

108TH CONGRESS
1ST SESSION

H. R. 1120

To ensure and foster continued patient safety and quality of care by clarifying the application of the antitrust laws to negotiations between groups of health care professional and health plans and health care insurance issuers.

IN THE HOUSE OF REPRESENTATIVES

MARCH 6, 2003

Mr. BACHUS (for himself, Mr. CONYERS, Mr. HOEFFEL, Mr. RANGEL, and Mr. RAHALL) introduced the following bill; which was referred to the Committee on the Judiciary

A BILL

To ensure and foster continued patient safety and quality of care by clarifying the application of the antitrust laws to negotiations between groups of health care professional and health plans and health care insurance issuers.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE; FINDINGS.**

4 (a) SHORT TITLE.—This Act may be cited as the
5 “Health Care Antitrust Improvements Act of 2003”.

6 (b) FINDINGS.—Congress finds the following:

1 (1) A large number of Americans receive their
2 health care coverage from managed health care
3 plans. This represents a 10-fold increase over the
4 last 20 years.

5 (2) The market power of insurance companies
6 has increased tremendously since the early 1990's.
7 Since 1995, there have been 321 announced man-
8 aged care mergers and acquisitions. This unprece-
9 dented consolidation has provided health plans with
10 significant leverage over health care professionals
11 and patients in determining the scope, coverage, and
12 quality of health care in this country.

13 (3) Health plans, because of the concentration
14 and exertion of market and economic power, system-
15 atically and improperly manipulate the practice of
16 medicine through such mechanisms as inappropri-
17 ately making medical necessity determinations,
18 down-coding and bundling, knowingly denying and
19 delaying payment, and engaging in a variety of prac-
20 tices that may affect the continuity and quality of
21 patient care.

22 (4) In 1992, Congress considered legislation ad-
23 dressing various antitrust issues within the health
24 care industry that were problematic for health care
25 providers and patients. Most of the legislation was

1 incorporated into the revised Statements of Anti-
2 trust Enforcement Policy in Health Care, issued by
3 the Department of Justice and the Federal Trade
4 Commission in August 1996. While the “safe har-
5 bor” guidance for physicians contained in the State-
6 ments was a good first step in addressing this mar-
7 ket imbalance, it does not provide adequate param-
8 eters for the roughly 54 percent of self-employed and
9 small physician group practices to interact, share in-
10 formation, and effectively and fairly negotiate with
11 health plans.

12 (5) The intent of the antitrust laws is to en-
13 courage competition and protect the consumer, and
14 the current per se standard for enforcing the anti-
15 trust laws in the health care field frequently does
16 not achieve these objectives.

17 (6) An application of the rule of reason to
18 health care professionals’ business activities and
19 interactions with health care plans will tend to pro-
20 mote both competition and high-quality patient care.

21 (7) An application of the rule of reason to
22 health care professionals’ business activities and
23 interactions with health plans will not change the
24 professionals’ ethical duty to continue to provide
25 medically necessary care to their patients.

1 **SEC. 2. APPLICABILITY OF RULE OF REASON STANDARD.**

2 In any action under the antitrust laws challenging the
3 efforts of 2 or more physicians or other health care profes-
4 sionals to negotiate with a health plan, the conduct of such
5 physicians or health care professionals shall not be deemed
6 illegal per se, but shall be judged on the basis of its rea-
7 sonableness, taking into account all relevant factors affect-
8 ing competition, including patient access to health care,
9 the quality of health care received by patients, and con-
10 tract terms or proposed contract terms.

11 **SEC. 3. AWARD OF ATTORNEY'S FEES AND COSTS OF SUIT.**

12 Notwithstanding sections 4(a) and 16 of the Clayton
13 Act (15 U.S.C. 15(a), 26), in any action under the anti-
14 trust laws brought against a health care cooperative ven-
15 ture based on its negotiations with a health plan, the court
16 at the conclusion of the action shall include an attorney's
17 fee in the award of costs to a substantially prevailing
18 plaintiff only if the defendant's conduct during litigation
19 of the claim was frivolous, unreasonable, without founda-
20 tion, or in bad faith.

