consensus on the testing issue. See 1 PROCEEDINGS OF THE NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS 609, 657–59 (1987).

17. 15 U.S.C. § 1 (2000).

18. *Id.* § 2.

19. *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 391 (1956).



anticompetitive conduct to obtain, use, or preserve it.<sup>20</sup> Because most insurance markets do not have a single insurer with dominant market power, section 2 has less practical importance to the insurance industry than section 1.<sup>21</sup> Regardless, section 1 is the provision relevant to concerted insurer conduct to eliminate use of one or more underwriting factors when determining coverage or premium levels.

The statutory language of the Sherman Act depends on judicial interpretation and construction for its content.<sup>22</sup> As the Court stated in *Apex Hosiery Co. v. Leader*,<sup>23</sup> “[t]he prohibitions of the Sherman Act were not stated in terms of precision or of crystal clarity and the Act itself did not define them. In consequence of the vagueness of its language . . . the courts have been left to give content to the statute.”<sup>24</sup> But in doing so, courts must adhere to the Act’s purpose: “The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. . . . [T]he policy unequivocally laid down by the Act is competition.”<sup>25</sup>

Other federal antitrust laws have potential relevance to the insurance industry. Congress passed The Clayton Act in 1914 to compensate for the Sherman Act’s perceived failure to remedy anticompetitive conduct before it occurred.<sup>26</sup> The two most important provisions of the Clayton Act for the insurance industry are section seven,<sup>27</sup> which prohibits mergers and acquisitions that may substantially lessen competition or tend to create a

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20. See *United States v. Grinnell Corp.*, 384 U.S. 563, 570–71 (1966) (noting that a section 2 violation requires monopoly power and “the willful acquisition or maintenance of [monopoly] power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.”).

21. See *INSURANCE ANTITRUST HANDBOOK*, *supra* note 5, at 18.

22. In this regard, the Sherman Act has been compared to the Bill of Rights, which also depends on judicial interpretation for determining the content of its short but sweeping provisions. *United States v. Topco Assocs.*, 405 U.S. 596, 610 (1972) (“Antitrust laws . . . are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms.”).

23. 310 U.S. 469 (1940).

24. *Id.* at 489.

25. *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 4 (1958).

26. JOHN H. SHENEFIELD & IRWIN M. STELZER, *THE ANTITRUST LAWS: A PRIMER* 15, 21 (1993) (the substance of the Clayton Act tends to “look to the future and require a prediction of probable anticompetitive effect.”).

27. 15 U.S.C. § 18 (2000).

monopoly, and section 8,<sup>28</sup> which prohibits with some exceptions the officers and directors of one corporation from serving in the same capacity at a competing corporation. The Clayton Act is not relevant to horizontal restraints among competitors in underwriting, but potentially relevant is the Federal Trade Commission Act, passed by Congress in 1914. Section 5(a)(1) of the FTC Act, as subsequently amended, gives the Commission the authority to regulate “[u]nfair methods of competition in or affecting commerce,” a standard that includes conduct that violates either the letter or spirit of other antitrust laws.<sup>29</sup>

Whether challenged insurer activity violates any of these antitrust laws is a question that, at least in theory, is preliminary to whether the insurer activity enjoys an exemption from federal antitrust law. Although the analysis needed to determine the applicability of an exemption can be very complicated, sometimes deciding the exemption question is easier than determining whether the challenged conduct is an antitrust violation.<sup>30</sup> Thus, it can be expedient to proceed initially to the exemption analysis rather than grapple with the question of antitrust liability. The following discussion, however, visits the antitrust liability issue first and then proceeds to the exemptions.

### *B. Horizontal Restraints and Section 1 of the Sherman Act*

#### 1. Elements of Section 1

The text of section 1 begins with the phrase “contract, combination . . . or conspiracy.”<sup>31</sup> Each term in the phrase requires cooperative conduct by at least two actors—either two (or more) sellers, two (or more) buyers, or a seller and buyer (or more) in combination.<sup>32</sup> In some circumstances, this concerted

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28. *Id.* § 19.

29. *Fed. Trade Comm’n v. Brown Shoe Co.*, 384 U.S. 316, 320–21 (1966) (FTC “has broad powers to declare trade practices unfair,” particularly with respect to “trade practices which conflict with the basic policies of the Sherman and Clayton Acts even though such practices may not actually violate these laws”); *Atl. Ref. Co. v. Fed. Trade Comm’n*, 381 U.S. 357, 369 (1965) (FTC Act declares unlawful practices that exhibit the same “central competitive characteristic[s]” as those which constitute Sherman Act violations); *Fed. Trade Comm’n v. Cement Inst.*, 333 U.S. 683, 694 (1948) (violations of the Sherman Act also constitute violations of the FTC Act).

30. Note, however, that even if the exemption issue is decided first, concluding that the insurer’s conduct enjoys an antitrust exemption does not establish that the conduct is unlawful in the absence of an exemption.

31. 15 U.S.C. § 1 (2000).

32. SHENEFIELD & STELZER, *supra* note 26, at 15.

action requirement can be met by the activity of a trade association or similar group.<sup>33</sup> The reference to “several States, or with foreign nations” means that the trade restrained by the concerted action must be either in or at least have an effect upon interstate or foreign commerce; incidental commerce that is entirely intrastate in character and impact is not the concern of section 1.<sup>34</sup> Because every contract restrains trade by obligating the contracting parties to deal only with each other with respect to the contract’s subject matter, a literal reading of section 1 would invalidate all contracts, an obviously untenable result.<sup>35</sup> In 1911, the United States Supreme Court, drawing upon the common law of unfair competition, interpreted section 1 as only prohibiting *unreasonable* restraints of trade,<sup>36</sup> and this reading of section 1 has been reiterated on numerous subsequent occasions.<sup>37</sup>

The meaning of “unreasonable restraint” has evolved along two lines. First, “there are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable.”<sup>38</sup> These kinds of restraints—such as direct price-fixing, bid-rigging, division of markets among competitors, some kinds of boycotts (*i.e.*, concerted refusals by competitors with market power to deal with third parties), and resale price maintenance—are deemed to be “unreasonable *per se*.”<sup>39</sup> The logic of this categorization is that courts have determined from past experience that some kinds of restraints are so fundamentally anti-competitive and so lacking in justification that no analysis beyond the determination of the fact of the existence of the restraint is necessary to determining invalidity.

The second line of analysis is known as the “rule of reason.” With respect to any activity that is not *per se* unreasonable, the relevant circumstances must

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33. See, e.g., *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492 (1988); *Nat’l Collegiate Athletic Ass’n v. Bd. of Regents*, 468 U.S. 85 (1984); *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1 (1979); *E. States Retail Lumber Dealers’ Ass’n v. United States*, 234 U.S. 600 (1914).

34. SHENEFIELD & STELZER, *supra* note 26, at 15.

35. See *Chi. Bd. of Trade v. United States*, 246 U.S. 231, 238 (1918) (“the legality of an agreement or regulation cannot be determined by so simple a test, as whether it restrains competition. Every agreement concerning trade, every regulation of trade, restrains.”).

36. *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1 (1911).

37. See, e.g., *Nat’l Collegiate Athletic Ass’n v. Bd. of Regents*, 468 U.S. 85, 98 (1984); *Nat’l Soc’y of Prof’l Eng’rs v. United States*, 435 U.S. 679, 690 (1978).

38. *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 5 (1958).

39. *Id.* at 9.

be evaluated to determine whether the conduct is, on balance, pro-competitive or anti-competitive.<sup>40</sup> The rule of reason is “the prevailing standard” under section 1 of the Sherman Act and is the “standard traditionally applied for the majority of anticompetitive practices” challenged under that provision.<sup>41</sup> For example, a bona fide joint venture (to be distinguished from a “sham” joint venture, which is a subterfuge for an agreement to fix prices and is therefore unreasonable *per se*) may be a legitimate effort to achieve efficiencies that promote, rather than stifle, competition.<sup>42</sup> Most “vertical” agreements (*i.e.*, agreements between companies at different levels of product distribution, such as a manufacturer and wholesaler)—as distinct from “horizontal” agreements (*i.e.*, agreements among competitors)—are tested under the rule of reason.<sup>43</sup> Although an agreement to fix one or more components of price may be a *per se* violation, “courts have applied the rule of reason rather than the *per se* rule where . . . the relationship between the restraint and price is sufficiently attenuated.”<sup>44</sup> Social considerations are generally excluded from rule of reason analysis: “[b]ecause the rule of reason focuses on the restraint’s competitive effect, factors unrelated to competition—with possible rare exceptions for health and safety considerations and for deviations from the traditional profit-maximizing business model such as the professions, municipalities, and universities—are generally irrelevant.”<sup>45</sup>

## 2. Underwriting Collaboration as Price Fixing

Because “[p]rotection of price competition from conspiratorial restraint is an object of special solicitude under the antitrust laws,”<sup>46</sup> courts have generally “declared unlawful *per se* agreements among competitors to raise, lower, stabilize, or otherwise set or determine prices.”<sup>47</sup> To constitute

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40. See *Nat'l Soc'y of Prof'l Eng'rs*, 435 U.S. at 691 (an inquiry under the rule of reason is limited to whether the restraint “is one that promotes competition or one that suppresses competition.”).

41. See *Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 723 (1988).

42. INSURANCE ANTITRUST HANDBOOK, *supra* note 5, at 13–14.

43. ABA SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS 79 (5th ed. 2002) [hereinafter ANTITRUST LAW DEVELOPMENTS].

44. *Id.* at 82.

45. *Id.* at 54.

46. *United States v. Gen. Motors Corp.*, 384 U.S. 127, 148 (1966).

47. ANTITRUST LAW DEVELOPMENTS, *supra* note 43, at 82. The three verbs—“raise,” “lower” and “stabilize”—come from the Supreme Court’s decision in *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 221 (1940). See, e.g., *Ariz. v. Maricopa County Med. Soc’y*, 457 U.S. 332 (1982); *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643 (1980).

horizontal price fixing, the agreement need not involve an agreement among competitors about the ultimate price; on the contrary, “[a]ny combination which tampers with price structures is engaged in an unlawful activity.”<sup>48</sup> Thus, any factor relevant to the ultimate cost to the consumer—such as credit terms, trade-in allowances, cash down payment requirements, discounts, free service, or any other element of price—which is the subject of competitor agreement can constitute a *per se* unlawful restraint.<sup>49</sup> Other less direct connections between the activity and price—such as agreements to use specific accounting methods, to require a percentage contribution from each contract to an industry-wide collective bargaining fund, to use only particular subcontractors, etc.—have also been deemed *per se* violations of section 1.<sup>50</sup> Agreements to “fix some element of price or the process by which price is determined . . . do not fix the price as such, [but] they do require participants to compute the price in a certain way . . . . Once such an agreement is appropriately classified as naked, *per se* condemnation follows as a matter of course.”<sup>51</sup>

Allegations of concerted action are not always based on alleged formal agreements among competitors. Frequently, such allegations are based on patterns of uniform business conduct, which is commonly referred to as “conscious parallelism.”<sup>52</sup> As one treatise explains, “lower courts have consistently held that conscious parallelism, by itself, will not support a

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48. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 221 (1940).

49. The leading case for this proposition is *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643 (1980). For more discussion, see ANTITRUST LAW DEVELOPMENTS, *supra* note 43, at 84.

