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Government Changes to the Rules of Competition

McCarran-Ferguson Act Health Insurance Exemption Repeal – What's It All About?

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What's up?

- Consumer groups and Congressional proponents have blamed various perceived health insurance marketplace problems on the McCarran-Ferguson Act's partial antitrust exemption for the business of insurance.
- Congress is considering legislation to eliminate the Act's antitrust exemption for the health insurance business
- House has passed H.R. 4626; Senate prospects uncertain
- No change in McCarran-Ferguson Act in health reform legislation as finally enacted
- If the exemption were changed, what difference would it make?

How did we get here?

- Early case law held that Commerce Clause did not bar various forms of state regulation of insurance because insurance contracts were not interstate “commerce”
- Change came in *U.S. v. South-Eastern Underwriters*, 322 U.S. 533 (1944)
  - Fire insurers indicted for price fixing in six states.
  - Fire insurance transactions which stretch across state lines are "Commerce among the several States" subject to regulation by Congress under the Commerce Clause.
  - The Sherman Act was intended to prohibit conduct of fire insurance companies which restrains or monopolizes the interstate fire insurance trade.
- Decision led to concern it would interfere with state regulation and taxation of insurance
- In 1945, McCarran-Ferguson Act passed in reaction

McCarran-Ferguson Act, 15 USC §§ 1011 et seq.

- Confirms state authority to regulate and tax insurance
- Protects state laws regulating insurance from invalidation or impairment by federal law that does not specifically relate to insurance
- Separate test for antitrust laws. Affirms, but specifically limits, applicability of antitrust laws and FTC Act to the business of insurance

Affirming state regulation and taxation of insurance

- §1011 -- Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.
- §1012(a) -- The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

Protection of state insurance laws

- §1012(b) -- No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance.
- Applies, for example, to Federal Arbitration Act if it would impair a state law regulating insurance that restricts use of arbitration in insurer-policyholder disputes.
- Doesn't bar application of federal civil rights law where federal law would complement state law

Applicability of antitrust law and FTC Act

- §1012(b) proviso -- After June 30, 1948, the Sherman Act, Clayton Act and FTC Act shall be applicable to the business of insurance to the extent that such business is not regulated by State law
- Grace period from application of antitrust laws from passage until July 1, 1948
- §1013(b) -- Nothing contained in this chapter shall render the Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation
  - Note Robinson-Patman Act normally has no applicability to the business of insurance in any event since it applies only to "commodities"

Since 1945 federal government has greatly increased role in health insurance

- Dependents Medical Care Act (1956) (precursor to CHAMPUS/TriCare)
- Welfare and Pension Plan Disclosure Act (1958)
- Federal Employees Health Benefits Act (1959)
- Medicare Act (1965)
- Medicaid (1965)
- Medigap law
- Federal HMO Act (1973)
- Employee Retirement Income Security Act (ERISA) (1974)
- Indian Health Care Improvement Act (1976)
- COBRA (continuation of group coverage following loss of eligibility) (1985)
- Medicare Catastrophic Protection Act (1988) (repealed 1989)
- Americans with Disabilities Act (1990)
- Omnibus Budget Reconciliation Act (OBRA) (1990) (standardization of Medicare supplement policies)
- Health Insurance Portability and Accountability Act (HIPAA) (portability, guaranteed issuance and guaranteed renewal/privacy) (1996)
- Newborn and Mothers Health Protection Act (1996)
- State Children's Health Insurance Program Act (1997)
- Balanced Budget Act (BBA)(1997) (expands Medigap eligibility guarantees)
- Women's Health and Cancer Right Act (1998)
- Graham-Leach-Bliley Act (1999)
- Medicare Prescription Drug, Improvement, and Modernization Act (2003) (Part D; Medicare Advantage)
- Mental Health Parity Act (2008)
- Medicare Improvements for Patients and Providers Act (MIPPA) (2008)
- Patient Protection and Affordable Coverage Act (2010)

