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Health Care Reform 101: For Insurers

Law360, New York (June 15, 2010) -- When President Barack Obama signed the Patient Protection and Affordable Care Act (P.L. 111-148) into law, noticeably absent from its provisions was a repeal of the health insurance industry's antitrust exemption. This occurred despite repeated claims by many of the law's chief sponsors that repeal was essential to any true reform. Were their claims correct? Does the continued existence of the health insurance industry's antitrust exemption spell failure for health care reform?

Ultimately, time will tell whether the new health care reform law succeeds in reining in escalating health care costs. If it does, we will have our answer — the failure to repeal the insurance industry's antitrust exemption was no impediment to success. But if health care costs continue to soar, will the continuation of the exemption properly be to blame?

While a definitive answer to that question will probably never be possible, what is clear, even now, is that many of the reasons advanced in support of repealing the exemption seem to have been based on a misunderstanding of the exemption's scope and effect. Moreover, during the course of the health care debate, proponents of repealing the exemption all but ignored its benefits. That being the case, we may ultimately find that the decision to retain the exemption (whether by design or not) may be precisely what the doctor (or more accurately, our legislators) should have been ordering all along.

The Origin and Scope of the Insurance Industry's Antitrust Exemption

The health insurance industry's antitrust exemption was created in 1945 by the passage of the McCarran-Ferguson Act, 15 U.S.C. §1011 et seq. ("McCarran"). More than just an antitrust exemption, McCarran creates an overarching regulatory scheme whereby the states, rather than the federal government, are the principal regulators of the insurance industry. Consistent with this approach, Section 2(b) of the Act provides insurers with a limited exemption from the federal antitrust laws.

Specifically, Section 2(b) exempts "the business of insurance" from the federal antitrust laws, provided that the conduct is "subject to state law" and does not constitute an act of "boycott, coercion or intimidation." 15 USC §1012(b). Sometimes overlooked, the exemption applies only to the "business of insurance," and not to the "business of insurance companies." Consequently, not all of the activities in which insurance companies engage constitute protected conduct. As the Supreme Court noted in SEC v. National Securities Inc., 393 US 453 (1969), "Insurers do many things . . . and only when they are engaged in 'the business of insurance' does the statute apply."

For this reason, the courts have repeatedly held that activities by insurance companies that are not at the "core" of the insurer/insured relationship — for example, insurance industry mergers, contract negotiations with providers, etc. — are outside the scope of the exemption. They remain fully subject to the federal antitrust laws. "Core"

insurer activities, including rate-making activities, enjoy the benefit of the exemption. Most notably, the exemption covers the sharing of statistical loss data among insurers, which enhances an insurer's ability — particularly a smaller insurer's ability — to promulgate actuarially sound rates. However, consistent with the overall regulatory scheme that McCarran creates, even activities that are exempt from the federal antitrust laws remain subject to state law, including state antitrust laws, unless the state has itself chosen to permit such activities.

The Case for McCarran Repeal

The careful balance between federal and state regulation of the insurance industry created by McCarran has existed for more than 60 years. Over the last several years, however, as health care costs have skyrocketed, the effect of McCarran's antitrust exemption on the health insurance industry has garnered significant attention (and criticism).

By the second half of 2009, calls for the repeal of the exemption reached a level never before seen during the entire history of McCarran's existence. Senate Majority Leader Harry Reid, D-Nev., for example, proclaimed that "Providing an exemption for insurance companies to antitrust laws has been anti-competitive and damaging to the American economy. Health insurance premiums have continued to rise at a rapid rate . . . and insurance companies have become so large that they dominate entire regions of the country." Sen. Patrick Leahy, D-Vt., also called for repeal: "Benefiting from a six-decade-old special interest exemption, the health insurance industry is not subject to the nation's antitrust laws. We can surely agree that health insurers should not be allowed to collude to fix prices and allocate markets."

In the U.S. House of Representatives, support for repeal was expressed by House Judiciary Committee chairman John Conyers, D-Mich., who described McCarran as "a mistake sitting on the federal statutes for over 60 years," and by House Speaker Nancy Pelosi, D-Calif., who announced that Congress needed to "repeal the special exemption that insurance companies have that no other industry, except Major League Baseball, has in our country."

With these legislators taking the lead, a repeal of McCarran's antitrust exemption for health insurers was passed as part of the House's omnibus health care reform bill (H.R. 3592) in November 2009. In the Senate, however, despite the efforts of Reid, Leahy and others, McCarran repeal did not survive in the final version of their bill, which was passed by the Senate in late December.

While those supporting McCarran repeal still harbored some hope that the repeal provisions might be revived when the House and Senate bills were reconciled, the surprise election of Republican Scott Brown in late January changed those plans. Fearing that any changes to the Senate bill might now cause health care reform legislation not to pass in any form, the House passed the Senate version of the legislation without amendment. Consequently, the final health care reform bill that was sent to President Obama to be signed into law did not include a repeal of the health insurance industry's antitrust exemption.

