

The Latest Swipe At Insurers' Antitrust Exemption

Law360, New York (March 02, 2010) -- For the second time in three months, the House of Representatives has passed legislation that would repeal the health insurance industry's antitrust exemption, provided for in the McCarran Ferguson Act (15 USC §1012 et seq.).

By an overwhelming 406-19 vote, the House passed the "Health Insurance Industry Fair Competition Act" (H.R. 4626) on Feb. 24, once again threatening to send the insurance industry's antitrust exemption — which it has enjoyed for 65 years — into retirement.

McCarran Repeal Rises from the Ashes

Last November, the House passed McCarran repeal legislation as part of its omnibus health care reform package, H.R. 3962. That legislation would have repealed McCarran for both health insurers and medical malpractice insurers, and would also have granted the Federal Trade Commission new authority to undertake industrywide investigations of the insurance industry.

The bill also included "safe harbors" that, notwithstanding the repeal, would have continued to make the "collection, compiling, classifying or disseminating of historical loss data," the "determination of a loss development factor," and the "performance of actuarial services" exempt conduct.

However, the Senate's concurrent efforts to pass health care reform legislation stalled, as Sen. Ben Nelson, D-Neb., — among others — announced that he would not support the legislation unless certain provisions in the House bill were modified.

One such provision was McCarran repeal, which Sen. Nelson, a former insurance industry executive and state insurance commissioner, refused to support. Accordingly, the Senate version of health care reform, ultimately passed on Dec. 24, did not contain any McCarran repeal provisions. In short, it appeared that despite numerous repeal efforts over the years, McCarran had, once again, survived.

However, only days later, Sen. Patrick Leahy, D-Vt., a longtime McCarran repeal proponent, made quite clear that he had no intention of giving up the fight.

Sen. Leahy issued a press release announcing his "disappointment" that McCarran repeal had not been included in the Senate bill, stated that McCarran repeal was necessary to "ensure that basic rules of fair competition apply to insurers," and indicated he intended to "work to include [McCarran repeal] when the Senate and House conference to reconcile their versions of the legislation."

As it turned out, efforts to repeal McCarran were only just getting started. At about the same time, unexpected events in Massachusetts were occurring that would have a dramatic impact on this issue. With the election of

Republican Scott Brown in Massachusetts, taking the seat that Ted Kennedy had previously held, the Democrats lost their 60 vote filibuster-proof majority in the Senate.

With this development, the prospect that any large scale health care reform measure would be passed, with or without a McCarran repeal provision, dimmed considerably. Accordingly, it appeared — at least for a moment — that Sen. Leahy's announced intentions would lead nowhere, and that the McCarran repeal effort would ultimately fail.

However, shortly thereafter, Speaker Nancy Pelosi announced that the Democrats would seek to pass health care reform legislation in "pieces," and, as it turned out, the House Democrats decided that the first step would be to try to pass McCarran repeal legislation.

H.R. 4626 is Introduced

In early February, a new McCarran repeal bill was prepared by two first-term Democrats, Thomas Perriello, D-Va., and Betsy Markey, D-Colo. The bill, designated H.R. 4626, was introduced on Feb. 22 as the "Health Insurance Industry Fair Competition Act."

In introducing the bill, Rep. Perriello stated that "It's time for Washington to decide whether we stand with patients or profiteering, whether we believe in market competition or collusion between politicians and insurance monopolies. It's time for a simple, clean bill — no carve outs or special deals — that forces insurance companies to compete."

While it was generally expected that Rep. Perriello's bill would simply transfer the McCarran provisions in H.R. 3962 into his new bill, that was not the case. Instead, while H.R. 3962 would have repealed McCarran for both health insurers and medical malpractice insurers, H.R. 4626 only addresses health insurance.

In addition, the "safe harbors" contained in H.R. 3962 are noticeably absent from the Perriello bill, as is the provision permitting the FTC to expand its authority to undertake industrywide studies of insurer activities.

While Rep. Perriello explained these changes as an attempt merely to create a "simple, clean bill," others speculated that the modifications were designed at least as much to avoid controversy and increase the likelihood of passage, given that the medical malpractice insurance industry had voiced strong opposition to H.R. 3962 and had aggressively argued for the necessity of safe harbors.

While almost two weeks passed between the time Rep. Perriello announced his intentions and his actual introduction of the bill, once introduced the bill progressed at a dizzying pace.

H.R. 4626 was presented to the House Rules Committee for consideration the very next day — Feb. 23 — and the Rules Committee, chaired by Rep. Louise Slaughter, D-N.Y., another strong voice for McCarran repeal, voted to have the bill considered by the full House the following day.

