

Union Calendar No. 579

110TH CONGRESS
2D SESSION

H. R. 971

[Report No. 110–898]

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 8, 2007

Mr. WEINER (for himself and Mr. MORAN of Kansas) introduced the following bill; which was referred to the Committee on the Judiciary

SEPTEMBER 28, 2008

Additional sponsors: Mr. SHAYS, Mr. GRIJALVA, Mr. ROGERS of Alabama, Mr. COBLE, Mr. ADERHOLT, Mr. ROSS, Mrs. BOYDA of Kansas, Mr. EVERETT, Mr. GRAVES, Mrs. EMERSON, Mr. CRAMER, Mr. WEXLER, Mr. GORDON of Tennessee, Mr. PETERSON of Pennsylvania, Mr. BONNER, Mr. HIGGINS, Mr. COOPER, Mr. JONES of North Carolina, Mr. ISRAEL, Mr. TERRY, Mrs. MCCARTHY of New York, Mr. PITTS, Mr. HOLDEN, Mr. DELAHUNT, Mr. JOHNSON of Georgia, Mr. BERRY, Ms. HIRONO, Ms. WOOLSEY, Mr. FATTAH, Mr. REYES, Mr. MILLER of North Carolina, Mr. PLATTS, Mr. LOBIONDO, Mr. BRADY of Pennsylvania, Mr. CAMP of Michigan, Mr. PRICE of North Carolina, Mr. MURTHA, Mr. KAGEN, Mr. ETHERIDGE, Mrs. MCMORRIS RODGERS, Mr. BRALEY of Iowa, Mr. MCINTYRE, Mr. BOUSTANY, Mr. KLEIN of Florida, Mr. MCHUGH, Mr. HERGER, Mr. FILNER, Mr. ORTIZ, Mr. SALAZAR, Mr. WAMP, Mr. KENNEDY, Mr. MARSHALL, Mr. GOODE, Mr. MOORE of Kansas, Mr. UPTON, Mr. ALLEN, Mr. MORAN of Virginia, Mrs. NAPOLITANO, Mr. THORBERRY, Mr. HAYES, Mr. ABERCROMBIE, Mr. FARR, Mr. CONYERS, Mr. TOWNS, Mr. BARRETT of South Carolina, Mr. SPRATT, Ms. CASTOR, Ms. HERSETH SANDLIN, Mr. BOUCHER, Ms. LINDA T. SÁNCHEZ of California, Mr. GOHMERT, Mr. DAVID DAVIS of Tennessee, Mr. TAYLOR, Mr. SHULER, Mr. PAUL, Mr. McNULTY, Mr. GINGREY, Mr. ALEXANDER, Mr.

