

Congress Repeals McCarran-Ferguson Antitrust Exemption for Health Insurance Companies

by C.Scott Litch Chief Operating Officer and General Counsel



What Does it Mean for Dentistry?

The Victory

A long-time legislative priority of the ADA and the AAPD was achieved on Dec. 22, 2020, when the U.S. Senate voted to repeal the McCarran-Ferguson antitrust exemption for health insurance companies by passing HR 1418, the Competitive Health Insurance Reform Act. The House previously passed the bill on Sept. 21, 2020. The President sign the bill into law into law on Jan. 13, 2021, as P.L. 116-327.

The bill amends the McCarran-Ferguson Act to restore the application of federal antitrust laws to the health insurance industry, but does not otherwise interfere with or impact the authority of state authorities to regulate health insurance provided under the act.

This success was possible thanks to the bi-partisan leadership of Senators Steve Daines (R-Mont.) and Patrick Leahy (D-Vt.), and House members Congressmen Peter DeFazio (D-Ore. 4th) and Paul Gosar (R-Ariz. 4th). Gosar has been the primary and leading congressional advocate for the bill's passage since being elected to Congress in 2010.

The bill was supported by many other dental organizations in addition to the ADA and AAPD, plus many consumer groups.¹

The AAPD thanks all those who contributed to the advocacy efforts on this issue, by responding to Action Alerts and advocating for the repeal during AAPD's annual Pediatric Oral Health Advocacy Conference in Washington, D.C.

The Impact

Promoting lower prices, greater consumer choice, and increased innovation through robust competition is the role of the antitrust laws. As the ADA testified before the U.S. House Judiciary Committee in 2017 (emphasis added in **bold**):

“Repeal of the McCarran-Ferguson Act will substantially improve, even potentially eliminate, the problem of one-sided federal antitrust enforcement. According to a 2008 study by the American Medical Association, within the 314 metropolitan statistical areas surveyed, 94% of commercial health insurance markets qualified as “highly concentrated” under standards established by DOJ and FTC. Yet, currently, dentists and other health care providers facing monopoly health plans have little recourse. If individual providers or practices band together to increase their negotiating clout, they are likely to trigger an antitrust investigation, if not an enforcement action. And, for

decades, when health care providers have brought antitrust concerns regarding insurers to the attention of federal enforcers, agency staff have been reluctant to proceed for fear of crossing the line that McCarran-Ferguson draws. **Repeal of the Act would enable both DOJ [Department of Justice] and FTC [Federal Trade Commission] to focus their attention on specific anticompetitive practices by insurers that may adversely affect patients and dentists, thereby leveling the playing field and ensuring that providers and health plans are abiding by the same set of competitive rules.**

If insurance companies had to observe the antitrust laws when setting rates and designing coverage, they would have to compete more aggressively with each other for both individual customers and purchasers of large group policies by keeping premiums comparatively low and benefits comparatively high. They would have to strive to differentiate themselves in other ways as well. **This would include offering plans that the most qualified professionals would want to participate in, which in turn would help make such plans more attractive to consumers.** The better plans that would result from insurance company competition would likely provide for a greater selection of dental treatment options and better coverage for them. These positive developments could result in new

insurance companies, different pricing, different coverage options, and different contractual terms. In other words, competition for insurance business would compel insurance companies to deal more fairly, effectively, and creatively with both consumers of dental services and with providers. Competition like this works in other sectors and, given the chance, it will work here.”²

The U.S. Justice Department issued a press release³ on Jan. 13, 2021, stating that the repeal will:

“ . . . assist the Antitrust Division in its mission to enforce the antitrust laws by narrowing this defense and clarifying that, except for certain activities that improve health insurance services for consumers, the conduct of health insurers is subject to the federal antitrust laws.”

and

“ . . . end distracting arguments about when health insurers qualify for the McCarran-Ferguson exemption, and it will enable the Antitrust Division to spend resources more efficiently to achieve results that make a difference for American consumers.”

The repeal will make it easier to legally challenge anti-competitive practices of insurers, making lawsuits like the ADA’s class action lawsuit filed in 2019 against Delta Dental more feasible, common, and winnable.⁴

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This column presents a general informational overview of legal issues. It is intended as general guidance rather than legal advice. It is not a substitute for consultation with your own attorney concerning specific circumstances in your dental practice. Mr. Litch does not provide legal representation to individual AAPD members.

¹<https://www.ada.org/en/publications/ada-news/2020-archive/december/congress-passes-competitive-health-insurance-reform-act>

²http://www.ada.org/~media/ADA/Advocacy/Files/170216_115hr372_judiciary_mcf.pdf

³<https://www.justice.gov/opa/pr/justice-department-welcomes-passage-competitive-health-insurance-reform-act-2020>

⁴<https://www.ada.org/en/publications/ada-news/2019-archive/november/american-dental-association-files-lawsuit-against-delta-dental>
This case was subsequently consolidated and is now pending in the U.S. District Court for the Northern District of Illinois.