A SUMMARY OF THE CONSIDERATIONS PUT FORTH SO FAR

Both the property insurance industry and the mortgage finance industry have the capacity to exert, individually or col-

lectively, considerable control over whether and to what extent private property owners purchase earthquake insurance. Neither wants to do so at present; neither has any apparent incentive for doing so. In the case of a major earthquake, the insurance industry simply would not be able to pay all losses. It must be recognized that in addition to fire damage, severe losses will be incurred in such diverse coverages as worker's compensation, medical, contractors' equipment, fine arts, and other inland marine coverage written on an all risk basis. Lenders may incur catastrophic losses or may be little affected, depending on their individual portfolios. If they need protection, they will probably find it more economical to procure portfolio coverage after extensive review and analysis of their individual needs. However, the interactions which both industries engage in, do, in some instances, suggest a theoretical potential for running afoul of antitrust laws. The following section, however, suggests that as the law now stands and is applied, there is less likelihood of a such violation being found or of a restraint of trade challenge being posed today than there was in 1980, but there is always the chance that the laws will be changed in such a manner that present speculations are invalidated.

ANTITRUST LIABILITY

The antitrust risks raised by these methods of mitigating earthquake damage depend on a variety of factors. Indeed, antitrust liability often turns on the factual context surrounding a

particular practice, and the precise analysis of individual actions must incorporate a detailed understanding of their origins and market impact.

Many changes have taken place in antitrust policy and enforcement since the study by Brown and Weston in 1980. In particular, Reagan Administration enforcement officials, antitrust scholars, and courts are taking a far more passive attitude toward mergers, joint ventures, vertical restrictions, and boycotts as the pro-competitive impact of many types of collaborative conduct have been recognized and accentuated. At the same time, the circumstances under which state and local governments can provide immunity for collaborative conduct have been eased and the Local Government Antitrust Act of 1984 has reduced the liability of governments, officials, and employees. Consequently, many of the risks emphasized in the previous study have been greatly lessened. The changes that result in this different assessment are only in part a function of who sits in the White House; they represent a basic shift in the thinking about antitrust that is unlikely to be undone by the elective process in the near future.

In the previous sections, a wide variety of options has been outlined as potentially available for an earthquake damage mitigation program. A complete understanding of the possible antitrust implications of a finance/insurance industry promotion of earthquake insurance must necessarily rest on a thorough review of the laws, cases, and opinions establishing the application of

antitrust doctrine,[16] and, again, it is difficult to give concrete antitrust guidance about these options without a close examination of the facts surrounding their origin and market impact. Nevertheless, the general lines of appropriate analysis can be articulated, and an outline of significant antitrust considerations is given below.

Permissible Independent Single Firm Conduct

Because independent conduct by a single firm does not violate the antitrust law unless monopolization is involved, the mitigation programs that rely on the decisions of independent firms are not likely to raise antitrust issues. Thus, insurance company ratings of buildings based on design or construction, and establishment of insurance premium differentials to encourage more earthquake-resistant construction or remodeling, would not be likely to involve significant risks under the federal antitrust law. Similarly, a single insurer can probably decide independently to "redline" a particular area that has poor building standards, and lending agencies, such as savings and loan associations or commercial banks, may endeavor to protect themselves by requiring borrowers to obtain earthquake insurance. If this action is taken by individual firms without agreement or collusion with others, it would not ordinarily present a substantial antitrust risk.[17]

Such decisions, of course, must be truly independent; that is, the decision to deny insurance, or to deny credit, must not be based on some assurance that a rival would make the same de-

cision.[18] Because such decisions are virtually always in the deciding firm's interest whether or not its rivals take similar action (because they are intended to control the deciding firm's risks), there is little likelihood that even similar decisions by rivals would be sufficient to give rise to an inference that the decisions were the result of a combination or agreement. Furthermore, insurance premium differentials are not subject to the Robinson-Patman price discrimination amendment to Section 2 of the Clayton Act because insurance is not a "commodity." While price or rate discrimination could, in exceptional circumstances, be challenged as an "attempt to monopolize" under Section 2 of the Sherman Act, such a claim could not be made here because differential rates could not lead to market power and because in most states such rates would probably be brought under the umbrella of the McCarran-Ferguson antitrust exemption.

