

Antitrust News & Notes

March 2010

The Justice Department Concludes That the Submission of Material and Ordinary Course Contracts Violates the HSR Act

By Billy Vigdor and Kimberley Biagioli

On January 21, 2010, the Department of Justice (DOJ) alleged that Smithfield Foods, Inc. and Premium Standard Farms, LLC violated the Hart-Scott-Rodino Antitrust Improvements Act (HSR Act) in connection with Smithfield's acquisition of Premium Standard. *United States v. Smithfield Foods, Inc.*, No. 1:10-cv-00120 (D.D.C., filed Jan. 21, 2010).¹ Central to the concern was that Premium Standard submitted to Smithfield for approval three "ordinary course" hog procurement contracts (including price and quantity information) before the expiration of the mandatory HSR Act waiting period. Significantly, hog contracting was a focus of the DOJ merger review. It appears that all three contracts were submitted for approval pursuant to a merger agreement provision prohibiting Premium Standard from entering into contracts that were material to the business absent the prior approval of Smithfield. Notably, the materiality of the contracts appears to have played little or no role in the DOJ analysis, and the complaint does not allege that Smithfield actually exercised any approval right over the contracts. *Smithfield* therefore highlights the DOJ view that submitting "ordinary course" contracts for approval violates the HSR Act, particularly when those contracts are likely to be important to the substantive merger review. This appears to be the case even if: (i) the submitted contracts are material contracts, and (ii) there is no evidence the buyer altered or attempted to alter the terms of the

¹ Available at www.justice.gov.

Also in this Issue

- 2 District Courts Consider Whether to Extend *Twombly* to Affirmative Defenses
- 4 Geographic Market: Watch the Buyer
- 5 Health Insurance Companies May Lose Federal Antitrust Exemption
- 7 Thresholds Lowered Under the HSR Act

contracts. This suggests that merging parties should look to contract provisions other than prior approval provisions for material contracts entered into in the ordinary course of business that may be related to the antitrust review.

Background

On September 17, 2006, Smithfield and Premium Standard entered into a merger agreement valued at approximately \$693 million. On October 6, the parties made their respective HSR Act filings, which (according to the DOJ) began the HSR Act waiting period. The DOJ issued a second request, extending the waiting period, which expired on March 7, 2007. The parties closed the transaction on May 7, 2007, without challenge from the DOJ.

The agreement apparently included many "standard" and, according to the DOJ, lawful limits on the seller's actions during the time between signing the merger agreement and closing the transaction, including "provisions regarding Premium Standard's rights to assume new debt or financing, issue new voting securities and sell

assets, as well as requirements that Premium Standard 'carry on its business in the ordinary course consistent with past practice.'"² As noted above, the merger agreement restricted Premium Standard from entering into contracts that were material to the business (valued at more than \$1 million and were cancellable in less than 90 days) without Smithfield's consent.

The DOJ alleged that Premium Standard stopped exercising independent judgment over its hog purchases. Starting three days after signing the merger agreement, Premium Standard submitted to Smithfield for consent three multi-year contracts (which incorporated prices and quantities) for approval. While one of the contracts constituted less than 1 percent of Premium Standard's slaughter capacity, the three contracts resulted in a commitment to a total cost between \$57 million and \$67 million. The complaint also alleges that each submission included "proposed contract terms, including the price to be paid, quantity to be purchased, and length of the contract." There is no allegation that Smithfield actually approved, disapproved, or sought any modification to the submitted contracts. Significantly, both Premium Standard and Smithfield were competitors to procure hogs and the competition between Premium Standard and Smithfield to procure hogs was the subject of the DOJ merger investigation. According to the DOJ, the submission of these contracts for approval violated the HSR Act by transferring operational control. The violation began on September 20, 2006, and ran through the expiration of the waiting period on March 7, 2007. The parties agreed to pay a civil penalty of \$900,000.