50. See ANTITRUST LAW DEVELOPMENTS, *supra* note 43, at 85–86.

51. 12 HERBERT HOVENKAMP, ANTITRUST LAW & 2020, at 121–22 (1999). See *UNR Indus., Inc. v. Cont’l Ins. Co.*, 607 F. Supp. 855, 859–60 (N.D. Ill. 1984):

[*P*er se status . . . has been conferred on price-fixing not merely because it harms consumers (which it does) but because it harms consumers in a particular way—by (almost always) restraining competition . . . . The price-fixing label can by analogy attach to conduct more subtle than a simple conspiracy to directly fix prices . . . but the analogy is successful only if the challenged conduct is, like traditional price-fixing, virtually certain to reduce competition.

*Id.*

52. See, e.g., *Am. Tobacco Co. v. United States*, 328 U.S. 781 (1946) (noting that a pattern of unexplained parallel conduct by three tobacco companies supported finding of conspiracy); *Interstate Cir., Inc. v. United States*, 306 U.S. 208 (1939) (pattern of uniform conduct among motion picture distributors that had imposed nearly identical restraints was sufficient to permit the inference of the existence of an agreement). See generally ANTITRUST LAW DEVELOPMENTS, *supra* note 43, at 9–16.

finding of concerted action . . . . [O]ther facts and circumstances, often referred to as 'plus factors,' typically must be combined with evidence of conscious parallelism to support an inference of concerted action."<sup>53</sup> The presence of legitimate business reasons that would lead firms to independently follow the same course of action or the absence of motive for a conspiracy exemplify the kinds of considerations that will rebut the allegation of conscious parallelism.<sup>54</sup> Insurers tend to compete rather than cooperate with respect to risk classification determinations.<sup>55</sup> Therefore, it is improbable that a "conscious parallelism" argument would succeed with respect to such determinations. Thus, if antitrust claims are to have viability, it will be with respect to demonstrated, formal collaborations among insurers.

Applying the foregoing general principles to collaborations among insurers presents no special difficulties. In insurance, the product is the insurance policy, and the price of the product is the premium. Thus, if insurers agree among themselves to fix the level of insurance premiums, they are engaged in price-fixing in violation of the Sherman Act; unless the anticompetitive conduct earns an antitrust exemption, the insurer combination constitutes a *per se* violation of section 1. Likewise, when two or more insurers agree that a particular underwriting factor shall not be used in determining the level of premiums, the insurers are taking a factor relevant to the ultimate cost to the consumer and agreeing to eliminate this factor as a basis for competition.<sup>56</sup> In other words, when insurers surrender the right to make price distinctions based upon a particular underwriting factor, insurers

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53. ANTITRUST LAW DEVELOPMENTS, *supra* note 43, at 10–11.

54. *Id.* at 12–13.

55. See KENNETH S. ABRAHAM, *DISTRIBUTING RISK: INSURANCE, LEGAL THEORY, AND PUBLIC POLICY* 67–68 (1986) (explaining "proliferation of risk classifications in insurance markets." "Different insurers sometimes may classify in different ways in the hope of capturing a different slice of the universe of good risks."); COMPTROLLER GENERAL, U.S. GENERAL ACCOUNTING OFFICE, *ISSUES AND NEEDED IMPROVEMENTS IN STATE REGULATION OF THE INSURANCE BUSINESS* 102–04 (1979) (describing fierce competition through classification in automobile insurance). See also Cynthia J. Crosson & Michael L. Albanese, *Gap Widens Between Haves and Have-Nots*, 97 *BEST'S REV.* 63 (1997) (describing conditions of "intense competition" in life insurance industry); Scott E. Harrington, *Insurance Rate Regulation in the 20th Century*, 19 *J. INS. REG.* 204, 211–12 (2000) ("Economists generally agree that market structure and ease of entry are highly conducive to competition in auto, homeowners, workers' compensation, and most other property-liability insurance lines.").

56. See Dep't of Justice Response Letter (B.R.L. 92-1) (Jan. 14, 1992) ("an agreement among competitors regarding the price or terms under which they will underwrite insurance would raise antitrust concerns.").

forfeit the ability to segregate a risk class and offer the members of the subdivided classes a differentiated product based on coverage or price (or both), all of which has the effect of stabilizing price in the relevant market by eliminating competition based on a component of product price. This, too, falls within the category of restraints that courts have traditionally deemed *per se* violations of section 1.

Insurers agreeing upon the manner in which insurance premiums will be calculated is analogous to the arrangement declared a *per se* violation of section 1 in *In re Wheat Rail Freight Rate Antitrust Litigation*,<sup>57</sup> where defendant railroads set the manner in which freight would be priced—flat rate or proportional—depending on whether the freight was transit or nontransit.<sup>58</sup>

As the court explained, “the agreement in question did not actually fix prices, but rather the manner in which those rates/prices are calculated. Nevertheless, the concept of price fixing which defines *per se* illegal conduct includes defendants’ conduct.”<sup>59</sup> This reasoning would seem to support a conclusion that insurer collaboration with respect to underwriting factors is *per se* unlawful, but one possible basis for distinguishing the restraint in *Wheat Rail Freight* from horizontal insurer agreements on underwriting criteria is the proximity of the restraint to the effect on price. In *Wheat Rail Freight*, the court observed that “[t]he agreement among defendants to eliminate the transit privilege on proportional rate freight has a direct effect on the price of freight. . . . [A]n agreement on how rates are to be calculated effectively fixes prices.”<sup>60</sup> As explained above, if the relationship between the restraint on a component of price and the ultimate price is sufficiently attenuated, courts have applied the rule of reason rather than the *per se* rule in assessing the restraint. In circumstances where insurers agree not to use a particular underwriting factor in determining premiums, one might argue that the impact on price is more attenuated because competition can still occur with respect to other underwriting factors, thereby diluting the impact on price of the

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57. 579 F. Supp. 517 (N.D. Ill. 1984), *aff'd*, 759 F.2d 1305 (7th Cir. 1985), *cert. denied sub nom.*, *Little Crow Milling Co. v. Baltimore & Ohio R.R.*, 476 U.S. 1158 (1986). Most price-fixing cases involve direct restraints on price or output (or both). It is less common for competitors to agree to fix a *component* of price, although examples of such conduct do exist. Still less common are agreements among competitors to agree upon a *methodology* for determining product price, but *Wheat Rail Freight* provides an example of this kind of collaboration. *See, e.g., Wheat Rail*, 579 F. Supp. at 523.

58. *Wheat Rail*, 579 F. Supp. at 538.

59. *Id.*

60. *Id.*

agreement not to use one particular factor. This analysis does not validate the restraint, but it does provide a basis for testing it—and possibly upholding it—under the rule of reason.

If the rule of reason is the appropriate standard, the question becomes whether the restraint “is one that promotes competition or one that suppresses competition.”<sup>61</sup> Exactly how this analysis would play out in the case of insurer agreements with respect to use of underwriting criteria is difficult to predict. On the one hand, competition would be enhanced based on the fact that consumers whose genetic profiles indicate higher risk would have access to insurance that would otherwise not be available at all or would be available only at higher rates. But consumers whose genetic profiles do not show propensity for higher risk or which affirmatively demonstrate a propensity for lower risk would not be able to receive the advantages of their relatively advantageous genetic profiles. When these consumers are grouped with consumers whose risks are higher, competition is impaired. In the same vein, consumers whose family history puts them in a higher-risk group would not be able to use genetic information to negate the assumptions normally drawn from adverse family history; for these consumers, competition is reduced. It is by no means obvious that the pro-competitive virtues of a restraint on the use of genetic information in underwriting outweigh the anticompetitive aspects of the restraint (or vice versa); thus, it cannot be assumed that the restraint would pass muster under the rule of reason.

Because a restraint on the use of genetic information arguably furthers egalitarian values and public policies which encourage the equal treatment of individuals based on factors beyond their control, the question arises as to whether these justifications count in the restraint’s favor under a rule of reason analysis. As noted earlier, social considerations are generally excluded from rule of reason analysis. For example, in *National Society of Professional Engineers v. United States*,<sup>62</sup> the United States Supreme Court rejected the professional organization’s argument that a provision in its canon of ethics prohibiting competitive bidding by member engineers was necessary to prevent inferior engineering work and to protect the public’s health, welfare, and safety.<sup>63</sup> The Court reasoned that its role was “not to decide whether a policy favoring competition is in the public interest, or in the interest of the

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61. *Nat’l Soc’y of Pro. Eng’rs v. United States*, 435 U.S. 679, 691 (1978).

62. 435 U.S. 679 (1978).

63. *Id.* at 681.



members of an industry,"<sup>64</sup> because the Sherman Act reflects Congress's judgment that competition "will produce not only lower prices, but also better goods and services,"<sup>65</sup> and that under the rule of reason, inquiry into "the question of whether competition is good or bad" is not permitted.<sup>66</sup> Similarly, in *Federal Trade Commission v. Indiana Federation of Dentists*,<sup>67</sup> the Court rejected the professional organization's quality of care justifications for a refusal to provide x-rays to insurance companies. The Court explained:

The argument is, in essence, that an unrestrained market in which consumers are given access to the information they believe to be relevant to their choices will lead them to make unwise and even dangerous choices. Such an argument amounts to "nothing less than a frontal assault on the basic policy of the Sherman Act."<sup>68</sup>

The restraint in *Professional Engineers* is arguably distinguishable from a insurer-imposed restraint on use of an underwriting factor in that the professional association's restraint on competitive bidding is directly beneficial to the economic self-interest of the association's members, whereas the insurance restraint does not eliminate competitive bidding but merely alters the terms on which the insurers' competition for business occurs. The restraint in *Indiana Federation* is similarly distinguishable; it, too, bore a direct relationship to the economic betterment of the dentists imposing the restraint. If a constraint on the use of genetic information in underwriting has any economic benefit for insurers, it is highly indirect and much less significant to the insurers than the restraints in *Professional Engineers* and *Indiana Federation* were to the parties imposing them.

The economic self-interest factor was important to the Third Circuit's analysis in *United States v. Brown University*,<sup>69</sup> where an agreement among universities on the financial aid to be offered students to eliminate a bidding war among the universities for top applicants was at issue. The universities argued that the agreements were designed to help make more money available for needy students, and the district court rejected this justification as an

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64. *Id.* at 692.

65. *Id.* at 695.

66. *Id.*

67. 476 U.S. 447 (1986).

68. *Id.* at 463 (quoting *Prof'l Eng'rs*, 435 U.S. at 695).

69. 5 F.3d 658 (3d Cir. 1993).

inappropriate social, non-economic justification.<sup>70</sup> The Third Circuit disagreed, reasoning that the aims of the financial aid agreement would increase the quality of the educational product by increasing socio-economic diversity on campuses and would increase consumer choice by making high-quality education available to different students, unlike the restraint in *Professional Engineers* which reduced consumer choice.<sup>71</sup> The Third Circuit remanded the case to the district court for full rule of reason analysis.<sup>72</sup>

How the choice-enhancing factor that aided the restraint in *Brown University* plays out in the insurance context is difficult to assess. On the one hand, it might be argued that a restraint on use of genetic information in underwriting increases consumer choice by making insurance available to more persons. Those who would have been denied insurance or only offered insurance on limited terms due to negative genetic information are benefited if insurers cannot take such information into consideration. On the other hand, applicants who do not present negative genetic information would presumably be rated as lower-risk insureds and would have access to lower-cost insurance if insurers did not foreclose their ability to make underwriting distinctions based on genetic information. How these two factors would be balanced by a court—and whether, ultimately, the restraint would be determined to achieve a net pro-competitive effect—is difficult to predict.

