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Antitrust/Health Care ADVISORY ■

JANUARY 14, 2021

President Signs Law Repealing Some Antitrust Immunity for Health Insurers

By Adam Biegel and Matt Dowell

In a rare change to federal antitrust law, on January 13, 2021, the President signed into law legislation that eliminates some immunities for health insurers. The Competitive Health Insurance Reform Act of 2020, passed unanimously by the Senate, repeals portions of the McCarran–Ferguson Act, which protects certain activity that constitutes the "business of insurance" from antitrust liability. But the repeal – which only applies to health and dental insurers, and not property, casualty, life, or other insurers – is likely to have little impact. Most activities by health insurers did not qualify for or rely on McCarran–Ferguson immunity, and, for those that did, several will continue to be protected under the new law.

Congress passed the McCarran–Ferguson Act in 1945 in response to a U.S. Supreme Court decision subjecting insurers to federal regulation, including federal antitrust laws. The law gives states the primary authority to regulate the insurance industry and creates an exemption from federal antitrust law when the conduct at issue relates to the "business of insurance," is regulated by state law, and was not an act of boycott, coercion, or intimidation.

Despite its potentially broad reach, courts have constrained the application of the McCarran–Ferguson Act. McCarran–Ferguson only immunizes activity by insurers that: (1) transfers or spreads policyholder risk; (2) is an integral part of the relationship between the insurer and the insured; and (3) is between entities in the insurance industry.

This puts most routine activity by health insurers outside the scope of the McCarran–Ferguson Act. This includes mergers between health insurers, some reimbursement practices, and contractual relationships insurers enter into with providers and other non-insurers. Given its limited impact, the McCarran–Ferguson Act has not seriously slowed federal agencies and private plaintiffs from bringing enforcement actions or lawsuits against health insurers for alleged federal antitrust violations, including many types of alleged anticompetitive conspiracies, market allocation arrangements, or mergers (a number of which have been successfully challenged in recent years). And even when McCarran–Ferguson applied, health insurers have always been subject to regulation under state laws that generally forbid anticompetitive conduct.

The impact of the Competitive Health Insurance Reform Act is further limited because some of the conduct that courts protected under the McCarran–Ferguson Act will continue to receive antitrust immunity. For example, courts have protected ratemaking activities like the collection of historical loss data. Courts have also protected the development of standard insurance policies. These activities will continue to receive antitrust immunity under the Competitive Health Insurance Reform Act, which protects insurers making a contract or engaging in a conspiracy to:

- Collect, compile, or disseminate historical loss data.
- Determine a loss development factor applicable to historical loss data.

- Perform actuarial services so long as it does not involve a restraint of trade.
- Develop or disseminate standard insurance policy forms if these forms are not mandatory.

Under this new law, however, health insurers that entered into agreements relying on McCarran–Ferguson immunity should assess the extent to which their arrangements, particularly data sharing, exceed these protections. However, even then, the lack of immunity in many cases may still only make them subject to antitrust liability in many cases if the conduct can be seen as having an overall anticompetitive impact in a relevant market.

The limited repeal of McCarran–Ferguson could overturn some successes health insurers have secured in protecting a broader range of conduct in recent years. For example, one district court late last year dismissed a complaint against several health insurers that allegedly conspired to deny reimbursement for a subset of services. Separately, the Eleventh Circuit is considering the appeal of an order dismissing a complaint challenging a health insurer's exclusivity requirements with brokers. The U.S. Department of Justice took the unusual step in that case of filing an amicus brief and appearing at oral argument in November 2020 to argue that the McCarran–Ferguson Act's immunity provisions should be narrowly construed and did not apply.

Notwithstanding these limited successes, the Competitive Health Insurance Reform Act is unlikely to dramatically change the scope of antitrust liability for health insurers or the dynamics of relationships between health care providers and insurers. The McCarran–Ferguson Act has often been perceived to protect more conduct than it actually does, as demonstrated by the fact that its repeal has often (and until now unsuccessfully) been raised in the context of multiple health care reform debates.

The repeal may, however, foreshadow some new aggressiveness from government enforcers (including the incoming Biden Administration) or private litigants to investigate or challenge insurance industry practices under the antitrust laws and the increased political (and perhaps bipartisan) support for broadening federal and state antitrust laws and doctrines impacting the health care industry and other sectors of the U.S. economy.

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