In addition, quite significantly, the House Rules Committee ruled that no amendments would be permitted to the bill. Instead, the House was left with only two options: (1) to recommit the bill to the Judiciary Committee for further action or (2) to pass or defeat the legislation as drafted.

H.R. 4626 is the Subject of a Spirited Debate on the House Floor

On Feb. 24, H.R. 4626 was debated on the House floor for several hours. While the debate addressed many issues — whether McCarran repeal would actually increase competition, whether it would decrease insurance premiums,

whether it was necessary given that the states already have the power to enforce their antitrust laws against insurers, etc. — the most spirited discussion focused on whether the “safe harbors” that had been contained in H.R. 3962 should be included in HR 4626.

In support of the “safe harbors,” Rep. Daniel Lungren, R-Calif., who had unsuccessfully sought to have them added by the Rules Committee the day before, argued that the bill should be recommitted to the House Judiciary so that the safe harbors could be added.

He maintained that the safe harbors would permit smaller insurers to share loss data free from antitrust risk, and that passing the legislation without the safe harbors could actually drive the smaller insurers from the market (thus making the industry more concentrated, not less, which is one of the stated objectives of the bill’s sponsors).

Rep. Lungren also noted that the safe harbor language he proposed had been a part of the McCarran repeal legislation introduced throughout the early 1990s by former House Judiciary Committee Chair Jack Brooks, D-Texas, a longtime McCarran repeal advocate, and that the concept of safe harbors was endorsed by the ABA Antitrust Section as well.

However, many House Democrats, including Rep. Peter DeFazio, D-Ore., a longtime McCarran repeal proponent, and Rep. Chellie Pingree, D-Maine, a Rules Committee member, rose in opposition to Lungren’s request.

Both Rep. DeFazio and Rep. Pingree characterized Lungren’s request for safe harbors as an insurance industry “loophole” that would permit the insurance industry to continue to engage in “price-fixing and collusion.”

Rep. DeFazio also noted that the Antitrust Modernization Commission had issued a report in 2007 stating that safe harbors were not necessary, and called for this “archaic exemption” to be relegated to the “dust bin of history.”

As a consequence of the House Rules Committee’s action, the voting on the House floor proceeded in two phases. The first vote taken was on the motion to recommit the bill to the House Judiciary for further consideration (and likely amendment). That vote failed by a vote of 249-170, largely on party lines.

Immediately thereafter, the bill was then presented for a vote on its passage. This time, the voting was remarkably different. The bill passed by a margin of 406-19, with every Democrat and 153 Republicans in favor of passage.

Those in favor of passage even included Rep. Lungren, who had announced during the course of the debate that he supported the legislation and was merely seeking to send it back to the Judiciary Committee for amendments to “get it right,” (i.e., to add his requested safe harbor amendments). Accordingly, when the motion to recommit failed, he voted in favor of the bill as written.

Prospects for Passage in the Senate

To become law, of course, the legislation must also get passed in the Senate and then be signed by President Obama. While President Obama expressed his strong support for the legislation on Feb. 23, support for the bill in the Senate remains, at least for now, quite uncertain.

Sen. Leahy will certainly seek to advance the bill toward passage, as he has repeatedly done in the past. Sen. Reid is also a strong proponent of McCarran repeal, and can be expected to work toward that end as well.

However, there is no reason to expect that Senator Nelson has changed his views on McCarran repeal, and the addition of Sen. Brown into the mix further decreases the likelihood that McCarran repeal proponents can defeat a possible Senate filibuster on the issue.

In addition, the decision not to permit any amendments to the bill may also complicate the task of getting the bill through in the Senate, and if the Senate were to pass a McCarran repeal bill with safe harbors the legislation could once again find itself before a Conference Committee, adding further delay and uncertainty as to possible passage.

Moreover, with the Senate reportedly having over 100 pieces of legislation passed by the House still pending, and so many other pressing matters to address, at some point the calendar may also become a factor as well.

McCarran's Long-Term Viability

The McCarran Ferguson Act has been the subject of numerous attacks over the course of its 65 years of existence. As noted above, former House Judiciary Chairman Jack Brooks was aggressively advocating McCarran repeal almost 20 years ago.

More recently, Sens. Leahy and Lott led a strong challenge to McCarran in 2007, but their effort failed as well. Thus, given this history, it is undoubtedly premature to declare an end to the McCarran Ferguson Act, notwithstanding the overwhelming support for repeal demonstrated in the House on H.R. 4626.

As its history has clearly shown, the McCarran Ferguson Act seems to have "nine lives," so perhaps the most important question that should be asked is: Which one of McCarran's "nine lives" is being debated by the 111th Congress? The answer to that question should become more clear over the next few months, but until then it is anyone's guess. Stay tuned.

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