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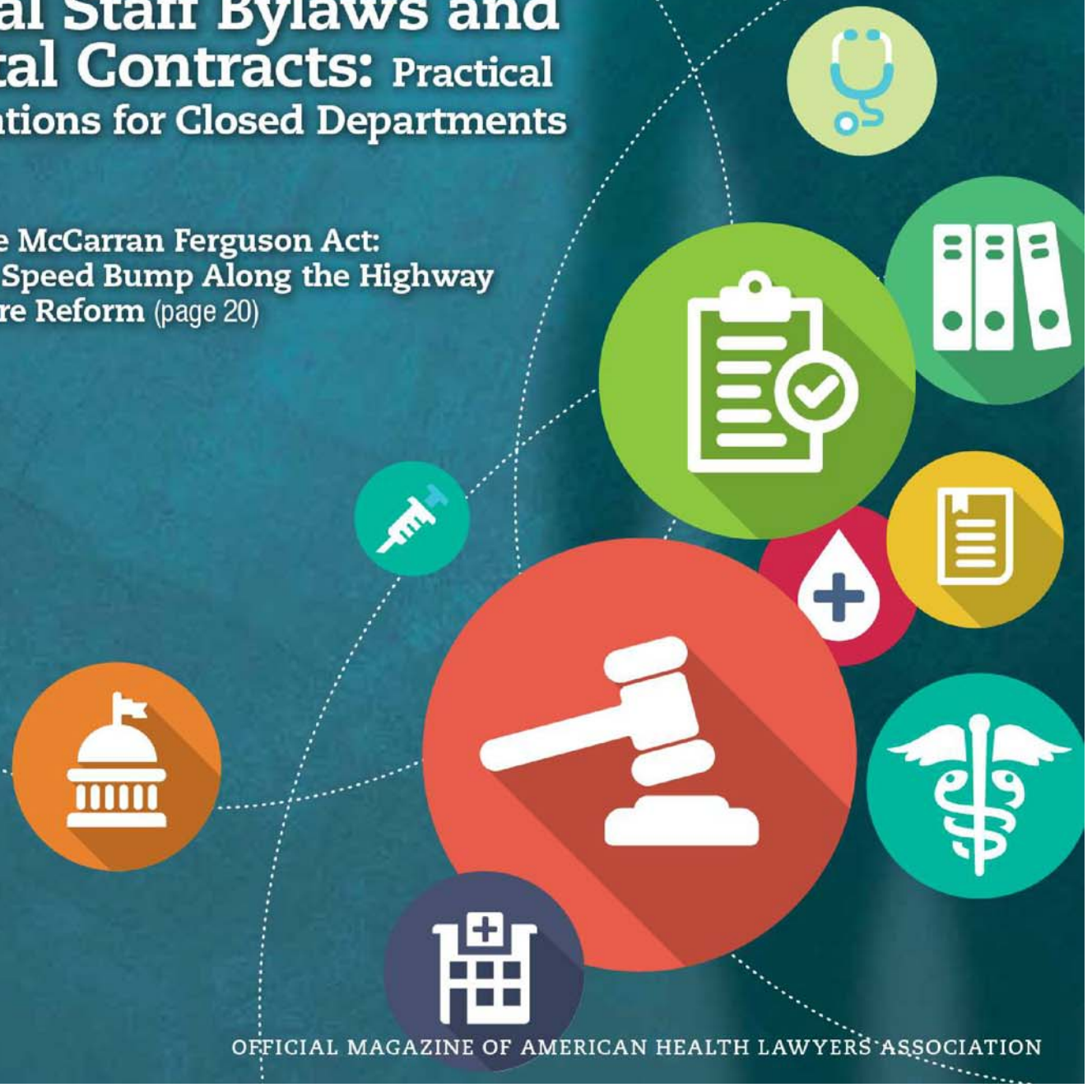

