NCOILETTER

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FEDS QUESTION STATE ANTITRUST OVERSIGHT

A 12-member presidential panel charged with reviewing current antitrust exemptions narrowed its gaze on the insurance industry on October 18, when the federal Antitrust Modernization Commission held a hearing regarding the McCarran-Ferguson Act's limited protections.

Regulator and insurer representatives stressed the critical importance of McCarran in promoting and protecting a competitive insurance market. Illinois Insurance Director Michael McRaith, speaking for the National Association of Insurance Commissioners (NAIC), said "the competition fostered by the [McCarran] exemption benefits both individual consumers and businesses, from large multi-national corporations to small firms in every rural county." Small insurers in particular, McRaith noted, rely on the industry's ability to share loss-history data, a practice that would be prohibited absent McCarran.

McRaith recognized the "complementary and mutually supportive roles" of state insurance officials and attorneys general when it comes to upholding state antitrust and unfair business practices laws, and he pointed to state regulation's ability to protect consumers and ensure solvency.

Julie Gackenbach of Confrere Stragties, representing the Nat.'l Association of Mutual Insurance Companies (NAMIC), said insurance is a fundamentally different product than other financial services instruments because it is an assurance of future payout. The uncertainty inherent in insurance transactions, she said, makes pooling of actuarial sound data vital to ensuring a healthy market that offers consumers greater choice.

Gackenbach warned the Commission that "Any change in the existing antitrust regime and repeal or modification to the current limitations could decrease market sta-

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SENIORS, OTHERS FALL THROUGH CRACKS IN MEDICARE PART D DRUG COVERAGE

In a move that could make it more difficult for seniors to pay for Medicare prescription drug coverage, the Centers for Medicare & Medicaid Services (CMS) announced recently that it will no longer automatically qualify certain individuals for premium subsidies.

The decision will affect some 632,000 beneficiaries who held "deemed status," including so-called "dual eligibles" who formally had drug coverage through state Medicaid programs, and those on Supplemental Security Income (SSI). When the new Medicare Part D drug benefit took effect January 1, 2005, CMS automatically enrolled these persons in a Part D drug plan and qualified them for low or no-cost coverage.

Now, seniors who lost their "deemed status" in the months since the 2005 open enrollment period must actively apply for a 2007 financial subsidy. "Deemed status" may be lost when a person is no longer signed up for Medicaid, no longer receiving SSI, or no longer in a Medicare Savings Program.

Affected individuals will keep their coverage, remaining in their current drug plans without a lapse of benefits, unless they opt out and pursue a new plan. The difference is that without the automatic subsidy, premiums may be much higher.

CMS says some formerly "deemed status" individuals are

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NATIONAL CONFERENCE OF INSURANCE LEGISLATORS

Preserving State Insurance Regulation...

- By interacting with Congress on issues of critical importance to insurance public policy
- By educating state lawmakers on the solutions to their insurance-market crises
- By fostering relationships between state legislators
- By asserting the primacy of state insurance regulation under the McCarran-Ferguson Act of 1945

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bility, reduce affordability and availability of products, stifle innovation and expansion, diminish industry efficiency and, ultimately, inhibit rather than increase competition in the insurance marketplace."

The American Insurance Association's (AIA) Stef Zielezienski spoke to the "balancing of regulatory supervision and antitrust litigation" that now takes place under state oversight. "If this were not the case," he said, "there would be nothing but chaos, with private antitrust litigation—including massive class actions—constantly at war with the federal regulatory systems established by the government. This would create enormous uncertainty for these business and their customers, to the benefit of neither."

Zielezienski, though conveying AIA's support for optional federal charter legislation in place of state regulation, stressed that amending McCarran to carve out so-called "safe harbors" that would still benefit from antitrust exemptions would be illusory in practice and would represent "a backdoor application of the antitrust laws."

