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Making Health Reform Work

Accountable Care Organizations and Competition

David Balto February 2011



Center for American Progress



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Introduction and summary

Almost 40 years ago Justice Thurgood Marshall wrote that the antitrust laws are a “consumer welfare prescription.” In few markets is competition as important as health care. This nation’s yearlong debate on health care reform illuminated many faults and weaknesses in our health care system while highlighting the potential for meaningful reform to improve health care results and better control costs. This paper attempts to explain how antitrust enforcers need to fully embrace the results of that inquiry and realign priorities in order for antitrust enforcement to become a tool and not an obstacle to improving our health care system.

One critical element under the Affordable Care Act is the formation of accountable care organizations, or ACOs, which seek to create integrated entities of hospitals, physicians, and other health care providers, to better control health care costs and deliver high-quality services. As explained in this paper, antitrust enforcers are frequently skeptical of integration, and in the past, administration antitrust enforcement—or the threat and cost of enforcement—was often a barrier to efficient collaboration. At the same time, reduced enforcement led to the growth of market power, especially in health insurance and hospital markets. The result was that if antitrust enforcement was an answer, it was the answer to the wrong problem.

Fortunately, in the Obama administration, health care antitrust enforcement is beginning to focus on the critical health care competition issues.¹ The Antitrust Division of the Department of Justice has challenged a health insurance merger, sending a clear signal that dominant insurers cannot reinforce their market power by merger. It has brought a critical case against exclusionary practices by a dominant insurer that reinforced barriers to entry. And the Federal Trade Commission has attacked two consummated hospital mergers, including an important case that would unwind a merger that would have resulted in increased costs for outpatient and imaging services in Roanoke, VA.

What are the important lessons from the health care reform debate that both regulators and antitrust enforcers need to embrace?

- **Many health insurance markets are highly concentrated.** This often results in supracompetitive profits, escalating numbers of uninsured, rapidly escalating costs, and in many cases, evidence of deceptive and fraudulent conduct. The congressional debate clearly and unequivocally established the need for the comprehensive reform that was enacted. Countless congressional hearings uncovered a disturbing pattern of egregious, deceptive, fraudulent, and anticompetitive conduct in some health insurance markets.²
- **Integration is not the problem in health care but is an important solution for improving quality and cost in the fee-for-service health care system.** Much of the health care debate focused on the lack of coordination among health care providers (typically hospitals and physicians) and how this led to excessive costs and poor health care results.³ The purpose of the ACOs is to provide entities that can better coordinate care and be held accountable for overall health care results.⁴
- **Aggregation of market power is a problem.** If there is a competitive problem in health care markets, it is due to aggregations of market power, such as in health insurance, and not because of improper integration among health care providers.

Many of these findings directly undermine the underpinnings of the current antitrust paradigm in health care. That paradigm suggests that it is necessary to harbor deep suspicion over integration by health care providers, particularly efforts by providers to collaborate. The priorities antitrust enforcement agencies set often appear to prefer a system of autonomous providers, who are fundamentally powerless to deal with insurance companies.

But this paradigm presents a significant problem for health care and consumers, highlighted by the health care debate. Providers acting autonomously are unable to effectively coordinate care because the “silo” problem leads to more costly and less efficient care, and delivers poorer health outcomes. The health care debate clearly demonstrated that a lack of integration led to more costly and lower-quality care.

This paper explains how the antitrust paradigm should be refocused to address the competitive issues surrounding the formation of ACOs. It begins by discussing the opportunity for ACOs to help transform the health care marketplace by permitting greater integration to help improve health care results and better control costs and utilization. It then assesses the recent overly skeptical approach

to health care integration and why that approach has deterred efficient health care collaboration, and finds that the problem in health care is not too much integration, but inadequate integration. The paper then assesses one of the most difficult issues in assessing ACOs: whether an ACO has market power. It suggests antitrust, market-driven, and regulatory approaches to dealing with issues of market power.

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