

C. Scott Litch

Chief Operating Officer and General Counsel



Efforts to Repeal the McCarran-Ferguson Act

The AAPD recently joined coalition efforts to repeal the McCarran-Ferguson Act. Until this current year's health care reform debate, it was believed that taking on this issue would be an impossible task for the dental profession, or the health professions in general. However, with a Congress very interested in health insurance reform and not favorably disposed towards the health insurance industry, an opportunity has arisen.

WHAT DOES THIS MEAN?

The ADA has prepared a legislative fact sheet: http://www.ada.org/prof/advocacy/issues/mf_hr1583_insurance.pdf.

Here are a few key points:

- The McCarran-Ferguson Act has for almost 65 years exempted the insurance business from federal antitrust laws. As pointed out in the last issue of Litch's Law Log, associations such as the AAPD have to comply with antitrust laws, as do individual health professionals such as dentists and physicians.
- The Act provides a partial exemption from federal antitrust laws; the exemption is applicable when an insurance practice that would otherwise offend antitrust laws but: (1) is part of the "business of insurance;" (2) is an insurance practice that is regulated by state law; and (3) does not constitute coercion, intimidation, or boycott.

- While some characterize it as a "pro-consumer" law, the reality is that the Act was passed in 1945 due to lobbying by the insurance industry in reaction to a Supreme Court opinion the previous year. The industry did not want to be subject to federal regulation.
- Many years of court decisions interpreting the Act have given guidance to what is the "business of insurance." This has partially mitigated some of the impact of the Act. For example, health plan contracts with health care providers are not exempt from antitrust laws, nor is health plan collusion on provider fee schedules. Because the act does not immunize insurers and plans from antitrust challenges raised by health care providers, the ADA has been able to bring three class action lawsuits against managed care companies concerning dental claims reimbursement practices.

The insurance industry argues that the exemption allows them to exchange historical and trend loss data, and consumers benefit from the setting of rates that are more accurate and competitive.

Among the main arguments for repeal of the exemption are that:

- Insurers would have to compete more aggressively for purchasers of large group policies by keeping premiums comparatively low and benefits comparatively high. They would strive to offer plans that most qualified professionals would want to participate in, thereby making plans more attractive to consumers.

- Consumers would likely have a greater selection of dental treatment options and better coverage for such options.
- Greater scrutiny would be given to questionable practices common across the insurance industry, such as contract terms with insured and providers, to quality criteria and selection of provider pools.

On March 18, 2009, the Insurance Industry Competition Act (H.R. 1583) was introduced in the House of Representatives to repeal the McCarran-Ferguson Act. H.R. 1583 would authorize both the Federal Trade Commission (FTC) and the Department of Justice to enforce the antitrust laws against insurance companies engaged in anticompetitive conduct. The bill would not interfere with states' ability to maintain and enforce their own insurance regulations, antitrust statutes, and consumer protection laws.

HOW WILL THIS ALL TURN OUT?

The Advocacy Forum at the 2010 AAPD Annual Session in Chicago will analyze what happened in health care reform on this topic and many others, and what it means for pediatric dentistry. Look for more details in future issues of *PDT*.

For further information contact Chief Operating Officer and General Counsel C. Scott Litch at (312) 337-2169 ext. 29 or slitch@aapd.org.