Joint Conduct to Establish Voluntary Building Standards

A combination of architects, builders, lending agencies, insurers, or others may establish "voluntary" building standards as a means of limiting earthquake damage. Such standardization programs present potential Sherman Act antitrust questions because they involve a combination of competitors, but they may have competitive benefits and are usually upheld if reasonable. They must be established and supervised with care to avoid antitrust violation.[19] If the effect of the standards is to eliminate competition in quality, or to eliminate or seriously disadvantage some competitors unreasonably, they may be held unreasonable.

There should be no standards that require use of a patented product or process or scarce material not available to all competitive builders. If a certification mark or seal of approval is used for construction, the certification mark or seal should be made available to any builder meeting the standards. There should be no <u>agreement</u> to adhere to the standards; each builder should retain its own freedom to conform or not.

The use of independent standards-making organizations such as the Underwriter's Laboratory lessens the antitrust risk by removing some suspicion of anticompetitive purpose, but does not provide immunity if, in fact, the standards unreasonably limit competition.[80] Encouragement by the National Bureau of Standards or other government agency to adopt standards does not protect otherwise unreasonable standards.

To be upheld as reasonable, the following guidelines should be followed:

1) The objectives of the standards—the need to mitigate earthquake damage in particular ways—should be clearly articulated.

2) The way in which the standards achieve their objectives should be articulated, as should the relationships between the standards and the objectives.

3) Care should be taken to eliminate any impact of the standards that is not related to their legitimate objectives; the legitimate objectives should be achieved in the least restrictive way possible.

4) The standards should be discussed at open meetings where competent counsel are present; all persons who have an interest in the standards should be allowed to participate in the process in a meaningful way and fair procedures should be adopted to insure that a sufficient factual basis is developed to demonstrate the relationship between the standards and their objectives.

5) Decisions should be made by groups of persons who are not directly affected by the decisions.

6) A process should be established so that any person or firm that claims to be injured by the standards has an opportunity to demonstrate that injury and to argue that the objectives of the standards can be met in some other way.

7) If there are several means of achieving the objectives effectively, all the means should be incorporated in the standards.

Individual Decisions to Enforce Voluntary Standards

Individual insurance company refusals to insure buildings that do not meet voluntary standards would not violate the antitrust laws. However, an agreed or concerted refusal by a group of insurers to insure buildings that fail to meet voluntary standards would probably be considered a "boycott" beyond the scope of the McCarran-Ferguson exemption[21] and possibly in violation of the Sherman Act. Similarly, a single savings and loan association, commercial bank, or other lending agency may, independently and without collusion with others, validly refuse to loan money for construction or permanent financing unless the building complies with "voluntary" standards of construction. However, if there is an agreement or collusion with other lenders to impose such conditions, such collusion could be challenged as a boycott under the Sherman Act. In addition, there should be no agreement or collusion with others, such as builders, land developers, or material suppliers with whom the lending agency may have some potentially beneficial financial relationship. We assume that the standards are ones that any firm would have an interest in implementing even if its rivals did not. Moreover, we assume

that implementing the standards would lower the risks for the firm and thus would make it less expensive to provide insurance or credit, and that this would occur even if rivals did not require the standards. If this assumption is correct, then there is little reason for competitors to communicate about which firms are imposing the standards.

Of course, not all boycotts are automatically unlawful under the antitrust laws.[22] In order to preserve its claim of independent decision making, each firm should follow these guidelines:

1) Each firm should make an independent evaluation of whether, and why, the standards are in its interest; if there are portions of the standards that are not in its interest it should not require them.

2) If the standards permit several approaches, the firm should be willing to consider all of the approaches.

3) The firm should be willing to consider requests to vary the standards if a good case can be made for doing so.

4) The firm should avoid communicating with competitors about whether the competitors are adopting the standards.

