WILLIAMS MULLEN
Where Every Client is a Partner®

March 2010

Insurance

Antitrust Alert

House Once Again Passes McCarran Repeal Legislation

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.

James M. Burns

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 That legislation would have repealed McCarran for both health insurers and medical malpractice insurers, and would also have granted the Federal Trade Commission new authority to undertake industry-wide 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 they would not support the legislation unless certain provisions in the House bill were modified. One such provision was McCarran repeal, which Senator 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 long-time 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 indicted 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,

Also in this edition:

- Insurance Industry Executives Avoid Criminal Sentences in Contingent Commission Antitrust Prosecutions
- Dismissal of Antitrust Case Against Title Insurers Affirmed on Appeal

 Editorial inquiries should be directed to James M. Burns at jmburns@williamsmullen.com or 202.327.5087

Please visit www.williamsmullen.com for more information about the Williams Mullen Antitrust Law Team.

taking the seat Ted Kennedy 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 Senator Leahy's announced intentions would lead nowhere, and that the McCarran repeal effort would ultimately fail. However, shortly thereafter, House 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, HR 4626 only addresses health insurance. In addition, the "safe harbors" contained in HR 3962 are noticeably absent from the Perriello bill, as is the provision permitting the FTC to expand its authority to undertake industry-wide 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 the 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-NY), 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 HR 3962 should be included in HR 4626.

In support of the "safe harbors," Rep. Lungren (R-Ca), 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-Tx), a long time 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-Oregon), a long-time 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 added 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 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 towards 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 towards that end as well. However, there is no reason to expect that Sen. Nelson has changed his views on McCarran repeal, and the addition of Senator 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 one hundred 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 twenty years ago. More recently, Senators 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.

Insurance Industry Executives Avoid Criminal Sentences in Contingent Commission Antitrust Prosecutions

On Jan. 29, New York County Supreme Court Judge James Yates dismissed all charges against a number of insurance industry executives who had previously pled guilty to violating the antitrust laws in the New York Attorney General's "contingent commission" investigation. At the time of the Court's decision, the defendants were merely awaiting sentencing, having entered into plea agreements early in the State's investigation to avoid the risks of a trial. In announcing this remarkable result Judge Yates indicated that dismissing the charges was "in the interests of justice," and that in the circumstances the imposition of criminal penalties against the executives was unwarranted.

Judge Yates's decision to dismiss the charges is, without question, the result of a series of setbacks for the Attorney General's office in the prosecution of these claims against other defendants who, rather than cooperating with prosecutors in the investigation, fought the charges against them at trial. In the first trial, which was brought against two former Marsh executives in 2007 and dragged all the way into 2008, the executives were ultimately acquitted of 20 of the 21 charges brought against them. Judge Yates then imposed a sentence of 16 weekends in jail on the charge that had been proven — far less than the penalty sought by the Attorney General's office. A second trial, which took most of 2009 to complete, was even less successful for the prosecution. In that case, Judge Yates acquitted the defendants of all criminal charges. Perhaps not surprisingly in light of the results, shortly after the second trial was concluded the New York Attorney General's office announced that it was voluntarily dismissing all charges still pending against a third group of executives, who were scheduled to commence trial before Judge Yates in November of 2009, citing the "high cost" of the prior trials.

However, with the completion of the trials, Judge Yates still had to address the more than a dozen individual defendants who had already pled guilty to the charges brought by the Attorney

General's office earlier in the proceedings, and were simply awaiting sentencing from the court. Undoubtedly influenced by the results of the cases that had been tried, Judge Yates chose leniency for these defendants. With the support of the prosecutors, Judge Yates dismissed all charges against those defendants who had pled guilty to misdemeanor violations, vacating their convictions. For those who had pled guilty to a felony, Judge Yates reduced their charges to misdemeanors, and then continued their proceedings for six months, with the understanding that at that time he would dismiss their charges as well.

Finally, even those defendants who the prosecutors did not recommend for leniency received generous treatment from Judge Yates. As to them, Judge Yates confirmed their convictions, but chose not to impose any sentence, stating that these defendants had already "suffered enough." With that, it appears that the "contingent commission" investigation has finally comes to a close.

Dismissal of Antitrust Case Against Title Insurers Affirmed on Appeal

On Feb. 11, the 2nd Circuit Court of Appeals issued its decision in *Dolan v. Fidelity National Title Insurance*, affirming District Judge Platt's ruling that the "filed rate doctrine" barred plaintiffs' antitrust challenge to the rates charged for title insurance in New York by state's largest title insurance companies. Dolan was the first, and highest profile, of a series of similar such cases brought by plaintiffs in numerous jurisdictions all across the country. Accordingly, the 2nd Circuit's decision is expected to have considerable influence in those cases as well, and constitutes a major victory for the title insurance industry.

In Dolan, the plaintiffs contended that the rates the title insurers charged for title insurance in New York, while approved by the New York Department of Insurance, had been artificially inflated by the title insurers' payment of excessive commissions to their affiliated title agents, which the Department was allegedly unaware of and, in any event, was a factor that they were not capable of meaningfully reviewing. In response, the title insurers maintained that the Department's approval of the rates as reasonable was all that mattered, and that this approval brought the plaintiffs' claims squarely within the scope of the "filed rate doctrine." That doctrine, which traces its roots to an almost 100 year old Supreme Court case (*Keogh v. Chicago & Northwestern Railway*, 260 U.S. 156 (1922)), provides that the courts should not substitute their judgment as to whether rates are "reasonable" for that of an agency with specialized knowledge in the area. Applying this principle, at the trial level Judge Platt held that because plaintiffs were, in essence, challenging the reasonableness of the title insurers' rates, the doctrine applied that plaintiffs' claims had to be dismissed.

On appeal, the plaintiffs again argued that because the Insurance Department lacked supervisory authority over the commission portion of the title insurers' rates their claims fell outside the scope of the filed rate doctrine. However, the 2nd Circuit rejected their argument. In reaching this conclusion, the court held that "Even if we were to conclude that the Department lacked the expertise to determine the portion of title insurance rates attributable to alleged illegal commissions, we would be no more competent than the Department to set title insurance rates." Echoing Judge Platt's decision, the 2nd Circuit held that the Department's ultimate approval of the title insurers' rates, which was undisputed, was determinative, and clearly brought the case within the scope of the filed rate doctrine.

For more information on these topics, please contact James M. Burns at 202.327.5087 or jmburns@williamsmullen.com.

Williams Mullen Antitrust Team

James M. Burns, Chair
202.327.5087
jmburns@williamsmullen.com

James R. Cannon, Jr.
202.293.8123
jcannon@williamsmullen.com

Patrick C. Devine, Jr.
757.629.0614
pdevine@williamsmullen.com

Arlene J. Diosegy
919.981.4096
adiosegy@williamsmullen.com

Patrick R. Hanes
804.783.6455
phanes@williamsmullen.com

M. Keith Kapp
919.981.4024
kkapp@williamsmullen.com

Eliot Norman
804.783.6482
enorman@williamsmullen.com

William A. Old, Jr.
757.629.0613
wold@williamsmullen.com

Robert W. Shaw
919.981.4310
rshaw@williamsmullen.com

Brian C. Vick
919.981.4023
bvick@williamsmullen.com

John L. Walker III
804.783.6463
jwalker@williamsmullen.com

WILLIAMS MULLEN
Where Every Client is a Partner®