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Commentary

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Insurance companies have come under increasing scrutiny in recent years from government antitrust enforcers and from private attorneys specializing in antitrust suits. This increased scrutiny has caused companies to reassess their practices for compliance with antitrust laws, including many practices that the industry has followed for years. One such practice is joint underwriting, arrangements such as pools and binding authorities, where a single underwriter prices and accepts risks on common terms for several insurers. On the surface, these arrangements can appear to be equivalent to price-fixing: rather than insurers competing head-to-head for their own individual sales, they are brought together in a scheme where they all cover a particular insured at the same premium rates, limits and terms, with the coverage allocated among them in accordance with predetermined shares.

In fact, no antitrust liability should attach to normal joint underwriting arrangements, due to the availability of certain exemptions from antitrust laws and to the correct application of the antitrust laws in the absence of those exemptions. However, companies need to be vigilant to prevent legitimate joint underwriting activities from leading to other practices that can be found to violate the antitrust laws, such as unreasonably broad constraints on competing with the joint underwriting arrangement, collusion outside of the arrangement and boycotts.

The Practice Of Joint Underwriting

In a typical joint underwriting arrangement, several insurers agree to accept fixed percentage shares of insurance or reinsurance contracts executed on their behalves by a common underwriting agent. Each insurer is entitled to its fixed share of premiums, less expenses and fees, earned on these contracts, and each is liable for its fixed share of the losses. In most schemes, each insurer's liability is several and not joint; none can be held responsible for another participant's share of the losses. A written contract between each insurer and the underwriting agent memorializes the scope and limits of the agent's underwriting authority and the agent's compensation, which frequently includes a share of profits earned on the contracts.

Many joint underwriting arrangements are established by state law or state insurance regulations in lines of business such as health and workers' compensation, where the state seeks to have a residual market offering coverage to insureds that cannot obtain adequate or affordable coverage on commercial markets. Participation in these schemes usually is mandatory for companies that write the line of business in the state, and their shares generally are equal to their portion of the total business written in the state for the particular line.

Voluntary joint underwriting arrangements often take the form of pools offering coverage for risks with very high insurable values, such as property and casualty coverage for airlines and nuclear power plants. These pools assemble high levels of capacity behind a single underwriter, commonly known as a "managing general underwriter" or "MGU." Insureds receive the benefit not only of the higher capacity but also of a diversification of insurers and hence a lower insolvency risk.

Foreign insurers, Lloyd's syndicates in particular, frequently will utilize voluntary joint underwriting arrangements to reach markets in the United States that require an underwriter with specialized knowledge and local market presence. In the Lloyd's arrangements, the underwriting agent is known as a "coverholder," and the agent's contract with the syndicates is known as a "binding authority."

The Relevant Antitrust Laws

The provision of the antitrust laws potentially applicable to joint underwriting is Section 1 of the Sherman Antitrust Act, which prohibits agreements in "restraint of trade."[1] An agreement among actual or potential competitors to fix the prices that they will charge or to allocate business among themselves ordinarily is found to be a *per se* violation of Sherman Act § 1, meaning that a violation will be found without the need to show an actual impairment of competition.[2]

The Sherman Act is a federal law applicable to agreements affecting interstate and international commerce. Almost every state has enacted its own antitrust law, which applies to agreements affecting commerce with the particular state.[3] These state antitrust laws generally mirror the federal Sherman Act and in most states are interpreted consistently with federal court interpretations of the Sherman Act.

State Action Exemption For Mandatory Pools

Mandatory joint underwriting arrangements rarely should be vulnerable to an antitrust challenge, regardless of the merits of any challenge, due to the state action exemption. Under this exemption, the antitrust laws do not apply to a restraint on competition imposed by the state "as an act of government."[4] To the extent that insurers merely participate in a joint underwriting scheme in compliance with a requirement imposed by a state statute, the conduct at issue is that of the state legislature, and it will be deemed *ipso facto* exempt from federal antitrust laws.[5]