Joint Competitor Refusals to Deal to Enforce Standards

Combined action by insurers to enforce prescribed standards or to "redline" or refuse to insure in any given area lacking adequate building codes would present major antitrust risk. Such conduct would probably be deemed a "boycott," under the U.S. Supreme Court's interpretation of the term "boycott" in the McCarran-Ferguson insurance business exemption. It would therefore probably violate Section 1 of the Sherman Act and not be

exempt under the insurance business exemption, St. Paul Fire & Marine Insurance Co. v. Barry.[23]

Joint Venture to Establish Comprehensive Earthquake Insurance

The inadequacies of existing earthquake insurance and serious doubts about the capabilities of present insurers to sustain the catastrophic losses of a major earthquake lead to the possibility of creating one or more joint ventures to establish a comprehensive earthquake insurance system. Joint ventures between competitors or significant potential competitors always present antitrust issues, although they may be held to be reasonable under particular circumstances.

Initially, it is quite arguable that such a joint venture would be exempt from federal antitrust laws under the McCarran-Ferguson Act. However, since the Supreme Court has never passed upon such an issue and there is little definitive precedent, there is no certainty of an exemption. Since such a joint venture would basically involve a method of spreading the great risks involved, the exemption arguably ought to be applicable, provided that states regulate the activities of the joint venture. There should, however, be no agreement by the joint venturers to insure only through the joint venture, because this could be challenged as an unlawful "boycott."

In the absence of the insurance exemption, an antitrust issue would be raised. Under the Sherman Act the validity of a joint venture is determined by its reasonableness.

Joint ventures were recently analyzed in the Antitrust Guidelines for International Operations, issued by the U.S. Department of Justice (1988).[24] Although the guidelines are directed at international operations, the analysis in the guidelines is a good summary of current enforcement policy and general thinking on the subject. The guidelines start from the premise that joint ventures "may be created for a variety of good business reasons," including "to take advantage of complementary skills or economies of scale in production, marketing, or R&D; [and] to spread risk."

The first inquiry must be whether the creation of the joint venture itself unreasonably restrains competition. If there is pre-existing competition between the joint venturers that would be eliminated, the joint venture must be shown to create more new competition than it eliminates or to increase significantly productive capacity or economies of scale and efficiencies. On the other hand, where the joint venture creates a product that would not otherwise be available or results in great efficiencies, it would be lawful. Thus, if the participants forming a joint venture can adequately document the fact that without the joint action they could offer no earthquake insurance at all, there is little possibility that the venture reduces competition, and hence no legitimate antitrust obstacle to its formation.

The second inquiry is whether the joint venture involves collateral restraints that are unreasonable. Agreements to fix prices or divide markets or not to compete in other areas that go

beyond the necessities of the joint venture would violate the Sherman Act.[25] The members of the joint venture should be left free to compete with the joint venture.

The third inquiry is whether the joint venture creates a "bottleneck" facility that cannot be duplicated by competitors or by competitive joint ventures. If the facility cannot be duplicated, then all competitors should be given access to it on a reasonable nondiscriminatory basis under the Department of Justice interpretation of Associated Press v. United States.[26] On the other hand, if competing joint ventures are feasible, then a single joint venture should not be established for an entire industry.[27] Joint ventures may also be challenged under Section 7 of the Clayton Act upon the ground that the effect of their creation may be substantially to lessen actual or significant potential competition.[28] The standards for applying section 7 of the Clayton Act are likely to be the same as those under the Sherman Act.

Collaborative Action to Seek Government Restrictions

Undoubtedly, one of the most viable approaches for mitigating earthquake losses is to obtain state, local or federal government agency action to impose mandatory construction standards, zoning or land-use controls, or other building restrictions. As mentioned above, conduct that is required by the government, and subject to government supervision, cannot form the basis of a viable antitrust claim, and collaborative action to bring about such government action is privileged and not sub-

ject to the antitrust laws. Any conduct that legitimately, and in good faith, seeks to influence how the government acts is lawful, even if done in collaboration with others and even if the government action injures competition or competitors.

