

Congress Poised to Repeal McCarran-Ferguson Federal Antitrust Exemption for Health and Medical Malpractice Insurance

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Summary

The McCarran-Ferguson Act now exempts the "business of insurance" from the federal antitrust laws where state insurance regulation exists. Proposed legislation would remove the McCarran-Ferguson federal antitrust exemption for "price fixing, bid rigging, or market allocations" by "health insurance issuers" and "issuers of medical malpractice insurance" in "connection with the conduct of the business of providing health insurance coverage...or coverage for medical malpractice claims or actions." There is a real possibility that such legislation could be enacted this year.

"Price fixing, bid rigging, or market allocations" are already subject to potential sanction under existing insurance, unfair trade practices, or antitrust laws of some states. In those cases, insurers would experience no change in the way they need to behave, only in their potential exposure for acting illegally. Many states do not authorize private parties to bring treble damage actions against insurers to enforce these laws.

Some forms of what could be labeled "price fixing" or similar conduct may actually be legal under state law, as in states that require collective rate-making. Where states do require collective rate-making (or other collective industry activity), the "state action" doctrine provides a separate exemption from the federal antitrust laws. The "state action" exemption shields conduct from the federal antitrust laws in regulated industries where the state requires and "actively supervises" the relevant industry conduct.¹

The main impact of passage may be to expose health and medical malpractice insurers to federal antitrust liability like many commercial and industrial companies. Initially, however, passage may trigger more treble damage federal antitrust lawsuits against these insurers to test the significance of the changes, until the courts interpret the new law.

¹ The state action exemption applies to conduct undertaken pursuant to a "clearly articulated" state policy where there is "active supervision" of the conduct by the state. *FTC v. Ticor Title*, 504 U.S. 621 (1992). Thus, the state action exemption requires a somewhat higher threshold to be triggered than the McCarran-Ferguson exemption. The McCarran-Ferguson exemption applies to challenged conduct that is the state regulated business of insurance, regardless of the level of supervision or whether the state endorses the practice.

What's New?

For possibly the first time since McCarran-Ferguson was enacted 64 years ago, there is a strong chance that a partial McCarran-Ferguson repeal may come to a vote by one or both chambers of Congress. Some of the key developments to date are as follows:

-- On October 21, 2009, the House Judiciary Committee approved the Health Insurance Industry Antitrust Enforcement Act (H.R. 3596) on a bipartisan 20-9 vote,² and on October 22, 2009, House Speaker Nancy Pelosi (D-CA) publicly indicated her intention to incorporate this bill into the health care reform legislation that is expected to come before the full House.

-- In the Senate, on October 21, 2009, a week after a Senate Judiciary Committee hearing on a similar bill (S. 1681), Senate Majority Leader Harry Reid (D-NV) and Judiciary Committee Chairman Patrick Leahy (D-VT), along with Senator Schumer (D-NY), announced their intention to offer the bill as an amendment when the Senate considers its health care overhaul legislation.

-- President Obama criticized conduct engaged in by the health insurance industry "even while enjoying a privileged exception from our antitrust laws, a matter that Congress is rightfully reviewing." Some senior legislators are actively circulating requests to their supporters to contact Congress to support enactment, and are including the President's remarks.

The Proposed Legislation

Both the House and Senate bills limit the McCarran-Ferguson Act's federal antitrust exemption for health and medical malpractice insurance even if a state regulates those businesses. The legislation would not otherwise affect state insurance regulation.

Both bills would make these insurers subject to the federal antitrust laws if they "engage in any form of price fixing, bid rigging, or market allocations."

While the bills started out the same, the House and Senate bills no longer match. The House bill added certain safe harbors, but to fall within them

² Three Republicans joined 17 Democrats in voting for the bill in the Judiciary Committee.

conduct can "not involve a restraint of trade." This circularity could reduce the effectiveness of the safe harbors.³

The bills currently include some ambiguous language and carefully define only some key terms and concepts. This may or may not be deliberate. For example, the term "issuer" in the medical malpractice market is not defined.⁴ Nor are the key terms "price fixing, bid rigging, or market allocations."⁵

The Practical Effect of this Legislation

The bills may *not* actually make illegal much that is legal today. There are two reasons for this.

First, a significant amount of this conduct may already be prohibited by state antitrust, unfair trade practices, or insurance laws.

