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ACCESS TO JUSTICE WORKING GROUP

WORKING AGENDA (August 2, 1994)

I. ADR/SETTLEMENT PROCEDURES

A. Justice Department ADR Initiatives

1. Guidance Revision

2. Education and Training

   a. DOJ attorneys, supervising attorneys, other professional staff;

   b. Client agencies; and

   c. Training on full range of dispute resolution techniques as essential component of legal education.

3. Funding for neutrals, other service (creating an earmarked fund separate from the general litigation fund).

4. Appropriate use of ADR/settlement as an element of performance evaluation of DOJ attorneys, supervisors and professional staff.

5. Use of ADR in community relations disputes.

6. Involvement of DOJ employees in community ADR programs.

7. Settlement process and settlement authority.

8. DOJ use and advocacy of ADR as a model for Federal agencies, the States, private parties and staff implications for DOJ.

B. Structure of Dispute Resolution Programs and Procedures

1. Mandatory vs. voluntary use of ADR.

2. Court-sponsored vs. private ADR programs.

3. Trial court vs. appellate court programs.

4. Early use of ADR techniques.

5. Appropriate use of binding and nonbinding ADR processes (e.g., arbitration, mediation, early neutral evaluation, mini-trials, negotiated rulemaking).

6. Application and tailoring of appropriate dispute resolution techniques to specific types of disputes (e.g., custody, divorce,

claims arising under the proposed health security act, landlord/tenant).

C. Other Mechanisms to Encourage Early Resolution of Disputes

   1. Pre-Complaint notice procedures, including notice under the Federal Tort Claims Act.

   2. Offers of settlement and amendments to F.R. Civ. P. 68.

D. Relationship of ADR and Settlement Mechanisms to Fee Shifting Statutes

E. Increased Access to Appropriate ADR Services

   1. Low-income and middle-income disputants.

   2. Culturally, ethnically, racially and linguistically diverse populations.

F. Qualifications, Training, Evaluation, and Ethics of ADR Providers and Users

G. Evaluation of Efficacy of Various Administrative Processes as Dispute Resolution Mechanisms, Including Interagency Arrangements for Sharing of Neutrals

H. Evaluation of Client Agency Use of Appropriate and Effective Use of ADR (e.g., conciliation process at HUD)

I. Use of Court-annexed and Private ADR in the States

II. DISCOVERY

A. Judicial Management of Discovery

   1. Judicial approval/oversight of discovery. Examine the role played by courts in preventing the abuse of discovery.

   2. Sanctions For discovery abuse -- presumptions and standards

   3. The use of adjuncts or others to manage discovery. Examine the role played by magistrates and discovery masters in managing the discovery process.

   4. Protective orders -- striking an appropriate balance between furthering the societal goal of allowing for the free flow of information and seeking to resolve individual cases in the most expeditious and cost-effective manner possible.

B. Increasing Efficiency and Economy In The Discovery Process

1. Time and numerical limitations on discovery.

   a. Examine whether the limitations on interrogatories and depositions that are now currently employed in most Civil Justice Reform Act plans have improved the flow of litigation.

   b. Examine whether time and numerical limitations on discovery have prevented certain classes of litigants from adequately developing their cases.

2. Use of case tracking. Examine whether the Federal Rules could be modified to allow for different types of discovery procedures in certain categories of cases.

3. Mandatory disclosure of core information. Determine whether the mandatory disclosure provisions that are contained in the Federal rules and in CJRA plans are promoting informal discovery or, instead, are generating satellite litigation.

4. Phased discovery. Determine whether the use of phased discovery promotes or hinders the early settlement of cases.

5. Use of technology. Examine how technology could be used to reduce the cost and improve the efficiency of the discovery process.

C. Re-Examining Discovery Principles

1. Uniformity vs. flexibility of discovery rules -- determine how to restore some uniformity to the Federal Rules regarding discovery without sacrificing appropriate flexibility

2. National rules and local rules -- determine how to reconcile the Rules Enabling Act process with the local rule experiments authorized by the Civil Justice Reform Act.

D. Internal DOJ Guidance on Discovery Practice

III. CASE MANAGEMENT AND TRIAL PROCESS

A. Expert reforms

1. Examine the appropriate roles and uses of expert testimony in civil litigation, including the use of experts in other than the traditional adversarial way.

2. Consider whether to establish or refine rules for the exercise of the judiciary's "gatekeeper" functions in this area.

