PROMOTING HEALTHY COMPETITION IN HEALTH CARE MARKETS: ANTITRUST, THE ACA, AND ACOS

Keynote Address by Julie Brill
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Good afternoon, and thanks to Bob Leibenluft, Suzanne Delbanco, and Catalyst For Payment Reform for inviting me to address you today. I am delighted to be part of today's National Summit. The Catalyst for Payment Reform and the FTC share an interest in looking closely at issues surrounding provider market power. At the FTC, we are determined to use antitrust enforcement to maintain competition in the health care sector to help promote high quality, cost-effective care. The antitrust laws are vital to maintaining competitive health care markets, never more so than now.

We are especially grateful for the valuable role that employers like many of you have played in promoting competition in health care markets. Through your amicus briefs, your comments on our policy proposals, and your participation in our workshops, you have helped us and our sister competition agency, the Antitrust Division of the U.S. Department of Justice, understand the real world harms from anticompetitive conduct to help us get our analysis right. I look forward to continuing to work together.

I and my colleagues at the FTC share your view about the importance of competition in health care markets, the subject of today's conference. There is a wealth of empirical evidence on the harmful effects of high concentration among health care providers. Numerous studies have found that the existence of provider market power results in higher prices, lower quality, and less innovation.[1]

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[1] *See, e.g.*, Martin Gaynor et al., *Death by Market Power: Reform, Competition and Patient Outcomes In the National Health Service* (April 2012), *available at:* http://www.andrew.cmu.edu/user/mgaynor/Assets/Death_by_Market_Power.pdf; Clark C. Havighurst and Barak Richman, *The Provider-Monopoly Power Problem in Health* Care, 89 Oregon L. Rev. 847 (2011); Robert Berenson, Paul Ginsburg, & Nicole Kemper, *Unchecked Provider Clout in California Foreshadows Challenges to Health Reform*, Health Affairs (April 2010); William B. Vogt and Robert Town, *How Has Provider Consolidation Affected the Price and Quality of Hospital Care?*, Synthesis Project No. 9, Robert Wood Johnson Foundation (Feb. 2006). Prices for inpatient hospital services in particular have risen dramatically. A new study published in the *American Journal of Managed Care* in March of this year found that from 2008 to 2010, inpatient hospital prices increased 8.2

With respect to health care delivery, the ACA's Medicare Shared Savings Program encourages groups of providers to form Accountable Care Organizations (ACOs) to work together to coordinate care for Medicare fee-for-service beneficiaries.[9] An ACO participating in the Medicare Shared Savings Plan may share in some portion of any savings they create if the ACO meets certain criteria set out by the Secretary of HHS, including quality performance standards.

The ACA and its ACO initiative address concerns that the current health care fee-for-service payment system creates incentives for overuse. In addition, when doctors fail to coordinate treatment plans for a patient, they may order duplicative tests and medications. This increases health care costs and can even result in worse patient outcomes.

As the FTC goes about its normal business of examining potentially problematic mergers among providers, agreements not to compete in their dealings with health plans, and other potentially troubling activity, we are starting to see some providers point to the ACO program as a justification for such conduct. The parties and their counsel complain that the federal government is "speaking out of both sides of its mouth," with the Medicare program encouraging providers to come together and create organizations that will enable greater collaboration, while the antitrust agencies challenge them.

These contentions are creative, but misguided. Indeed, the goals of the ACA and antitrust enforcement are aligned and compatible.

The federal health care regulators and the FTC and Antitrust Division of the Department of Justice have a shared commitment to the development of lawful and procompetitive ACOs. The Centers for Medicare and Medicaid Services (CMS) always intended that the antitrust a024 Tw -10.00x 0s/ed that7y/5(ere r)4(ly troubltient,rouitiv1 Tc -0.0001 Tw -17.86 -115 (le greateACOs.)]cor

on the antitrust agencies to use "their existing enforcement processes for evaluating concerns raised about an ACO's formation or conduct and [to file] antitrust complaints when appropriate."[12] Importantly, CMS can exclude from the Shared Savings Program any ACO that violates the antitrust laws, and CMS has promised to "coordinate closely with the Antitrust Agencies throughout the application process and the operation of the Shared Savings Program to ensure that the implementation of the program does not have a detrimental impact upon competition."[13]

Secretary of Health and Human Services Kathleen Sebelius recently reaffirmed her

antitrust regulators – we embraced it as far back as 1996.[16] With regard to aggregations of market power – whether through mergers or otherwise – antitrust law uses a scalpel, not a sledgehammer, and carefully analyzes each case to bar only those that on balance threaten to harm consumers.[17]

The argument that the ACA encourages providers to "consolidate" whereas the antitrust laws require that providers "compete" is mistaken. The ACA requires providers to create entities that *coordinate* the provision of patient care services. The ACA neither requires nor encourages providers to merge or otherwise consolidate. ACOs may be formed through contractual arrangements that are well short of a merger, such as a joint venture. Provider groups, like any other business entity, must successfully develop their business [(to bar only th)6(ose that4457 Tu8.00s.)l busi

independent physicians for alleged price fixing and refusal to deal with health plans except on collectively determined terms. We found that Advocate Health Partners and the other organizations had negotiated group contracts with fees 20 to 30 percent higher than one health plan's individual physician contracts. The physician groups settled the charges, entering into an order that bars anticompetitive pricing practices and refusals to deal, and allows the doctors to collaborate when doing so could lead to cost savings and better health care for patients.[27] Advocate Health Partners earnestly undertook reforms consistent with our order. Today, Advocate Health Partners is cited as an exemplary provider organization delivering high-quality, cost-effective care.[28]

FTC staff gave this same message earlier this year to physicians in Norman, Oklahoma, who sought our advice concerning their proposal to develop a clinically integrated, centrally managed physician hospital organization (PHO) as a way to improve quality of care and reduce costs. FTC staff concluded that the proposed PHO created the potential for a high degree of interdependence and cooperation among the participating physicians, and therefore would have the potential to generate significant efficiencies in the provision of physician services.[29] Hopefully the Norman PHO will have results similar to the reports about Mesa IPA and Advocate Health Partners.

Now let me touch on our recent enforcement actions where the primary focus was on the accumulation of market power by providers.[30] It is critical that our enforcement actions in this area get it right, because once market power is created it is hard to undo. Most of our enforcement activity involving provider market power has involved hospital mergers, where we have a very active and successful program. Since 2011, we have investigated and challenged four mergers,[31] while at the same time allowing dozens more to proceed without a challenge.

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[27] *In the Matter of* Advocate Health Partners, *et al*, FTC File No. 031-0021 (Consent Agreement), dated Dec. 29, 2006, *available at:* http://www.ftc.gov/os/caselist/0310021/061229agree0310021.pdf.

[28] *See, e.g.*, Annie Lowry, '*Accountable Care' Helping Hospitals Keep Medical Costs Down*, New York Times (April 24, 2013), *available at:* http://www.nytimes.com/2013/04/24/business/accountable-care-helping-hospitals-keep-medical-costs-down.html?pagewanted=all&_r=0.

[29] Norman PHO,