McCarran-Ferguson and the Proper Limits of Federal Antitrust Deference to State Insurance Regulation

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The role of competition policy in regulating insurance business activities is a thorny problem that continues to vex regulators and the courts. The McCarran-Ferguson Act of 1945 was intended to clarify federal and state roles in regulating competition. But, since its adoption, McCarran-Ferguson has not proved easy to apply. Clear and sensible rules to determine when federal antitrust law should defer to state regulation have not yet emerged.

A recent example of this failure is presented in Oscar Insurance Co. of Florida v. Blue Cross and Blue Shield of Florida, Inc. Relying on Eleventh Circuit precedent, Oscar Insurance concluded that McCarran-Ferguson precluded the application of federal antitrust law to allegedly anticompetitive insurance business activity in Florida, even though Florida apparently permits no state regulator to consider competition questions in the regulation of insurance.

Decried as unjustifiable special interest legislation from the time it was adopted, McCarran-Ferguson has been the target of many repeal attempts. Many antitrust scholars, some of whom filed amicus briefs in the Oscar Insurance appeal, argue that there never was a proper place for McCarran-Ferguson in antitrust law. These scholars argue that, under Parker v. Brown, federal

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1 The relevant provisions of McCarran-Ferguson are as follows:

15 U.S.C. § 1012:

(a) State regulation

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) Federal regulation

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, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: Provided, That after June 30, 1948 (originally January 1, 1948), . . . the Sherman Act, . . . the Clayton Act, and . . . the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State Law. (emphasis added).

15 U.S.C. § 1013:

(a) Until June 30, 1948 (originally January 1, 1948) . . . the Sherman Act . . . the Clayton Act, and . . . the Federal Trade Commission Act, and . . . the Robinson-Patman Anti-Discrimination Act, shall not apply to the business of insurance or to acts in the conduct thereof.

(b) Nothing contained in this chapter shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation.

2 413 F. Supp. 3d 1198 (M.D. Fla. 2019), appeal docketed, No. 19-14096 (11th Cir. 2019).

3 Then President-Elect Trump supported repeal of McCarran-Ferguson and, in 2017, the House voted overwhelmingly for repeal (with opposition from 7 Democrats), but the measure did not make it to the Senate floor. More recently, Senators Daines (R-MT) and Leahy (D-VT) introduced a bill in early 2019 that would largely repeal McCarran-Ferguson, which Senator Daines described as merely a “special-interest loophole.” Sen. Daines, One Page Summary of the Competitive Health Insurance Reform Act of 2019 (Feb. 6, 2019), https://www.daines.senate.gov/imo/media/doc/Big%20Insurance%20One%20Pager.pdf.

4 317 U.S. 341 (1943).
antitrust law already defers to active state regulation of commercial activity that otherwise comports with Parker’s requirements.

This article aims to show that the dissatisfaction with McCarran-Ferguson stems not from the law itself, but from courts’ failure to interpret the statute in a manner that effectuates its essential purpose of providing federal deference to alternative state competition regulation, not a blanket exemption from federal antitrust laws.

The result in Oscar Insurance, which the court describes as a “catch-22,” demonstrates the need for a renewed focus on the interpretation of the key phrase “not regulated by State law” in McCarran-Ferguson. As discussed below, interpreting the “regulated by State law” proviso in a manner consistent with its plain meaning and legislative purpose will align antitrust regulation of the insurance industry with modern competition policy. In enacting McCarran-Ferguson, Congress concluded that the Parker standard did not provide sufficient deference to state regulatory action that might conflict with federal antitrust law, but Congress did not expect that courts would exempt insurance activity in the absence of state regulation that included competition considerations. McCarran-Ferguson was merely intended to strike a different federalism balance than Parker for states that, in regulating insurance business activity, have chosen to promote other policy considerations ahead of competition issues that might otherwise trigger federal antitrust concerns. The statute was not intended to exempt insurance business activity from federal antitrust governance for states such as Florida, which have prohibited the consideration of competition issues within the ambit of their insurance regulatory processes.

In enacting McCarran-Ferguson, Congress . . . did not expect that courts would exempt insurance activity in the absence of state regulation that included competition considerations.