The terms of a mandatory joint underwriting scheme frequently are established not by a statute but by regulations adopted by a state insurance commissioner. Three federal courts of appeals have held that regulations adopted by a state's executive officers are *ipso facto* actions of the state and therefore qualify for the state action exemption without any further showing.[6] The Supreme Court has reserved decision on this issue.[7] The Court, however, has indicated that so long as the state official's decision to limit competition is in accordance with an intention "clearly articulated and affirmatively expressed as state policy" in a statute, compliance with the regulation will be exempt.[8] Thus, where the legislature adopts legislation that clearly calls for the insurance commissioner to establish and oversee a mandatory joint underwriting scheme, and the insurance commissioner adopts regulations establishing the terms of the scheme, insurers who participate in the scheme in compliance with those regulations should qualify for the state action exemption.

In some mandatory schemes, the premiums, coverage and other terms are set not by the legislature or the insurance commissioner but by a board consisting of insurers participating in the scheme. One federal court of appeals has found such a board to be the equivalent of a state official and has applied the state action exemption to its actions as if they were the actions of the insurance commissioner.[9] Whether any other court reaches that conclusion will depend upon the decision in a case currently pending before the Supreme Court, which will address the application of state action immunity for state boards and commissions made up of private individuals.[10]

If and to the extent that insurers setting the terms of a mandatory joint underwriting scheme are deemed to be private rather than state actors, the state action exemption might still be available. In this situation, two requirements must be met: (1) the alleged impairment of competition must be "clearly articulated and affirmatively expressed as state policy;" and (2) the restraint must be "actively supervised by the State itself."[11]

The first requirement, clear articulation, will be met when a statute enacted by the legislature "explicitly permits the displacement of competition"[12] or "the displacement of competition was the inherent, logical, or ordinary result of the exercise of authority delegated by the state legislature."[13] The issue is whether the state "clearly intends to displace competition . . . with a regulatory structure."[14] The basic process of joint underwriting – setting common premium rates and coverage terms for all participants and allocating business among them – should qualify, as it is the clear and obvious result of state laws mandating joint underwriting.[15] However, if the participants in a mandatory joint underwriting scheme adopt restraints on competition

that are neither expressly permitted by statute nor the inherent, logical result of the authority granted by statute, for example if they seek to restrain competition among themselves outside of the scheme, the state action exemption may not be available.

To apply the second requirement, whether the anticompetitive conduct is "actively supervised by the State," courts assess "whether the State has exercised sufficient independent judgment and control so that the details of the rates and prices have been established as a product of deliberate state intervention, not simply by private agreement."[16] This requirement will not be met when the participants in the scheme set the rates and terms of coverage, which then go into effect unless the insurance commissioner chooses to veto them.[17] For the state action exemption to apply, a state official must be actively involved in reviewing and approving the private conduct for compliance with state law and policy.[18] Furthermore, the state supervision must apply to the particular conduct that is alleged to violate the antitrust laws.[19] If the insurance commissioner reviews and approves the rates set for a joint underwriting scheme but not all of the coverage terms, an agreement among the participant terms on any such unreviewed coverage terms would not qualify for the state action exemption.

Some states recognize an equivalent state action exemption to their antitrust laws.[20] Other states do not follow the federal exemption, but no state has held that participation in a state mandated joint underwriting scheme is a violation of the state's antitrust laws. Such a claim at a minimum would set up a conflict between two state laws and would require the court to reconcile them.[21] To uphold the antitrust claim, a court would have to conclude that the state legislature, when enacting the state's antitrust law, intended to abolish very specific legal requirements like mandatory joint underwriting, and no court is likely to reach that conclusion. Hence, where insurers' conduct in participating in a mandatory joint underwriting scheme qualifies for the federal state action exemption, the same conduct very likely will not be found to violate state antitrust laws.

