Antitrust Law & Health Insurance Consolidation

Thomas (Tim) Greaney
Chester A. Myers Professor and Co-Director, Center for Health Law Studies
Saint Louis University School of Law

The Affordable Care Act & Competition Policy

- *Argument*: ACA responsible for excessive merger/consolidation
- *Contra*: ACA depends on & promotes competition
  - E.g. Exchanges, payment reform, spur to new delivery systems
  - Fixing Market Failures: Fragmentation & payment incentives
Antitrust Merger Law

- **Goal**: Prevent consolidation that enables exercise of market power.
- **Merger Presumed illegal**: Concentration/market share of the “product market”
- **Kinds of harms**:
  - *Coordinated Pricing* / Oligopoly
  - *Unilateral Effects*: Merging Parties exercise power without regard to rivals
  - *Monopsony*: Power to lower prices paid to doctors, hospitals
  - *Potential Competition*: Entry would occur but for merger
- **Economic Effects**: Price, Quality, Innovation

Unpacking Insurance Mergers

- **Product markets**
  - Small group/individual (exchanges)
  - Large group
  - Self insured
  - Medicare Advantage
  - Medicaid managed care
- **Geographic**
  - Mostly local: So multiply 5 x 1000???
  - Regional/national for large employers
- **Market Data**
  - AHA & AMA: 800 or more objectionable markets
Rebuttal/Mitigating Evidence

- **Legal Presumption:**
  - High concentration & market shares of merging parties

- **Rebuttal standard**
  - Proof that merging parties will NOT exercise market power despite size

- **Examples**
  - Ease of Entry
  - Countervailing Power of large providers
  - Regulatory constraints on pricing/profits
  - Efficiencies

Ease of Entry Defense

- **Legal Standard:** Entry must be:
  - “Timely, likely and sufficient” to mitigate harm

- **Dept. of Justice cases:** significant entry barriers
  - Network formation barriers
  - Brand recognition

- **Post ACA Experience**
  - Entry by hospital systems
  - Co-Op insurers
  - Entry into Health Exchanges
Ease of Entry: Slippery Slope

- Question posed to Insurance CEOs who claimed entry was likely/easy (by Senator Lee R-UT):
  - "If that’s the case, why not enter into the Humana & Cigna markets ... instead of buying those competitors?"
- Encouraging new entry: central goal of the ACA
  - Experience: Mixed results in Exchanges
  - Flashback: Rationale for Public Option

Regulation & The “ACA Made Me Do It” Defense

- Impetus to consolidate comes from the ACA
  - Defense rejected by courts
- "Soft immunity" Is regulation an effective substitute for antitrust
- MLR/Rate regulation?
  - Self-insured plans not covered
  - “Gameable”
  - Doesn't control monopoly pricing
Countervailing Power/Monopsony: The Sumo Wrestler Fallacy

Evidence re: Larger Payers’ Bargaining Leverage

- Distinguish **monopsony**
  - Large buyer v. fragmented provider market
    - Higher prices to consumers; lower quality

- **from countervailing power**
  - Large insurer securing discounts from dominant provider
    - Lower premiums? Not necessarily

- Economic studies: Large insurers DO secure larger discounts from providers

- More studies: Dominant providers are leading cause of high health costs and insurance premiums

- **BUT:** Large insurers do not pass on cost savings to consumers in reduced premiums
Strategic & Coerced Accommodation

- Dominant insurers bargaining with dominant providers have found *strategic solution: Mutual accommodation*
  - *Boston Globe: A Handshake That Made Healthcare History*
  - Leavitt, *Freakonomics: Collusion among Sumo Wrestlers*
- Other instances where insurers have coerced accommodation from providers
  - Most Favored Nations cases

Plan Divestitures as a Remedy: A Bridge Too Far?
Problems with Spin-Offs

- **State Attorneys General as regulators**:
  - Conduct decrees in hospital merger cases
  - Rejected by court: Partners Health (Massachusetts)

- **Insurance Plan Spin Offs in Antitrust Merger Cases**
  - Finding buyers that are:
    - Capable
    - Not themselves a problem
    - Able to maintain favorable provider contracts
  - Need for administrative/judicial supervision
  - Practical? 1000 buyers?