Federal Expectations in Adopting McCarran-Ferguson

The essential premise underlying the regulation of insurance is two-fold: first, purchasers of insurance should be able to understand the scope and limits of the promised insurance; and second, purchasers should be able to trust that any insurer in the marketplace has the capital to meet its insurance promise. Without that regulation, an unscrupulous business could form an insurer with little more than a company name, collect premiums against vague promises to assume risks, and then default if the risks are realized. These unscrupulous participants would drive insurance rates below the true marginal cost of insurance, driving out insurers who intend in good faith to pay and survive in business when insured risks are realized.5

Prior to World War II, states and the federal government largely allowed the individual states to regulate the insurance industry to the extent it was regulated at all.6 Federal competition laws did not apply because the business of insurance was said not to constitute interstate commerce. Although insurance firms conducted business across multiple states, the prevailing logic, established almost a century earlier in Paul v. Virginia,7 was that insurance is but an “instrument of commerce” and not “commerce” itself. Moreover, as policies were delivered by local agents, all insurance was local, regardless of the domicile of the insurers issuing the policies.8

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6 John G. Day, Dep’t of Transportation, Economic Regulation of Insurance in the United States 13 (1970) (“By 1944, the insurance industry was subject to comprehensive regulation, although rate regulation was sporadic.”); see generally Alan M. Anderson, Insurance and Antitrust Law: The McCarran-Ferguson Act and Beyond, 25 WM. & MARY L. REV. 81, 83 & n.6 (1983).
7 75 U.S. 168 (1869).
8 Id. at 183–84 (quoting Nathan v. Louisiana, 49 U.S. (8 How.) 73, 81 (1850)).
By World War II, some states—Florida among them—had competition laws comparable to the Sherman Antitrust Act, but had interpreted them as exempting the business of insurance. Accordingly, insurer-organized rate-fixing boards often functioned as cartels, pricing insurance above competitive rates to extract monopoly profits while disciplining rogue insurers and brokers who might otherwise engage in legitimate competition by excluding them from participating in insurance markets. For example, by the 1940s, it was common for fire and casualty insurers to form “bureaus” that would fix insurance rates and impose disciplinary measures to ensure that all market participants involved with the selling of insurance complied with the bureaus’ decisions. This conduct was widely recognized as violating federal antitrust laws—if those laws were applied to the insurance business activity.  

The tides began to shift during the mobilization for World War II, when the federal government became concerned that it was overpaying insurers on cost-plus contracts for the production of war material. In late 1942, the Roosevelt administration brought an antitrust criminal indictment against over 200 entities and individuals participating in a fire-insurance rate-fixing organization that encompassed six states. The indictment focused on the rate-fixing boards’ penalties for renegade insurers and agents, describing rules prescribing insurer boycotts and discontinued agent appointments as “coercion” and “intimidation.” The case ultimately made its way to the Supreme Court.

At the height of the War—indeed, just one day before the Normandy Invasion—the Supreme Court overruled Paul v. Virginia and its progeny in United States v. South-Eastern Underwriters Association, finding that interstate insurance was indeed interstate commerce. The Court’s 4-3 majority pointed out that the decision did not invalidate state laws regulating insurance because “[f]ew states go so far as to permit private insurance companies, without state supervision, to agree upon and fix uniform insurance rates. No states authorize combinations of insurance companies to coerce, intimidate, and boycott competitors and consumers in the manner here alleged, and it cannot be that any companies have acquired a vested right to engage in such destructive business practices.” Thus, complying with federal competition law was simply part and parcel of being an industry engaged in interstate commerce.

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9 Brock v. Hardie, 114 Fla. 670, 686–87 (1934) (As insurance “is a mere contract of indemnity against contingent loss,” the Florida Supreme Court held that “our view is that insurance is neither produced, consumed, manufactured, transported, nor sold in the ordinary significance of those words as they are used in our statutes against unlawful combinations in restraint of trade.”).

10 See, e.g., Harold J. Ginsburgh, Developments Under the New Legal Environment of Insurance, Proceedings of the Casualty Actuarial Society, Vol. 32, No. 62, at 3 (Nov. 16, 1945) (“Some of these bureaus had been formed under mandate of specific state statutes, some had been formed under direction of state supervisory officials without specific statutory authority, and some were entirely voluntary in character.”).

11 Attorney General Francis Biddle apparently initiated the South-Eastern Underwriters prosecution after investigating complaints from Missouri State Attorney General Roy McInturff about any one state’s difficulty in controlling the anticompetitive activities of large multi-state insurers. McInturff stated, “In a wartime like this, there is no reason why a few corporations, a few men, should take advantage of this situation and force people to pay whatever they desire should be paid, and also the Government, because the Government is being supported by the people who are paying these insurance premiums.” Insurance: Hearing Before the Subcommittee of the Senate Committee on the Judiciary on S.1362, 78th Cong. 1st Sess., at 169 (Oct. 20, 1943). McInturff believed that no one state was capable of controlling these anticompetitive activities that were resulting in the Government paying inflated prices in cost-plus contracts for the insurance costs of the firms producing the material for fighting the War. Id.


