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Keeping Up Your Antitrust Guard:

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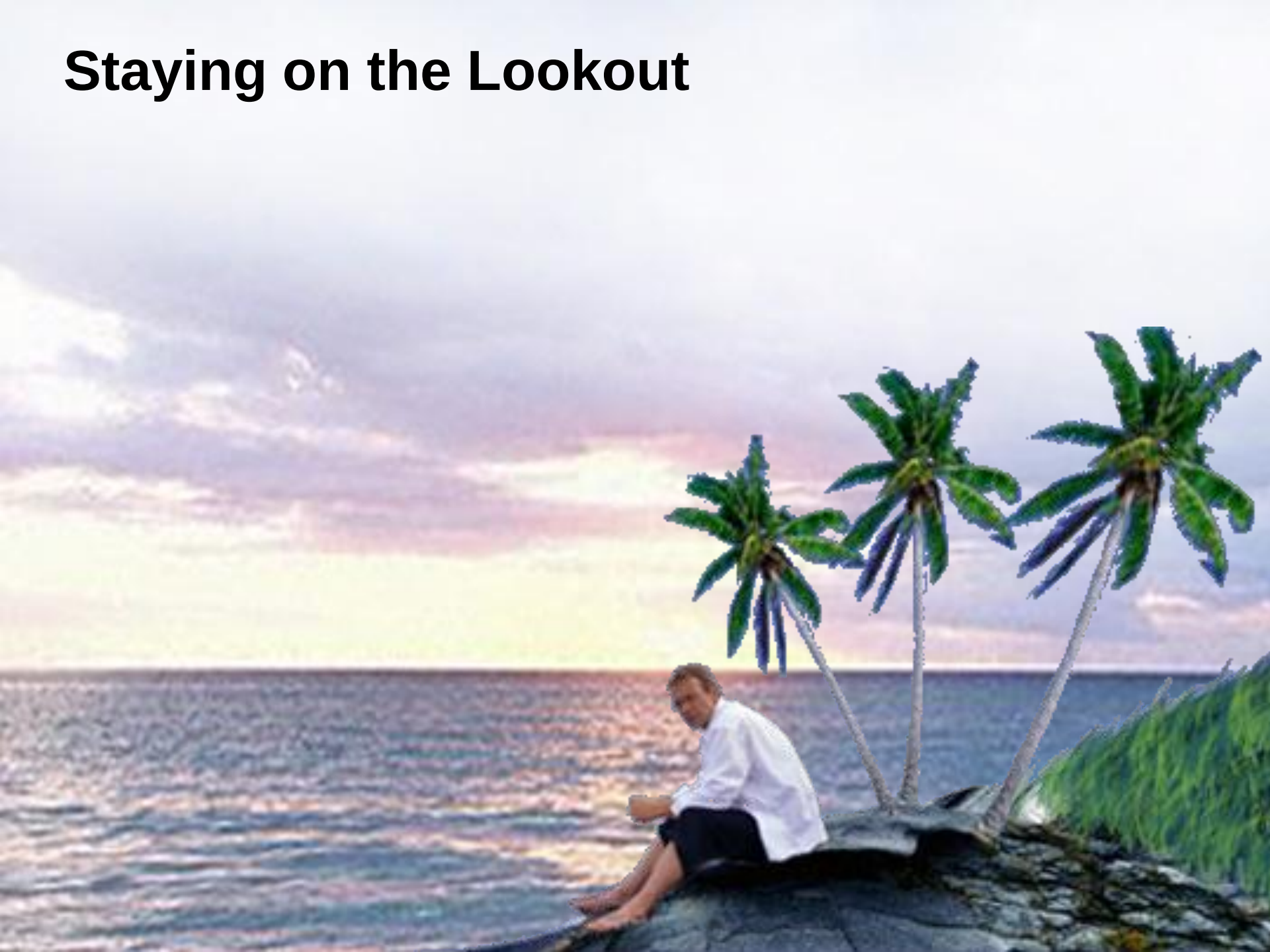
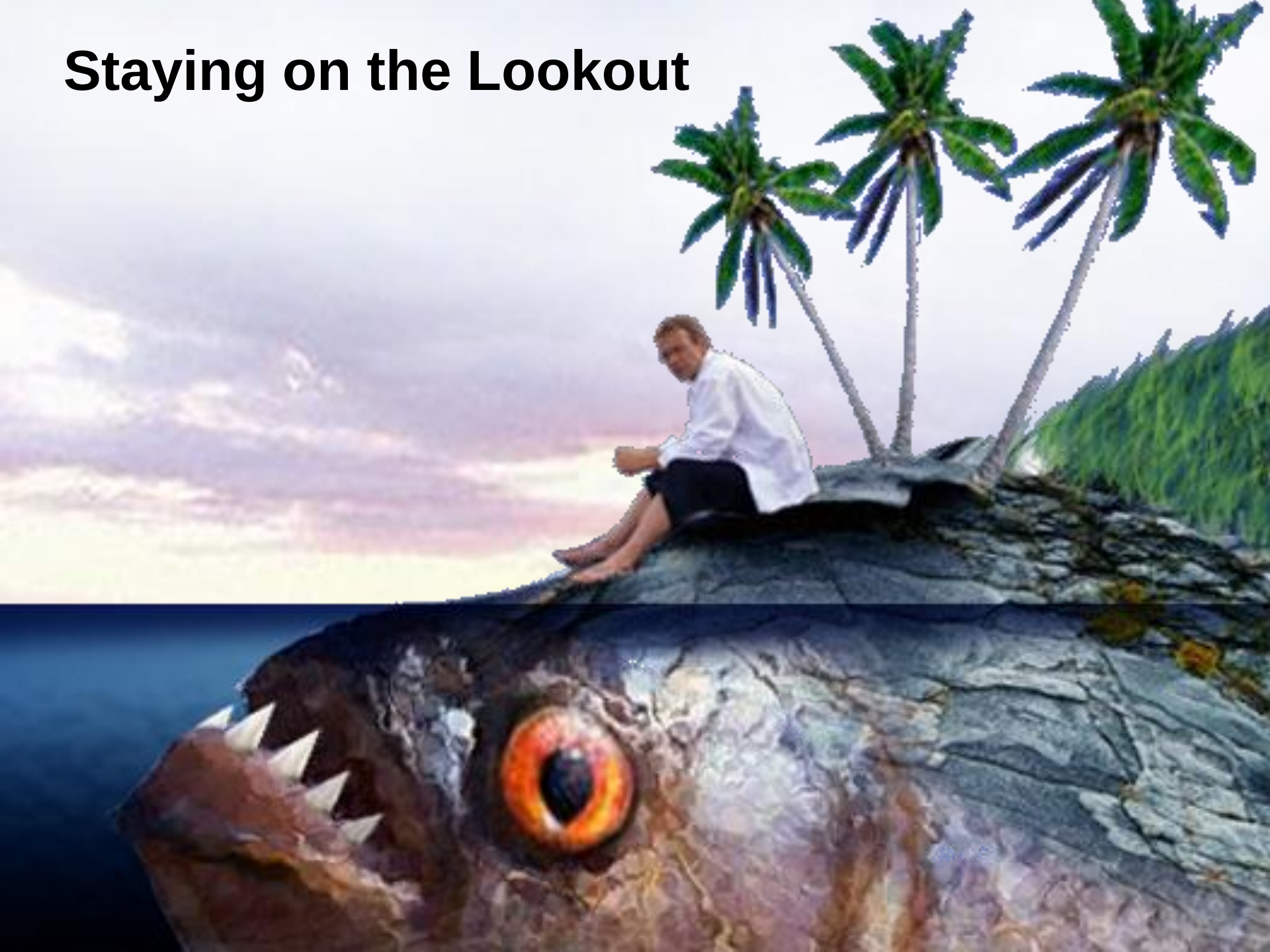
Overview

