

## STATEMENT

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On Behalf of America's Health Insurance Plans**

**Testimony on An Act Concerning Cooperative Health Care Arrangements**

**Connecticut General Assembly, Committee on Judiciary**

**March 4, 2011**

I am Michael Cowie, Partner with Dechert LLP testifying today on behalf of America's Health Insurance Plans ("AHIP"). AHIP's health insurance plan members provide health care coverage to more than 200 million Americans, including millions of Connecticut residents. I formerly held leadership positions at the Federal Trade Commission ("FTC") and have served as an FTC representative at healthcare competition hearings. My work at the FTC included supervising investigations of anticompetitive practices by hospital systems and physician groups. Some of these investigations resulted in enforcement actions after the FTC found significant consumer harm.

I am testifying today in opposition to HB No. 6343 on behalf of AHIP's health insurance plans in the State of Connecticut. It authorizes the Attorney General to issue "certificates of public advantage" that would allow Connecticut physicians and other providers to enter into "cooperative arrangements" for the purpose of, among other things, "negotiating fees, prices or rates with managed care organizations." Further, HB No. 6343 requires "managed care organizations" to negotiate "in good faith with parties to a cooperative agreement" and makes it an "unfair or deceptive trade practice" to refuse to so negotiate, subject to civil penalties for non compliance.

AHIP opposes this bill as harmful to Connecticut citizens because:

1. Clearly stated, it authorizes price-fixing by physicians and other providers, with the inevitable result of increased consumer costs – all at a time when Connecticut citizens are already struggling with rising health care costs.
2. It would do nothing to improve the quality of patient care in Connecticut.

In July 2004, the FTC and the U.S. Department of Justice ("DOJ") released a Report on Health Care Competition<sup>1</sup> after over two years of hearings, in which dozens of providers as well as health insurance plans testified on the record. Those comprehensive hearings led to a telephone-book size report, which emphasized the vital role of competition in obtaining lower prices and higher quality in health care. Thus, the Report indicated that "[v]igorous competition promotes the delivery of high quality, cost-effective health care, and vigorous antitrust enforcement helps protect competition."

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<sup>1</sup> Federal Trade Commission and the U.S. Department of Justice, "Improving Health Care: A Dose of Competition," July 2004.

Further, the agencies made six key recommendations, including one explicitly relevant here to HB No. 6343:

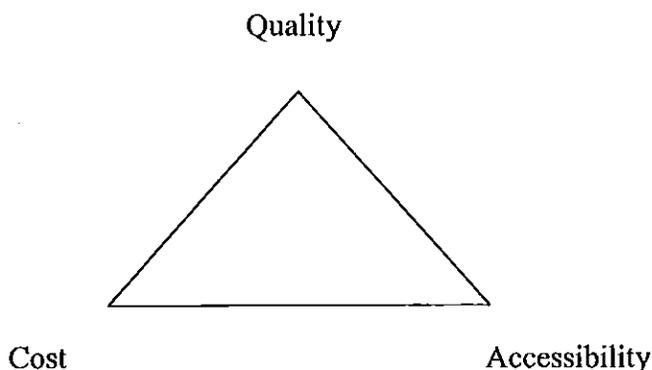
**“Governments should not enact legislation to permit independent physicians to bargain collectively.”**

Why such a blanket rejection by the two principal Federal antitrust agencies of such legislation? *Because authorizing physicians and other providers to engage in collusive conduct never serves the interests of consumers.* Instead, it’s likely to increase substantially the price of health care services, as providers acting collectively are likely to demand higher fees. The bill under consideration today, HB No. 6343, would allow physicians and other providers to fix prices, boycott health insurance plans, and divide markets—conduct that would be so plainly anticompetitive that a court would declare the agreement illegal without taking evidence on its actual competitive effects.

I would like to outline three specific reasons why AHIP opposes this bill.

**(1) The bill will do nothing to solve the quality, cost and access challenges of the health care system.**

The FTC and DOJ’s 2004 Report spoke of the “iron triangle” of health care. The three points of that triangle are cost, quality and accessibility.



The issue everyone is faced with is how to make sure that increasing the performance of the health care system along any one of those dimensions won’t compromise one or both of the other dimensions.<sup>2</sup> This bill is anti-competitive, harming every one of the points of the triangle: raising costs; decreasing accessibility; and reducing incentives to improve quality.

To assure the best prices and highest quality for consumers, competition law must focus on protecting competition and the competitive process, not individual competitors. This bill,

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<sup>2</sup> FTC/DOJ, “Improving Health Care: A Dose of Competition,” July 2004, at p. 6.

however, ill-advisedly attempts to protect competitors at the expense of consumers in a manner that no other group in the State possesses. AHIP urges you to leave these choices to the marketplace, subject to established antitrust law prohibitions against price fixing. As in other sectors of our economy, “the providers who are the most efficient and offer the best-quality service at reasonable prices will attract patients in a competitive environment.”<sup>3</sup>

**A. The bill will likely increase costs and reduce access**

In its report, the FTC and DOJ identified various ways in which provider collective bargaining and price fixing likely will harm consumers and other participants in the health care system:

- Consumers and employers will face higher prices for health insurance coverage;
- Consumers will face higher out-of-pocket expenses as co-payments and other unreimbursed expenses increase;
- Consumers will receive reduced benefits as costs increase;
- State and local governments will incur higher costs to provide health benefits to their employees; and
- State Medicaid programs will incur higher costs to provide health benefits, forcing states to increase taxes, cut benefits, or reduce the number of beneficiaries.

