Hospital Acquisitions of Physician Practices: Does the "Vertical=Good" Maxim Apply?

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

Antitrust & Competition in Health Care

- Enforcement by FTC, DOJ & State Attorneys General
  - Top priority for 35 years
  - Conduct & Structure cases
- The Affordable Care Act
  - Addresses key market & regulatory failures
    - Fragmentation in delivery
    - Perverse payment incentives
  - Strong impetus for provider integration
    - Bundled payment, value based payment
    - Accountable Care Organizations

Horizontal Merger Enforcement

- Hospital Mergers
  - Numerous challenges post ACA
  - FTC reverses losing streak
    - Notable shift in judicial attitudes:
      - Local markets
      - Competition for Inclusion in Payor Networks
- Physician Merger Challenges
  - NONE, until 2012
  - *RenownHealth:* 15/16 cardiologists in Reno NV
  - *St. Alphonsus & FTC v. St. Luke's:* 80% of PCPs in Nampa

"Vertical Good": The Integration Narrative in Health Care

- "Vertical Good, Horizontal Bad"
  - Cf. "Four legs good, two legs bad" ANIMAL FARM
- Chicago's presumptions re vertical mergers
  - Efficiencies in coordination, transaction costs, etc
  - Hierarchical command
  - Shaping group norms
- Health Care as paradigmatic case for lenient standard
  - Vertical integration promotes seamless care, improves quality, enables efficient payments
  - Imprimatur of the Affordable Care Act

Scholarship Questioning the AT Paradigm in Health Care

- *"Go Slow"*
  - Relaxed enforcement to allow innovation
  - Improvement in delivery & innovation as counterweight (efficiency defense?) to conduct & structure claims
- *Redefine Markets*
  - Forward looking approach
  - "Assembled Products", not hosp. care, physicians, etc.
- *Regulate Dominant Provider Pricing*
  - Horse has long left the barn: consolidation 1995-2008
  - "Must-have" hospitals: source of health care costs growth

Counter-Narrative: Risks of Non-Enforcement of Vertical Consolidation

- Post-Chicago Scholarship
  - Risks of input and customer foreclosure
  - Raising rivals costs
- Employment of Physicians
  - Foreclosure "downstream" (hospital)
    - Losses of needed referrals (Primary care physicians)
    - Inability to staff specialty services (Specialists)
    - Raising cost/reducing quality such that rival hospitals cannot achieve efficient scale/quality

Assessing Competitive Impact of Physician Practice Acquisitions

- Yet-Unproven Record of Vertical Integration
  - Studies showing increased cost, no quality improvement
  - "Hospital ownership of practices associated with higher prices and spending"
    - Baker et al. Health Affairs (May, 2014)
  - Health system organizational literature
    - Hospital and physician motives imperfectly aligned
- Two-Stage Model of Competition
  - Providers compete first (and foremost) to get in Network—Bidding model
  - Then compete on quality and reputation for patients

Litigation Issues: Horizontal Physician Merger Analysis

- *Quorum Health Group* (1997)
  - Ease of entry justifies merger
  - Natural monopoly for market of 2 specialists
- *St. Luke's* (2015)
  - Local market for primary care services
  - PCPs very likely to refer to the hospital that employs them
  - Entry analysis looked to timeliness, "ramp up" lags, attractiveness of market
  - Rejects efficiencies defense: not merger specific, speculative
  - Rejects "ACA made me do it" defense

The Case for Targeted Enforcement

- *Uncertainty is a Two-Way Street*
  - Benefits of integration uncertain
  - Achievable by joint venture rather than merger
  - Time to achieve efficiencies
  - No assurance that cost savings will be passed on
- *Alternative Modalities of Integration Are Available*
  - ACOs, joint ventures
  - Evidence of comparable efficiencies
- *Targeting Significant Foreclosures Should not Chill Innovation*
  - Just the opposite: encourages experimentation

Case for Enforcement cont'd

- *"Stickiness" of Acquisitions*
- *Regulations Artificially Encourage Acquisitions*
  - Payment higher for physician services if employed in an hospital owned facility
  - Other regulations eased for employment: e.g. Stark Law
- *Physicians are Most Viable Source of Potential Competition to "Must Have" Hospitals*
  - Specialty hospitals
  - Migration of services to outpatient care