B. Differentiated or "Tiered" Case Management

1. Study whether improvements could be gained by using case tracking, under which different classes of cases would proceed under different sets of procedures.

2. Determine whether a system of five tracks, as follows, would be feasible:

   a. "Super Fast Track" -- Voluntary; few legal issues or parties; agree to waive trial before Article III judge, forego ADR, and participate in speedy pre-discovery disclosure.

   b. "Fast Track" -- Cases historically concluded in less than nine months; ADR use rare; discovery limited; case may be assigned to an alternate Article III judge to preserve the trial date if necessary.

   c. "Standard Track" -- Cases historically concluded in nine months to a year; assignment to this track rests with the judge and litigants; mediation and arbitration frequently used; summary jury trials rarely used; discovery tailored to the individual case.

   d. "Complex Track" -- Cases that historically take more than two years to resolve; involve complicated legal issues or a large number of parties; evaluated by a judicial officer and parties to require extended processing time; will almost always be analyzed in terms of potential for using ADR techniques; discovery tailored to the individual case.

   e. "Highly Complex Track" -- Cases that historically take two or more years to complete; are exceptionally complex; involve large numbers of parties, extensive pre-trial motions or proceedings; includes class actions; a magistrate judge will normally be assigned to make reports, recommendations, and assist in resolving pre-trial and discovery disputes; very few cases will be placed on this track.

C. Court Supervision of Cases and Lawyers

1. Explore whether courts should issue a practice and procedure order to plaintiffs within ten business days after the case is filed, and to defendants, or other parties, within ten business days after their appearance in the case. Such orders might schedule an initial case management conference to discuss pleadings, discovery, motions; would establish a firm trial date; list the documents to be filed with the court; and prescribe procedures

governing experts, witnesses, jury selection, jury instructions, and other matters.

2. Explore augmenting existing legal training and continuing legal education to target such skills as face-to-face communication ability, dispute resolution skills, client counseling, and time management.

D. Evaluations and Response to Civil Justice Reform Act (CJRA) Recommendations

1. Examine the 94 CJRA plans and identify those elements of case management reform that have been broadly adopted, as well as any unique case management techniques of special merit.

2. Analyze the evaluations made by the U.S. Attorneys and judicial officers of CJRA plans for their districts (especially the 34 plans adopted by the Early Implementation District Courts) to determine which reform elements are considered most or least effective.

3. Choose the best ideas and determine the extent to which they can be adopted in the various district courts.

E. Use and Cost of Technology

1. Explore the standard use of electronic filing of all court documents.

2. Explore the cost and feasibility of having telecommunication centers available for litigants and attorneys.

3. Explore the many other electronic technologies that would improve the access to justice and reduce civil justice cost and delay.

F. Multi-District Litigation

1. Consider enhancing the Federal Courts' ability to coordinate and consolidate multi-district litigation.

2. Concepts involved could include--

   a. Consolidating cases for trial on all issues or on particular issues in a single forum;

   b. Removing designated cases for inclusion in consolidated federal multi-district litigation on the basis of minimal diversity jurisdiction;

c. Defining special multi-district jurisdiction in a manner that would enhance efficiency for the litigants and the judicial system;

d. Determining, or providing rules for determining in a reasonably predictable manner, the rules of law to be applied in consolidated multi-district proceedings.

G. Class Actions

1. Explore further the methods and means utilized by Attorney Kenneth Feinberg in resolving "mega" cases through dispute resolution rather than utilizing standard methods outlined in the Rules of Civil Procedure.

2. Examine how to promote the use of such resolution methods.

IV. ACCESS TO JUSTICE

A. Barriers to Access to Justice

1. Among the most significant barriers to access to the justice system are:

a. Unavailability of legal information and assistance;

b. Bias, based on gender, race, ethnicity, language, literacy, disability, socio-economic status, sexual preference, age, religion, etc., within the justice system;

c. Inadequate facilities;

d. Inadequate and improperly allocated resources;

e. Non-consumer-oriented court organization and case management systems; and

f. Lack of appropriate alternative dispute resolution mechanisms

2. These barriers exist to some degree in all components of the justice system including federal and state courts, administrative tribunals, and the bar.