To be immunized, of course, the conduct must be directed at governmental action and not at competitive injury outside of the governmental process. For example, the FTC has held that a concerted refusal by lawyers to represent indigent defendants in order to induce the government to increase its compensation for representing indigents is not immunized from antitrust attack merely because it sought to influence government policy; the competitive injury from the boycott was direct and not through the governmental process.[29] Similarly, a campaign of publicity calculated to harass competitors, or to frighten, intimidate, or deter customers, might be challenged as a "sham" even though it purports to seek government action. Thus, if a group of insurers or lenders or builders or a combination thereof were to engage in a publicity campaign that unduly emphasized the dangers of personal injury and financial loss that customers of particular builders might incur in the event of an earthquake, the inference might be drawn that the real purpose was to deter customers from dealing with those builders, although the campaign ostensibly promoted government adoption of legislation or regulations. Similarly, a combination to oppose automatically rezoning petitions or issuance of construction permits and to appeal such actions in the courts could be challenged as intended primarily

to harass competitors, deter them or impose heavy costs upon them, and therefore might not be legitimate governmental activity.

Moreover, where a public official has a personal, competitive interest in the subject matter on which the official is ruling, the immunity may be lost.[30] If, for example, a member of a local government zoning board or other state or local government agency is also a builder, developer, or lending agency official, a group seeking restrictive zoning or building standards that might affect the business of that member may be alleged to have conspired with that public official. Of course, the plaintiff would have to prove some conspiracy or concerted action, and the Supreme Court has ruled that governmental conduct does not become "concerted action" merely because it benefits or affects classes of private persons.[31]

On the other hand, the antitrust immunity is normally retained when the government agency acts as a buyer, seller, lessor or franchiser, provided that the challenged restraint of trade is imposed by the government as a result of its policy. Thus, for example, in Greenwood Utilities Commn. v. Mississippi Power Co.,[32] the defendant was held to be privileged to petition a federal power company to sell exclusively to the defendant, thereby refusing to deal with the plaintiff. The decision of the "government to market power through the [defendant] reflected its implicit determination of how much competition was desirable."[33] Similarly, in the Airport Car Rental Antitrust Litigation,[34] there

was no antitrust liability for defendants who allegedly conspired to influence airport authorities to adopt criteria that would exclude several firms from renting an airport space for car rentals. Although the defendant may have influenced the officials in reaching their decision, any resultant restraint of trade flowed not from the defendants' action but from the government decision.

State or Local Government Action to Mitigate Earthquake Damage

The approach to earthquake mitigation with the least risk of antitrust liability is to have state or local governments mandate such action through mandatory building standards, restrictive zoning, or other restrictive provisions. Again, conduct that is required and supervised by the government acting within its governmental powers cannot form the basis of antitrust liability. In seeking to come within this doctrine, the following guidelines are relevant.

1) The governmental policy must be clearly articulated and affirmatively expressed. A state or local government action which merely approves, acquiesces in, or even actively encourages, a restraint upon competition, is not sufficient to confer antitrust immunity. Thus, approval or encouragement of restraints in the form of construction standards, limitations upon land use, etc. being imposed by agreement among builders, developers, lending agencies or insurers (even as a result of exhortation initiated by the government) would not be exempt. On the other hand, if a state or local government adopts and actively supervises standards or codes as part of the governmental policy, then conduct in accordance with the standards or codes is immune to antitrust suit, even if the standards or codes were recommended by private parties.

2) The Government must be acting "as sovereign." The plurality of the Supreme Court in City of Lafayette, La. v. La. Power & Light Co.[35] stated that the exemption for government action applies only to conduct "engaged in as an act of government by the State as sovereign." It emphasized the need for express or

implied delegation from the State to the municipality of sovereign power pursuant to state policy to displace competition with regulation or monopoly public service. Subsequently, such authorization has been found in a wide variety of circumstances that recognize the implied authority of local governments to regulate the health and welfare of its citizens, circumstances similar to those that would be involved in adopting building standards, zoning provisions, and other earthquake regulations.

