



DEPARTMENT OF JUSTICE

JOINT DOJ/FTC HEARINGS ON HEALTH CARE AND COMPETITION LAW AND POLICY

Opening Day Comments

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INTRODUCTION

It is a privilege to participate in the opening session of these hearings, during which the Department of Justice and the Federal Trade Commission will examine the role of competition law and policy in the health care arena. The Greek playwright Menander is credited with saying “[h]ealth and intellect are the two blessings of life.” If that is so, we should certainly be blessed this afternoon and throughout the course of these hearings. We have an impressive list of speakers today, with a keynote address by Thomas Scully, Administrator of the Centers for Medicare & Medicaid Services within the U.S. Department of Health & Human Services, so I will be brief in covering three points.

The first is to underscore the Antitrust Division’s past, present, and future commitment to antitrust enforcement in health care. Second, let me mention from the DOJ perspective some highlights among the important and interesting topics that we will examine this spring during the hearings hosted at the Great Hall at Main Justice. Third, this is a perfect occasion to mention the great public benefits produced by the collaborative efforts of two separate competition and consumer focused agencies working together on products such as these hearings.

I. The Division’s Commitment to Antitrust Enforcement in Health Care

Health care is a large and important component of our economy. Health care spending climbed to \$1.4 trillion in 2001. That constituted over 14% of the GDP (gross domestic product) in 2001 and was an 8.7% increase in spending over the previous year’s level. Predictions are

that, if growth in health care spending is unchecked, such spending will represent more than 23% of the GDP in 2011.¹

Health care costs are rising, too. The results of a national survey indicated that employers' health insurance premiums increased 12.7% from 2001 to 2002, even though the general inflation rate was only 1.6%. This jump in premiums was the highest since 1990.² The survey also showed that employers reacted to those increases by increasing their employees' deductibles and co-pays, reducing benefits, or, in some cases, eliminating health insurance coverage completely.³

While there are likely many factors that have influenced increases in health care spending and health care costs, there is no doubt that market competition has a role to play in containing costs and promoting high quality care. At the Division we are working to promote competition by enforcing the antitrust laws. Although our lawyers have labored in shops bearing different names (Professions and Intellectual Property, Health Care Task Force, Litigation I), the Division has long had a dedicated staff focused on health care antitrust issues.

Together with the FTC, the Division drafted the Health Care Policy Statements in 1993 and substantially revised them in 1996.⁴ In the past decade, the Division has brought nearly 20

¹ BNA Health Care Daily Report, Wednesday, January 8, 2003 (*citing* January 8, 2003 release by Centers for Medicare & Medicaid Services).

² Lawrence Wu, Vice President, NERA, "On Health Insurance: Payor/Provider Issues," September 9, 2002.

³ The Kaiser Family Foundation and Health Research and Education Trust Survey of Employer-Sponsored Health Benefits: 2002. *See* "Employer Health Benefits: 2002 Annual Survey," pp. 12-15.

⁴ U.S. Dep't of Justice & Federal Trade Commission, *Statements of Antitrust Enforcement in Health Care* (1996).

cases and issued over 55 business reviews in the health care sector. The Division has an active staff of 23 lawyers and over 10 economists (Litigation I and various members of the Economic Litigation and Competition Policy Sections) substantially engaged in antitrust enforcement in health care markets.

Indeed, just in the second half of 2002 the Division brought four major health care initiatives to fruition.

A. Mountain Health

In December 2002, the Division filed a case against a physician organization called Mountain Health Care in Asheville, North Carolina for developing and using a uniform fee schedule in negotiations on behalf of its participating physicians with managed care purchasers. I was recused from that matter, but I am able to describe public information about the case. It is important to note that this case does not involve just two or three doctors. Instead, it involves an organization comprised of over 1200 physicians throughout Western North Carolina. This matter is important for health care costs in that area. This case also sends an important message: it is one of the few cases either federal agency has filed that requires a provider-controlled organization to disband.

B. Washington State Business Review

In contrast, our Washington State Medical Association business review (September 2002) involved doctors getting together in a constructive way to address an important issue without running afoul of the antitrust laws. The Washington State business review concerned a fee and reimbursement survey the Association wanted to conduct. This business review is especially noteworthy because it spells out in some detail how a provider-run and controlled

survey involving insurer reimbursements can raise competitive concerns (identification of individual insurers' average reimbursement rates can lead to boycotts or collusive pricing) and why those concerns were not significant in the Washington State situation (the Association intends to take active steps to prevent use of the survey for anticompetitive purposes, and individual insurers' average reimbursement rates are highly pertinent information to individual providers).