Immunity From Federal Antitrust Laws

Participation in voluntary joint underwriting, by definition, is not done pursuant to a requirement of state law and therefore cannot qualify for state action immunity. However, voluntary joint underwriting schemes, as well as mandatory schemes that fail to qualify for the state action exemption, generally should benefit from the McCarran-Ferguson Act, which provides immunity from federal, but not state, antitrust laws for conduct that (1) constitutes "the business of insurance," (2) is "regulated by State law," and (3) is not an "act of boycott, coercion or intimidation."[22]

As to the first requirement, the Supreme Court has held that a practice will be deemed the "business of insurance" upon consideration of "first, whether the practice has the effect of transferring or spreading a policyholder's risk; second, whether the practice is an integral part of the policy relationship between the insurer and the insured; and third, whether the practice is limited to entities within the insurance industry."[23] The essential processes of joint underwriting, a single underwriter sets premiums and terms for all participants and the coverage is allocated among them, satisfy all three factors. It undeniably has the effect of spreading a policyholder's risk. It is an integral part of the policy relationship, in that it establishes the relationship and sets its terms. Finally, only insurance companies engage in the practice of jointly underwriting insurance. On these grounds, two courts of appeal have found joint underwriting to constitute the "business of insurance."[24] Other lower courts can be expected to reach the same conclusion.

Courts have ruled that certain practices of insurance companies do not constitute the "business of insurance." Examples include dealings with third party providers of goods and services[25] and agreements on brokerage commissions.[26] Hence, for practices outside of the essential processes of joint underwriting, the availability of immunity will depend upon an assessment of the particular practice.

The second requirement, "regulated by State law," is much more lenient than the "actively supervised" requirement of the state action exemption. The authority to review and prohibit "unfair insurance practices," which most states grant to their insurance commissioners in the same or similarly broad terms, has been found sufficient, whether or not the commissioner has actively reviewed the conduct at issue.[27] The category of "unfair insurance practices" is broad enough to cover most, and possibly all, aspects of joint underwriting that might violate the antitrust laws. Hence, joint underwriting arrangements should have no difficulty satisfying the state regulation requirement for immunity.

Furthermore, the requirement of state regulation is met when the activity is subject to regulation, whether or

not all of the insurers engaged in it are within the state's jurisdiction.[28] Thus, joint underwriting by foreign insurers, like Lloyd's syndicates, can benefit from immunity, because one or more state insurance commissioners will have jurisdiction over the coverholder and will have the authority to review the coverholder's practices in setting premiums, coverage and other terms.

Immunity will be lost under the third requirement, "boycott, coercion or intimidation," when the conduct at issue involves an agreement not to deal in one transaction for the purpose of coercing terms in a separate or collateral transaction.[29] As nothing in the basic operations of joint underwriting relates to any collateral transactions, immunity generally should not be lost on this ground. However, if the members of the joint underwriting scheme do attempt coerce terms in collateral transaction, for example if they collectively agree not to place other business with brokers who compete with the scheme, they could lose the benefit of immunity.[30]

Joint underwriting schemes, therefore, generally should qualify for immunity under the McCarran-Ferguson Act. This immunity applies, however, only to the federal antitrust laws. It provides no immunity from state antitrust laws. Some states expressly grant immunity from the state's antitrust laws for insurance companies, agents and brokers for conduct that is permitted by the state's insurance laws or is regulated by the insurance commissioner.[31] In most states, insurers are subject to the antitrust laws to a substantial extent and must take care to conform their conduct to these laws.

Elements Of A Sherman Act Violation

Where a joint underwriting scheme does not qualify for either the state action exemption or McCarran-Ferguson immunity, its legality will turn on the application of Section 1 of the Sherman Antitrust Act, or its state law counterparts, which prohibit a "contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade."[32] Establishing a violation of Sherman Act § 1 requires proof of two elements.

The first requirement is proof of an *agreement* or a concert of action. Actions taken independently or unilaterally by a single firm cannot violate Section 1.[33] The agreement can be vertical, meaning that the parties are at different levels of the chain of production or distribution, such as suppliers or customers. The agreement can also be horizontal, meaning that the parties are at the same level of production or distribution. In other words, they are actual or potential competitors.