B. Ideas for Removing Barriers and Expanding Access to Justice

1. Increase Availability of Assistance and Legal Information

a. Increase the availability of legal assistance to low- and moderate-income households:

(1) Government employee pro bono programs, with an initial emphasis on a program to expand the participation of Department of Justice employees in pro bono and volunteer work;

(2) National Service Corps involvement in the provision of attorney and non-attorney legal services; and

(3) Increased funding for the Legal Services Corporation and elimination of restrictions on the use of its funds.

b. Use modern technology to expand the availability of legal information to the public at large:

(1) Public domain citation system and "public" electronic data base of statutory and case law;

(2) Automated kiosks to assist in the preparation and filing of routine court documents;

(3) Touch-tone telephone information systems in the courthouse and other places to dispense recorded legal information; and

(4) Video and computer interactive education programs on the law and legal matters in public libraries, schools, and other public forums.

c. Develop innovative outreach and educational methods to help citizens recognize when they have problems that can be addressed through the legal system.

d. Support innovative approaches for utilizing non-lawyers as advocates, counselors, and ombudspersons.

e. Support the expansion of the "multi-door courthouse" approach to legal counseling and information/referral services.

2. Attack Bias Within the Justice System

a. Encourage the establishment of bias task forces in all the various circuits, USAO's, Federal Defender Offices, ALJ systems, and state courts, and the implementation of the recommendations of such task forces.

b. Improve enforcement of Title VI of the Civil Rights Act of 1964 and other statutes that prohibit discrimination in federally-assisted state court programs.

c. Support adequate interpretative services, including non-English languages and listening assistive devices.

d. Recommend changes in statutes, court rules, administrative regulations, and enforcement polices and procedures to deal with various forms of bias in the legal system.

e. Encourage the evaluation of federal, state, and ALJ judicial selection systems to ensure diversity on the bench.

f. Encourage the expansion of fairness/diversity training for federal judges, ALJ's, and members of USAO's and Federal Defender Offices.

g. Encourage the federal judiciary to adopt the principles of Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act, and the Age Discrimination in Employment Act to govern employment relationships within the federal court system.

h. Encourage the federal judiciary to adopt ADA standards concerning reasonable accommodation of disabled judges, attorneys, litigants, witnesses, jurors and the public; and improve enforcement of such standards in the state courts.

3. Upgrade Inadequate Facilities

a. Support the development of electronic systems for routine legal functions such as the filing of pleadings and payment of fines through "legal ATM machines" located in public areas such as shopping malls, neighborhood centers, and schools.

b. Encourage construction of child-care centers for litigants, witnesses, and jurors in justice system facilities.

c. Improve enforcement of ADA physical reasonable accommodation standards in construction of new justice system facilities.

d. Support the development of satellite facilities to bring adjudicatory bodies closer to the people who use them.

4. Improve the Adequacy and Allocation of Resources

a. Encourage the allocation of resources within the justice system to give greater priority to courts which deal with people-oriented problems, such as divorce, child support, domestic violence, child abuse and neglect, housing, credit, and consumer issues.

b. Support adequate funding for "problem-prevention" resources, such as counseling and substance abuse treatment, to prevent unnecessary litigation

5. Require Court Organization and Case Management Systems to Be "Consumer- Oriented"

   a. Develop case management and delay reduction systems that take into account the needs of persons who represent themselves.

   b. Encourage court scheduling systems that reduce waiting time in court for litigants, witnesses, jurors, and provide more sessions outside of regular work hours.

   c. Encourage innovative court reorganization that allows different lawsuits (civil, criminal, and/or juvenile) affecting one family to be heard all in a single proceeding.

6. Use Appropriate Alternative Dispute Resolution Mechanisms for Different Kinds of Problems

V. COURT RESOURCES

A. Defining the Role of the Courts

1. Examine the three aspects of current Federal jurisdiction:

   a. Courts as the vehicle for enforcing compliance with Federal criminal and civil laws;

   b. Courts as the vehicle for vindicating rights and ensuring benefits conferred by the Constitution and Federal statutes; and

   c. Courts as the vehicle for resolving disputes that do not involve Federal law.

2. Examine how the adjudicative resources of the courts are being allocated among these functions.

   a. Comprehensive statistical review of the workload of Federal judges: raw and weighted case statistics, statistics on which functions judges spend the most time, the results of other studies, etc.

(1) Review 1979 and 1989 time studies and other workload studies performed by the Federal Judicial Center and the Administrative Office.

(2) Determine whether additional statistics are necessary to more accurately capture the true workload of Federal judges.

b. Balance between criminal/civil resources -- study the impact that Federalization of crimes, the sentencing guidelines and other major criminal developments have had on the availability of resources for civil litigation. Compile evidence on this front contained in almost all the Civil Justice Reform Act Plans.