21 **SEC. 4. NOTIFICATIONS UNDER ANTITRUST LAW FOR**
22 **HEALTH CARE COOPERATIVE VENTURES.**

23 (a) NOTIFICATIONS.—

24 (1) SUBMISSION OF NOTIFICATION BY VEN-
25 TURE.—Any party to a health care cooperative ven-
26 ture (acting on behalf of such venture) that intends,

1 or has begun, to negotiate with a health plan may
2 file with the Attorney General of the United States
3 a written notification disclosing—

4 (A) the identities of the parties to such
5 venture, and the name and address of each
6 agent representing such venture;

7 (B) the identity of each health plan with
8 which such venture is or may be negotiating;
9 and

10 (C) the general nature and objectives of
11 the negotiations.

12 (2) SUBMISSION OF INFORMATION ON CHANGES
13 TO VENTURE.—A health care cooperative venture for
14 which a notification is in effect under this section
15 shall submit information on any change in the mem-
16 bership of the venture not later than 90 days after
17 such change occurs.

18 (3) PUBLICATION OF NOTIFICATION.—Except
19 as provided in paragraph (4), not later than 30 days
20 after receiving a notification with respect to a health
21 care cooperative venture under paragraph (1), the
22 Attorney General shall publish in the Federal Reg-
23 ister a notice with respect to such venture that iden-
24 tifies the parties to the venture, the name and ad-
25 dress of each agent representing the venture, and

1 generally identifies the purpose and planned activity
2 of the venture. Prior to its publication, the contents
3 of the notice shall be made available to the agents
4 of the venture.

5 (4) RESTRICTION ON DISCLOSURE OF OTHER
6 INFORMATION.—All information submitted pursuant
7 to notification and all information and documentary
8 material obtained by the Attorney General in the
9 course of any investigation with respect to a poten-
10 tial violation of the antitrust laws by the health care
11 cooperative venture shall be exempt from disclosure
12 under section 552 of title 5, United States Code,
13 and shall not be made publicly available by any
14 agency of the United States to which such section
15 applies except in a judicial proceeding in which such
16 information and material are subject to any protec-
17 tive order.

18 (5) WITHDRAWAL OF NOTIFICATION.—Any per-
19 son who files a notification pursuant to this section
20 may withdraw such notification before a publication
21 by the Attorney General pursuant to paragraph (3).

22 (6) NO JUDICIAL REVIEW PERMITTED.—Any
23 action taken or not taken by the Attorney General
24 with respect to notifications filed pursuant to this
25 subsection shall not be subject to judicial review.

1 (7) RESTRICTIONS ON ADMISSIBILITY OF IN-
2 FORMATION.—

3 (A) IN GENERAL.—Any information dis-
4 closed in a notification submitted under para-
5 graph (1) and the fact of the publication of a
6 notification by the Attorney General under
7 paragraph (3) shall only be admissible into evi-
8 dence in a judicial or administrative proceeding
9 for the sole purpose of establishing that a party
10 to a health care cooperative venture is entitled
11 to the protections described in subsection (b).

12 (B) ACTIONS OF ATTORNEY GENERAL.—
13 No action taken by the Attorney General pursu-
14 ant to this subsection shall be admissible into
15 evidence in any judicial or administrative pro-
16 ceeding for the purpose of supporting or an-
17 swering any claim under the antitrust laws.

18 (b) PROTECTIONS FOR VENTURES SUBJECT TO NO-
19 TIFICATION.—

20 (1) IN GENERAL.—

21 (A) PROTECTIONS DESCRIBED.—The pro-
22 visions of paragraph (2) shall apply with re-
23 spect to any action under the antitrust laws
24 challenging conduct within the scope of a notifi-

1 cation which is in effect pursuant to subsection
2 (a)(1).

3 (B) TIMING OF PROTECTIONS.—The pro-
4 tections described in this subsection shall apply
5 to a venture, and any party to such venture
6 that has made a notification under subsection
7 (a)(1) as of the postmarked date of the notifica-
8 tion.

9 (2) LIMITATION ON RECOVERY TO ACTUAL
10 DAMAGES AND INTEREST.—Notwithstanding section
11 4 of the Clayton Act, any person who is entitled to
12 recovery under the antitrust laws for conduct that is
13 within the scope of a notification filed under sub-
14 section (a) shall recover only the actual damages
15 sustained by such person and interest calculated at
16 the rate specified in section 1961 of title 28, United
17 States Code, for the period beginning on the earliest
18 date for which injury can be established and ending
19 on the date of judgment, unless the court finds that
20 the award of all or part of such interest is unjust
21 under the circumstances.