The second requirement is that the agreement, once it is identified, have an *unreasonable* effect on competition. Certain types of agreements, such as horizontal agreements fixing prices among competitors, are deemed *per se* unreasonable and will be found illegal without any further showing of an effect on competition.[34] Other types of agreements are analyzed under the "rule of reason," which considers, based the facts the facts and circumstances of the particular agreement, whether it "is one that promotes competition or one that suppresses competition."[35]

The Basic Structure And Terms Of The Joint Underwriting Scheme

In all voluntary joint underwriting schemes, and in some mandatory schemes,[36] a contract between the underwriter and each participating insurer will establish the essential terms of the scheme, such as the scope and limit of the underwriter's authority to execute contracts and to settle claims on behalf of the insurer, the underwriter's reporting obligations and the underwriter's compensation. As a series of separate agreements between the underwriter and each insurer, these contracts are vertical agreements. All vertical agreements of this type are analyzed under the rule of reason.[37] An agreement between a single insurer and a single underwriter on such terms as the scope of authority, reporting and compensation would not even arguably suppress competition. Nothing in that agreement affects the ability of any other insurer or any other underwriter to compete for any business. Hence vertical agreements establishing the basic terms of a joint underwriting scheme would not be found unreasonable or a violation of Sherman Act § 1.

An antitrust challenger could assert that a joint underwriting scheme also reflects an agreement among the participating insurers, which would be a horizontal agreement. In most schemes, a horizontal agreement would be difficult to find. Contracts for joint underwriting usually are formed by the underwriter or its broker negotiating separately with each participating insurer, not by the insurers negotiating with each other. Moreover, the contracts typically state rights and obligations running between the underwriter and each insurer separately, not between the insurers. Most contracts state explicitly that the liability of each insurer is several and not joint, so that the obligations and performance of any one insurer has no effect on the obligations or performance of any other insurer under the contact.

The argument for finding a horizontal agreement would include an assertion that each insurer entered

the scheme knowing that other insurers would participate in the same insurance contracts at the same premium rates and terms, but this assertion alone would not be sufficient. A horizontal agreement under the Sherman Act cannot be inferred from the fact that competitors took parallel actions, each knowing or expecting that the others would take the same action.[38] Finding a horizontal agreement would require additional proof that tends to exclude the possibility that each participating insurer decided independently to enter the joint underwriting scheme, such as proof that agreeing to the terms of the scheme would have been contrary to each insurer's interests in the absence of a commitment from its competitors to agree to the same terms.[39] The availability of such proof will depend upon the facts and circumstances surrounding a particular underwriting scheme.

If a horizontal agreement could be shown in a particular case, the joint underwriting scheme would effectively be an agreement among competitors to charge the same price and to allocate business among themselves. Ordinarily, an agreement of this type would be a *per se* violation of the Sherman Act.[40] However, the *per se* rule of illegality does not apply when competitors integrate their operations with the purpose and effect of increasing their efficiency and competitiveness, and they adopt horizontal restraints that are reasonably necessary to achieve that beneficial integration.[41]

The process of joint underwriting fits this description. It involves an integration of the underwriting operations of the participating insurers, and it achieves efficiencies and increases competitiveness through a number of measures:

- First, joint underwriting substantially increases the capacity offered by an individual underwriter, usually offering much more capacity than any participating insurer could offer, or would be willing to offer, on its own. This assembling of capacity is particularly important in lines of business requiring very high limits of liability, like aviation and nuclear power, where joint underwriting schemes frequently compete.

- Second, the scheme offers a diversification of insurers offering the high capacity, which lowers the risk to policyholders of an insolvency.

- Third, the scheme gives the participating insurer the services of underwriters with specialized skills and experience, enabling the insurers to compete in lines of business in which their own underwriters lack the expertise or experience needed to compete effectively.

- Fourth, in some lines of insurance business, the underwriter must have a presence in the local market, for purposes such as loss prevention activities. Joint underwriting schemes open these markets to foreign insurers, who do not themselves have the needed local market presence.