Analysis

The DOJ generally accepts the premise that parties may protect the value of their investment by requiring parties to operate in the ordinary course of business and not make material and adverse changes to the business. The government, however, requires the parties to maintain their individual identities and continue operating in the ordinary course of business, which gives the government time to review the transaction. Also, the government accepts that parties may need to exchange competitively sensitive information to conduct due diligence or plan for integration, but only may do so when it is necessary

to the conduct of diligence or planning and when proper protections are put in place to prevent the information from being used commercially. Perhaps most importantly, the HSR Act is interpreted as preventing parties from exerting operational control prior to expiration of the waiting period.

In *Smithfield*, just days after signing the merger agreement Premium Standard allegedly began submitting to Smithfield for approval contracts that were material and entered into in the ordinary course of business. The proximity between signing the merger agreement and the submission of the contracts (including competitively sensitive prices and quantities) may have been a fact drawing the interest and attention of the DOJ. Hog purchasing was a focus of the antitrust issues surrounding the merger review. Also, the contracts at issue were relatively large and may have been important for the competition analysis. These factors appear to have persuaded the DOJ that the parties were not observing the waiting period.

Smithfield, therefore, highlights the DOJ view that parties do not properly observe the waiting period when they seek approval of ordinary course contracts, particularly when the contracts are important to the antitrust review and contain competitively sensitive information. Moreover, the DOJ does not seem to allow for exceptions for the prior approval of material contracts where other merger agreement provisions can protect the value of the transaction and regardless of whether the recipient of the contract influences or tries to influence the terms of the submitted contracts. ■

District Courts Consider Whether to Extend *Twombly* to Affirmative Defenses

By Brian Robison and Alithea Sullivan

The Supreme Court raised the bar for federal-court plaintiffs in 2007's *Bell Atlantic Corp. v. Twombly*³ by clarifying the standard for deciding motions to dismiss for failure to state a claim. Previously, a claim would be dismissed only if it appeared "beyond doubt that the plaintiff [could] prove no set of facts in support of his claim which would entitle him to relief."⁴ *Twombly* rejected this standard in favor of a rule

² Complaint ¶ 16.

³ 550 U.S. 544 (2007).

⁴ *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

requiring a complaint to state “enough facts to state a claim to relief that is plausible” — not merely “conceivable.”⁵ Under *Twombly*’s standard, plaintiffs’ claims would come under increased scrutiny, forcing complainants to allege sufficient factual bases for their contentions or face dismissal. Accordingly, *Twombly* has been widely regarded as an added obstacle for plaintiffs — and an unalloyed benefit to defendants.

But the benefits of *Twombly* may not be so one-sided after all: in several recent cases, defendants have been held to the heightened pleading standards of *Twombly* for their affirmative defenses. Although the trend has drawn little attention from commentators, this view is quickly finding favor in more and more jurisdictions.

While no court of appeals has confronted the issue, many federal district courts have weighed in on whether *Twombly*’s pleading requirements apply to affirmative defenses in defendants’ answers. The majority of these courts — in Texas,⁶ New York,⁷ California,⁸ Wisconsin,⁹ Illinois,¹⁰ Louisiana,¹¹ Minnesota,¹² Vermont,¹³ Missouri,¹⁴

Kansas,¹⁵ and Florida¹⁶ — have opted to apply *Twombly* to affirmative defenses. Some of these courts extended *Twombly* on the basis of pre-*Twombly* precedent confirming that “an affirmative defense is subject to the same pleading requirements as the Complaint.”¹⁷ Other courts, concluding that “sauce for the goose is sauce for the gander,”¹⁸ found *Twombly* applicable to both claims and affirmative defenses because the purpose underlying the requirement — “to provide enough notice to the opposing party that indeed there is some plausible, factual basis for the assertion and not simply a suggestion of possibility that it may apply to the case”¹⁹ — applies equally to both. The courts also played down the additional burden that *Twombly* would place on defendants, observing that defendants were permitted leave to amend their pleadings²⁰ and stressing that *Twombly*’s requirement that a pleading include “more than labels and conclusions”²¹ is nothing new, because even before *Twombly*, a bare-bones recital of a boilerplate affirmative defense was considered insufficient.²²

⁵ *Twombly*, 550 U.S. at 570.