3. Consider implications of this allocation of resources in terms of the current and future ability of courts to perform their essential functions.

a. Study of the impact that limitations of civil resources has had on the integrity of the civil justice adjudicative process.

b. Examine the question: How do we avoid rationing civil justice?

B. Jurisdictional and Structural Questions

1. Determine whether changes in jurisdiction could be made to improve the efficiency of the courts:

a. Examine the jurisdictions of specialized courts (e.g., the Court of Federal Claims) and various boards (e.g., Board of Contract Appeals) to see whether cases currently handled by district courts could be handled more effectively elsewhere.

b. Examine whether diversity jurisdiction should be limited by:

(1) eliminating plaintiff-based diversity (cases where the plaintiff files in his or her state);

(2) indexing the amount-in-controversy in accordance with the CPI; or

(3) making corporations domiciliaries of each state in which they are licensed to do business.

Consider the impact these proposals would have on the number of civil juries empaneled in the Federal courts and on the allocation of workload between Federal and State resources.

2. Determine whether the structure or organization of the courts should be altered to improve access:

   a. Examine the role played by administrative law judges in producing or preventing litigation.

      (1) Examine whether there is adequate managerial control over the productivity and performance quality of administrative law judges.

      (2) Examine whether the categories of cases in which administrative law judges are employed should be expanded or reduced.

      (3) Examine the process by which courts and agencies review the decisions of administrative law judges.

   b. Examine whether a specialized court or a court with limited jurisdiction (e.g., the Court of Federal Claims) could be employed to provide better review in Social Security, FELA and other classes of cases arising out of administrative determinations.

   c. Examine whether expanded procedures or resources should be developed to deal successfully with mass tort cases. Determine whether additional procedures are needed to allow for better consolidation of such cases and to encourage global settlements.

   d. Examine ways to improve the flexibility of judicial resources to address fluctuating workloads (e.g., cross-district/circuit assignments, floating judges, floating magistrates, ways to handle multi-district litigation).

C. Ensuring that Courts Have the Resources to Perform Their Mission

1. Determine the factors and criteria that should be employed in determining appropriate judicial staffing.

   a. Examine the case weighing system and the 400 weighted filings per judge target use by the Federal Judicial Conference.

   b. Examine GAO criticisms of the case weighing system.

2. Determine the proper role of adjuncts (magistrates, staff attorneys, clerks), the potential for creating new types of

adjuncts (e.g., appellate magistrates) and the general resources needed by the courts in this area.

a. Examine whether adjuncts are being used improperly to decide particular classes of cases (e.g., social security cases and prisoner petitions).

b. Examine procedures to ensure better diversity in adjunct appointments.

3. Examine the role that can be played by technology in assisting judicial employees in accomplishing their work.

4. Examine mechanisms that should be employed to ensure appropriate court funding levels.

D. Providing for the Long-Term Health of the System

1. Funding and conduct of long-term research on civil justice issues: determine whether a new or existing Department component should have a continuing responsibility to track issues involving civil justice and to propose needed reforms.

2. Reducing unnecessary government litigation -- focusing on ways to prevent cases from ever being filed in court. This includes:

a. Broader use of the "reg-neg" procedures used effectively by such agencies as EPA and the Army Corp of Engineers;

b. The use of judicial impact and legislative checklists; and

c. A review of Executive Orders which affect the way that the Government conducts litigation.

3. Examine the effectiveness of civility codes in reducing cost and delay.

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General | Washington, D.C. 20530

JUL 21 1994

The Honorable Jack Brooks
Chairman
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

I am writing in response to your request for the views of the Department of Justice on H.R. 9, the Insurance Competitive Pricing Act of 1993, as reported favorably by the Subcommittee on Economic and Commercial Law. As Assistant Attorney General Bingaman testified before the Subcommittee on July 29, 1993, the Administration supports a narrowing of the current broad exemption for the business of insurance in the McCarran-Ferguson Act. As you know, the Administration is proposing the repeal of the McCarran-Ferguson exemption for the business of insurance to the extent that such business relates to the provision of health benefits. The Department of Justice believes that H.R. 9 as reported by the Subcommittee is an appropriate balance of the need to narrow the current broad antitrust exemption for the business of insurance and the need of the industry to operate efficiently and effectively in an increasingly competitive environment. Thus, the Department supports the thrust and scope of H.R. 9 as reported by the Subcommittee.