Proposed repeal legislation

- H.R. 4626 “Health Insurance Industry Fair Competition Act” passed House 2/24/2010
- Amends Section 3 of McCarran-Ferguson Act, 15 U.S.C. §1013, adding:
  - “(c) Nothing . . . in this Act shall modify, impair, or supersede the . . . the antitrust laws with respect to the business of health insurance. . . . `[A]ntitrust laws' has the meaning given it in subsection (a) of the first section of the Clayton Act, except that such term includes section 5 of the [FTC] Act to the extent that such section 5 applies to unfair methods of competition.”
- Although it does not literally appear to achieve it, the proposed language seems also intended to provide to the FTC unfair methods of competition authority over non-profit health insurers, irrespective of the exception for charitable organizations in the definition of “corporation” in the FTC Act:
  - “For purposes of section 5 of the Federal Trade Commission Act (15 U.S.C. 45) to the extent such section applies to unfair methods of competition, section 3(c) of the McCarran-Ferguson Act shall apply with respect to the business of health insurance without regard to whether such business is carried on for profit, notwithstanding the definition of `Corporation' contained in section 4 of the Federal Trade Commission Act.”
- As drafted, HR 4626 would not affect McCarran-Ferguson exemption on the “consumer protection” side, and would not give the FTC “consumer protection” authority over non-profit health insurers, if it did not already have it
- No definition of health insurance so full scope not clear
  - Disability insurance? Workers comp insurance? Long term care insurance? Reinsurance of health insurers?
- Similar Senate bill (S.B. 1681) introduced by Senator Leahy, co-sponsored with Senators Feingold, Cantwell, Durbin, Schumer and Feinstein

Posited arguments for repeal

- State insurance commissioners are not policing anticompetitive conduct by health insurance companies
- Law sometimes blocks assessment on the merits of plausible antitrust claims
- Increasing concentration in the health insurance industry warrants greater role for antitrust
- Law enforcers, non-partisan antitrust commissions and consumer groups have called for repeal
- Evidence, such as auto insurance regulation in California, that applicability of the antitrust laws can reduce rate of premium increases
- Antitrust enforcement would not interfere with state regulation or with legitimate data gathering and statistical information sharing that is defensible under normal antitrust rule of reason

Posited arguments against repeal

- Current case law permits antitrust enforcement in key areas of concern
- Removing exemption will encourage frivolous and expensive lawsuits
- Removing exemption may discourage bona fide sharing of underwriting experience or other information needed for bona fide actuarial purposes, especially among smaller companies
- Removing exemption may discourage pro-consumer collaboration among plans to increase choices of products and provide cost savings and better service
- Removing exemption is scapegoating insurance industry for cost increases unrelated to partial antitrust immunity

Three elements for antitrust exemption

- Activity must be the “business of insurance” to be exempt
- Activity must be “regulated” by the state to be exempt
- Activity may not be agreement to boycott, coerce or intimidate, or act of boycott, coercion or intimidation, to be exempt

What is the "business of insurance"?

- Exemption is for "business of insurance," not all business activities of insurers
- Includes spreading and underwriting policyholder risk and relationship between insurer and insured (such as type of policy, its reliability and interpretation), sale and advertising of insurance, and insurer and agent licensing. Key factor whether activity is limited to parties within insurance industry.
- Does not include contracts by insurers with providers, which help insurers manage risk, but do not involve underwriting or spreading of risk. *Group Life Ins. Co. v. Royal Drug Co.*, 440 U.S. 205 (1979)
- Does not include insurance peer review activities by health care provider organizations under contract to insurers. *Union Labor Life. Ins. Co. v. Pireno*, 458 U.S. 119 (1982)

What's the "business of insurance"? (cont'd)

- Some law that merger activity is not the "business of insurance." *American General Insurance Co.*, 81 F.T.C. 1052 (1972); *American General Ins. Co. v. FTC*, 359 F. Supp. 887 (S.D.Texas 1973) (denying injunction against FTC proceeding), *aff'd on other grounds*, 496 F.2d 197 (5th Cir. 1974). Antitrust Division enforcement proceeds on same basis.
  - Cf. *SEC v. National Securities, Inc.*, 393 U. S. 453 (Arizona law requiring commissioner to assess merger based on whether it would reduce security of or service to policyholders is a law relating to "business of insurance," but SEC suit to invalidate merger due to misrepresentations to shareholders was not barred).
  - "The paramount federal interest in protecting shareholders is, in this situation, perfectly compatible with the paramount state interest in protecting policyholders. Different questions would, of course, arise if the Federal Government were attempting to regulate in the sphere reserved primarily to the States by the McCarran-Ferguson Act."
- If, however, a state law regulating insurance mergers to protect policyholders is a law regulating the "business of insurance" according to the Supreme Court, then would the insurers' merger activity be the "business of insurance" protected from federal antitrust challenge?
- Other than *American General*, no litigated cases test federal government's authority to challenge a merger claimed to risk antitrust harm to consumers where merger is subject to state insurance commissioner approval that includes assessment of merger's competitive impact.
- Is case for federal authority even stronger if federal government is concerned about potential monopsony power over providers resulting from merger, since *Royal Drug* holds that insurer contracts with providers are not within the "business of insurance"?