For evidence that this bill will send health care costs soaring in both private and public healthcare programs and result in more uninsured, one has only to look at the Federal experience. Both Republicans and Democrats in Congress have rejected attempts to create broad antitrust exemptions to permit independent, competing physicians to form cartels that would negotiate prices and other terms with health plans. Why? Because objective analyses found that the proposals *would increase costs for consumers*. For example, the Congressional Budget Office in 2000 estimated that one such piece of Federal legislation, HR 1304, would increase private health care costs by 2.6%, even assuming that only 30% of physicians took advantage of the bill’s exemption to join effective cartels. Another report by LECG/Navigant Consulting projected that this bill would increase health care expenditures by 8.6% of private health care costs. The LECG/Navigant report also estimated that the bill would have caused approximately 3 million more individuals to become uninsured.

Critically, these negative results will not just impact the commercial marketplace. If providers are permitted to collude in the commercial marketplace, the State’s Medicaid and public employee programs will likely face higher prices as well.

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<sup>3</sup> L. Barry Costilo, “Antitrust Enforcement in Health Care: Ten Years After the AMA Suit,” 313 New Eng.J.Med. 901, 904 (1985).

**B. The bill does nothing to improve quality and may reduce incentives to improve quality**

Competition law explicitly recognizes quality as a critical goal in the health care system and uses it as a guidepost for determining the types of provider communications and arrangements that are pro-competitive and pro-consumer and, thus, permissible under the antitrust laws. Competition is the best incentive providers have to meet consumer needs.

AHIP's health insurance plans have played a leadership role in exploring ways in which a more competitive health care system could address quality issues. Competition among health care providers to improve the quality of care delivered has been a critical aspect of many health plan efforts to improve the quality of care received by consumers. This has been important to efforts by AHIP plans to, for example:

- Disseminate information about the best available medical and scientific evidence to providers and consumers;
- Assess progress in meeting externally determined and objective quality standards in such areas as diabetes care, post-heart attack treatment, and cancer screening; and
- Publicly report this information in a format that allows consumers to make straightforward comparisons among plans on performance benchmarks.

By reducing competition, HB No. 6343 would work counter-productively to such health insurance plan activities, which attempt to take advantage of competition to meet quality challenges and work collaboratively with providers and consumers.

**(2) There is no need for HB No. 6343, since providers already have appropriate flexibility to act collectively to improve quality of care.**

This bill not only has deleterious effects on the costs and quality advances of Connecticut health care, but it isn't necessary. Physicians and other providers can already, in appropriate circumstances, collectively negotiate with health insurance plans without running afoul of antitrust rules.

Pursuant to the 1996 DOJ/FTC Health Care *Antitrust Guidelines*, physicians who participate in a broad range of procompetitive joint ventures have the ability to engage in collective activity, and have been accorded "safety zones" by the Federal government when conducting these activities. The FTC and DOJ, in their 2004 Report on Health Care Competition, specifically affirmed that physician networks can enter into joint negotiations with health insurance plans. To engage in such negotiations, the physician group can be either (1) financially integrated (like IPAs formed to accept risk) or (2) clinically integrated.

Clinical integration can take many forms as long as the results are likely to increase efficiencies and improve patient care. Many providers today are experimenting with various types of clinical integration. Thus, for example, many physicians are banding together to institute

mechanisms to control costs and ensure quality, or share electronic clinical data systems, or reward those physicians in the group who meet performance goals. Consumers stand to benefit when appropriate provider collaborations achieve quality and other improvements.

**(3) HB No. 6343 would diminish innovation in the State's health care system.**

This is a time of rapidly changing health care systems, reaping the benefits of technological innovations unheard of just a few years ago. For example, the advent of e-prescribing and web-based tools have transformed health care, making consumers and providers more knowledgeable, and making delivery of health care more efficient and effective for all citizens.

This bill works in the opposite direction: it inevitably retards innovation. Instead of allowing for continued evolution of the health care system, it instead requires the Attorney General to engage in detailed supervision of an important sector of the State's economy. Not only does the Attorney General under this bill issue "certificates of public advantage," but then the Attorney General must monitor the impact and effects of any of the cooperative arrangements already approved. But antitrust analysis is always extremely fact-specific. Each so-called cooperative arrangement would have to be looked at carefully to ascertain if it complied with the standards set forth in this bill, including the very amorphous standard of "cost efficiency of providing health services." The Attorney General would need to hire health care economists simply to analyze the impact of each of these cooperative.

Any such rigid procedure would forestall continued evolution of the health care Connecticut citizens receive. What the State needs is a health care system that promotes innovation and responsiveness to consumer needs-- not one that takes a step backwards and allows provider the power to determine the form, scope and cost of health care delivery in their communities.

**Conclusion**

Competition is crucial to keep health care costs under control in the private and public sector, and to inspire innovative means of improving and measuring quality. HB No. 6343 is anti-competitive and would allow physicians and all other health care providers to engage in price-fixing, boycotts, provider monopolies and other restraints of trade. In short, this bill would eliminate the ability to use competition to control health care costs, improve quality and expand access.

Thank you for the opportunity to share our views on this bill.