

CONGRESS TARGETS THE BUSINESS OF HEALTH INSURANCE FOR INCREASED ANTITRUST SCRUTINY

Congress has renewed its efforts to subject the business of health insurance to increased antitrust scrutiny, with support from the Obama Administration.

On February 24, 2010, the House passed a single-issue, two-page bill, H.R. 4626, the “Health Insurance Industry Fair Competition Act” (or the “Act”). The Act would repeal the limited antitrust exemptions provided by the McCarran-Ferguson Act (“McCarran-Ferguson”) for the “business of health insurance” and permit the Federal Trade Commission (“FTC”) to enforce the “unfair methods of competition” provision of Section 5 of the FTC Act regarding such business.

On March 1, 2010, the bill was placed on the Senate’s legislative calendar. It is not yet clear when the Senate will address the bill.

Background

Enacted in 1945, McCarran-Ferguson delegates to the states the authority to regulate and tax “the business of insurance” and establishes that no federal law should be presumed to interfere with that authority. McCarran-Ferguson specifically exempts from government and private enforcement of the federal antitrust laws conduct that constitutes the “business of insurance,” is regulated by a state, and is not an act of boycott, coercion, or intimidation.

McCarran-Ferguson’s limited exemption has permitted insurance companies and other market participants to engage in certain activities that might otherwise be prohibited under the federal antitrust laws. Such activities have included sharing loss-experience data, standardizing policy forms, and creating joint underwriting associations, all of which can have procompetitive benefits. McCarran-Ferguson has exposed the insurance industry to criticism each decade since its enactment.

The House Overwhelmingly Passed A Bill That Would Remove The “Business Of Health Insurance” From McCarran-Ferguson Protection And Expose It To The Federal Antitrust Laws

The House passed the Act by a vote of 406-19. If the Act becomes law, it would expose the “business of health insurance” to a broad application of federal antitrust laws. Specifically, Section 2 of the Act states, “nothing in [the McCarran-Ferguson] Act shall modify, impair, or supersede the operation of any of the antitrust laws with respect to the business of health insurance.” The Act defines “antitrust laws” more broadly than does the Clayton Act by including “Section 5 of the FTC Act to the extent that such Section 5 applies to unfair methods of competition.”

Although the “business of health insurance” is not defined in the bill, it contains no reference to medical malpractice insurance. Providers of medical malpractice insurance argued that such insurance, which is typically regarded as a property/casualty product, not a health insurance product, should not be included in the bill. The Act does not provide any “safe harbors” for particular types of conduct, which earlier bills had contained.

The Obama Administration has expressed strong support for House passage of the Act: “The repeal of the antitrust exemption in the McCarran-Ferguson Act as it applies to the health insurance industry . . . will outlaw existing, anti-competitive health insurance practices like price fixing, bid rigging, and market allocation that drive up costs for all Americans. . . . Health insurance reform should be built on a strong commitment to competition in all health care markets, including health insurance.”

Implications For Industry Participants

The bill would result in Sections 1 and 2 of the Sherman Act and Section 5 of the FTC Act (as it relates to “unfair methods of competition”) now applying to the “business of health insurance.”

As noted, the bill would remove McCarran Ferguson as a defense against allegations of price-fixing and illegal market allocation between competitors, perhaps leaving such conduct as illegal *per se* under Section 1 of the Sherman Act. The Act, however, would have no effect on other potentially applicable legal defenses.

Repeal of the McCarran-Ferguson exemption may be less disruptive for participants in the health-insurance business than such a repeal would be for other insurance participants. For example, health insurers tend to be larger in size than other types of insurers and have less need for information-sharing arrangements that smaller insurers often cite as a procompetitive activity that is protected under McCarran-Ferguson.

Regardless of whether the Act passes, the increased focus of Congress and the Obama Administration on the competitiveness and other aspects of the health insurance industry may result in increased scrutiny of industry participants by the Department of Justice and the FTC.

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