- State and federal antitrust laws prohibit monopolistic conduct and agreements that unreasonably restrain trade
- Antitrust laws intended principally to protect consumers, but injured competitors and distributor/producers may also have claims
- Avoid improper agreements with competitors on price, customers, markets or other terms of dealing, and avoid contract terms that exclude competition
- Limited exemption for “business of insurance” if “regulated” by the state, but not “boycotts,” “coercion” or “intimidation”
- Protection for petitioning/lobbying activity and actions furthering clearly articulated state purpose that state actively supervises
- Foreign countries have their own antitrust laws. They generally run parallel to US laws, but more detailed review beyond scope of this outline.

Staying on the Lookout



Staying on the Lookout



Enforcement

- U.S. Government – Department of Justice Antitrust Division and the Federal Trade Commission
- State attorneys general
- Private plaintiffs
  - Customers, competitors, producers
- State insurance departments have similar authority

Risks of non-compliance

- Criminal sanctions, including up to ten years in prison and/or substantial fines
- Actions against the insurer, including investigations, class actions and other lengthy, expensive proceedings
- Large civil damage awards, including triple damages and plaintiff's attorney fees
- Disclosure of confidential commercial information through the legal process
- Lost time for staff who need to search document files and prepare and testify in legal actions
- Employment sanctions, including termination
- Business losses resulting from required alterations in business relationships or contracts

Larger antitrust penalties

- Tough penalties for criminal antitrust violations:
- Maximum prison sentences now ten years, rather than three
- Maximum fines for individuals now $1 million, up from $350,000
- Maximum fines for corporations now $100 million, up from $10 million

Compliance plan credit vs. Amnesty

- Antitrust compliance plan yields no leniency under sentencing guidelines, in contrast to other areas of law
- Senior DOJ criminal antitrust enforcer notes that almost all criminal violators had compliance programs
- He describes their compliance plans as “two time losers” since they didn’t prevent violations and didn’t result in self-reporting.
- Instead, DOJ provides amnesty commitments to firms that come forward
- DOJ wants compliance, not compliance plans
- *Ironically, this creates added emphasis on effectiveness of compliance program*

Compliance program features

- Corporate policy
- Program to maintain compliance
- Education – at executive, marketing and provider relations levels
- Monitoring

Key compliance focus: Avoiding collusion

- Antitrust laws prohibit:
  - Collusion -- agreements that restrain competition
  - Monopolization and attempted monopolization
  - Anticompetitive mergers

The first is the main focus of this session, because it's the most likely risk area in everyday operations.

Collusion/agreement in restraint of trade

In the real world?

In 1982, Robert Crandall (President and CEO for American Airlines) calls Howard Putnam (President and Chief Executive for Braniff) . . .

- RC: I think it's dumb as hell for X's sake, all right, to sit here and pound the @#%#@!$ out of each other and neither one of us making a #@$#!@ dime.
- HP: Well…
- RC: I mean, you know, @$#@, what the hell is the point of it?
- HP: But if you're going to overlay every route of American's on top of every route that Braniff has — I just can't sit here and allow you to bury us without giving our best effort.
- RC: Oh sure, but Eastern and Delta do the same thing in Atlanta and have for years.

Let's see . . . .

- HP: Do you have a suggestion for me?
- RC: Yes, I have a suggestion for you. Raise your @$@~!$ fares 20 percent. I'll raise mine the next morning.
- HP: Robert, we…
- RC: You'll make more money and I will too.
- HP: We can't talk about pricing!
- RC: Oh !#!@*!, Howard. We can talk about any @#!$! thing we want to talk about.

