Joint FTC/DOJ Hearings on Health Care and Competition Law and Policy

Health Insurance Monopoly Issues - Market Definition

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Is "It" a market?

A market is a product or group of products for which a hypothetical profit-maximizing firm, not subject to price regulation, that was the only present and future producer or seller of those products likely would impose at least a "small but significant and nontransitory" increase in price, assuming the terms of sale of all other products are held constant.

FTC-DOJ Merger Guidelines

Focus on customer response

- Market definition focuses solely on demand substitution factors--i.e., possible consumer responses.
- Supply substitution factors--i.e., possible production responses--are considered in the identification of firms that participate in the relevant market and the analysis of entry.

Evaluating customer response

1) Do buyers shift or consider shifting purchases between products in response to relative changes in price or other competitive variables?

(2) Do sellers base business decisions on the prospect of buyer substitution in response to relative changes in price or other competitive variables?

(3) What is the influence of downstream competition faced by buyers in their output markets; and

(4) What are the timing and costs of switching products?

Keep eye on ball

- Price or other product differences do not indicate different market
- Need to ask whether change in price of one “product” would result in enough shifts to other “product” to constrain price increase

Digging in

- What is the product comprising the hypothetical market?
- What distinguishes the products allegedly in the market from those outside
- How substitutable are various health benefit products?
- What different vertical configurations are marketed and purchased?

Key features

- Insurance function
- Access to network of providers
- Utilization management/quality improvement/ prior authorization
- Claims processing
- "Gatekeeper" requirements
- Benefit design
  - In network or nothing
  - In network and reduced benefit if out of network (OON)
  - Multi-tier benefit designs

Alternate configurations

All inclusive: HMO
Proprietary insured PPO

Modular: Insurance/rental PPO
TPA/rental PPO/stop-loss carrier

Employers can mix and match

Convergence / Spectrum

	Insured	Network	Gatekeeper	Prior approval	OON
HMO	Usually	Yes	Often	Usually	Often
PPO	Often	Yes	Sometimes	Sometimes	Yes

Increasingly common model

HMO product with

- no gatekeeper referral requirement
- no prior authorization
- point of service OON option

And . . .
EPO,
ASO,
3-tier benefits, stacked networks
full replacement, carve-out networks,
dual option, triple option,
minimum premium,
low threshold aggregate stop-loss,
capitated self-insured,
HMO/ indemnity PPO wrap products,
defined contribution plans,
managed indemnity,
blended premiums

. . . .

What's been proven?

- **Broad definition**
  - Blue Cross & Blue Shield United v. Marshfield Clinic
  - Ball Memorial Hospital v. Mutual Hospital Ins.
  - U.S. Healthcare, Inc. v. Healthsource, Inc.
  - Reazin v. Blue Cross & Blue Shield
  - Coventry Health Care v. Via Christi Health System

- Hassan v. Independent Practice Ass.

- Gateway Contracting Services v. Sagamore Health Network

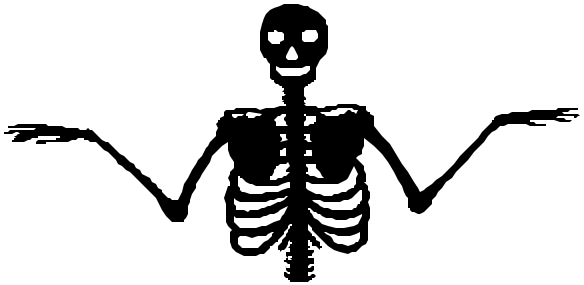
- **HMO and HMO-like POS products**
  - DOJ settlement in Aetna-Prudential
- **What do the FACTS show?**

Who is “in” the market?

- Sellers already selling the defined products
- “Production substitution”
- “Uncommitted entrants”

Even narrower markets?

- Medicare + Choice?
- Medicaid managed care?
- Small business?
- Individual market?



Similar analysis to be done to test each -- both for market and for who is “in”