Provider Concentration and Antitrust Implications

The first two parts of this Health Capital Topics series on concentration in the healthcare industry focused on the consolidation of health systems and hospital acquisition of insurers. This third and final installment will focus on healthcare provider concentration and associated antitrust implications. The consolidation of healthcare providers continues to be a growing trend since the passage of the Patient Protection and Affordable Care Act (ACA). Partly due to the ACA, which incentivizes quality healthcare, in contrast to the quantity of healthcare services provided, many hospitals are merging with other healthcare systems to create organizations capable of managing population health to better handle the operational needs and expenditures required to meet these goals.\(^1\) In the 1990s, there was a similar surge of hospital mergers and acquisitions, and ultimately evidence indicated that the consolidation produced some cost savings.\(^2\) However, classic market theory indicates that a concentration in providers could lead to higher prices for consumers.\(^3\)

Prior to the Great Recession of 2005-2007, on average, 50 to 60 hospital mergers or acquisition deals occurred annually.\(^4\) In contrast, in 2013 alone, 98 mergers or acquisition deals were made.\(^5\) These acquisitions can affect the number of independent healthcare providers still practicing, which decreased from 57% of the marketplace in 2000 to 39% in 2013.\(^6\) Physicians are increasingly seeking employment and abandoning their independence, with 87% of employed physicians citing costs and expenses as their primary reason for seeking employment.\(^2\) A number of different approaches are available to assist policymakers in promoting integration across the spectrum of healthcare, which could assist in reducing healthcare costs, yet still allow the system to remain competitive, including:

1. Antitrust enforcement;
2. Promotion of greater transparency;
3. Utilization of Physician Assistants (PAs) and Nurse Practitioners (NPs);
4. Alternative Delivery Models;
5. Payment Regulation;
6. Tax Incentives; and,
7. Utilization of the insurance rate review process.\(^7\)

Antitrust enforcement has become a common response in efforts to minimize anti-competitive consolidation activities in healthcare markets.\(^9\) Typically, antitrust enforcement has been utilized to block large organizations from merging and to halt physician-hospital consolidations, especially where the arrangements may “give providers sufficient market power to raise prices above competitive levels.”\(^10\) A prominent example of this occurred with the 1994 merger of Massachusetts General Hospital and Brigham and Women’s Hospital, to become Partners HealthCare in the Boston region.\(^11\)

The purpose of this merger was:

“to take away the ability of insurance companies to demand lower prices from one hospital with the threat that they could just send patients to the other. After the merger, insurers had to take both of them or neither.”\(^12\)

As a result of this merger, healthcare costs in the Boston area escalated as reimbursement costs, unrelated to the quality of care delivered, increased. In 2000, the Tufts Health Plan, a prominent private health plan in the local area, decided that Partners HealthCare was demanding unjustifiably high prices for healthcare services and refused to pay for services.\(^13\) When Partners Healthcare subsequently announced they would not accept the Tufts Health Plan, Tufts quickly conceded and agreed to pay the premiums.\(^14\) Recently, Partners Healthcare sought to acquire more physician groups south of Boston, and after review by the Health Policy Commission, it was determined that the acquisition could drive up prices in the area by $23-$26 million, and the matter was referred to the State Attorney General.\(^15\) The Attorney General allowed the transaction to proceed, in exchange for “temporary restrictions on raising [Partners Healthcare’s] prices and no further expansion,” which will last for 10 years.\(^16\) The state investigators found no legal method to undo the original merger, and blocking this acquisition was deemed to not have a substantial effect on current market prices or the market power of Partners Healthcare.\(^17\) Therefore, antitrust enforcement was not applied.

The hospital sector has been scrutinized by antitrust agencies more than any other sector of the U.S. economy.\(^18\) A growing frustration among hospital
executives is that there are two competing goals – a focus on integration and coordination of care, versus the enforcement against provider concentration by the Federal Trade Commission (FTC). Even though healthcare reform encourages the integration of healthcare delivery systems, this fact alone cannot defend against antitrust litigation. Other factors, in conjunction with the healthcare reform argument, such as quality and efficiency improvement, may assist hospitals, but ultimately the considerations will center on provider concentration and the lessening of competition.

When either entity has more market power, their ability to drive prices increases and can lessen competition in a particular market, leading to antitrust concerns. As physician organizations, hospitals, and health systems continue to consolidate, the balance of market power between insurers and hospitals may prove critical for the shaping of public policy.

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9 Ibid.
10 Ibid.
12 Ibid.
13 Ibid.
14 Ibid.
15 Ibid.
16 Ibid.
17 Ibid.
19 Ibid.
20 Ibid.
21 Ibid.
23 Ibid.
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