Collusion

- Collusion is agreement, usually between competitors, that restrains competition. It can involve activity as sellers OR buyers.
- Requires two independent separate economic actors – you cannot conspire with your own parent, subsidiary or sister corporation
- Mutual understanding to accomplish a common purpose.
- Does NOT require: (1) express, written, or formal agreements, (2) meetings in a "smoke filled room" or elsewhere, (3) statement of purpose, detailed plan, or specific agreement on means to carry out plan. Informal "signaling" can be the method.
- Complaint must plausibly allege conspiracy; not enough to plead parallel behavior and conclusory allegations of conspiracy
- Sharing confidential information can be used as evidence to prove conspiracy
- To be unlawful, agreement must *unreasonably* restrain trade
- Some restraints "per se" unlawful – legality of others more dependent on market analysis, such as bona fide joint ventures

Core antitrust misconduct

- Price-fixing – agreement between competitors on ANY element of price
- Bid rigging – agreeing to fix or rig responses to a customer's request for proposals
- Customer allocation – agreeing which firm will do business with which customers
- Boycotts – concerted refusals to deal with particular customers, distributors/agents, or carriers
- Certain tie-ins, forcing buyers of product where seller has market power to purchase separate product

“Rule of reason”

- Where “per se” rule doesn’t apply, test is “rule of reason”
  - Anticompetitive impact balanced against procompetitive aspects
- This can include “vertical” restrictions, such as exclusive dealing, and territorial or product restrictions on distributors

Importance of “market power”

- Market power, in a particular relevant product and geographic market, is typically key to evaluation of risk under rule of reason
- A product or geographic market is an area or cluster of products in which a hypothetical monopolist could exploit position to detriment of customers
- Market power = ability to exclude competition, impose above market prices or restrict output profitably
- Market share can be an indication of market power, but is not definitive proof
- Absent market power, most conduct is defensible under rule of reason

Joint ventures

- Joint ventures, teaming agreements, co-marketing arrangements, and reinsurance coverage for competitors are subject to antitrust screen
  - If arrangement is merely formalized price-fixing, market division or cartel activity, substance trumps form
  - If arrangement fosters provision of new product, entry into new market, achievement of additional choice or better product for customers, efficiencies other than those that merely reflect loss of competition, or enhanced competition in the market, venture will itself typically be OK, unless the loss of competition by venturers outweigh positive value due to market power concerns
  - Collateral restraints will not have protection if they are not needed for success of the venture

Collaboration implementation

- Determine if venture is bona fide venture -- not a cartel scheme in disguise and adds value to the market
- Confirm that collaboration is not anticompetitive on balance
- Check for any collateral or ancillary restraints to make sure they are not overbroad in light of legitimate needs of venture
- Erect appropriate firewalls as precaution against anticompetitive side effects or tacit collusion

Reinsurance and marketing cooperation examples

- An insurer may reinsure a competitor's business, and get detailed information on the competitor's customers and premiums
- Or a carrier may cooperate in joint marketing of complementary products with a competitor, while also having its own product line, outside the scope of the collaboration, that competes with the competitor's product suite
- In both instances, a tailored compliance program with firewalls is warranted to avoid improper collusion and mitigate any risk of the appearance of such collusion

McCarran-Ferguson Act – a partial exception for the "business of insurance"

- Early case law held that federal authority did not reach insurance or limit state regulation of insurance because insurance contracts were not interstate "commerce"
- Then came *U.S. v. South-Eastern Underwriters*, 322 U.S. 533 (1944)
  - Fire insurers indicted for price fixing in six states.
  - Insurance transactions that stretch across state lines are "Commerce among the several States" subject to regulation by Congress under the Commerce Clause.
  - The Sherman Act was intended to prohibit conduct of fire insurance companies which restrains or monopolizes the interstate fire insurance trade.
- Decision led to concern it would interfere with state regulation and taxation of insurance.
- In 1945, McCarran-Ferguson Act passed in reaction.

McCarran-Ferguson Act, 15 USC §§ 1011 et seq.

- 1945 law confirms state authority to regulate and tax insurance
- Protects state laws regulating insurance from invalidation or impairment by federal law that does not specifically relate to insurance
- Separate test for antitrust laws. Affirms, but specifically limits, applicability of antitrust laws and FTC Act to the business of insurance
- Does not directly affect applicability of state antitrust laws

Affirming state regulation and taxation of insurance

- §1011 -- Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.
- §1012(a) -- 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.