C. Dentsply

The Division finished trying *United States v. Dentsply* last year. That case challenges the use by Dentsply, the dominant manufacturer of artificial teeth in the United States, of two exclusive dealing arrangements with dental laboratory distributors. *Dentsply* presents some important legal issues. One is whether exclusive dealing agreements that are technically terminable at will can nevertheless cause anticompetitive effects in the market. Another relates to the importance of the traditional proxies used by courts in assessing exclusive dealing agreements. The *Dentsply* trial lasted more than three weeks following comprehensive discovery involving over a hundred depositions. This case confirms that the Division will commit whatever resources are necessary to prepare and try cases challenging anticompetitive conduct.

D. Federation of Physicians and Dentists

The Division also recently (late 2002) obtained entry of a stringent decree in *United States v. Federation Of Physicians And Dentists*. In that case, we alleged that the Federation had recruited nearly all of the private practice orthopedic surgeons in Delaware as members, who then agreed to designate the Federation as their agent to negotiate the fee levels they would accept from Blue Cross & Blue Shield of Delaware. When Blue Cross declined to negotiate with

the doctors through the Federation, the Federation and others persuaded the doctors to deal with Blue Cross only through the Federation. The Federation ultimately organized nearly all of its members to terminate their contracts with Blue Cross in the belief that this would force Blue Cross to accede to their fee demands.

The *Federation* decree is nationwide in scope. It prohibits the Federation from participating in, encouraging, or facilitating any agreement or understanding between competing physicians. Moreover, the Federation is prohibited from negotiating, collectively or individually, on behalf of competing physicians about any payer contract or contract term. If undertaken, all of the prohibited activities would have forced health plans to pay increased fees.

E. Current Investigative Efforts

The Division currently has a large number of active inquiries in the health care sector. Many focus on the conduct of health plans:

- The Division is looking into two separate matters focused on the manner in which health plans market and price their products to employer and other groups. One of these focuses on putative collective action by plans and another on unilateral contracting practices.
- The Division has an active inquiry into a national joint venture among plans that requires us to consider the potential benefits of coordination among health plans in different markets in contracting for national and regional accounts.
- We have inquiries into a joint venture among plans in the contracting for provider networks, the imposition of “most favored nation” pricing by another plan, and an allegation that groups of plans have colluded in the setting of provider fees. As to the latter inquiry, we are exploring whether a grand jury should be convened.

The competitive concern in all but one of these matters focuses on whether payor conduct has reduced the quality or raised the price of plans to customers. The remaining matter focuses on allegations of collective monopsonization, a topic that the Division is continuing to study in response to allegations by provider groups, including those contained in the American Medical Association's recent study.

By no means does all of our work focus on health plans. We will continue to use our expertise to open investigations and take action in any appropriate health care area. For example, we are examining a number of allegations of physician collective bargaining. We are also taking a close look at the issues of integration and competitive effects in regard to a consummated hospital joint operating agreement, as well as a network of hospitals engaged in joint contracting. Finally, the Division has two active matters involving medical equipment and products. In short, the Division has a strong core of attorneys and economists responding to a variety of congressional, citizen, and industry complaints.

II. Preview of DOJ-Hosted Hearings

Another example of the Division's continuing commitment to health care, of course, is our participation in these joint hearings. While we are actively involved in all of the antitrust sessions, we are taking the lead in seeking information with respect to health plans and several other important topics, such as criminal remedies and hospital joint ventures/joint operating agreements. Indeed, almost all of the sessions focused on payor issues will be held in the Great Hall at Main Justice.

A key health care enforcement priority of the Division will continue to be the evaluation of health insurers. For consumers to benefit from competition in health care markets, sufficient

competition must be maintained among health plans. The Division helps maintain this competition through vigorous, responsible enforcement of the antitrust laws, including our merger enforcement program. The more we know about the rapid growth and change taking place in the health care sector, the better our enforcement efforts will be. It is with that goal in mind that we have selected our topics for these hearings. Let me preview just a few of the important issues related to health plans that the panelists will discuss and we hope vigorously debate at Main Justice in late April and early May.

A. Health Insurance Monopoly

We were told at the September Workshop that one of the key trends shaping health care markets today is the continuing consolidation of health plans. Indeed, one panelist indicated that more than 350 mergers and acquisitions took place over the five year period between 1995 and 2000.⁵ Increasingly, consolidation has been across geographic markets, as merging parties have been national firms and regional Blues.⁶ The hearings will explore whether consolidation in this sector is likely to give rise to market power. We will also encourage our panelists to discuss the various competitive effects theories that might predict higher prices to consumers or a reduction in quality following a health plan merger. We expect the discussion to address unilateral effects, coordinated effects, and auction theories.

⁵Donald Palmisano, M.D., “Taking the Payor Side Seriously: Why the Federal Trade Commission Should Redirect its Efforts in Health Care Antitrust Enforcement,” September 9, 2002 (presented on behalf of the American Medical Association).

⁶Cara S. Lesser, “Recent Developments in Health Care Markets and Policy Implications,” September 9, 2002 (presented on behalf of the Center for Studying Health System Change).