13 Id.

14 Id. at 562 (citation omitted).

15 One of the dissenting Justices claimed that the majority was requiring Congress to “nationalize” the insurance business. Id. at 322 U.S. at 592 (footnote omitted) (Jackson, J., dissenting in part). Justice Robert Jackson wrote, “To use my office, at a time like this, and with so lit-
Prompted by concerns of due process for the many participants in the South-Eastern Underwriters Association, the future organization of the insurance market, and states’ power to tax insurers’ interstate income, members of Congress promptly sought to adopt legislation in response. After initial attempts failed to restore the state of affairs that prevailed prior to South-Eastern Underwriters, Congress adopted the McCarran-Ferguson Act. The Act, based largely on draft legislation proposed by the National Association of Insurance Commissioners (NAIC), provided a brief moratorium on any enforcement of federal antitrust laws concerning the business of insurance, thereby allowing states to adopt comprehensive insurance regulatory frameworks to which federal law would generally defer, after which federal law would apply in the absence of regulation by state law.17

During the final debates on the bill, Senator Homer S. Ferguson sought to rebuff concerns that McCarran-Ferguson granted a broad antitrust exemption to the insurance industry. Ferguson emphasized that state law only prevailed over the application of federal antitrust law:

"If the States were specifically to legislate upon a particular point, and that legislation were contrary to the Sherman Act, the Clayton Act, or the Federal Trade Commission Act, then the State law would be binding. . . . After a conference with the House, we believed that the States should regulate insurance, and taxation on the insurance business.18"

Thus, a chief sponsor of the bill assured skeptics that federal antitrust deference was only required when states purposefully adopted insurance regulation that promoted alternative public policy.

Senator Ferguson argued that the bill was consistent with Parkerm,19 which had been decided a year earlier than South-Eastern Underwriters. Parker’s “state action” doctrine affords deference to state action that might otherwise contravene federal antitrust laws where: (1) there is a clear articulation that the state intends to displace competition with a regulatory structure; (2) the state regulators have the statutory authority to review the challenged private conduct; and (3) the state regulators actually exercise that authority.20 But one of the leading opponents of McCarran-Ferguson,

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16 See 322 U.S. at 538 n.6 (reserving the due process issue for consideration on remand). The insurers and executives who had participated in, and operated, rate-fixing bureaus, including the many participants in the South-Eastern Underwriters Association, apparently did so with the firm belief that they were entirely legal and without antitrust risk, and had no fair warning of the criminality of their conduct. Cf. Connally v. General Constr. Co., 269 U.S. 385, 391 (1926) (striking down a criminal statute under the Due Process Clause where it was not “sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties”).

17 As adopted, Section 2(b) of McCarran-Ferguson provided a blanket exception to federal antitrust laws—the “moratorium”—until January 1, 1948, when the present-day limited federal deference was to apply. In the summer of 1947, the moratorium was then extended another six months, to June 30, 1948. 61 Stat. 448. Perhaps the most significant change from the original NAIC proposal was to substitute the general provision that antitrust law would apply after the expiry of the moratorium “except to the extent regulated by State law,” in lieu of NAIC’s enumeration of specific business functions typically subject to state regulatory activity.

18 91 CONG. REC. 1481 (Feb. 27, 1945).

19 In Parker, the Court held that federal antitrust legislation had not been intended to displace a California statutory price support program for raisin manufacturers. The Supreme Court found that deference to the state program was implied in federal antitrust statutes. 317 U.S. at 350–51.

20 See Cal. Retail Liquor Dealers Ass’n v. Midcal Aluminum, Inc., 445 U.S. 97, 105 (1980) (highlighting that extensive official oversight, and not just state authorization for the challenged conduct, was necessary to the Court’s decision in Parker); see also N.C. State Bd. of Dental Examiners v. FTC, 574 U.S. 494, 503–04 (2015) (“A nonsovereign actor controlled by active market participants . . . enjoys Parker immunity only if it satisfies two requirements: first that the challenged restraint . . . be one clearly articulated and affirmatively expressed as state policy, and second that the policy . . . be actively supervised by the State.” (citation and internal quotation marks omitted)).
Senator Claude Pepper of Florida, objected that the proposed legislation did not require the active supervision prong of *Parker* to be satisfied to protect private insurer action that had been sanctioned by the states. Pepper argued that McCarran-Ferguson therefore went beyond *Parker*, effectively shielding insurers that continued to engage in rate-setting boards and other anticompetitive conduct that would not be permitted under *Parker*, provided a state chose to authorize the conduct as part of its regulatory scheme.21

Apparently expecting that the courts would interpret the “regulated by State law” proviso forcefully, President Roosevelt declared, when signing the bill into law, that federal antitrust laws would apply to the business of insurance “except to the extent that the states have assumed the responsibility, and are effectively performing that responsibility, for the regulation of whatever aspect of the insurance business may be involved.”22

Roosevelt’s wish for a statute that included an “effectively performing” standard would have been close to *Parker’s* “active supervision” requirement. But Congress rejected that approach. The legislative history confirms that the primary purpose in adopting McCarran-Ferguson was to give states broader room than *Parker* allowed to exempt the activities of the insurance business from federal antitrust law, given the states’ primary role in the regulation of that business. However, in the years following the adoption of McCarran-Ferguson, the courts seem to have lost sight of the intended balancing of federalism and antitrust interests.