Where Does This Leave Us Now?

With McCarran's antitrust exemption having survived the enactment of the new health care law, where does that leave us now? Does the failure to repeal McCarran mean that true health care reform is impossible, or will necessarily be unsuccessful? Do antitrust regulators truly lack the tools necessary to attack the conduct that they claim contributed to escalating health care costs, as Reid and Leahy, and others, had suggested? Fortunately, a close examination of this issue suggests that the answer to this question is "no."

One of the chief reasons advanced in support of McCarran repeal was the claim that the exemption limited the ability of antitrust regulators to address market "dominance" by a select group of insurers. However, this appears

to be based upon a misinterpretation of McCarran. As the Supreme Court's decision in SEC v. National Securities Inc., 393 US 453 (1969), made clear, mergers are not "the business of insurance," and therefore McCarran does not restrict the U.S. Department of Justice's ability to challenge proposed health insurance mergers. And the DOJ's Antitrust Division has been active in this area, challenging several such mergers and requiring that the parties agree to structural remedies to address the competitive concerns identified by the DOJ. In fact, only a few months ago the Antitrust Division derailed a proposed merger between two Michigan health insurers based upon competitive concerns. Thus, the failure to repeal McCarran as part of the new health care law should not impair the Justice Department's ability to address any potential concerns about "dominance" in the health insurance industry.

The assertion that McCarran's antitrust exemption needed to be repealed because regulators were precluded from addressing anti-competitive "market allocation" agreements among insurers is also misplaced. Several court decisions, including Maryland v. Blue Cross and Blue Shield, 620 F.Supp. 907 (D. Md. 1985), have held that an agreement among insurers to carve up markets is not "the business of insurance," and thus not within the scope of the exemption. Other cases have held agreements between health insurers and providers (hospitals, physicians, etc.) not to be within the "business of insurance," and therefore also not exempt. In short, the failure to repeal McCarran should have little, if any, impact on the ability of federal regulators to take action, where appropriate, against these forms of conduct as well.

Most importantly, however, even as to conduct that McCarran does exempt from the federal antitrust laws, state regulators remain fully capable of enforcing their state antitrust laws against the health insurance industry whenever they find that insurer conduct is anti-competitive. While some repeal advocates contend that the states' efforts in this area have been inadequate, the record does not seem to support that view. In the past few years alone, the states have challenged several health insurance mergers (sometimes in conjunction with federal regulators, sometimes on their own), and have on occasion obtained even broader relief than their federal counterparts as a condition to approval of the transactions.

In other circumstances, including most recently in response to a proposed merger in Pennsylvania, the state insurance commissioner successfully blocked the merger, even after federal antitrust regulators had concluded the transaction was not anti-competitive. Thus, in short, it appears that the claim that state regulators are "ineffectual" antitrust regulators of the insurance industry is both unfair and inaccurate.

The same can be said with regard to nonmerger enforcement as well. Several states have been very active in this area over the past few years. The New York attorney general, for example, recently brought a significant health insurance antitrust enforcement action (the Ingenix matter) that led to industrywide structural changes and significant fines. In Connecticut, the attorney general commenced an investigation against an insurer challenging its use of "most favored nation" clauses in contracts with providers, while several other states have addressed this issue legislatively, barring the use of such clauses altogether. McCarran's continued existence has no impact on these efforts, so state regulators can be expected to continue to take action against health insurers where they believe anti-competitive conduct has occurred.

On the other hand, what might be lost by repealing McCarran's antitrust exemption? As noted above, the antitrust exemption is only one small piece of a larger regulatory framework that grants authority over the insurance industry to the states. Might repealing the exemption upset this balance? What about more tangible harms created by repeal; would there be any? When Sen. Ben Nelson of Nebraska announced his opposition to McCarran repeal (which was a contributing factor in the decision to strip McCarran repeal from the Senate version of the bill), he expressed the view that, in some cases, McCarran actually promotes competition. Nelson, a former state insurance commissioner, explained that McCarran's protection of insurer data exchanges permits smaller insurers to obtain such information free from antitrust risk, and that McCarran's elimination would make it more difficult for smaller insurers to compete with larger insurers (who have sufficient data on their own to do so).

While proponents of repeal respond that the conduct Sen. Nelson identifies would likely be found to be permissible under the rule of reason absent McCarran, uncertainty about the limits of such protection — and the legal expense that might be required to establish it — could chill conduct that all agree should not be discouraged. If this is so, is it wise to heap this additional, arguably unnecessary, "change" on top of the enormous change that the other aspects of the new health care law will unquestionably bring?

Conclusion

While there is little disputing that our health care system is in need of "reform," whether that reform necessarily required, or requires, a repeal of the insurance industry's antitrust exemption remains subject to debate. What is certain, however — barring unexpected developments in the 111th Congress over the next several months — is that we will soon embark on reform without any change in McCarran. Was this the right decision? If we heed the health care axiom to "first, do no harm," we may ultimately conclude that, at least for now, it was indeed the best result.

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