DOJ Antitrust Division and FTC Health Care and Competition Law & Policy

Perspectives on Competition Policy and the Health Care Marketplace

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Competition Policy: Successfully Building on (Market) Failure

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2 Observations + 1 Question

- Observation: Health Care Complications
  - Private Markets *plus*
  - Regulation (State and Federal) *plus*
  - Public Subsidies
- Observation: Multiple Market Failures
- Question: How Build a Competition Policy?

General Analytic Framework

- General Competitive Equilibrium
  - Arrow & Debreu (1954)
  - numerous restrictive assumptions
- Market Failure = Violation of Conditions
- Problem of Second Best
  - Lipsey & Lancaster (1956)
  - close is not good enough
- Economic Nihilism? (Richard Markovits)

General Framework - cont.

- Role of Social Institutions
  - Arrow (1963)
  - Optimality-gap-filling function
- Building a Competition Policy
  - proper blend of market and non-market institutions
  - filter public from private (special) interest
  - accidental or coordinated process?
  - What is the role of antitrust courts?

Medical Market Failures

- information
- moral hazard
- adverse selection
- agency failures
- market power
- public goods (trust)
- externalities
- innovation/technology

- Private Contract
  - Coase Theorem
  - contract failure (Havighurst)
- Structure of the Firm
  - physician/hospital
  - managed care
- New Product/Markets
  - government regulations
  - restricted commodity space

DOJ-FTC's Dual Challenge

- Internal: Antitrust Enforcement
  - doctrinal questions
  - second best problems
  - competition v. total welfare
  - market facilitating v. market displacing
  - state action defense
  - Noerr-Pennington
- External: Interagency Coordination
  - monopsony power in lieu of regulation
  - Medicare conduct as market shaping
  - Medicare conduct as market facilitating
  - competitive effects of regulation/licensing
  - competitive effects of technology/innovation

Rational Divisions of Labor

- What functions can antitrust courts-enforcers realistically accomplish?
- What functions are better left to political or administrative processes?
- Problem: institutional constraints-competencies
- Problem: Who speaks for “competition” in areas channeled outside the antitrust domain?

What Antitrust Courts Do Well

- Create Space for Private Medical Markets
  - foster active price competition
  - police naked restraints
- Narrow Range of Productive Efficiencies
- *Limited* Protection for Quality Concerns
  - use (1) choice and (2) information as proxies for non-price concerns
  - demand-side models of non-price competition

What Courts Don't Do Well

- Acknowledge Market Failures
  - but see California Dental (1999)
- Appreciate "Supply-Side" Quality Concerns
  - what is the health care production function?
  - (technology, innovation, the knowledge-base of medicine, practice guidelines, medical errors)
- Address Price-Quality Tradeoffs
  - assume price-quality work in tandem
  - no framework for price-quality tradeoffs

Competition Policy: Engineering the Public-Private Interface

- Arrow's insight: *public* and *private* institutions can serve optimality-gap-filling roles in the face of market failures
- Antitrust challenge: be more open to private remedial efforts to remedy market failures
- Public policy challenge: better calibrate social institutions to bridge rather than widen the optimality gap

Plausible Private Initiatives

- Information failures (credentialing, accreditation, standardized report cards?)
- Risk selection (standardization of insurance products, coordinated restrictions on choice?)
- Public goods (joint R&D, practice guidelines?)
- Organizational innovation (creative contracting, integration and product offerings in response to market failures?)

Evaluating Public Actions

- Problems of special interest capture and private strategic manipulation
- Public action can decreases social welfare
- Public action can frustrate private efforts to remedy market failures
- Economic v. non-economic values

Laws Can Complicate Failures

- Havighurst: Obstacles to private contracting
  - lower standard of care (tort, licensing)
  - limits on restricting provider choice (AWP laws)
- Constraints on “firm” organization
  - organization of hospital-physician relations
  - Medicare fraud and abuse
  - Stark prohibitions on self-referrals
- Restrictions on the commodity space
  - licensing laws, insurance regulations

Concluding Thoughts

- Introspection
  - rethinking traditional antitrust law
  - getting non-antitrust actors to consider competitive concerns
- Interdependence
  - multiple dimensions of competition policy
- Information
  - learn from Health Services Research literature
- Intrasystem Rationality
  - making the pieces fit together

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