Perhaps a more likely outcome is that courts would observe that prohibiting life insurer use of genetic information in underwriting is something that the legislatures could do; after all, many state legislatures have taken precisely that position with respect to health insurance underwriting and a few have done so with respect to life insurance underwriting.<sup>73</sup> The failure of some legislatures to include life insurance in the statutes prohibiting the use of genetic information in health insurance underwriting stands, arguably, as an indirect, but deliberate statement of legislative policy that such a prohibition is not desired, at least at this time. In some states, the relevant statute has an explicit carve-out for life insurance.<sup>74</sup> In circumstances where legislatures have declined to elevate egalitarian values with respect to the use of genetic information in life insurance underwriting, a court may decline to take it upon itself to elevate such values in the face of legislative unwillingness to do so.

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70. *Id.* at 664.

71. *Id.* at 677–78.

72. *Id.* at 678.

73. *See supra*, note 1.

74. *See* MO. REV. STAT. § 375.1303(3) (2000).

### 3. Underwriting Collaboration as a Concerted Refusal to Deal

Courts have also interpreted section 1 as placing limitations on competitors' ability to agree not to deal with, or to deal only on particular terms with, other entities.<sup>75</sup> These arrangements are typically described as "group boycotts" or "concerted refusals to deal."<sup>76</sup> For purposes of the applicability of the Sherman Act, it is not necessary to distinguish between boycotts and concerted refusals to deal; "as far as the Sherman Act (outside the exempted insurance field) is concerned, concerted agreements on contract terms are as unlawful as boycotts."<sup>77</sup> Early cases treated these combinations as *per se* violations of section 1, but more recent cases tend to analyze such restraints under the rule of reason.<sup>78</sup> Exactly how one draws the line between a refusal to deal that is *per se* unlawful and one that receives rule of reason treatment is difficult to articulate. Even the United States Supreme Court has acknowledged this problem with respect to boycotts: "there is more confusion about the scope and operation of the *per se* rule against group boycotts than in reference to any other aspect of the *per se* doctrine."<sup>79</sup>

In the insurance context, the argument might be made that an agreement among insurers to deal with individual applicants only on terms that make no distinction based on genetic information constitutes a boycott or concerted refusal to deal. Authority for this position comes from cases like *Sandy River Nursing Care v. Aetna Casualty*,<sup>80</sup> where the First Circuit held that concerted

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75. ANTITRUST LAW DEVELOPMENTS, *supra* note 43, at 104.

76. *Id.*

77. *Hartford Fire Ins. Co. v. Cal.*, 509 U.S. 764, 803 (1993). The Court cited *Paramount Famous Lasky Corp. v. United States*, 282 U.S. 30 (1930) and *United States v. First Nat'l Pictures, Inc.*, 282 U.S. 44 (1930) for the proposition that an agreement among competing motion picture distributors refusing to license films to exhibitors except on standardized terms was unlawful, and *Anderson v. Shipowners Ass'n of Pac. Coast*, 272 U.S. 359 (1926), which involved the effort of an association of employers to establish industry-wide employment terms, as examples of unlawful concerted refusals to deal.

The distinction between concerted refusals and boycotts is, however, highly relevant to the scope of the McCarran-Ferguson Act's antitrust exemption because no protection is given boycotts. This issue is discussed below.

78. *See, e.g., Fed. Trade Comm'n. v. Ind. Fed'n of Dentists*, 476 U.S. 447 (1986); *N.W. Wholesale Stationers, Inc. v. Pac. Stationery and Printing Co.*, 472 U.S. 284 (1985); ANTITRUST LAW DEVELOPMENTS, *supra* note 43, at 105.

79. *N.W. Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co.*, 472 U.S. 284, 294 (1985) (quoting LAWRENCE A. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST § 83, at 229-30 (1977)).

80. 985 F.2d 1138 (1st Cir. 1993), *cert. denied*, 510 U.S. 818 (1993).

efforts by insurers to refuse to offer certain types of insurance coverage in an attempt to induce the Maine legislature to authorize rate increases was "an economic boycott that beyond doubt 'constituted a classic restraint of trade within the meaning of Section one of the Sherman Act'"<sup>81</sup> and was *per se* unlawful (although the boycott was ultimately exempted from the antitrust laws by virtue of the state action doctrine, which is discussed below).

In *Sandy River*, the concerted action was designed to secure objectives collateral to the transactions in which the restraint was imposed, which under the United States Supreme Court's reasoning in *Hartford Fire*, constitutes a boycott for purposes of section 3(b) of the McCarran-Ferguson Act.<sup>82</sup> An effort to impose standard terms is, in contrast, a concerted refusal to deal, as it is difficult to imagine a scenario in which an agreement among life insurers to abandon the use of genetic information in underwriting would have any purpose in a collateral transaction. Although this concerted conduct is unlawful under the Sherman Act, the antitrust exemption provided by the McCarran-Ferguson Act immunizes it, as discussed more fully below.

#### 4. Underwriting Collaboration as a Uniform Product Standard

Industry self-regulation efforts can also give rise to allegations of concerted refusal to deal.<sup>83</sup> One of the most common scenarios involves industry enforcement of trade association membership criteria; if, for example, an association member deviates from association guidelines, other association members might take steps to sanction the offending member, perhaps through actions that exclude the offender from markets.<sup>84</sup> Association membership criteria can also be directed at third parties, as, for example, occurs when a professional organization explicitly seeks to deny third parties (for example, an association of physicians creating standards that exclude non-physicians) privileges that come with association membership. In evaluating whether such restrictions constitute unlawful concerted action, "courts typically have examined whether the collective action is intended to accomplish a goal

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81. *Id.* at 1143 (quoting *FTC v. Super. Ct. Trial Lawyers Ass'n*, 493 U.S. 411, 422 (1990)).

82. For more discussion of this aspect of *Hartford Fire*, see text accompanying notes 120–25, *infra*.

83. ANTITRUST LAW DEVELOPMENTS, *supra* note 43 at 114.

84. *See, e.g., N.W. Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co.*, 472 U.S. 284 (1985).

justifying self-regulation and, if so, whether the action is reasonably related to the goal.”<sup>85</sup>

Industry associations sometimes also set standards for product quality or safety, occasionally offering certifications for products that meet the standards. When a particular firm's product is excluded from or disadvantaged in the market on account of its failure to meet such standards, the firm might claim that the association's standards constituted an unlawful restraint on trade. For example, in *Allied Tube & Conduit Corp. v. Indian Head, Inc.*,<sup>86</sup> the petitioner, a manufacturer of steel conduit, lobbied a trade association to disapprove the use of polyvinyl conduit as an approved type of electrical conduit.<sup>87</sup> The respondent, a manufacturer of polyvinyl conduit who was disadvantaged by the association's action, brought an antitrust action against the respondent and the association under the logic that the action constituted a concerted refusal to deal, and the United States Supreme Court upheld the section 1 claim.<sup>88</sup> When challenged, such standards are usually evaluated under the rule of reason:

Key factors determining whether . . . standard-setting or certification programs restrain trade are the extent of the economic detriment they cause to an excluded or non-qualifying firm, the breadth of restrictions in relation to their need, and how the standards are used. In considering the manner in which standards are used, courts have considered whether the application of nominally acceptable rules is designed to suppress competition.<sup>89</sup>

Product standard-setting is common in the insurance industry; most notable is the practice in many lines of insurance of the creation of standardized forms. When challenged, courts have noted the pro-competitive aspects of industry standardization of forms, in that standardization makes

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85. *Id.*

86. 486 U.S. 492 (1988).

87. *Id.* at 496-97.

88. *Id.* at 511. See also *Am. Soc'y of Mech. Eng'rs, Inc. v. Hydrolevel Corp.*, 456 U.S. 556 (1982) (association held liable for acts of agents where agents used association's safety standards against plaintiff at urging of one of its competitors); *United States v. Am. Bar Ass'n Proposed Final Judgment & Competitive Impact Statement*, 60 Fed. Reg. 39,421 (Aug. 2, 1995) (Department of Justice accepted consent decree that bars ABA from imposing accreditation requirements or conditions on various aspects of law school faculty compensation, library standards, etc.).

89. ANTITRUST LAW DEVELOPMENTS, *supra* note 43, at 115-16.

consumer comparison of the price of alternative products easier.<sup>90</sup> If insurers were to agree that policy pricing would not be based on certain criteria, it could be argued that this combination constituted the equivalent of a trade association standard or perhaps the standardization of the product itself. Those who could claim disadvantage from the practice would be consumers who would have benefited if the underwriting criterion had been used (in this context, consumers lacking genetic characteristics that would have been disadvantageous in the underwriting process) and, perhaps, firms that wish to market policies based on genetic distinctions if efforts to exclude these firms from the market accompanied the promulgation of the standard. The evaluation of the standard would proceed under the rule of reason, and, it is difficult to predict what conclusions courts would draw when applying the rule.

### 5. Summary

If life insurers were to act collaboratively to set standards for use of genetic information in insurance underwriting, the practice could be characterized as unlawful price-fixing in that competition with respect to a component of product price is being eliminated, as a concerted refusal to deal with consumers on terms other than the sale of products which are not based on such underwriting, or as a concerted refusal to deal under the guise of association standard-setting. There is authority for viewing the fixing of a component of product price as a *per se* violation of section 1 of the Sherman Act, although the attenuated connection between the restraint and ultimate price may mean that the restraint is tested under the rule of reason. The other contentions are likely to be evaluated under the rule of reason. In the absence of clear precedent on insurer combinations involving underwriting factors, particularly combinations involving restraints motivated by pro-egalitarian values, it is difficult to predict how a court would balance the pro-competitive

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90. See, e.g., *Maple Flooring Ass'n v. United States*, 268 U.S. 563, 566 (1925) (standardization is beneficial to both industry and consumers); *Tag Mfrs. Inst. v. FTC*, 174 F.2d 452, 462 (1st Cir. 1949) (concerted efforts to standardize products are beneficial to "all concerned, including the consumer who, among other benefits, is thereby better enabled to know what he is buying and to make intelligent price comparisons"); James S. Greenan & John P. Markin, *The Impact of California's Proposition 103 on Insurance and Related Industries: Exchange of Information, Standardization of Forms and Products, and Effect of Joint Activities Outside California*, 659 PLI/CORP 639, 648 (1989) (in the absence of concerted action to mandate use of the standardized form, "the existence of a product standard that may be used by competitors based upon unilateral choice should not be judged an antitrust violation.").

and anti-competitive aspects of the restraint. The possibility that the restraint would be declared unlawful cannot be casually dismissed. At that point, the analysis would proceed to a further question, the answer to which could moot all of the Sherman Act analysis: whether the insurer conduct enjoys an exemption from federal antitrust law. The three possible exemptions—the McCarran-Ferguson exemption; the state action exemption; and the Noerr-Pennington exemption—are discussed in the next three subsections.

### *C. The McCarran-Ferguson Federal Antitrust Exemption*

#### 1. Origin of the Exemption and Substantive Overview

Although the McCarran-Ferguson Act is often described as a statute preempting federal antitrust law, the Act does much more than that. The statute's most important purpose is to give primacy to state regulation of the insurance business to the extent that the states choose to regulate the industry, at least to the extent that Congress opts not to reassert its primacy, as it can at any time or in any specific context.<sup>91</sup> Yet because the Act's emergence can be traced to the concern of stock fire and casualty companies about the application of antitrust laws to their business, the Act's antitrust implications are very significant.

Even before the Sherman Act was passed in 1890, it was assumed that the federal government lacked authority to regulate the insurance industry. Under the authority of the Supreme Court's 1869 decision in *Paul v. Virginia*,<sup>92</sup> a policy of insurance was deemed not to be "a transaction of commerce," which was tantamount to putting the business of insurance outside the constitutional authority of Congress.<sup>93</sup> Under this precedent to which the Court adhered for seventy-five years,<sup>94</sup> individual states retained the authority to regulate insurance companies.