EDWARDS, Mr. JINDAL, Ms. SLAUGHTER, Mr. STUPAK, Mr. MILLER of Florida, Mr. CONAWAY, Mr. SMITH of Nebraska, Mr. SKELTON, Mr. GILLMOR, Mr. PICKERING, Mrs. DRAKE, Mr. GERLACH, Mr. BOOZMAN, Mr. HOEKSTRA, Mr. BUTTERFIELD, Mr. CARNEY, Mr. BARTLETT of Maryland, Mr. TIAHRT, Mr. GILCHREST, Mr. HINCHEY, Mr. FORTENBERRY, Mrs. CUBIN, Mr. LARSEN of Washington, Mr. SNYDER, Ms. BALDWIN, Mr. REHBERG, Mr. ARCURI, Mr. BISHOP of New York, Mr. HODES, Mr. SPACE, Mr. COURTNEY, Mr. BISHOP of Georgia, Mr. JORDAN of Ohio, Mr. POMEROY, Ms. JACKSON-LEE of Texas, Mr. WESTMORELAND, Mr. RAHALL, Mr. NEUGEBAUER, Mr. MELANCON, Mr. CAPUANO, Ms. HOOLEY, Mr. HALL of Texas, Mr. DAVIS of Kentucky, Mr. CUELLAR, Mr. HARE, Mr. ELLSWORTH, Ms. ROYBAL-ALLARD, Mr. JEFFERSON, Mr. RAMSTAD, Mr. CARTER, Mr. SIMPSON, Mr. CHANDLER, Mr. MICHAUD, Mr. SCHIFF, Mr. CLEAVER, Mr. DUNCAN, Mr. LOEBSACK, Mr. WALBERG, Mr. RODRIGUEZ, Mr. MURPHY of Connecticut, Mrs. MALONEY of New York, Ms. SHEA-PORTER, Mr. HINOJOSA, Mr. MCCAUL of Texas, Mr. LAMPSON, Ms. FALLIN, Mr. SALI, Mr. BOREN, Mr. SHUSTER, Mrs. MUSGRAVE, Mr. BOYD of Florida, Mr. WALZ of Minnesota, Mr. BLUMENAUER, Mr. NADLER, Mr. SARBANES, Ms. FOXX, Mr. PRICE of Georgia, Mr. BARROW, Mr. CROWLEY, Mr. COHEN, Mr. WELCH of Vermont, Ms. MCCOLLUM of Minnesota, Mr. PATRICK J. MURPHY of Pennsylvania, Mr. DOGGETT, Mr. ROTHMAN, Mr. WILSON of Ohio, Mr. MANZULLO, Mr. LUCAS, Mr. ROGERS of Kentucky, Ms. NORTON, Mr. WATT, Mr. WALDEN of Oregon, Mr. OLVER, Mr. ENGLISH of Pennsylvania, Mr. MCNERNEY, Mr. GUTIERREZ, Mr. DEFazio, Mr. CARNAHAN, Mrs. CAPITO, Mr. SESTAK, Mr. WITTMAN of Virginia, Mr. KINGSTON, Mr. SOUDER, Mr. DONNELLY, Mr. SCOTT of Virginia, Mr. KUHl of New York, Ms. CLARKE, Mr. SMITH of New Jersey, Mr. REYNOLDS, Mr. BAIRD, Mr. CARSON, Mr. CUMMINGS, and Mr. BROWN of South Carolina

SEPTEMBER 28, 2008

Reported with an amendment, committed to the Committee of the Whole House on the State of the Union, and ordered to be printed

[Strike out all after the enacting clause and insert the part printed in *italic*]

[For text of introduced bill, see copy of bill as introduced on February 8, 2007]

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 Pro-

gram) 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 2007”.*

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 pro-*
13 *vided under such plan shall, in connection with such nego-*
14 *tiations, be entitled to the same treatment under the anti-*
15 *trust laws as the treatment to which bargaining units which*
16 *are recognized under the National Labor Relations Act are*
17 *entitled in connection with activities described in section*
18 *7 of such Act. Such a pharmacy shall, only in connection*
19 *with such negotiations, be treated as an employee engaged*
20 *in concerted activities and shall not be regarded as having*
21 *the status of an employer, independent contractor, manage-*
22 *rial employee, or supervisor.*

23 *(b) PROTECTION FOR GOOD FAITH ACTIONS.—Actions*
24 *taken in good faith reliance on subsection (a) shall not be*

1 *the subject under the antitrust laws of criminal sanctions*
2 *nor of any civil damages, fees, or penalties beyond actual*
3 *damages incurred.*

4 (c) *NO CHANGE IN NATIONAL LABOR RELATIONS*
5 *ACT.*—*This section applies only to independent pharmacies*
6 *excluded from the National Labor Relations Act. Nothing*
7 *in this section shall be construed as changing or amending*
8 *any provision of the National Labor Relations Act, or as*
9 *affecting the status of any group of persons 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 sec-*
14 *tion shall exempt from the application of the antitrust laws*
15 *any agreement or otherwise unlawful conspiracy that—*

16 (1) *would have the effect of boycotting any inde-*
17 *pendent pharmacy or group of independent phar-*
18 *macies, or would exclude, limit the participation or*
19 *reimbursement of, or otherwise limit the scope of serv-*
20 *ices to be provided by, any independent pharmacy or*
21 *group of independent pharmacies with respect to the*
22 *performance of services that are within the scope of*
23 *practice as defined or permitted by relevant law or*
24 *regulation;*

25 (2) *allocates a market among competitors;*

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

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

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

17 (g) *NO EFFECT ON TITLE VI OF CIVIL RIGHTS ACT*
18 *OF 1964.—Nothing in this section shall be construed to af-*
19 *fect the application of title VI of the Civil Rights Act of*
20 *1964.*