⁶ *Mumphrey v. Credit Solutions of Am., Inc.*, No. 3:09-cv-1208-M, 2010 WL 652834, at *1 (N.D. Tex. Feb. 24, 2010); *Lehman Bros. Holdings, Inc. v. Cornerstone Mortgage Co.*, No. H-09-0672, 2009 WL 2900740, at *3 & n.11 (S.D. Tex. Aug. 31, 2009); *Teirstein v. AGA Med. Corp.*, No. 6:08cv14, 2009 WL 704138, at *6 (E.D. Tex. Mar. 16, 2009); *Stoffels ex rel. SBC Tel. Concession Plan v. SBC Commc’ns, Inc.*, No. 05-CV-0233-WWJ, 2008 WL 4391396, at *1 (W.D. Tex. Sept. 22, 2008).

⁷ *Tracy ex rel. v. NVR, Inc.*, No. 04-CV-6541L, 2009 WL 3153150 at *7 (W.D.N.Y. Sept. 30, 2009); *Aspex Eyewear, Inc. v. Clariti Eyewear, Inc.*, 531 F. Supp. 2d 620, 622 (S.D.N.Y. 2008).

⁸ *CTF Development, Inc. v. Penta Hospitality, LLC*, No. C 09-02429-WHA, 2009 WL 3517617, at *8 (N.D. Cal. Oct. 26, 2009); *Anticancer Inc. v. Xenogen Corp.*, 248 F.R.D. 278, 282 (S.D. Cal. 2007). *But cf. Sorensen v. Spectrum Brands, Inc.*, No. 09cv58-BTM, 2009 WL 5199461, at *1 (S.D. Cal. Dec. 23, 2009) (using pre-*Twombly* standards to determine sufficiency of affirmative defenses without mention of *Twombly*’s potential applicability).

⁹ *Voeks v. Wal-Mart Stores*, No. 07-C-0030, 2008 WL 89434, at *6 (E.D. Wis. Jan. 7, 2008); *Greenheck Fan Corp. v. Loren Cook Co.*, No. 08-cv-335-jps, 2008 WL 4443805, at *1-2 (W.D. Wis. Sept. 25, 2008).

¹⁰ *OSF Healthcare Sys. v. Banno*, No. 08-1096, 2010 WL 431963, at *2 (C.D. Ill. Jan. 29, 2010); *Darnell v. Hoelscher, Inc.*, No. 09-204-JPG, 2009 WL 4675884, at *1-2 (S.D. Ill. Dec. 4, 2009); *Bank of Montreal v. SK Foods, LLC*, No. 09 C 3479, 2009 WL 3824668, at *3-4 (N.D. Ill. Nov. 13, 2009); *SEG Liquidation Co., LLC v. Stevenson*, No. 07-C-3456, 2008 WL 623626, at *2 (N.D. Ill. Mar. 6, 2008).

¹¹ *Cosmetic Warriors Ltd. v. Lush Boutique, L.L.C.*, No. 09-6381, 2010 WL 481229, at *1 (E.D. La. Feb. 1, 2010).

¹² *E.E.O.C. v. Hibbing Taconite Co.*, No. 09-0729, 2009 WL 5610134, at *5-6 (D. Minn. Dec. 7, 2009).

¹³ *In re Montagne*, No. 08-10916, 2010 WL 538216, at *3 (Bankr. D. Vt. Feb. 8, 2010).

¹⁴ *Premium Standard Farms, LLC v. Travelers Property & Cas. Co.*, No. 09-0699-CV-W-GAF, 2009 WL 4907063 (W.D. Mo. Dec. 14, 2009) (applying *Twombly* “plausibility” standard).

¹⁵ *Hayne v. Green Ford Sales, Inc.*, No. 09-2202-JWL-GLR, 2009 WL 5171779, at *2-3 (D. Kan. Dec. 22, 2009).