What does "regulated" by state law mean?

- Does not require level of state activity required for antitrust "state action" immunity.
  - Test to date does not include "active state supervision" element in antitrust "state action" jurisprudence. Inquiry not a test of state's "zeal and efficiency". *Lawyers Title Co. v. St. Paul Title Ins. Corp.*, 526 F.2d 795 (8th Cir. 1975)
  - State regulates where it has adopted prohibitory legislation and scheme of administrative supervision, even if prohibitions are not crystallized with elaboration of standards. *FTC v. National Casualty Co*., 357 U.S. 560 (1958). Not clear how close state law must be to "mere pretense" for exemption not to apply
  - State express approval for conduct not required; sufficient that state regulatory scheme have jurisdiction over challenged practice. See *Feinstein v. Nettleship Co.*, 714 F.2d 928 (9th Cir. 1983), *cert. denied*, 466 U.S. 972
  - Extra-territorial regulation by a state is not regulation for McCarran-Ferguson Act exemption purposes. See *FTC v. Travelers Health Ass'n*, 362 U.S. 293 (1960)
- States have passed not only laws of the traditional "regulatory" variety, but also unfair insurance trade practice laws and competition-based approval standards for insurer acquisitions
  - One case indicates state general antitrust laws sufficient. *State of Md. V. Blue Cross and Blue Shield Ass'n*, 620 F.Supp. 907 (D.C.Md. 1985). This ruling subject to criticism to the extent other case law may require that state regulation be via law specifically regulating insurance, rather than state laws of general application.
- Supreme Court has not revisited this "regulation" issue in 50 years!

What is boycott, coercion and intimidation?

- “Boycott" is not limited to concerted activity against insurance companies or agents or against competitors of members of the boycotting group. It can include concerted refusal to deal with policyholders, but would not include unilateral action. *St. Paul Fire & Marine Ins. Co. v. Barry,* 438 U. S. 531(1978)
- Mere concerted refusal to deal except on specified terms may not be a boycott. *Cf. New Jersey Auto Ins. Plan v. Sciarra*, 103 F.Supp. 388 (D.N.J. 1998)
- Nor would price fixing alone likely be deemed a boycott. *In re Workers Compensation Antitrust Litigation*, 867 F.2d 1552 (8th Cir. 1989), *cert. denied*, 492 U.S. 920
- Enforcement activity to pressure participation in concerted refusal to deal can be enough for “boycott”. *Id*.
- Little precedent construing “coercion” and “intimidation”

What cases found exemption applicable?

- Prepaid plan limiting drug benefit to prescriptions filled at plan's own pharmacy is within "business of insurance". *Klamath-Lake Pharm. Ass'n v. Klamath Medical Service Bureau*, 701 F.2d 1276 (9th Cir. 1983), *cert. denied*, 464 U.S. 822)
- Black insurance agent's antitrust action challenging insurer's redlining. See *Mackey v. Nationwide Ins. Companies*, 724 F.2d 419 (4th Cir. 1984)
- Market division complaint by malpractice insurance broker where facts showed only action among insurers. *Owens v. Aetna Life & Cas. Co.*, 654 F.2d 218 (3rd Cir. 1981), *cert. denied*, 454 U.S. 1092
- Health insurer's use of "adverse selection" policy – insurer charged employer also offering competing HMO higher rates than employer who offered only insurer's plan -- was exempt from antitrust scrutiny where no evidence any employer was "coerced" not to offer competing HMO product. *Ocean State Physicians Health Plan, Inc. v. BCBS of Rhode Island*, 883 F.2d 1101 (1st Cir. 1989), *cert. denied*, 494 U.S. 1027

Is there continuing rationale for antitrust exemption in health insurance

- Was there ever a good rationale?
- If so, have things changed?