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MULTIPLE BILLS INTRODUCED IN CONGRESS TO REPEAL HEALTH INSURERS' ANTITRUST EXEMPTION

by James M. Burns

Over the course of the last two months, four separate bills have been introduced in the House of Representatives (H.R. 99, H.R. 344, H.R. 743 and H.R. 911) that would modify the McCarran Ferguson Act (15 USC 1011 *et seq.*) to eliminate the limited antitrust exemption currently provided in the Act as it relates to health insurers. Three of the bills, H.R. 99, H.R. 743 and H.R. 911, were introduced by long-time proponents of McCarran repeal -- Representative John Conyers (D-Michigan), Representative Peter DeFazio (D-Oregon) and Representative Paul Gosar (R- Arizona) – while the fourth bill, H.R. 344, was introduced by a relative "newcomer" to the issue, Representative Steven Lynch (D-Massachusetts).

The first bill, H.R. 99 ("The Health Insurance Industry Antitrust Enforcement Act of 2013"), was introduced by Representative John Conyers on January 3. In introducing the legislation, Rep. Conyers, a long-time proponent of the repeal of McCarran's antitrust exemption, stated that H.R. 99 would "end the mistake Congress made in 1945 when it added an antitrust exemption for insurance companies into the McCarran Ferguson Act" and that passage of the bill would "make health insurance more affordable to more Americans." Specifically, H.R. 99 provides that "nothing in the McCarran Ferguson Act shall be construed to permit health insurers to engage in any form of price fixing, bid rigging or market allocations in connection with the conduct of the business of providing health insurance." Unlike the other recently introduced bills (but consistent with prior McCarran repeal bills introduced by Representative Conyers in prior years), the bill would also repeal McCarran's antitrust exemption for medical malpractice insurers. Finally, H.R. 99 would also make Section 5 of the Federal Trade Commission, which prohibits "unfair methods of competition," applicable to health insurers (McCarran currently exempts them from Section 5) and provides that Section 5 would apply to health insurers even if they are non-profit entities, eliminating the exemption for non-profit entities currently contained in Section 4 of the Federal Trade Commission Act.

The texts of H.R. 344, the "Competitive Health Insurance Act," introduced by Representative Lynch on January 22, and H.R. 743, the "Health Insurance Industry Fair Competition Act," which was introduced by Representative DeFazio (on behalf of himself and Representative Louise Slaughter of New York) on February 15, are identical. Each of these bills would modify the McCarran Ferguson

Act as to health insurers in the same ways as Representative Conyers's bill, but neither bill contains any proposed changes to McCarran with respect to medical malpractice insurance. In introducing H.R. 743, Representative DeFazio stated that "No matter what political ideology, most can agree that insurance companies should play by the same rules as virtually every other industry in America" and, seeking to rally support for his bill, asserted that "Right now, it is legal under federal law for insurance companies to collude to drive up prices, limit competition, conspire to underpay doctors and hospitals and price gouge consumers." Representative DeFazio also noted that he introduced similar legislation during the Affordable Care Act debate in 2010, and stated that "If 406 members could support [the legislation] during the highly charged, partisan health care reform debate, we can pass [similar legislation] today."

Finally, the text of H.R. 911, introduced by Rep. Gosar on February 28, has not yet been made available, but is likely to track the McCarran repeal legislation Rep. Gosar introduced last Congress. If that is the case, the legislation will seek to repeal McCarran's antitrust exemption only as to health insurers, not medical malpractice insurers as well (like H.R. 344 and H.R. 743, but unlike H.R. 99). In addition, if H.R. 911 tracks Rep. Gosar's prior McCarran repeal bill, it will also contain a provision not found in any of the other recently introduced bills – a prohibition on the filing of antitrust class actions against insurers. Rep. Gosar, who was a practicing dentist for over twenty five years before his election in 2010, has described the McCarran Ferguson Act's antitrust exemption as an "outdated, nonsensical exemption," and thus his re-introduction of McCarran repeal legislation this Congress is not particularly surprising.

Each of the four bills has been sent to the House Judiciary Committee for further action and, so far, no action has been taken on any of the bills. Similar legislation has yet to be introduced in the Senate, although Senator Patrick Leahy of Vermont has introduced McCarran repeal legislation several times over the years in prior sessions of Congress. Will this be the year that McCarran repeal advocates finally succeed in their efforts? Only time will tell; stay tuned.

