

American Insurance Association  
Council of Insurance Agents and Brokers  
The Financial Services Roundtable  
Independent Insurance Agents & Brokers of America  
National Association of Insurance and Financial Advisors  
National Association of Mutual Insurance Companies  
National Association of Professional Insurance Agents  
Physician Insurers Association of America  
Property Casualty Insurers Association of America  
Reinsurance Association of America

January 29, 2010

Dear Member of Congress:

The House of Representatives may soon take up legislation to amend the McCarran-Ferguson Act to change the rules for medical liability insurers. When Congress enacted McCarran-Ferguson nearly 65 years ago it delegated insurance regulation to the states and provided narrow relief from enforcement of the federal antitrust laws to the extent that the states enacted regulatory regimes. Every state has a comprehensive insurance code that governs the insurance industry, including subjecting the industry to antitrust enforcement. Medical liability insurers, like other property-casualty companies, are subject to this overarching enforcement structure.

It is important to note that medical malpractice insurance is not a health insurance product. It is a property/casualty insurance liability product, underwritten by property/casualty companies for medical professionals and facilities. In fact, the only thing even health-related about medical malpractice insurance is simply its name and the fact that the medical profession and medical facilities purchase it. Its inclusion in legislation to repeal McCarran-Ferguson for health insurance is misplaced.

Some members of Congress have a mistaken perception that the antitrust provisions of the McCarran-Ferguson Act protect anticompetitive activities by medical liability insurers. They do not. The National Association of Insurance Commissioners (NAIC) has stated that “no state insurance regulator has seen evidence that suggests medical malpractice insurers have engaged or are engaging in price fixing, big rigging, or market allocation.”

Contrary to popular belief, McCarran does not give insurers a blanket exemption from antitrust laws. In October, 2009, the Congressional Budget Office (CBO) noted that “State laws already prohibit issuers of health insurance and medical malpractice insurance from engaging in practices such as price fixing, bid rigging, and market allocations.”<sup>1</sup>

Insurance is relatively unique in that it is one of the few industries that must price its products before knowing the costs of providing them, which are known as “loss costs.” Therefore, insurers need a reliable way of projecting those loss costs in order to price their products in a sound manner. McCarran-Ferguson was enacted, in part, to facilitate the pro-competitive pooling of historical loss cost data necessary to all insurers for sound underwriting, residual market mechanisms, risk pools, and a number of other areas in which the Congress and the states have agreed promote competition. Without this data, many medical liability insurers may be forced to leave the market, which will not only impact doctors and hospitals, but also many other types of health care providers that rely on access to a competitive medical liability insurance market, including dentists, nurses, optometrists, paramedics, x-ray technicians, and nursing homes, among others.

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<sup>1</sup> Letter from the Congressional Budget Office to the House Judiciary Committee concerning the cost of implementing H.R. 3596, October 23, 2009, printed in H. Rept. 111-322, footnote 10, at 10.

Loss of access to this data will also hurt the doctor-owned mutual insurance companies that were formed in response to the availability and affordability “crisis” that afflicted the medical liability insurance market in the 1980s. These companies were formed by doctors to provide doctors with another option to obtain medical liability coverage. This helped fill the gap that had developed in the medical liability insurance market. But without the availability of aggregate loss information and analysis, the doctor-owned medical malpractice insurers would not have been able to enter the business when they were so sorely needed. The absence of that aggregate data and analysis today would be a barrier to market entry for all new start-up insurers in the medical malpractice market, and would have a chilling effect on the ability of existing insurers, especially small and medium-sized insurers to expand into new markets or even to continue their existing business. *At a time when Americans are calling on their government to get health care costs under control, this legislation could increase those costs and ultimately create another medical liability availability crisis.*

The Congressional Research Service (CRS) reported earlier this month that amending the antitrust provisions of McCarran could result in “many lawsuits challenging some insurer-cooperation practices. . . .”<sup>2</sup> The report added that prohibiting necessary and pro-competitive insurer information sharing “could . . . actually disserve consumers and lessen competition between insurance companies; e.g., if information sharing were categorically prohibited, some small companies that require it could be forced to leave the market.”<sup>3</sup>

Finally, and most ominously, the CRS said that “further consolidation in the insurance industry as small insurers merge in order to gain the competitive advantage of additional information is a likely, albeit ironic, possibility.”<sup>4</sup> Thus, CRS has confirmed the pro-competitive nature of McCarran-Ferguson’s antitrust provisions, and also confirms that efforts to further limit McCarran-Ferguson’s antitrust provisions could lead to less competition – an outcome that would undercut the fundamental purpose of the federal antitrust laws.

The McCarran-Ferguson Act’s antitrust provisions were intended to be and are used for pro-competitive purposes only. Proponents of this legislation have not put forward any credible, documented evidence to counter the NAIC’s conclusion that McCarran-Ferguson does not permit medical liability insurers to engage in anticompetitive activities that harm consumers. To amend McCarran’s antitrust provisions without evidence of the need, but with plenty of evidence of the potential harm, would be irresponsible and would drive up health care costs. We therefore strongly urge you to oppose this legislation.

Sincerely,

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<sup>2</sup> *Limiting McCarran-Ferguson’s Antitrust Exemption for the “Business of Insurance”*: Impact on Health Insurers and Issuers of Medical Malpractice Insurance, Congressional Research Service, January 14, 2010, footnote 28, at pg. 8

<sup>3</sup> *Id.*, at pg. 5.

<sup>4</sup> *Id.* at pg. 8.