¹⁶ *FDIC v. Bristol Home Mortgage Lending, LLC*, No. 08-81536-CIV, 2009 WL 2488302, at *2 (S.D. Fla. Aug. 13, 2009); *Torres v. TPUSA, Inc.*, No. 2:08-cv-618-FtM-29DNF, 2009 WL 764466, at *1 (M.D. Fla. Mar. 19, 2009); *Home Management Solutions, Inc. v. Prescient, Inc.*, No. 07-20608-CIV, 2007 WL 2412834, at *3 (S.D. Fla. Aug. 21, 2007).

¹⁷ *See, e.g., Cosmetic Warriors Ltd. v. Lush Boutique, L.L.C.*, No. 09-6381, 2010 WL 481229, at *1 (E.D. La. Feb. 1, 2010) (citing *Woodfield v. Bowman*, 193 F.3d 354, 362 (5th Cir. 1999)); *OSF Healthcare Sys. v. Banno*, No. 08-1096, 2010 WL 431963, at *2 (C.D. Ill. Jan. 29, 2010) (citing *Heller Financial, Inc. v. Midway Powder Co., Inc.*, 883 F.2d 1286, 1294 (7th Cir. 1989)).

¹⁸ *Kaufmann v. Prudential Ins. Co.*, No. 09-10239-RGS, 2009 WL 2449872, at *1 (D. Mass. Aug. 6, 2009).

¹⁹ *Hayne*, 2009 WL 5171779, at *3.

²⁰ *Id.* at *4.

²¹ *Twombly*, 550 U.S. at 545.

²² *In re Montagne*, No. 08-10916, 2010 WL 538216, at *3 (Bankr. D. Vt. Feb. 8, 2010); *OSF Healthcare Sys.*, 2010 WL 431963, at *2; *Stoffels ex rel. SBC Tel. Concession Plan v. SBC Commc’ns, Inc.*, No. 05-CV-0233-WWJ, 2008 WL 4391396, at *1 (W.D. Tex. Sept. 22, 2008); *Voeks v. Wal-Mart Stores*, No. 07-C-0030, 2008 WL 89434, at *6 (E.D. Wis. Jan. 7, 2008).

However, district courts in Pennsylvania,²³ Alabama,²⁴ and Colorado²⁵ have deemed *Twombly* inapplicable to affirmative defenses, under various theories. Some of these courts concluded that *Twombly* sought to interpret only Federal Rule of Civil Procedure 8(a) (concerning claims) and did not intend to alter the interpretation of Federal Rule 8(c) (concerning affirmative defenses).²⁶ Others found it “reasonable to impose stricter pleading requirements on a plaintiff who has significantly more time to develop factual support for his claims than a defendant who is only given 20 days to respond to a complaint and assert its affirmative defenses.”²⁷

Other jurisdictions are uncertain. District courts in Delaware,²⁸ Tennessee,²⁹ New Jersey,³⁰ and Massachusetts³¹ have explicitly declined to decide the question. Two districts —the Eastern District of Michigan³² and the Western District of Oklahoma³³ — have issued widely divergent opinions.

²³ *Romantine v. CH2M Hill Eng'rs, Inc.*, No. 09-973, 2009 WL 3417469, at *1 (W.D. Pa. Oct. 23, 2009).

²⁴ *Westbrook v. Paragon Sys., Inc.*, No. 07-0714-WS-C, 2007 U.S. Dist. LEXIS 88490, at *1-2 (S.D. Ala. Nov. 29, 2007).

²⁵ *Holdbrook v. SAIA Motor Freight Line, LLC*, No. 09-cv-02870-LTB-BNB, 2010 WL 865380, at *2 (D. Colo. Mar. 8, 2010).

²⁶ See *Romantine*, 2009 WL 3417469, at *1; *Westbrook*, 2007 U.S. Dist. LEXIS 88490, at *1-2.

²⁷ *Holdbrook*, 2010 WL 865380, at *2.

²⁸ See *Sun Microsystems, Inc. v. Versata Enterprises, Inc.*, 630 F.Supp.2d 395, 408 n.8 (D. Del. 2009) (explaining disparity of opinions among district courts and concluding that resolution was unnecessary).