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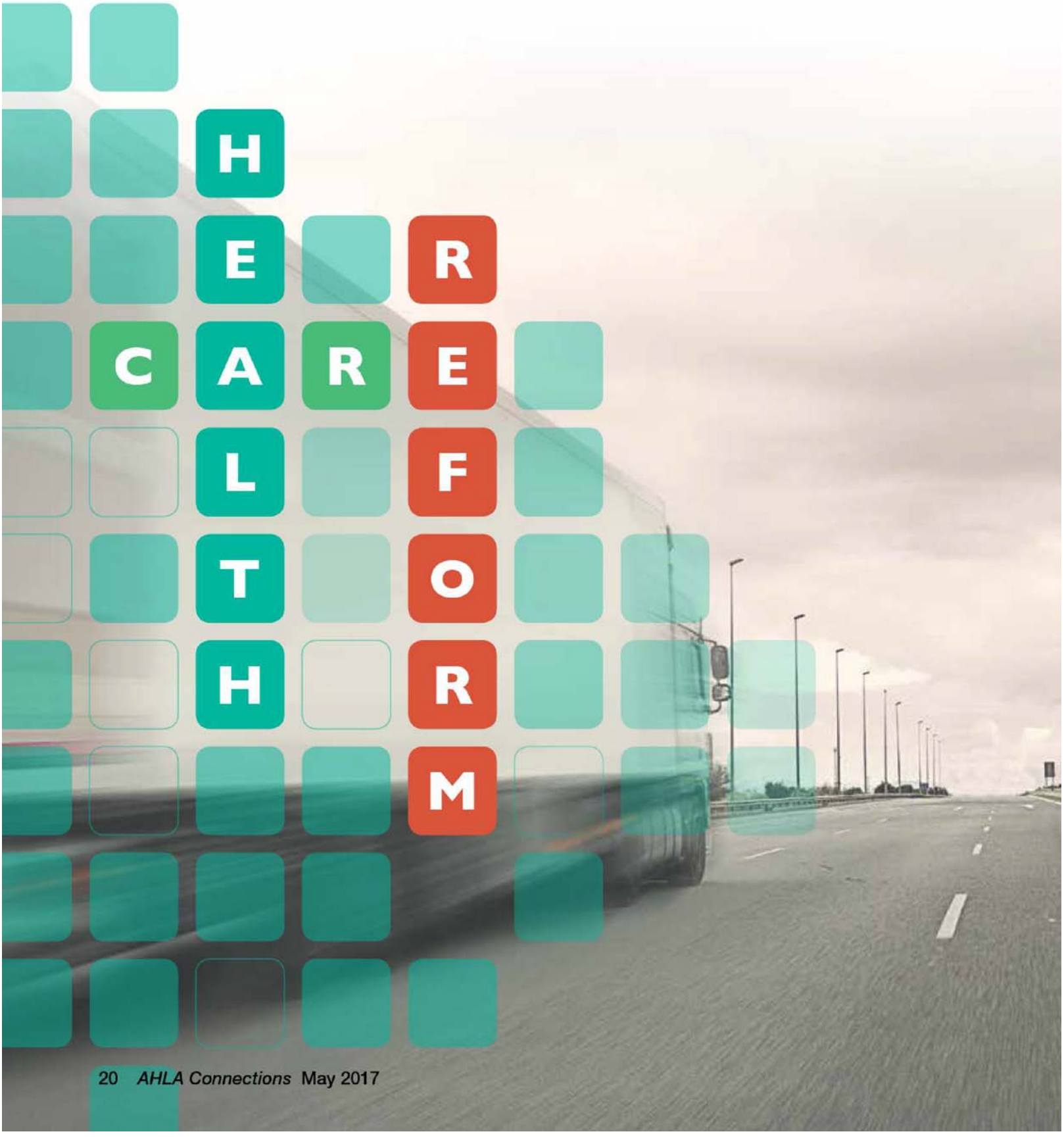
Repeal of the McCarran Ferguson Act: On Ramp or Speed Bump Along the Highway of Health Care Reform

By Radha Bachman and Elizabeth Scarola, Carlton Fields



You can rest assured that the national conversation on health care reform is far from over. The campaign mantra of "repeal and replace" seems to have overshadowed other potential avenues for reforming U.S. health care policy: including repealing the McCarran Ferguson Act (Act) as it applies to health insurance. In a nutshell, the Act grants health insurance companies (and other types of insurers) certain exemptions (discussed in greater detail below) from federal antitrust law enforcement.[1] Recent developments have renewed interest in examining the potential impact of repealing this exemption for health insurers.

Bipartisan Agreement

Though the conversation surrounding health reform is largely split along party lines, there is underlying bipartisan agreement on the need to lower costs and deliver higher-quality health care to the American public.

