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Health and dental insurers' federal antitrust exemption under McCarran-Ferguson Act partially repealed

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In January, former President Donald Trump signed the Competitive Health Insurance Reform Act (CHIRA), which partially eliminated health and dental insurers' decades-old exemption from federal antitrust laws under the McCarran-Ferguson Act for practices constituting the "business of insurance." While CHIRA includes important carve-outs that preserve several previously recognized immunities, certain collaborative practices between health and dental insurers may be newly subject to federal antitrust scrutiny. Health and dental insurers should carefully assess their collaborative practices to ensure they do not run afoul of newly applicable federal antitrust laws.

The McCarran-Ferguson Act pre-CHIRA

The McCarran-Ferguson Act, 15 U.S.C. § 1101 et seq., was passed decades ago in response to the Supreme Court's decision in *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944), which held that insurance companies involved in interstate commerce were subject to federal antitrust laws and regulations. Immediately, state regulators and insurance industry leaders objected to the decision—the former because they feared it would limit states' power to regulate and tax insurance companies, and the latter because they feared that the threat of antitrust liability would significantly chill various procompetitive collaborations. As a result, the McCarran-Ferguson Act was passed in 1945, which, among other things, exempted insurers from federal antitrust laws if three conditions were met:

1. The conduct was part of the "business of insurance"
2. The conduct was regulated by state law
3. The conduct did not constitute a boycott, coercion or intimidation

15 U.S.C. §§ 1012(b), 1013(b).

In 1982, the Supreme Court, in *Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119, 129 (1982), limited the definition of "business of insurance" to include only business practices that:

1. Have the "effect of transferring or spreading a policyholder's risk"
2. Are "an integral part of the policy relationship between the insurer and the insured"
3. Are "limited to entities within the insurance industry"

Since then, federal courts have frequently been asked to determine whether specific practices by insurance companies constitute the "business of insurance." Federal courts have routinely found that mergers between health insurers, contractual relationships between insurers and providers, and market allocation agreements between insurers do not constitute the "business of insurance" and therefore are not exempt under the McCarran-Ferguson Act.

However, federal courts found that the following do constitute the "business of insurance" and therefore were exempt:

1. Cooperative ratemaking among insurers, *Arroyo-Melecio v. Puerto Rican Am. Ins. Co.*, 398 F.3d 56, 68 (1st Cir. 2005);
2. Joint underwriting, *Slagle v. ITT Hartford*, 102 F.3d 494, 497–98 (11th Cir. 1996);
3. Claims handling, *Campo v. Allstate Ins. Co.*, 562 F.3d 751 (5th Cir. 2009); and
4. Reinsurance risk spreading, *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 214 (1979).

Other examples of practices previously found to be exempt under the McCarran-Ferguson Act include agreements regarding data sharing and form standardization.

The McCarran-Ferguson Act post-CHIRA

The McCarran-Ferguson Act's antitrust exemption has long been a target for repeal by some who argued that doing so will reduce premiums and limit unfair insurance restrictions and policy exclusions. To ostensibly effectuate that goal, CHIRA repeals the antitrust exemption for health and dental insurers by amending the McCarran-Ferguson Act to provide 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).

However, CHIRA also specifically provides that four practices will continue to receive immunity from federal antitrust laws:

1. Contracts or cooperation among insurers to collect, compile or disseminate historical loss data
2. Contracts or cooperation among insurers to determine a loss development factor applicable to historical loss data
3. Contracts or cooperation among insurers to perform actuarial services, provided it does not involve a restraint of trade
4. Contracts or cooperation among insurers to develop or disseminate standard insurance policy forms, provided the forms are not mandatory

CHIRA's carve-outs therefore continue to provide antitrust immunity for many collaborative practices that previously were exempt as constituting the "business of insurance," such as certain types of data sharing, including historical loss data utilized for rate-setting, and the development of standardized forms.

Nonetheless, the scope of the CHIRA carve-outs is narrower than the historic case law defining the "business of insurance." Certain collaborative agreements, including those relating to reinsurance, claims handling and standardization of rates are now, for the first time in over 70 years, subject to federal antitrust scrutiny. Therefore, health and dental insurers must be aware of CHIRA and the limits of its carve-outs to avoid the potential for federal investigations, civil litigation brought by the government or private parties, or even potentially criminal prosecution. Health and dental insurers also should be aware that conduct previously approved by state insurance regulators may no longer be acceptable as a matter of federal antitrust law.

That notwithstanding, CHIRA is unlikely to have a substantial impact on the insurance industry at large for four reasons:

1. While the antitrust exemptions in the McCarran-Ferguson Act applied to all insurers, CHIRA's repeal applies only to health and dental insurers. Thus, all other types of insurers continue to enjoy the same protections under the McCarran-Ferguson Act as before.

2. Certain types of practices commonly at issue in antitrust cases involving health and dental insurers—including mergers and acquisitions, provider agreements, and geographic market allocations—already were found to be outside of the "business of insurance" and thus not subject to McCarran-Ferguson's exemption. CHIRA, therefore, should have no impact on these practices that never have been immune from federal antitrust scrutiny.

3. Insurers always have been subject to state antitrust, consumer protection and unfair trade practice laws that in some cases already provided a separate and additional bar to anti-competitive conduct.

4. Antitrust challenges to collaborative conduct impacted by CHIRA often would be subject to rule of reason analysis, rather than per se scrutiny—for example, information exchanges to create a new insurance product. Accordingly, health and dental insurers may be able to show that the net effect of a given collaboration or agreement is pro-competitive.

Health and dental insurers should consult with counsel before continuing a historical practice that may constitute the "business of insurance" to ensure that it is compliant with changed federal antitrust laws.

For more information on this topic, or to learn how Godfrey & Kahn can help, contact a member of our team.