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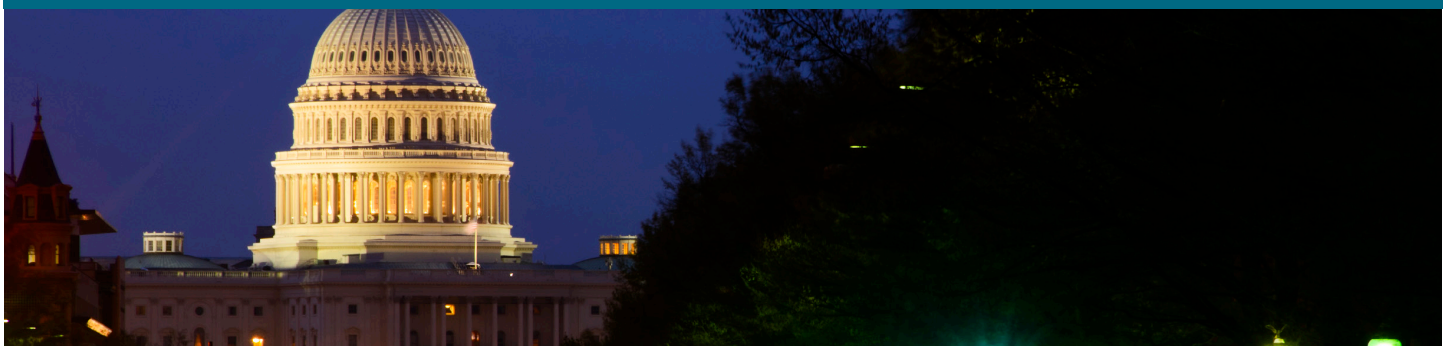

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ABOUT THE AUTHOR

James M. Burns
Shareholder
202.508.3430
jmburns@bakerdonelson.com

HEARING HELD ON MCCARRAN REPEAL LEGISLATION

On February 16, the House Judiciary Subcommittee on Regulatory Reform, Commercial and Antitrust Law held a hearing to consider H.R. 372, the "Competitive Health Insurance Reform Act of 2017." The legislation, introduced by Congressman Paul Gosar (R-AZ) on January 9, would repeal the antitrust exemption that the health insurance industry currently enjoys under the McCarran-Ferguson Act (15 U.S.C. 1011 et seq.). Enacted in 1945, the McCarran-Ferguson Act exempts all insurers (not just health insurers) from the federal antitrust laws with respect to conduct that is (1) "the business of insurance;" (2) is "subject to state regulation;" and (3) does not constitute an act of "boycott, coercion or intimidation." Congressman Gosar's bill would strip the health insurance industry of the exemption, but leave the exemption in place for other insurers.

When introducing H.R. 372, Congressman Gosar announced that "since the passage of Obamacare, the health insurance market has mutated into one of the least transparent and most anti-competitive industries in the United States," and he asserted that H.R. 372 would address these concerns. Congressman Gosar also noted that similar McCarran repeal legislation was passed in the House during the 111th Congress (2009 – 2011) by a vote of 406 to 19, and by the 112th Congress (2011 – 2013) by voice vote, and proclaimed that "now is the time" for this legislation to be enacted into law.

During the hearing, the Subcommittee heard from several proponents of McCarran repeal, including Congressman John Conyers (D-MI), who has also introduced his own McCarran repeal legislation this Congress (H.R. 143), and representatives from the Consumer Union and several health care provider organizations. These witnesses testified that (1) the insurance industry is one of only a handful of industries that have an antitrust exemption; (2) that while the exemption may have been justified when enacted, it is no longer necessary or appropriate; and (3) that the result of the exemption is higher prices for health care for consumers. All urged the Subcommittee to repeal the exemption.

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The Subcommittee also heard from several witnesses that opposed the repeal. They maintained that there is no need to repeal the exemption, that it is only a limited exemption from the federal antitrust laws and that the States have antitrust enforcement authority that ensures that, even in circumstances where McCarran might exempt insurers from federal antitrust scrutiny, insurers are not able to engage in anticompetitive conduct without consequence. Repealing the exemption, they claimed, would create legal uncertainty that would only serve to increase health insurance costs. These witnesses also noted that the National Association of Insurance Commissioners opposes the legislation, and a representative of the property and casualty insurance industry testified that even if the exemption might no longer be appropriate for health insurance, the exemption should be retained as to all other forms of insurance.

