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Honorable Pamela J. Hunter
Member, New York State Assembly
Chair, NCOIL Health Insurance and
Long-Term Care Issues Committee
Via email to Will Melofchik, Esq.,
wmelofchik@ncoil.org

Re: Air ambulance subscriptions/McCarran-Ferguson Act

Dear Chairperson Hunter:

I have been retained by Air Methods Corporation to review and offer my analysis[1] of Professor Schwarcz's conclusion, regarding NCOIL's draft Model Act Regarding Air Ambulance Patient Protections ("Model"), that: "It is virtually certain that federal courts will continue to conclude that the sale of air ambulance subscriptions does not constitute the 'business of insurance' under the McCarran Ferguson Act."[2]

I respectfully disagree. Invalidation of the Model is not a certainty; instead, substantial authority supports state insurance regulation of a product that, according to Professor Schwarcz, "ha[s] certain features of insurance contracts. Most notably, they do indeed transfer the risk that a subscriber will face uncovered expenses for necessary air ambulance services." Schwarcz, p. 9.

In summary, my main conclusions are:

- Recent federal court opinions preempting North Dakota and West Virginia statutes regulating air ambulance subscriptions as insurance are highly distinguishable—not harbingers of certain doom. Both were blunt instruments (a ban and a wholesale delegation of authority to the regulator), and the courts seemed suspicious of them as end runs around

[1] I am a partner at Katten Muchin Rosenman LLP with a practice in insurance regulation and litigation. I served four years as Illinois Director of Insurance and was elected to the NAIC Executive Committee four times, twice as a national officer. I chaired numerous committees at NAIC, including one pertaining to boundaries between federal and state regulation. I have testified numerous times in Congress, state legislatures, and NCOIL and the NAIC, regarding insurance regulation, including preemption and McCarran-Ferguson, and have taught insurance law several times as a lecturer at the University of Chicago Law School.

[2] Professor Daniel Schwarcz, "Analysis of *Guardian Flight LLC v. Godfread* and State Regulation of Air Ambulance Subscriptions," July 15, 2021, p. 9.

prior cases. The Model, by contrast, would present to a court as a more detailed, nuanced, tailored product of lengthy deliberations by the national expert insurance legislator group.

- Professor Schwarcz turns controlling standards on their head by arguing that whether the regulated activity is "the business of insurance" under McCarran-Ferguson is determined by "first…deciding whether…companies that sell subscriptions are 'insurers' and the subscribers…are 'policyholders.'" Schwarcz, p. 10. But that statute's plain language applies to the "regulation of…the business of insurance"—not the "regulation of insurers"—and thus is controlled by what actors do, not how they are labeled.

- Courts reviewing the Model will apply the three *Pireno* criteria that Professor Schwarcz dismisses as "question-begging," *id*,. under *Fabe's* overlay of substantial deference to the states' broad regulatory authority over the business of insurance in a "first clause" McCarran case such as this.

- The Model is not "virtually certain" to fail this test. Air ambulance subscriptions "do indeed transfer the risk" under *Pireno's* crucial first prong. The second and third prongs (whether the conduct is an integral part of the policy relationship and is limited to entities within the insurance industry) are subject to *Pireno's* controlling language—never quoted by Professor Schwarcz and ignored by the two court opinions—directing judicial review to the "particular practice" in question. Here, the "particular practice" regulated by the Model is risk-transferring subscription agreements, not ambulance services.

- As the designated guardians of U.S. insurance regulatory policy under McCarran, NCOIL members are authorized and obligated to responsibly craft model legislation when they determine that consumers lack necessary protection in risk transfer agreements constituting "the business of insurance." Federal courts applying this phrase to the particular practice of the risk sharing contracts regulated by the Model should not be expected to lightly invalidate the Committee's methodical and carefully crafted work product.

The Recent Federal Court Opinions

Two recent opinions—*Guardian Flight, L.L.C. v. Godfread*, 991 F.3d 916 (8th Cir. 2021); *Air Evac EMS, Inc. v. Dodrill*, 2021 WL 2877603 (S.D.W.Va. 2021)—held that North Dakota and West Virginia statutes regulating air ambulance subscriptions as insurance were preempted by the Airline Deregulation Act (ADA) and not saved by McCarran-Ferguson reverse preemption. But they are distinguishable from the Oct. 19 draft Model.

