

3-2010

Medical Malpractice Insurers: Time to End Their License to Gouge

Joanne Doroshow



Joanne Doroshow, Contributor

Executive Director, Center for Justice & Democracy at New York Law School

Medical Malpractice Insurers: Time to End Their License to Gouge

03/18/2010 05:12 am ET **Updated** May 25, 2011

In 1945, Congress gave the massively powerful insurance industry an astonishing gift. It bestowed on them the freedom to do what would be illegal in every other industry (save, strangely, Major League Baseball) — fix-prices, collude and practice anti-competitive behavior. Now there's a movement afoot to repeal this extraordinary law, called the McCarran-Ferguson Act, which Senate Majority Leader Harry Reid (D-NV) testified recently, "has been damaging to the American economy."

All this begs an important question, though — did no one notice before? Was this extraordinary privilege, granted over 60 years ago, buried in an obscure volume of the federal code that we are just now discovering? Well, no. Actually, consumer advocates have been noticing it for a long time. Clearly, it's taken the movement to reform health care to finally put it on people's radar. But the lack of notice until now hasn't been for lack of trying.

Laws to repeal this anti-trust exemption have been introduced in every Congress for many years. The industry has fought back every time and nothing was ever really accomplished — until now. Now that affordable health insurance has become the driving force behind repeal of this law, it's getting somewhere. Bills exist in both Houses of Congress and are beginning to be reported out of committee faster than you can say "price-fix."

But the McCarran-Ferguson Act covers a few different sectors of the insurance industry, and health is just one of them. Another significant sector is property/casualty. That's the sector that covers all liability insurance — your auto insurance, homeowners policies, and commercial lines, as well. The insurance that doctors purchase to cover medical malpractice is part of this property/casualty sector.

For years now, doctors have been screaming about their medical malpractice insurance rates. But organized medicine and insurance executives always blame everyone else for charging doctors' exorbitant rates. They especially like to point the finger at judges, juries,

and injured patients, blaming them for insurers' decisions to raise rates even though claims and payouts have dropped like a rock over the last several years. That doesn't seem to matter. They still tell lawmakers that the only way to bring rates under control is to strip away patients' rights to go to court.

We are hearing about that now, as the push for so-called "tort reform" has become part of the health care discussion. Sick and injured patients, after all, are the perfect insurance industry scapegoats. Even President Obama is talking about it, directing HHS to set up a panel to explore "tort reform" ideas, which met for the first time on October 26. But consumer advocates have always known that limiting the legal rights of patients is no answer, and that the insurance industry itself is responsible for the price-gouging of doctors. The anti-trust exemption, which leads to skyrocketing rates and profiteering within the property/casualty insurance sector, allows this to happen.

It's fascinating to watch the insurance industry try to justify 60 years of anti-competitive behavior. The medical malpractice insurers are doing their best, that's for sure. They want medical malpractice "removed from the bill," according to insurance lobbyist Larry Smarr, president of the Physician Insurers Association of America, who testified that "market conduct abuses" never happen in the medical liability industry, and that repealing the most anti-competitive law in the nation would, in his words, "undermine competition."

Whatever their tactic and latest form of utterly absurd double speak, it's crucial that when Congress does repeal the McCarran-Ferguson Act, the medical malpractice industry is not left out. The Consumer Federation of America predicts that repealing this law for medical malpractice insurers could result in a 20 percent insurance savings for doctors.

Let's finally see what happens once the industry is prevented from colluding and price-fixing, once insurer-supported "rate bureaus" that tell insurers what rates to charge are outlawed, and when the pressure to take away the right of injured patients is diminished. Maybe, finally, people will understand that it's not only unfair, but also ineffective, to try to reform insurance abuses on the backs of malpractice victims. When it comes to real health care reform, that seems like a good place to start.