Like H.R. 9 as introduced, the bill as reported would narrow the current antitrust exemption for the business of insurance. It differs in form from the bill as introduced, however, in that it simply applies the antitrust laws to the business of insurance, except for certain categories of conduct to the extent that such conduct is regulated by state law. This format is similar to that of the current exemption and provides, we believe, a workable way to narrow the exemption to specified conduct without creating unnecessary uncertainty.

Section 2 of the bill sets forth rules of construction to clarify the intent and the effect of the legislation. One such rule preserves the legal standards applicable under the existing McCarran-Ferguson Act with respect to conduct in the bill's "safe harbors" (categories of conduct that will remain exempt from the antitrust laws to the extent regulated by state law). Another rule of construction preserves the current provisions relating to acts of boycott, coercion or intimidation in section 3 of the McCarran-Ferguson Act. Still another preserves the availability of the state action defense to persons engaged in the business of insurance to the same extent such defense is available to other persons. Other rules of construction preserve existing state taxing and regulatory authority as provided in section 2 of the McCarran-Ferguson Act, and preserve antitrust immunities that may be applicable under other laws.

Section 3 of the bill would effectively narrow the current antitrust exemption for the business of insurance to certain "safe harbors" specified in the bill. Safe harbors are provided for joint conduct involving the collection, compilation and dissemination of historical data; the determination, using standard actuarial techniques, and dissemination of a loss development factor or developed losses; the development and dissemination of standard policy forms, provided that there is no agreement to adhere to such forms or to require adherence to such forms; the provision of insurance through public necessity market mechanisms (often referred to as assigned risk pools); the provision of insurance as a historic underwriting capacity risk pool (certain "grandfathered" pools specified in the bill); the development of or participation in certain specified fire inspection programs; and the development of or participation in a program, pursuant to a worker's compensation insurance plan filed with the state entity that regulates the business of insurance under state law, to measure an employer's experience with respect to occupational accident or illness of its employees against comparable experience of other employees and to make a modification for an individual employer based on such comparisons, if an affected employer has a reasonable opportunity to appeal a determination under such a program to a government agency. We believe that these safe harbors are well-considered and appropriate.

The bill also provides, during a 2 year transition period beginning on the effective date of the bill (1 year after the date of enactment), a safe harbor for conduct that consists of making an agreement or engaging in joint conduct to determine or disseminate a trend factor (an adjustment to developed losses to account for any change that is anticipated to affect losses). It further provides that subsequent to the transition period, the independent purchase of a trend factor by a person engaged in the business of insurance from a person not engaged in (and not affiliated with a person engaged in) providing insurance shall be presumed not to violate the antitrust laws. While we do not believe that trending should be permanently safe-harbored, we have no objection to the transition period in the bill during which trending will remain exempted from the application of the antitrust laws.

Section 5 of the bill provides that the Attorney General shall issue a "business review letter" (a statement of the Department's antitrust enforcement intentions with respect to specific conduct) in response to a written request by any person engaged in the business of insurance with respect to the activities of an underwriting risk pool in accordance with 28 C.F.R. § 50.6 (describing the Department's business review procedure). The Department already provides guidance to the insurance and other business communities through the use of the business review procedure contained in the Code of Federal Regulations. We will be sensitive to the needs of insurers and others affected by the passage of H.R. 9 in responding to requests for business review letters that they may submit pursuant to that procedure. We are, however, firmly opposed to statutorily invoking the Department's business review procedure. There is no need to do so given the Department's longstanding business review policies and procedures. Moreover, a statutory provision could encourage unnecessary business review requests that otherwise would not be made and that could be costly both to the industry and to the Department. And private antitrust counsel are also available to advise the industry on specific pooling practices, guided by the business reviews issued by the Department in the normal course. Finally, business reviews are not currently provided for by statute, and such a provision in McCarran-Ferguson reform legislation would set a dangerous precedent for similar provisions in other areas where the affected industry argues that some level of antitrust uncertainty warrants special consideration.

Aside from this important objection, we believe that H.R. 9 as reported by the Subcommittee is a highly workable solution to the long-debated issue of McCarran-Ferguson reform. We thank the Committee for the opportunity to contribute to this historic legislative effort. We look forward to continuing to work with you on this legislation through its successful passage and enactment into law.

This Department has been advised by the Office of Management and Budget that there is no objection to the submission of this report from the standpoint of the Administration's program.