These statutes were blunter instruments than the nuanced regulatory scheme in the Model; North Dakota "prohibit[ed] air ambulance providers…from selling subscription agreements," *Guardian Flight*, 991 F. 3d at 919, and West Virginia simply declared the commissioner should regulate them as insurance, delegating the details to him without the Model's detail and standards.[3]

From its first line—Yogi Berra's quote that "it's déjà vu all over again," 2021 WL 2877603 at *1—*Dodrill* questioned the West Virginia statute as end-running a prior court opinion invalidating the insurance department's regulation of subscription agreements.[4] *Guardian Flight* also referenced a court order invalidating North Dakota's regulation of air ambulance products.[5]

Dodrill and *Guardian Flight* are thus of relatively limited persuasive value in analyzing the Model. The Model, drafted by the national group of experts in insurance regulatory legislation, is substantively distinguishable from West Virginia and North Dakota's laws, and, if adopted, would also come to a reviewing court in a different procedural posture than *Dodrill* and *Guardian Flight*.

The Applicable Standard

The central policy governing a preemption challenge to a state insurance regulatory law[6] is the Supreme Court's instruction, in *Dept. of Treasury v. Fabe*, 508 U.S. 491, 505 (1993), that the McCarran-Ferguson Act, 15 U.S.C. § 1011 et seq., establishes "Congress' primary objective of granting the States broad regulatory authority over the business of insurance."

This standard governs application of the phrase "business of insurance" in the first clause of Section 2(b), pertaining to state regulation of insurance, which is substantially broader than in the

[3] While some have said that *Dodrill* invalidates a state version of the Model, it does not. The West Virginia law dropped all of the substantive protections found in Sections 4 and 5 of the current draft of the Model. *See* West Virginia HB 2776, 2021 (all standard setting delegated in West Va. Stat. § 33-11B-1(d) ("The commissioner may promulgate rules…to effectuate the provisions of this section.")).

[4] *See Dodrill*, 2021 WL 2877603 at *3 (discussing "*Dodrill I*," *Air Evac EMS, Inc., v. Dodrill*, Civil Action No. 2:210cv.00105 (D. W.Va.).

[5] *See Guardian Flight,* 991 F.3d at 920 (discussing "privately insured individuals complain[ts] to the North Dakota Insurance Department regarding unexpected bills from air ambulance providers" and the state's first regulatory effort with respect to which "the district court enjoined enforcement….*See Valley Med Flight, Inc. v. Dwelle*, 171 F.Supp.3d 930 (D.N.D. 2016).").

[6] In challenging a state law implementing the NCOIL model, a plaintiff would argue that the Airline Deregulation Act preempts the state law. Since the ADA does not "specifically relate[ ] to the business of insurance," 15 U.S.C. § 1012, it can be reverse preempted by McCarran if the state law regulates "the business of insurance." *Guardian Flight*, *Dodrill*, and Professor Schwarcz thus all focus on what constitutes the "business of insurance" under Supreme Court jurisprudence.

second clause's limited antitrust exemption.[7] Professor Schwarcz disputes this dichotomy, asserting, with respect to a decision preceding *Fabe*, that "it is immaterial that *Royal Drug* [*Group Life v. Royal Drug*, 440 U.S. 205 (1979)] was focused on the meaning of the phrase 'the business of insurance' in the context of the Act's limited antitrust exemption rather than its reverse preemption provision." Schwarcz, p. 5.

That is because, he argues, "it is a widely-accepted principle of statutory interpretation that identical phrases used in a single statutory section should be interpreted in the same way, especially when, as here, the language encompassing these two provisions was enacted at the same time and for the same statutory purpose." *Id*. But the Supreme Court categorically rejected this argument when it was made, virtually verbatim, by the dissenters in *Fabe*.[8]

Fabe intended to grant broad latitude to the insurance regulatory policy decisions of state legislators. *See Fabe,* 508 U.S. at 505 ("Our plain reading of the McCarran- Ferguson Act also comports with the statute's purpose. As was stated in *Royal Drug*, the first clause of § 2(b) was intended to further Congress' primary objective of granting the States broad regulatory authority over the business of insurance. The second clause accomplishes Congress' secondary goal, which was to carve out only a narrow exemption for 'the business of insurance' from the federal antitrust laws."). *See also id.* ("The broad category of laws enacted 'for the purpose of regulating the business of insurance…necessarily encompasses more than just the 'business of insurance.'").