²⁹ See *Del-Nat Tire Corp. v. A to Z Tire & Battery, Inc.*, No. 2:09-cv-02457-JPM-tmp, 2009 WL 4884435, at *2 (W.D. Tenn. Dec. 8, 2009) (declining to address issue).

³⁰ *Huertas v. U.S. Dep't of Educ.*, No. 08-3959, 2009 WL 2132429 (D.N.J. July 13, 2009) (noting absence of caselaw in jurisdiction and proceeding to apply pre-*Twombly* precedent).

³¹ *Kaufmann v. Prudential Ins. Co. of Am.*, No. 09-10239-RGS, 2009 WL 2449872, at *1 (D. Mass. Aug. 6, 2009) (assuming, without deciding, that *Twombly* applies to affirmative defenses).

³² Compare *First Nat'l Ins. Co. of Amer. v. Camps Serv., Ltd.*, No. 08-cv-12805, 2009 WL 22861, at *2 (E.D. Mich. Jan. 5, 2009) (rejecting *Twombly*'s application to affirmative defenses), with *United States v. Quadrini*, No. 2:07-CV-13227, 2007 WL 4303213, at *4 (E.D. Mich. Dec. 6, 2007), and *Shinew v. Wszola*, No. 08-14256, 2009 WL 1076279, at *2-5 (E.D. Mich. Apr. 21, 2009) (finding *Twombly* applicable).

³³ Compare *Gibson v. Officemax, Inc.*, No. CIV-08-1289-R (W.D. Okla. Jan. 30, 2009) (extending *Twombly* to affirmative defenses), with *Schlottman v. Unit Drilling Co.*, No. CIV-08-1275-C, 2009 WL 1764855, at *1 (W.D. Okla. June 18, 2009) (declining to address whether *Twombly* applied to affirmative defenses), and *Henson v. Supplemental Health Care Staffing Specialists*, No. CIV-09-397-HE (W.D. Okla. July 30, 2009) (refusing to extend *Twombly*).

Although many district courts have extended *Twombly* to the pleading of affirmative defenses, the issue is far from settled. District courts in more than half of the states have not yet decided whether the *Twombly* pleading standard applies to affirmative defenses. Moreover, the courts of appeals may be willing to invalidate their pre-*Twombly* holdings treating affirmative defenses and complaint claims equally, in a way that district courts were not. Until more courts weigh in on the matter and clarify the state of the law, *Twombly*'s expansion is an issue potential defendants should monitor with care. ■

Geographic Market: Watch the Buyer

By Brian Robison and Sarah Stark

In two recent decisions, the Third and Fifth Circuit Courts of Appeals dismissed antitrust claims (at least in part) because the plaintiffs improperly defined the geographic market by the area where a seller peddles its product rather than the area where potential purchasers look to procure the relevant product.

In *Wampler v. Southwestern Bell Telephone Co.*, the plaintiffs, as representatives of a proposed class of persons who live in multiple dwelling units (MDUs), alleged that the owner of the MDU where plaintiffs resided conspired with AT&T when the owner gave AT&T the exclusive right to provide voice, video, and broadband internet services to the MDU's residents. The district court and the Fifth Circuit rejected the plaintiffs' contention that one MDU comprised the relevant geographic market. Rather, the Fifth Circuit concluded that MDUs are “specific venues” within the broader market — the city in which the MDUs are located. The court held that several competitive factors preclude any one MDU from being its own geographic market: (1) MDUs compete with one another for tenants, which incentivizes each MDU to offer high quality, low cost services; (2) AT&T competes with other providers of voice, video, and broadband internet services, also incentivizing AT&T to offer low prices and high quality services; and (3) tenants make choices about where to live based on the services that each MDU offers and may choose not to rent an apartment that does not offer their preferred services. By arguing that the single MDU constituted a geographic market, the plaintiffs improperly focused on the real estate controlled by the owners of the

MDU rather than the geographic region in which MDUs compete, the region in which people might rent apartments.

