



Unlocking Competition

The Need to Eliminate the Antitrust Exemption for Health Insurers

David Balto and Stephanie Gross | October 28

Competition is the lodestar of the marketplace. Where competition thrives, consumers benefit from numerous choices, low prices, superior service, and innovation. But where competition is absent, consumers pay more for less, have fewer choices, and are at the mercy of market participants with unbridled power. Bringing competition to health insurance markets is essential to achieve meaningful health care reform, and as a first step Congress should eliminate the antitrust exemption that prevents effective federal enforcement against health insurers.

It is becoming clear in the health care debate that health insurance markets are broken. A tsunami of health insurance mergers has led to high levels of concentration in practically every market to the point where there are only one or two dominant insurers in many states. New companies face substantial entry barriers, and so these local monopolies go unchallenged.

Lack of competition has led to supracompetitive profits, an escalating number of uninsured, an epidemic of deceptive and fraudulent conduct, and rapidly escalating costs. Over 47 million Americans are now uninsured, and premiums have risen over 120 percent in the past decade for those who do have coverage.¹ Health insurers engage in an endless list of deceptive, fraudulent, and unfair practices that deny millions of consumers adequate coverage. And meanwhile, 10 of the largest health insurers saw their profits balloon from \$2.4 billion in 2000 to \$13 billion in 2007.²

Yet the health insurance industry is one of only two industries that are exempt from federal antitrust laws (baseball is the other). The McCarran-Ferguson Act, passed in 1945, effectively grants all insurers an exemption from federal antitrust or consumer protection enforcement. House Judiciary Chairman John Conyers and Senate Judiciary Chairman Patrick Leahy have proposed to rescind the exemption for health and medical malpractice insurers. And last week the House Judiciary Committee passed the proposed repeal. Eliminating this exemption is a necessary first step in adding much-needed oversight to the health insurance industry.

State enforcement is insufficient to protect consumers and competition

A lack of federal oversight and the insurers' successful battle against regulation has given insurers great latitude to invent deceptive and fraudulent schemes to harm consumers. Insurers engage in a veritable laundry list of misleading and abusive conduct such as egregious preapproval provisions, deception about scope of coverage, unjustifiably denying or reducing payments to patients and physicians, and other coercive conduct.

Some opponents of reform argue that it is appropriate to leave health insurance regulation to the states, and that state insurance commissioners can effectively police health insurers' antitrust and consumer protection violations. This could not be farther from the truth. The state insurance commissioners have never brought any actions against anticompetitive conduct, and they have brought relatively few consumer protection actions.

State insurance commissioners are charged with a wide variety of tasks and do not necessarily have the resources to fully address insurers' many types of fraudulent conduct. A small handful of states might have adequate resources to police health insurers, while residents of a neighboring state might not enjoy any meaningful protection at all. Karen Pollitz, professor at the Georgetown University Health Policy Institute, observed in testimony before the House Oversight Committee that "State regulators necessarily focus primarily on licensing and solvency. Dedicated staff to oversee consumer protections in health insurance are limited." Health insurance is not necessarily a high priority. Professor Pollitz noted that "In four states, the insurance commissioner is also the fire marshal."³

A recent Center for American Progress survey of actions by state insurance commissioners found only extremely limited and sporadic enforcement by state insurance commissioners.⁴ There were no antitrust actions brought by state insurance commissioners. And a third of the states brought no significant consumer protection actions. Over 10 percent of the remaining states only participated in multi-state actions.

Those states that need an active insurance regulator the most—ones dominated by a single insurer—rarely bring enforcement actions. In six of the seven most concentrated markets for health insurance—Rhode Island, Alabama, Maine, Alaska, Hawaii, and Montana—the state Department of Insurance has taken no significant consumer protection actions against health insurers in the past five years.⁵

State insurance laws are not an adequate substitute for federal antitrust and consumer protection laws. State actions are laudable, but state enforcement is episodic and can only repair a problem involving a single company in a single state. And employer-sponsored health plans account for over 40 percent of the private health insurance market but are not subject to state regulation at all. As Chairman Conyers recently put it, "Although state regulation of this industry is crucial and is preserved in this bill, it has proved insufficient to prevent these particularly abusive practices."

Trying to fix these endemic problems in the health insurance market with sporadic state enforcement is like treating cancer with a bushel of Band-Aids. That is why it is necessary to eliminate the McCarran-Ferguson antitrust exemption.