3) The government must "actively supervise" the policy. The government's role in adopting and supervising the restraint must be significant. Cantor v. Detroit Edison Co.[36] emphasized the passive role of the state agency in adopting and supervising the tie-in of light bulbs with electric power and found no immunity for the conduct. More recently, the Supreme Court's decision in California Retail Liquor Dealers v. Midcal Aluminum[37] held that a California statute requiring wine dealers to adhere to resale price maintenance schedules filed with the state was in violation of the Sherman Act, because the state did not "actively supervise" the policy. There was no review of the prices to determine their reasonableness, or of contract terms or market conditions. The state simply enforced prices privately established.

In the context of earthquake mitigation programs this means that the regulatory scheme should be carefully reviewed to make sure that the state or local government agency performs an active role in supervising whatever restrictions are adopted to make sure they are consistent with the state policy.

CONCLUSION

Antitrust analysis is not nearly as antithetical to legitimate competitor collaboration that is designed to enhance the availability and attractiveness of products and consumer welfare as was thought to be the case a decade ago. Moreover the circle of uncertainty resulting from antitrust analysis has grown narrower, making it easier for competent antitrust counsel to give good advice with certitude. The analysis and guidelines set

forth above should reduce the risk that well-intentioned persons would run afoul of the antitrust laws.

Certainty can be increased in two other ways. First, the continuing interest of Congress in the problems addressed in the study of antitrust law suggests that where a legitimate case is well presented, Congress would be receptive to arguments for particularized relief, even though there are at present several efforts underway to move to reduce the exemption from federal antitrust law provided by the McCarran-Ferguson Act. Congress has been increasingly willing to enact special legislation to remove uncertainty in particular situations. They did this, for example, in the National Cooperative Research Act of 1984 to encourage pro-competitive joint research and development ventures, and the Reagan administration proposed and Congress passed the Superconductivity Competitiveness Act of 1988 to further expand and amplify the 1984 act. Second, the Department of Justice "Business Review" letters and Federal Trade Commission "Advisory Opinions" provide means for obtaining the guidance of one or another of the enforcement agencies in advance of entering into an agreement or joint venture. The current climate is much more favorable to issuance of such clearances than in the past; the Department of Justice has cleared several joint ventures in recent months.[38]

In sum, given the analysis in this report, it should be possible to achieve all of the legitimate goals of an active earthquake mitigation program with little risk of successful attack under the antitrust laws.

ENDNOTES

1. A working draft of an earlier (and more extensive) version of this paper served as the framework for discussions at workshops conducted at The George Washington University and at Boulder, Colorado in 1987. Many of the suggestions of workshop participants are incorporated, directly and indirectly, into this paper. In several cases, direct comments are cited here, but attribution is not given in order to preserve confidentiality. In other cases, where comments are attributed, the speakers have reviewed transcripts of their comments and agreed to their publication. One of the authors (Brown) has complete recordings and transcripts of these comments.

2. The California "FAIR" (Fair Access to Insurance Requirements) Plan was a response to the racial riots of the early 1960s. Its purpose was to assist individuals to secure basic property coverage, i.e., fire, in high-risk urban neighborhoods by distributing the risk of insuring against property damage in these riot-vulnerable sectors of metropolitan areas. The California legislature created the FAIR Plan as a joint reinsurance association. Membership is required of all insurers licensed to write basic property insurance within the state. The program is similar to "uninsured motorist" pooling programs. It should be recognized that "pooling" does not increase capacity. It merely assures that, out of the total available capacity, the subject of such a plan will be assured coverage regardless of the demands of other lines, if the capacity to handle all available business is lacking.