Because of these competitive benefits, a joint underwriting arrangement will not be deemed *per se* illegal. Its legality will be tested under the "rule of reason," meaning that it will be found legal unless evidence shows that the effect of the particular arrangement is more to impair than to promote competition.[42]

The essential terms of joint underwriting — a single underwriter sets identical premiums and terms for all participants and the coverage is allocated among them — should pass muster under the rule of reason. A participating insurer usually would not or could not offer on its own coverages and premiums as attractive as those of the scheme. An insurer can offer the coverage terms and better premiums through the scheme, by reason of the scheme's higher capacity, diversification, specialized underwriting expertise and/or local presence. The overall impact of the arrangement usually will be to increase the number of effective competitors in the line of business, which is an enhancement of competition. Moreover, nothing in the normal joint underwriting scheme forecloses any other insurers from competing for the same business, either individually or through other joint underwriting schemes.[43] The facts surrounding particular joint underwriting schemes might differ, with possibly different results under the rule of reason, but the essential features of joint underwriting ordinarily should be found legal under the Sherman Act.

Restrictions On Competing With The Scheme

In some voluntary joint underwriting schemes, the participating insurers agree not to offer the same line of business in the same geographic market as the scheme, either directly or through another joint underwriter. The legality of such restrictions will depend upon the facts and circumstances of each particular case, including whether the agreement not to compete is found to be a vertical or a horizontal agreement.

To the extent that the agreement establishing the scheme is treated as a series of separate vertical agreements between the underwriter and each participating insurer, the restraint on competition is equivalent to each insurer agreeing to make the underwriter the exclusive outlet for its insurance capacity in the particular line of business and geographic market. A vertical agreement establishing an exclusive outlet for a supplier is presumptively legal and will not violate the Sherman Act in the absence of evidence that the agreement has the effect of establishing or maintaining a monopoly.[44] Insurance markets rarely are vulnerable to monopolization, due to the ease in which insurers can enter markets and expand their capacity. Consequently, a set of entirely vertical agreements preventing the participants in an underwriting scheme from competing with the scheme will rarely raise any serious antitrust risks.

The issue becomes more complicated if the facts of the particular arrangement lead to finding a horizontal agreement among the participants not to compete with the scheme. An agreement among competitors not to compete in a particular market usually is found *per se* illegal,[45] but the rule of *per se* illegality would not apply to most cases of joint underwriting. Where a joint undertaking among competitors serves to increase efficiencies and competitiveness, as is the case with joint underwriting schemes, an agreement among the competitors not to compete with their joint undertaking is considered an "ancillary restraint," and is not *per se* illegal, if the restraint is reasonably necessary to achieve the efficiencies and competitive benefits of the undertaking.[46]

Restrictions on competing with a joint underwriting scheme ordinarily would qualify as ancillary restraints. An essential part of the scheme is that the common underwriter offers participating insurers the benefit of its position in the particular market, including its underwriting expertise, its reputation as an underwriter and its relationships with brokers and policyholders. Underwriters would be reluctant to offer these benefits if insurers could take advantage of them on coverage placed through other channels, in which the underwriter did not have a share of the profits. Essentially, the justification for the restraint on competition is that it prevents a free-rider problem that would undermine the effectiveness of the joint underwriting scheme. Ancillary restraints on competition with joint undertakings frequently are justified on the grounds that they are necessary to prevent this type of free-rider problem.[47]

Furthermore, an ancillary restraint does not violate the Sherman Act unless the parties agreeing to it possess market power, meaning that they have the ability to raise their prices by reducing their output, as a result of a very large market share and an inability of competitors to enter the market or to expand their capacity in response to the premium increase.[48] Without market power, the parties' restraint on poses no threat that consumers will be denied the benefits of competition. It is possible that a particular underwriting scheme possesses market power, but most clearly do not, as they operate in markets that are highly competitive.[49]

It is important to note that agreements among insurers participating in joint underwriting schemes not to compete will be deemed ancillary restraints only so long as they are limited to the markets where the joint underwriting scheme operates. If the parties agree not to compete in lines of business or geographic areas where the joint underwriting scheme does not operate, the restrictions could not be justified as an ancillary restraint. It would be presumed unlawful, and a violation of the Sherman Act would be found unless the parties could prove that its overall effect is to enhance competition.[50]

Restrictions On Membership

During the 1960s, the two leading aviation insurance pools in the United States were investigated by the Department of Justice for restrictions that they imposed on insurers joining the pools. Both investigations ended with consent decrees, and as a consequence no precedent was established.[51] Judicial decisions issued since those consent decrees have provided substantial guidance on when membership restrictions for voluntary joint underwriting schemes will raise antitrust risks.[52]

Frequently the membership is selected unilaterally by the underwriter, and no participating insurer has any involvement in deciding which other insurers may or may not be invited. In that situation, no agreements on membership restrictions are formed, and no Sherman Act § 1 violation will be found.