Protection of state insurance laws

- §1012(b) -- 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.
- Applies, for example, to Federal Arbitration Act if it would impair a state law regulating insurance that restricts use of arbitration in insurer-policyholder disputes.
- Doesn't bar application of federal civil rights law where federal law would complement state law

Effect on antitrust law and FTC Act

- §1012(b) proviso -- After June 30, 1948, the Sherman Act, Clayton Act and FTC Act shall be applicable to the business of insurance to the extent that such business is not regulated by State law
- §1013(b) -- Nothing contained in this chapter shall render the Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation
  - Note Robinson-Patman Act (anti-price discrimination law) has no applicability to the business of insurance in any event since it applies only to “commodities”

Three elements for antitrust exemption

- Activity must be the “business of insurance” to be exempt;
- Activity must be “regulated” by the state to be exempt; and
- Activity may not be agreement to boycott, coerce or intimidate, or act of boycott, coercion or intimidation, to be exempt

What is the "business of insurance"?

- Exemption is for "business of insurance," not all business activities of insurers
- Includes spreading and underwriting policyholder risk and relationship between insurer and insured (such as type of policy, its reliability and interpretation), and probably includes sale and advertising of insurance, and insurer and agent licensing. Key factor whether activity is limited to parties within insurance industry.
- Does not include contracts by insurers with providers of services to insureds, the cost of which is insured against. *Group Life Ins. Co. v. Royal Drug Co*., 440 U.S. 205 (1979)
- Does not include division of customers or bid rigging, since that does not spread risk. *In re Insurance Brokerage Antitrust Litigation,* 618 F.3d 300 (3rd Cir. 2010).

What's the "business of insurance"? (cont'd)

- One decision that antitrust law can apply to mergers, on ground that merger activity is not the "business of insurance." *American General Insurance Co.*, 81 F.T.C. 1052 (1972); *American General Ins. Co. v. FTC*, 359 F. Supp. 887 (S.D.Texas 1973) (denying injunction against FTC proceeding), *aff'd on other grounds*, 496 F.2d 197 (5th Cir. 1974).
  - Cf. *SEC v. National Securities, Inc.*, 393 U. S. 453 (Arizona law requiring commissioner to assess merger based on whether it would reduce security of or service to policyholders is a law relating to "business of insurance," but SEC suit to invalidate merger due to misrepresentations to shareholders was not barred).
- If a state law regulating insurance mergers to protect policyholders is a law regulating the "business of insurance," would a merger subject to such a law be the "business of insurance" protected from federal antitrust challenge? -- no precedent except for *American General.*

What does "regulated" by state law mean?

- Does not require level of state activity required for antitrust "state action" immunity.
  - Test to date does not include "active state supervision" element in antitrust "state action" jurisprudence. Inquiry not a test of state's "zeal and efficiency". *Lawyers Title Co. v. St. Paul Title Ins. Corp.*, 526 F.2d 795 (8th Cir. 1975)
  - State regulates where it has adopted prohibitory legislation and scheme of administrative supervision, even if prohibitions are not crystallized with elaboration of standards. *FTC v. National Casualty Co*., 357 U.S. 560 (1958). Not clear how close state law must be to "mere pretense" for exemption not to apply
  - State express approval for conduct not required; sufficient that state regulatory scheme have jurisdiction over challenged practice. See *Feinstein v. Nettleship Co.*, 714 F.2d 928 (9th Cir. 1983), *cert. denied*, 466 U.S. 972
  - Extra-territorial regulation by a state is not regulation for McCarran-Ferguson Act exemption purposes. See *FTC v. Travelers Health Ass'n*, 362 U.S. 293 (1960)
- States have passed not only laws of the traditional "regulatory" variety, but also unfair insurance trade practice laws and competition-based approval standards for insurer acquisitions
  - One case indicates state general antitrust laws sufficient. *State of Md. V. Blue Cross and Blue Shield Ass'n*, 620 F.Supp. 907 (D.C.Md. 1985).
- Supreme Court has not revisited this issue in 50 years!

