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

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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