A "first clause" analysis applies the three factors from *Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119 (1982), determining whether a regulated practice constitutes "the business of insurance" (as discussed below), with *Fabe* deference to the "broad category of laws enacted 'for the purpose

[7] 15 U.S.C. § 1012(b) reads in its entirety: "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, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended [15 U.S.C. 41 et seq.], shall be applicable to the business of insurance to the extent that such business is not regulated by State Law."

[8] *See Fabe* 508 U.S. at 504 ("The dissent contends that our reading of the McCarran-Ferguson Act 'runs counter to the basic rule of statutory construction that identical words used in different parts of the same Act are intended to have the same meaning.' [Citation omitted.] This argument might be plausible if the two clauses actually employed identical language. But they do not. As explained above, the first clause contains the word 'purpose,' a term that is significantly missing from the second clause. By ignoring this word, the dissent overlooks another maxim of statutory construction: 'that a court should "give effect, if possible, to every clause and word of a statute."'"). *See also id*. ("Both *Royal Drug* and *Pireno*…involved the scope of the antitrust immunity located in the second clause of Sect. 2(b). We deal here with the first clause, which is not so narrowly circumscribed."); *Merchants Home Delivery Service, Inc. v. Frank B. Hall & Co., Inc*., 50 F.3d 1486, 1490 n. 2 (9th Cir. 1995) (explaining that *Fabe* "held the business of insurance was to be defined more broadly outside the antitrust area").

of regulating the business of insurance' consist[ing] of laws that possess the 'end, intention, or aim' of adjusting, managing, or controlling the business of insurance." *Fabe*, 508 U.S. at 505.

NCOIL's robust deliberations—lengthy substantive discussions documented in 28 single-spaced pages of minutes covering four meetings over the last fifteen months—substantially support a conclusion that the Model was created with such an "end, intention, or aim."

Application Of *Fabe* and *Pireno*

Professor Schwarcz's cites no authority for his unusual if not novel standard: "[A]pplication of the *Pireno* test to air ambulance subscriptions first requires deciding whether the air ambulance companies that sell subscriptions are 'insurers,' and the subscribers who purchase these contracts are 'policyholders.'" Schwarcz, p. 10. If yes, then "the *Pireno* test does indeed suggest that the sale of air ambulance subscriptions constitutes the business of insurance"; if no, it "yields the opposite conclusion." *Id*., p. 10-11.

Although Professor Schwarcz dismisses the *Pireno* factors as "question-begging, in my view," *id*. at 10, they are routinely applied by courts hearing preemption challenges to state insurance regulatory laws. The Model thus must be analyzed under *Pireno* and *Fabe*—whose standards are upended by Professor Schwarcz's controlling threshold rule of "whether companies that sell subscriptions are 'insurers,' and the subscribers…are policyholders,'" which seems to end the inquiry before it starts.

McCarran-Ferguson preserves and protects state regulation of "the business of insurance," not state regulation of "insurers." Conduct, as opposed to labels, is determinative. A company is an insurer subject to state insurance regulation because it engages in the business of insurance—not vice versa.

Pireno's "three criteria relevant in determining whether a particular practice is part of the 'business of insurance' exempted from the antitrust laws by § 2(b)" are: "*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." *Pireno*, 458 U.S. at 129.

On their face, the *Pireno* factors are flexible—"none of these criteria is necessarily determinative in itself," *id*.—which, combined with *Fabe's* further deference in "first clause" cases to "Congress' primary objective of granting the States broad regulatory authority over the business of insurance," 508 U.S. at 505, would pose a significant hurdle for plaintiffs challenging the Model.

First factor—"has the effect of transferring or spreading a policyholder's risk":

Professor Schwarcz explains that "the transfer of risk" is precisely what the contracts regulated by the Model do: "To be sure, it is indeed the case that air ambulance subscriptions have certain features of insurance contracts. Most notably, they do indeed transfer the risk that a subscriber will face uncovered expenses for necessary air ambulance services." Schwarcz, p. 9. He elaborates: "Additionally, the seller of air ambulance subscriptions is able to spread this risk across a large number of people and therefore make it predictable by relying on the fact that a large number of independent risks will tend to produce predictable aggregate losses." *Id*.[9]

Dodrill similarly finds that "the Membership Program does involve the sharing of risk between member and Air Evac because…'in exchange for the prepaid membership fee, if a member is transported…then Air Evac…will cancel the portion of the bill that would otherwise be the patient's out-of-pocket responsibility.'" *Dodrill*, 2021 WL 2877603 at *10.