Other witnesses were critical of McCarran's protections. Theodore Voorhees, Jr., representing the American Bar Association (ABA), said that, as a general rule, the ABA opposes industry-specific antitrust exemptions on the grounds that they are "rarely justified." Unlike Zielezienski, he supported safe harbors, including allowances for collecting and disseminating loss data, developing policy forms, and participating in residual market and joint underwriting associations, among other activities.

Full repeal of McCarran is called for, said Jay Angoff of the law firm Roger Brown & Associates, because the Act results in exemptions from both federal antitrust and consumer protection laws. Though he recognized that state statutes governing mergers between insurance companies are tougher than those set forth by federal agencies or the courts, Angoff declared that the state regulation established under McCarran "in many cases prevents insurance policyholders from obtaining an adequate remedy" in times of need. He concluded, in part, that "there is no principled argument that any legitimately pro-competitive activity currently undertaken by insurers would be struck down as violative of the antitrust laws if McCarran were repealed."

The Antitrust Modernization Commission, created pursuant to the Antitrust Modernization Act of 2002, is charged with examining the appropriateness of current antitrust exemptions and must report to the President and Congress by July 15, 2007, regarding specific proposals for antitrust-related legislation. Members were appointed by the President and by leadership in both the Senate and the House of Representatives.

The 1945 McCarran-Ferguson Act explicitly provides for state supremacy in the regulation of the business of insurance; provides insurers a limited exemption from federal antitrust laws as long as the activity is state-regulated; and allows insurers to share information that lowers costs of doing business, including shared loss experience and policy forms.

"Any change in the existing antitrust regime and repeal or modification to the current limitations could decrease market stability, reduce affordability and availability of products, stifle innovation and expansion, diminish industry efficiency and, ultimately, inhibit rather than increase competition in the insurance marketplace."

NCOIL ANNUAL MEETING

Market Conduct Surveillance Reform
Friday, November 10, from 3:15 to 5:30 p.m.

Draft NAIC-NCOIL Mega-Catastrophe Plan
Thursday, November 9, from 3:00 to 4:30 p.m.

NCOIL LOOKS FOR ANSWERS IN LIFE SETTLEMENTS DEBATE

The NCOIL Life Insurance & Financial Planning Committee will explore options to address newly emerging life settlement schemes on November 10, during the NCOIL Annual Meeting in Napa, California. Up for discussion is whether lawmakers should revisit an NCOIL *Life Settlements Model Act* to address such contemporary concerns, or whether separate action would be appropriate.

Since the model's adoption in 2000 and readoption in 2004, issues have developed regarding life settlement transactions in which an individual purchases a life insurance policy using borrowed money, with the intent to sell that policy to investors after the expiration of an initial two-year contestability period.

Committee Chair Rep. Larry Taylor (TX) said, "Life settlements raise complex issues for legislatures to address. There is a very fine line between violating an individual's right to settle a policy and regulating the manner and intent of a policy purchase. On one hand, there are legitimate circumstances where an individual will no longer want or need a policy, and that individual should be compensated fairly. On the other hand, there is no place in the life insurance business for scenarios that amount to nothing more than betting on lives through improper policy purchases."

Among the options to be discussed are drafting a resolution in opposition to so-called stranger-owned life insurance (STOLI) transactions, drafting a resolution regarding proposed related revisions to a National Association of Insurance Commissioners (NAIC) *Viatical Settlements Model Act*, or considering changes to the NCOIL model.

ND Insurance Commissioner Jim Poolman, chair of the NAIC Life Insurance & Annuities Committee, will report on the status of his amendments to the NAIC model that, in part, would expand a policy's incontestability period from two to five years. The American Council of Life Insurers and Life Insurance Settlement Association also are expected to comment.

At the NCOIL Summer Meeting, the Committee voted to defer review of the NCOIL model for one meeting and to schedule extended debate at the November conference.

"Life settlements raise complex issues for legislatures to address. There is a very fine line between violating an individual's right to settle a policy and regulating the manner and intent of a policy purchase."