In 1944, the Supreme Court overruled *Paul* in *United States v. South-Eastern Underwriters Ass'n*<sup>95</sup> and held that insurance transactions were

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91. See Spencer L. Kimball, *The Meaning of the McCarran-Ferguson Act Today*, 10 J. INS. REG. 5, 6 (1991) ("[Act] was intended primarily to allocate power in our federal system to deal with and make law for insurance.").

92. 75 U.S. (8 Wall.) 168 (1868).

93. *Id.* at 183.

94. See, e.g., *N.Y. Life Ins. Co. v. Deer Lodge County*, 231 U.S. 495, 508 (1913); *Hooper v. Cal.*, 155 U.S. 648, 655 (1895).

95. 322 U.S. 533 (1944).

subject to federal regulation under the Commerce Clause.<sup>96</sup> This also meant that the insurance industry was subject to federal antitrust statutes. In response to the *SEUA* decision, the industry and the National Association of Insurance Commissioners rallied behind legislation to limit the impact of the decision, and Congress enacted the McCarran-Ferguson Act<sup>97</sup> in 1945.

The *SEUA* decision arose out of the effort of the Missouri Attorney General to indict an association of 198 stock fire insurance companies in six states, its officers, and its member companies for unlawful agreements to fix insurance rates and boycott nonmembers. It is undoubtedly no coincidence that Congress began to consider an antitrust exemption for the insurance industry while the *SEUA* litigation was pending.<sup>98</sup> In October, 1943, Congress began hearings on a number of bills that would have provided a total antitrust exemption for the insurance industry, but this approach, sponsored by stock fire insurance companies but opposed by the life and mutual companies, did not garner sufficient support for enactment. Congress then turned to an alternative proposal backed by the NAIC, and it was this proposal which became the basis for what was ultimately adopted as the McCarran-Ferguson Act. The predominant purpose of the NAIC was not to create an antitrust exemption (which, of course, had been the purpose of the stock fire insurance companies who were concerned about the *SEUA* indictments) but was to preserve the system of state regulation.<sup>99</sup> Thus, it is correct to observe that the McCarran-Ferguson Act was most importantly a federalism statute, not an antitrust preemption statute.<sup>100</sup>

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96. *Id.* at 579.

97. 15 U.S.C. §§ 1011–1015 (2000).

98. This history is summarized in *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 218–25 (1979). For a detailed discussion, see Alan M. Anderson, *Insurance and Antitrust Law: The McCarran-Ferguson Act and Beyond*, 25 WM. & MARY L. REV. 81, 83–89 (1983); Charles D. Weller, *The McCarran-Ferguson Act's Antitrust Exemption for Insurance: Language, History and Policy*, 1978 DUKE L.J. 587, 592–97 (year); EARL W. KINTNER, ET AL., *FEDERAL ANTITRUST LAW: A TREATISE ON THE ANTITRUST LAWS OF THE UNITED STATES*, § 70.3, at 184–88 (1994).

99. The Interim Report of the NAIC's Subcommittee on Federal Legislation in 1945 described the NAIC's task as "preserving state regulation and at the same time not emasculating the federal anti-trust laws." Weller, *supra* note 98, at 593 (quoting 1945 NAIC PROC. 156, 159–60). Further, a 1944 report of the Subcommittee specifically recommended "a limited exemption of insurance from the Sherman and Clayton Acts for cooperative procedures related to statistics, rates, coverage and similar matters." *Id.* at 594 (citing 1945 NAIC PROC. 23, 28–29, reprinted in 90 CONG. REC. A4403-05 (1944)).

100. See *Royal Drug*, 440 U.S. at 219, n.18:



The substantive core of the McCarran-Ferguson Act is contained in section 2:

(a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

(b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance . . . unless such Act specifically relates to the business of insurance: *Provided*, That after June 30, 1948, [the Sherman Act, the Clayton Act, and the Federal Trade Commission Act] shall be applicable to the business of insurance to the extent that such business is not regulated by State law.

Section 2(a) states that the “business of insurance”—a phrase that is not defined in the Act—is appropriately within the domain of state regulation. The portion of section 2(b) before the proviso functions as a “reverse preemption” statute; Congress uses its commerce power to state that no act of Congress shall preempt state law unless Congress is explicit that it intends such preemption to occur. Because antitrust laws are general statutes that do not “specifically relate” to insurance, the antitrust laws would be applied to the insurance business if the text of section 2(b) ended before the proviso. The section 2(b) proviso addresses the antitrust question and creates a limited antitrust exemption: after June 30, 1948, the federal antitrust laws shall apply to the business of insurance to the extent the states opt not to regulate such business. The proviso does not explain what kind or intensity of regulation is necessary to trigger the antitrust exemption; like the “business of insurance” definition, this matter is left to the courts for development and interpretation.

Section 3(b) of the Act created an exception to the section 2(b) antitrust exemption. It states that the Sherman Act applies to some insurer activities regardless of whatever regulation the states might enact: “Nothing contained in this chapter shall render the said Sherman Act inapplicable to any

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There is no question that the *primary* purpose of the McCarran-Ferguson Act was to preserve state regulation of the activities of insurance companies, as it existed before the *South-Eastern Underwriters* case. . . . The question in the present case, however, is one under the quite different *secondary* purpose of the McCarran-Ferguson Act—to give insurance companies only a limited exemption from the antitrust laws.

For further discussion, see Weller, *supra* note 98, at 598; JERRY, *supra* note 13, § 21[c], at 77.

agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation.” None of the three practices listed in section 3(b) is defined in the statute. The term “boycott” has been a difficult one in antitrust law, and coercion and intimidation are concepts that are potentially much broader than whatever meaning is given to the term “boycott.”

When the meaning of the McCarran-Ferguson Act for antitrust enforcement is digested from the Act’s provisions, the following formula emerges: if a federal antitrust law is sought to be applied to an insurer activity, the activity—(1) if it constitutes the “business of insurance”—is exempt from such regulation (2) to the extent that such business “is regulated by” state law and (3) the challenged insurer activity does not constitute “a boycott, coercion or intimidation” within the meaning of the section 3(b) exception.<sup>101</sup> The three elements of this formula are discussed in the ensuing subsections.

## 2. The “Business of Insurance”

For many years after the McCarran-Ferguson Act was enacted, it was widely assumed that federal antitrust law—and state antitrust law as well—had limited relevance to the activities of insurance companies.<sup>102</sup> However, two United States Supreme Court decisions—*Group Life & Health Insurance Co. v. Royal Drug Co.*<sup>103</sup> in 1979, and *Union Labor Life Insurance Co. v. Pireno*<sup>104</sup> in 1982—construed the McCarran-Ferguson Act narrowly, thereby exposing insurance companies to increased antitrust scrutiny. This narrowing of the McCarran-Ferguson immunity has continued during the last twenty years, perhaps reflecting a view that the immunity was initially construed too broadly, or perhaps that the immunity has become unnecessary in light of the availability of the state action immunity, which is discussed below.<sup>105</sup>

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101. See, e.g., *Uniforce Temp. Personnel, Inc. v. Nat’l Council on Comp. Ins.*, 87 F.3d 1296, 1299 (11th Cir. 1996) (stating that McCarran-Ferguson Act exempts the business of insurance if it is regulated by state law and does not constitute a boycott); *UNR Indus., Inc. v. Cont’l Ins. Co.*, 607 F. Supp. 855, 862 (N.D. Ill. 1984) (“The McCarran-Ferguson Act exempts from the antitrust laws conduct which is the business of insurance, is regulated by state law, and does not amount to boycott, coercion or intimidation.”). For more discussion, see JERRY, *supra* note 13, § 21[d], at 78–96.

102. INSURANCE ANTITRUST HANDBOOK, *supra* note 5, at 1.

103. 440 U.S. 205 (1979).

104. 458 U.S. 119 (1982).

105. See 1 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 219a, at 325–26 (Rev. 2d ed. 2000); KINTNER ET AL., *supra* note 98, § 70.6, at 203–05.

As explained above, the McCarran-Ferguson Act exempts the “business of insurance” from federal antitrust laws if the challenged activity is regulated by state law and does not constitute a boycott, coercion, or intimidation within the meaning of section 3(b) of the Act. Thus, the threshold question is whether the challenged insurer activity involves the “business of insurance.” If this question is answered in the negative, the insurer conduct enjoys no protection from antitrust analysis. Under the *Royal Drug–Pireno* test, three questions must be asked and answered in the affirmative when determining whether an insurer’s activity constitutes the “business of insurance:” (1) Does the activity involve the underwriting or spreading of risk? (2) Does the activity involve an integral part of the insurer-insured relationship? (3) Is the activity limited to entities within the insurance industry?<sup>106</sup> None of the three factors is necessarily determinative in and of itself.<sup>107</sup>

To satisfy the first element, which requires that the activity involve the underwriting or spreading of risk, the insurer’s activity must have “the effect of transferring or spreading a policyholder’s risk.”<sup>108</sup> Transactions in which the insurer does not assume risk and distribute it across a pool of similarly situated insureds in similar transactions will not meet this test. If, for example, the insurance product is primarily an investment instrument, such as a variable life insurance or variable annuity product, the product may not involve the spreading of risk and thus may not be the business of insurance. Thus, in *Securities and Exchange Commission v. Variable Annuity Life Insurance Co. of America*,<sup>109</sup> the Court concluded that the variable annuity policies offered by insurance companies were not part of the business of insurance protected by the McCarran-Ferguson Act:

[T]he concept of “insurance” involves some investment risk-taking on the part of the company. The risk of mortality, assumed here, gives these variable annuities an aspect of insurance. Yet it is apparent, not real; superficial, not substantial. In hard reality the issuer of a variable annuity that has no element of a fixed return assumes no true risk in the insurance sense. It is no answer to say that the risk of declining returns in times of depression is the reciprocal of the

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106. For detailed discussion of *Royal Drug* and *Pireno*, see AREEDA & HOVENKAMP, ANTITRUST LAW ¶ 219b, at 326–41 (2d ed. 2000).

107. *Pireno*, 458 U.S. at 129.

108. *Id.*

109. 359 U.S. 65 (1959).

fixed-dollar annuitant's risk of loss of purchasing power when prices are high and gain of purchasing power when they are low. We deal with a more conventional concept of risk-bearing when we speak of "insurance." For in common understanding "insurance" involves a guarantee that at least some fraction of the benefits will be payable in fixed amounts.<sup>110</sup>

The underlying public policy advanced by the Court's decision is causing variable annuities sold by insurance companies to be subject to the regulatory scheme of the securities laws.<sup>111</sup> The logic of this policy is as follows: If the insurance company's instrument is the functional equivalent of the financial instruments sold by non-insurers, it is not unique to the insurance business and insurance company activities with regard to it should not enjoy special status as "business of insurance" under the McCarran-Ferguson Act. By this analysis, inter-insurer agreements with respect to these kinds of insurance products should have no immunity from federal antitrust laws.

The second part of the *Royal Drug-Pireno* test—whether the activity involves an integral part of the insurer-insured relationship—was derived from *Securities and Exchange Commission v. National Securities, Inc.*,<sup>112</sup> where the Court stated that section 2(b) was designed to protect from impairment, invalidation, or preemption by congressional action state laws concerned with the relationship between the insurance company and its policyholders:

Congress was concerned with the type of state regulation that centers around the contract of insurance . . . . The relationship between insurer and insured, the type of policy which could be issued, its reliability, interpretation, and enforcement—these were the core of the "business of insurance." Undoubtedly, other activities of insurance companies relate so closely to their status as reliable insurers that they too must be placed in the same class. But whatever the exact scope of the statutory term, it is clear where the focus was—it was on the relationship between the insurance company and the policyholder. Statutes

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110. *Id.* at 71.

