Three Things to Know About the Competitive Health Insurance Reform Act

On March 22nd, House Resolution 372, known as the Competitive Health Insurance Reform Act, passed in the House by a vote of 416 to 7. The bill repeals antitrust exemptions for health insurers created by the McCarran-Ferguson Act of 1945 (15 U.S.C. §§ 1011-1015) ("McCarran-Ferguson"). Unfortunately, despite bipartisan support for this legislation, it is unlikely to significantly improve competition in health insurance markets. The legislation is unlikely to improve health insurance market concentration, or create a robust market for health insurance sales across state lines, despite GOP hopes. The legislation primarily shifts responsibility for enforcing some antitrust conduct laws from states to the federal government. Below, we discuss three things you should know about this legislation: (1) what antitrust exemptions McCarren-Ferguson grants to insurers|(2) why legislators are proposing to eliminate them for health insurance|and (3) how this bill will affect healthcare price and competition if passed.

1. **What is the antitrust exemption in McCarren-Ferguson?**

Congress passed McCarran-Ferguson in 1945 in response to a U.S. Supreme Court case, *United States v. South-Eastern Underwriters Association*, 322 U.S. 533 (1944), in which the Court held that federal regulators could prosecute insurers that share competitive information under federal antitrust law. Congress had two aims in passing McCarran-Ferguson. First, to exempt insurers from a limited number of federal antitrust laws and allow states to regulate those issues instead. Second, and perhaps more importantly, to reaffirm the historical role of the states as the primary regulators of the

insurance industry. This reaffirmation has impacted the structure of our health insurance markets significantly more than the limited antitrust exemption.

The U.S. Supreme Court has concluded that "the business of insurance" in McCarren-Ferguson centers around the contract between insurers and the insured.[2] When determining whether a law regulates the business of insurance, courts have considered: "(1) whether the activity has the effect of transferring a policyholder's risk|(2) whether the activity is an integral part of the policy relationship between insurer and policyholder|and (3) whether the activity is limited to entities within the insurance industry."[3] Activities defined as "the business of insurance" include rate fixing, licensing of companies and agents, and insurance policy sales. Conversely, insurance company mergers and acquisitions, bid rigging, rate fixing, and reimbursement practices do not constitute "the business of insurance." McCarren-Ferguson therefore did not prevent DOJ from challenging the proposed Anthem-Cigna and Aetna-Humana mergers under federal antitrust law. DOJ and FTC have brought many cases involving anticompetitive conduct by health insurance agencies, such as the use of anti-steering provisions and most-favored nation clauses in contracts, without running afoul of the antitrust exemption. Thus, in practice, the exemption has a limited effect on the application of federal antitrust laws to health insurers.

2. **Why do legislators want to repeal the antitrust exemption for health insurers?**

Supporters of the Competitive Health Insurance Reform Act argue that repealing the antitrust immunities will increase competition between insurers and reduce insurance prices. Democrats first tried to repeal the antitrust exemption in 2010 because they believed that it allowed health insurers to

inflate prices through rate fixing. Now Republicans support the legislation as part of their push to repeal the ACA and implement laws promoting health insurance sales across state lines. According to Republicans backing the bill, repealing the antitrust exemptions, which give states the ability to regulate insurance licensing and sales, would make it easier for health insurers to sell products across state lines. As discussed in more detail below, repealing the exemption may not have this desired effect. Selling insurance across state lines involves serious market challenges for health insurers that remain unaddressed by the bill.

3. **What effect would repeal have on health insurance competition and prices?**

Unfortunately, repealing the antitrust exemption is unlikely to substantially improve health insurance markets or prices. Little information suggests that insurers engage in the type of price fixing and collusion addressed by the bill. Art Lerner, who used to lead the FTC's health care antitrust program, said in an NPR article about McCarran-Ferguson that health insurance industry does not typically share rate information between competitors.

In addition, insurers have little economic incentive to begin selling insurance across state lines because building interstate provider networks is expensive. As we have discussed in a previous blog post, the ACA already allows insurers to sell across state lines if states adopt "healthcare choice compacts." So far, no insurers have teamed with states to do so. Moreover, interstate insurance sales could actually harm competition by encouraging insurance consolidation, as the biggest insurers with the most resources seek even greater market power. And if Congress eliminates the minimum essential benefits requirements in the ACA, insures could also maximize profits by flooding the interstate market

with bare-bones plans licensed in states with the least consumer protections.

This bill unfortunately does not address the most pressing concerns regarding health insurer market competition. Lack of competition in ACA marketplaces primarily stems from the inability for insurers to turn a profit in those markets. This legislation does nothing to address that problem. In the broader health insurance market, the dominance of the four largest insurers and growing insurer market power stifles competition. As mentioned above, existing law allows federal regulators to combat consolidation and abuses of this power by challenging anticompetitive mergers and most anticompetitive conduct. Given these problems, the most effective tool for promoting health insurance competition may be to enforce existing state and federal antitrust regulations more aggressively.

In sum, while this bill does help promote antitrust enforcement in a market that continues to have competition challenges, it will not go far in protecting competition in healthcare markets. We hope Congress will continue to find bipartisan support for legislation that supports competitive markets. We will continue to track the Competitive Health Insurance Reform Act and provide you with any major updates!

[1] *See* SEC v. National Securities, 398 US 453 (1969).

[2] Callman on Unfair Competition, Trademarks, and Monopolies, §4:7 Exemptions from the antitrust laws – Insurance (4th ed.).