ILLINOIS HOSPITAL BRINGS ANTITRUST SUIT AGAINST RIVAL HOSPITAL ALLEGING IT PRESSURED INSURERS NOT TO CONTRACT WITH PLAINTIFF

by James M. Burns

On February 5, Methodist Medical Center, in Peoria, Illinois, announced that it had filed an antitrust lawsuit in the United States District Court for the Central District of Illinois against OSF Saint Francis Hospital, Peoria's largest hospital, accusing Saint Francis of impeding Methodist's ability to compete with it for hospital patient admissions. Methodist contends that Saint Francis is the only area hospital that provides certain essential services, such as tertiary pediatric services, solid organ transplants, and NICU treatment of low birth rate babies, and that Saint Francis has sought to leverage that circumstance to pressure health insurers not to permit Methodist into their preferred provider networks. Specifically, Methodist alleges that Saint Francis has "threatened to withdraw from [insurers'] networks and take along with it the essential services that only Saint Francis can provide . . . if an insurer contracts with [Methodist]," and that, given Saint Francis's status as a "must-have" hospital, the insurers have capitulated to Saint Francis's demands.

In support of its claims, Methodist specifically alleges that Blue Cross Blue Shield of Illinois, the largest commercial health insurer in the area, denied Methodist's request for network admission "because of pressure from Saint Francis," and that "Blue Cross Blue Shield explained [to Methodist] that it could not offer Methodist an in-network contract because Saint Francis threatened to withdraw from BCBS's PPO network if Methodist became a participating provider." Methodist also alleges similar conduct by Saint Francis with respect to Humana and Aetna, and claims that Saint Francis "negotiated an agreement with Aetna [that required Aetna] to terminate its 23 year relationship with Methodist," which Aetna did because it "needed Saint Francis as an in-network provider to compete with BCBS."

As a consequence of Saint Francis's alleged exclusionary conduct, according to Methodist, Methodist's ability to obtain commercial insurance business has been largely foreclosed, leaving Methodist to compete only for Medicare, Medicaid and Tricare business, which offer lower reimbursement rates than commercial carriers. Methodist claims that Saint Francis's conduct has caused it harm in excess of $100 million, which it seeks to have trebled under federal antitrust law principles and paid to Methodist in damages. A response to the complaint has not yet been filed by Saint Francis.

Notably, none of the insurers mentioned in Methodist's complaint have been named as co-defendants in the action. Nevertheless, the case is another example of a health insurer being drawn into a provider antitrust dispute (as a third party witness, if not a party), which is an increasingly common phenomenon that imposes significant burdens on insurers. Given the recent increase in cases of this nature, the Methodist case is one to watch going forward.

AETNA ANNOUNCES SALE OF ITS MISSOURI MEDICAID BUSINESS TO WELLCARE IN CONNECTION WITH ITS EFFORTS TO GAIN REGULATORY APPROVAL FOR ITS ACQUISITION OF COVENTRY HEALTH

by James M. Burns

On January 22, Aetna announced plans to sell its Missouri Medicaid business, Missouri Care, to WellCare Health Plans, a nationwide managed care services provider that focuses on Medicare and Medicaid business. As Aetna explained in a press release announcing the deal, the sale is related to Aetna's proposed acquisition of Coventry Health Care, a $5.7 billion deal announced last August, and is being undertaken to eliminate an overlap in the Medicaid businesses both Aetna and Coventry currently have in Missouri. While Aetna is divesting its interest in Missouri Care, Aetna intends to continue to provide Medicaid business in Missouri through HealthCare USA, Coventry's Medicaid entity in the state, after the Coventry deal is completed.

Aetna's divestiture of Missouri Care is not particularly surprising, given that WellPoint and Amerigroup engaged in a similar type transaction last year to complete their merger. Specifically, in that deal, Amerigroup arranged for the sale of its Northern Virginia operation in Northern Virginia to eliminate a competitive overlap that existed between the two parties. That divestiture helped pave the way for WellPoint to gain regulatory approval for that merger, undoubtedly the result Aetna is hoping for by its decision to sell Missouri Care as well, and so far it appears to be getting quite close to achieving that objective. Aetna has announced that it has already received 20 of the 21 state approvals required for its Coventry deal, and that currently expects to be able to complete the Coventry transaction in mid-2013.

SOUTH CAROLINA INSURANCE COMMISSIONER APPROVES WELLCARE'S ACQUISITION OF UNITEDHEALTH OF SOUTH CAROLINA'S MEDICAID BUSINESS

On January 4, South Carolina Interim Director of Insurance Raymond G. Farmer approved WellCare Health Plans proposed acquisition of UnitedHealthcare of South Carolina's Medicaid business. The transaction, first announced in October of 2012, provides WellCare with 65,000 Medicaid members in the state, and is another sign of increasing consolidation in the Medicaid HMO market nationwide. WellCare has over 2.5 million Medicare and Medicaid members across the country, but was not previously doing business in South Carolina.

In approving WellCare's change of control application for the South Carolina Medicaid business, Director Farmer noted that under South Carolina law an applicant must demonstrate that the proposed change in control will not "substantially lessen competition in insurance in the State or tend to create a monopoly." Given that WellCare is a new entrant into the South Carolina Medicaid market, its acquisition of UnitedHealth was, not surprisingly, held not to present any significant competitive concerns, and the Director approved the change of control. The parties subsequently closed the deal on February 4.