**The Strange Case of Oscar Insurance**

In November 2018, Oscar Insurance, a new entrant to the Florida individual health insurance market, brought an antitrust action against three Florida Blue Cross/Blue Shield affiliates (Florida Blue). The action sought to enjoin Florida Blue from enforcing exclusivity contracts with insurance brokers or otherwise preventing brokers from selling individual health insurance plans issued by any other provider.23 Oscar claimed to have better-priced contracts, better technology for operating them, and a “customer-first” approach. But it alleged that it could not break into the market for Florida ACA individual health contracts because Florida Blue controlled so many licensed Florida insurance agents through exclusivity agreements. Oscar asserted that Florida Blue’s enforcement of its exclusivity agreements constituted anticompetitive behavior in violation of Sections 1 and 2 of the Sherman Act.24

Apparently anticipating a McCarran-Ferguson defense, Oscar obtained an email from Florida’s insurance regulators that “[v]iolation of an agent’s contract with an insurer to maintain exclusivity is a civil contractual issue between the parties to the contract involved. There is no law in the Florida Insurance Code that could be applied to this civil employment issue.”25 Indeed, the authority of Florida insurance regulators to consider competition policy at all is remarkably unclear. A 1980 revision to the Florida Antitrust Act indirectly referenced the McCarran-Ferguson exemption by adopting the following provision, which remains in effect: "Exemptions.—Any activity or con-

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21 *91 Cong. Rec. at 1480–81 (colloquy of Sens. Pepper, O'Mahoney, and Murdock).*
22 Anderson, *supra* note 6, at 89–90 & n.99 (summarizing much of the relevant legislative history) (emphasis added by Anderson).
23 *See Oscar Insurance*, 413 F. Supp. 3d at 1200–01.
24 *Id.*
duct exempt under Florida statutory or common law or exempt from the provisions of the antitrust laws of the United States is exempt from the provisions of this chapter.”

This Florida statute apparently seeks to incorporate from McCarran-Ferguson a blanket exemption for the business of insurance, even though no state or federal governmental entity remains authorized to consider competition policy with respect to the business of insurance in Florida.

Florida Blue moved to dismiss Oscar’s complaint under Federal Rule of Civil Procedure 12(b)(6), arguing that McCarran-Ferguson barred the lawsuit. The district court granted Florida Blue’s motion and dismissed Oscar's complaint. The court agreed that federal antitrust law will apply to insurance company conduct only if (1) the challenged conduct does not constitute the “business of insurance” or (2) the conduct is (a) the “business of insurance,” (b) “regulated by State law,” and (c) is not “boycott, coercion or intimidation.” The court found that the broker exclusivity agreements being challenged were part of the business of insurance but that the enforcement of the exclusivity agreements could not constitute “boycott, coercion or intimidation” as a matter of law because “there is nothing coercive about enforcing the [exclusive] contractual agreement.” Accordingly, the Oscar Insurance court dismissed the case on McCarran-Ferguson grounds and declined to reach the merits of the federal antitrust claims.

The Oscar Insurance court undertook a detailed examination of whether federal antitrust law should apply because the challenged conduct was not “regulated by State law.” The court found it was in a “catch-22 situation,” where neither Florida nor federal authorities were authorized to consider competition concerns in connection with the business of insurance. Echoing President Roosevelt, the court recognized the “reasonable argument” that “one can argue that state regulation means effective state regulation and that such regulation is defeated [by the state exemption statute].” But the court decided that, since the word “effective” was “clearly absent” from the statute, that standard could not properly be applied. As a result, the court concluded that Florida’s policy to not consider competition in the regulation of insurance, combined with the rest of its insurance regulatory framework, is sufficient to meet the “regulated by State law” requirement.

The notion that a state’s legislative choice of “no regulation” can constitute sufficient “regulation” to warrant federal antitrust deference seems contrary to the purpose of McCarran-Ferguson, which as noted above, was to give the states the room to balance competition and insurance protection considerations. The result can perhaps be explained by the limited attention the Oscar Insurance litigants gave to the “regulated by state law” element of McCarran-Ferguson. Oscar itself barely raised the issue in its briefing, and the Department of Justice, which filed a Statement

