

# The Role of Competition in Health Care Policy

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# Introduction

- I am delighted to be here today to discuss the role of competition in health care policy.
- This is an area that the U.S. Federal Trade Commission has addressed in hearings, reports, and enforcement actions.
- The views expressed today are my own. They do not necessarily represent the views of the FTC or its Commissioners.

# Background on Health Care

- Health care industry huge part of U.S. economy – almost \$2 trillion in annual expenditures and steadily increasing.
- Economic development has also caused health care expenditures worldwide to soar, but U.S. expenditures highest by far.
- I will focus on U.S. experience with health care and competition, and principles that may be applicable worldwide.

# U.S. Health Care System

- Private provision, but government pays for 45% of U.S. health care expenses. Insurance and other private spending pays for 40%, consumer out-of-pocket spending 15%.
- Extensive regulatory framework affects where and how competition occurs in U.S. health care markets. Mix of federal and state rules.
- Third party insurance payments can distort incentives, make competition less effective.

# FTC-DOJ Health Care Report

- FTC and DOJ convened 2003 hearings on competition and health care; follow-up 2004 report made recommendations.
- Report recognized new strategies and new forms of organization for lowering costs and enhancing quality have emerged.
- Found competition less effective than possible because prerequisites for fully competitive markets not fully satisfied.

# Health Care Report, continued

- Report recommendations focused on how to encourage development of good price and quality-related information.
- Six specific report recommendations.
- (1) Private payors, governments, and providers should try to improve provider incentives to lower costs and enhance quality and for consumers to seek lower prices and better quality.

# Health Care Report, continued

- (2) States should lower barriers to entry (licensure, capacity) into provider markets.
- (3) Governments should reexamine role of subsidies in health care markets in light of their inefficiencies and distortions.
- (4) Governments should not authorize physicians to bargain collectively.
- (5) States should consider costs and benefits of regulating pharmacy benefit manager transparency.

# Health Care Report, continued

- (6) Government mandated health insurance benefits likely reduce competition, restrict consumer choice, raise health insurance costs, and increase the number of uninsured Americans.
- Report also presented FTC and DOJ perspectives on antitrust enforcement.
- I summarize those perspectives below.



# Health Care Report, continued

- Clinical integration among physicians may justify rule of reason for joint pricing.
- Research on hospital merger analysis needed.
- Countervailing power should not be considered an effective response to disparities in bargaining power between payors and health care providers – not likely in consumers' interest.
- Remedies must resolve harm, restore competition, prevent future anticompetitive conduct. Avoid under and over-deterrence.

# Health Care Report, continued

- Some aspects of Health Care Report emphasize U.S. institutional peculiarities.
- But Report also focuses on generally applicable principles, including need to improve marketplace information and minimize distortions caused by insurance and government involvement in system.
- Dutch Government officials, other foreign policy experts have consulted the Report.

# Health Care Antitrust Enforcement

- I will now survey federal health care antitrust enforcement efforts in U.S.
- The FTC and DOJ are both active here.
- Agency Health Care Guidelines authorize advisory opinions, upon request, on clinical integration, other specific issues.
- Advisory opinions help avoid problems.
- But litigation key to laying down markers.

# Antitrust Enforcement, continued

- Let me turn to FTC enforcement priorities.
- Preventing anticompetitive mergers that raise price, reduce output and quality.
- During past year, FTC obtained consent decree relief in 7 mergers, dealing with: generic drugs, over-the-counter medications, injectable analgesics, and other medical devices and diagnostic services.
- FTC, on appeal, is reviewing ALJ's decision that Evanston Hospital's acquisition of Highland Park Hospital was anticompetitive (diminished competition for acute care inpatient services).

# Antitrust Enforcement, continued

- FTC continues to investigate and challenge unlawful price fixing by physician groups. The FTC obtained 3 consents in this area during the last year. Key question in cases was lack of pro-efficiency clinical integration justifying conduct.
- In one case, respondents implemented a clinical integration plan seeking to integrate member practices in a manner that justifies collective rate setting. FTC is monitoring the plan (not barred by consent decree), will challenge it if warranted.

# Antitrust Enforcement, continued

- FTC also focuses on agreements between drug companies that delay generic entry.
- October 2006 FTC settlement with Warner Chilcott ended agreement between WC and Barr Labs that denied consumers choice of a lower-priced generic version of WC's Ovcon 35. Post-settlement, Barr announced intention to start selling a generic version (still litigating with Barr).

# Antitrust Enforcement, continued

- In *Schering-Plough* case, FTC held that Schering agreed to pay generic pharma manufacturers to delay the sale of generic drugs. BUT Schering argued successfully on appeal that payments were part of an appropriate patent litigation settlement, because Schering patents potentially constrained generics from entering the market.
- FTC continues to investigate settlements of this sort; no final Supreme Court decision in area.
- Also, proposed federal legislation would render illegal anticompetitive reverse payments.

# Antitrust Enforcement, continued

- On June 20, FTC announced a consent settling charges that South Carolina Board of Dentistry violated FTC Act by adopting a rule that required a dentist to examine every child before a dental hygienist could provide preventive care in schools. (This rule clashed with SC state law.)
- SC Board is a state regulatory agency, comprised primarily of dentists. FTC's concern was that this rule reduced competition to dentists and denied services to poor children. There was no true safety justification.
- Board publicly announced support for state policy and agreed to notify FTC before adopting rules in this area.



# Antitrust Enforcement, continued

- SC Board illustrates that government actions may cause serious competitive harm, in health care and other sectors.
- FTC will not hesitate to challenge harmful conduct of this sort, within limits imposed by U.S. “state action” doctrine.
- But competitive advocacy – FTC filings explaining to agencies and legislatures why certain proposed actions will harm competition – may be highly effective when litigation infeasible.

# Competition Advocacy

- FTC has a long history of competition advocacy, including many filings before U.S. state legislatures and other agencies.
- Some bad laws/actions were forestalled.
- FTC officials have also urged foreign authorities to consider advocacy as a tool.
- April AEI-Brookings Conference on how other federal agencies could take competition into account. OECD “toolkit.”

# Competition Advocacy, continued

- Example of FTC competition advocacy in health care: April 20 FTC staff comments regarding New Jersey bill that would regulate contractual relationships between pharmacy benefit managers (PBMs) and both health benefit plans and pharmacies.
- Comments concluded such regulation would raise risk exposure in PBM/health plan contracting; undermine efficient use of mail order pharmacies; and impede competition.
- Comments illustrate reality that “public interest” laws may instead have anticompetitive effects.

# FTC Studies

- Besides enforcement and commentary, FTC carries out major research studies.
- For example, FTC has announced a planned study to examine both likely short-term competitive effects of authorized (by brand name firm) generic drug entry and likely long-term impact on competition by generic drug manufacturers.
- Studies advance effective policymaking.

# Conclusions

- Sound competition policy can enhance welfare, promote innovation in health care.
- Competition analysis may fruitfully be applied to the structure of health system rules and government decisions, as well as to private behavior.
- Thank you for your attention.