President Obama gained support for the ACA by advocating that it would allow Americans to buy "quality, affordable health insurance."[2] House Speaker Paul Ryan's *A Better Way* proposal outlined its vision as "a step-by-step plan to give *every* American access to quality, affordable health care."[3] The House GOP leadership website pledged that the American Health Care Act would "[restore] the free market so Americans can access the quality, affordable health care options that are tailored to their needs," while arguing that the ACA "led to higher costs, fewer choices, and less access to the care people need."[4]

Federal antitrust law (which includes the Sherman Act, the Clayton Act, and the Federal Trade Commission Act) is intended to protect the American public from predatory business practices and promote consumer access to high-quality, low-cost goods by ensuring sufficient competition between private firms.[5] It is only natural, then, that antitrust law should be a part of the national health reform conversation.

Antitrust Law

Antitrust law safeguards the American marketplace by prohibiting anticompetitive conduct, restraints on trade, and unfair or deceptive acts or practices.[6]

The Sherman Act, which applies to hospitals and other health care providers, prohibits "every contract, combination, or conspiracy in restraint of trade,"[7] and any "monopolization, attempted monopolization, or conspiracy or combination to monopolize."[8] The Federal Trade Commission Act bans "unfair methods of competition" and "unfair or deceptive acts or practices,"[9] and the Clayton Act prohibits mergers and acquisitions where the effect "may be substantially to lessen competition, or tend to create a monopoly."[10] The Federal Trade Commission (FTC) and the Department of Justice (DOJ) Antitrust Division actively enforce the antitrust laws.[11] Exemptions to the antitrust laws are limited. In fact, only two industries—baseball (outside of the scope of this article)[12] and insurance—have been granted broad exemptions.

The McCarran Ferguson Act

The McCarran-Ferguson Act grew out of a 1944 U.S. Supreme Court decision that found an insurance company conducting a substantial part of its business across state lines was engaged in "commerce among the several States" and, therefore, was subject to regulation by Congress under the Commerce Clause, including the Sherman Antitrust Act.[13] Immediate controversy ensued. State officials feared that the Court's decision threatened states' rights to regulate and tax; and, insurance company executives feared that Sherman Act enforcement would prevent essential procompetitive, "collaborative" industry activities that were essential in keeping consumer cost down (e.g., information sharing amongst competitors used to set insurance rates).

To address these concerns, Senators Pat McCarran and Homer Ferguson introduced a measure that exempted the business of insurance from the Sherman and Clayton Acts. After substantial amendment, the Act passed the House and Senate and was signed into law by President Roosevelt on March 9, 1945.

The text of the statute as enacted is as follows:

- Sec. 1. ***Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest,*** and that silence on the part of Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.
- Sec. 2(a) ***The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.*** (b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: provided, that ***after January 1, 1948,*** the Act of July 2, 1890, as amended, known as ***the Sherman Act***, and the Act of October 15, 1914, as amended, known as ***the Clayton Act, and*** the Act of September 26, 1914, known as ***the Federal***

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Trade Commission Act, as amended ***shall be applicable to the business of insurance to the extent that such business is not regulated by State law***.

» Sec. 3. (a) Until January 1, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, and the Act of June 19, 1936, known as the Robinson-Patman Anti-discrimination Act, shall not apply to the business of insurance or to acts in the conduct thereof. (b) ***Nothing in this Act shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation*** . . . .] (emphasis added)

In summary, the McCarran-Ferguson Act provides that the Sherman Act, the Clayton Act, and the Federal Trade Commission Act apply to the business of insurance only "to the extent that such business is not regulated by state law." Although this limited exemption does not extend to "any agreement to boycott, coerce or intimidate," it effectively granted health insurance companies an exception from the meat of federal antitrust law enforcement.[14]

Note, however, that the Act does not bar the FTC and the DOJ from regulating health insurance mergers and acquisitions, as evidenced by the agencies' recent challenges of Anthem's bid for Cigna and Aetna's offer for Humana. Courts have determined that mergers are not included in the "business of insurance."[15]

Despite the FTC and DOJ's review of proposed health insurance mergers, proponents of repealing the Act's antitrust exemption argue that anticompetitive activity among the highly concentrated health insurance market has contributed to substantial premium rate increases, lower reimbursement rates paid to the providers delivering care, and an overall reduction in the quality of health care available to consumers. Many legislators have called for repeal of the McCarran-Ferguson Act over the years, but to no avail.[16] However, in March, the House nearly unanimously voted (416-7) to repeal the Act's exemption for health insurance[17] via H.R. 372, the Competitive Health Insurance Reform Act of 2017.[18]

