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MCCARRAN REPEAL LEGISLATION PASSES IN THE HOUSE

by James M. Burns

In late March, legislation that would repeal the health insurance industry's antitrust exemption, contained in the McCarran-Ferguson Act (15 USC §§1011 *et seq*.), was passed by the House of Representatives as an amendment to H.R. 5, the "Protecting Access to Health Care Act." The text of the McCarran repeal provisions (Title IV of H.R. 5) mirror those introduced last year by Representative Paul Gosar of Arizona as a stand-alone bill McCarran repeal bill (H.R. 1150). That legislation, however, had made little progress since its introduction. Accordingly, Representative Gosar, recognizing that HR 5, a Republican-sponsored bill that would abolish the Independent Payment Advisory Board (an entity created by the Affordable Care Act to advise on Medicare rates) and cap punitive damages in medical malpractice cases, was moving swiftly towards a vote in the House, introduced his bill as an amendment to H.R. 5. His strategy proved successful when the House subsequently passed H.R. 5 – with Representative Gosar's amendment included in the bill.

Tracking Representative Gosar's prior legislation, Title IV of H.R. 5 provides that, notwithstanding the McCarran-Ferguson Act's antitrust exemption, "Nothing contained in [the Act] shall modify, impair or supersede the operation of any of the antitrust laws with respect to the business of health insurance." As such, the exemption would continue to apply to life insurance and property & casualty insurance, as the legislation itself expressly provides. In addition, as had been the case with H.R. 1150 as well, the legislation provides that Section 5 of the FTC Act (which prohibits "unfair methods of competition") shall apply to health insurers even if they are nonprofit entities and, in a provision likely to provide some (small) comfort to insurers, limits antitrust actions against them to individual actions, barring private class action proceedings.

In introducing his amendment, Representative Gosar exhibited the same anti-McCarran fervor that he had exhibited when introducing H.R. 1150 last year. After again noting – as he had last year - that the House had passed similar legislation by a wide majority last Congress (as part of the House's original Affordable Care Act legislation), Representative Gosar, a dentist for over twenty five years, urged the House to repeal what he claimed was an "outdated, nonsensical exemption." Whether persuaded by Representative Gosar's views on McCarran or not, voting on H.R. largely followed party lines, passing by a vote of 223 to 181.

Whether Representative Gosar's success in the House will be replicated in the Senate, however, is far from clear. While Senator Leahy of Vermont has repeatedly advocated that McCarran should be repealed, and announced last year that the repeal of McCarran would be a "priority" of his this Congress, neither he, nor his fellow Democrats, is likely to embrace H.R. 5, with its anti-Affordable Care Act provisions and medical malpractice caps, and with the Democrats in the majority in the Senate, that may ensure that the legislation goes no further. Nevertheless, the Obama Administration, taking no chances,

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promptly issued a "Statement of Administration Policy" in which it criticized H.R. 5 for "attempting to erode the important provisions of the Affordable Care Act" and imposing caps on medical malpractice awards that would "prevent patients and other claimants who have been wrongfully harmed from receiving just compensation." Moreover, removing any doubt about the Administration's view of the issue, the Statement concluded by indicating that "If the President is presented with H.R. 5, his senior advisors would recommend that he veto the bill."

Accordingly, despite the House's passage of the bill, the likelihood that McCarran repeal legislation will be enacted into law this Congress remains tenuous, at best, particularly absent some creative legislative maneuvering by McCarran-repeal advocates. Stay tuned.

BLUE CROSS WIN IN "MOST FAVORED NATION" CLAUSE ANTITRUST CASE

by James M. Burns

On March 30, United States District Court Judge Denise Page Hood (E.D. Mich.) handed Blue Cross Blue Shield of Michigan a victory, dismissing an antitrust action filed against it by the City of Pontiac in which the City alleged that Blue Cross's use of "most favored nation" clauses in its provider contracts violated the antitrust laws. (*City of Pontiac v. Blue Cross Blue Shield of Michigan*, Case No. 11-10276, Eastern District of Michigan).

