AN EMPIRICAL PERSPECTIVE ON HEALTH CARE COMPETITION POLICY

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RELATED PUBLICATIONS

- ***Antitrust, Health Care Quality, and the Courts*, 102 COLUM. L. REV. 545 (2002)**
  - empirical assessment of judicial medical antitrust enforcement
- ***A Copernican View of Health Care Antitrust*, 65 LAW & CONTEMP. PROB. (2002)**
  - legal and policy issues implicated in constructing an integrated competition policy for health care markets

What do I mean by empirical?

- What it is: Detailed study of judicial health care antitrust enforcement
  - Objective: assess judicial capacity to address quality and non-price concerns in medical markets
- What it is not: Economic study of health care markets themselves
  - Caveat: we can and do examine the role empirical health services research plays in antitrust litigation

STUDY OBJECTIVES

- To describe medical antitrust litigation between 1985 and 1999

- To determine how medical antitrust courts address quality and non-price concerns

STUDY METHODS

- Develop instrument to code judicial opinions
- Identify relevant medical antitrust cases
- Research assistant codes cases *and* identifies text relating to nonprice competition
- Second research assistant double checks coding
- Principal investigators review coding and text excerpts
- Results are compiled and analyzed

HEALTH CARE ANTITRUST OPINIONS AND DISPUTES

- LEXIS search
  - antitrust and date aft 1/1/85 and date bef 6/1/99 and (physician or hospital or health insur! or HMO or pharmaceutical or nursing or medical device or dentist or chiropractor or mental health)
- 3390 judicial opinions met search terms
- 988 opinions were coded after screen
- 539 opinions were confirmed relevant
- 401 separate disputes represented

OPINIONS BY COURT

	Opinions	Percent of Total Opinions
U.S. Supreme Court	4	1%
Federal appeals courts	200	37%
Federal district courts	335	62%

BUSINESS CONDUCT

Coded Entry by Opinions

	All Opinions	% of Total	Public Opinions	Public Opinions
Health professionals				
Staff privileges	132	33%	0	0%
Exclusive hospital contracting	132	33%	1	4%
Professional organization rules	11	3%	1	4%
Hospitals and health care organizations				
Mergers and acquisitions	31	8%	11	42%
Joint ventures	14	3%	1	4%
Joint purchasing	2	0%	0	0%
Insurance and managed care				
Network participation	20	5%	0	0%
Joint contract negotiation	5	1%	2	8%
Unilateral contract terms	19	5%	2	8%
Payer standards and practices	25	6%	1	4%
Information				
Private credentialing/accreditation	30	7%	1	4%
Information sharing	7	2%	1	4%
Advertising and marketing	22	5%	1	4%
Other	95	24%	4	15%

CONDUCT BY DATE

	1985-89	1990-94	1995-99
Health professionals			
Staff privileges	49	52	31
Exclusive hospital contracting	41	42	49
Professional organization rules	8	3	0
Hospitals and health care organizations			
Mergers and acquisitions	5	10	16
Joint ventures	5	6	3
Joint purchasing	0	0	2
Insurance and managed care			
Network participation	10	4	6
Joint contract negotiation	3	1	1
Unilateral contract terms	5	5	9
Payer standards and practices	15	7	3
Information			
Private credentialing/accreditation	13	12	5
Information sharing	2	3	2
Advertising and marketing	8	7	7
Other	27	27	36

DISPOSITION BY TYPE OF ENFORCEMENT

Coded Entries by Opinion

	Private litigation	**Public litigation**
Substantial Outcome For plaintiff: (Denial of defendant's summary judgment motion, Affirmance on Appeal by defendant, Reversal on appeal by plaintiff, Other judgment for plaintiff)	**80 (15%)**	**12 (43%)**
Substantial Outcome For defendant: (Grant of defendant's summary judgment motion, Affirmance on appeal by plaintiff, Reversal on appeal by defendant, Other judgment for defendant)	**346 (65%)**	**12 (43%)**
Neutral or Non-Dispositive	109 (20%)	4 (14%)

DISPOSITION BY CONDUCT

	Coded Entries			
	Staff Privileges	**Exclusive Contracting**	**Other**	**Total**
Substantial Outcome For plaintiff: (Denial of defendant's summary judgment motion, Affirmance on appeal by defendant, Reversal on appeal by plaintiff, Other judgment for plaintiff)	**15 (9%)**	**30 (16%)**	**48 (22%)**	**93 (16%)**
Substantial Outcome For defendant: (Grant of defendant's summary judgment motion, Affirmance on appeal by plaintiff, Reversal on appeal by defendant, Other judgment for defendant)	**127 (73%)**	**110 (60%)**	**127 (59%)**	**364 (63%)**
Neutral or Non-Dispositive	33 (19%)	44 (24%)	40 (19%)	117 (21%)

Preliminary Conclusions: Medical Antitrust Litigation

- **Business conduct:**
  - Litigation is dominated by hospital-related cases involving staff privileges and exclusive contracting.
  - Managed care reflects only a small minority of litigated antitrust cases by comparison.
- **Outcomes:**
  - Plaintiffs lose a disproportionately large percentage of cases, no matter how wining and losing are measured.

Preliminary Conclusions - cont.

