

ABA Antitrust Section Fall Forum

Legislation: What is Congress Doing?

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Moderator:

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Speakers

- **Ivy Johnson**, Chief Antitrust Counsel, Minority Staff, Committee on the Judiciary, United States Senate
- **Gene Kimmelman**, Vice President for Federal and International Affairs, Consumers Union
- **Jeffrey Miller**, Democratic Chief Counsel, Antitrust, Competition Policy and Consumer Rights Subcommittee, Committee on the Judiciary, United States Senate
- **Melanie Sabo**, Assistant Director (Anticompetitive Practices), Bureau of Competition, Federal Trade Commission

Major Developments

- Insurance Industry
- Pharmaceutical Industry
- Energy Industry
- Railroad Industry
- Resale Price Maintenance/*Leegin* decision
- Attorney-client privilege protection

Insurance Industry

- **H.R. 1081 / S. 618** - The "Insurance Industry Competition Act of 2007"
- Status: Referred to Committee
- Would amend the McCarran-Ferguson Act to remove antitrust and FTC Act "unfair methods of competition" exemption and retain existing limited exemption for business of insurance from FTC "unfair and deceptive practices" authority

Insurance Industry

- **H.R. 3200 / S. 40** – The “National Insurance Act of 2007”
- Status: Referred to Committee
- Seeks to apply federal antitrust laws to national insurers, national agencies, and federally licensed insurance producers
 - Exceptions:
 - Would not apply to the use of standard insurance policy forms
 - Section 5 of the Federal Trade Commission Act would not apply

Pharmaceutical Industry

- **H.R. 971 / S. 885** – The “Community Pharmacy Fairness Act of 2007”
- Status: Passed by the House Judiciary Committee
- Would exempt certain groups of independent pharmacies from antitrust law allowing them to collectively negotiate prices with drug benefit plans, with standards borrowed from the National Labor Relations Act
 - Includes health plans acting under Parts C and D of the Medicare Program

Pharmaceutical Industry

- **H.R. 1432 / S. 316** – The “Preserve Access to Affordable Generics Act”
- Status: Passed by the Senate Judiciary Committee
- Seeks to amend the Clayton Act to prevent parties to a patent infringement suit from agreeing not to research, develop, manufacture, market, or sell generic drugs for any period of time
 - Exempts agreements solely transferring the right to market a generic drug during life of the patent

Pharmaceutical Industry

- **H.R. 2970** – The “Pharmacy Benefit Manager Transparency Act of 2007”
- Status: Referred to Committee
- Would require pharmacy benefit managers to annually disclose all compensation received from drug manufacturers to the managers’ client plans and the Antitrust Division of the Department of Justice

Energy Industry

- **S. 879 /HR 2264**– The “No Oil Producing and Exporting Cartels Act of 2007”;
- Status: Passed by Senate and House
- Seeks to amend Section 7 of the Sherman Act to forbid any foreign state, or state agent, from:
 - colluding to limit the production or distribution of any petroleum product;
 - setting or maintaining the price of any petroleum product; or
 - restraining trade for any petroleum product
- Seeks to remove sovereign immunity defenses in federal court

Energy Industry

- **H.R. 1500** – The “Gasoline Price Stabilization Act of 2007”
- Status: Referred to Committee
- Would amend Section 7 of the Clayton Act to require that petroleum industry mergers be likely to result in a net benefit to consumers by maintaining or increasing competition
- Would also institute a one year moratorium preventing the merger of petroleum companies valued over \$10 million

Energy Industry

- **H.R. 1252** – The “Federal Price Gouging Prevention Act”
- Status: Passed by House; similar bills introduced in Senate
- Would bar selling at wholesale or retail during a period of an energy “emergency,” gasoline or other petroleum distillate at a price that--
 - (A) is unconscionably excessive; and
 - (B) indicates the seller is taking unfair advantage of the circumstances related to an energy emergency to increase prices unreasonably.
- Enforceable civilly by FTC, by State AGs as *parens patriae*, and criminally by Department of Justice

Railroad Industry

- **H.R. 1650 / S. 772** – The “Railroad Enforcement Act of 2007”
- Status: Referred to Subcommittee in the House; passed by the Senate Judiciary Committee
- Would remove many exemptions currently protecting rail common carriers currently subject to the jurisdiction of the Surface Transportation Board, including (i) eliminating the exemptions on railroad merger review by the FTC/DOJ; (ii) eliminating exemptions on private antitrust lawsuits against railroads; and (iii) eliminating exemptions for railroad collective ratemaking

Resale Price Maintenance/ *Leegin* Decision

- **S. 2261** – The “Discount Pricing Consumer Protection Act”
- Status: Introduced
- Seeks to overturn Supreme Court’s June 2007 *Leegin* decision and restore the rule of per se illegality for minimum resale price maintenance
- Bill introduction followed Senate Judiciary Committee Subcommittee on Antitrust, Competition Policy and Consumer Rights 7/31/2007 hearing -- “The *Leegin* Decision: The End of the Consumer Discounts or Good Antitrust Policy?”

Government Investigations

- **H.R. 3013 / S. 186** – The “Attorney-Client Privilege Protection Act of 2007”
- Status: House agreed to the bill by voice vote upon suspension of the rules; Senate has referred to Committee
- Would prevent prohibit federal prosecutors from pressuring corporations into waiving the attorney-client or attorney work product privileges under threat of indictment