Finally, perhaps most notably, Congressman Bob Goodlatte (R-VA), who is an ex officio member of the Subcommittee and Chair of the full House Judiciary Committee, stated during the hearing that, in his view, the current "political climate" in Washington made repeal of the McCarran-Ferguson antitrust exemption "likely" this Congress. Whether Congressman Goodlatte turns out to be correct remains to be seen; McCarran repeal has been predicted for many years, and despite some close calls, the advocates for repeal have never been successful in having such legislation enacted into law. Will the 115th Congress be the time? Stay tuned.

DOJ PREVAILS IN BOTH THE ANTHEM AND AETNA MERGER TRIALS

During the summer of 2015, within a matter of days, Aetna announced an intention to merge with Humana and Anthem announced an intention to merge with Cigna. The deals, among the largest insurance industry combinations ever announced, had the potential to transform the "big five" national health insurers (the fifth being United Healthcare, which is the largest) into a "big three." However, after almost 18 months seeking to gain regulatory approval for the deals from federal and state regulators, it appears that the parties' efforts to merge have been derailed on antitrust grounds by two rulings in the District of Columbia District Court.

The first decision, issued by District Judge John Bates on January 23, followed a December trial in which the DOJ Antitrust Division (and several states) sought to have Aetna's merger with Humana enjoined on antitrust grounds. In a 158 page opinion, Judge Bates ruled for the DOJ, finding that the merger would substantially reduce competition for the sale of Medicare Advantage products and cause harm to consumers in 364 counties that the DOJ had identified in their complaint.

Judge Bates also rejected Aetna's claim that a proposed divestiture of a portion of Aetna's Medicare Advantage business to another insurer, Molina, would be sufficient to protect against any potential anticompetitive harm. Judge Bates also ruled that the merger would have anticompetitive effects in the insurance exchange markets in several states.

Upon the release of Judge Bates's decision, the DOJ's Acting Assistant Attorney General for Antitrust, Brent Snyder, issued a press statement claiming that the Court's decision was "a victory for American consumers" and that, as a result of the ruling, "millions of consumers will continue to benefit from competition between Aetna and Humana." While Aetna announced its disappointment and disagreement with the Court's ruling, shortly thereafter it announced that it would not appeal the decision and that it was discontinuing its efforts to merge with Humana. Notably, the decision triggers Aetna's obligation to pay Humana a "break-up fee" of $1 billion for failing to succeed in getting the deal approved.

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While the Aetna case was being tried, the DOJ was also seeking to have the Anthem/Cigna transaction – an even bigger deal – enjoined in a courtroom down the hall from the Aetna courtroom, before another D.C. District Court Judge. The Anthem merger was tried before Judge Amy Berman Jackson and included even more issues than the Aetna case; as a consequence, Judge Jackson did not issue her ruling until February 8. However, when she did, Judge Jackson ultimately sided with the DOJ as well, ruling that the proposed transaction should be enjoined on antitrust grounds. Echoing words he had used only two weeks earlier, Acting Assistant Attorney General Brent Snyder declared that Judge Jackson's ruling was another "victory for American consumers." In addition, while 140 pages in length, Judge Jackson's opinion addressed only one of several claims that the DOJ had advanced, as she concluded that the DOJ had succeeded in showing the proposed combination would likely have anticompetitive effects "in the market for the sale of health insurance to 'national accounts' – customers with more than 5,000 employees, usually spread over at least two states – within the 14 states where Anthem operates as a Blue Cross Blue Shield licensee." In reaching this decision, Judge Jackson also found that the "efficiency" benefits that Anthem argued would be created by the deal were not sufficient, in scope or type, to offset the harm she identified. In light of Judge Jackson's decision on the DOJ's first claim, she stated that it was not necessary for her to reach a decision as to whether the transaction would also harm competition in 35 local markets that DOJ had asserted would be harmed (which was a second claim by the DOJ). Judge Jackson did, however, include in her opinion a discussion as to at least one of these markets – Richmond, Virginia – and suggested that the DOJ's argument as to this claim was meritorious as well.