Second, if state law makes the conduct lawful, it may *remain* shielded from federal antitrust law under the judicially-created "state action" doctrine, which substantially overlaps McCarran-Ferguson, although it is not co-extensive.

However, one likely impact of the legislation would be to expose health and medical malpractice providers to more private treble-damage antitrust actions (at least until courts decide what the changes mean). McCarran-Ferguson has probably deterred the filing of some federal antitrust actions against insurers subject to state regulation.

³ The amendment adopted by the House Judiciary Committee provides a safe harbor for insurers to contract, agree or combine "to collect, compile, or disseminate historical loss data;" "...determine a loss development factor applicable to historical loss data;" or..."perform actuarial services."

⁴ Indeed, determining the applicability of the McCarran-Ferguson Act typically does not focus on the nature of an entity, but rather on the business activity itself. In other words, if an insurer engages in some activities that are the state regulated business of insurance and some that are not, only the former activities are shielded from federal antitrust liability by the McCarran-Ferguson Act. These legislative proposals, however, refer to both the activities and the entity in a way that could create some ambiguity as to whether the carve-out from the McCarran-Ferguson Act federal antitrust protections applies to other lines of insurance offered by insurers who offer either medical malpractice or health insurance. It appears, however, that the intent is to limit the applicability of the repeal to health and medical malpractice insurance only, even if an insurer also sells other lines of insurance.

⁵ Antitrust case law typically treats conduct in these categories as egregious "per se" offenses, but conduct that does not fall into the most common patterns in these categories can be analyzed under a "rule of reason." It is not clear if the legislation may displace McCarran-Ferguson Act protection only for conduct that is normally per se illegal.

Actions to Consider in Response to Legislation

Antitrust Audits

If the legislation passes, some carriers may wish to conduct an antitrust audit in areas that may be competitively sensitive. This could be particularly important if there is joint behavior in concentrated markets.

It could also be useful to identify and “audit” the sufficiency of other antitrust immunities like the “state action” doctrine. For example, insurers may engage in agreements or combinations under state direction and supervision. If correctly conducted, that conduct should be immune under federal antitrust law. However, in some cases, courts have found that the level of state supervision was not diligent enough to justify displacing the antitrust laws, or that the state policy favoring the conduct was not clearly enough expressed. In such cases, an insurance regulator or state legislature may want to enhance the direction and level of supervision to make sure that the state action exemption would hold up under scrutiny. At the same time, there is no reason for companies that *are* in compliance with state law to overreact.

Antitrust Training for Employees

If this has not yet been done, insurers may want to consider ensuring that their internal antitrust compliance efforts are sufficient and are in line with companies in other industries.

Because of the historical federal antitrust immunity for the insurance industry, employees may not have been fully sensitized to antitrust issues in the way that employees in other industries have. Insurance employees may require additional training on antitrust issues and litigation risks.

Outlook

Consideration of the current legislation comes when Congressional leaders and the President are criticizing the health insurance industry severely in the debate over health care reform. This timing is not surprising given that examinations of McCarran-Ferguson have frequently been undertaken when the reputation of one or more segments of the industry has been questioned, as in the liability crisis in the 1980s, the solvency crisis in the 1990s, and after Hurricane Katrina in more recent years. The specific proposals to reform McCarran-Ferguson this year, however, closely match up with the industry segment and practices that are generating concern, and come when a major piece of closely related legislation is expected to move forward.

This memorandum is intended only as a general discussion of these issues. It is not considered to be legal advice. We would be pleased to provide additional details or advice about specific situations. For additional information on this important topic, please feel free to call upon your Dewey & LeBoeuf relationship partner.

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The current legislation must be taken seriously given the actions to date, plus the indications from Congressional leaders that they intend to incorporate it into the health care overhaul. If it passes, its impact on health and medical malpractice insurance will depend in part on the language changes that will be made as the legislation progresses, including any changes to the safe harbors.

While it remains to be seen whether Congressional leaders will follow through on their expressed intentions, what legislative language will be included if they do, and whether the health care overhaul will be enacted, the prospects for enactment of a partial repeal of the McCarran-Ferguson Act antitrust exemption are better than at any time in recent memory. Indeed, the legislation has already advanced further in Congress than any previous repeal effort.

The current legislation contains numerous ambiguities and the language is in flux. We will continue to monitor developments on this legislation and update you as warranted.

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