Wampler continues the Fifth Circuit's long refusal to allow plaintiffs to define geographic markets narrowly in order to ease their paths to successfully pursuing antitrust claims. Both the district court's and Fifth Circuit's conclusions in *Wampler* were based on a 2002 Fifth Circuit case, *Apani Southwest, Inc. v. Coca-Cola Enterprises, Inc.*, in which it similarly rejected a plaintiff's inadequate market definition. The *Wampler* decision was consistent with the Fifth Circuit's understanding that "a single purchaser [can] not be considered a relevant market unless [the] plaintiff made some showing of the purchaser's monopsony power." Considering the competition among MDU owners and telecommunication service providers, as well as the choices that tenants make based on services provided by their potential landlords, the *Wampler* plaintiffs were unable to make such a showing.

On the heels of the *Wampler* decision, the Third Circuit released a ruling in which it too found that the plaintiff had failed to properly define a geographic market and, therefore, could not sustain its antitrust claim. In *U.S. Horticultural Supply, Inc. v. Scotts Co.*, U.S. Horticultural Supply (USHS) alleged that The Scotts Co. (Scotts) unlawfully conspired to restrain trade in violation of Section 1 of the Sherman Act when Scotts decided not to renew its distribution agreement with USHS. Like the *Wampler* plaintiffs, USHS tried to define the geographic market narrowly, alleging that the relevant geographic market was nearly the same as the geographic area covered by the parties' distribution agreement. While USHS presented evidence showing how Scotts defined its sales region, USHS was unable to show that the geographic area considered by Scotts and covered by the distribution agreement was the same as the area where Scotts' customers (distributors such as USHS) would attempt to purchase their product. USHS's failure to define the relevant geographic market with reference to "the area where customers would look to buy [the] product" was fatal to its case (as was its failure to properly define the relevant product market).

The *Wampler* and *Scotts* cases are part of a continuing trend and show that courts will not allow plaintiffs to pursue their cases unless they meet the standards for defining the relevant geographic market in an economically sensible manner. ■

Health Insurance Companies May Lose Federal Antitrust Exemption

By Brian Robison and Allan Johnson

On February 24, 2010, the U.S. House of Representatives overwhelmingly passed, in a 406-19 vote, H.R. 4626 — The Health Insurance Industry Fair Competition Act — repealing portions of the federal antitrust exemption contained in the McCarran-Ferguson Act (15 U.S.C. §§ 1012 et seq.).³⁴ The bill, sponsored by Rep. Tom Perriello (D-VA) and Rep. Betsy Markey (D-CO), seeks "[t]o restore the application of federal antitrust laws to the business of health insurance to protect competition and consumers," amending the McCarran-Ferguson Act to remove "the business of health insurance" from the antitrust exemption contained therein, thus making health insurers subject to federal antitrust laws.³⁵

H.R. 4626 is actually the second piece of legislation to pass in the House during this session that repeals a portion of the McCarran-Ferguson Act. House Speaker Nancy Pelosi stated that the House would move to pass small portions of the healthcare reform agenda while Democratic leaders work to move forward on a comprehensive healthcare package.³⁶

New Bill Differs From Omnibus Healthcare Reform Bill

The omnibus healthcare reform legislation passed by the House in November 2009 also contains a provision repealing a portion of the insurance antitrust exemption.³⁷ However, H.R. 4626 differs from the omnibus bill in two important ways. First, the House omnibus bill repeals the antitrust exemption for "the business of medical malpractice insurance," while H.R. 4626 does not apply to medical malpractice insurers. In response to successful lobbying from malpractice insurers, House Democrats agreed to preserve the antitrust exemption for property and casualty insurers in H.R. 4626, including malpractice insurers, and

³⁴ Perry Bacon Jr., *House votes to strip health insurance companies of antitrust exemption*, THE WASHINGTON POST, Feb. 24, 2010 (available at www.washingtonpost.com).

³⁵ Health Insurance Industry Fair Competition Act, H.R. 4626, 111th Cong. (2010).

³⁶ Laura Litvan and Lorraine Woellert, *House to Revoke Antitrust Exemption for Insurers, Pelosi Says*, BLOOMBERG, Feb. 4, 2010 (available at www.bloomberg.com).