111. See JONATHAN R. MACEY & GEOFFREY P. MILLER, *COSTLY POLICIES: STATE REGULATION AND ANTITRUST EXEMPTION IN INSURANCE MARKETS* 17–18 (1993).

112. 393 U.S. 453 (1969).

aimed at protecting or regulating this relationship, directly or indirectly, are laws regulating the "business of insurance."<sup>113</sup>

*Royal Drug* refined the foregoing analysis somewhat, as it can be argued that "every business decision made by an insurance company has some impact on its reliability, its ratemaking, and its status as a reliable insurer."<sup>114</sup> Thus, if the insurer's activity has only an "indirect" effect on the reliability of the insurer or on the insurer-insured relationship, that minimal effect is not enough to qualify the activity as the "business of insurance."<sup>115</sup>

To satisfy the third part of the test, it is necessary to show that the challenged insurer activity is limited to entities within the insurance industry. The Court in *Royal Drug* looked to the legislative history of the McCarran-Ferguson Act and observed that, "the primary concern of both representatives of the insurance industry and the Congress was that cooperative ratemaking efforts be exempt from the antitrust laws."<sup>116</sup> Given that purpose, the Court reasoned that the exemption did not extend to activities involving parties outside the insurance industry.<sup>117</sup>

Under the tripartite test, it is well settled that rate-making activity constitutes the business of insurance for purposes of the McCarran-Ferguson Act.<sup>118</sup> Scope of coverage, including the content of policy provisions, is very closely connected to rate-making; thus, joint activities with respect to scope of coverage also fit within the business of insurance. As one court explained, "[m]atters of rate, extent of coverage, and policy provisions go to the very heart of the relationship between the insurance company and the policyholder and therefore clearly fall within the *National Securities* definition of the business of insurance."<sup>119</sup>

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113. *Id.* at 460.

114. *Grp. Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 216-17 (1979).

115. *Id.*

116. *Id.* at 221.

117. *Id.* at 231.

118. *Id.* at 224-25 n.32 ("the fixing of rates is the 'business of insurance'"). *See also* *Uniforce Temp. Pers., Inc.*, *supra* note 101, at 1300 ("appellees' rate-making activity clearly constitutes the business of insurance for purposes of the McCarran-Ferguson Act"); *KINTNER ET AL.*, *supra* note 98, § 70.7, at 213 ("It is clear that agreements among insurance companies as to their rates are within the 'business of insurance.'").

119. *McIlhenny v. Am. Title Ins. Co.*, 418 F. Supp. 364, 369 (E.D. Pa. 1976). As another court explained, "[i]t is obvious that an agreement to change the type of policy offered is the business of insurance. The type of coverage offered directly affects the spreading of risk, is at the very heart of the policy relationship, and the agreement is limited to insurance companies." *UNR Indus. v. Cont'l Ins. Co.*, 607 F. Supp. 855, 862 (N.D. Ill. 1984). *See also* *Ocean State*

This is consistent with the Supreme Court's analysis in *Hartford Fire Insurance Co. v. California*,<sup>120</sup> where the Court reaffirmed the tripartite test articulated in *Royal Drug* and *Pireno* when evaluating United States insurers' joint actions to standardize policy forms.<sup>121</sup> The Ninth Circuit did not hold, as the Supreme Court observed, that the domestic insurers' conduct with respect to standardization of forms fell outside the business of insurance, and the Supreme Court said nothing to call this conclusion into doubt.<sup>122</sup> It is unlikely that the Court would have let the Ninth Circuit's analysis pass without comment if the Court thought it erroneous. The holding in *Hartford Fire* concerned whether domestic insurers lost their antitrust exemption when they acted in concert with foreign reinsurers (the Supreme Court concluded that they did not),<sup>123</sup> but under the reasoning of *Hartford Fire*, joint insurer standard setting with respect to the terms of coverage and prices is squarely within the "business of insurance."<sup>124</sup> Although joint insurer conduct with respect to underwriting criteria has not been directly challenged or the subject

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Physicians Health Plan, Inc. v. Blue Cross & Blue Shield of R.I., 883 F.2d 1101, 1108 (1st Cir. 1989), cert. denied, 494 U.S. 1027 (1990) (the marketing and pricing of insurance policies is the business of insurance).

120. 509 U.S. 764 (1993).

121. *Id.* at 780–81.

122. *Id.* at 782. The Court referenced the joint insurer conduct in footnote ten, where it observed that while it "might be tempting to think that unlawful acts are implicitly excluded from the 'business of insurance,'" such analysis would not conform to the text of § 2(b) of the McCarran-Ferguson Act, which contemplates that illegal acts, *i.e.*, acts that violate the Sherman Act, may still enjoy antitrust immunity. *Id.* at n.10.

123. The Ninth Circuit held that the McCarran-Ferguson exemption was lost because foreign reinsurers, which the circuit court found not subject to state regulation and therefore not exempt under the McCarran Act, had participated in the activities. In re Ins. Antitrust Litig., 938 F.2d 919, 928 (9th Cir. 1991), *aff'd in part and rev'd in part on other grounds sub nom.*, *Hartford Fire Ins. Co. v. Cal.*, 509 U.S. 764 (1993). The Supreme Court disagreed, holding that even if the foreign reinsurers were non-exempt (an issue the Court did not decide), their participation with the domestic insurers was still part of the "business of insurance" and did not eliminate the domestic insurers' antitrust immunity. *Hartford Fire*, 509 U.S. at 784.

124. A more recent decision dealing with claims practices also upheld the McCarran-Ferguson immunity. In *United States Dep't of Treasury v. Fabe*, 508 U.S. 491 (1993), the Court held that an Ohio statute granting policyholders' claims priority over claims of the federal government in proceedings to liquidate an insurance company escaped preemption because it regulated the business of insurance. *Id.* at 505. The pattern of the Supreme Court cases is that activities within the traditionally understood business of insurance—ratemaking; standardization of forms; claims processing; etc.—enjoy the protection of the McCarran-Ferguson Act.

of a judicial decision,<sup>125</sup> the logic of the foregoing cases would surely consider such agreements to fall within the ambit of the "business of insurance." If this is correct, it follows that an agreement by life insurers not to use genetic information as an underwriting factor would rest at the core of the "business of insurance." If, however, the insurance product in question did not involve the transfer of risk (as in the case, for example, of an investment instrument), the agreement on underwriting criteria would fall outside the "business of insurance."

### 3. "Regulated by State Law"

When the statute sought to be applied to an insurer's activity is a federal antitrust law, the analysis becomes more complicated because of the section 2(b) proviso, which requires that the insurer activity be "regulated by State Law" to prevent the application of federal law. The difficulty with this language is its ambiguity with respect to *what kind* of regulation is needed and the extent to which the regulation must be *effective* to avoid the regulation of federal antitrust law. In applying this language, courts have been disposed to treat statutes of general applicability, such as corporation codes,<sup>126</sup> general

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125. In *Owens v. Aetna Life & Cas. Co.*, 654 F.2d 218 (3d Cir. 1981), *cert. denied*, 454 U.S. 1092 (1981), an insurance broker brought an action in which he alleged that multiple insurers and some individuals conspired to give a particular insurer a monopoly in the medical malpractice field, engaged in an unlawful boycott, and conspired to drive the plaintiff out of business. *Id.* at 220-21. In the course of explaining the "business of insurance" exemption, the court stated that "it is clear that at least the following activities are the business of insurance, either because they pertain to risk-spreading or to the contract between the insurer and insured," and one of the four activities listed was "deciding upon rating classification differences between individual policies and group marketing plans, either individually or jointly through a rating bureau . . ." *Id.* at 225-26. Joint determination of the factors to be used for pricing individual policies differently from group policies is functionally the equivalent of joint determination of underwriting criteria. The quoted passage from *Owens* is dicta because that practice was not at issue in the case, but the analysis is consistent with the results in other cases. As one prominent treatise states with citation to supporting authority, "[a] number of other essentially horizontal arrangements among insurance companies, which affect the scope or amount of coverage afforded to an insured, or which indirectly affect the premium paid by the insured, have also been held within the 'business of insurance.'" KINTNER ET AL., *supra* note 98, § 70.7, at 213.

126. *Manasen v. Cal. Dental Serv.*, 424 F. Supp. 657 (N.D. Cal. 1976), *rev'd on other grounds*, 638 F.2d 1152 (9th Cir. 1979) (in suit by dentists against corporation providing prepaid dental plans, state antitrust law, corporation code and business and professions code are sufficient to constitute state regulation of business of insurance).

business and professional codes,<sup>127</sup> and state antitrust laws,<sup>128</sup> as the kinds of laws that regulate the business of insurance. It is assumed that state legislatures made a judgment when the general statutes were enacted about the extent to which insurers should be regulated. When general statutes are deemed sufficient to meet the state regulation requirement, challenged insurer activity becomes immune from federal regulation without the state taking definite steps targeted at the insurer-insured relationship. As for the effectiveness of state regulation, for the most part, courts have not been particularly concerned about how much regulation occurs when seeking to justify recognition of the antitrust exemption. As one treatise states, “[t]he courts have generally been satisfied with the existence of a state regulatory scheme and rather superficial indicators of supervision, without much regard for the actual intensity of state regulation.”<sup>129</sup> This result strikes some observers as being rather odd, as “it is likely that Congress intended the antitrust exemption to be available only when effective state regulation, rather than a mere pretense of regulation, exists.”<sup>130</sup> The generally lax approach of the courts with respect to the McCarran-Ferguson exemption is more lenient

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127. See, e.g., *Ocean State Physicians Health Plan, Inc.*, *supra* note 119, at 1108–09 (marketing and pricing of health insurance was regulated by state law where state department of business regulation approved the activities); *Manasen*, *supra* note 126, at 657 (in suit by dentists against corporation providing prepaid dental plans, state antitrust law, corporation code, and business and professions code are sufficient to constitute state regulation of business of insurance).

128. See, e.g., *Klamath-Lake Pharm. Ass'n v. Klamath Med. Serv. Bureau*, 701 F.2d 1276, 1287 (9th Cir.) (state antitrust laws meet state regulation requirement), *cert. denied*, 464 U.S. 822 (1983); *State v. Blue Cross & Blue Shield Ass'n*, 620 F.Supp. 907, 920–21 (D. Md. 1985) (Maryland's antitrust laws are sufficient to meet the state regulation requirement).

129. 1 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 219c, at 342 (Rev. 2d ed. 2000). See generally ANTITRUST LAW DEVELOPMENTS, *supra* note 43, at 1373. See also 1 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 219c, at 341–42 (Rev. 2d ed. 2000) (“Except in a few non-antitrust decisions, the courts have not scrutinized the nature and intensity of state regulation very closely.”). See, e.g., *Uniforce Temp. Pers., Inc. v. Nat'l Council on Comp. Ins.*, 892 F. Supp. 1503 (S.D. Fla. 1995) (state regulation prong of test for business of insurance met if state regulatory agency has jurisdiction generally over the challenged practices and maintains authority to approve or prohibit them), *aff'd*, 87 F.3d 1296 (11th Cir. 1996). But see *McIlhenny*, *supra* note 119, at 370–71 (“The McCarran-Ferguson Act does not require an examination into the regulatory status of every detail of the business of insurance; it is sufficient that the state regulatory scheme is comprehensive and meaningfully administered.”).

