

111TH CONGRESS
1ST SESSION

H. R. 1204

To ensure and foster continued patient safety and quality of care by making the antitrust laws apply to negotiations between groups of independent pharmacies and health plans and health insurance issuers (including health plans under parts C and D of the Medicare Program) in the same manner as such laws apply to protected activities under the National Labor Relations Act.

IN THE HOUSE OF REPRESENTATIVES

FEBRUARY 25, 2009

Mr. WEINER (for himself, Mr. ADERHOLT, Ms. BALDWIN, Mr. BARTLETT, Mr. BERRY, Mr. BISHOP of Georgia, Mr. BISHOP of New York, Mr. BOUSTANY, Ms. CLARKE, Mr. COBLE, Mr. CONYERS, Mr. COURTNEY, Mr. CUMMINGS, Mr. FARR, Mr. HINCHEY, Mr. HINOJOSA, Mr. HOLDEN, Mr. JONES, Mr. LOEBSACK, Mr. MCHUGH, Mr. MOORE of Kansas, Mr. MORAN of Kansas, Mr. PATRICK J. MURPHY of Pennsylvania, Mr. NADLER of New York, Mr. PAUL, Mr. ROE of Tennessee, Ms. LINDA T. SÁNCHEZ of California, Mr. TERRY, Mr. WELCH, Mr. WILSON of Ohio, Mr. HALL of Texas, Mr. DRIEHAUS, Mr. PLATTS, and Mr. TAYLOR) 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 making the antitrust laws apply to negotiations between groups of independent pharmacies and health plans and health insurance issuers (including health plans under parts C and D of the Medicare Program) in the same manner as such laws apply to protected activities under the National Labor Relations Act.

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.**

4 This Act may be cited as the “Community Pharmacy
5 Fairness Act of 2009”.

6 **SEC. 2. APPLICATION OF THE ANTITRUST LAWS TO INDE-**
7 **PENDENT PHARMACIES NEGOTIATING WITH**
8 **HEALTH PLANS.**

9 (a) IN GENERAL.—Any independent pharmacies who
10 are engaged in negotiations with a health plan regarding
11 the terms of any contract under which the pharmacies pro-
12 vide health care items or services for which benefits are
13 provided under such plan shall, in connection with such
14 negotiations, be entitled to the same treatment under the
15 antitrust laws as the treatment to which bargaining units
16 which are recognized under the National Labor Relations
17 Act are entitled in connection with activities described in
18 section 7 of such Act. Such a pharmacy shall, only in con-
19 nection with such negotiations, be treated as an employee
20 engaged in concerted activities and shall not be regarded
21 as having the status of an employer, independent con-
22 tractor, managerial employee, or supervisor.

23 (b) PROTECTION FOR GOOD FAITH ACTIONS.—Ac-
24 tions taken in good faith reliance on subsection (a) shall
25 not be the subject under the antitrust laws of criminal

1 sanctions nor of any civil damages, fees, or penalties be-
2 yond actual damages incurred.

3 (c) NO CHANGE IN NATIONAL LABOR RELATIONS
4 ACT.—This section applies only to independent phar-
5 macies excluded from the National Labor Relations Act.
6 Nothing in this section shall be construed as changing or
7 amending any provision of the National Labor Relations
8 Act, or as affecting the status of any group of persons
9 under that Act.

10 (d) EFFECTIVE DATE.—The exemption provided in
11 subsection (a) shall apply to conduct occurring beginning
12 on the date of the enactment of this Act.

13 (e) LIMITATIONS ON EXEMPTION.—Nothing in this
14 section shall exempt from the application of the antitrust
15 laws any agreement or otherwise unlawful conspiracy
16 that—

17 (1) would have the effect of boycotting any
18 independent pharmacy or group of independent
19 pharmacies, or would exclude, limit the participation
20 or reimbursement of, or otherwise limit the scope of
21 services to be provided by, any independent phar-
22 macy or group of independent pharmacies with re-
23 spect to the performance of services that are within
24 the scope of practice as defined or permitted by rel-
25 evant law or regulation;

1 (2) allocates a market among competitors;

2 (3) unlawfully ties the sale or purchase of one
3 product or service to the sale or purchase of another
4 product or service; or

5 (4) monopolizes or attempts to monopolize a
6 market.

7 (f) LIMITATION BASED ON MARKET SHARE OF
8 GROUP.—This section shall not apply with respect to the
9 negotiations of any group of independent pharmacies with
10 a health plan regarding the terms of any contract under
11 which such pharmacies provide health care items or serv-
12 ices for which benefits are provided under such plan in
13 a PDP region (as defined in subsection (j)(4)) if the num-
14 ber of pharmacy licenses of such pharmacies within such
15 group in such region exceeds 25 percent of the total num-
16 ber of pharmacy licenses issued to all retail pharmacies
17 (including both independent and other pharmacies) in
18 such region.