The McCarran-Ferguson exemption is a serious impediment to effective federal antitrust and consumer protection enforcement

Testimony from recent congressional hearings demonstrates that there is little dispute that the health insurance industry desperately needs effective federal antitrust and consumer protection enforcement. Several congressional committees have held hearings documenting health insurers' fraudulent and deceptive practices in detail. Substantial regulatory reform and enforcement is necessary.⁶ But the McCarran-Ferguson exemption arguably prevents federal enforcement for any area regulated by the states.

The McCarran-Ferguson Act can be a serious obstacle to effective federal antitrust or consumer protection enforcement. The leading antitrust treatise notes that under the McCarran-Ferguson Act “the presence of even minimal state regulation, even on an issue unrelated to the antitrust suit, is generally sufficient to preserve the immunity.”⁷ As Assistant Attorney General for Antitrust Christine Varney recently testified, “The case law can be read as suggesting that the act precludes federal antitrust action whenever there is a state regulatory scheme, regardless of how perfunctory or ineffective it may be.” She noted that the exemption is so broad that “the most egregiously anticompetitive claims, such as naked agreements fixing price or reducing coverage, are virtually always found immune.” That is why the Justice Department has called for the elimination of the exemption. The Antitrust Modernization Commission, a bipartisan commission appointed by President George W. Bush, also supported eliminating the exemption.⁸

Some may suggest that repealing the exemption will prevent health insurers from engaging in certain types of procompetitive activity, such as information sharing to properly assess risk. Yet there is relatively little evidence to suggest that the health insurance industry uses the exemption for this purpose. Even if they do, an antitrust exemption is unnecessary for this type of information sharing—it may have been illegal when the McCarran-Ferguson Act was enacted 62 years ago, but that is no longer the case. As Assistant Attorney General Varney noted, “Some forms of joint activity that might have been prohibited under earlier, more restrictive doctrines are now clearly permissible, or at very least analyzed under a rule of reason that takes appropriate account of the circumstances and efficient operation of a particular industry. Thus, there is far less reason for concern that overly restrictive antitrust rulings would impair the insurance industry's efficiency.”⁹

Others may allege that removing the exemption will not improve competition because health insurers are not currently engaging in collusive conduct. We do not know if that is true since there has been so little enforcement against health insurers. But even if it is true, it misses the point.

Health insurers probably do not need to collude because most markets are dominated by only one or two insurers. Even if health insurance markets are not fully competitive, eliminating the exemption is important for the future of health insurance competition. One of the goals of health care reform is to begin to open health insurance markets to competition. If the McCarran-Ferguson exemption continues to exist, it will protect health insurers' efforts to kill that competition through market divisions, price fixing, and other anticompetitive conduct. As Varney observed, "[r]epealing the McCarran-Ferguson Act would allow competition to have a greater role in reforming health and medical malpractice insurance markets than would otherwise be the case."¹⁰

The Obama administration needs to strengthen health insurance antitrust and consumer protection enforcement

Eliminating the McCarran-Ferguson Act is an important first step toward bringing market discipline to health insurance markets. But the Obama administration needs to go farther. The Department of Justice and Federal Trade Commission will not start taking action against health insurers' egregious practices without a change in priorities. The Bush administration took no federal enforcement actions against anticompetitive conduct by health insurers, and the FTC has not brought a single case against deceptive or fraudulent conduct by health insurers. The Bush administration reviewed numerous mergers, but approved all of them, requiring some modest restructuring in two mergers. Establishing a proactive antitrust and consumer protection enforcement agenda is necessary for effective health care reform. Here are five suggestions:

Marshal competition and consumer protection enforcement resources to focus on insurers' anticompetitive, egregious, and deceptive conduct. The health insurance market is broken, and the evidence strongly suggests a pervasive pattern of deceptive and egregious practices. Health insurance markets are extremely concentrated, and the complexity of insurance products and opaque nature of their practices make these markets a fertile medium for anticompetitive conduct.

Create a vigorous health insurance consumer protection enforcement program. The Federal Trade Commission's health care consumer protection enforcement currently focuses solely on companies that market clearly sham and deceptive products. This is unfortunate. In many other areas, such as financial services, the FTC uses a broad range of powers, including studies, workshops, policy hearings, legislative testimony, and industry conferences to better inform marketplace participants of how to properly abide by the law. The FTC should adjust its health care consumer protection enforcement to focus on health insurers and other health care intermediaries such as pharmacy benefit managers. These efforts should focus on enforcement to prevent egregious and fraudulent practices, and assure that there is a sufficient amount of information and choice so that consumers

can make fully informed decisions. The FTC should establish a new division for health insurance consumer protection because of the importance of these issues, especially in controlling health care costs.

