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## Can Antitrust Exemption Survive Health Care Reform?

*Law360, New York (January 08, 2010)* -- While most of the attention in the health care reform debate over the last several months has focused on the public option, changes to Medicare and Medicaid, and federal funding for abortion, whether such reform should also include a repeal of the insurance industry's antitrust exemption, provided for in the McCarran-Ferguson Act, has attracted considerably less attention.

However, when Congress returns from their recess this month, this may well change.

As the House and Senate seek to harmonize their competing health care reform proposals, which currently take conflicting approaches to this issue, repeal of the act may very well become a significant bargaining chip in the larger health care debate.

As a result, the act's continued existence — at least for health and medical malpractice insurers — will unquestionably face the greatest challenge it has ever faced during its almost 65 years of existence.

### **The Current Status**

Enacted in 1945, the McCarran-Ferguson Act provides the insurance industry with an exemption from the federal antitrust laws for conduct that constitutes "the business of insurance," provided that the conduct is "subject to state law" and does not constitute an act of "boycott, coercion or intimidation."

The underlying purpose behind the act is to permit the states, rather than the federal government, to be the principal regulators of the insurance industry.

Despite numerous efforts to repeal the act over the years, including a much-publicized call for repeal by former Sen. Trent Lott, R-Miss., shortly after the Hurricane Katrina disaster, to date the act has withstood all such challenges without amendment.

However, it appears that the "storm" surrounding health care reform may finally succeed where all prior efforts to repeal the act have failed.

Specifically, the push to repeal the act began this fall, with the House and Senate Judiciary Committees hearing testimony in support of repeal from Assistant Attorney General Christine Varney (who heads the U.S. Department of Justice Antitrust Division), the Chair of the American Bar Association's Antitrust Section, and Sen. Harry Reid, D-Nev., among others.

Strongly advocating for repeal, AAG Varney expressed the view that the act's antitrust exemption had permitted the health insurance industry to become dominated by a few large insurers in each state, and that repeal would restore competition to the marketplace.

Sen. John Conyers, D-Mich., chair of the House Judiciary Committee, echoed this view, stating that a repeal of the act would "fix a mistake sitting on the federal statutes for over 60 years."

Ultimately, the House included McCarran repeal as part of the omnibus health care reform legislation proposal (HR 3962) that it passed on Nov. 7. As such, repeal of the act had cleared its first hurdle, advancing further toward passage than it ever had before.

Moreover, to the surprise of many, the legislation that was passed by the House turned out to be broader in scope with respect to McCarran repeal than anyone had anticipated.

Specifically, as had been expected, Section 262 of the House bill repeals the act's antitrust exemption for health and medical malpractice insurers with respect to all conduct except (a) "collecting, compiling, classifying or disseminating historical loss data; (b) determining a loss development factor applicable to historical loss data; and (c) performing actuarial services if doing so does not involve a restraint of trade."

However, the bill also contains two other related provisions that were added late in the drafting process which received far less attention but have the potential to be equally significant, if not more so.

First, subdivision (b) of Section 262 expands the Federal Trade Commission's authority to bring actions under Section 5 of the FTC Act (for anti-competitive conduct) against nonprofit health and medical malpractice insurers. Currently, the FTC has no such authority.

Even more significantly, Section 260 of the bill permits the Federal Trade Commission to conduct studies and prepare reports concerning the entire insurance industry — not just as to health and medical malpractice insurers. Such studies and reports are also currently outside the scope of the FTC's authority.

At the same time, efforts to repeal the act were also advancing in the Senate. These efforts were led by Democratic Sen. Patrick Leahy of Vermont, who has been one of the most outspoken advocates for McCarran repeal for many years.

As he had in prior years, Sen. Leahy introduced a stand-alone McCarran repeal bill (S. 1681) in September which, unlike the McCarran provision that was passed in the House, contained no “safe harbors.” Instead, the bill provided for a complete repeal of the act.

In early December, as the Senate began debate on health care, Sen. Leahy offered his McCarran bill as an amendment to the Senate’s omnibus health care reform legislation.

As has now been widely reported, the Senate Democrats needed all 58 Senate Democrats, plus independent Sens. Bernie Sanders, of Vt., and Joseph Lieberman, of Conn., to defeat a Republican filibuster and push the bill forward to passage and, as it turned out, Sen. Leahy’s McCarran amendment proved to be a sticking point in the proposal.

Democratic Sen. Ben Nelson of Nebraska, who is both a former insurance industry executive and a former state insurance commissioner, voiced his strong opposition to the initial Senate bill.

Sen. Nelson indicated that he would not provide the critical 60th vote necessary for Senate Democrats to push the Senate bill forward if changes to the legislation were not made, and one of the provisions in the bill that Sen. Nelson specifically refused to support was Senator Leahy’s McCarran repeal amendment.

Accordingly, reportedly for that very reason, the Senate health care bill that was approved by the Senate on Dec. 24 does not include any McCarran repeal provisions.

### **What Happens Next?**

While the Senate’s actions seemed to suggest, at least at the time, that the act would, once again, survive efforts to repeal it, subsequent developments have made that prediction far less certain.

Shortly after the Senate’s Christmas Eve vote, Sen. Leahy issued a statement indicating his “profound disappointment” that his McCarran repeal amendment had not survived.

He also reiterated his view that McCarran repeal is “an integral part of injecting competition into the health insurance market,” and that McCarran repeal “would ensure that basic rules of fair competition will apply to insurers.”

Sen. Leahy then issued an ominous statement that he “looked forward to working to include [McCarran repeal] when the Senate and House conference to reconcile their versions of the legislation.”

Accordingly, it appears we may not yet have heard the last from Sen. Leahy on this issue, and that the act's fate may remain very much in doubt.

Congress is in recess until Jan. 19, and thus no further formal action on the issue will be taken until then, when a Conference Committee will attempt to harmonize the two conflicting bills.

In the interim, there has already been considerable debate about whether the House approach — which includes McCarran repeal — or the Senate's approach, which does not, should be advanced in the final health care proposal.

While several Senators have publicly stated that any changes made to the Senate bill by the Conference Committee will make it unlikely the legislation will continue to garner the 60 votes necessary to defeat a Republican filibuster, and thus defeat the legislation in its entirety, only time will tell whether McCarran will survive to see its 65th birthday, particularly for the health and medical malpractice insurance industries.

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