In some schemes, the agreements between the underwriter and each participating insurer may preclude the underwriter from inviting any other insurers, or certain other insurers, from joining the scheme, or it may set out criteria or processes for selecting other participating insurers. As vertical agreements, their legality would be tested under the rule of reason.[53] The legal test would be the same if the membership restrictions were found

to be part of a horizontal agreement among the participating insurers. Membership rules established by participants in joint undertakings that enhance competition are assessed under the rule of reason.[54]

Under the rule of reason, agreements restricting membership in a joint underwriting scheme ordinarily will be found legal. Membership restrictions can serve to enhance competition, by keeping out of the scheme insurers who might be less attractive to potential insureds for various reasons, such as a weaker capital structure and increased insolvency risk. They also give participating insurers confidence that their shares of the scheme's profits will not be diluted and assure the pioneering participants in a scheme that they need not share its benefits with insurers who wish to join only after the profitability of the scheme is established. As to negative effects on competition, a membership restriction might prevent another insurer from retaining the particular underwriter's services, but unless the underwriter has a monopoly over underwriting in the particular insurance market, which is rarely if ever the case, the agreement would not lead to any impairment of competition. The excluded insurer would still have the ability to compete, either by delegating to another underwriter or by underwriting directly on its own.

Membership restrictions might, however, lead to a risk of a boycott allegation. A boycott will be found when firms agree not to deal with another as a means of coercing the terms of a transaction that is different from and unrelated to the transaction on which they are refusing to deal.[55] For example, if the participants in a joint underwriting scheme agree to refuse membership to an insurer, based on that insurer's competition with the participants in other markets where the scheme does not operate, the agreement would be a *per se* violation of the Sherman Act.[56] Furthermore, the McCarran-Ferguson Act does not confer immunity from federal antitrust laws for boycott claims.[57] To avoid the risk of a boycott claim, a scheme should deny membership only on grounds that are reasonably related to the scheme's operation and effectiveness. Membership should not be denied to benefit participants on business that they write outside of the scheme.

Competition Outside Of The Scheme

One significant antitrust risk presented by a joint underwriting scheme is that it brings together companies that frequently are competitors outside of the scheme. Obviously, participants should not use the scheme as a forum for agreeing to raise prices, limit output or otherwise restrain competition in other markets. Even if participants refrain from such conduct, they face a risk of an antitrust claim alleging that the joint underwriting scheme gave them an opportunity to collude in other markets. An opportunity to collude, by itself, is not illegal and would not be sufficient grounds for a government agency or a private plaintiff to assert a claim of actual collusion among the participants.[58] However, in a situation where other indications of collusion are present, such as clear patterns of price leadership and conduct inconsistent with independent decision-making, an opportunity to collude could be a significant factor in a court allowing a collusion claim to proceed to trial.

To avoid this risk, the joint underwriting scheme must be managed carefully. As much as possible, the underwriter should deal and communicate with participating insurers individually and separately. Participants who are actual or potential competitors outside of the scheme should not meet or communicate directly with one another unless necessary, and when necessary, their dealings and communications with one another should be monitored closely to ensure that they do not address or discuss competition outside of the scheme. The information that participants receive from the underwriter should relate only to the scheme. The underwriter should not collect any information from participants concerning their activities outside of the scheme, unless the information is clearly relevant to the management of the scheme, and where such information is collected, is must be kept confidential under procedures that ensure no participant's confidential information is disclosed to any other participant. Finally, a joint underwriting scheme should adopt and implement, with the assistance of counsel, an effective antitrust compliance program.

