GUIDE TO THE ISSUES

HOUSE REPUBLICAN POLICY COMMITTEE
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SCRUTINIZE ANTI-COMPETITIVE HEALTH CARE CONTRACTS

Market consolidation among health services providers and within the insurance industry should be examined to ensure consumers are not harmed by anti-competitive contracting practices.

Quick Take

Restrictive clauses in contracts containing "anti-competitive elements" have emerged as a commonplace practice across the health care industry.

Congress should empower the FTC to enforce existing antitrust laws in the health care space.

BACKGROUND

The health care sector represents about one-fifth of America's economy.[1] Over the past twenty years, the health care marketplace has experienced significant consolidation among hospitals, providers, and insurance companies.[2] Moreover, restrictive clauses in contracts containing "anti-competitive elements" have emerged as a commonplace practice across the industry.[3] These restrictive contracts are designed to retain the market advantage for larger firms at the expense of competitors and consumers.

Rural communities are particularly adversely impacted by this monopolization due to limited alternatives and access to providers.[4] In 2017, the National Rural Health Association estimated that 673 rural facilities – over one-third of rural hospitals – were at risk of closure.[5] Additionally, the two largest insurers reportedly claim over 70 percent of the health care market "in one-half of all local insurance markets."[6]

A 2017 analysis by Carnegie Mellon University professor Martin Gaynor addressed recent antitrust cases that highlight the anti-competitive practices in the health care marketplace.[7] In one example from 2016, the Department of Justice (DOJ) and the State of North Carolina filed a civil antitrust lawsuit against a large hospital system in North Carolina now known as Atrium Health.

The complaint alleged that the health care system contractually prohibited insurers from steering patients to lower-cost providers or equipping patients with certain price and quality information in an effort to undermine competition.[8] These contractual provisions known as "anti-steering" and "gag" clauses respectively may significantly undermine price competition in health care, especially in situations where a health provider has a dominant market position.[9,10]

Ultimately, Atrium Health settled with the DOJ and agreed to nullify certain anti-competitive steering provisions in its contracts.[11]

Anti-competitive contracting is not limited to health care providers. Market-dominating insurers may also extract contractual concessions that potentially harm competition.

In 2010, the DOJ and the State of Michigan filed an antitrust suit against Blue Cross Blue Shield (BCBS) of Michigan which alleged the insurer's use of "most favored nation" clauses illegally inhibited hospitals from negotiating contracts with BCBS's competitors.[12] A "most favored nation" provision generally requires that

a provider not give an equal or more favorable price for services to any other plan. The DOJ claimed that the contractual provisions were "likely raising prices for health insurance in Michigan."[13]

The State of Michigan enacted laws banning "the use of most favored nation clauses by insurers, health maintenance organizations, and nonprofit health care corporations in contracts with providers."[14] As a result, the DOJ agreed to dismiss the case without prejudice.[15]

Presently, federal law limits the Federal Trade Commission's (FTC) authority over the insurance industry[16,17] and any antitrust violations other than mergers by non-profit firms.[18,19] As a result, the Federal Government's top antitrust officials do not have jurisdiction over important competitive aspects of American health care.

CONSTITUTIONAL AUTHORITY AND REPUBLICAN PRINCIPLES

The Constitution grants Congress the power to regulate interstate commerce.[20] Government should promote competition to benefit consumers. Market participants should be treated equally with respect to government oversight.

POLICY SOLUTIONS

Authorizing the FTC to conduct oversight regarding these matters has bipartisan support. For example, the Brookings Institution and the American Enterprise Institute have noted, "Empowering the FTC to study the insurance industry, enforce antitrust laws in the insurance industry and enforce antitrust laws with respect to nonprofit health care organizations could enable it to work against anticompetitive practices."[21]

Congress should empower the FTC to enforce existing antitrust laws in the health care sector including oversight of actions taken by non-profit health care companies.

Please contact Cameron Smith or Kelsey Wall with the Republican Policy Committee at (202) 225-4921 with any questions.

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[1] Will Kenton, *Health care Sector*, Investopedia (July 7, 2019), https://www.investopedia.com/terms/h/health_care_sector.asp.
[2] According to the American Hospital Association, for example, "over 1,600 hospital mergers have occurred from 1998 to 2017."
[3] Martin Gaynor, *Diagnosing the Problem: Exploring the Effects of Consolidation and Anticompetitive Conduct in Health Care Markets*, Statement before the Committee on the Judiciary Subcommittee on Antitrust, Commercial, and Administrative Law U.S. House of Representatives, (Mar. 7, 2019), https://docs.house.gov/meetings/JU/JU05/20190307/109024/HHRG-116-JU05-Bio-GaynorM-20190307.pdf.
[4] *Id.* at 3.
[5] *NRHA endorses reintroduction of Save Rural Hospitals Act to new Congress*, National Rural Health Association, Government Affairs Office (Jun. 20, 2017), https://www.ruralhealthweb.org/NRHA/media/Emerge_NRHA/Press%20releases/NRHA-Release-2017-Save-Rural-Hospitals-Act.pdf.
[6] Gaynor, *supra* note 3, at 2.
[7] Martin Gaynor, Farzad Mostashari, Paul B. Ginsberg, *Making Health Care Markets Work: Competition Policy for Health Care*, Brookings Institution (Apr. 2017), https://www.brookings.edu/wp-content/uploads/2017/04/gaynor-et-al-final-report-v11.pdf.
[8] United States of America and North Carolina v. The Charlotte-Mecklenburg Hospital Authority d/b/a Carolinas Health care System, Vol. 84, FR 14675 (4th Cir. 2018), https://www.justice.gov/atr/case-document/file/1117111/download.
[9] Gaynor, Motashari, Ginsberg, *supra* note 7.
[10] Martin Gaynor testified that there is presently no systematic evidence or analysis on the extent, effect, or impact of restrictive "anti-steering" and "gag" clauses being employed in these contracts or on market competition, due in part to a lack of federal authority to conduct investigations. *See* Gaynor, *supra* note 3, pg. 17.
[11] United States of America and The State of North Carolina v. The Charlotte-Mecklenburg Hospital Authority d/b/a Carolinas Health care System, Vol. 84, FR 14675 (4th Cir. 2018), https://www.justice.gov/atr/case-document/file/1157461/download.

[12] United States of America and the State of Michigan v. Blue Cross Blue Shield of Michigan, Case 2:10-cv-14155-DPH -MKM (Oct. 18, 2010), https://www.justice.gov/atr/case-document/complaint-43.
[13] *Id.*
[14] 2013 P.A. 5 and 2013 P.A. 6.
[15] Civil Action No.: 210-CV-14155 (E.D. Mich. Oct. 11, 2012), https://www.justice.gov/atr/case-document/file/489421/download.
[16] Federal Trade Commission Act, 15 U.S.C. §§ 71-77 (1916).
[17] McCarran-Ferguson Act, 15 U.S.C. § 6 1011-1015 (1945).
[18] Federal Trade Commission Act, 15 U.S.C. §§ 4 (1947).
[19] Gaynor, Motashari, Ginsberg, *supra* note 7.
[20] U.S. Const. art. I, § 8, cl. 3.
[21] Henry Aaron, Joseph Antos, Loren Adler, James Capretta, Matthew Fiedler, Paul Ginsburg, Benedic Ippolito, Alice Rivlin, *Attachment: Recommendations to Reduce Health Care Costs* (2019), Brookings Institute, American Enterprise Institute, https://www.brookings.edu/wp-content/uploads/2019/03/AEI_Brookings_Attachment_Cost_Reducing_Health_Policies_Update.pdf.