The Competitive Health Insurance Reform Act of 2017

Although there is no clear explanation for the newfound support of repealing the antitrust exemption for health insurance, the recent public outcry over rising health care costs combined with the number of insurers exiting the ACA exchanges may have invigorated repeal efforts. Representative Paul Gosar (R-AZ), a former practicing dentist, led the effort to pass H.R. 372, explaining "when we put the patient first and demand that health insurance companies compete for their business, premiums go down while quality goes up."[19]

As further evidence of the growing momentum for the Act's repeal, look no further than the DOJ. In 1999, the DOJ testified to Congress that "the McCarran-Ferguson Act does not give insurers leverage."[20] At that time, the DOJ described the Act's exemption as a "limited one" explaining that it "provides no obstacle to prosecution of [appropriate] claims either by the affected providers or by the state or Federal antitrust enforcement agencies."[21] The DOJ has since shifted its position, stating that the Act's exemption is "very broad."[22] As the House of Representative's indicated in a recent report, the DOJ has not explained why its position has shifted.[23]

Providers widely support repeal of the Act's exemption for health insurance. The American Hospital Association, the American Dental Association, the American Association of Oral and Maxillofacial Surgeons, the American Chiropractic Association, the American Community Pharmacy Association, and the American Optometric Association have all endorsed H.R. 372.[24]

As of March 23, 2017, the Act was received in the Senate and referred to the Judiciary Committee.

Repeal Opponents

Opponents of repeal argue that the exemptions created under the Act are necessary to allow insurers to share information to better project future losses. Pooling such information, they argue, creates procompetitive benefit, such as lower, actuarially based prices for health insurance products.

They argue that insurers need access to accurate and comprehensive actuarial data to gauge the risk associated with product offerings, and set premiums accordingly. It is now common industry practice for insurance companies to aggregate data from various competitive insurers, analyze the data, and use the data to set future rates.[25] Opponents of repeal argue that this type of information sharing is particularly valuable to small and start-up insurance companies that would otherwise lack the information scale to accurately price policies.

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In arguing against repeal, the Insurance Information Institution explains that a corresponding increased risk of antitrust challenges and resultant defense costs would have the effect of an increase in the cost of premiums, as well.[26] According to the Insurance Information Institution, the mere threat of antitrust litigation would make insurers less willing or unwilling to engage in efficiency-enhancing cooperative activities, as collective activities like sharing information tend to spread risk among insurers and reduce the price of insurance to consumers.

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Repeal proponents argue that since the Act was passed, courts have recognized that certain types of information sharing across competing firms can create beneficial effects for consumers. In *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.* (*BMI*), the Supreme Court refused to denounce a price-fixing agreement as *per se* illegal because it created a beneficial new product for the market.[27] Since *BMI*, the Court has taken a more nuanced view of horizontal agreements among competitors, reviewing alleged agreements in restraint of trade under the rule of reason, and weighing the potential impacts of procompetitive efficiencies against anticompetitive effects.[28]

Further, in 1996, the DOJ and FTC issued six Statements of Antitrust Enforcement Policy, indicating that sharing historical cost and price information is typically procompetitive, so long as appropriate safeguards are adopted.[29]

Proponents contend that repealing the antitrust exemption would spur competition among health insurers, lower costs to consumers, and still permit health insurers to share historical loss information for rate-setting purposes.

Looking Ahead

As noted, repeal of the Act's antitrust exemption for health insurance drew overwhelming support in the House. Although it is too soon to predict what action the Senate will ultimately take, the White House issued a statement of administration policy in support of H.R. 372, indicating if the measure "were presented . . . in its current form, [President Trump's] advisors would recommend that he sign the bill into law." According to the statement, "[m]any Americans have seen their health insurance premiums increase, and the healthcare options decrease, significantly under the Affordable Care Act. The Administration supports efforts to restore competition to the health insurance marketplace in order to lower costs and expand choices for consumers."

The purpose of antitrust law is to protect consumers from anticompetitive practices. Evidence from other industries demonstrates that competition tends to enhance efficiency, resulting in lower prices and high-quality, innovative goods. Notably, however, the Congressional Budget Office (CBO) estimated that repealing the Act's antitrust exemption for health insurance would have no significant effects on either the federal budget or the premiums that private insurers charge for health insurance.[30]

Either way, repealing the antitrust exemption for health insurance alone will not put an end to anticompetitive behavior without federal administrative enforcement. President Trump recently nominated Makan Delrahim, a former antitrust enforcer and corporate lobbyist, to DOJ's Antitrust Division.[31] The nature of his enforcement approach remains to be seen, although arguably Delrahim may have an insider's perspective on the need for rate sharing between large health insurance firms.

