

## *Antitrust in Healthcare Under Reform*

Approved 20 to 9 by the House Judiciary subcommittee, the “Health Insurance Industry Antitrust Enforcement Act of 2009” (H.R. 3596) will, if passed, partially repeal the exemption from federal antitrust laws that health and medical malpractice insurers have enjoyed since the 1945 passage of the McCarran-Ferguson Act.<sup>1</sup> Introduced in September by Rep. John Conyers Jr. (D-MI), H.R. 3596 will strengthen the ability of the federal government to prevent insurers from engaging in price fixing, bid rigging, or market allocations that deter competition and impair consumers.<sup>2</sup> Contemporaneously, a companion bill (S. 1681) has been introduced in the Senate; the first committee hearing for that bill occurred on October 14.<sup>3</sup>

The McCarran-Ferguson Act prevents Congress from preempting state laws by imposing federal antitrust laws on insurance companies.<sup>4</sup> While the Act exempts all types of insurance providers, the application of the Act to the healthcare industry has drawn particular criticism from the DOJ and lawmakers, who claim that the exemption has led to anticompetitive behavior which has resulted in higher healthcare costs to both providers and patients.<sup>5</sup> Legislators behind both bills are motivated by soaring insurance costs and increasing numbers of uninsured Americans, and note that this repeal signifies the first step in a continuing evaluation of the antitrust system.<sup>6</sup>

Republicans worry that the bill represents the beginning of broad-scale repeal of the McCarran-Ferguson Act, which limits federal scrutiny of insurers and places states in primary control of antitrust enforcement. State legislation is preserved in the bill, but supporters claim it is insufficient to stop the abusive acts of the healthcare industry.<sup>7</sup> The ABA spoke out in support of the bill and added that exemptions should be repealed for the entirety of the insurance industry and replaced with a series of safe harbor protections for certain procompetitive conduct.<sup>8</sup> By contrast, opponents of the repeal argue that states have done a good job to prevent anticompetitive behavior by insurers, and that there is no conclusive evidence that such repeal will have any positive impact on the insurance industry.<sup>9</sup>

Beyond the repeal of the insurance company exemption, these two bills demonstrate the beginning of potential widespread impact of health reform on antitrust

enforcement. In July, FTC Director of Competition, Richard A. Feinstein, testified before the Senate Subcommittee on Consumer Protection, Product Safety, and Insurance to advocate for the role of the FTC’s antitrust enforcement authority to prevent anticompetitive agreements that drive up the cost of care and help spur innovation to improve quality and access.<sup>10</sup> This understanding of the connection between antitrust, lower costs, and higher quality healthcare was echoed Carnegie Mellon economics and health policy professor, Martin Gaynor, as well as by staff members of the Medicare Payment Advisory Commission (MedPAC), who testified before MedPAC on the impact of consolidation of healthcare providers on private payors and the Medicare program.<sup>11</sup> Both parties expressed concern that provider consolidation, through horizontal integration (e.g., mergers between hospitals) and vertical integration (e.g., integration between hospitals and physicians), may create market power in some areas, potentially leading to higher prices and higher costs which could negatively impact patient access under Medicare, among other problems. While vertical integration can result in more efficient delivery of services and better negotiating power vis-à-vis health insurers, Gaynor cautioned that integration of this sort can also be anticompetitive in markets that don’t have enough competition between both hospitals and physicians.<sup>12</sup>

As legislators continue to focus on reducing the cost of healthcare while improving quality and access, antitrust enforcement is likely to take on a larger role in the healthcare sector. As described in “The Next Antitrust Agenda,” published by the American Antitrust Institute in 2008, healthcare antitrust enforcement in the past has been lax or non-existent, noting over 400 health care mergers occurred resulting in significant consolidation of the insurance industry.<sup>13</sup> With the promotion of a “public option” as part of healthcare reform legislation, however, the focus has been placed on the benefits of competition in the healthcare insurance marketplace, and the proposed repeal of the McCarran-Ferguson Act shows how legislators will continue work to improve competition throughout the sector in an effort to reduce costs and improve quality.

