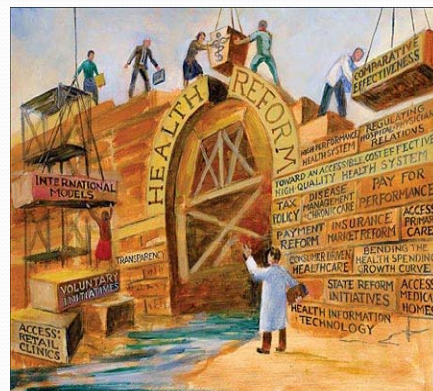


Antitrust Law & Health Insurance Consolidation

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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

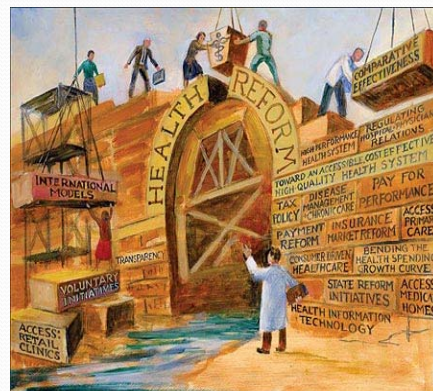
- **Legal Standard:** Entry must be:
 - “Timely, likely and sufficient” to mitigate harm
- **Dept. of Justice cases:** significant entry barriers
 - Network formation barriers
 - Brand recognition
- **Post ACA Experience**
 - Entry by hospital systems
 - Co-Op insurers
 - Entry into Health Exchanges

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, *Freakenomics*: 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?