22 **SEC. 5. TYING ARRANGEMENTS.**

23 Any rule, policy, agreement, or other action of a
24 health plan that has the effect of requiring a health care
25 professional to participate in a product, all products, or

1 product lines offered by the health plan in order to partici-
2 pate in a particular product or product line, shall be con-
3 strued to be an illegal tying arrangement under the anti-
4 trust laws unless the health plan demonstrates that it
5 lacks market power in the market for the tying product
6 or product lines.

7 **SEC. 6. DEMONSTRATION PROJECTS ALLOWING HEALTH**
8 **CARE PROFESSIONALS TO NEGOTIATE WITH**
9 **HEALTH PLANS.**

10 (a) ESTABLISHMENT OF DEMONSTRATION
11 PROJECTS.—The Attorney General, in accordance with
12 the recommendations of the advisory committee appointed
13 under subsection (b), shall establish demonstration
14 projects (in this section referred to as “projects”) under
15 which health care professionals in the States designated
16 as project sites may act together to jointly negotiate con-
17 tracts and agreements with health plans to provide health
18 care items and services for which benefits are provided
19 under such health plans. Projects shall be established for
20 the purpose of testing various options in the health care
21 market to allow negotiations and agreements by health
22 care professionals that will enhance efficiency, quality, and
23 availability of health care, while promoting competition in
24 the health care market.

1 (b) ADVISORY COMMITTEE.—(1) Not later than 180
2 days after the date of the enactment of this Act, the Attor-
3 ney General shall appoint an Advisory Committee on
4 Health Plan Negotiations to advise the Attorney General
5 with respect to the carrying out of the Attorney General’s
6 functions under this section. The duties of the Advisory
7 Committee shall include, but not be limited to, providing
8 recommendations regarding implementation and design of
9 projects and monitoring and reporting on the impact of
10 projects as required under subsection (e).

11 (2) The Advisory Committee shall consist of 13 mem-
12 bers, appointed without regard to the civil service laws.
13 Seven members shall be representatives of health care pro-
14 fessional organizations, 2 of whom shall be self-employed
15 physicians (allopathic or osteopathic). The remaining
16 members shall have expertise in health care quality, eco-
17 nomics, or insurance, but at least 1 of such remaining
18 members shall be a representative of consumers.

19 (3) The Attorney General shall furnish to the Advi-
20 sory Committee an executive secretary and such secre-
21 tarial, clerical, and other services as may be necessary to
22 conduct its business, and may call upon other agencies of
23 the Government for statistical data, reports, and other in-
24 formation which will assist the Advisory Committee in the
25 performance of its duties.

1 (4) Members of the Advisory Committee, while serv-
2 ing on business of the Advisory Committee (inclusive of
3 travel time), shall be entitled to receive the daily equiva-
4 lent of the annual rate of basic maximum rate of pay pay-
5 able from time to time under section 5376 of title 5,
6 United States Code, for each day and, while so serving
7 away from their homes or regular places of business, may
8 be allowed travel expenses, including per diem in lieu of
9 subsistence, in the same manner as provided in section
10 5703 of title 5, United States Code, for individuals in the
11 Government employed intermittently.

12 (5) The members shall serve until submission of the
13 report pursuant to subsection (e)(2), at which time the
14 Advisory Committee shall terminate. A vacancy arising in
15 the Advisory Committee shall be filled in the same manner
16 as the original appointment is made. A majority of mem-
17 bers shall constitute a quorum, and action shall be taken
18 only by a majority vote of those present and voting.

19 (c) APPLICATION FOR STATES TO PARTICIPATE IN
20 PROJECTS.—

21 (1) IN GENERAL.—Not later than 180 days
22 after appointment of the Advisory Committee, the
23 Attorney General shall establish, taking into consid-
24 eration the recommendations of the Advisory Com-
25 mittee, an application process that shall allow health

1 care professional organizations to apply for 1 or
2 more States to be designated as a site for 1 project
3 to be implemented under subsection (d). Such health
4 care professional organizations shall be permitted a
5 3-month period to submit applications. At the end of
6 the 3-month application period, the Attorney Gen-
7 eral shall have 3 months to designate not fewer than
8 6 States in which projects shall be implemented re-
9 gardless of the number of applications submitted.