PBM, PHYSICIAN REIMBURSEMENT BILLS TO HIGHLIGHT NCOIL COMMITTEE MEETING

The NCOIL Health, Long-Term Care, and Health Retirement Issues Committee will tackle controversial pharmacy benefit manager (PBM) and physician reimbursement model laws at the NCOIL Annual Meeting, on November 9 from 10:30 a.m.-12:00 p.m.

Committee Chair Rep. George Keiser (ND) said, "These two issues involve complex contracting arrangements between parties that have a direct impact on health care costs. At the meeting, we will bring together opposing interests and try to work through the issues with model laws."

A draft *Model Act Regarding Pharmacy Benefit Managers* would require that a PBM owe a fiduciary duty to a covered entity; provide transparency regarding financial/utilization information; disclose any conflict of interest; and follow drug substitution guidelines. A recently submitted amended version would add language related to prompt payment of clean claims and needs a 2/3 vote for consideration.

A draft *Model Act Concerning Regulation of the Secondary Market in Physician Discounts* would define the relationship between a "contracting agent" and a physician and regulate the secondary market in physician discounts by, in part, demanding comprehensive disclosures on contracts between doctors and contracting agents regarding use of physician discount information.

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NCOIL

STATES, FEDS TAKE TITLE INSURERS TO TASK

Officials in Washington State, Connecticut, and the Dept. of Housing and Urban Development (HUD) have added their names to a growing list of state and federal entities that have taken action to reform practices in the thriving title insurance industry.

In an October 16 report, WA regulators found that title insurers there engage in "truly astonishing numbers of violations" of laws and regs governing incentives for obtaining business. The 30-page report on 11 Seattle-area title insurers said insurers provide gifts, golf trips/sponsorships, meals/luncheons, ski and shopping outings, and what amounts to co-underwriting of a real estate agent's advertising costs, among other activities.

The report noted that some violations were minor but characterized the business as one "rife with practices gone haywire." The study also referenced a recent multi-state investigation, led by CO, that targeted so-called bogus reinsurance transactions. In such cases, title insurers buy reinsurance from companies owned by any of several real estate professionals in return for those professionals steering business to the insurer. Regulators assert that no risk is actually transferred in these deals.

In CT, a class action against ten title insurers accuses them of breaking state law by using out-of-state closing service vendors who are not recognized as CT title agents. The suit says this allows title insurers to capitalize on their referral arrangements with outside vendors, who earn a share of the insurance premiums title companies collect.

Attorney John Gale, representing the agents bringing suit, said the companies' allegedly illegal actions "have resulted in closing CT lawyers out of [the title insurance] practice area and in creating a new world of unlicensed, illegal title agents engaging in the unauthorized practice of law, systematically depriving consumers of...protections…."

On the federal level, HUD announced last month that it had reached settlements of almost $2 million with three captive title reinsurers that, HUD says, violated federal anti-rebating laws by engaging in sham reinsurance deals.

All three captives are owned by builders, deny any wrongdoing, and have agreed to cease entering into new title insurance deals and writing new business.

Federal Housing Comm. Brian Montgomery said, "We've taken a long hard look at captive title reinsurance and see almost no legitimate purpose for it when it comes to single-family homes. HUD will continue to scrutinize these and other affiliated business arrangements to see if they were set up merely as a way to pay for the referral of...business."

SENIORS

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eligible for subsidies based on their income and assets. These beneficiaries must have annual incomes at or below 150 percent of the federal poverty level, or $14,700 for individuals and $19,800 for married couples. They must have assets of no more than $11,500 per person, $23,000 per couple.

In September, CMS sent letters to affected beneficiaries telling them of their new Medicare responsibilities. But the National Council on Aging claims that just 20 percent of low-income seniors actually respond to letters, due to illness, advanced age, or illiteracy, among other reasons.

CMS also has contacted insurers with Medicare drug plans notifying them of who's affected, as well as reached out to community organizations in order to encourage education and assistance for impacted seniors.

CMS says it will extend this year's enrollment period 90 days beyond the December 31 cut-off for affected dual-eligible beneficiaries. According to the National Senior Citizens Law Center, dual-eligibles are generally in poorer health and have fewer financial resources.