27 As noted above, earlier Florida caselaw had interpreted the state antitrust analogue to the Sherman Antitrust Act to be inapplicable to the business of insurance. See supra note 9. Florida is not the only state that effectively exempts competition as a consideration in insurance regulation. See, e.g., Sanger Ins. Agency v. HUB Intern’t Ltd., 802 F.3d 732, 745 (5th Cir. 2015).
28 Oscar Insurance, 413 F. Supp. 3d at 1211 (finding that, because exclusivity arrangements can sometimes be lawful under Florida regulatory law, McCarran-Ferguson analysis compelled the court to find the “boycott, coercion or intimidation” provision inapplicable).
29 Id. at 1210.
30 Id.
31 Id. The Oscar Insurance court gives no citation for the “reasonable argument” for effective regulation, but the court probably drew the suggestion from a 1983 law review article cited elsewhere in the Oscar Insurance opinion. Id. at 1207 n.7 (citing Anderson, supra note 6, at 89–90 & n.99). See also id. at 1202 n.6 (citing, with respect to the “regulated by state law” proviso, Charles D. Welller, The McCarran-Ferguson Act’s Antitrust Exemption for Insurance: Language, History and Policy, 1978 Duke L.J. 587, 607 (1978)).
of Interest favoring Oscar, ignored the issue entirely. It may also be that the court favored disposing of the case at the pleading stage on McCarran-Ferguson grounds because it had already found on Florida Blue’s unsuccessful motion for a preliminary injunction that Florida Blue failed to demonstrate a probability of success on the merits of its antitrust claims. The court probably recognized that, unless McCarran-Ferguson immunized the challenged conduct by Florida Blue, the amended complaint might well be viewed by the Eleventh Circuit as stating a plausible violation of federal antitrust laws, thereby extending the case at least until Florida Blue could be in a position to move for summary judgment.

The downside of interpreting “regulated by State law” to mean “effectively” regulated is that it requires federal courts to make subjective judgments about the effectiveness of state regulatory activity. But this is no reason to ignore that the “regulated by State law” standard was intended to require the existence of state regulation of competition in the business of insurance, not the complete abdication that apparently has been the case in Florida.

The Supreme Court’s Uncertain Jurisprudence on “Regulated by State Law”

As the Areeda-Hovenkamp treatise notes, the phrase “regulated by State law” is “hardly a model of clarity.” Where the meaning of the words of the statute is not plain, one might expect courts to apply the commonly recited maxim that exemptions to antitrust laws should be narrowly construed and look to the statute’s context and purpose, for which the legislative history could shed light.

As shown above, Congress intended McCarran-Ferguson to require federal antitrust deference only when states afforded some regulatory consideration of the antitrust implications of the regulated business activity. Why, then, did the Oscar Insurance court essentially read the “regulated by State law” requirement out of the statute? It appears that the lower court caselaw by which the Oscar Insurance court felt bound has misinterpreted the “regulated by State law” requirement. The origin of that error seems to be an overreading of one of the first cases interpreting the statute, FTC v. National Casualty Co., a 1958 per curiam opinion that is of doubtful continuing vitality beyond its immediate holding.

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32 In its amicus brief, the Department of Justice argued only that (a) the district court should not have treated the challenged exclusivity arrangements for the sale of insurance as “the business of insurance” and (b) even accepting for the purpose of argument that the exclusivity arrangements are the business of insurance within the meaning of McCarran-Ferguson, the district court erred in concluding that Florida Blue’s alleged leveraging of its market power and other conduct to secure broker exclusivity did not constitute “coercion.” Brief for the United States as Amicus Curiae Supporting Plaintiff-Appellant and Reversal, Oscar Insurance, No. 19-14096 (11th Cir. Jan. 6, 2020).


34 1A PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶ 219c, at 27 (4th ed. 2013).


37 Only two years later, National Casualty was limited by the Court in FTC v. Travelers Health Ass’n, 362 U.S. 293 (1960). Following Travelers Health, the Supreme Court has never returned to the interpretation of “regulated by State law” in any detailed way, although there were potentially opportunities to do so. See Ohio AFL-CIO, United Autoworkers of Ohio v. Insurance Rating Board, 409 U.S. 917–18 (1972) (Douglas, J., dissenting from the denial of certiorari); Humana Inc. v. Forsyth, 525 U.S. 299, 309 (1999). In several cases, however, the Supreme Court restricted the availability of antitrust deference by sharply narrowing the meaning of “the business of insurance.” But these cases did not have occasion to explicate the “regulated by State law” provision. E.g., United Labor Life Ins. Co. v. Pireno, 458 U.S. 119 (1982); Group Life, 440 U.S. at 214–15. In Hartford Fire Insurance Co. v. California, 509 U.S. 764 (1993), which held that domestic insurers do not lose antitrust immunity by acting with foreign insurers and distinguished boycotts from cartel activity generally for the purposes of applying the exception for “boycotts, coercion or intimidation,” the Court left the question of whether the business activity of the defendant insurers was “regulated by State law” to the lower courts on remand. Id. at 784 n.12.
In *National Casualty*, the FTC argued unsuccessfully that state governance of unfair and deceptive insurance advertising materials was insufficient to meet the “regulated by State law” standard of McCarran-Ferguson. In rejecting this argument, the Court held:

> Each State in question has enacted prohibitory legislation which proscribes unfair insurance advertising and authorizes enforcement through a scheme of administrative supervision. Petitioner does not argue that the statutory provisions here under review were mere pretense. Rather, it urges that a general prohibition designed to guarantee certain standards of conduct is too “inchoate” to be “regulation” until that prohibition has been crystallized into “administrative elaboration of these standards and application in individual cases.”