Endnotes

1. 15 U.S.C. § 1.

2. *United States v. Trenton Potteries Co.*, 273 U.S. 392, 396-401 (1927).

3. *See, e.g.*, NY Gen. Bus. Law § 340 (New York); Conn. Gen. Stat. § 35-26 (Connecticut); N.J. Stat. § 56:9-3 (New Jersey); 740 ILCS 10/3 (Illinois); Cal. Bus. & Prof. Code § 16720 (California).

4. *Parker v. Brown*, 317 U.S. 341, 352 (1943).

5. *Hoover v. Ronwin*, 466 U.S. 558, 569 (1984).

6. *Neo Gen Screening, Inc. v. New England Newborn Screening Program*, 187 F.3d 24, 29 (1st Cir. 1999); *Charley's Taxi Radio Dispatch Corp. v. SIDA of Hawaii, Inc.*, 810 F.2d 869, 875-76 (9th Cir. 1987); *Saenz v. University Interscholastic League*, 487 F.2d 1026, 1027-28 (5th Cir. 1973).

7. *Hoover v. Ronwin*, 466 U.S. 558, 568 n. 17 (1984).

8. *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 46 n. 10 (1985).

9. *See Bankers Ins. Co. v. Florida Residential Property & Casualty Joint Underwriting Ass'n*, 137 F.3d 1293, 1297-98 (11th Cir. 1998).

10. *North Carolina State Board of Dental Examiners v. FTC*, 717 F.3d 359 (4th Cir. 2013), *cert, granted*, 134 S. Ct. 1491 (2014).

11. *California Retail Liquor Dealers Assn v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980).

12. *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365, 373 (1991).

13. *FTC v. Phoebe Putney Health Sys., Inc.*, 133 S. Ct. 1003, 013 (2013).

14. *Southern Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48, 64 (1985).

15. *Bankers Ins. Co. v. Florida Residential Property & Casualty Joint Underwriting Ass'n*, 137 F.3d 1293, 1298 (11th Cir. 1998).

16. *FTC v. Ticor Title Insurance Co.*, 504 U.S. 621, 634-35 (1992).

17. *Id.* at 638.

18. Where a state official with authority to regulate premium rates reviews and approves premiums as reasonable, the "filed rate" doctrine bans a private party from suing under the antitrust laws for damages based upon an overcharge, but government antitrust actions and a private injunction actions remain available. *Keogh v. Chicago & N.W. Ry Co.*, 260 U.S. 156 (1922).

19. *Patrick v. Burget*, 486 U.S. 94, 101 (1988).

20. *See, e.g., Duck Tours Seafari, Inc. v. Key West*, 875 So.2d 650, 653 (Fla.App. 2004); *Fischer, Spruhl, Herzurm & Assocs. v. Forest T. Jones & Co.*, 586 S.W.2d 310, 313-14 (Mo. 1979).

21. *See, e.g., Town of Hallie v. City of Chippewa Falls*, 105 Wis.2d 533, 537-39, 314 N.W.2d 321 (1982).

22. 15 U.S.C. §§ 1012(b), 1013(b).

23. *Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119, 129 (1982).

24. *Arroyo-Melecio v. Puerto Rican American Ins. Co.*, 398 F.3d 56, 67-69 (1st Cir. 2005); *Slagle v. ITT Hartford*, 102 F.3d 494, 498-99 (11th Cir. 1996).

25. *Pireno, supra* at 129: *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 214-15 (1979).

26. *In re Insurance Brokerage Antitrust Litigation*, 618 F.3d 300, 356-61 (3rd Cir. 2010).

27. *FTC v. National Casualty Co.*, 357 U.S. 560 (1958); *In re Workers' Compensation Ins. Antitrust Litigation*, 867 F.2d 1552, 1557-60 (8th Cir. 1989); *Mackey v. Nationwide Ins. Cos.*, 724 F.2d 419, 420-21 (4th Cir. 1984).

28. *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 781-82 (1993).

29. *Id.* at 803-09 & n. 6.