Analytically, this "setup inherently involves risk for both Air Evac and the member of the Membership Program. The member risks paying the annual membership fee but then never using Air Evac's services while Air Evac risks the possibility that a member uses the Air Evac services and that the cost of those services is much higher than the annual membership fee." *Id*.[10]

Even opponents of state insurance regulation of air ambulance subscriptions have thus plainly described them as having the characteristics of the crucial first *Pireno* prong—risk transfer and spreading, the essence of insurance.

Second factor—"integral part of the policy relationship between the insurer and the insured":

Professor Schwarcz's conclusory approach—under which the "business of insurance" test "first requires" determining what "one assumes to be the case" as to whether subscription issuers "are

[9] Echoing how insurance is described by Professor Schwarcz's preferred authority: "The primary elements of an insurance contract are the spreading and underwriting or a policyholder's risk.'It is characteristic of insurance that a number of risks are accepted, some of which involve losses, and that such losses are spread over all the risks so as to enable the insurer to accept each risk at a slight fraction of the possible liability upon it.'" *Royal Drug*, 440 U.S. at 211 (citation omitted).

[10] Having conceded this, *Dodrill* offers a tortured analogy in opposition: the "risk sharing in a situation where a car wash offers a $20 monthly membership for unlimited car washes…does not convert the car wash membership program into insurance." *Id*. Anyone involved with the business of insurance can recognize that the uncontrollable expenses resulting from the emergency transportation by air of a person whose life is in danger pose an insurance peril distinguishable from some consumers irrationally indulging in time wasting, unnecessary car washes.

'insurers' and the subscribers…are 'policyholders'"—yields this analysis: "Moving to the second prong in the *Pireno* test, the management of these uncovered expenses would thus not at all be 'an integral part of the policy relationship between the insurer and the insured,' but instead largely a matter of indifference to the health insurer, who need only pay the air ambulance expenses that it covers in its own policy." Schwarcz, p. 11.

But the consumer's *health insurer* is not the relevant risk bearer; the *subscription issuer* is. The "policy relationship between the insurer and the insured" is the risk-transferring contract between subscription issuer and subscriber, and *Pireno's* controlling prefatory language explains that its three factors are the "criteria relevant in determining whether a **particular practice** is part of the 'business of insurance.'" *Pireno*, 458 U.S. at 129; emphasis added.

The "particular practice" regulated by the Model is an air ambulance subscription between a consumer and the risk-bearing subscription issuer, not any relationship between either of those parties and any third party (such as the relationship between the consumer and her health insurer).

The test is thus of function and conduct, not labels. McCarran holds that "the continued regulation and taxation of the business of insurance is in the public interest"—not that the "regulation…of insurers…is in the public interest"; and that "the business of insurance…shall be subject to the laws of the several states"—not that "insurers…shall be subject to the laws of the several states." 15 U.S.C. §§ 1011, 1012.

If the intended starting point of a McCarran analysis was "deciding whether the…companies…are 'insurers,'' then Congress could and would have used the phrase, the "the regulation of insurers," not "the…regulation…of the business of insurance." The latter determines the former, not vice versa.

In this instance, the Model regulates the performance of contracts which transfer the consumer's risk of a balance following services to the subscription issuer. In *Pireno*, the "particular practice" at issue was the decisions of a chiropractic peer review committee used by the insurer for claims decisions whose "decision making process is a matter of indifference to the policyholder, whose only concern is whether his claim is paid, not why it is paid," rendering the particular practice not an "integral part of the policy relationship between the insurer and the insured." 458 U.S. at 132.

By contrast, the Model only regulates the issuer's performance of its subscription contract, which is integral to and defines its "policy relationship" with subscribers, a matter of significant interest to the policyholder—and within McCarran-authorized state regulation of the business of insurance.

