Make the Market Work for Health Care

SOURCE: AP/Matt Rourke

A pedestrian walks past the headquarters of the health insurer Cigna Corp. in Philadelphia.

By David Balto | February 9, 2010

If anything is clear from the months of health care debate, it is that health insurance markets are broken. A number of congressional hearings documented how health insurance markets are highly concentrated, there is a tremendous lack of transparency, and there is a shortage of effective regulation.

Lack of competition has led to supracompetitive profits for insurance companies and an epidemic of deceptive and fraudulent conduct, while an escalating number of Americans are uninsured and struggle to cope with rapidly escalating costs. More than 47 million Americans are now uninsured, and premiums have risen over 120 percent in the past decade for those who do have coverage. Ten of the largest health insurers meanwhile saw their profits balloon from $2.4 billion in 2000 to $13 billion in 2007.

The health insurance industry has inexplicably enjoyed an exemption from the federal antitrust laws. Congress enacted the exemption in 1945 and has long outlived any utility. Indeed, health insurers cannot point to any type of pro-competitive conduct that they are able to engage in because of the exemption. Exemptions to the antitrust laws are rare and indeed only insurance and baseball have an antitrust exemption.

Representatives Tom Perriello (D-VA) and Betsy Markey (D-CO) last week introduced legislation to repeal the health insurance industry's long-outdated antitrust exemption. Eliminating this exemption is a necessary first step to restoring competition to these markets.

Why is eliminating this exemption important?

The antitrust exemption is absolute

An antitrust exemption is absolute. Health insurers could, under the current law, engage in numerous forms of price fixing, market allocations, or other forms of collusive activity, and they may. To a certain extent, they do not have to because most metropolitan markets are dominated by one or two insurers, and there is no need to collude when a firm has a monopoly.

The antitrust exemption could negate reform efforts

The health reform bills that have passed the House and Senate are designed to create a more competitive and consumer-friendly insurance marketplace. Insurance exchanges, market reforms, and new transparency requirements on coverage and cost-sharing structures will help consumers find and purchase cost-effective, high-quality coverage. Allowing an outdated antitrust exemption to undermine these important reforms would be a terrible mistake. If this exemption continues to exist, insurance companies can easily kill any form of new competition through market allocations, price fixing, or other collusive arrangements.

The antitrust exemption prevents antitrust enforcement

Eliminating the exemption is necessary for the type of substantial antitrust enforcement that is long overdue in health insurance markets. Unfortunately, there has been very little state or federal antitrust enforcement. Neither the Justice Department, state insurance commissioners, nor state attorneys generals have brought any significant cases against anticompetitive conduct by health insurers in the past several years. The McCarran-Ferguson exemption may be an obstacle to increased enforcement; as Assistant Attorney General Christine Varney has noted, "the most egregiously anticompetitive claims such as naked agreements, fixing price, or reducing coverage are virtually always found immune [under the exemption]."

The antitrust exemption prevents federal consumer protection

The McCarran-Ferguson exemption appears to be an obstacle to federal consumer protection against health insurers. State Departments of Insurance currently have jurisdiction over consumer protection violations by the health insurers in their states. Unfortunately, only a handful of states are equipped to address these practices, and states'

budget crises are only exacerbating the problem. I found in a study of 33 states' Departments of Insurance's enforcement activity regarding health insurers that the vast majority of consumer protection actions were from only five states. Over a third of states examined had taken no significant consumer protection actions, and the state insurance commissioner had taken no significant consumer protection actions in six of the seven most concentrated markets for health insurance. The most competitive markets for health insurance—California and Florida—also had the most active regulators. State enforcement of these violations is erratic at best, and a federal enforcer should instead be charged with regulating health insurers. The FTC has been remarkably effective at protecting consumers from deceptive and fraudulent activity in practically every other market. The FTC's involvement in health care markets has for too long been limited to marketers of sham products, such as deceptive weight-loss drugs. This is unfortunate. The FTC should focus its consumer protection and antitrust enforcement efforts on industries where there is the most consumer harm. If the health care debate has accomplished anything in the past year, it certainly has taught us that the health insurance market is riddled with consumer neglect and competition is sorely lacking. The FTC's enforcement power needs to be focused on health insurers where fraudulent and deceptive practices are legion.

Nothing pro-competitive will be lost by eliminating the exemption

The McCarran-Ferguson exemption does not assist consumers in any fashion. Life insurers typically use the exemption to share historical loss data to assess risk. Health insurers do not use the exemption to engage in this type of information sharing. And such conduct is clearly permissible under the current antitrust laws if it is properly structured—no exemption is needed. If health insurers needed to, they could easily gain a business review letter from the Department of Justice or find another way to engage in information sharing within the confines of the antitrust laws, which have permitted a wide variety of information sharing over the past 40 years. Health insurers cannot point to any other type of activity they engage in because of the exemption. There is simply nothing pro-competitive that will be lost from the elimination of the exemption.

This is an important point. Antitrust exemptions are extraordinary and have typically been permitted only where industries demonstrate some compelling market failure to make the exemption necessary. The burden of preserving the exemption should be placed on the health insurance industry and to date they have failed to present a single justification for the exemption.

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 rein 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 to guide health insurance markets.

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