What is boycott, coercion and intimidation?

- Concerted or joint refusal to deal on any terms with target is a boycott. Mere concerted refusal to deal except on specified terms may not be a boycott.
- “Boycott" is not limited to concerted activity against insurance companies or agents or against competitors of members of the boycotting group. It can include concerted refusal to deal with policyholders. *St. Paul Fire & Marine Ins. Co. v. Barry,* 438 U. S. 531(1978)
  - Alleged scheme among insurers to force policyholders to accept insurer’s change to “claims made” from “occurrence” coverage.
- Price fixing alone not likely to be deemed a boycott. *In re Workers Compensation Antitrust Litigation*, 867 F.2d 1552 (8th Cir. 1989), *cert. denied*, 492 U.S. 920.
  - Enforcement activity to pressure participation in price fixing scheme could be enough for “boycott”.
- Little precedent construing “coercion” and “intimidation”

What cases have found

- Agreement between insurers to file only a single mass market rating schedule and a high individual market rate is within exemption. *Owens v. Aetna Life & Cas. Co.*, 654 F.2d 218 (3rd Cir. 1981), *cert. denied*, 454 U.S. 1092.
- Alleged bid rigging via broker organized conspiracy not exempt. *In re Insurance Brokerage Antitrust Litigation, supra.*
- Health insurer's use of "adverse selection" policy – insurer charged employer also offering competing HMO higher rates than employer who offered only insurer's plan -- was exempt where no evidence any employer customer was "coerced". *Ocean State Physicians Health Plan, Inc. v. BCBS of Rhode Island*, 883 F.2d 1101 (1st Cir. 1989), *cert. denied*, 494 U.S. 1027.
- Black insurance agent's antitrust action challenging insurer's redlining. See *Mackey v. Nationwide Ins. Companies*, 724 F.2d 419 (4th Cir. 1984).

Separate exemptions for “state action” and lobbying or petitioning activities

- Federal antitrust laws do not apply to conduct that is:
  - Taken in furtherance of a clearly articulated state purpose; and
  - Actively supervised by the state
    - Mere existence of state regulatory scheme not sufficient
  - State agency “rubber stamping” not enough
- Another exception applies to lobbying or petitioning activities
  - Immunity does not apply, though, where petitioning activity is a “sham” for anticompetitive effects achieved directly by the lobbying or petitioning activity itself

A cautionary tale of realtors

- Annual dinner meeting
- President's address
- "Costs up; my fees going up to 7%"

Note: Criminally convicted, but no jail time on this one.

A little bit of knowledge . . .

- It's OK because it's in the minutes
- It's OK because it's not in the minutes
- Hmm. Everyone else is just sitting there, so I guess it's OK . . .
- Let's all unilaterally set rates at . . . .
- Thanks for the antitrust presentation. Now, let's get back to business . . .

Example 1: Checking on premiums

- Carl the Customer tells Insureco's Harry that Insureco's initial proposed rates in response to an RFP are not competitive, since other insurers are proposing to charge less.
- Harry calls other insurers to check and learns that Carl told the same thing to each bidder. In fact, their proposals to Carl are comparable and none has agreed to give less than a 5% increase from the previous year's rates by the incumbent carrier.
- Harry and his colleagues at the other insurers are not bulldozed by Carl and do not lower their premium proposals.
- ***Does Insureco have antitrust vulnerability?***

A. No, Insureco didn't change what it planned to do.

B. No, because Harry just checked on what Carl told him.

C. Very possibly.

Example 1: Checking on premiums

- ***Answers: Does Insureco have antitrust vulnerability?***
  - A. No, Insureco didn't change what it planned to do.
    - *Maybe wrong. Agreements can be inferred, even in the absence of an express or stated understanding.*
  - B. No, because Harry just checked on what Carl told him.
    - *Maybe so, but it doesn't look very good.*
  - C. Very possibly
    - *Right!*

