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CLIENT ALERT

New Legislation Eliminates Long-Standing Antitrust Immunity for Health Insurers

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Yesterday, the Competitive Health Insurance Reform Act of 2020 (CHIRA) was signed into law, eliminating the longstanding federal antitrust exemption for health insurers provided under the McCarran-Ferguson Act. According to AAG Delrahim, head of the DOJ Antitrust Division, by "[l]imiting the scope of conduct exempt from the antitrust laws … [CHIRA] will strengthen the Antitrust Division's ability to investigate and prosecute anticompetitive behavior." While the new law will provide DOJ some additional scope for antitrust enforcement related to ratemaking, underwriting, and certain other activities, the law will not impact the Antitrust Division's ongoing enforcement of price fixing and other collusion, monopolization, or merger and acquisition matters in the health insurance industry – all of which have been, and will likely remain, robust.

Enacted in 1945, the McCarran-Ferguson Act granted an antitrust exemption for "the business of insurance" and more broadly gave states the primary authority to regulate the insurance industry. The antitrust exemption, however, was limited to activities that: (1) constitute the "business of insurance;" (2) are "regulated by State law;" and (3) do not constitute an agreement or act "to boycott, coerce, or intimidate."[1][1]

As such, McCarran-Ferguson immunity was not broadly conferred but rather, courts had to evaluate whether all three elements identified above were satisfied. To determine whether challenged conduct constituted the "business of insurance" courts considered: (1) whether the activity had the effect of transferring a policyholder's risk; (2) whether the activity was an integral part of the policy relationship between insurer and policyholder; and (3) whether the activity was limited to entities within the insurance industry.[2][2] Conduct that had been found to qualify as the "business of insurance" and thus subject to immunity included ratemaking, form standardization, and joint underwriting – although some parties alleged that McCarran-Ferguson afforded much broader immunity, creating uncertainty and litigation risk for both the government and private parties alike.

CHIRA removes that ambiguity by eliminating immunity for the "business of health insurance." Specifically, the law amends the McCarran-Ferguson Act to state 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 law explicitly maintains immunity for health insurance companies 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. Such immunity allows small insurers, who otherwise would have too limited data to develop reliable actuary rates, access to broader data to both better compete with larger insurers who have a larger pool of available data as well as to generate more accurate rates that are fairer to consumers. Without such immunity, this type of information exchange could be prohibited under the antitrust laws.

Stakeholders have been split on the potential impact of the legislation. Advocates for the new law believe that subjecting health insurance companies to federal oversight "will help address instances of artificially higher premiums, unfair insurance restrictions, and harmful policy exclusions."[3][3] Health insurers and others, on the other hand, have expressed concerns that the legislation will lead to duplicative and conflicting federal and state oversight requirements, while failing to promote competition in health care coverage, as well as costly litigation in federal and state courts. While the ultimate impact is yet to be determined, CHIRA will not impact the DOJ Antitrust Division's active and ongoing enforcement of price fixing, collusion, and monopolization activities, as well as its scrutiny of mergers and acquisitions in the health insurance industry.

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[1] 15 U.S.C. §§ 1011–1

[2] Union Labor Life Ins. Co. v. Pireno, 458 U.S. 119, 129 (1982).

[3] https://www.leahy.senate.gov/press/daines-leahy-bipartisan-bill-promoting-affordable-health-insurance-passes-senate-heads-to-presidents-desk-

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