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BLOG

# Trump Signs Law Revoking Health Insurers' Antitrust Immunity

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On December 22, 2020, Congress passed the Competitive Health Insurance Reform Act (CHIRA), H.R. 1418, which will amend the McCarran-Ferguson Act to apply the federal antitrust laws to the health insurance industry. President Trump signed the bill into law on January 13, 2021.

## Background

Previously, the "business of insurance" was immune from the federal antitrust laws. That exemption had been in place since 1945, when Congress passed the McCarran-Ferguson Act in response to the Supreme Court's decision in *U.S. v. South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944), which held that the Commerce Clause of the Constitution permitted the federal government to regulate the health insurance industry and that therefore the Sherman Act applied to that industry. *See* 15 U.S.C. §§ 1012, 1013. The McCarran-Ferguson Act effectively overturned that decision, leaving antitrust enforcement of the industry to the states. Seventy-five years later, CHIRA will permit the Department of Justice (DOJ) and the Federal Trade Commission (FTC) to regulate health and dental insurers as well.

The Act received strong bipartisan support. It passed the House by a voice vote on September 21, 2020, and passed the Senate by unanimous consent on December 22.

"Our bipartisan bill will allow for greater transparency and oversight into the health insurance industry and help make health insurance more affordable for … Americans across the country," Senator Steve Daines of Montana, who co-introduced the bill in the Senate, said in a press release.

The U.S. Supreme Court had interpreted the "business of insurance" antitrust exemption in the McCarran-Ferguson Act to apply to three practices: (1) those that have "the effect of transferring or spreading a policyholder's risk," (2) those that are "an integral part of the policy relationship between the insurer and the insured," and (3) those that are "limited to entities within the insurance industry." *Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119, 129 (1982). Courts traditionally determined whether an insurer's challenged practice fell into one of these three categories before deciding whether the exemption applied. Now, under CHIRA, not even these groups of practices will be exempted.

CHIRA does provide exceptions for insurer attempts to collect and analyze historical loss data, perform actuarial services, and develop standard insurance policy forms. Its authors argue the Act will "help address instances of artificially higher premiums, unfair insurance restrictions, and harmful policy exclusions."

Health insurance industry leaders, however, claim that McCarran-Ferguson repeal will add unnecessary administrative red tape and only serve to reduce competition and raise premiums.

## Takeaway

The Act is especially significant in that health care was one of the few remaining industries that Congress or the courts had specifically granted an exemption to the antitrust laws. Major League Baseball still has such an exemption, and certain agricultural cooperatives have a limited exemption under the Capper-Volstead Act. Health and dental insurers, however, will now be subject to the same federal antitrust laws that govern all other businesses.

There was already increased regulatory attention on the industry due to the COVID-19 pandemic, and that emphasis is only expected to rise under the Biden administration (for more on what the upcoming transition means for antitrust enforcement, see our Competition Corner post on this subject). On top of this increased focus from the new administration, health and dental insurers will now face regulatory scrutiny from DOJ and FTC, as well as increased liability to private civil antitrust suits brought under the Sherman Act and other federal antitrust laws. It is thus recommended that any entity that was previously immune from these regulatory risks undergo a compliance update or refresher.

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