10 (2) CRITERIA FOR SELECTION.—The Attorney
11 General shall determine the States to be designated
12 in accordance with the recommendations of the Advi-
13 sory Committee, and taking into account the level of
14 managed care penetration in the particular State, as
15 well as other factors that demonstrate a need to ad-
16 dress unfair negotiations, based upon factual infor-
17 mation submitted by the applicants or otherwise
18 found by the Advisory Committee. The designated
19 States shall represent an appropriate environment
20 for a study on the imbalance in contractual negotia-
21 tions between health care providers and health
22 plans.

23 (d) PROJECT IMPLEMENTATION.—

24 (1) IN GENERAL.—Not later than 18 months
25 after the date of the enactment of this Act the At-

1 torney General shall implement not fewer than 6
2 projects, limited to 1 project in each State des-
3 ignated under subsection (c) and satisfying subpara-
4 graphs (A) and (B).

5 (A) QUALITY HEALTH CARE COALITION
6 DEMONSTRATION.—For not fewer than 3 of
7 such States, the following provisions shall apply
8 to projects in such States:

9 (i) IN GENERAL.—Notwithstanding
10 the antitrust laws (except as provided in
11 clause (ii)), health care professionals may
12 act jointly to negotiate and enter into con-
13 tracts and agreements with health plans to
14 provide health care items and services for
15 which benefits are provided under such
16 health plans.

17 (ii) LIMITATION.—

18 (I) NO NEW RIGHT FOR COLLEC-
19 TIVE CESSATION OF SERVICE.—Clause
20 (i) shall not provide health care pro-
21 fessionals with any new right to par-
22 ticipate in any collective cessation of
23 service to patients not already per-
24 mitted by existing law.

1 (II) OTHER CONDUCT UNDER
2 ANTITRUST LAW UNAFFECTED.—
3 Nothing in this section shall exempt
4 from the application of the antitrust
5 laws any agreement or otherwise un-
6 lawful conspiracy that excludes, limits
7 the participation or reimbursement of,
8 or otherwise limits the scope of serv-
9 ices to be provided by any health care
10 professional or group of health care
11 professionals with respect to the per-
12 formance of services that are within
13 their scope of practice as defined or
14 permitted by relevant law or regula-
15 tion.

16 (iii) PROTECTION FOR GOOD FAITH
17 ACTIONS.—Actions taken by health care
18 professionals in good faith reliance on
19 clause (i) shall not be subject under the
20 antitrust laws to criminal sanctions or civil
21 damages, fees, or penalties other than ac-
22 tual damages.

23 (B) QUALITY HEALTH CARE COOPERATIVE
24 DEMONSTRATION.—For any remaining States

1 designated under subsection (c), the following
2 provisions shall apply to projects in such States:

3 (i) IN GENERAL.—Notwithstanding
4 the antitrust laws, any health care profes-
5 sionals may act jointly to negotiate and
6 enter into contracts and agreements with
7 health plans to provide health care items
8 and services for which benefits are pro-
9 vided under such health plans.

10 (ii) OVERSIGHT.—(I) If the Attorney
11 General has reason to believe that 2 or
12 more health care professionals have jointly
13 engaged in conduct described in clause (i)
14 with a health plan, that is intended to sub-
15 stantially harm both competition and the
16 quality of health care received by patients,
17 the Attorney General shall serve upon such
18 health care professionals a complaint alleg-
19 ing such conduct.

20 (II) The complaint shall accompany a
21 notice of hearing to be held not less than
22 60 days after the date of service, requiring
23 the health care professionals to show cause
24 why an order should not be made directing

1 them to cease and desist from engaging in
2 such conduct.

3 (iii) ADMINISTRATIVE ADJUDICA-
4 TION.—(I) The Attorney General shall
5 make a determination of the charge alleged
6 in the complaint based on the record after
7 an opportunity for a hearing.