If repeal does not win the day during this legislative session, the Act will remain a topic for dinner table fodder, particularly as new reimbursement schemas (e.g., bundled payment initiatives, gainsharing, episode payment models, and alternative payment models under the Medicare Access and CHIP Reauthorization Act) require or incentivize providers to take on financial risk without granting similar antitrust immunities for information sharing that currently are available to health insurers.

Tune in, folks. We have a bumpy road ahead and it remains to be seen whether repeal of the Act's antitrust exemption for health insurers will be an on ramp to facilitating a model that promotes the delivery of high-quality, low-cost care to all Americans, or another speedbump along the road to reform. ■

The authors, while intrigued by the status of the McCarran Ferguson Act and its effect on the greater objective of "affordable health care for all," practice exclusively transactional and regulatory health care law, (carefully) dabbling in the field of antitrust only when such fields intersect.

About the Authors

Radha Bachman is a Shareholder in Carlton Fields, Tampa, FL. Her clients include a diverse array of health care entities including hospitals and health systems, physician groups, management service organizations, ambulatory surgery centers, and post-acute care providers. As the daughter and sister of physicians, she is uniquely aware of the intersection between clinical, business, and legal objectives in health care. On behalf of the firm's hospital and other institutional clients, Ms. Bachman provides counsel regarding system operations, joint venture and transaction structuring, physician employment and contracting, federal and private payer issues, HIPAA, licensing matters, and tax-exempt issues. She also represents physicians and physician organizations of all sizes in structuring and executing deals with third-party investors and private equity organizations, provider-to-provider mergers and acquisitions, corporate document preparation, Medicare revalidations, and general contract review. Ms. Bachman holds a law degree from the University of Florida and an undergraduate degree from Vanderbilt University.

Elizabeth "Beth" Scarola is an Associate in the health care practice group of Carlton Fields. Ms. Scarola has an insider's perspective in her health care practice. In addition to her extensive work on strategic and operational projects for a large, statewide clinically integrated network, she has hands-on scientific research experience, having conducted independent research in pediatric endocrinology. Ms. Scarola now counsels health administrators and providers, helping them navigate the complexity of health care regulation and policy. Ms. Scarola holds a Master in Medical Science from Boston University School of Medicine, a Master of Health Administration from the University of Michigan, and law and undergraduate degrees from the University of Notre Dame.