130. JERRY, *supra* note 13, § 21[d][4], at 91–93.



than the "active supervision" requirement needed for an exemption under the *Parker* doctrine, discussed below.<sup>131</sup>

The leading Supreme Court decision on this issue is *Federal Trade Commission v. National Casualty Co.*,<sup>132</sup> a 1958 decision in which the Court rejected the FTC's argument that the states' uniform unfair insurance practices statutes were insufficient to support application of the McCarran-Ferguson Act exemption.<sup>133</sup> The FTC argued that the state statutes had not been effectively elaborated or applied, but the Court essentially took the position that once a statute purporting to regulate insurance practices has been enacted, the effectiveness of state regulation is irrelevant.<sup>134</sup> The Court did note that the FTC had not argued that the state unfair practices acts "were mere pretense,"<sup>135</sup> thereby leaving open the possibility that a sham regulatory scheme would not be sufficient to create antitrust immunity. Exactly where this leaves the issue is uncertain.

*National Casualty* also left open the question of whether state regulation could be ineffective because of constitutional constraints on the extraterritorial effect of state regulation. This issue was addressed in *Federal Trade Commission v. Travelers Health Ass'n*,<sup>136</sup> which involved the FTC's effort to prohibit an insurer's nationwide distribution of allegedly deceptive circulars.<sup>137</sup> The Eighth Circuit upheld the insurer's state action exemption claim on the basis of a Nebraska statute regulating deceptive insurance practices.<sup>138</sup> The Supreme Court held that "the state regulation which Congress provided should operate to displace [federal antitrust law] means regulation by the State in which the [insurer activity] is practiced and has its impact."<sup>139</sup> This means that regulation by a particular state "cannot provide an exemption for insurer activity occurring beyond its borders."<sup>140</sup>

Is concerted insurer activity with respect to the use of underwriting criteria, and with respect to criteria on the use of genetic information in

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131. See *infra* text accompanying note 159.

132. 357 U.S. 560 (1958) (per curiam).

133. *Id.* at 560-65.

134. *Id.* at 564-65.

135. *Id.* at 564.

136. 362 U.S. 293 (1960).

137. *Id.* at 298-99.

138. See *Travelers Health Ass'n v. Fed. Trade Comm'n*, 262 F.2d 241, 244 (8th Cir. 1959), *vacated and remanded*, 362 U.S. 293 (1960).

139. *Fed. Trade Comm'n v. Travelers Health Ass'n*, 362 U.S. 293, 298-99 (1960).

140. Anderson, *supra* note 98, at 103.

particular, “regulated by state law”? No state statute gives explicit approval to such restrictions. At least forty-five states regulate some aspect of genetic testing in health insurance, and many of these statutes restrict insurers’ underwriting practices. A few states extend these prohibitions to life insurance underwriting.<sup>141</sup> The fact that legislatures in many states opted not to regulate underwriting in life insurance at the same time they enacted such regulations in health insurance suggests that the states made a judgment about the extent to which regulation of underwriting with respect to genetic information should occur.

In addition, the unfair trade practices statutes of most states contain unfair discrimination prohibitions that specifically reference sex, marital status, race, religion, and national origin.<sup>142</sup> The omission of genetic characteristics (other than sex and race) from this list could be viewed as a deliberate legislative assumption that insurers should not be subject to regulation with respect to their use of information relevant to such characteristics. The unfair trade practices statutes have generally not been held to prohibit underwriting criteria that are “actuarially fair,”<sup>143</sup> and sex and marital status often figure

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141. See NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS, *supra* note 1.

142. See *Model Unfair Trade Practices Act*, in 5 NAT’L ASSOC. OF INS. COMM’RS, MODEL LAWS, REGULATIONS, AND GUIDELINES, § 4(G)(5), at 880–84 (2001) (prohibiting “[r]efusing to insure, refusing to continue to insure, or limiting the amount of coverage available to an individual because of the sex, marital status, race, religion or national origin of the individual”). Note that by its literal terms, the model act does not reach the level of premium charged for particular classifications. Generally speaking, distinctions based on sex (and presumably other listed factors) are not deemed “unfair” if they are based on “actuarially sound” classifications. See, e.g., *State Dept. of Ins. v. Ins. Serv. Office*, 434 So.2d 908, 912–13 (Fla.App. 1983) (Unfair Trade Practices law only prohibits unfair discrimination, not actuarially sound discrimination); *Ins. Serv. Office v. Comm’r of Ins.*, 381 So.2d 515, 517 (La.App. 1979) (statute requires that classifications be reasonable and not unfairly discriminatory). See also *Nat’l Org. for Women v. Metro. Life Ins. Co.*, 516 N.Y.S.2d 934, 936 (1987) (Human Rights Law does not prohibit gender classifications with regard to the terms and conditions of life and disability insurance policies in insurance).

143. See Roberta B. Meyer, *Justification for Permitting Life Insurers to Continue to Underwrite on the Basis of Genetic Information and Genetic Test Results*, 27 SUFFOLK U. L. REV. 1271, 1286 (1993) (“courts have interpreted their own state unfair discrimination statutes as permitting insurers to distinguish among applicants in underwriting on the basis of any characteristic that places the insured at a greater hazard for illness or a lower life expectancy, provided insurers do so fairly”); Joseph M. Miller, Comment, *Genetic Testing and Insurance Classification: National Action Can Prevent Discrimination Based on the “Luck of the Genetic Draw,”* 93 DICK. L. REV. 729, 749 (1989) (courts have interpreted state unfair discrimination statutes as permitting insurance companies to “use any trait to differentiate among insureds as long as there is a reasonable basis for concluding that the trait places the insured at a greater

prominently in underwriting in some lines of insurance in many states. Although one might argue that this demonstrates that the use of genetic information in underwriting is *not* regulated by state law, courts' disposition to treat statutes of general applicability as the kinds of laws that regulate the business of insurance strongly suggests that the unfair trade practices statutes are specific enough to satisfy the "regulated by State law" requirement, thereby supporting the proposition that insurer underwriting practices with respect to genetic information do enjoy an antitrust exemption.

The territoriality question could serve in some situations to limit the scope of the exemption. Assuming an insurer activity which operates and has its impact nationally, under the authority of *Travelers Health*, discussed above, effective regulation of the activity in state A does not provide an exemption for the activity's operation and impact in state B; only if state B also regulates the activity does it enjoy the benefit of an exemption in state B.<sup>144</sup> All states have unfair trade practice regulation, but not all states have genetic information underwriting regulation. To the extent the exemption's existence depends on genetic information regulation, it is possible that a national business practice could enjoy the exemption in some states but not in others.

In short, what constitutes being "regulated by state law" for purposes of the McCarran-Ferguson Act exemption from federal antitrust law is indefinite. Because general state statutes have been deemed sufficient to create an antitrust exemption in other contexts, the best prediction is that courts would hold that the subject of underwriting with respect to genetic information is subject to state regulation and therefore enjoys an exemption from antitrust scrutiny. As one court stated, "[i]t is not necessary to point to a state statute which gives express approval to a particular practice; rather, it is sufficient that a state regulatory scheme possess jurisdiction over the challenged practice."<sup>145</sup> If, however, a court opted to require more specific evidence of state regulation, it is possible that the exemption would be nonexistent in some jurisdictions.

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hazard for illness or a lower life expectancy"); Leah Wortham, *The Economics of Insurance Classification: The Sound of One Invisible Hand Clapping*, 47 OHIO ST. L. J. 835, 851 (1986) ("Such unfair discrimination statutes have been construed only to require that there be a statistical difference in the average loss between groups for any classification used.").

144. See KINTNER ET AL., *supra* note 98, at § 70.12, at 235-37.

145. *Feinstein v. Nettlehip Co. of L.A.*, 714 F.2d 928, 933 (9th Cir. 1983).

#### 4. The “Boycott” Exception to the Exemption

If one seeks to subject an insurer’s activity to Sherman Act scrutiny, the Sherman Act will apply—even if the insurer’s activity constitutes the “business of insurance” and even if state law regulates it—if the activity involves a boycott, coercion, or intimidation. The McCarran-Ferguson Act provides that nothing in the Act “shall render the . . . Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or any act of boycott, coercion, or intimidation.”<sup>146</sup>

The Supreme Court has spoken to the content of section 3(b) on two occasions. In 1978, the Court decided *St. Paul Fire & Marine Insurance Co. v. Barry*,<sup>147</sup> which addressed a conflict in the circuits as to whether section 3(b) was limited to boycotts or concerted activity directed against competing insurers or agents, or whether the boycott or concerted activity could apply to conduct directed against policyholders as well. In *Barry*, physicians sued four malpractice insurers, three of which allegedly agreed not to offer insurance on any terms to customers or former customers of the fourth insurer.<sup>148</sup> The Court rejected defendants’ argument that the exemption only extends to activities intended to coerce competitors rather than policyholders and held that the boycott exception extends to insurer activities affecting parties outside the industry.<sup>149</sup> That holding broadened the exception to the exemption, which had the effect of narrowing the antitrust exemption. The case also did not resolve the meaning of “boycott,” but the Court did reject the suggestion that price fixing standing alone constitutes either a “boycott” or “coercion” within the meaning of section 3(b).<sup>150</sup>

In 1993, the Court again examined the meaning of “boycott” in section 3(b) in *Hartford Fire Insurance Co. v. California*,<sup>151</sup> a case in which nineteen states and numerous private parties brought antitrust suits against domestic insurers, domestic and foreign reinsurers, and insurance brokers on account of

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146. 15 U.S.C. § 1013(b) (2000).

147. 438 U.S. 531 (1978).

148. *Id.* at 531.

149. *Id.* at 550, 552. The decision in *Barry* did not consider the meaning of “coercion” and “intimidation,” the two other key terms in section 3(b). *Id.* at 541 n.10.

150. *Id.* at 544. See also *Slagle v. ITT Hartford*, 102 F.3d 494 (11th Cir. 1996) (alleged concerted refusal of insurers to issue windstorm insurance on the open market in certain Florida coastal areas and to refer such business to a joint underwriting association whose premiums the insurers set constituted the business of insurance to which the McCarran-Ferguson antitrust immunity extended).

151. 509 U.S. 764 (1993).

their alleged agreement to boycott general liability insurers that used non-conforming policy forms.<sup>152</sup> The insurers urged the McCarran-Ferguson Act exemption, and the question was whether the agreements among primary insurers and reinsurers on standardized policy forms and terms of coverage constituted agreements to boycott.<sup>153</sup> The Ninth Circuit applied a broad definition of boycott, defining it as any “use of economic power of a third party to force the boycott victim to agree to the boycott beneficiary’s terms.”<sup>154</sup> A majority of the Court rejected this standard, concluding instead that a boycott exists only when the refusal to deal goes beyond the targeted transaction.<sup>155</sup> For example, a labor strike where the union refuses to work unless the employer agrees to employment terms is not a boycott, but would become a boycott if the union members agreed not to purchase the employer’s product until agreement is reached on employment terms.<sup>156</sup> Thus, a collective refusal by the defendant insurers to reinsure risks on the disfavored policy forms until desired changes were made was not a boycott.<sup>157</sup> Stated more generally, it is not a boycott for insurers to refuse to engage in a particular transaction until the coverage or other terms of that transaction are agreeable.<sup>158</sup>

In light of the Supreme Court’s narrow construction of the term “boycott” in *Hartford Fire*, it is clear that if insurers agree to use particular underwriting criteria and do not use this agreement to try to extract favorable terms from third parties on collateral transactions, a section 3(b) boycott is not involved and the exception to the antitrust exemption is not triggered. Under this logic,

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152. *Id.* at 770–71.