As set forth in our Merger Guidelines, evaluation of the ease or difficulty of entry is an important factor in the determination of whether a merger is likely to have an anticompetitive effect. We heard at the hearings that “[e]ase of entry may be changing.”⁷ One panelist asserted that significant regulatory barriers to entry exist in health insurance markets.⁸ There are also questions as to whether certain contracting practices such as “most favored nation” clauses or “all product” clauses make entry more challenging by locking in physicians.⁹ We hope to gain greater insight as to whether there exist significant costs and impediments to entry into these markets.

B. Health Insurance Monopsony

We also seek further insights and perspectives regarding the conditions under which plans might obtain and exercise monopsony power against providers. Monopsony is the term used to describe substantial market power being exercised by buyers over sellers. In the health insurance industry, payors are both sellers (of insurance to consumers) and buyers (of, for example, hospital and physician services). Many providers accuse insurance companies of forcing them to accept unreasonably low rates and unattractive contract terms, which in turn may impact quality of care. In response to claims that they have monopsony power, payors cite substantial competition among health insurers seeking strong provider panels and a consumer backlash against managed care. Payors say that providers thus have more leverage because

⁷ *Id.*

⁸ Donald Palmisano, M.D., “Taking the Payor Side Seriously: Why the Federal Trade Commission Should Redirect its Efforts in Health Care Antitrust Enforcement,” September 9, 2002 (presented on behalf of the American Medical Association).

⁹ *Id.*

insurance companies must now have networks with large numbers of physicians or specific physicians to respond to changed consumer demands. We will encourage our panelists to explore several facets of this debate, including market definition and competitive effects theories. As with our other topics, the questions our panelists will address regarding monopsony in the health insurance context are complex. As an economist testifying at the September Workshop noted, “[w]hen evaluating the buying power of a health plan, we will need to be careful to distinguish sensible and procompetitive cost controls (which could lead to lower payments to providers) from the exercise of market power that also lowers the amount that is paid to providers. It is not always easy to separate the two theories.”¹⁰

III. The Value of DOJ-FTC Collaboration

This is only the second time that the Antitrust Division and the FTC have jointly sponsored a series of hearings. Tim Muris deserves great credit for promoting the joint hearing concept in the Intellectual Property hearings that were concluded last year, and on which our staffs are now working on a joint report. In the field of health care, Tim and I view the work of the two agencies as complementary, and we both expect to benefit from the hard work of our staffs in assembling these programs. For the DOJ’s part, Principal Deputy Assistant AG Debbie Majoras is taking an active role in the work of the hearings. Special Counsel Leslie Overton, together with Bill Berlin – a leader in the Lit I section where our health enforcement work is concentrated – are handling day to day issues in putting together the hearings. I hope all of you

¹⁰ Statement by Lawrence Wu, Vice President, NERA, “On Health Insurance: Payor/Provider Issues,” September 9, 2002.

with an interest in these topics will feel free to contact Leslie and Bill to pass on your input and suggestions for future panels.

From a broader perspective, I think these hearings exemplify the benefits of having two separate agencies working on competition related issues. Perhaps these benefits are unintended, as many observers have suggested that nobody would have designed a system with two separate antitrust enforcers having significant overlapping responsibility. But this is in my view a bit simplistic, and ignores the fact that some of life's most effective arrangements are less the product of elegant design than of historical accident and years of hard work.

In the case of the Antitrust Division and the FTC, our overlapping and hopefully complementary efforts can provide real benefits to the cause of promoting competition for the benefit of consumers. The agencies differ, of course, in many ways: the Division is charged with criminal antitrust enforcement, which is not part of the FTC's authority; similarly, the FTC has important consumer protection functions not shared by DOJ. It might fairly be said that the Antitrust Division – not surprisingly since it is a component of the Justice Department – sees its primary focus as law enforcement, while I know that many colleagues at the FTC rightly take great pride in their focus on policy and empirical research. Of course, this is not to say that the FTC is not a great enforcer, or that the Division is uninterested in policy – far from it.

My point is that the agencies have differences of approach, and that the public can benefit from this. This happens in our day to day operations, whether it be a referral of a criminal case to the Division by our FTC colleagues, or the benefits DOJ lawyers derive from research and policy work undertaken by the Commission. It can even happen in areas of overlapping interest, through initiatives spurred by friendly rivalry, so long as we are able to avoid inefficiency and

duplication. Obviously, I believe these joint hearings are an example of DOJ-FTC collaboration at its best.

CONCLUSION

The Division is committed to antitrust enforcement in the health care sector. We hope that these hearings will offer both agencies insights into how competition is working and should work in this important part of our economy. We have worked and will continue to work with the FTC to ensure that these hearings provide a forum comprised of balanced sessions where representatives from a broad cross-section of the health care sector – payors, hospitals, physicians, academics, state antitrust enforcers, economists, regulators – can express their views on a public record and engage in a spirited, productive discussion.