The action, which was filed by the City in January of 2011 against Blue Cross and twenty-two Michigan hospitals, alleged that the defendants' inclusion of "most favored nation" clauses in their provider contracts, requiring the hospitals to charge other insurers more than they charged to Blue Cross for provider services, constituted a *per se* violation of the antitrust laws.

Ruling on Blue Cross's motion to dismiss the Complaint, Judge Hood held that the City's antitrust allegations did not state a claim. Specifically, Judge Hood noted that the City had pled a *per se* violation, and that while some *horizontal* agreements are subject to *per se* condemnation, "all *vertical* price restraints are judged under the rule of reason." Because "Blue Cross and the hospital defendants are at different levels of the market," with Blue Cross acting as a purchaser of hospital services from the hospital defendants, "the relationship between Blue Cross and the hospital defendants is vertical." Accordingly, the Court held that "in light of the City of Pontiac's reliance on a *per se* violation analysis, which this Court rejects . . . the Court finds that the City of Pontiac fails to state a plausible claim under the Sherman Act and the Michigan antitrust laws."

After finding that the City of Pontiac had also failed to allege a claim of unjust enrichment, the Court dismissed the City's complaint, bringing this portion of the closely watched MFN actions to a close. (Notably, litigation between Blue Cross of Michigan and the DOJ over the use of most favored nation clauses, which is the subject of a separate action, continues at this time, as do other related civil actions. In the DOJ case the government contends that Blue Cross's contracts constitute a "rule of reason" antitrust violation which, unlike a *per se* violation, will require that the DOJ also prove that Blue Cross's alleged conduct has had anticompetitive effects in the market, a more difficult task for an antitrust plaintiff).

NEW YORK COURT OF APPEALS HOLDS THAT THE NEW YORK ANTITRUST LAW DOES NOT HAVE EXTRA-TERRITORIAL REACH, REQUIRING THE DISMISSAL OF REINSURER ANTITRUST ACTION

by James M. Burns

On March 27, the New York Court of Appeals (New York's highest state court), held that the state's antitrust law does not have extra-territorial reach in *Global Reinsurance Corp. v. Equitas Ltd*. Accordingly, the court held that the plaintiff, the United States subsidiary of Global Reinsurance Corporation, could not assert claims under New York's Donnelly Act against a U.K corporation (Equitas) for alleged anticompetitive conduct that had occurred in the London reinsurance market.

As plaintiff alleged in its complaint, in the early 1990s it purchased reinsurance for certain non-life risks from several Lloyd's of London syndicates. After losses on the plaintiff's business began to mount, the syndicates sought to reduce their subsequent exposure by agreeing to cede plaintiff's business to Equitas, an entity that, according to the plaintiff, took a much more "hard-nosed approach" to the handling of its claims than the syndicates had when individually assessing plaintiff's claims. Plaintiff contended that the syndicate's creation of Equitas constituted unlawful joint action, actionable under the Donnelly Act.

As the Court explained, to state an antitrust claim under the Donnelly Act, Global was required to allege both concerted action by two or more entities and market-wide anticompetitive effects (as opposed to individual harm to the plaintiff, which is insufficient). Plaintiff's claims, however, at most alleged a conspiracy having anticompetitive effects in the London reinsurance market, the Court held, and "plaintiff, although alleging individual injury in New York, has not alleged harm to competition in this country." Accordingly, because New York's relationship to the action was "only by reason of the circumstance that plaintiff's purchasing branch happens to be situated [in New York]," the Court concluded that plaintiff's claims were "not redressable under New York's antitrust statute." Notably, in reaching this conclusion, the Court explained that even the federal antitrust laws fail to reach anticompetitive conduct having effects solely outside the United States, and that this limitation on the Sherman Act, imposed by Congress, "would be undone if states remained free to authorize 'little Sherman Act' claims that went beyond it." For this reason, the Court held that Global Reinsurance's claims had to be dismissed, and reversed the lower court ruling that had permitted plaintiff's action to proceed.