

## Public Takings of Private Health Insurance

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### **Facts:**

The Medicare for All Act of 2017 Bill (S.1804) was introduced in the US Senate on September 9, 2017.<sup>1</sup> It provides national public health insurance and ends private health insurance coverage. It lowers the Medicare age effective January 1 the first year for individuals 55 years of age; the second year for individuals 45 years of age; and the third year for individuals 35 years of age. Effective January 1 of the fourth year after the date of enactment of the Act, it becomes unlawful for a private health insurer to sell health insurance coverage that duplicates the benefits provided under the Act.

### **Issue:**

Is Senate Bill 1804 subjected to the last clause of the Fifth Amendment of the Constitution of United States which states "nor shall private property be taken for public use, without just compensation"?

### **Rule:**

The last clause of the Fifth Amendment is known as the "Takings Clause." Constitutional takings refer to the government depriving owners of their interest in private property. The takings require payment of compensation based on the value of the property.

### **Analysis:**

In 1965, the United States Congress enacted Medicare under Title XVIII of the Social Security Act to provide health insurance to people age 65 and older. In 1972, Congress passed legislation extending Medicare eligibility to individuals under age 65 with long-term disabilities or end-stage renal disease. These individuals found it nearly impossible to get private health insurance coverage due to the high cost and risk to the private health insurers.

Senate Bill 1804 extends Medicare coverage to everyone under age 65 who is a resident of the United States. Private health insurance providers are issuing policies to the majority of those under age 65 which distinguishes it from prior Medicare legislation. Medicaid is provided for lower-income individuals in this age group.

The enactment of Senate Bill 1804 without compensation would cause owners of private health insurance companies to suffer financial losses. In prior Medicare legislation, no compensation was required under the Takings Clause since there were no losses.<sup>2</sup>The Takings Clause requires that financial losses caused by public action be compensated by the government.

#### Per Se Takings

A health insurance policy is a contract between a private health insurer or a government program and individuals. The type and amount of health care costs that will be covered by the health insurance provider are specified in writing, in a member contract or "Evidence of Coverage" booklet for private insurance or in a national health policy for public insurance.

The private health insurance companies have a contract interest in health insurance policies. Interests in intangible property are subject to protection under the Takings Clause. The Supreme Court has ruled that private contract rights are "property" for the purposes of the Takings Clause and taking occurs when the government directly appropriates contract interests for itself.<sup>3</sup> In *Brooks-Scanlon Corp. v. United States*, the Court ruled that an appropriation of a contract had occurred when the government had "put itself in the shoes" of one of the contracting parties.<sup>4</sup>

*Monongahela Nav. Co. V. U S* is an example of the taking of contracts rights. An Act of Congress authorized the government to acquire and operate a lock and dam of a private navigation company. The company was a publicly traded corporation that was collecting tolls under a franchise given by a state government. The Act provided "that in estimating the sum to be paid by the United States the franchise of said corporation to collect tolls shall not be considered or estimated." The Court ruled that the franchise was as much a vested right of property as the ownership of the tangible property and just compensation requires payment for the franchise to take tolls.<sup>5</sup>

Further, Mr. Justice Black delivering the opinion of the Court in *Armstrong v. United States* stated that "the Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."<sup>6</sup>

The facts of Senate Bill 1804 support a finding of per se takings. The Fifth Amendment of the United States Constitution requires just compensation to the owners of private health insurance companies that are suffering financial losses.

#### Just Compensation

The Supreme Court has stated that the purpose of paying just compensation is to make "whole" the injured parties and that this will be accomplished by paying fair market value.<sup>7</sup> Since the government would dissolve the commercial health insurers, the fair market value is the enterprise value and not the going concern equity value. The difference is the debt which includes bonds, loans, unfunded pension liabilities and other financing or leasing obligations.

Enterprise Value = market value of common stock (market capitalization) + debt at market value + minority interest at market value + preferred equity at market value + unfunded pension liabilities – value of associate companies – cash and cash equivalents.

Nonprofit health insurers are valued by comparison with a publicly traded insurer having similar financial characteristics. The proceeds from the government to the discontinued nonprofit health insurers go into newly formed charitable foundations with a new mission.

#### Economic Impact

The Takings Clause requires that economic losses caused by public action be compensated by the government. The economic impact on the property owners is one of the regulatory takings tests found in *Penn Central Transportation Co. v. New York City*.<sup>2</sup> Regulatory taking is a governmental action that significantly restricts uses of private property to such a degree that the action effectively deprives the property owners of the economic benefits or productive uses of their property. This test is not used when the facts support a per se taking.<sup>8</sup> However, the magnitudes of the losses and types of ownership of the health insurance companies requires not only an analysis of the economic impact on the property owners but the entire economy.

Health insurance companies are some of the largest publicly traded companies listed on the American stock exchanges. The revenue ranking in the 2017 Fortune 500 includes the largest health insurance companies. Six of the health insurance companies are in the top 70 with two more added for the top 195. Compared with other companies, UnitedHealth Group is ranked 6<sup>th</sup> with General Motors ranked 8<sup>th</sup>, Ford Motor ranked 10<sup>th</sup>, Fannie Mae ranked 20<sup>th</sup>, Wells Fargo ranked 25<sup>th</sup>, and Bank of America Corp. ranked 26<sup>th</sup>.<sup>9</sup> The nonprofit health insurance organizations are not included in this ranking but three of the nonprofit health insurers are in the top 10 of health insurers by enrollment.<sup>10</sup>

The top publicly traded health insurers' ownership must also be examined. The breakdown of the shareholders for UnitedHealth Group shows 1.57% of shares held by all insider, 89.15% of shares held by institutions, 90.57% of float held by institutions, and 1,981 number of institutions holding shares.<sup>11, 12</sup> The institutional holders are investment management firms and mutual funds. These financial institutions manage funds for governments, companies, foundations, educational institution, pension plans, life insurance policies and educational savings accounts for children. The next three largest health insurers are Anthem, Humana, and Aetna. They individually have less percentage of shares held by all insider and a higher percentage of institutions holding shares.<sup>13, 14, 15</sup>

The enterprise value for all of the private health insurance companies has been estimated to be \$714 billion.<sup>16</sup> Consequently, due to the required large compensation and types of ownership, the failure to pay the enterprise value for the health insurers would cause a downward spiral leading to instability in the financial markets and a government caused financial crisis.

#### Transition

The Senate Bill 1804's Transitional Medicare Buy-in Option and Transitional Public Option program phases-in Medicare over a 4-year period for those under age 65. This incremental

approach does not take into account the Federal Government's liability to pay a just compensation for the takings of private health insurance. Partial constitutional takings' valuations can't be determined in the transition purposed in Senate Bill 1804. There are no market values and debt obligations associated with age that can be used to measure a just compensation.

In per se takings, the Federal Government can acquire the for-profit private health insurers paying the market equity value and the nonprofit insurance companies at going concern market value. Once in control, the government can dissolve the companies after properly dealing with the assets and liabilities. Thus, everyone under 65 years of age will be in a newly created single risk pool with its own Trust Fund starting January 1st of the effective year. The Federal Hospital Insurance Trust Fund and the Federal Supplementary Medical Insurance Trust Fund (including the Medicare Prescription Drug Account within such Trust Fund) remain separate for those 65 and older.

### **Conclusion:**

The Medicare for All Act of 2017 Bill (S.1804) is subjected to the last clause of the Fifth Amendment of the United States Constitution which states "nor shall private property be taken for public use, without just compensation." In per se takings, the Federal Government pays the enterprise value which is the just compensation for owners and debtholders in the dissolution of health insurance companies

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