Antitrust Alert

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Competitive Health Insurance Reform Act Signed Into Law, Repeals More Than Half-Century-Old Antitrust Exemption for US Health Insurers

February 2, 2021

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Key Points

- Until recently, the McCarran-Ferguson Act of 1954 made the “business of insurance,” including the business of health insurance, immune from federal antitrust laws.
- The Competitive Health Insurance Reform Act has amended the McCarran-Ferguson Act such that **health insurers** will now be subject to the same federal antitrust laws as other industries; other insurers, however, will continue to have federal antitrust immunity.
- Repeal of the antitrust exemption subjects health insurers to increased scrutiny by federal antitrust authorities (namely the Antitrust Division of the Department of Justice) as well as private parties seeking to bring federal antitrust claims, which may counsel for a re-examination of antitrust compliance policies.

The McCarran-Ferguson Act

From 1954 to 2021, insurers were among a small number of industries who enjoyed immunity from federal antitrust laws. Signed into law in 1954, the McCarran-Ferguson Act (“the Act”) gave states the power to regulate the “business of insurance.” As a result, the Act prevented the application of federal antitrust laws to insurers to this set of activities (although not with respect to acts of boycott, coercion or intimidation), leaving state antitrust laws as the only means of preventing certain anticompetitive activities by insurers.[1]

Over time, courts have somewhat eroded the insurer exemption by limiting the scope of the phrase “business of insurance.” Most significantly, the Supreme Court in *Group Life & Health Insurance Co. v. Royal Drug Co.* articulated a three-pronged test to determine whether a practice fell within the confines of the “business of insurance” and was, therefore, immune from the federal antitrust laws. The three prongs were:

1. Whether the practice had the effect of transferring or spreading a policyholder’s risk;

2. Whether the practice was an integral part of the policy relationship between the insurer and the insured; and
3. Whether the practice was limited to entities within the insurance industry.

The most widely understood practical effect of the McCarran-Ferguson Act and the cases interpreting it has been to permit data sharing among insurance companies.[2] Indeed, an analysis by the Congressional Budget Office estimated that repealing the antitrust exemption for health insurers "would have no significant effects on either the federal budget or the premiums that private insurers charged for health insurance." Nevertheless, activists have long argued that the Act enabled anticompetitive conduct and have pushed for legislative reform for over a decade (legislation was first introduced in 2010).

The Competitive Health Insurance Reform Act

The Competitive Health Insurance Reform Act (CHIRA) was a bipartisan effort introduced by Reps. Peter DeFazio (D-OR) and Paul Gosar (R-AZ), and House Judiciary Committee Chairman Jerrold Nadler (D-NY). CHIRA unanimously passed both chambers of Congress in 2020 and then-President Trump signed it as one of the final acts of his presidency. Rep. Nadler described passage by Congress as a "major win" for Americans. He went on to add that:

The Competitive Health Insurance Reform Act repeals a longstanding antitrust exemption for the health insurance industry under the McCarran-Ferguson Act. This exemption effectively shielded health insurance companies from antitrust scrutiny for some of the most egregious forms of anticompetitive conduct, such as price-fixing, bid-rigging, and market allocation. There is absolutely no justification for this broad antitrust exemption, and its repeal is long overdue.

The text of CHIRA is, itself, quite short and straightforward. The Act amends the McCarran-Ferguson Act by providing that "nothing contained 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 (including the business of dental insurance and limited-scope dental benefits)."

CHIRA does not, however, fully repeal the application of the McCarran-Ferguson Act to all practices by health insurers. CHIRA explicitly retains federal antitrust immunity for health insurers with respect to "a contract, combination or conspiracy to (1) collect, compile, or disseminate historical loss data; (2) determine a loss development factor for historical loss data; (3) perform actuarial services if the collaboration does not involve a restraint of trade; or (4) develop or disseminate a standard insurance policy form if adherence to the form is not required." The flowchart here outlines the general application of CHIRA for businesses in the insurance industry and the limited continuation of immunity.

Practical Considerations Moving Forward

As an initial matter, the passage of CHIRA does not impact the authority of states to regulate insurance. Health insurers, like companies in most other industries, will now be governed by state *and* federal antitrust laws. Importantly, CHIRA applies only to health insurers, not to all types of insurers. For instance, property and casualty insurers remain exempt from the federal antitrust laws under the McCarran-Ferguson

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Act. And other exemptions may be available to health insurance companies. For example, the state action doctrine may protect concerted pricing, the development of joint products, or incidental effects on competition from single-firm conduct, as long as the activity falls within a “clearly articulated” state policy that is “actively supervised” by the state. Of course, in these cases, the party claiming the immunity must prove its application.

While the plain text of the Act continues to permit data sharing, that practice is not without limits. Federal antitrust laws now prevent health insurers from exchanging competitively sensitive data. The practical effect of CHIRA is that health insurers will need to exercise caution and carefully evaluate business practices. Indeed, in addition to increased federal oversight as a result of the Act (signaled by a supporting statement from then-Assistant Attorney General Makan Delrahim of the Department of Justice Antitrust Division), CHIRA also effectively opens the door for private antitrust litigation. Importantly, potential plaintiffs now have a potent new set of tools on which they can base federal antitrust claims against health insurers. It may be prudent for health insurance companies to revisit their antitrust compliance programs following CHIRA.

[1] Neither the McCarran-Ferguson Act nor CHIRA affect the regulation of health insurance company mergers, which are still reviewed by the Department of Justice and the Federal Trade Commission under the Hart-Scott-Rodino Act.

[2] To be clear, although some types of insurance have historically formed organizations to share claims data, the health insurance industry has not usually shared premium rate information about customers.

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