Endnotes

1 McCarran Ferguson Act, Pub. L. No. 79-15, 59 Stat. 33 (1945) codified at 15 U.S.C. §§ 1011-1015 (2006).
2 *See* White House, Office of the Press Secretary, Remarks by the President on the Affordable Care Act, Sept. 26, 2013, *available at* https://obamawhitehouse.archives.gov/the-press-office/2013/09/26/remarks-president-affordable-care-act.
3 *See* A Better Way: Our Vision for a Confident America, *available at* https://abetterway.speaker.gov/_assets/pdf/ABetterWay-HealthCare-Snapshot.pdf.
4 *See* https://housegop.leadpages.co/healthcare/.
5 15 U.S.C. §§ 1-7 (1994); 15 U.S.C. §§ 12-27; and 15 U.S.C. §§ 41-58 (1994).
6 *See* Fed. Trade Comm'n (FTC), Guide to Antitrust Laws, *available at* https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/antitrust-laws.
7 15 U.S.C. §§ 1-7.
8 *Id.*
9 15 U.S.C. § 41.
10 15 U.S.C. §§ 12-27.
11 Commission complaints and orders issued since March 1996 are *available at* http://www.ftc.gov/tips-advice/competition-guidance/industry-guidance/health-care. *See*, e.g., *Victrex plc/Invibio Limited/Invibio, Inc.*, FTC File No. 1410042; *FTC v. Cardinal Health*, FTC File No. 1010006; *IDEXX Labs., Inc.*, FTC File No. 1010023; *Transitions Opitcla, Inc.*, FTC File No. 0910062; *Inverness Med. Innovations, Inc.*, FTC File No. 061123.
12 *Federal Baseball Club v. National League*, 259 U.S. 200 (1922).
13 *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944).
14 The Supreme Court has established a three-prong test for determining whether the actions of an insurance company should be construed as part of the "business of insurance." This three-prong test requires a court to determine whether an activity spreads the insured's risk; whether the activity is an essential part of policy relationship between insured and insurer; and whether the activity is limited to members within the insurance field.
15 *See, e.g., United States v. Aetna Inc.*, No. 1:16-cv-01494, slip op. at 18, 19 (D.D.C. Jan. 23, 2017).
16 *See, e.g.*, S. 430, 102d Cong., 1st Sess. (1991); H.R. 10, 102d Cong., 1st Sess. (1991); S. 719 101st Cong., 1st Sess. (1989); S. 1299, 100th Cong., 1st Sess. (1987); S. 804, 100th Cong., 1st Sess., (1987); S. 80, 100th Cong., 1st Sess. (1987); H.R. 3596, S. 1681, 111th Cong. (2009); H.R. 4626, 111th Cong., (2009); H.R. 1583, 111th Cong. (2009).
17 H.R. 372 would leave in place the antitrust exemption for other types of insurance.
18 *See* https://www.congress.gov/bill/115th-congress/house-bill/372/actions.
19 *See* Press Release, *416-7: House Passes Bipartisan Gosar Bill Restoring Competition in the Healthcare Market*, Mar. 22, 2017, *available at* http://gosar.house.gov/press-release/416-7-house-passes-bipartisan-gosar-bill-restoring-competition-healthcare-market.
20 *See* Hearing Before the Committee on the Judiciary, House of Representatives, 106th Cong., June 22, 1999, *available at* http://commdocs.house.gov/committees/judiciary/hju62446.000/hju62446_0.HTM.
21 *Id.*
22 *See* Report 115-26 of the House of Representatives, 115th Cong., Mar. 13, 2017, *available at* https://www.congress.gov/congressional-report/115th-congress/house-report/36/1?r=10.
23 *Id.*
24 *See* Press Release, *House Judiciary Committee Approves Rep. Gosar's Competitive Health Insurance Reform Act*, Feb. 28, 2017, *available at* http://gosar.house.gov/press-release/house-judiciary-committee-approves-rep-gosar%E2%80%99s-competitive-health-insurance-reform-act; Am. Hosp. Ass'n, Letter to Representative Paul Gosar, dated Mar. 22, 2017, *available at* www.aha.org/advocacy-issues/letter/2017/170322-let-gosar-hr372.pdf.
25 *See* Janice E. Rubin and Baird Webel, Cong. Research Serv., *Limiting McCarran-Ferguson Act's Antitrust Exemption for the "Business of Insurance": Impact on Health Insurers and Issuers of Medical Malpractice Insurance* at 5 (Jan. 14, 2010).
26 *See* Ins. Information Inst., *Antitrust Law and Insurance: The McCarran-Ferguson Act: What it Is, What it Isn't and Consequences of Repeal of the Insurance Industry's Limited Antitrust Exemption, available at* http://www.iii.org/article/antitrust-law-and-insurance.
27 *Broadcast Music v. Columbia Broadcasting Sys.*, 441 U.S. 1 (1979).
28 *Major League Baseball Props. Inc. v. Salvino, Inc.* 542 F.3d 290, 340 n.10 (2d Cir. 2008) (Sotomayor, J. concurring) ("When empirical analysis is required to determine a challenged restraint's net competitive effect, neither a per se nor a quick-look approach is appropriate . . . ." *See also Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 886 (2007) ("To justify a per se prohibition a restraint must have manifestly anticompetitive effects, and lack . . . any redeeming value"); *In re Se. Milk Antitrust Litig.*, 801 F. Supp. 2d 705, 717 (E.D. Tenn. 2011) ("A per se rule is inappropriate where the effects of a particular restraint are unclear, even where aspects of the restraint may appear to be facially anti-competitive."
29 *See* DOJ and FTC, *Statements of Antitrust Enforcement Policy in Health Care* (Aug. 1996), *available at* https://www.ftc.gov/sites/default/files/attachments/competition-policy-guidance/statements_of_antitrust_enforcement_policy_in_health_care_august_1996.pdf.
30 *See* CBO, Cost Estimate, H.R. 372 Competitive Health Insurance Reform Act of 2017 (Mar. 10, 2017), *available at* https://www.cbo.gov/sites/default/files/115th-congress-2017-2018/costestimate/hr372.pdf#sthash.uLz6MhUp.dpuf.
31 *See* Cecilia Kang, *Trump Appoints One of His Lawyers to Review Mergers*, N.Y. Times, Mar. 27, 2017, *available at* https://www.nytimes.com/2017/03/27/business/makan-delrahim-justice-department-mergers.html?_r=0.