McCarran-Ferguson Antitrust Reform 101

Questions and Answers on Reforming Health Care Antitrust

David Balto February 22, 2010

What is the McCarran-Ferguson Act?

The McCarran-Ferguson Act was passed in 1945 and exempts insurers from the full range of federal antitrust laws—including the laws against collusion or price fixing.

Why was it enacted?

Antitrust law was very different back in 1945. Any kind of information sharing was illegal in those days, and small insurance companies used to share information to share risks. That type of conduct is now seen as clearly legal. But Congress enacted the exemption to preserve this type of information sharing and to help new entrants to the insurance market. The original intention was to allow these new entrants to share historical loss data with other insurers in order to set premiums appropriately. But rather than enacting a narrow exemption, Congress gave insurers a full exemption from the antitrust laws.

What other industries enjoy antitrust exemptions?

The only other industry that enjoys an antitrust exemption is professional baseball.

How do insurance companies use their antitrust exemption?

They don't. The life insurance industry uses the exemption to share information to assess risk, but the health insurance industry has not used it for that purpose. Nothing would be lost by eliminating the exemption.

Why isn’t it sufficient to leave antitrust and consumer protection enforcement to the states?

Eliminating the exemption will make it clear that the Justice Department can bring antitrust cases and the Federal Trade Commission can bring consumer protection cases against health insurers. Some argue that the current system of state regulation is sufficient and that federal authorities don’t need to be involved. But the reality is that the patchwork of state laws cannot protect consumers nationwide from anticompetitive, deceptive, or fraudulent conduct.

Individual states’ departments of insurance are not necessarily equipped to take action against problematic conduct going on in their own states. I recently found in a study of 33 states that none of the states had taken an antitrust enforcement action in the past five years, and over a third had taken no significant consumer protection actions. The vast majority of state actions against deceptive conduct were brought in a small handful of states. Unless you live in one of those states, there is not a great deal of consumer protection enforcement.

Wouldn’t eliminating this exemption harm small insurers?

No. Information sharing may be beneficial for small insurers or new entrants to the market, but eliminating the exemption would not preclude that type of conduct. The Antitrust Modernization Commission considered this question in 2007 and found that it was unlikely that the antitrust agencies would enforce against this sort of information sharing unless the conduct actually had anticompetitive effects. The FTC and DOJ’s antitrust guidelines allow for “safe harbors” for certain types of information sharing between entities under their joint health care guidelines.

The Justice Department could alternatively provide a business review letter approving the specific type of information sharing that small insurers might seek to engage in, and the DOJ has given these approval letters in the past. For example, see the DOJ business review letter to Washington State Medical Association from September 2002, which approves the exchange of price and cost information between health care providers within “safety zone,” and the DOJ business review letter to DataCheck Inc. from January 1997, which allows a retail price auditing firm to collect and publish current public shelf prices of products found in grocery stores.

The courts and antitrust agencies have in general permitted a wide variety of information sharing over the past 40 years.

How would eliminating this exemption improve competition?

Eliminating this exemption is necessary for the type of substantial antitrust enforcement that is long overdue in health insurance markets. The DOJ, state insurance commissioners, and state attorneys general have not brought any significant cases against anticompetitive conduct by health insurers in the past several years. The McCarran-Ferguson exemption is an obstacle to effective enforcement; as Assistant Attorney General Christine Varney has noted, "the most egregiously anticompetitive claims, such as naked agreements fixing price or reducing coverage, are virtually always found immune [under the exemption]."

The health reform bills that have passed the House and Senate are designed to create a more competitive and consumer-friendly insurance marketplace. Insurance exchanges, market reforms, and new transparency requirements on coverage and cost-sharing structures will help consumers find and purchase cost-effective, high-quality coverage. Allowing an outdated antitrust exemption to undermine these important reforms would be a terrible mistake. If this exemption continues to exist, insurance companies can easily kill any forms of new competition—through market allocations, price fixing, or other collusive arrangements.

The McCarran-Ferguson exemption also prevents the FTC from fully exercising its consumer protection jurisdiction over health insurers. An outdated law bars the FTC from conducting studies of health insurers without congressional approval. Paired with McCarran-Ferguson, these laws have the effect of making the FTC avoid health insurers altogether, even though increased consumer protection enforcement is vitally needed.

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