Third prong —"limited to entities within the insurance industry":

Dodrill and Professor Schwarcz follow *Godfread's* analogy to the debt cancellation contracts preempted by the National Bank Act and not saved by McCarran under *First Natl. Bk. of Eastern Ark. v. Taylor*, 907 F.2d 775 (8th Cir. 1990). *See Godfread,* 991 F.3d at 923 ("[T]he subscription program was not enacted for the purpose of regulating the business of insurance. In so holding, we find [*Taylor*] controlling."); *Dodrill* 2021 WL 2877603 at *10 ("pre-payment of a membership fee…amounts to debt cancellation"); Schwarcz at 7 (explaining that *Godfread* and *Taylor* hold that "air ambulance subscriptions were akin to debt-cancellation contracts").[11]

But *Taylor* is distinguishable. Its debt cancellation contracts protected a fixed, defined, pre-existing debt owed by a consumer to a bank. In air ambulance subscriptions, by contrast, the consumer pays a premium to protect herself from a risk of unknown amount resulting from the possibility of a fortuitous event.[12]

Taylor's debt cancellation contracts were issued by federally chartered national banks pursuant to a rule promulgated by the Comptroller of the Currency, which—like state insurance commissioners, and unlike the FAA and air ambulances—prudentially regulates the paramount concern of financial institution solvency. And Professor Schwarcz is correct that "the *Guardian* court perhaps went too far in suggesting that the conventional insurance regulatory concern of insolvency is…irrelevant in the context of these [subscription] agreements." Schwarcz, p. 10.

If a subscription issuer challenged the Model as passed by a state legislature, the courts would, under *Pireno,* review whether the "particular practice" regulated by the law is "limited to entities within the insurance industry." In *Pireno*, the Court observed that, with respect to the "particular practice" of a peer review committee composed of chiropractors, this "inevitably involves third parties wholly outside the insurance industry—namely, practicing chiropractors," *Pireno*, 458 U.S.

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[11] Compounding the problem, only the third *Pireno* factor supports *Dodrill's* holding, in conflict with *Pireno's* admonition that "the challenged…practices need not be denied the exemption *solely* because they involve parties outside the insurance industry." *Pireno*, 458 U.S. at 133; emphasis in original. *Dodrill* takes potshots at the West Virginia statute under the first two prongs, *see Dodrill*, 2021 WL 2877603 at *3, but does not find non-compliance.

[12] Thus the New York Department of Financial Services's long-standing and unchallenged interpretation holds that ambulance service subscriptions constitute the "doing of an insurance business." *See* New York Department of Financial Services, Office of General Counsel Opinion 08-07-30 re: Ambulance Subsription/Membership Plans ("[R]esidents with the coverage…pay an annual fee. In exchange,…the ambulance service agrees to accept whatever payment that the member's or subscriber's insurance coverage will pay and will not collect any co-payment or deductible….[It is] the longstanding view of this Department that ambulance membership or subscription plans constitute the doing of an insurance business….[T]he agreement central to the operation of an ambulance subscription or membership plan…requires that the ambulance service provide a benefit of pecuniary value to the subscriber or member upon the occurrence of a fortuitous event.").

at 132, and thus constituted "a provider market—the market for chiropractic services—rather than…an insurance market," *id*. at 133.

The Model regulates subscription agreements—an insurance market between risk bearers and subscribers, not the relationship between the air ambulance company or the subscribers, on the one hand, and third parties in the ambulance services provider market, on the other hand.[13]

NCOIL Speaks For State Insurance Legislators, The Guardians Of McCarran

After the Supreme Court determined that insurance was interstate commerce in 1944,[14] Congress quickly passed the McCarran-Ferguson Act of 1945, establishing that "the continued…regulation by the several States of the business of insurance is in the public interest." 15 U.S.C. § 1011.

This policy that the business of insurance is "subject to the laws of the several States which relate to the regulation…of such business" 15 U.S.C. 1012(a), is backed up a unique reverse preemption regime whereby state law trumps federal statutes "unless such Act specifically relates to the business of insurance," 15 U.S.C. 1012(b), which the ADA does not.

Any state determination that a practice constitutes the business of insurance, though ultimately subject to federal court review, will enjoy a reasonable presumption of validity pursuant to the Supreme Court standard that McCarran represents "Congress' primary objective of granting the States broad regulatory authority over the business of insurance." *Fabe,* 508 U.S. at 505.

In support of the state legislators who are the guardians of this enormous responsibility, NCOIL's mission is to "write Model Laws in insurance [and]…preserve the state jurisdiction over insurance as established by the McCarran-Ferguson Act." In this instance, NCOIL members engaged in substantial study and review of public policy and legal issues around air ambulance subscriptions.

