

Insurance Antitrust Exemption Repeal Effort Broadens in House Health Reform Bill

November 4, 2009

Massive health care reform legislation that would include repeal of the McCarran-Ferguson Act's federal antitrust exemption is being readied for consideration on the House floor.

This repeal would apply to health and medical malpractice insurance. The bill also contains a change to the Federal Trade Commission Act that would affect the entire insurance industry. These changes would apply even to insurance not offered for profit.

There are four significant differences from the legislation that was approved recently by the House Judiciary Committee, and which we reported on [here](#).

1. FTC Studies of Insurance

One significant difference is a new provision (Section 260) authorizing the Federal Trade Commission to do studies and reports on its own initiative "relating to insurance," and then refer relevant information for criminal or other enforcement. Existing law requires the FTC to have specific authorization from Congress to do insurance studies.

The expansion of the FTC's power under this provision would not be limited to health and medical malpractice insurance – it would simply apply to "insurance," thus including other property and casualty lines, life insurance, and any other form of insurance that might not otherwise have been covered.

2. No Limitation on Application of Antitrust Laws

Another key difference is that Section 262 of the new legislation includes a broader repeal of the McCarran antitrust exemption than the bill approved by the House Judiciary Committee on October 21. The House Judiciary bill covered only "price fixing, bid rigging or market allocations," while the new legislation contains no such limitation. It simply provides that the McCarran-Ferguson Act will not "modify, impair, or supersede the operation of any of the antitrust laws with respect to the business of health insurance or the business of medical malpractice insurance."

This is a significant expansion of the repeal provisions. For example, under the new legislation, health and medical malpractice insurers could be subject to liability under Section 2 of the Sherman Act, which prohibits monopolization and "attempts to monopolize." This could be particularly significant where concentration is high in a relevant market.

In such cases, the dominant health insurer or medical malpractice insurer may arguably be exposed to increased risk of federal antitrust litigation from private plaintiffs or antitrust enforcers. While having or attempting to win all of a market does not violate federal antitrust law, acquiring or maintaining a monopoly through anticompetitive behavior can do so.

Moreover, monopolization exposure may not be effectively covered by the "state action" exemption (see description in our prior report). This is because a plaintiff with a monopolization claim would try to point to alleged anticompetitive conduct of the dominant insurer taken without a state's clear encouragement and active supervision. A plaintiff could also claim that the state does not have a policy favoring monopoly. In contrast, while the current McCarran antitrust exemption does not protect against all exposure, the dominant insurer would have had to show only that the conduct was part of the state-regulated business of insurance, even if not clearly encouraged or actively supervised.

3. FTC Act: Unfair Methods of Competition

Section 262 also would permit the FTC to enforce Section 5 of the FTC Act against health and medical malpractice insurers to the extent of the McCarran repeal.

Section 5 applies to "unfair methods of competition," which arguably is broad enough to include conduct that would not violate the Sherman Act. Indeed, there is an ongoing debate in antitrust law circles about the extent to which Section 5 applies to conduct other than that which violates other federal antitrust laws.

4. Ambiguities Remain

Finally, Section 262 makes changes relevant to some of the prior ambiguities that we noted, but without eliminating all of the ambiguity.

Unlike the House Judiciary bill, which applied to health insurance and medical malpractice insurance "issuers," Section 262 repeals the McCarran-Ferguson exemption for the "business of health insurance or the business of medical malpractice insurance." Neither "health insurance" nor "medical malpractice insurance" is specifically defined. Insurers who write many lines of coverage should see a change in McCarran-Ferguson protection only for their health and medical malpractice insurance, but the lack of definitions leaves the boundaries unclear.

Next Steps

As we noted in our previous report, the language of this legislation remains in flux, and it is possible that some of the ambiguities we have identified may be addressed if and when the bill moves through the full legislative process. Still, the current legislation is slated for

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consideration by the full House of Representatives in fairly short order, given that the House Democratic leadership plans to vote on health reform prior to the November 11 Veterans' Day holiday.

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