3. Department of Insurance, 1986, pp. 15-16 summarizes the "concurrent causation" concerns generated by the Garvey decision and the scope and function of Assembly Bill No. 2865, effective January 1, 1985, which was enacted in response to the opinion in Garvey v. State Farm Fire & Casualty Co., 227 Cal. Rptr. 209 (1986), modified, 182 Cal.App. 3d 470 (1986), rev. granted, 723 P. 2d. 1248 (1986). The trial court decision in Garvey, in a directed verdict, held that plaintiffs Garvey were covered under their homeowner's insurance policy for loss incurred as a consequence of the pulling away of an addition to their house, caused by earth movement, even though their policy expressly excluded coverage for damage caused by earth movement, because a proximate cause of the damage was negligent construction, which was a covered risk under the policy. The court granted the motion for directed verdict on the principle, recognized in California, of concurrent proximate cause, earlier set forth in State Farm Mut. Auto. Ins. Co. v. Partridge, 10 Cal. 3d 94, 109 Cal. Rptr. 811, 514 P. 2d 123 (1973). The Court of Appeals decision reversed the trial court on the basis that it incorrectly directed a verdict in the case instead of sending to the jury the fact question of whether the earth movement caused the negligent con-

struction, or whether the tearing away of the addition was independent of the earth movement.

4. The U.S. Senate committee studying this issue, taking into account a broader but not necessarily comprehensive set of earthquake related risks, (subject to considerable qualification regarding variables such as time of day of occurrence, whether replacement costs or appraised value of a property is the proper figure to use, and whether damage could be repaired by homeowners at far less cost than postearthquake professional repair) concluded that "certain credible earthquake scenarios would result in over $60 billion of total property losses." In "Table 3 - Property Damage from Possible California Earthquakes" the committee's report projects a total property damage of $38.7 billion for the San Francisco area as a consequence of a R8.3 event occurring on the San Andreas fault; and for a R7.5 event occurring along the Hayward fault, a total damage of $43.9 billion. Similarly, for a R7.5 event occurring along the Newport-Inglewood fault, the same table indicates a total estimated damage of $62.2 billion. (Cheney, 1987, pp. 16-17)

5. McCarran-Ferguson Act, 15 U.S.C. §§1011-15 (1945). This statute partly negates the decision in United States v. South-Eastern Underwriters Association, 322 U.S. 533 (1944) which had held that the business of insurance was subject to the federal antitrust laws, by reinstating, within limits, the power of state governments to regulate insurance. McCarran-Ferguson exempted "insurance ratemaking and underwriting activities from scrutiny under the federal antitrust laws . . . to the extent that such activity does not constitute a boycott, coercion or intimidation." Matters "unrelated to the contract of insurance between the insurer and the insured" remained subject to the federal act.

"Because of the widespread view that it is difficult to underwrite risks in an informed and responsible way without intra-industry cooperation, the primary concern of [insurance industry representatives and of members of the Congress] was that cooperative rate-making efforts be exempt from antitrust laws." Group Life & Health Ins. Co. v. Royal Drug Co., 440 U.S. 205, 221, (1979).

6. McBride-Grunsky Insurance Regulatory Act of 1947, Ch. 9, California Insurance Code, §§1850-1860.3. In its preamble this act granted "certain immunities under other laws which do not specifically refer to insurance." The McBride Act exempts rating and underwriting activities from other state laws protecting against anti-competition or other unfair business activities.

7. See: S804, 100th Congress, 1st Session (specifically §3(b)) (the Simon bill) and S1299, 100th Congress, 1st Session (specifically §2(a) (2) and 3(a)) (the Metzenbaum bill).

8. A "rate" is the price charged for each unit of protection or exposure, and should be distinguished from a "premium," which is determined by multiplying the rate by the number of units of protection purchased. . . . The premium income of the insurer must be sufficient to cover losses and expenses. To obtain this premium income, the insurer must predict the claims and expenses, and then allocate these anticipated costs among the various classes of policyholders. The final premium that the insured pays is called the "gross premium" and is based on a "gross rate." The gross rate is composed of two parts, one designed to provide for payment of losses and a second, called a "loading," to cover the expenses of operation. That part of the rate that is intended to cover losses is called the "pure premium" when expressed in dollars and cents, and the "expected loss ratio" when expressed as a percentage. . . . In general the pure premium is determined by dividing expected losses by the number of exposure units. (Vaughan and Elliott, 1978, p. 87)

