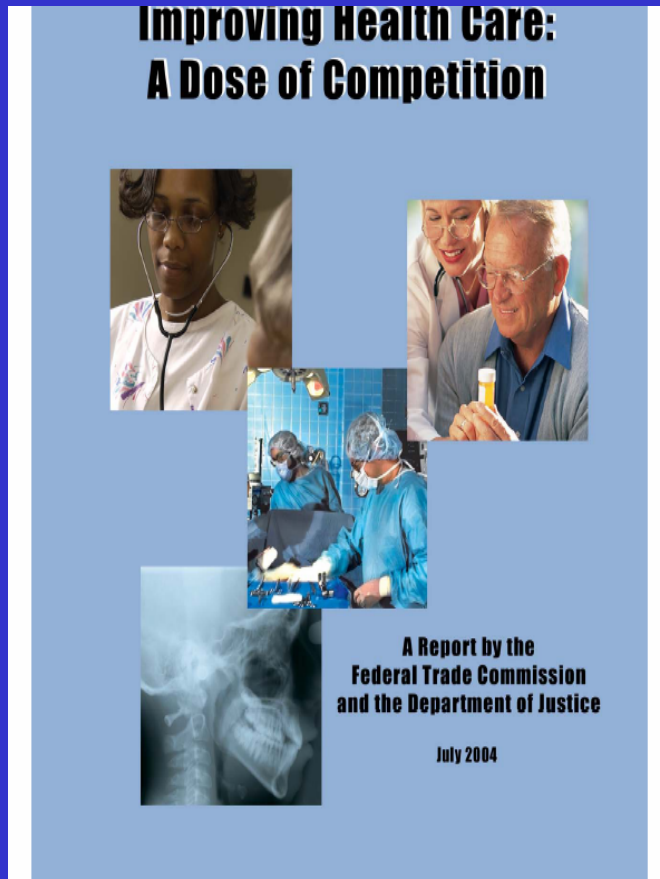


Is Antitrust a Significant Barrier to Health Care System Transformation?



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“Federal antitrust policy has emphasized the preeminent importance of maintaining markets in which no entity is dominant enough to dictate prices or expunge competition. Consequently, federal antitrust policy stands in the way of creating integrated health systems. . . . The risk of ‘after the fact’ review substantially increases the legal and financial risks for organizations considering consolidation.”

James J. Mongan, Robert E. Mechanic & Thomas Lee, *Transforming U.S Health Care* (2006)

Why is this an antitrust issue?

“The foundation of effective P4P initiatives is collaboration with providers and other stakeholders, to ensure that valid quality measures are used, that providers aren’t being pulled in conflicting directions, and that providers have support for achieving actual improvement.”

CMS press release, 1/31/05

“When providers talk about the need for cooperation to ensure the delivery of high quality care, antitrust lawyers hear collusion.”

Professor Jim Blumstein

Are Antitrust Enforcers True Believers or Agnostics?

- True Believers:

“Consumer welfare is maximized by open competition and consumer sovereignty – even when complex products and services such as health care are involved. The Agencies play an important role in safeguarding the free-market system from anticompetitive conduct, by bringing enforcement actions against parties who violate the antitrust and consumer protection laws. . . [The Agencies also play an important role when regulation is employed] by making policy makers aware of the costs of impediments to competition, and by advocating for competitive market solutions.”

Executive Summary, FTC/DOJ Report 28-29 (2004)

Are Antitrust Enforcers True Believers or Agnostics?

- Agnostics

“The Agencies do not have a pre-existing preference for any particular model for the financing and delivery of health care. Such matters are best left to the impersonal workings of the marketplace.”

Executive Summary, FTC/DOJ Report 29
(2004)

What Can We Learn From the Past?

Quality-of-care arguments “have been advanced to support, among other things, broad restraints on almost any form of price competition, policies that inhibited the development of managed care organizations, and concerted refusals to deal with providers or organizations that represented a competitive threat to physicians.”

Prepared Statement Concerning the “Quality Health-Care Coalition Act of 1998”:
Hearing on H.R. 4277 Before the House Comm. On the Judiciary, 105th Cong.
(1998) (Statement of Robert Pitofsky, Chairman, Federal Trade Commission)

So Where Does That Leave Us?

- Hospital Mergers v. Physician “Busted Messenger Models”
- Prospective v. Retrospective Challenges
- Partial v. Complete Integration (Financial and Clinical)
- Supply Side (Integration) v. Demand Side (High Deductible Health Plans) Strategies
- Is Antitrust Really to Blame?

Do Consumers Want Integrated Health Care Delivery?

“The collective judgment of health care professionals concerning what patients should want can differ markedly from what patients themselves are asking for in the marketplace.”

Robert Pitofsky, Prepared Statement of Federal Trade Commission Concerning H.R. 1304 (June 22, 1999)

Do Consumers Want Integrated Health Care Delivery?

“If the people don't want to come out to the ballpark, nobody's going to stop them.”

Yogi Berra



Do We Need
Integration
to Get What
Consumers
Want?