Anthem, like Aetna, expressed disappointment and disagreement with the Court's ruling; however, unlike Aetna, Anthem swiftly announced an intention to appeal the decision to the D.C. Circuit and filed a motion seeking an expedited appeal only five days after the issuance of Judge Jackson's decision. However, Cigna subsequently announced that it was no longer interested in pursuing the deal and filed an action in the Delaware Chancery Court seeking to have that court declare that it was no longer bound to support the merger effort (and seeking $14 billion in damages from Anthem, including the $1.85 billion "break-up fee" that the parties had negotiated back in 2015). In response, Anthem cross-sued, contending that Cigna had breached the merger agreement and Anthem sought, and ultimately obtained, an order from the Delaware court requiring that, at least for now, Cigna continue with the merger effort.

As a result of the Delaware ruling, the possibility that the Anthem/Cigna deal could be completed has not been *completely* extinguished; however, for the deal to close, it would likely require (1) a reversal by the D.C. Circuit; (2) subsequent rulings in Anthem's favor on *all* of the claims in the DOJ complaint; *and* (3) state regulatory approvals for all of the remaining states that had not yet granted their approval to the deal. And, with the merger deal set to expire in April, all of these steps would need to be accomplished on an expedited schedule and with a less than eager merger partner in Cigna. Can Anthem accomplish this nearly herculean task? Only time will tell. Stay tuned.

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THE TRUMP ADMINISTRATION BEGINS THE TASK OF SELECTING NEW FEDERAL ANTITRUST ENFORCERS

With every new administration, there is typically a change in the leadership of both the Federal Trade Commission and the DOJ Antitrust Division, the two regulators principally responsible for federal antitrust oversight. Not surprisingly, particularly given the significant differences in ideology between the Obama and new Trump Administrations, wholesale changes in leadership at both the FTC and the DOJ Antitrust Division have begun over the last two months, with more likely to follow.

At the FTC, shortly before the inauguration, FTC Chairwoman Edith Ramirez, who was appointed by President Obama, announced that she would be leaving the Commission effective February 10. To replace her, President Trump named current Commissioner Maureen Ohlhausen, a Republican appointee, as "Acting" Chairwoman. Whether President Trump will ultimately nominate Commissioner Ohlhausen to be Chair on a permanent basis remains unclear, with other names also being rumored to be in consideration for that role. However, despite the interim title, Commissioner Ohlhausen has already begun the process of refilling the senior leadership ranks at the FTC. On February 16, Ohlhausen announced the appointment of Abbott Lipsky as Acting Director of the FTC's Bureau of Competition (the division of the FTC responsible for antitrust enforcement), replacing Deborah Feinstein, who had also resigned. Lipsky previously served in a leadership role at the DOJ Antitrust Division as Deputy Assistant Attorney General during the Reagan Administration. Ohlhausen also announced that Thomas Pahl would serve as Acting Director of the Bureau of Consumer Protection. As of this time, it is unclear how long Lipsky and Pahl will serve in their respective roles, because if Ohlhausen does not ultimately get named permanent Chair, the new Chair could potentially replace them with new appointees. There are also three vacant Commissioner positions (the one vacated by former Chairwoman Ramirez and two others) that President Trump will need to fill, but he has not yet announced any nominees for any of these vacant positions as of yet.

At the DOJ Antitrust Division, significant changes in leadership have also occurred. On January 20, several of the most senior members of the Antitrust Division, including then-Acting Assistant Attorney General Renate Hesse, announced their resignations, effective immediately, leaving only one senior leader, Brent Snyder, in place. Snyder was quickly named the new Acting Assistant Attorney General. Since then, former senator Jeffrey Sessions has been nominated and confirmed as the new Attorney General, but a new head of the Antitrust Division (a post that also requires Senate confirmation) has yet to be nominated. (Notably, in contrast, President Obama nominated his first head of the Antitrust Division – Christine Varney – within two days of his inauguration). With no announcement of a nominee, as of yet, recent speculation has centered on former FTC Commissioner Joshua Wright, who served from 2013 – 2015 and often dissented from the views of the Commission during that time, and Makan Delrahim, former Chief Counsel to the Senate Judiciary Committee during the Bush Administration. With Attorney General Sessions now in place, a nominee to head the Antitrust Division will likely be announced in the next few weeks.

As the leadership at the FTC and Antitrust Division round into shape, the antitrust world will begin looking closely for clues in terms of potential changes in enforcement policy and priorities. Stay tuned.