

Senate Bill Targets Insurers' Antitrust Exemption as Medical-Liability Crisis Solution

WASHINGTON 02/13/2003 (BestWire)-A bill to modify the antitrust exemption insurers have under the McCarran-Ferguson Act as a way to control rising medical-malpractice premiums has been introduced in the Senate.

"High malpractice insurance premiums are not the result of malpractice lawsuit verdicts. They are the result of investment decisions by the insurance companies and of business models geared toward ever-increasing profits," Sen. Patrick Leahy, D-Vt., said in a statement.

"An insurer that has made a bad investment, or that has experienced the same disappointments from Wall Street that so many Americans have, should not be able to recoup its losses from the doctors it insures," Leahy continued. "The insurance company should have to bear the burdens of its own business model, just as the other businesses in the economy do."

Leahy said his bill would modify the McCarran-Ferguson Act with respect to medical-malpractice insurance and address the most "pernicious" antitrust offenses--price fixing, bid rigging and market allocations.

"Only those anti-competitive practices that most certainly will affect premiums are addressed," he said. Insurers have benefitted from "a blanket exemption" from federal antitrust laws for too many years--"a benefit that is novel in our marketplace," he said.

President Bush and others in the Senate have blamed out-of-control medical litigation and frivolous lawsuits for causing medical-liability insurance premiums to skyrocket--forcing some insurance companies to stop providing the coverage and thus forcing doctors to leave some states or retire from practice.

Sens. Orrin Hatch, R-Utah, chairman of the Senate Judiciary Committee, and Judd Gregg, R-N.H., chairman of the Health, Education, Labor, and Pensions Committee, held a hearing Feb. 11 to look into the medical-liability crisis. The pair blamed "out-of-control medical litigation and frivolous lawsuits" for rising medical-malpractice premiums.

At the hearing, Texas Insurance Commissioner Jose Montemayor cited findings from a report on availability and affordability of medical professional liability insurance in Texas. The report first was delivered to his state's legislature in 2001, and it was updated last year.

"There are a number of theories regarding the current situation in medical-malpractice coverage; however, the sum of the report clearly indicates that loss trends--increasing amounts paid for claims--are the primary cause of rising costs in medical-malpractice insurance. All other causes are a distant second," Montemayor told the senators, according to a copy of his testimony.

Insurers in many states, especially Texas, are writing at significant losses, said Montemayor, who chairs the National Association of Insurance Commissioners' Property and Casualty Committee, and separately, a working group looking into medical-malpractice insurance coverage for physicians and other health-care providers on a national basis.

Texas medical-malpractice insurers have \$1.60 in losses for every dollar in premium, Montemayor said. "This trend has affected net worth, with Texas carriers realizing a negative return of 3.3% for 2000, and a negative 2% return for the 10-year period."

Bush supports a \$250,000 cap on noneconomic damages such as pain and suffering in medical-malpractice cases.

But Leahy said the Bush administration is "ignoring the central truth of this crisis--that it is a problem in the insurance industry, not the tort system."

Using their exemption, insurers can collude to set rates, resulting in higher premiums than true competition would achieve, Leahy said, and because of this exemption, enforcement officials can't investigate any such collusion.

But state insurance regulators haven't seen evidence to suggest medical-malpractice insurers have engaged or are engaging in price fixing, bid rigging or market allocation, wrote Mike Pickens, Arkansas insurance commissioner and the NAIC's president.

Pickens was responding to written questions from Gregg, who said Leahy's legislation "presumes" insurers are engaging in these practices.

"The preliminary evidence points to rising loss costs and defense costs associated with litigation as the principal drivers of medical malpractice prices. A July 2002 report prepared by the Department of Health and Human Services also cites the impact of litigation and defense costs on this line of insurance," Pickens wrote in his Feb. 7 letter to Gregg.

States have strong laws that prohibit price-fixing and anti-competitive practices by insurers, and state insurance regulators generally do have the authority to prevent antitrust violations by insurers, Pickens said, adding he wasn't aware of any recent state actions in this regard.

"Because of extremely high loss ratios in many states, regulator concerns have been with rate inadequacy, and not excessiveness or unfair discrimination," Pickens wrote. Some states are seeing difficult market conditions, but this is "by no means" widespread in all states, he said.

"We do not believe enactment of the Leahy legislation as originally drafted would change the underlying costs of malpractice claims or premiums," Pickens wrote.

Bush has given his support to a medical-liability-reform bill setting caps on punitive damages, which passed the House last year but saw no action in the Senate. It was reintroduced by Rep. James Greenwood, R-Pa., who said his bill has some 68 co-sponsors in the House. (BestWire, Feb. 11, 2003).

Leahy and several of his bill's co-sponsors--Sens. Edward Kennedy, D-Mass., Richard Durbin, D-Ill., and John Edwards, D-N.C., signed a Jan. 23, "Dear Colleague" letter calling for an end to the limited exemptions insurers have from federal antitrust laws under the McCarran-Ferguson Act as the way to address rising medical-malpractice premiums (BestWire, Feb. 6, 2003).

Joining them in sponsoring the bill are John D. Rockefeller IV, D-W.Va.; Harry Reid, D-Nev.; Barbara Boxer, D-Calif.; Russell Feingold, D-Wis.; and Jon Corzine, D-N.J.

Many state insurance commissioners police the industry well within their powers, Leahy said, and some states have antitrust laws of their own that could cover some anti-competitive activities in the insurance industry.

"Our legislation is a scalpel, not a saw," Leahy said. "It would not affect regulation of insurance by state insurance commissioners and other state regulators. But there is no reason to continue a system in which the federal enforcers are precluded from prosecuting the most harmful antitrust violations just because they are committed by insurance companies."

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