153. *Id.* at 779 n. 8.

154. In re Ins. Antitrust Litig., 938 F.2d 919, 930 (9th Cir. 1991), *aff’d in part and rev’d in part on other grounds sub nom*, *Hartford Fire Ins. Co. v. Cal.*, 509 U.S. 764 (1993).

155. *Hartford Ins. Co.*, 509 U.S. at 802–03. The Court unanimously agreed that “only those refusals to deal involving the coordinated action of multiple actors constitute section 3(b) boycotts,” *Id.* at 785, and that a section 3(b) boycott need not involve an “absolute refusal to deal,” but could instead be conditional. *Id.* at 785–86.

156. *Id.* at 805.

157. *Id.* at 806.

158. *See id.* at 806 (“it is obviously not a ‘boycott’ for the reinsurers to ‘refus[e] to reinsure coverages written on the ISO CGL forms until the desired changes were made,’ . . . because the terms of the primary coverages are central elements of the reinsurance contract—they are *what* is reinsured.”(emphasis in original)). *See also* Uniforce Temp. Pers., Inc., *supra* note 101, at 1300 (conduct does not constitute a boycott unless there is a “refusal to deal” in order to coerce a desired transaction); *N.J. Auto. Ins. Plan v. Sciarra*, 103 F. Supp. 2d 388, 407 (D.N.J. 1998) (“refusal to deal except on certain terms” does not constitute a boycott).

if the insurers are entering into this agreement without any effort to extract concessions on other collateral matters, it is difficult to imagine how such conduct would fall within the ambit of “coercion” or “intimidation,” two other terms in section 3(b) which to date have received no definitive interpretation in judicial decisions. Thus, it seems likely that a multi-insurer agreement not to use particular information in underwriting would not involve a Section 3(b) boycott, thereby triggering the exception to the antitrust exemption.

### 5. Summary

If life insurers were to agree to place a moratorium on the use of genetic information in underwriting, such an agreement would almost certainly be considered the “business of insurance” unless the policies in question did not involve risk spreading (*i.e.*, were investment vehicles), in which case the agreement would be outside the “business of insurance.” It is probable that the activity would be considered a part of business “regulated by State law” and it is very probable that the activity would not fall within the boycott exception to the exemption. Thus, a multi-insurer agreement not to use such information in underwriting would probably enjoy an exemption from federal antitrust laws under the McCarran-Ferguson Act, except with respect to insurance products that fall within the category of investment vehicles and thus fall outside the “business of insurance.”

#### *D. The State Action Exemption (the “Parker Doctrine”)*

Under the state action doctrine, restraints of trade that are the product of state regulatory policy are exempt from the antitrust laws. Sometimes called the “*Parker doctrine*” after the United States Supreme Court decision that is its cornerstone,<sup>159</sup> antitrust immunity is given to private parties as long as their conduct is authorized and regulated by the state. It is not enough for the state

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159. In *Parker v. Brown*, 317 U.S. 341 (1943), the Court upheld a California program regulating production and marketing of raisins by the state’s growers. The program was created by statute and was implemented by an advisory commission on which the state director of agriculture participated. The statute authorized programs that restricted competition among growers and maintained prices in the distribution of agricultural commodities to packers. The Court explained that this program was an “act of government which the Sherman Act did not undertake to prohibit.” *Id.* at 352. *Parker’s* roots lie in older cases sustaining state ownership and operation of business, state control of entry requirements through licensing, and state regulation of markets against Sherman Act attack. Milton Handler, *The Current Attack on the Parker v. Brown State Action Doctrine*, in 1 ANTITRUST IN TRANSITION 201, 208–09 (M. Handler, ed. 1991). For further discussion of *Parker*, see 1 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 221b, at 359–62 (Rev. 2d ed. 2000).

to immunize private conduct that would otherwise be unlawful, as would be the case if the state simply authorized private actors to fix prices; rather, the state must be involved so that the competitive restraints constitute "state action or official action directed by a state."<sup>160</sup>

The test for determining the availability of the exemption has two elements: "First, the challenged restraint must be 'one clearly articulated and affirmatively expressed as state policy'; second, the policy must be 'actively supervised' by the State itself."<sup>161</sup> The "clear articulation" prong is met if the state clearly intends through the enactment of a regulatory scheme to displace competition in a particular market.<sup>162</sup> "Specific detailed legislative authorization" of the restraint of trade is not required,<sup>163</sup> and it is only necessary that the statute permit, as opposed to require, the anticompetitive conduct.<sup>164</sup> The "active supervision" prong is met if state regulators have the statutory authority to review the challenged anticompetitive conduct and actually exercise that authority.<sup>165</sup> Exactly how vigorous state review must be to create the state action immunity is uncertain. In *Federal Trade Commission v. Ticor Title Co.*,<sup>166</sup> the Supreme Court found the active supervision test was not met where statutory review authority over rate filings existed, and the insurance department was "staffed and funded" and showed "some basic level of activity" in enforcing the rating law.<sup>167</sup> This fell short of demonstrating that "the State has exercised sufficient independent judgment and control so that the details of the [conduct] have been established as a product of deliberate state intervention."<sup>168</sup> Thus, more aggressive state regulation is needed to create *Parker* immunity than is needed for McCarran-Ferguson Act immunity, but existing case law does not quantify this difference.<sup>169</sup> The difference

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160. *Parker*, 317 U.S. at 351. For more discussion, see 1 PHILLIP E. AREEDA & HERBERT HOVENKAMP, *ANTITRUST LAW* ¶ 222a, at 387-88 (Rev. 2d ed. 2000).

161. *Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980) (citations omitted).

162. *S. Motor Carriers Rate Conference v. United States*, 471 U.S. 48, 60-61, 64 (1985).

163. *Lafayette v. La. Power & Light Co.*, 435 U.S. 389, 415 (1978).

164. *See Columbia v. Omni Outdoor Adver., Inc.*, 499 U.S. 365, 372-73 (1991).

165. *Fed. Trade Comm'n v. Ticor Title Ins. Co.*, 504 U.S. 621, 634 (1992); *Patrick v. Burget*, 486 U.S. 94, 101 (1988).

166. 504 U.S. 621 (1992).

167. *Id.* at 637-39.

168. *Id.* at 634 (alteration in original).

169. For more discussion, see Phil Goodin, Note, *Keeping the Foxes From Guarding the Henhouse: The Effect of Humana v. Forsyth on McCarran-Ferguson's Antitrust Exemption for the Business of Insurance*, 86 IOWA L. REV. 979, 984-85 (2001).

between the two regimes is largely academic, as it is difficult to imagine a situation where the *Parker* doctrine would confer immunity in circumstances where the insurer activity is insufficiently regulated by state law to obtain the McCarran-Ferguson immunity.<sup>170</sup>

Nevertheless, in those few states that presently limit life insurers' use of genetic information in underwriting,<sup>171</sup> an agreement among insurers not to use such information would be immune from antitrust liability under the *Parker* doctrine. Whatever anticompetitive impact would arise from such a restraint would be absolutely irrelevant under antitrust law by virtue of the state action doctrine. Likewise, if similar statutes were to be adopted in other states, insurers in those states would be absolutely immune from antitrust liability. As noted above, many more states have statutes that prohibit the use of genetic information in the underwriting of health insurance policies.<sup>172</sup> These statutes should not be viewed as constituting state action that immunizes collaborative conduct by life insurers with respect to genetic information. The enactment of a health insurance regulation does not carry a clearly stated legislative purpose to authorize the anticompetitive conduct in life insurance and does not put in place state mechanisms that supervise private conduct in this area.

To summarize, the state action doctrine does not immunize life insurers from antitrust liability for joint agreements to forego using genetic information in underwriting, except in those states where the use of such information is prohibited by state statute. The fact remains, however, that by exercising their prerogative to regulate and supervise insurers' use of genetic information in life insurance, the states could create federal antitrust immunity under the state action doctrine. If a few states enacted such legislation and life insurers, acting independently, conformed their underwriting practices to the requirements of these states, this conduct should not be deemed an unlawful combination triggering antitrust scrutiny.<sup>173</sup>

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170. KINTNER ET AL., *supra* note 98, § 70.13, at 249.

171. *See supra* note 1.

172. With respect to health insurance policies provided by employers as fringe benefits, the requirements of the state statutes are preempted by ERISA. *See generally* 29 U.S.C. §§ 1001-01a (1994). This gap is substantially filled with respect to genetic information, however, by the Health Insurance Portability and Accessibility Act of 1996, which prohibits group health insurers from making underwriting distinctions based on "genetic status." Pub. L. No. 104-191, §702(a)(1)(F), 110 Stat. 1936, 1945 (1996) (codified in scattered sections of 29 and 42 U.S.C.).

173. On the one hand, there is the general principle that a state cannot regulate activity outside its borders. *See text accompanying AREEDA, supra* note 160, at 146, from which it



### *E. The Noerr-Pennington Doctrine*

The *Noerr-Pennington* doctrine, which is named for two United States Supreme Court decisions that articulate the doctrine's substantive core,<sup>174</sup> gives antitrust immunity to restraints that derive from legislative, executive, regulatory, or judicial decisions resulting from the joint lobbying or litigation efforts of competitors. The protected conduct is the petitioning of the government to restrict competition in the marketplace.<sup>175</sup> Standard-setting by a private association is not protected by this doctrine; rather, the restraint must flow from government action.<sup>176</sup> Thus, life insurers would be free to collaborate to petition state legislatures to adopt statutes that would eliminate underwriting based on genetic factors. *Noerr-Pennington* would not protect an agreement among life insurers to stop using genetic information in underwriting.

Under existing authority, it is doubtful that joint insurer lobbying of the National Association of Insurance Commissioners (NAIC) would be protected by the *Noerr-Pennington* exemption, even though the NAIC is a voluntary body of government regulators, the efforts of which are often translated

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arguably follows that regulation in one state cannot create immunity in another state that lacks such regulation. But, although few cases have discussed the extraterritorial reach of *Parker* immunity, the logic of the doctrine seems to dictate that the exemption "must be coextensive with the scope of the Sherman Act, and thus [apply] to the interstate effects of a particular form of state action." *Caribe Trailer Sys. v. P.R. Mar. Shipping Auth.*, 475 F. Supp. 711, 723 (D.C. Dist. Ct. 1979). In *Caribe Trailer*, the actions of a Puerto Rican government agency in acquiring and operating steamships were protected by the state action exemption, even though this extended the exemption to state control of shipping lines operating outside the territory of Puerto Rico. The court noted that *Parker v. Brown* itself involved action by the State of California "to raise and stabilize the price of raisins, ninety-five percent of which were sold outside the state." *Id.* (citing *Parker*, 317 U.S. at 345).

174. *United Mine Workers of Am. v. Pennington*, 381 U.S. 657 (1965); *E.R.R. Presidents Conf. v. Noerr Motor Freight*, 365 U.S. 127 (1961).