21 (h) *NO APPLICATION TO SPECIFIED FEDERAL PRO-*
22 *GRAMS.—Nothing in this section shall apply to negotiations*
23 *between independent pharmacies and health plans per-*
24 *taining to benefits provided under any of the following:*

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

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

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

9 (4) *Chapter 17 of title 38, United States Code*
10 *(relating to Veterans’ medical care).*

11 (5) *Chapter 89 of title 5, United States Code (re-*
12 *lating to the Federal employees’ health benefits pro-*
13 *gram).*

14 (6) *The Indian Health Care Improvement Act*
15 *(25 U.S.C. 1601 et seq.).*

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

17 (1) *ANTITRUST LAWS.—The term “antitrust*
18 *laws”—*

19 (A) *has the meaning given it in subsection*
20 *(a) of the first section of the Clayton Act (15*
21 *U.S.C. 12(a)), except that such term includes sec-*
22 *tion 5 of the Federal Trade Commission Act (15*
23 *U.S.C. 45) to the extent such section 5 applies to*
24 *unfair methods of competition; and*

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

3 (2) *HEALTH PLAN AND RELATED TERMS.*—

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

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

9 (ii) includes any entity that con-
10 tracts with such a plan or issuer for the ad-
11 ministering of services under the plan or
12 coverage; and

13 (iii) includes a prescription drug plan
14 offered under part D of title XVIII of the
15 Social Security Act and a Medicare Advan-
16 tage plan offered under part C of such title.

17 (B) *HEALTH INSURANCE COVERAGE;*
18 *HEALTH INSURANCE ISSUER.*—The terms “health
19 insurance coverage” and “health insurance
20 issuer” have the meanings given such terms
21 under paragraphs (1) and (2), respectively, of
22 section 733(b) of the Employee Retirement In-
23 come Security Act of 1974 (29 U.S.C. 1191b(b)).

24 (C) *GROUP HEALTH PLAN.*—The term
25 “group health plan” has the meaning given that

1 *term in section 733(a)(1) of the Employee Re-*
2 *tirement Income Security Act of 1974 (29 U.S.C.*
3 *1191b(a)(1)).*

4 (3) *INDEPENDENT PHARMACY.—The term “inde-*
5 *pendent pharmacy” means a pharmacy that has a*
6 *market share of—*

7 (A) *less than 10 percent in any PDP re-*
8 *gion; and*

9 (B) *less than 1 percent in the United*
10 *States.*

11 *For purposes of the preceding sentence, all phar-*
12 *macies that are members of the same controlled group*
13 *of corporations (within the meaning of section 267(f)*
14 *of the Internal Revenue Code of 1986) and all phar-*
15 *macies under common control (within the meaning of*
16 *section 52(b) of such Code but determined by treating*
17 *an interest of more than 50 percent as a controlling*
18 *interest) shall be treated as 1 pharmacy.*

19 (4) *PDP REGION.—The term “PDP region” has*
20 *the meaning given such term in section 1860D–*
21 *11(a)(2) of the Social Security Act (42 U.S.C.*
22 *1395w–111(a)(2)).*

23 (j) *5-YEAR SUNSET.—The exemption provided in sub-*
24 *section (a) shall only apply to conduct occurring during*
25 *the 5-year period beginning on the date of the enactment*

1 *of this Act and shall continue to apply for 1 year after the*
2 *end of such period to contracts entered into before the end*
3 *of such period.*

4 *(k) GENERAL ACCOUNTING OFFICE STUDY AND RE-*
5 *PORT.—The Comptroller General of the United States shall*
6 *conduct a study on the impact of enactment of this section*
7 *during the 6-month period beginning with the 5th year of*
8 *the 5-year period described in subsection (j). Not later than*
9 *the end of such 6-month period, the Comptroller General*
10 *shall submit to Congress a report on such study and shall*
11 *include in the report such recommendations on the exten-*
12 *sion of this section (and changes that should be made in*
13 *making such extension) as the Comptroller General deems*
14 *appropriate.*

15 *(l) OVERSIGHT.—Nothing in this section shall preclude*
16 *the Federal Trade Commission or the Department of Justice*
17 *from overseeing the conduct of independent pharmacies cov-*
18 *ered under this section.*

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