Special Challenges for Antitrust in Health Care

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Law and Policy.[2] A detailed report will be issued, but the hearings have already enriched our understanding of issues in health care.

Much of this article is based on information presented at the hearings. Since the audience for an ultimate report and for this article primarily consists of lawyers, I will also occasionally compare and contrast competition issues as they affect the medical profession and the legal profession. When we look at the medical profession, we also need to take a hard look at ourselves. The article is deliberately provocative because the purpose is to stimulate discussion not to conclude it.

The following are what I believe are the most significant factors that distinguish competition in the health care sector from competition in many other sectors of the economy.

1. Third-Party Payors and Health Care as an Entitlement

Perhaps the most serious and pervasive problem, with which readers are undoubtedly familiar, is the fact that the consumers of medical services and products normally do not pay the full incremental costs of their care. They may pay collectively and indirectly through insurance premiums and taxes, but these costs are relatively fixed. Accordingly, there is a tendency to "over-consume." The o

economic models with which antitrust lawyers are familiar. This solicitude is even harder to accommodate when elected officials are almost compelled to say that everyone, regardless of means, is entitled not only to medical care but the "best possible" medical care. This is, of course, literally impossible, just as it is impossible for all the children in the mythical town of Lake Wobegon to be "above average." But, we have to pretend that we believe it.

As a result, the keepers of the gates will never be popular. If they are health maintenance organizations (HMOs) or insurance companies, they are broadly excoriated in the press and on the floors of Congress. If the gatekeeper is the State, like our neighbor to the North, people not only complain but also pour across the border to bypass the system.[3] (In fact, we can assume that the relatively affluent or well-connected will find a way to jump the line in any seemingly objective and egalitarian rationing regime—whether we are talking about health care or education or anything else where the perceived stakes are high.)

Most lawyers are not familiar with this kind of environment. Payment by third parties is relatively rare. Companies may pay for the legal expenses of employees in situations where the company may be vicariously liable for employees' conduct, but payment for purely personal legal expenses is not part of an ordinary compensation package, even when medical expenses are subsidized in some way. The government will pay for the legal defense of indigents accusemp88

integration. Integration should improve outcomes and also enhance the autonomy of the profession as a whole. The unusual economics of the health-care market, described above, make it likely that there will always be pressures for overconsumption and oversupply, with a corresponding need for one or more gatekeepers to "ration" medical care. If provider associations were better integrated, they could theoretically assume a greater role in gatekeeping them-