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

23 (h) NO APPLICATION TO SPECIFIED FEDERAL PRO-
24 GRAMS.—Nothing in this section shall apply to negotia-

1 tions between independent pharmacies and health plans
2 pertaining to benefits provided under any of the following:

3 (1) The Medicaid Program under title XIX of
4 the Social Security Act (42 U.S.C. 1396 et seq.).

5 (2) The State Children’s Health Insurance Pro-
6 gram (SHIP) under title XXI of the Social Security
7 Act (42 U.S.C. 1397aa et seq.).

8 (3) Chapter 55 of title 10, United States Code
9 (relating to medical and dental care for members of
10 the uniformed services).

11 (4) Chapter 17 of title 38, United States Code
12 (relating to Veterans’ medical care).

13 (5) Chapter 89 of title 5, United States Code
14 (relating to the Federal employees’ health benefits
15 program).

16 (6) The Indian Health Care Improvement Act
17 (25 U.S.C. 1601 et seq.).

18 (i) DEFINITIONS.—For purposes of this section:

19 (1) ANTITRUST LAWS.—The term “antitrust
20 laws”—

21 (A) has the meaning given it in subsection
22 (a) of the first section of the Clayton Act (15
23 U.S.C. 12(a)), except that such term includes
24 section 5 of the Federal Trade Commission Act

(15 U.S.C. 45) to the extent such section 5 applies to unfair methods of competition; and

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

(2) HEALTH PLAN AND RELATED TERMS.—

(A) IN GENERAL.—The term “health plan”—

(i) means a group health plan or a health insurance issuer that is offering health insurance coverage;

(ii) includes any entity that contracts with such a plan or issuer for the administering of services under the plan or coverage; and

(iii) includes a prescription drug plan offered under part D of title XVIII of the Social Security Act and a Medicare Advantage plan offered under part C of such title.

(B) HEALTH INSURANCE COVERAGE; HEALTH INSURANCE ISSUER.—The terms “health insurance coverage” and “health insurance issuer” have the meanings given such terms under paragraphs (1) and (2), respectively, of section 733(b) of the Employee Retirement

1 ment Income Security Act of 1974 (29 U.S.C.
2 1191b(b)).

3 (C) GROUP HEALTH PLAN.—The term
4 “group health plan” has the meaning given that
5 term in section 733(a)(1) of the Employee Re-
6 tirement Income Security Act of 1974 (29
7 U.S.C. 1191b(a)(1)).

8 (3) INDEPENDENT PHARMACY.—The term
9 “independent pharmacy” means a pharmacy that
10 has a market share of—

11 (A) less than 10 percent in any PDP re-
12 gion; and

13 (B) less than 1 percent in the United
14 States.

15 For purposes of the preceding sentence, all phar-
16 macies that are members of the same controlled
17 group of corporations (within the meaning of section
18 267(f) of the Internal Revenue Code of 1986) and
19 all pharmacies under common control (within the
20 meaning of section 52(b) of such Code but deter-
21 mined by treating an interest of more than 50 per-
22 cent as a controlling interest) shall be treated as 1
23 pharmacy.

24 (4) PDP REGION.—The term “PDP region”
25 has the meaning given such term in section 1860D–

1 11(a)(2) of the Social Security Act (42 U.S.C.
2 1395w-111(a)(2)).

3 (j) 5-YEAR SUNSET.—The exemption provided in
4 subsection (a) shall only apply to conduct occurring during
5 the 5-year period beginning on the date of the enactment
6 of this Act and shall continue to apply for 1 year after
7 the end of such period to contracts entered into before
8 the end of such period.

9 (k) GENERAL ACCOUNTABILITY OFFICE STUDY AND
10 REPORT.—The Comptroller General of the United States
11 shall conduct a study on the impact of enactment of this
12 section during the 6-month period beginning with the 5th
13 year of the 5-year period described in subsection (j). Not
14 later than the end of such 6-month period, the Comptroller
15 General shall submit to Congress a report on such study
16 and shall include in the report such recommendations on
17 the extension of this section (and changes that should be
18 made in making such extension) as the Comptroller Gen-
19 eral deems appropriate.

20 (l) OVERSIGHT.—Nothing in this section shall pre-
21 clude the Federal Trade Commission or the Department
22 of Justice from overseeing the conduct of independent
23 pharmacies covered under this section.

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