Testimony of

The Honorable Trent Lott

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Prepared Remarks of U.S. Senator Trent Lott of Mississippi

Senate Judiciary Committee Hearing on the McCarran-Ferguson Act and Antitrust Immunity

Wednesday, March 7, 2007

Let me begin by thanking Chairman Leahy and Senator Specter, the Ranking Member, for all of their efforts on this issue. I appreciate this opportunity to address the Committee on this issue that I believe is vitally important to my constituents.

As I have stated before, it wasn't until after Hurricane Katrina that I gained a true understanding of the fact that the insurance industry had a blanket exemption from our antitrust law. And as I witnessed the reprehensible behavior of the insurance industry in their response to Katrina, I became curious about the history, rationale, and wisdom of such a broad exemption from federal oversight.

As I began to research the history of the exemption, I was astounded by what I found. Until 1944, regulation of the business of insurance resided securely with the States, based on the rationale that this business did not meet the legal definition of "interstate commerce." That year, the insurance industry was turned on its head by the Supreme Court in the case of United States v. South-Eastern UnderWriters Association. By signaling that the business of insurance is "interstate commerce," the case brought about a kneejerk reaction from Congress in a bill that would eventually be known as the McCarran-Ferguson Act.

Soon after the Supreme Court decision, Senators McCarran and Ferguson introduced a bill that within two weeks, and without any hearings, passed the Senate. The House also passed a similar measure with little debate. A review of the Congressional Record shows clearly that the intent of both houses was to provide only a temporary moratorium rather than the permanent exemption.

It was while the bill was being discussed by the conference committee that a seemingly innocuous phrase was inserted. It was this modification - not in either the House or Senate versions of the bill - that when judicially interpreted turned a temporary moratorium into a permanent exemption.

The House approved the conference report without debate. The Senate, in contrast, debated the conference report for two days. Again, the record of the debate clearly shows that a permanent exemption was not the intent of those who voted for its passage.

So clear was this intent, that President Roosevelt, upon signing the bill, stated the following in a press release: "After a moratorium period, the antitrtlst laws ... will be applicable in full force and effect to the business of insurance ... "

So what happened? The problem resides in the interpretation of the phrase "regulated by state law." Under the McCarran-Ferguson Act, insurers are exempt from federal antitrtlst scrutiny so long as they are "regulated by state law." Courts have interpreted this phrase to require only that state regulators have jurisdiction oVer particular conduct-regardless of whether that authority is ever exercised.

In other words, joint conduct by insurance companies would not be subject to antitrust scrutiny unless it was undertaken pursuant to a clearly articulated state policy that is actively supervised by the state. As a result, anticompetitive conduct may escape both regulatory oversight and antitrtlst scrutiny.

So for more than 6 decades, the insurance industry has operated largely beyond the reach of federal competition laws. I trully believe that the McCarran-Ferguson Act's antitrust exemption has allowed insurers to engage in anticompetitive conduct, and I can find no justification to exempt the insurance industry from federal government oversight. Such oversight could help make certain that the industry is not engaging in anticompetitive conduct such as price fixing, agreements not to pay, and market allocations.

Insurers may object to being subject to the same antitrust laws as everyone else, but if they are operating in an honest and appropriate way, they should have nothing to fear. American consumers and American businesses rely on insurance - it is a vital part of our economy - and they have the right to be confident that the cost of their insurance, and the decisions by their insurance carriers about which claims will be paid, reflect competitive market conditions, not collusive behavior.

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