Sincerely,

Sheila Anthony

Sheila F. Anthony
Assistant Attorney General

Department of Justice

STATEMENT OF

ANNE K. BINGAMAN

ASSISTANT ATTORNEY GENERAL

ANTITRUST DIVISION

BEFORE THE

SUBCOMMITTEE ON ECONOMIC AND COMMERCIAL LAW

COMMITTEE ON THE JUDICIARY

U.S. HOUSE OF REPRESENTATIVES

CONCERNING

LEGISLATION TO AMEND THE ANTITRUST EXEMPTION

PROVIDED BY THE McCARRAN-FERGUSON ACT

PRESENTED ON

JULY 29, 1993

Mr. Chairman and Members of the Subcommittee:

I am pleased to be here today to present the views of the Department of Justice on proposals to amend the McCarran-Ferguson Act so as to narrow the scope of the antitrust immunity that it affords to the business of insurance. The Department believes that the time has come to act on such legislation, and supports the objectives of the Subcommittee in this regard.

Prior to 1944, regulation of the business of insurance was seen as the exclusive province of the states. In that year, the Supreme Court held in United States v. South-Eastern Underwriters Association 1/ that the insurance business was within the regulatory power of Congress under the Commerce Clause and thus was subject to the antitrust laws. This decision was perceived to threaten state authority to regulate and tax the business of insurance. The McCarran-Ferguson Act was designed to return the legal climate to that which existed prior to South-Eastern Underwriters by specifically delegating to the states the authority to continue to regulate and tax the business of insurance. It also created a broad antitrust exemption based on state regulation. This antitrust exemption applies where three basic requirements are met: (1) the

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1/ 322 U.S. 533.

challenged activity must be part of the "business of insurance"; (2) that business must be regulated by state law; and (3) the activity must not constitute boycott, coercion, or intimidation.

Repeal or reform of the broad antitrust exemption currently enjoyed by the business of insurance has been a perenniel subject of interest. In 1977, a Justice Department study concluded that the insurance industry could function competitively without the protection of the McCarran-Ferguson Act. The National Commission for the Review of Antitrust Laws and Procedures recommended in 1979 that the broad exemption in the Act be replaced by narrowly drawn legislation adopted to affirm the lawfulness of a limited number of collective activities under the antitrust laws. The 1989 report of the American Bar Association Commission to Improve the Liability Insurance System contained a generally similar recommendation. This Subcommittee and other bodies of Congress have held several hearings on the McCarran-Ferguson exemption over the years, and during the last session the full Committee reported favorably legislation that would replace the current exemption with a narrower one affording continued protection to certain procompetitive activities. The pros and cons, as well as the particulars, of legislative reform of the McCarran-Ferguson antitrust exemption have thus been thoroughly and carefully debated. The Department believes that the time has come to enact such legislation.

The Department is generally opposed to exemptions from the antitrust laws, whether they be industry-specific or general, in the absence of a strong showing of compelling need. The antitrust laws protect and promote the nation's fundamental national policy of competition. Exceptions from that policy should be and fortunately are relatively rare. Those who advocate the creation of a new antitrust exemption, or the preservation of a longstanding exemption such as that contained in the McCarran-Ferguson Act, rightfully bear a heavy burden in justifying the exemption.

In considering any alleged need for an antitrust exemption, the flexible nature of the antitrust laws as interpreted in such recent cases as General Dynamics, 2/ GTE Sylvania, 3/ Broadcast Music, 4/ and Northwest Wholesale Stationers, 5/ must be recognized. Allegations that particular procompetitive behavior would violate the antitrust laws and thus should be exempted from their application can fail to take account of the

2/ United States v. General Dynamics Corp., 415 U.S. 486 (1974).

3/ Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977).

4/ Broadcast Music, Inc. v. Columbia Broadcasting Sys., Inc., 441 U.S. 1 (1979).

5/ Northwest Wholesale Stationers, Inc. v. Pacific Stationary and Printing Co., 472 U.S. 284 (1985).

economically sound competitive analysis that is used today to carefully circumscribe per se rules and fully analyze other conduct under the rule of reason. Congress has occasionally recognized a need for clarification of a proper antitrust standard or adjustment of antitrust remedies, as it did earlier this year in passing the National Cooperative Production Amendments of 1993, but the flexibility of the antitrust laws and their crucial importance to the economy argue strongly against antitrust exemptions that are not clearly and convincingly justified.

