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Congress Restores Application of Federal Antitrust Laws to Health Insurers

On December 23, 2020, the U.S. Senate unanimously passed the Competitive Health Insurance Reform Act of 2020, which includes a provision that would repeal the limited federal antitrust immunity currently granted to certain health insurance business practices by the 1945 McCarran-Ferguson Act. The U.S. House of Representatives previously passed this bill on September 21, 2020, and will become law when the President signs the bill, as expected. The text of the Competitive Health Insurance Reform Act of 2020 is [here](#).

Congress passed the McCarran-Ferguson Act, 15 U.S.C. § 1013, in 1945, which exempts the “business of health insurance” from federal antitrust laws and largely gives authority to the states to regulate the industry. The McCarran-Ferguson Act does not provide blanket antitrust immunity for insurers, however. Rather, it exempts the activities of insurance companies from federal antitrust liability only when the following elements are met: (1) the insurance activity is part of the “business of insurance”; (2) the insurance activity is regulated by state law; and (3) the insurance activity does not constitute a boycott, coercion, or intimidation. With respect to whether the activity is within the business of insurance, courts examine whether the challenged practice has the effect of transferring or spreading a policyholder’s risk and whether the practice is an integral part of the policy relationship between the insurer and the insured.

The Competitive Health Insurance Reform Act would amend the McCarran-Ferguson Act by adding language stating that, “Nothing contained in this Act shall modify, impair, or supersede the operation of any of the antitrust laws with respect to the business of health insurance (including the business of dental insurance and limited-scope dental benefits).”

The bill applies to health insurance companies “without regard to whether such business is carried on for profit.” However, the bill expressly exempts life insurance, including annuities, and property and casualty insurance. The bill also leaves in place exceptions for the collection and



dissemination of historical loss data, the determination of a loss development factor applicable to historical loss data, the performance of actuarial services to the extent they do not restrain trade and the development or dissemination of a standard insurance policy form or addenda.

The measure enjoys bipartisan support in both the House and the Senate. It passed the House by voice vote and passed the Senate without amendment by unanimous consent.

TAKEAWAYS

- The McCarran-Ferguson Act has not immunized insurers from federal antitrust laws. Among other things, the Department of Justice, Antitrust Division (the “DOJ”) successfully blocked two health insurance mergers in 2017 (e.g., Aetna/Humana). Its repeal would nevertheless have some impact on the insurance industry.
- For one, the bill may impact a pending appeal before the U.S. Court of Appeals for the Eleventh Circuit between Oscar Insurance Company of Florida and Blue Cross and Blue Shield of Florida, Inc. (together with affiliated co-defendants, “Florida Blue”). The lower court dismissed the case on the grounds that Florida Blue’s exclusive-dealing arrangements between insurers and brokers in the health insurance market constituted the “business of insurance” as defined in the McCarran-Ferguson Act, and therefore was exempt from federal antitrust laws. The Court of Appeal heard oral argument on November 20, 2020, but it has not yet issued a decision.
- Furthermore, the repeal of the McCarran-Ferguson Act would provide the DOJ with authority to examine data sharing arrangements between insurers that are for the purpose of developing premiums. Such arrangements were immune from federal scrutiny under the McCarran-Ferguson Act.
- We anticipate that health insurers will see a rise in antitrust claims/counterclaims asserted against them in a variety of cases. The potency of that strategy, and the strength of such claims/counterclaims, will need to be assessed on a case-by-case basis and will clarify over time as courts issue opinions in such cases.
- Finally, the bill is part of a broader focus by Congress on reforming the federal antitrust laws. There are currently over a dozen pieces of proposed antitrust legislation, some of which would dramatically change U.S. antitrust enforcement with respect to mergers, conduct, and private litigation. The likelihood of any of these bills becoming law in 2021 is difficult to predict and depends on several variables, including the outcome of the runoff election in the Georgia Senate races on January 5.

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