Chairperson Hunter described the rich texture of the work she has led in a process steeped in good faith review and study, and thus legitimacy: "Having been Chair…for a couple of years this model has been a point of conversation and has changed along the way since it's been introduced as we've had an introduction and amendments and federal legislation and state legislation and lawsuits." Minutes, Health Insurance & Long Term Care Issues Committee, July 17, 2021.

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[13] *Pireno*, referencing *Royal Drug*, emphasized that, "So long as that promise [fixed co-pay amount in *Royal Drug*, no out-of-pocket in air ambulance subscriptions] is kept, policyholders are basically unconcerned with arrangements made between Blue Shield and participating pharmacies [analogous to the subscription issuer's arrangements with transportation and medical providers]." *Pireno*, 458 U.S. at 132.

[14] *U.S. v. Southeastern Underwriters*, 322 U.S. 533 (1944).

That process has forthrightly confronted preemption, including the Chair's recognition of "the need to further examine the legal issues surrounding this type of legislation." A lengthy hearing this summer followed, featuring extensive testimony from opponents' retained expert.

Professor Schwarcz is a distinguished, chaired professor at a major university, with substantial insurance expertise, whom I know to be capable and qualified. But after analyzing the draft model, its legislative history, and relevant authorities, I believe his conclusion of the "almost certainty" of invalidation of a state law that regulates what, as he describes it, is the essence of a risk transferring and spreading mechanism, is far more aggressive than what is suggested by controlling law.

The Model's scope is on its face explicitly limited—applying only "to the extent that an air ambulance subscription falls within the business of insurance described" as the transfer of risk of "cost-sharing amounts of a patient." Model, Sections 3(b) and 3(a). It does not regulate the provision of medical services or how providers interact with their vendors—"particular practices" which are not the "business of insurance" under Supreme Court doctrine.

The Model only concerns the "particular practice" of subscription agreements that transfer risk from consumers to risk bearing providers.[15] Such conduct can reasonably be considered the "business of insurance" by legislators who have concluded that state insurance regulatory intervention is necessary to protect consumers in a risk-transferring market otherwise lacking the Model's protections.

Conclusion

The Committee has properly sought legal input following *Guardian Flight* and *Dodrill*, but I respectfully disagree with Professor Schwarcz's conclusion that passage of the Model is a fruitless exercise doomed to failure via judicial invalidation.

[15] NCOIL has recognized the difference between regulating risk transferring subscription agreements and regulating those subscriptions' underlying financial peril of unpaid bills. It passed a resolution in 2017 urging Congress to legislatively override ADA preemption of state "laws to protect consumers from out-of-network air ambulance bills" because "courts have determined that these laws are preempted by the Airline Deregulation Act of 1978." Such state laws pertain to "particular practices" which are billing for services and thus far more vulnerable to preemption without McCarran protection than regulation of air ambulance subscriptions—a "particular practice" which shares risk rather than provides services. Since the Model only regulates risk transferring agreements, it can be protected by McCarran without amendment of any federal statute if these subscription contracts are considered "the business of insurance."

The Model is more nuanced than and substantially different from the North Dakota and West Virginia statutes. It does not emerge from a prior court battle in a specific jurisdiction and should not be seen as "déjà vu all over again" by a reviewing court thus disinclined to be sympathetic.

Rather, it should receive a fair review on the merits. That necessarily includes, first, application of *Fabe's* fundamental recognition that "Congress' primary objective" for insurance regulation in the U.S. was "granting the States broad regulatory authority over the business of insurance"; and, second, a disciplined application of the *Pireno* factors, which review conduct, not actors—specifically the "particular practice" described by Professor Schwarcz as "spread[ing] the risk across a large number of people and therefore mak[ing] it predictable by relying on the fact that a large number of independent risks will tend to produce predictable aggregate losses."

Properly understood, the Model's regulation of the "business of insurance" can reasonably be viewed as grounded in controlling McCarran standards, thus staking a substantially plausible claim of validity. Adoption of the pending draft might well be irresponsible if Professor Schwarcz's virtual certainty of defeat in federal court could not be materially rebutted, but I respectfully submit that the authorities discussed herein do precisely that.

Thus the Committee can fairly ask whether it is irresponsible to *not* take action on a Model that it determines in deliberative fashion provides needed consumer protections over contracts that indisputably "do indeed transfer the risk that a subscriber will face uncovered expenses."

I thank you for your consideration and look forward to presenting to the Committee in Scottsdale.

Best regards,

Nat Shapo