There are strong indications that possible justifications for the broad insurance antitrust exemption in the McCarran-Ferguson Act when it was enacted in 1945 are no longer valid today. To the extent that the exemption was designed to enable the states to continue to regulate the business of insurance, it is no longer necessary. The "state action" defense, which had been announced by the Supreme Court in Parker v. Brown 6/ in 1943 but was undeveloped in 1945 when the McCarran-Ferguson Act was enacted, has now been the subject of many Supreme Court opinions. This defense allows a state effectively to immunize what the antitrust laws otherwise may proscribe by clearly articulating and affirmatively expressing

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6/ 317 U.S. 341.

a policy to displace competition and by actively supervising any private conduct that might be involved.

Moreover, the application of the antitrust laws to potentially procompetitive collective activity has become far more sophisticated during the nearly 50 years since the McCarran-Ferguson Act was enacted. Some forms of joint activity that might have been prohibited under earlier, more restrictive doctrines are now clearly permissible, or at very least analyzed under a rule of reason that takes appropriate account of the circumstances and efficient operation of a particular industry. Thus, there is far less reason for concern that overly restrictive antitrust rulings would impair the insurance industry's efficiency. And, as I will discuss in more detail in a moment, to the extent that a case can be made that uncertainty as to the application of the antitrust laws may deter particular procompetitive activity even if, in the long run, such conduct would be vindicated, legislation could be enacted that would afford continued protection to carefully defined conduct that is considered necessary or appropriate to the operation of the insurance industry.

Against what I believe to be less than convincing justifications for continuance of the current broad antitrust exemption for the business of insurance are some significant potential benefits from legislation that would narrow it. First, reform of this exemption is consistent with the normal presumption that an industry functions more efficiently and in the interests of consumers without antitrust exemptions that permit potentially anticompetitive conduct. State regulation of collective insurer conduct that affects rates or terms of coverage is simply not a good substitute for the disciplines of a competitive marketplace. This may be particularly true where states are forced to devote more of their limited regulatory resources to guarding against discrimination or protecting solvency than to ensuring competitively priced options for consumers. Second, some regulatory goals, such as guarding against discrimination or protecting solvency, appear to be obtainable without the broad antitrust exemption that is currently in place. If convincing arguments are made that a particular regulatory goal cannot be furthered without collective conduct that is or might be considered unlawful under the antitrust laws, such conduct could be protected by a special exception in legislation that narrowed the current broad exemption.

The matter of antitrust uncertainty that I discussed above and possible arguments regarding the need for certain collective conduct to promote state regulatory goals go more, I believe, to the form and precise content of legislation to reform the current antitrust exemption for the business of insurance than to its overall desirability. I see no reason why these concerns could not be accommodated by the legislative process.

It may be argued that the development of antitrust law takes time and occasionally may take a wrong turn. Uncertainty as to how collective insurer conduct will fare under the antitrust laws is thus argued potentially to inhibit procompetitive activities. I give some credence to this argument, but believe that legislation that contains carefully drawn safe harbors would be an adequate and appropriate response. I would, however, caution against accepting the uncertainty argument too willingly and safe harboring activities that may be anticompetitive, at least in some contexts. First, the courts are in my view capable of making and likely to make the right decisions regarding any conduct in the business of insurance that is subjected to antitrust challenge. Second, the current antitrust exemption in the McCarran-Ferguson Act has proven to be highly resistant to change, and I suspect that the decisions Congress makes on what will continue to be protected by the Act will be in effect for a long time. Thus, I believe that there should be a high degree of confidence in the worthiness of any specific antitrust protection that Congress decides to continue. And, with respect to promoting state regulatory goals, we should recognize that those goals may vary from state to state and can also be promoted through the exercise of state action to exempt particular conduct from antitrust scrutiny.

In sum, the Department supports replacement of the current broad exemption for the business of insurance with more carefully crafted protection for activities that are demonstrably potentially procompetitive and efficiency-enhancing. Such legislation must, of course, be consistent with the Administration's forthcoming health care reform proposal. We believe that McCarran-Ferguson reform legislation can accommodate the interests of those who support such reform--including the Department--as well as those who have expressed concern that reform would have to permit insurance companies large and small to engage in activities that would both benefit consumers and allow the industry to prosper.

Mr. Chairman, this concludes my prepared statement. I would be happy to address any questions that you or the other members of the Subcommittee may have.