30. *See, e.g., Arroyo-Melecio, supra* at 69, 71-72.

31. *See, e.g.*, 740 ILCS 10/5(5) (Illinois); NY Gen. Bus. Law § 340(2) (New York).

32. 15 U.S.C. § 1.

33. *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 767-68 (1984).

34. *Northern Pacific Ry Co. v. United States*, 356 U.S. 1, 5 (1958).

35. *National Society of Professional Engineers v. United States*, 435 U.S. 679, 691 (1978).

36. To the extent that the terms of a mandatory joint underwriting scheme are set by statute or regulation, no agreement will be found. "A restraint imposed unilaterally by government does not become concerted-action within the meaning of" Sherman Act § 1, "simply because it has a coercive effect upon parties who must obey the law." *Fisher v. City of Berkeley, California*, 475 U.S. 260, 267 (1986).

37. *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 49-52 (1977).

38. *Theatre Enterprise, Inc. v. Paramount Film Distributing Corp.*, 346 U.S. 537, 541 (1954).

39. *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986).

40. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 221-23 (1940).

41. *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1, 21-23 (1979); *see United States v. Morgan*, 118 F. Supp. 621, 686-91 (S.D.N.Y. 1953) (finding syndicates of securities underwriters legal under the rule of reason).

42. *Broadcast Music, supra; NCAA v. Board of Regents of the University of Oklahoma*, 468 U.S. 85, (1984).

43. Mandatory joint underwriting schemes usually do not face significant competition, because they are established to provide insurance coverage that is not available to the insureds on commercial markets. By providing insurance coverage that otherwise would not be available, such schemes clearly increase competition and benefit policyholders.

44. *United States v. Arnold Schwinn & Co.*, 388 U.S. 365, 376 (1967); *E & L Consulting, Ltd. v. Doman Industries Ltd.*, 472 F.3d 23, 30-31 (2nd Cir. 2006); *Paddock Publications, Inc. v. Chicago Tribune Co.*, 103 F.3d 42, 47-48 (7th Cir. 1997).

45. *United States v. Topco Associates*, 405 U.S. 596, 608 (1972).

46. *United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 282 (6th Cir. 1998), *aff'd*, 175 U.S. 211 (1899); *Rothery Storage & Van Co. v. Atlas Van Lines*, 792 F.2d 210, 224, 229 (D.C. Cir. 1986); *Polk Bros., Inc. v. Forest City Enterprises, Inc.*, 776 F.2d 185, 188-89 (7th Cir. 1985).

47. *SCFC ILC, Inc. v. Visa USA, Inc.*, 36 F.3d 958 (10th Cir. 1994) *Rothery, supra* at 212-13, 221-23; *Polk Bros., supra* at 190.

48. *Rothery, supra* at 219-21; *Polk Bros., supra* at 191.

49. The federal antitrust agencies have announced a policy of not challenging a collaborative undertaking if it has competition enhancing effects and the participants in the collaboration have a collective market share of less than 20%. FTC & DOJ, Antitrust Guidelines for Collaborations among Competitors (2000) ¶ 4.2.

50. *Polygram Holding, Inc. v. F.T.C.*, 416 F.3d 29 (D.C. Cir. 2005).

51. *United States v. United States Aviation Underwriters, Inc.*, 1968 Trade Cases (CCH) ¶ 72,521 (S.D.N.Y. Oct. 17, 1968); *United States v. Associated Aviation Underwriters*, 1967 Trade Cases (CCH) ¶ 72,260 (S.D.N.Y Dec. 1, 1967).

52. Issues with membership restrictions will not arise in mandatory schemes, because the membership in these schemes by definition is determined by statutes or regulations and not by agreement.

53. *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717, 723-36 (1988).

54. *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284 (1985).

55. *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 800-08 (1993).

56. *Klor's, Inc. v. Broadway-Hale Stores*, 359 U.S. 207, 222 (1959).

57. 15 U.S.C. § 1013(b).

58. *In re Insurance Brokerage Antitrust Litigation*, 618 F.3d 300, 349 (3rd Cir. 2010). ■

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