8 (II) If the Attorney General deter-
9 mines that such health care professionals
10 have jointly engaged in conduct described
11 in clause (i) with a health plan that is in-
12 tended to substantially harm both competi-
13 tion and the quality of health care received
14 by patients, the Attorney General shall
15 issue and cause to be served upon such
16 health care professionals, an order reciting
17 the facts on which the determination is
18 made and directing such health care pro-
19 fessionals to cease and desist from engag-
20 ing in such conduct.

21 (III) A health care professional ag-
22 grieved by such determination may com-
23 mence a civil action in an appropriate dis-
24 trict court of the United States, not later
25 than 60 days after receiving such order,

1 for review of such determination on the
2 record of the Attorney General.

3 (IV) As part of the answer to the
4 complaint, the Attorney General shall file
5 in such court a certified copy of the record
6 on which such determination is based. The
7 findings of fact of the Attorney General
8 may be set aside only if found to be un-
9 supported by substantial evidence in such
10 record taken as a whole.

11 (iv) JUDICIAL REVIEW.—(I) The dis-
12 trict courts of the United States shall have
13 jurisdiction to review in accordance with
14 this subparagraph determinations made
15 and orders issued under clause (iii).

16 (II) CONTEMPT.—Failure to obey any
17 such order may be punished by such courts
18 as a contempt thereof.

19 (C) NO EFFECT ON TITLE VI OF CIVIL
20 RIGHTS ACT OF 1964.—Nothing in this section
21 shall be construed to affect the application of
22 title VI of the Civil Rights Act of 1964.

23 (e) MONITORING AND REPORT.—

24 (1) MONITORING IMPACT.—During the effective
25 period of projects implemented under this section,

1 the Attorney General shall, in accordance with the
2 recommendations of the Advisory Committee, closely
3 monitor and measure the impact of projects in each
4 State on the quality of and access to health care
5 services, choice of health plans, changes in health
6 plan enrollment, and other relevant factors. The At-
7 torney General shall, in accordance with the rec-
8 ommendations of the Advisory Committee, determine
9 the criteria for evaluating the impact on the quality
10 of health care services.

11 (2) REPORT.—Not earlier than 3 years and not
12 later than 4 years after commencement of all of the
13 projects implemented pursuant to subsection (d), the
14 Attorney General shall submit to the Committee on
15 the Judiciary of the Senate and the Committee on
16 the Judiciary of the House of Representatives 1 re-
17 port on the progress of all of the projects imple-
18 mented under this section, including a comparison of
19 the matters monitored under paragraph (1) among
20 the different designated States and as compared to
21 the Nation as a whole.

22 (3) PROJECT TERMINATION.—Unless the report
23 submitted pursuant to paragraph (2) demonstrates
24 by factual evidence that consumers have been
25 harmed by a decrease in quality of or access to

1 health care services as a direct result of a project
2 implemented under this section and without any off-
3 setting benefits, the Attorney General may not ter-
4minate such project. Projects that are implemented
5 under this section and that are not terminated under
6 this paragraph shall be extended by the Attorney
7 General to additional States.

8 **SEC. 7. NO APPLICATION TO FEDERAL PROGRAMS.**

9 Nothing in this Act shall apply to negotiations, agree-
10 ments, or other obligations between health care profes-
11 sionals and health plans that pertain to benefits provided
12 under any of the following:

13 (1) The Medicare Program under title XVIII of
14 the Social Security Act (42 U.S.C. 1395 et seq.).

15 (2) The Medicaid Program under title XIX of
16 the Social Security Act (42 U.S.C. 1396 et seq.).

17 (3) The SCHIP program under title XXI of the
18 Social Security Act (42 U.S.C. 1397aa et seq.).

19 (4) Chapter 55 of title 10, United States Code
20 (relating to medical and dental care for members of
21 the uniformed services).

22 (5) Chapter 17 of title 38, United States Code
23 (relating to veterans' medical care).

1 (6) Chapter 89 of title 5, United States Code
2 (relating to the Federal Employees' Health Benefits
3 Program).

4 (7) The Indian Health Care Improvement Act
5 (25 U.S.C. 1601 et seq.).