³⁷ Affordable Health Care for America Act, H.R. 3962, 111th Cong. § 262 (2009).

the Property Casualty Insurers Association of America dropped its opposition to the bill.³⁸

The second major difference between the pieces of legislation is that the omnibus bill contains a carve-out not found in H.R. 4626. This carve-out would preserve the antitrust exemption for “collecting, compiling, classifying, or disseminating historical loss data;” “determining a loss development factor applicable to historical loss data;” and “performing actuarial services.”³⁹ Thus, under H.R. 4626, health insurance companies sharing information regarding insurance risk could be subject to federal antitrust scrutiny. For example, at least one commentator has predicted that activities related to Ingenix, the database where many insurers pool charge data on medical procedures, would no longer be covered by the McCarran antitrust exemption.⁴⁰ Interestingly, this restriction could be most acutely felt by smaller and start-up insurance companies because larger insurers are better able to collect data themselves.⁴¹ The absence of this carve-out could actually lead to decreased competition if small insurance companies decide against entering the marketplace due to the inability to review industry data and accurately set premiums in response to actual insurance risk.⁴²

Notable Arguments Regarding the Possible Antitrust Exemption Repeal

Several prominent industry and advocacy groups have expressed differing opinions about the implications of the possible repeal of the McCarran antitrust exemption. Most notably, several groups have advanced projections regarding the potential savings to consumers directly tied to passage of a McCarran repeal. The Consumer Federation of America estimates a full repeal of the McCarran-Ferguson Act would save Americans at least 10 percent of premiums or as much as \$50 billion per year.⁴³

³⁸ Lorraine Woellert, *House Democrats Seek to Revoke Insurers' Antitrust Exemption*, BLOOMBERG, Feb. 22, 2010 (available at www.bloomberg.com).

³⁹ H.R. 3962 § 262(a)(2).

⁴⁰ Jenny Gold, *The Antitrust Exemption For Health Insurers: Meaningful or Not?*, KAISER HEALTH NEWS, Feb. 8, 2010 (available at www.kaiserhealthnews.org).

⁴¹ Julie Rovner, *Bill Would Apply Antitrust Laws to Insurance*, NPR, Feb. 8, 2010 (available at www.npr.org).

⁴² *Id.*

⁴³ Letter from J. Robert Hunter, Director of Insurance, Consumer Federation of America and Joanna Doroshov, Executive Director,

On the other hand, the nonpartisan Congressional Budget Office has stated that repeal of the antitrust exemption could cause premiums to increase or decrease, but the magnitude of such a change “is likely to be quite small.”⁴⁴

Another point of contention involves issues of federalism. Some conservatives believe that this bill serves as a precursor to increased control of the health insurance industry by the federal government.⁴⁵ State antitrust laws already apply to the health insurance industry. In fact, the McCarran antitrust exemption, which applies only to federal antitrust laws, was originally intended to allow states to regulate the insurance industry without federal intervention. A prominent health insurance trade group notes that the health insurance industry is comprehensively regulated at the state level and argues that federal antitrust consequences may work to undermine the current regulatory scheme.⁴⁶ However, a Senior Fellow at the Center for American Progress claims that state enforcement is insufficient, citing his study where he found that 33 states had failed to bring a single antitrust enforcement action in the past five years.⁴⁷

Prospects for Bill Becoming Law

Efforts to repeal the McCarran antitrust exemption have not found the same traction in the Senate that they enjoyed in the House. The omnibus healthcare bill passed by the Senate in a party-line vote did not contain any McCarran repeal provisions.⁴⁸ Sen. Patrick Leahy (D-VT) offered a McCarran repeal bill as an amendment to the Senate omnibus bill, but this proved to be a sticking point in getting enough votes to avoid a Republican

Center for Democracy and Justice to Members of U.S. House of Representatives, Feb. 23, 2010 (available at admin.consumerfed.org).

⁴⁴ Congressional Budget Office Cost Estimate, H.R. 3596 Health Insurance Industry Antitrust Enforcement Act of 2009, Oct. 23, 2009 (available at www.cbo.gov).