This paragraph is notable in two respects. First, the Court indicates that a “mere pretense” of insurance regulation might be insufficient to meet the “regulated by State law requirement.” Second, and far more controversially, this paragraph is the genesis of the concept that any state legislation that governs the business of insurance at all is sufficient “regulation” to displace federal antitrust laws, regardless of whether that regulation was intended to create an alternative regulatory framework that displaces federal antitrust law. Many lower courts have read *National Casualty* to mean that the mere presence of a state agency or official who oversees insurance practices is sufficient to prohibit federal antitrust enforcement, regardless of whether that agency or official is actually vested with authority to consider competition concerns.

In *Gilchrist v. State Farm Mutual Automobile Insurance Co.*, the Eleventh Circuit reached the same interpretation of the “regulated by State law” proviso in a few conclusory paragraphs that referenced no prior federal authority at all. As a result of its interpretation of McCarran-Ferguson, the Eleventh Circuit held that Florida’s otherwise comprehensive regulatory framework was sufficient to exempt from federal antitrust law a secret agreement among insurers to limit insurance coverage for certain auto body repairs. *Gilchrist* did not address whether this activity was actually regulated by state law, or even whether a state regulator was authorized to consider enforcement against this allegedly anticompetitive agreement. It is difficult to imagine any useful public policy promoted by *Gilchrist*, where the insurers had hidden their anticompetitive activity but nevertheless escaped any antitrust liability because the state had an otherwise comprehensive regulatory scheme. In fact, Areeda and Hovenkamp specifically single out *Gilchrist* as an example of why interpreting the “regulated by State law” proviso to mean merely a generally comprehensive regulatory framework results in particularly ineffective antitrust policy and, in their view,

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38 *National Casualty*, 357 U.S. at 564 & n.6 (in a footnote to this statement, the Court observed that “At the time the complaints were filed thirty-six States had enacted the ‘Model Unfair Trade Practices Bill for Insurance.’ Eight others had statutes essentially the same in effect as the ‘Model Bill.’”).

39 See, e.g., *Sanger Insurance Agency*, 802 F.3d at 745; Arroyo-Melecio v. Puerto Rican Am. Ins. Co., 398 F.3d 56, 66 n.7 (1st Cir. 2005). See generally AREEDA & HOVENKAMP, supra note 34, ¶ 219c at 29. (“[I]n an antitrust case the presence of even minimal state regulation, even on an issue unrelated to the antitrust suit, is generally sufficient to preserve the immunity. The 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.”) (footnote omitted).

40 390 F.3d 1327 (11th Cir. 2004).

41 Id. at 1334–35.

42 A second case that the *Oscar Insurance* court found relevant in interpreting the phrase “regulated by State law” was *Crawford v. American Title Ins. Co.*, 518 F.2d 217 (6th Cir. 1975) (affirming dismissal of a putative price-fixing class action against title insurers and agents because Alabama had granted its insurance commissioner the power to enforce its prohibition on “all unfair methods of competition” in the business of insurance).
would perhaps justify the repeal of McCarran-Ferguson entirely.\textsuperscript{43}

The \textit{Oscar Insurance} court noted the uncertain legal basis for that interpretation of the proviso, but noted the apparently controlling authority of \textit{Gilchrist}. There is, however, little basis to read \textit{National Casualty} so broadly. That case involved the FTC’s consumer protection jurisdiction, rather than antitrust regulation. The “regulated by State law” requirement of the second sentence proviso, which addresses federal deference of antitrust laws, was therefore not even squarely at issue in \textit{National Casualty}. Indeed, some years later, in \textit{United States Department of Treasury v. Fabe},\textsuperscript{44} the Court noted that the clause of McCarran-Ferguson containing the “regulated by State law” proviso for antitrust regulation is “more narrowly circumscribed” than the clause earlier in the Act that provides more generally for deference when other federal law impairs state laws that have been adopted for the purpose of regulating the business of insurance.