- **Public Antitrust Enforcement:**
  - Only a small percentage of cases are brought by public entities
  - Enforcement agencies are more successful than private plaintiffs in medical antitrust cases, but are less successful than historic benchmarks of federal antitrust enforcement
- **Caveats:**
  - Judicial opinions present only a partial picture of enforcement agency conduct
  - Enforcement agency conduct as a regulator is at least as important as enforcement agency conduct as a prosecutor
  - Further analysis of consent decrees, advisory opinions, guidelines and investigatory decisions will be necessary to gain a complete picture of of the significance of public medical antitrust enforcement

CODING FOR QUALITY

- **Ideological conflicts**
  - Professional paradigm: absolutist, objective, quality as "*apart from*" competition
  - Antitrust paradigm: quality as "*a part of*" the competitive process
- **Health Services Research**
  - Structure (accreditation, ownership, physical facilities)
  - Process (tests ordered, malpractice history, preventative services)
  - Outcome (mortality, morbidity, surveys and consumer rankings)
- **Economic Perspectives**
  - Choice (product differentiation, location)
  - Information (credentialling, disclosure)
  - Innovation (technological and organizational innovation)

GENERAL BELIEFS ABOUT COMPETITION

	Coded Entries	% of General Discussions
Orthodox beliefs		
"Competition decreases prices"	58	36%
"Competition decreases costs"	15	9%
"Competition increases quality"	37	23%
Unorthodox beliefs		
"Competition increases prices"	6	4%
"Competition increases costs"	7	4%
"Competition decreases quality"	3	2%
Goldfarb era concerns		
"Apply antitrust laws strictly"	7	4%
"Consider professional issues"	16	10%
"Consider social issues"	11	7%

Overview Quality Characteristics

- **Firm-Specific Characteristics** (224 entries)
  - Clinical Structure (81 entries)
  - Clinical Process (77 entries)
  - Administration (66 entries)
- **Market-Level Characteristics** (211 entries)
  - Freedom of Choice (72 entries)
  - Range of products and services (21 entries)
  - Informed consumer choice (16 entries)
  - Innovation and R&D (7 entries)

CLINICAL STRUCTURE (Firm-Specific)

	Coded Entries	% of Quality Discussions
Qualifications of physicians	29	7%
Adequacy of non-physician staffing	11	3%
Continuity of care	11	3%
Adequacy of physical facilities	10	2%
Private accreditation	9	2%
Advanced technology	8	2%
Government certification/licensure	3	1%

CLINICAL PROCESS (Firm-Specific)

	Coded Entries	% of Quality Discussions
Unspecified process/outcome quality	**43**	**10%**
Malpractice history	**25**	**6%**
Potential for clinical improvement	**6**	**1%**
Ranking in surveys	**1**	**0%**
Outcome statistics	**1**	**0%**
Preventive services	**1**	**0%**
Product defects	**0**	**0%**

ADMINISTTRATION (Firm-Specific)

Firm-level administration	Opinions	% of Quality Discussions
General reputation for quality	24	6%
Other	10	2%
Charity care	9	2%
Nonprofit governance	6	1%
Duration of existence (stability)	4	1%
Consumer information	4	1%
Amenities	3	0%
Administrative restrictions	2	0%
Legal rights and remedies	2	0%
Solvency	1	0%
Health education	1	0%
Grievance mechanisms	0	0%

MARKET LEVEL QUALITY CHARACTERISTICS

	Coded Entries	% of Quality Discussions
Freedom of choice among professionals	72	17%
Unspecified quality of care	27	6%
Range of products and services	21	5%
Overall professional qualifications	18	4%
Informed choice	16	4%
Overall hospital quality	16	4%
Other	14	3%
Location or geographic scope	10	2%
Professionalism	10	2%
Innovation/R&D	7	2%

Preliminary Conclusions: Antitrust Treatment of Quality

- Orthodox economic beliefs about the effects of competition trump unorthodox beliefs in most medical antitrust cases
- Hospital merger cases reflect substantial, *but isolated*, judicial skepticism about the effects of competition in health care markets
- Judicial Opinions exhibit a tension between treating quality as "apart from" as opposed to "a part of" competition
  - Staff privilege cases -- quality as "*apart from*" competition
  - Exclusive contracting -- quality as "*a part of*" competition

Preliminary Conclusions: Antitrust Treatment of Quality

- Courts pay almost no attention to quality as it is analyzed in the health services research literature - *clinical structure*, *process*, *and outcome measures*.
- Courts employ conventional economic heuristics to assess economic quality concerns - respect for consumer *choice*, belief in the procompetitive effects of *information*, and faith in markets to spawn optimal technological and organizational *innovation*.
- Antitrust law has played only a minor role in addressing quality-related concerns managed care and insurance cases

Designing A Health Care Competition Policy

- Rethinking Medical Antitrust Law
  - revising antitrust doctrine to better address quality and non-price concerns in health care
  - Integrating antitrust policy with the government's role as a regulator and purchaser of health care services
- Markets and regulation across a dynamic interface - Beyond artificial "boundaries" between market and non-market institutions

Designing A Health Care Competition Policy - cont.

- Areas of specific concern
  - *Noerr* doctrine invites private manipulation of technological and regulatory parameters
  - Need for a more unified treatment of state regulation and professional self regulation - reforming the state action doctrine
  - Contested role of choice versus standardization in markets for information and insurance
  - Uneasy relationship between antitrust law and agency market failures in health care