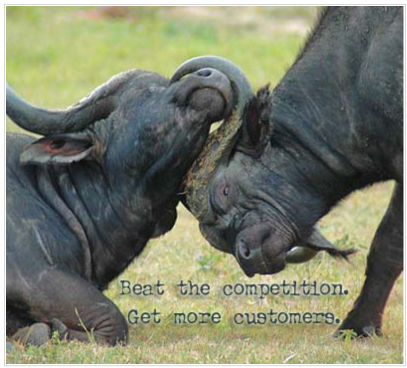
Promoting Competition Through Policies Unlikely to Promote Competition

Peter Suderman | February 24, 2010

In today's *New York Times*, *Supercapitalism* author Robert Reich declares "we've got to make sure health insurers compete for every one of our dollars." Competition can be a good thing, but it's not at all clear that his preferred solution would actually result in a more competitive insurance market.

What Reich wants to do is get rid of McCarran-Ferguson, the "limited" antitrust exemption that insurance companies currently enjoy. Would doing so actually increase competition or bring down premiums? Probably not.



When the Congressional Budget Office looked at legislation that would repeal the antitrust exemption, it found that "whether premiums would increase or decrease as a result is difficult to determine, but in either case the magnitude of the effects is likely to be quite small." Nor is it at all certain that dumping the exemption would increase competition. For example, via Michael Cannon, here's Cato adjunct and professor of law and medicine at the University of Illinois College of Law David Hyman:

> Hyman considers it unlikely that repeal [of the antitrust exemption] would fundamentally change the nature of the market. While it might increase competition in some markets, he says, it could actually decrease it in others, such as those where small insurers survive because they have access to larger providers' data. Changes to the act could therefore hurt smaller companies more than larger ones, he says.

Reich also points to statistics showing that in many states, insurance giant Wellpoint is the dominant insurance provider. That's true, but it's not traditionally been considered a good reason to flex the government's antitrust muscle. Here's Hyman again, this time writing with William Kovacic in *Health Affairs*:

> Even if it could be shown that a health insurer has market power, the issue for antitrust purposes is whether the insurer has obtained or maintained that power through improper means. Absent such evidence, the sole fact that a market is concentrated is unlikely to attract the interest of an antitrust enforcer. With one exception, high levels of concentration have never been thought sufficient by themselves to merit an antitrust challenge. In the late 1970s the FTC briefly flirted with using a "no-fault" theory of antitrust liability to deconcentrate various industries without proof of improper conduct. It dropped this approach after developments in the case law and criticism from antitrust experts led it to conclude that no-fault cases would receive a hostile reception in the courts. No competition agency has sought to revive this strategy in the intervening twenty-odd years.

In other words, one would need to do more than demonstrate that an insurer has a high market share; one would need to demonstrate particular anti-competitive behavior. Reich doesn't do that, but he does make time to gripe about insurance company profits. They sure are high! "Health insurers are making boatloads of money," he writes, "America's five largest health insurers made a total profit of $12.2 billion last year." Boatloads! That's a lot!

Thing is, despite the billions, there's some evidence that health insurance company profit margins really aren't that high, particularly in comparison to other industries. Here's a 2009 article in *U.S. News*: "Overall, the profit margin for health insurance companies was a modest 3.4 percent over the past year, according to data provided by Morningstar. That ranks 87th out of 215 industries and slightly above the median of 2.2 percent."

That article is title "Why Health Insurers Make Lousy Villains," but, of course, that's exactly how Reich is hoping to portray them. Just as when gutting the insurance exemption was last proposed (as a threatening response to a politically inconvenient report from the insurance lobby), the thinking here seems to basically be that health care is really expensive, and reform legislation isn't likely to pass, and that's just not right! So let's find a bad guy to beat up. It's vindictive politics, not prudent policy. But here's what's really telling: The health insurance industry is fairly nonchalant about the proposal; according to Kaiser Health News, "defeating the bill is not a top priority for America's Health Insurance Plans." If the insurers don't care, how effective a punishment can it be?