6 **SEC. 8. DEFINITIONS.**

7 In this Act, the following definitions shall apply:

8 (1) ANTITRUST LAWS.—The term “antitrust
9 laws”—

10 (A) has the meaning given it in subsection
11 (a) of the first section of the Clayton Act (15
12 U.S.C. 12(a)), except that such term includes
13 section 5 of the Federal Trade Commission Act
14 (15 U.S.C. 45) to the extent such section ap-
15 plies to unfair methods of competition; and

16 (B) includes any State law similar to the
17 laws referred to in subparagraph (A).

18 (2) HEALTH PLAN.—The term “health plan”
19 means a group health plan or a health insurance
20 issuer that is offering health insurance coverage.

21 (3) GROUP HEALTH PLAN.—The term “group
22 health plan” means an employee welfare benefit plan
23 to the extent that the plan provides medical care (in-
24 cluding items and services paid for as medical care)
25 to employees or their dependents (as defined under

1 the terms of the plan) directly or through insurance,
2 reimbursement, or otherwise.

3 (4) MEDICAL CARE.—The term “medical care”
4 means amounts paid for—

5 (A) the diagnosis, cure, mitigation, treat-
6 ment, or prevention of disease, or amounts paid
7 for the purpose of affecting any structure or
8 function of the body;

9 (B) transportation primarily for and essen-
10 tial to medical care referred to in subparagraph
11 (A); and

12 (C) insurance covering medical care re-
13 ferred to in subparagraphs (A) and (B).

14 (5) HEALTH INSURANCE COVERAGE.—The term
15 “health insurance coverage” means benefits con-
16 sisting of medical care (provided directly, through
17 insurance or reimbursement, or otherwise and in-
18 cluding items and services paid for as medical care)
19 under any hospital or medical service policy or cer-
20 tificate, hospital or medical service plan contract, or
21 health maintenance organization contract offered by
22 a health insurance issuer.

23 (6) HEALTH INSURANCE ISSUER.—The term
24 “health insurance issuer” means an insurance com-
25 pany, insurance service, or insurance organization

1 (including a health maintenance organization) that
2 is licensed to engage in the business of insurance in
3 a State and that is subject to State law regulating
4 insurance. Such term does not include a group
5 health plan.

6 (7) HEALTH MAINTENANCE ORGANIZATION.—
7 The term “health maintenance organization”
8 means—

9 (A) a federally qualified health mainte-
10 nance organization (as defined in section
11 1301(a) of the Public Health Service Act (42
12 U.S.C. 300e(a)));

13 (B) an organization recognized under State
14 law as a health maintenance organization; or

15 (C) a similar organization regulated under
16 State law for solvency in the same manner and
17 to the same extent as such a health mainte-
18 nance organization.

19 (8) GROUP HEALTH PLAN, HEALTH INSURANCE
20 ISSUER.—The terms “group health plan” and
21 “health insurance issuer” include a third-party ad-
22 ministrator or other person acting for or on behalf
23 of such plan or issuer.

24 (9) HEALTH CARE COOPERATIVE VENTURE.—
25 The term “health care cooperative venture” means 2

1 or more health care professionals who are engaged
2 in negotiations with a health plan, including any at-
3 tempts to enter into negotiations with a health plan,
4 regarding the provision of health care services to in-
5 sureds, enrollees, or beneficiaries of a health plan.

6 (10) HEALTH CARE SERVICES.—The term
7 “health care services” means any services for which
8 payment may be made under a health plan, includ-
9 ing services related to the delivery or administration
10 of such services.

11 (11) HEALTH CARE PROFESSIONAL.—The term
12 “health care professional” means any individual or
13 entity that provides health care items or services,
14 treatment, assistance with activities of daily living,
15 or medications to patients and who, to the extent re-
16 quired by State or Federal law, possesses specialized
17 training that confers expertise in the provision of
18 such items or services, treatment, assistance, or
19 medications.

20 (12) HEALTH CARE PROFESSIONAL ORGANIZA-
21 TION.—The term “health care professional organiza-
22 tion” means any nonprofit association, society, or
23 organization whose membership consists of health
24 care professionals.

1 (13) PERSON.—The term “person” includes a
2 State or unit of local government.

3 (14) STATE.—The term “State” includes the
4 several States, the District of Columbia, Puerto
5 Rico, the Virgin Islands of the United States, Guam,
6 American Samoa, and the Commonwealth of the
7 Northern Mariana Islands.

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