Example 2: One for you, one for me

- Bob the Broker tells insurer Holotta Risk that Big Bank is going to pick the competing Alpha Beta Insurer for liability coverage. He asks Holotta to submit a high bid, so he can show his client that the Alpha Beta bid is competitive and help justify his big commission. He promises to get a high bid from Alpha Beta on Holotta's Even Bigger Bank account, to help Holotta 's rates for that account look good. Barney at Holotta says he'll think about it.
- Holotta decides to bid in the normal fashion on the Big Bank account, but it comes in higher than the Alpha Beta bid.
- Alpha Beta bids on the Even Bigger Bank account but it is not competitive with Holotta.
- ***Does Holotta have antitrust risk exposure?***

A. No, because Holotta didn't do anything wrong.

B. Yes.

Example 2: One for you, one for me

- ***Answers: Does Holotta have antitrust risk exposure?***
  - **A. No, because Holotta didn't do anything wrong.**
    - *Nope. The "I'll get back to you" comment creates problems. Allegations could be made, resulting in dispute regarding plausibility of conspiracy claim*
  - **B. Yes.**
    - *Maybe didn't break the law, but appearances do matter.*

Example 3: Market Signaling

- Carrier C announces big losses for the fiscal year, and reports that the losses are largely driven by higher than anticipated claims on certain liability claims where customers have benefited from broad coverage limits and definitions.
- In a conference call with Wall Street analysts, Carrier C's CEO explains that he anticipates a turn-around, if the industry sharpens its underwriting and increases its margins on low attachment point coverage.
- ***Did Carrier C violate the antitrust laws?***

A. No, it didn't agree with anyone else.

B. Very possibly.

Example 3: Market Signaling

- ***Answers: Did Carrier C violate the antitrust laws?***
  - **A. No, it didn't agree with anyone else.**
    - *Not so fast. Could depend on reaction of other companies. It may have invited "agreement by action"*
  - **B. Very Possibly.**
    - *Correct! If other insurers accepted "invitation" and changed their business behavior, allegations of conspiracy could be supported.*

Example 4: Ancillary restraints

- International Reinsurance and Galactic Reinsurance have very little presence in Asia. They agree to jointly establish a new venture to handle reinsurance of risks in Asia, agreeing to pool their contacts and opportunities and share in the risk.
- They will continue to compete in the United States and Europe, but decide that International will not reinsure risks in South America, and Galactic will not reinsure risk in Africa.

- ***Did the insurers violate the antitrust laws?***

A. Yes

B. No

Example 4: Ancillary restraints

- ***Answers: Did the insurers violate the antitrust laws?***
  - A. **Yes.**
    - *Right. The joint venture itself is probably fine, but the division of markets regarding South America and Africa does not appear to be needed to make the legitimate joint activity work.*
  - B. No.
    - *Wrong. The restraint on competing in Africa and South America is not justified by or needed for the joint venture activity in Asia.*

Example 5: Legislative restraints

- Five insurance companies, coordinating with their trade association, lobby for new state legislation that would increase reserve levels, impose minimum margin requirements, erect other new requirements for new insurance carriers in their state, and would exempt carriers already licensed from the most burdensome requirements.
- Brokers and customer groups object that the new law will limit competition and result in higher insurance premiums.
- Documents leaked to the press show one insurance executive telling another that the legislation will remove lower cost choices from the market, and increase profits and premiums.
- ***Did the insurers violate the antitrust laws?***

A. Yes

B. No

Example 5: Legislative restraints

- ***Answers: Did the insurers violate the antitrust laws?***
  - **A. Yes.**
    - *Wrong. Lobbying immunity ("Noerr-Pennington doctrine) will protect joint lobbying for legislation or other government action, even if the action is anticompetitive.*
  - **B. No.**
    - *Right. Federalism and First Amendment principles protect the insurers' actions from antitrust liability.*

Example 6: Opposing regulations

- A small New England state passes new legislation regulating property and casualty insurance, seeking to protect individual small businesses, tighten reserve requirements and limit use of non-U.S. reinsurers
- The insurance department issues proposed regulations that the industry believes are unduly restrictive and will increase costs of doing business
- Licensed insurers, working through an association, file comments with the department and meet with the governor explaining that most of the carriers will withdraw from the market if the proposed regulations are not rewritten.