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robc | 2.24.10 @ 11:19AM | #

If they really want competition, why dont they use the Commerce Clause properly and allow inter-state insurance policies?

Answer: Because they dont really want competition.

reply to this

John Thacker | 2.24.10 @ 11:30AM | #

Also, don't forget that it's only an exemption from *federal* antitrust regulation, not state. That's why it's limited. The thinking is that the insurance companies are regulated and operate exclusively on a state-by-state basis, so the individual states should investigate them.

Note that if a health insurance policy is inter-state, then McCarran-Ferguson ceases to apply, because in the statute itself, it says that it only applies to single-State regulated policies. (See the GAO link in the post.)

Individual states are already free to break up their local insurers for antitrust reasons.

reply to this

Hazel Meade | 2.24.10 @ 12:25PM | #

There aren't any interstate insurance policies because every state has different regulations. It's McCarran-Fergeson that lets them do that.

Hence if you repeal McCarran-Fergeson, you implicitly make interstae competition possible.

At least that's how I understand it ...
this is assuming they repeal the whole bill, and not just the exemption part.

reply to this

IceTrey | 2.24.10 @ 2:20PM | #

That's what I thought. M-C isn't just about anti-trust it is what allows the states to mandate insurance and eliminate out of state competition.

reply to this

John Thacker | 2.24.10 @ 3:21PM | #

A state would still be able to pass mandates for insurance operating within its borders. The only difference that repealing McCarran-Ferguson would make is that federal antitrust law could be applied to judge if a state insurance market were too concentrated.

However, it would not force a state to remove the various mandates, regulation, and other requirements placed on insurance.

reply to this

John Thacker | 2.24.10 @ 3:19PM | #

What McCarran-Ferguson says is that if a state chooses to regulate insurance on the state level (which it need not do), then most federal antitrust law does not apply and it is considered a matter of state law.

Right now, any state could allow inter-state competition, but they don't.

Repealing it would not, however, allow inter-state competition. States would still be allowed to heavily regulate insurance, just federal antitrust law would also apply.

reply to this

John Thacker | 2.24.10 @ 3:30PM | #

> Hence if you repeal McCarran-Fergeson, you implicitly make interstae competition possible.

Only if you're a huge fan of the Commerce Clause.

reply to this

Gilbert Martin | 2.24.10 @ 11:31AM | #

It seems to me that the main obstruction to more competiton in the insurance industry are all the state regulations and coverage mandates that restrict interstate competion - not any anti-trust exemption.

Gee I wonder why Reich isn't in favor of fixing that?

Also if antit-trust exemptions are bad and drive up costs, that same principle applies to labor unions as well. Get rid of THEIR anti-trust exemptions and help reduce labor costs. That will be a benefit to the stockholders and customers of unionized companies.

I would love for somebody to ask Reich why the unions shouldn't lose their exemptions as well - just to watch his head explode on TV.

reply to this

JW | 2.24.10 @ 11:44AM | #

I loved his performance in *Time Bandits*.

And what robc said. This kabuki theater of health ~~care~~ insurance is a bit too much to take. Really, you want to cover the uninsured so that they can have insurance too? OK, then all you have to do is expand Medicaid.

What's that? We need to have a new national plan? Because the old plan sucks, is too expensive, inefficient, prone to fraud and is unsustainable for more than a couple more years? I'm sure it will be different this time.

reply to this

Warren | 2.24.10 @ 11:53AM | #

Reich is an imp in service to Keynes' shade.

reply to this

Forrest | 2.24.10 @ 11:55AM | #

But here's what's really telling: The health insurance industry is fairly nonchalant about the proposal; according to Kaiser Health News, "defeating the bill is not a top priority for America's Health Insurance Plans." If the insurers don't care, how effective a punishment can it be?