9. Miller's paper notes:

> Lending institutions and insurance companies with financial interests in noncomplying properties are a potential source of pressure on owners, both as incentives and disincentives. In Los Angeles, lending institutions frequently will not permit use of unreinforced brick masonry buildings to secure loans. However, certain lenders have indicated a willingness to loan against such buildings if the buildings are brought into compliance with the Los Angeles Earthquake Hazard Reduction in Existing Buildings ordinance. Owners wishing to borrow on their equity in such buildings will find compliance in their interest. (Miller, 1985, p. 111)

If lenders are forced to be too sensitive to accusations of locational discrimination, they may bow to the risk of embarrassment and costly defense by substituting as a prerequisite to a loan commitment that the property carry an earthquake insurance endorsement, thus putting the insurer under pressure to depart from sound business judgment in order to accommodate a highly respected lender. If, on the other hand, an insurer will issue an earthquake endorsement, the lender's business judgment decision to abstain from making a loan because the lender feels uncomfortable about the locational risk, is subject to question regarding the true reason for the rejection. The question then arises whether such a relationship can rise to the status of a restraint of trade. Even if a one-to-one relationship of this nature is safe, a further question arises if several insurers coordinate independently with one lender, or vice versa, in as much as one dominant entity could "taint" the arena of such interactions.

10. For a discussion of recent efforts of the Earthquake Project, see Lecomte, 1989.

11. These excerpts are from an untitled and unpublished draft paper by Richard J. Roth, Jr., California Assistant Commissioner of Insurance, forwarded to Professor Brown by covering letter dated March 23, 1987, copy now in Professor Brown's files. Roth observes that "bodily injury losses and business losses are still exceedingly difficult to estimate."

The summary of Mr. Roth's concepts is the authors', and should not be attributed to Mr. Roth. We express our appreciation for his willingness to share this draft with us.

12. Unlike the insurance industry, which under McCarran-Ferguson [15 U.S.C. §§1011 et seq.] is largely state-regulated, the mortgage finance industry, in all of its various elements, is predominantly federally regulated. During the Boulder workshop one insurance industry official observed to an official of a major California bank that, as he saw it, the bankers, in getting together to develop disaster plans for their computerized systems, would not be as comfortable in coordinated planning as insurers might be because the bankers did not have the umbrella of the McCarran-Ferguson Act. The banker agreed, but observed that as long as they were consulting with each other for informational and educational purposes, he did not think they were in any jeopardy, but that in any event, the planning they had initiated in 1982 on their own volition had, in 1985, been brought under a ruling directive by the Comptroller of the Currency, which should absolve them of any antitrust vulnerability with respect to this endeavor.

13. The vice president of a major California bank recounted for Boulder workshop participants an experience that is pertinent here. He described considering whether to insure, against earthquake, a mortgage loan portfolio of a half billion dollars, and, if so, whether he should procure coverage for the entire $500 million value. To answer the question, he platted on a map the zip code location of each of the security properties and then analyzed the result to see where the biggest exposures were. As a result, he concluded that the bank's maximum need was to procure $17 million coverage.

14. When a pool is established, the effect is not to increase the total insurance available but to assure coverage of "bad risks" with sufficient diversity of placement among the companies that none can be financially disrupted by the responsibility they have been obliged to assume for public benefit. To the extent that the state subsidy adds capacity, the intended result may be fostered. However, in the absence of an adequate subsidy, the requirement of pooling to cover high-risk, otherwise uninsurable, property could result in reducing the potential to also cover property that is more readily insurable. For illustration and

discussion of "Distressed and Residual Risk Pools," see Vaughan and Elliott, 1978, pp. 80-82.