- ***Did the insurers violate the antitrust laws?***

A. Yes, they acted collectively in restraint of trade.

B. No, they are free to lobby for changes in regulations.

Example 6: Opposing regulations

- ***Answers: Did the insurers violate the antitrust laws?***
  - **A. Yes, they acted collectively in restraint of trade.**
    - *They are at risk. They may have gone beyond lobbying protected by Noerr-Pennington doctrine, to actually threatening a concerted refusal to deal with customers in the state.*
  - **B. No, they are free to lobby for changes in regulations.**
    - *Risk of liability. "Noerr-Pennington" doctrine protects petitioning, but not threats. Sending a collective message that most of the firms will pull out could be viewed as going beyond lobbying*

Avoiding Collusion

- Avoid even the appearance of collusion. Here are some guidelines for external communications:

Don't:	Do:
Discuss or share premium levels with competitors o That includes chats with personal friends	Make independent decisions, considering available information, including data providers may voluntarily give you or that is public
Make statements to third parties designed to "get the message" to competitors on need for restraint in bidding for new business	Exercise unilateral judgment without comment; use competitive intelligence from customers or brokers to guide unilateral decisions

Avoiding Collusion (more)

Don't:	Do:
Discuss or reveal to any competitor accounts to which the insurer will or will not market	Make independent decisions
Don't discuss or reveal to competitors the carrier's intentions for selling in new product segments or geographies, or reducing its product line or selling territory	Maintain confidentiality of the plan's marketing or expansion plans

Managing Documents

- Antitrust cases are often about “bad documents.” This is especially true about email. When writing notes, documents, or emails, pay attention to the words or expressions used.
- Documents are often required to be turned over; ‘bad” ones can spark needless antitrust problems

PERSONNEL NEED TO BE AWARE OF EVERYTHING WRITTEN IN EMAIL OR OTHER DOCUMENTS!

- Some phrases, taken out of context, may be problematic:
- “The other insurers ‘got the message’ when we shifted our underwriting policy.
- “We need to ‘hold the industry line’ and make sure there is discipline in the market on premium reductions or increases.
- We “control,” “dominate” or “own” that market.
- Our share of the “New Jersey market” is 65%.

Tips to Compliance with Antitrust Laws

1. Focus on what business strategies will do “for” customers, not “to” customers or competitors.
2. Avoiding exaggerations like “dominate” and “control.”
3. Avoid casual discussion of “markets” and “market share”; focus on customers or products instead.
4. Do not discuss one customer’s contract with a competitor.
5. Do not create non-privileged documents regarding on-going litigation, government inquiries, or other legal disputes.
6. Be especially careful at industry seminars and conferences. Walk out of meetings that seem to risk crossing the line.
7. Don’t just “recite” the antitrust compliance “pledge.” Adhere to the substance.

Tips to Compliance (cont'd)

9. Think of emails and voicemails as documents; do not say things in jest that would embarrass you or the company if made public later.
10. Do not retain drafts, either in hard copy or electronic form, unless necessary and in compliance with the plan's document retention policy.
11. Review working files to prevent the build-up of unnecessary paper or electronic files.
12. At least once a year, reduce the quantity of paper and electronic files that you maintain or for which you are responsible, consistent with corporate document retention policy
13. However, do not discard documents or emails if they are relevant to a litigation or government investigation. Talk to the Law Department if you have questions about document retention.
14. Avoid use of premium or rate information, contracts or other confidential documents of competitors brought by new employees; if documents arrive, consult legal counsel