If a reporter had asked Eisenhower on June 5, 1944, whether he considered liberating Normandy to be a top priority for the Allied forces, he would undoubtedly have said no. The worst thing the insurance companies can do is give this issue more attention than it's getting.

reply to this

Hazel Meade | 2.24.10 @ 12:22PM | #

There's a lot more in McCarran-Fergeson than just the anti-trust exemption. It's also the bill that split the insurance market into state-based cartels, by allowing the states to separately regulate insurance.

And while I doubt that eliminating the anti-trust exemption would in itself improve much, we should encourage them to do it because it has the side benefit of allowing interstate insurance competition.

reply to this

John Thacker | 2.24.10 @ 3:29PM | #

> And while I doubt that eliminating the anti-trust exemption would in itself improve much, we should encourage them to do it because it has the side benefit of allowing interstate insurance competition.

States would still be allowed to regulate insurance at the state level.

Well, perhaps not, given the current interpretation of the Commerce Clause. Given that I disagree with *Gonzales v. Raich* and prosecuting state-legal pot, I must disagree with you here.

reply to this

BeesInTheBrain | 2.24.10 @ 1:22PM | #

Lets see, the average family health insurance policy costs $13,375. Profit margin is 3.4%, or $454.75 per year or $37.90 per month. So even in an ideal world where all insurance companies could operate at 0% profit I would expect to see a $37.90 drop in my monthly insurance premiums? $37.90? Personally I would rather pay the $37.90 than risk that what ever tweeking the government is planning would end up costing me more.

Also does anyone know if that profit margin is before or after putting money into the government mandate operating reserve?

Another question on operating reserves, some health insurance companies had their operating reserve invested in the market and other investments. Does anyone know how much of the insurance premium increases are to make up for losses in their operating reserve?

reply to this

thomastonpaine | 2.24.10 @ 2:13PM | #

How can one honestly argue about encouraging true competitive market forces in an industry that presently holds an "Anti-Trust" exemption? Further, how can a representative reasonably vote to legally allow the Insurance industry to avoid the competition law that applies to "all" other American businesses with the exception of our national pastime--Major League Baseball? This would be hypocrisy burned into the memories of American voters of "all" parties.

Most notably for conservatives, maintaining the exemption flies in the face of those who would reasonably and pragmatically advocate for a lowering of health care costs by encouraging market oriented reforms.

Regardless of your feelings on any other aspect of health care reform this is something that we should all be able to agree upon. This Monopolistic exemption should be ended. This is the start...this is the "common ground."

*Comprehensive article that substantially covers the crucial role that this exemption plays in allowing the health insurance industry to price fix, collude and use other monopolistic practices:

http://www.americanprogress.or.....st101.html

reply to this

Hazel Meade | 2.24.10 @ 3:14PM | #

Unfortunately, the progressives would probably try to replace it with a new array of federal-level regulations and mandates, and those probably set to the most onerous combinations of all the existing state-level ones.

reply to this

John Thacker | 2.24.10 @ 3:27PM | #

> How can one honestly argue about encouraging true competitive market forces in an industry that presently holds an "Anti-Trust" exemption?

Because it's not exempt from state antitrust laws. The business is regulated extensively at the state level.

State regulation, state businesses means state antitrust law. It's quite simple.

The law today is already such that federal antitrust law would apply to any interstate medical insurance policy. The problem is that states don't allow interstate competition, preferring to regulate locally.

> Further, how can a representative reasonably vote to egally allow the Insurance industry to avoid the competition law that applies to "all" other American businesses with the exception of our national pastime--Major League Baseball?

So you're in favor of removing the antitrust exemption for unions and collectively bargained industries? And for regulated monopoly utilities? How would that even work?

> Comprehensive article that substantially covers the crucial role that this exemption plays in allowing the health insurance industry to price fix, collude and use other monopolistic practices

It's regulation that encourages monopolies and price fixing.

reply to this

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