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Repeal of McCarran-Ferguson Act — Ramifications for Insurance Clients

Health insurance companies are now no longer immune from antitrust scrutiny for activities previously found to be "the business of insurance." Last week, the Competitive Health Insurance Reform Act (CHIRA) was enacted, repealing health insurers' federal antitrust immunity provided by the McCarran-Ferguson Act. Prior to CHIRA, insurers were immune from federal antitrust liability for all conduct that (1) was part of the business of insurance, (2) was regulated by state law, and (3) did not constitute a boycott, coercion, or intimidation.[1] Courts had exempted insurers from federal antitrust liability — even when state law was deemed to ineffectively regulate the business of insurance.[2]

With the enactment of CHIRA, the U.S. Department of Justice and Federal Trade Commission have expanded authority and oversight to regulate the business of health insurance and prosecute allegedly anticompetitive behavior. The repeal of the exemption potentially exposes insurers to federal antitrust liability for any alleged collaborative or anticompetitive conduct, including, but not limited to:

- Agreements regarding data sharing between insurers;
- Cooperative ratemaking among insurers;[3]
- Form standardization;
- Joint underwriting;[4]
- Claims handling;[5]
- Reinsurance risk spreading;[6] and
- Any other conduct that would ordinarily give rise to a federal antitrust cause of action for which the McCarran-Ferguson Act previously afforded immunity including under the Clayton Act, the Sherman Act, and FTC Act.[7]

Advocates for the repeal of the McCarran-Ferguson exception cite CHIRA as beneficial for insurance competition and protecting consumers within the health insurance.[8] Experienced counsel can assist in navigating the newly heightened regulation and potential antitrust liabilities insurers are now exposed to with the repeal of the McCarren-Ferguson exemption.

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Related Practice Areas

- Antitrust & Competition
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1 *See* 15 U.S.C. §§ 1011-1015; *McCray v. Fidelity Nat. Title Ins. Co.*, 682 F.3d 229 (3d Cir. 2012), *cert. denied*, 2013 WL 598864 (U.S. 2013).

2 *See Federal Trade Com'n v. National Casualty Co.*, 357 U.S. 560, 564, 78 S. Ct. 1260, 2 L. Ed. 2d 1540 (1958); *Ohio AFL-CIO v. Insurance Rating Bd.*, 451 F.2d 1178, 1183 (6th Cir. 1971); *Commander Leasing Co. v. Transamerica Title Ins. Co.*, 477 F.2d 77, 83-84 (10th Cir. 1973). *See also Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119, 129 (1982) (finding the "business of insurance" to include practices that have "the effect of transferring or spreading a policyholder's risk," practices that are "an integral part of the policy relationship between the insurer and the insured" and practices that are "limited to entities within the insurance industry.")

3 *See Arroyo-Melecio v. Puerto Rican American Ins. Co.*, 398 F.3d 56, 68 (1st Cir. 2005) ("Horizontal agreements among insurers to fix the price and to issue policies only through the residual market are within the business of insurance."); *Crawford v. American Title Ins. Co.*, 518 F.2d 217 (5th Cir. 1975) (finding that Sherman Act claims against insurers to conspire to raise prices for premiums and fees were exempt under the McCarran-Ferguson Act, and requiring the state to regulate the specific challenged anticompetitive activity).

4 *See Slagle v. ITT Hartford*, 102 F.3d 494, 497–98 (11th Cir. 1996) (Insurers' collective arrangement to issue windstorm insurance in parts of Florida only through joint underwriting association is within the "business of insurance.").

5 *See Campo v. Allstate Ins. Co.*, 562 F.3d 751 (5th Cir. 2009) (granting summary judgment for insurer because the action related to claims handling)

[6] *See Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 214, 99 S. Ct. 1067, 59 L. Ed. 2d 261 (1979) (finding that agreements providing for risk spreading, not risk reduction, fall under the definition of the "business of insurance" and are therefore exempt from federal antitrust liability).

[7] 15 U.S.C. §§ 12 *et seq.* (2009); 15 U.S.C. §§ 1 *et seq.* (2009); 15 U.S.C. §§ 41 *et seq.* (2009).

[8] *See* "Daines, Leahy Bipartisan Bill Promoting Affordable Health Insurance Passes Senate, Heads to President's Desk," (Dec. 22, 2020) https://www.leahy.senate.gov/press/daines-leahy-bipartisan-bill-promoting-affordable-health-insurance-passes-senate-heads-to-presidents-desk-.