15. Fidelity Savings & Loan Association v. De La Cuesta, 458 U.S. 141, 102 S. Ct. 3014 (1982) upheld, on grounds of federal preemption, a 1976 Federal Home Loan Bank Board (FHLBB) regulation that permitted federally chartered thrift institutions to invoke "due-on-sale" clauses in loan agreements without regard to the security value of the collateral. Congress subsequently enacted Pub. L. 97-320, 96 Stat. 1469, the Garn-St. Germain Depository Institutions Act of 1982, which expanded the coverage of the regulation to all lenders, individual as well as institutional, and to both residential and commercial loans, subject to some "window period" exceptions which state governments were authorized to extend (although none seems to have done so) and excepting a few expressly delineated transfers of title.

16. A longer analysis of the pertinent law is contained in the original Brown and Gerhart report to FEMA (available from Professor Brown).

17. United States v. Colgate & Co., 250 U.S. 300 (1919).

18. See, for example, Cement Manufacturer Protective Association v. United States, 268 U.S. 588 (1925) (Circulation of credit information not unlawful); Theatre Enterprises, Inc. v. Paramount Film Distributing Corp., 346 U.S. 537 (1954); Eastern States Retail Lumber Dealer's Assoc. v. United States, 234 U.S. 600 (1914).

19. Compare Roofire Alarm Co. v. Underwriters Laboratories, Inc., 188 F. Supp. 753 (E.D. Tenn. 1959), aff'd, 284 F. 2d 360 (6th Cir. 1960) with Structural Laminates, Inc. v. Douglas Fir Plywood Ass'n., 261 F. Supp. 154 (D. Ore. 1966), aff'd per curium, 399 F. 2d 155 (9th Cir. 1968), cert. denied, 393 U.S. 1024 (1969).

20. Radiant Burners, Inc. v. Peoples Gas Light & Coke Co., 364 U.S. 656 (1961).

21. See, Roofire Alarm Co. v. Underwriters Laboratories, Inc., 188 F. Supp. 753 (E.D. Tenn. 1959), aff'd, 284 F.2d 360 (6th Cir. 1960).

22. Northwest Wholesale Stationers v. Pacific Stationary and Printing Co., 105 S. Ct. 2613 (1985); American Federation of TV and Radio Artists v. National Ass'n of Broadcasters, 407 F.Supp. 900 (S.D.N.Y. 1978).

23. 438 U.S. 531 (1978).

24. (Draft revision published in June 8, 1988), 54 A.T.R.R. supp. (June 9, 1988). See also, Bradley, Joint Ventures and Antitrust Policy, 95 Harv. L. Rev. 1521 (1982); Pitofsky, A Framework for Antitrust Analysis of Joint Ventures, 74 Geo. L. J. 1605 (1987).

25. United States v. Topco Associates, Inc., 405 U.S. 536 (1972); Citizen Publishing Co. v. United States, 394 U.S. 131 (1969).

26. 326 U.S. 1 (1945).

27. See, United States v. Automobile Manufacturer Ass'n., 1969 CCH Trade Cases §72,907 (C.D. Cal. 1969) (Consent Judgment).

28. United States v. Penn-Olin Chemical Co., 378 U.S. 158 (1964).

29. Supreme Court Trial Lawyers, Ass'n., 3 Trade Reg. Rep. §22,373 (1988).

30. Harmon v. The Valley Nat'l Bank of Arizona, 339 F.2d 564 (9th Cir. 1965).

31. Fisher v. City of Berkeley, 106 S.Ct. 1045 (1986).

32. 751 F.2d 1489, 1505 5th Cir. (1985).

33. Id. at 1499.

34. 693 F.2d 84 (9th Cir. 1982), cert. denied sub rem. Budget Rent-A-Car of Wash.-Or. v. Hertz, 462 U.S. 1133 (1983).

35. 435 U.S. 389 (1978)

36. 428 U.S. 579 (1978)

37. 445 U.S. 97 (1980)

38. See, 54 BNA, antitrust & Trade Reg. Rep. 497 (3/24/88) (clearance of Petroleum Independents Cooperative, Inc. Joint Venture to Cooperatively Market National Gas); 53 BNA, Antitrust & Trade Reg. Rep. 518 (Financial Institutions joint venture cleared); 54 BNA, Antitrust & Trade Reg. Rep. 926 (FTC modifies old order to permit railroads to engage in joint ventures).

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