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- <sup>1</sup> “Health Insurance Industry Antitrust Enforcement Act of 2009” H.R. 3596, [opencongress.org](http://www.opencongress.org), [http://www.opencongress.org/bill/111-h3596/actions\\_votes](http://www.opencongress.org/bill/111-h3596/actions_votes) (Accessed 10/30/09).
- <sup>2</sup> “House Committee Reports Measures to End Insurers’ Antitrust Exemption” By Tiffany Milone, BNA Health Law Reporter, 18 HLR 1431, October 29, 2009; “House Panel Launches Hearings on Bill Limiting Insurers’ Use of Antitrust Exemption” BNA Health Law Reporter, 18 HLR 1362, October 15, 2009.
- <sup>3</sup> “Health Insurance Industry Antitrust Enforcement Act of 2009” S.1681, [opencongress.org](http://www.opencongress.org), [http://www.opencongress.org/bill/111-s1681/actions\\_votes](http://www.opencongress.org/bill/111-s1681/actions_votes) (Accessed 10/30/09).
- <sup>4</sup> “The McCarran Ferguson-Act,” 15 U.S.C. § 1011 (2006); “House Panel Launches Hearings on Bill Limiting Insurers’ Use of Antitrust Exemption,” Bureau of National Affairs Health Law Reporter, Vol. 18, No. 40, Oct. 15, 2009, P. 1362.
- <sup>5</sup> “Senate Panel Hearing Airs Criticisms of Health, Malpractice Insurer Exemption,” By Cecelia M. Assam, Bureau of National Affairs Health Law Reporter, Vol. 18, No. 41, Oct. 22, 2009, p. 1397.
- <sup>6</sup> “House Panel Launches Hearings on Bill Limiting Insurers’ Use of Antitrust Exemption” BNA Health Law Reporter, 18 HLR 1362, October 15, 2009.
- <sup>7</sup> “House Panel Approves Bill Curbing Insurers’ Antitrust Exemption” By David M. Herszenhorn, New York Times, October 21, 2009.
- <sup>8</sup> “House Panel Launches Hearings on Bill Limiting Insurers’ Use of Antitrust Exemption” BNA Health Law Reporter, 18 HLR 1362, October 15, 2009.
- <sup>9</sup> “House Panel Launches Hearings on Bill Limiting Insurers’ Use of Antitrust Exemption,” Bureau of National Affairs Health Law Reporter, Vol. 18, No. 40, Oct. 15, 2009, P. 1362; “Senate Panel Hearing Airs Criticisms of Health, Malpractice Insurer Exemption,” By Cecelia M. Assam, Bureau of National Affairs Health Law Reporter, Vol. 18, No. 41, Oct. 22, 2009, p. 1397.
- <sup>10</sup> “FTC Testifies on Importance of Competition and Antitrust Enforcement to Lower-Cost, Higher-Quality Health Care,” FTC Press Release, July 16, 2009, <http://www.ftc.gov/opa/2009/07/healthcare.shtm> (Accessed 11/3/09).
- <sup>11</sup> “MedPAC Examines Provider Consolidation, Impacts on Hospital, Physician Competition,” BNA Health Law Reporter, 18 HLR 1363, Oct. 15, 2009.
- <sup>12</sup> “MedPAC Examines Provider Consolidation, Impacts on Hospital, Physician Competition,” BNA Health Law Reporter, 18 HLR 1363, Oct. 15, 2009.
- <sup>13</sup> “Competition in the Unhealthy Health Sector” Edited by Albert A. Foer, The Next Antitrust Agenda: The American Antitrust Institute’s Transition Report on Competition Policy to the 44th President of the United States, Vandeplas Publishing, August 28, 2008, p.320.



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