⁴⁵ Andie Brownlow, *The Antitrust Trap for Health Care Insurance*, AMERICAN THINKER, Mar. 5, 2010 (available at www.americanthinker.com).

⁴⁶ Letter from Karen Ignagni, President and Chief Executive Officer, America's Health Insurance Plans to The Honorable Tom Perriello and the Honorable Betsy Markey, U.S. House of Representatives, Feb. 18, 2010 (available at www.americanhealthsolution.org).

⁴⁷ David Balto, *McCarran-Ferguson Antitrust Reform 101*, CENTER FOR AMERICAN PROGRESS, Feb. 22, 2010 (available at www.americanprogress.org).

⁴⁸ Patient Protection and Affordable Care Act, H.R. 3590, 111th Cong. (2009).

filibuster.⁴⁹ Sen. Ben Nelson (D-NE), a former insurance industry executive and state insurance commissioner, refused to vote for the bill if it contained a McCarran repeal provision, so it was dropped before the Senate approved the bill.

Events transpiring since the passage of the senate omnibus bill only make passage of H.R. 4626 in the Senate more unlikely. Democrats have lost their filibuster-proof majority with the election of Sen. Scott Brown (R-MA), and it is unlikely that Sen. Nelson has changed his views on the McCarran repeal in the past three months.⁵⁰ However, this has not deterred a group of 22 Democratic senators, led by Sen. Leahy, from publicly urging Senate Majority Leader Harry Reid (D-NV) to schedule a vote on H.R. 4626.⁵¹

Should Congress pass a bill to repeal the antitrust exemption for the health insurance industry, it is almost certain that it would be signed into law by President Obama. Christine Varney, the U.S. Justice Department's chief of antitrust enforcement, has endorsed the legislation, stating that revoking the exemption could alter behavior and introduce more competition into the market.⁵²

On March 21, 2010, the House passed, by a vote of 219 to 212, H.R. 3590, the Senate version of the omnibus healthcare bill.⁵³ This bill does not contain any provision repealing the McCarran antitrust exemption. President Obama signed the bill into law on March 23, 2010.⁵⁴ Despite the passage of the omnibus bill, health insurers and other potentially affected parties should monitor the progress of H.R. 4626 and other related legislation as Congress continues to debate possible healthcare reform bills. ■

⁴⁹ James M. Burns, *Can Antitrust Exemption Survive Health Care Reform?*, LAW 360, Jan. 8, 2010 (available at www.law360.com).

⁵⁰ James M. Burns, *The Latest Swipe at Insurers' Antitrust Exemption*, LAW 360, Mar. 2, 2010 (available at www.law360.com).

⁵¹ Aruna Viswanatha, *Leahy Urges Reid to Schedule Insurance Antitrust Vote*, MAIN JUSTICE, Mar. 4, 2010 (available at www.mainjustice.com).

⁵² Lorraine Woellert and Justin Blum, *Antitrust Enforcer for U.S. Says Insurers May Lack Competition*, BLOOMBERG, Feb. 27, 2010 (available at www.bloomberg.com).

⁵³ Sheryl Gay Stolberg, *Obama Signs Health Care Overhaul Bill, With a Flourish*, NEW YORK TIMES, Mar. 23, 2010 (available at www.nytimes.com).

⁵⁴ *Id.*

Thresholds Lowered Under the HSR Act

Once a year, the Federal Trade Commission adjusts Hart-Scott-Rodino (HSR) filing thresholds based on changes in the GNP. Effective February 22, 2010, the thresholds will be lowered for 2010. Major changes in the thresholds are as follows:

Current Threshold	New Threshold
1. HSR Size of Person Test	
Need \$13 million person and \$130.3 million person	Need \$12.7 million person and \$126.9 million person
2. HSR Test Disregarded	
When Size of Transaction Is Over \$260.7 Million	When Size of Transaction Is Over \$253.7 Million
3. HSR Size of Transaction Test	
\$65.2 million	\$63.4 million

Contact Vinson & Elkins attorneys Cathy Lewis or Neil Imus if you have any questions concerning these changes.

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