175. See 1 PHILLIP E. AREEDA & HERBERT HOVENKAMP, *ANTITRUST LAW* ¶¶ 201–202d, at 148–64 (Rev. 2d ed. 2000).

176. See *Premier Elec. Constr. Co. v. Nat'l Elec. Contractors Ass'n*, 814 F.2d 358, 376 (7th Cir. 1987):

If the injury is caused by persuading the government, then the antitrust laws do not apply to the squelching (*Parker v. Brown*) or the persuasion (*Noerr-Pennington*). If the injury flows directly from the "petitioning"—if the injury occurs no matter how the government responds to the request for aid—then we have an antitrust case. When private parties help themselves to a reduction in competition, the antitrust laws apply.

directly into official state policy throughout the nation.<sup>177</sup> In *Preferred Physicians Mutual Risk Retention Group v. Cuomo*,<sup>178</sup> the court rejected insurers' claim of immunity, reasoning that *Noerr-Pennington* does not apply because the NAIC is not a governmental body: "[the NAIC] is a private trade association composed of government regulators from different states, and *Noerr-Pennington* immunity does not apply to such private associations."<sup>179</sup> Because the *Noerr-Pennington* immunity is grounded in a First Amendment right to petition the government, the fact that the NAIC is not a government entity—even though its membership consists of government officials—means that non-recognition of the immunity for efforts to petition the NAIC is sound doctrinally. As a matter of antitrust policy, however, it is not obvious that the *Noerr-Pennington* issue was decided correctly in *Preferred Physicians*. The leading Supreme Court authority on the question, upon which the court in *Preferred Physicians* relied, involved a very different trade organization and overtly anticompetitive conduct,<sup>180</sup> which would not be the situation with respect to collaborative insurer conduct with respect to underwriting factors. Even so, in the absence of clear case law endorsing multi-insurer collaboration to lobby the NAIC, one should not expect insurers to voluntarily test the limits of the immunity by engaging in such conduct. But *Noerr-Pennington* would apply if insurers collaborated to petition state legislators or insurance commissioners for a statute or rule authorizing industry-wide disregard of particular underwriting factors.

### III. THE STATE ANTITRUST LAWS AND ANTICOMPETITIVE INSURER CONDUCT

Generally speaking, state antitrust laws use language that tracks closely the federal statutes, and state courts give federal cases varying degrees of precedential value, but there are notable deviations from both propositions.<sup>181</sup>

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177. See NAT'L ASSOC. OF INS. COMM'RS 2001 ANNUAL REPORT, available at [http://www.naic.org/pressroom/2001\\_Annual\\_Report\\_X.pdf](http://www.naic.org/pressroom/2001_Annual_Report_X.pdf) (last visited March 1, 2003), at 3.

178. 865 F. Supp. 1057 (S.D.N.Y. 1994), *vacated on other grounds*, *Preferred Physicians Mut. Risk Retention Group v. Pataki*, 85 F.3d 913 (2d Cir. 1996).

179. *Id.* at 1072.

180. In *Allied Tube & Conduit Corp. v. Indian Head*, 486 U.S. 492 (1988), petitioner unsuccessfully urged that its efforts to affect a trade association's product standard-setting process were immune from antitrust liability. In that case, however, the petitioner recruited and orchestrated a vote at an annual meeting to approve a trade standard (one widely adopted verbatim in city codes) that would disadvantage the product of its competitors.

181. 14 HERBERT HOVENKAMP, ANTITRUST LAW ¶ 2410, at 302-03 (1999).

According to one recent compilation, forty-eight of the fifty states have general antitrust statutes, and many states have "little FTC" acts that generally operate in the same way as the federal statute.<sup>182</sup> Twelve states have statutory provisions specifically exempting some insurance-related activities.<sup>183</sup> Several states have statutes that incorporate federal exemptions, most notably the McCarran-Ferguson exemption and the state action doctrine, into state law.<sup>184</sup>

But many states have no such exemption and some generally refuse to find any immunity for insurance companies from state antitrust law.<sup>185</sup> Twenty-one states have a generic exemption for regulated industries, including insurers; these exemptions are usually functional equivalents of the state action doctrine.<sup>186</sup> In a number of states without statutory exemptions, courts have applied doctrines of exclusive and primary jurisdiction or the federal "filed rate" doctrine to provide insurers with defenses in state antitrust actions involving insurance rates.<sup>187</sup> It is difficult to generalize about state exemptions, except to say that in many states the exemption is a limited one.<sup>188</sup>

About a decade ago, state antitrust law became more significant for the insurance industry.<sup>189</sup> State enforcement became more aggressive and more coordinated,<sup>190</sup> and some states repealed part or all of the provisions giving state antitrust immunities to the insurance industry.<sup>191</sup> In 1988, California voters approved Proposition 103, which, *inter alia*, repealed the insurance antitrust exemption and substituted two safe harbors limited to the exchange of certain historical data and participation in state approved residual market mechanisms.<sup>192</sup> Thereafter, the legislature restored an exemption for joint

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182. INSURANCE ANTITRUST HANDBOOK, *supra* note 5, at 34.

183. *Id.* at 35.

184. *Id.* at 36.

185. Hovenkamp, *supra* note 181, ¶ 2411d, at 309–10.

186. INSURANCE ANTITRUST HANDBOOK, *supra* note 5, at 36.

187. *Id.* at 37–38. In *Keogh v. Chic. & Nw. Ry. Co.*, 260 U.S. 156 (1922), the Court held that a private shipper could not recover treble damages against railways that had set uniform rates filed with, and approved by, the Interstate Commerce Commission.

188. INSURANCE ANTITRUST HANDBOOK, *supra* note 5, at 37–38.

189. *Id.* at 33.

190. *See id.* (citing the multi-state investigation and federal court actions which resulted in the Court's decision in *Hartford Fire Ins. v. Cal.*, 509 U.S. 764 (1993)).

191. *See id.* (citing California, Texas, and New Jersey as prominent examples). *See also* Macey & Miller, *supra* note 111, at 5–6.

192. *See* CAL. INS. CODE § 1861.03(a), (b) (West 1993).

development of standardized policies.<sup>193</sup> In 1990, New Jersey eliminated its exemption for joint ratemaking in the private passenger automobile insurance market except for the “collection, compilation and dissemination of historical data.”<sup>194</sup> In 1991, Texas eliminated its exemption based on the McCarran-Ferguson exemption and substituted an exemption for “actions required or affirmatively approved by any statute of this state . . . or by a regulatory agency of this state.”<sup>195</sup> Since this flurry of activity a little over a decade ago, state legislatures appear to have given relatively little attention to insurance antitrust issues.

It is impossible to summarize here the antitrust law of all fifty states, but as a general proposition, insurers cannot be assured without careful study of the law of individual states that they will enjoy the same breadth of immunity from antitrust enforcement in the states as they do at the federal level. As a result, insurers will be reticent to engage in collaborative conduct, particularly if the perceived benefits from the conduct are relatively limited.

#### IV. THE IMPACT OF UNCERTAINTY

Although insurers are in the business of assuming and distributing risk, they are risk averse, just like the individuals and firms who pay premiums to transfer risk to them. Risk averse actors assign probabilities to the outcomes of conduct, and if the expected benefits of an activity do not exceed the expected losses, the activity will not occur.

As a matter of antitrust law, there is no impediment to individual life insurers unilaterally rejecting of the use of genetic information in underwriting. The Sherman Act and its state counterparts subject collaborative behavior between two or more market participants to antitrust scrutiny, not unilateral conduct. But individual insurers are not likely to renounce the right to use genetic information. As long as genetic information is thought to have the potential to help insurers make more precise risk classifications and more accurately price coverage, no insurer is likely to unilaterally subject itself to the comparative disadvantage that goes with renouncing the use of a viable, or potentially viable, rating tool. If information has predictive power for risk classification, the insurer that ceases to make distinctions based on genetic information will attract higher-risk

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193. CAL. INS. CODE § 1855.3–.4 (West 1993). Whether this legislation comports with Proposition 103 is arguable.

194. N.J. STAT. ANN. § 17:33B-31 (West 1994).

195. TEX. BUS. & COM. CODE ANN. § 15.05(g) (Vernon 2002).

insureds to its pools, and the insurer that uses the information to make distinctions will be able to offer lower-risk insureds a more favorably priced product, which in turn will cause lower-risk insureds to depart the pool of the insurer that declines to make such distinctions. Ultimately, the insurer ceasing to make distinctions will be forced to raise premiums to cover its higher-risk pool, which in turn will drive more insureds out of the pool. Left uncorrected, this adverse selection spiral will result in the collapse of the pool. The only circumstances in which an insurer should seriously contemplate unilaterally surrendering an underwriting tool is if the insurer is convinced that other insurers will follow suit. But in a competitive market, the insurer should anticipate that some other insurers will decline to do so in order to gain the comparative advantages that accompany the use of an underwriting tool with predictive power.

If unilateral surrender is not viable, the question becomes whether concerted action by multiple insurers could achieve the same result. For the same reasons discussed above, it is unlikely that insurers would be able to forge an industry-wide moratorium on the use of genetic information because of the industry's inability to effectively police the moratorium against nonconforming insurers. The possibility of competitive advantage from violating the moratorium means that the moratorium would not be accepted on an industry-wide basis. In these circumstances, some insurers might endorse the moratorium in principle but would be unwilling to subscribe to it knowing that industry-wide adherence is impossible.

Moreover, even if such an agreement could be reached, the collaborative conduct would raise the antitrust issues discussed earlier in this Article. The discussion in the prior two sections of this Article suggests that collaborative insurer standard-setting with respect to use of genetic information in underwriting would probably pass muster under the federal antitrust laws (provided the policies involved are insurance products, as opposed to financial investment devices that do not involve the spreading and distribution of risk). Greater uncertainty exists under state laws, particularly for insurers whose business is multi-state. For insurers, because the costs of being wrong about the lawfulness of such conduct are so significant, the conclusion that joint conduct is *probably* lawful is insufficient to cause insurers to proceed with the activity. A prominent insurance treatise explains the problem in this way:

The pervasive uncertainty about how antitrust principles will be applied in different insurance contexts chills not only the ardor of the more aggressive competitors but also the willingness of many insurers to participate in collective mechanisms to serve various public policy objectives. The

threat of litigation is real. Antitrust law permits, even encourages, such actions by providing for treble damages . . . .

The possibility of treble damages, the creativity of plaintiff antitrust lawyers, the potential of large and hugely expensive class action litigation, the civil and criminal penalties available to the government, and the uncertain results when applying antitrust law to insurance all tend to stifle even activity that might ultimately pass antitrust muster.<sup>196</sup>

Only if collaborative conduct promises benefits more substantial than the risks associated with possible antitrust liability would the rational insurer be interested in joining the agreement. The cost-benefit calculus does not favor concerted action to surrender the use of a viable underwriting tool.

The creation of an explicit statutory immunity for collaborative insurer activity with respect to underwriting factors—or with respect to the use of genetic information in particular—would remove the antitrust uncertainty, but it would not alter the competitive forces that make a multi-insurer agreement unlikely in the first place. As is often the case in insurance underwriting, industry movement to a particular underwriting standard occurs only if the movement is universally adopted, which will not occur absent compulsion by some external authority (such as government regulation). Thus, the most effective way to achieve a moratorium on insurers' use of genetic information in life insurance underwriting is to prohibit the practice outright, as many states have done with health insurance and some have done with life insurance. This, however, turns the discussion full circle to the fundamental question that is the root of this discussion: whether it is feasible and desirable to prohibit life insurers from using genetic information in underwriting and, if so, whether such prohibitions are politically achievable in the legislative arena. It is because this question is so difficult to answer in the affirmative that it becomes attractive to ask whether insurers could achieve the proscription by simply agreeing to it among themselves. Unfortunately for those hoping for the simple solution, the complexities and uncertainties of insurance antitrust stand in the way, relegating those who wish a change in the *status quo* to take their case to the political arena.

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196. Jon S. Hanson, *The Regulation of Life Insurance—Part 2*, in MCGILL'S LIFE INSURANCE at 673–74 (Edward E. Graves ed., 3d ed. 2000).