Either as a result of the uncertain meaning of the “regulated by State law” proviso after \textit{National Casualty}, or due to a concern that McCarran-Ferguson as commonly applied results in bad public policy, some courts have gone to great lengths to limit the application of McCarran-Ferguson by sharply narrowing the definition of the “business of insurance.”\textsuperscript{45} At least one court has even held that the process of acquiring insurance business is not the “business of insurance” if that process is tainted by bid rigging by insurers.\textsuperscript{46} But, bidding to acquire insurance business, badly conducted or not, is nevertheless fairly understood to be “the business of insurance.” Rather than draining “the business of insurance” of its meaning, the courts would accurately view bid rigging to acquire insurance business as conduct “not regulated by State law” and therefore subject to the full panoply of federal antitrust regulatory remedies.

\textbf{Toward an Effective McCarran-Ferguson}

On appeal, Oscar Insurance argues that the district court erred in finding that its federal antitrust claims were precluded by McCarran-Ferguson, but Oscar has largely abandoned the argument that Florida’s state insurance regulatory scheme was not sufficient to meet McCarran-Ferguson’s “regulated by State law” proviso.\textsuperscript{47} The appeal has attracted several amicus briefs, two of which—one signed by legal scholars including Herbert Hovenkamp and the other by the Department of Justice—indicate disappointment that Oscar has not chosen to attack the district court’s finding that the exclusivity arrangements are “regulated by State law.” For the scholars, McCarran-Ferguson is superfluous because the only deference ever due to state regulation should be the

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\footnote{\textsuperscript{43} \textsc{Arreida} \& \textsc{Hovenkamp}, \textit{supra} note 34, ¶ 219e \& n.116.}
\footnote{\textsuperscript{44} 508 U.S. 491 (1993).}
\footnote{\textsuperscript{45} See P. Steffen, \textit{After Fabe: Applying the Pireno Definition of Business of insurance in First-Clause McCarran-Ferguson Act Cases}, 2000 \textsc{Univ. Chi. Legal Forum} 447, 471 (advocating a return to the broad definition of “business of insurance” found in South-Eastern Underwriters in antitrust cases).}
\footnote{\textsuperscript{46} \textit{In re Ins. Brokerage Litig.}, 618 F.3d 300, 351–52 (3d Cir. 2010).}
\footnote{\textsuperscript{47} Oscar argues instead that it properly pleads federal antitrust claims because either Florida Blue’s broker exclusivity arrangements are not the “business of insurance” within the meaning of McCarran-Ferguson, Brief for Appellant at 22–40, \textit{Oscar Insurance}, No. 19-14096 (11th Cir. Dec. 16, 2019), or the arrangements are “coercion” for which McCarran-Ferguson would not require deference to state regulation, \textit{id.} at 41–54. Though beyond the scope of this article, it seems that the exclusive dealing arrangements that were described in \textit{South-Eastern Underwriters} are of the same type as those imposed by Florida Blue. Accordingly, if one were to accept at least at the pleading stage that Florida Blue allegedly has market dominance as a single actor akin to the market dominance allegedly acquired by the insurance rate-fixing boards challenged in the \textit{South-Eastern Underwriters} indictment, it would seem difficult to accept that the “boycott, coercion or intimidation” provision would not apply merely because the exclusivity agreements are permitted under Florida state law or because Florida Blue is a single actor with alleged market dominance rather than a cartel.}
\end{footnotes}
deference provided by *Parker*. According to these scholars, McCarran-Ferguson merely serves to harm the public good by protecting the “unregulated, unsupervised, and self-enriching actions of industry participants, rather than policies adopted and supervised by the States for the public good.”

The arguments of these scholars ask the Eleventh Circuit to ignore that Congress determined that the limited degree of deference afforded by *Parker*’s “active supervision” requirement was insufficient to protect states’ interest in having the flexibility to regulate the business of insurance without strict adherence to federal antitrust requirements. By adopting McCarran-Ferguson, Congress plainly intended to permit state insurance regulators to authorize insurers to undertake some collaborative activities that might otherwise run afoul of federal antitrust laws even absent the “active supervision” required by *Parker*. Nothing in the Congressional debates suggests that insurance business activities that were not fully disclosed to state regulators and subject to their regulation would still meet the “regulated by State law” requirement.

Indeed, the express carve-out in McCarran-Ferguson for the ancillary antitrust violations of boycott, coercion, and intimidation suggest that there was no legislative expectation that the more severe antitrust violations of secret price-fixing cartels or bid-rigging arrangements would ever be immune from antitrust regulation. Rather, Congress presumably expected that secret bid rigging or other hidden cartel-like activity among insurers for the placement of insurance would continue to constitute criminal conduct under both state and federal law.

The difference between modern *Parker* analysis and McCarran-Ferguson is illustrated by the recent case of *North Carolina Board of Dental Examiners v. FTC*, which held that a dental board controlled by market participants that set terms of business conduct without active state supervision was not entitled to antitrust deference under *Parker*. The dental board that failed under *Parker* is the same type of privately controlled board that commonly fixed rates and set industry terms and conditions for business at the time of *South-Eastern Underwriters*. Plainly, the “active supervision” standard of state involvement required for deference under *Parker* is higher than the standard Congress intended the courts to impose in interpreting the “regulated by State law” requirement of McCarran-Ferguson.

