

The Antitrust Coalition For Consumer Choice in Health Care
1150 17th Street, N.W.
Suite 601
Washington, D.C. 20036

April 12, 2002

Dear Member of Congress:

Legislation was recently introduced that would grant physicians special antitrust treatment, making their egregious anticompetitive conduct subject to a very lenient standard of antitrust review. Presently, when physicians who independently compete against each other in the marketplace discuss prices, form cartels, engage in group boycotts, or act in concert, current law regards these actions as indefensibly anticompetitive and therefore per se illegal.

The Antitrust Coalition for Consumer Choice in Health Care – a broad consortium of employers, health plans, health care professionals, and others involved in the purchase, management, and delivery of health care services – respectfully urges members of the 107th Congress to oppose this legislation, H.R. 3897. The “Health Care Antitrust Improvements Act” would create a virtual antitrust exception for physicians who wish to engage in presently illegal antitrust violations.

The bill would make a number of significant, and harmful, changes in antitrust law. First, H.R. 3897 would require that the actions of two or more health professionals taken in connection with their negotiations with a health plan be examined under the “rule of reason.” That means anticompetitive conduct that the law otherwise regards as against the interests of consumers would have to be judged as to its reasonableness, in light of several factors. In other words, the law regards some acts as fundamentally anticompetitive and contrary to consumer interests; the fact that they occur is presently against the law. However, this bill would set a lower standard for doctors, making what is automatically illegal suddenly possibly legal if it is “reasonable” within a range of circumstances. Such a requirement would tie the hands and tie up the resources of antitrust enforcers. The result would be a lack of sufficient scrutiny in many instances.

Second, H.R. 3897 would establish a useless notification process. Cartels would have to give the Department of Justice notice of their formation for negotiating with a given health plan. However, the notification would serve no purpose other than to relieve the bargaining group of potential liability damages beyond actual damages and interest. The notification process envisioned by the bill would lack any active oversight role on the part of antitrust enforcement agencies. In fact, a recent agreement between the Federal Trade Commission and DOJ, the agencies with antitrust jurisdiction, gives the FTC enforcement responsibility for health care, not DOJ. Thus, health care consumers would stand unprotected by their government and would suffer the consequences of unregulated, less scrutinized contract negotiations.

Third, this bill would limit consumer choice in the health care market by restricting the ability of health plans to enable patient access to a wide range of doctors. Currently, health plans try to ensure that patients in all their insurance options have access to an adequate number of doctors in all parts of the market, by specialty, etc. But this legislation would serve to reduce that access.

Fourth, H.R. 3897 would foster anticompetitive tactics to eliminate certain consumer protections in many health insurance contracts. Contractual provisions often prohibit “balance billing,” the charging of patients above what their insurance pays. This legislation would turn the elimination of these consumer protections into negotiation demands, thus leaving patients exposed to additional out-of-pocket costs.

Fifth, the clear adverse consequences for patients, should H.R. 3897 become law, would include higher health care costs, fewer choices, and less access to health coverage. At a time when health costs have been rising markedly, this bill would cause costs to rise even higher. The number of uninsured would undoubtedly rise because of this legislation’s cost effects.

Though the bill seeks to exempt federal health programs, so did similar legislation in the 106th Congress. However, the Congressional Budget Office estimated that that bill would reduce federal tax revenues by \$3.6 billion over 10 years and significantly raise the cost of Medicaid, S-CHIP, and FEHBP.

Employers would face difficult choices in the face of higher premiums, including having to restrict the types of health plans purchased and to reduce the scope of coverage provided. Nonphysician providers would face subtle exclusionary practices, such as new contract demands that effectively put nonphysician providers at a tremendous competitive disadvantage; therefore, consumers and patients would have fewer choices for the treatment needed. Rural areas would suffer even more pronounced effects because of the substantial market power the fewer doctors there already exercise.

In the previous Congress, proponents of a similar bill, H.R. 1304, claimed legislation was needed to permit physicians to negotiate effectively with insurers and managed care plans. Nothing could be further from the truth. Physicians who are financially integrated are permitted to negotiate collectively with health plans under current law. What is illegal is for doctors who are competitors and not financially integrated to engage in price-fixing, group boycotts, and other anticompetitive conduct free from the oversight of any regulatory agency. H.R. 3897, like H.R. 1304 last year, would limit the FTC’s authority to provide oversight protection for consumers and patients from such obvious harmful conduct by physician organizations.

The current legislation, H.R. 3897, though repackaged, suffers the same fundamental flaws and would inevitably lead to the same adverse results. Therefore, the Antitrust Coalition urges Congress to oppose this legislation.

Sincerely,

American Academy of Nurse Practitioners
American Association of Nurse Anesthetists
American College of Nurse-Midwives
American Nurses Association
Employers Health Care Coalition of Los Angeles
Health Insurance Association of America
National Association of Health Underwriters
National Business Coalition on Health
Pharmaceutical Care Management Association
Aetna Incorporated
First Health
Principal Financial Group
WellPoint Health Networks

American Association of Health Plans
American Benefits Council
American Insurance Association
Blue Cross Blue Shield Association
ERISA Industry Committee
Healthcare Leadership Council
National Association of Manufacturers
National Retail Federation
US Chamber of Commerce
CIGNA Corporation
Mutual of Omaha
United Health Group