Reinvigorate enforcement against anticompetitive conduct. The DOJ and FTC need to reinvigorate enforcement against health insurers' anticompetitive conduct. The FTC should scrutinize anticompetitive conduct and use its powers under Section 5 of the FTC Act. Section 5 of the FTC Act can attack practices that are not technical violations of the traditional antitrust laws—the Sherman and Clayton Acts. The FTC can use that power under Section 5 to address practices that may not be technical violations of the federal antitrust laws, but still may be harmful to consumers. It should begin to use that power by attacking a wide range of anticompetitive and egregious practices by health insurers, pharmacy benefit managers, and group purchasing organizations.

Strengthen health insurance merger enforcement and conduct a retrospective study on consummated health insurance mergers. There was significant consolidation in health insurance markets during the Bush administration. If the FTC and/or Justice Department lacks sufficient resources to effectively challenge anticompetitive mergers, the Obama administration should give them those resources. If the current merger standards are not appropriate to effectively challenge these mergers, those standards should be reevaluated. The public cannot afford any greater consolidation in health insurance markets.

Conduct a retrospective study of health insurer mergers. One approach to this issue would be for the FTC or the DOJ to conduct a study of consummated health insurer mergers. One of the Bush administration's significant accomplishments was a retrospective study of consummated health insurance mergers by the Federal Trade Commission. This study led to an important enforcement action in Evanston, Illinois, which helped to clarify the legal standards and economic analytical tools for addressing health insurance mergers. A similar study of consummated health insurance mergers would help to clarify the appropriate legal standards for health insurance mergers and identify mergers that have harmed competition.

Conclusion

Health insurance markets need a tremendous infusion of competition and transparency to help eliminate deceptive, fraudulent, and egregious practices. The antiquated McCarran-Ferguson Act leaves antitrust and consumer protection enforcement to the states, which frequently lack sufficient resources to reign in powerful national insurers. Consumers are consequently left to the mercy of dominant insurers. Restoring competition and consumer protection enforcement is essential to meaningful reform. Eliminating the McCarran-Ferguson exemption is an important first step to allowing the lodestar of competition provide guidance in health insurance markets.

Endnotes

- 1 The Kaiser Family Foundation, available at www.kff.org
- 2 Health Care for America Now, "Premiums Soaring in Consolidated Health Insurance Market: Lack of Competition Hurts Rural States, Small Businesses" (2009) available at http://hcfan.3cdn.net/dadd15782e627e5b75_g9m6isltl.pdf.
- 3 Karen Pollitz, "On Transparency in Health Insurance," Testimony before the Oversight and Government Reform Committee, Subcommittee on Domestic Policy, "Between You and Your Doctor: the Bureaucracy of Private Health Insurance," September 16, 2009, available at <http://groc.edgeboss.net/download/groc/domesticpolicy/preparedtestimonyofms.karenpollitz.pdf>
- 4 David Balto and Stephanie Gross, "Don't Leave it to the States" (Washington: Center for American Progress, 2009) available at http://www.americanprogress.org/issues/2009/10/health_oversight.html.
- 5 Health Care for America Now, "Premiums Soaring in Consolidated Health Insurance Market: Lack of Competition Hurts Rural States, Small Businesses."
- 6 See: House Committee on Oversight and Government Reform Hearing, September 15, 2009, available at <http://domesticpolicy.oversight.house.gov/story.asp?ID=2589>; Senate Committee on Commerce, Science & Transportation Hearing, June 24, 2009, available at http://commerce.senate.gov/public/index.cfm?FuseAction=Hearings.Hearing&Hearing_ID=6f02dcc8-ad5b-445c-81ca-36c9b06ebdd5.
- 7 Phillip E. Areeda and Herbert Hovenkamp, *Antitrust Law*, ¶ 219c, at 25 (3d ed. 2006).
- 8 Christine Varney, Testimony before the Senate Committee on the Judiciary, "Prohibiting Price Fixing and Other Anticompetitive Conduct in the Health Insurance Industry," October 14, 2009.
- 9 *Ibid.*
- 10 *Ibid.*