The scholars’ amicus brief indicates a concern that, if the rationale of the district court’s decision is affirmed on appeal, federal antitrust deference would be granted to a state’s insurance regulatory scheme even when that scheme does not authorize the state regulators to consider competition issues at all. Such a result is not compelled by the language of the statute, its legislative history, or *National Casualty* and its doubtful progeny. Nor is it consistent with common sense.

Part of the courts’ difficulty in accepting that “regulated by State law” means competition regulation provided by State law has been the challenge of identifying a standard to judge the adequacy of state regulation. Though President Roosevelt might have hoped that “regulated by State law”...
“law” meant effective state regulation, that standard would call for subjective federal judgments about the quality of state regulatory activity that, as noted above, would be quite difficult to apply consistently. Federal courts likely would not wish to undertake that task absent a clearer legislative mandate.

But it is not necessary to read McCarran-Ferguson out of the law to effectuate good public policy. Far better would be for the courts to interpret the “regulated by State law” requirement to mean that a state insurance regulatory scheme will displace federal antitrust policy only when the state indicates it means to do so for a countervailing public purpose. To the extent National Casualty is relevant to the interpretation of “regulated by State law,” this standard would be consistent with the proviso in National Casualty that a “mere pretense” of regulation might be insufficient for state regulatory activity to warrant protection from McCarran-Ferguson. It would also prevent insurers engaged in bid rigging or secret cartel activity, as in Gilchrist, from claiming that the mere presence of some state regulatory scheme provides immunity from federal antitrust risk. In contrast, regulatory judgments about exclusive-selling or -dealing arrangements could be reviewed by regulators properly authorized to consider competition concerns.

It is true that the insurance industry has largely abandoned rate-fixing boards as a means to ensure the effective operation of the business of insurance and, consequently, McCarran-Ferguson is no longer necessary to protect such activities. Some have argued that the modern national character of the business of insurance makes federal antitrust deference to state regulation no longer good policy. However, those who advocate for repealing the Act overlook that insurance is a business that requires intensive regulation, and that regulatory apparatus is established at the state, not federal, level. In the 75 years since McCarran-Ferguson, states have developed a substantial apparatus for regulating insurers and others involved in the sale of insurance through expert specialists in actuarial science, concepts of regulatory “risk capital,” state insolvency guarantee protections, and, most importantly, detailed knowledge of the insurers in their states and the senior executives who manage those insurers. Since the states have the regulatory apparatus, McCarran-Ferguson, properly interpreted, makes the right choice in giving states special leeway in analyzing how antitrust considerations should fit into that regulatory process. By the same token, federal courts should recognize that federal antitrust deference remains warranted for states that authorize their regulators to consider competition concerns, but no such deference is warranted for those states that have not made that choice.

Even though Oscar Insurance has not put the “regulated by State law” question squarely before the Eleventh Circuit, it can be hoped that the court will take this opportunity to limit Gilchrist.

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53 See discussion supra note 22.

54 See, e.g., Angelo Borselli, Insurance Rate Regulation in Comparison with Open Competition, 18 CONN. INS. L.J. 109, 133 (2011) (“The cartel pricing concern originated from the initial bureau rate-making activities and the regulatory restrictions on deviations from the bureau rates in the 1950s and early 1960s. Effective cartel pricing is now unlikely given the large number of insurers, ease of entry into the market and the decreased influence by rate bureaus in setting rates.”) (footnotes omitted).

55 See, e.g., Herbert Hovenkamp, The Insurance Industry’s Antitrust Immunity (Faculty Scholarship at Penn Law 20, Jan. 29, 2010), https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=2808&context=faculty_scholarship (stating that the “notion that insurance regulation is a special prerogative of the state is a historical relic of the nineteenth century”). Areeda and Hovenkamp suggest that, despite McCarran-Ferguson, most anticompetitive activity by insurers would be subject to federal antitrust law because of the activity’s interstate character or would fit the “boycott” exception in McCarran-Ferguson. See Areeda & Hovenkamp, supra note 34, ¶ 219e. However, the district court’s decision in Oscar Insurance demonstrates that, absent judicial support for a more accurate reading of the “regulated by State law” proviso, the “catch-22” will continue to ensnare efforts to remedy allegedly anticompetitive activity.
Perhaps the court will make clear that a state affording no regulatory authority to consider competition concerns for insurance business activity is not one that warrants federal antitrust deference, regardless of how comprehensively the state might otherwise regulate that business. Such a decision would be a major step toward a proper balance in the effective regulation of competition issues for the insurance industry and properly effectuate the true legislative purpose of McCarran-Ferguson.