

STATEMENT

of the

American Medical Association

to the

**Subcommittee on Health
Committee on Ways and Means
United States House of Representatives**

RE: Health Care Industry Consolidation

September 9, 2011

The American Medical Association (AMA) appreciates the opportunity to provide our views regarding today's hearing on health care industry consolidation. We commend Chairman Camp, Ranking Member Levin, Subcommittee Chairman Herger, Subcommittee Ranking Member Stark, and Members of the Committee for addressing this important issue. Our comments examine health insurer consolidation, hospital consolidation, and consolidation pursuant to the formation of innovative health care delivery models. We look forward to working with you on these issues.

Health Insurer Consolidation

The Problem of the Dominant Health Insurer

The AMA has long held that health insurer consolidation results in health insurer concentration and increased market power. To gather data on this issue, for the past ten years, the AMA has conducted the most in-depth study of commercial health insurance markets in the country.

The most recently published AMA study, "Competition in Health Insurance: A Comprehensive Study of U.S. Markets (2010 update)," found that the vast majority of health insurance markets across the United States are highly concentrated and are dominated by one or two health insurers. Specifically, the study found that 80 percent of the metropolitan areas examined were highly concentrated based on the 2010 Horizontal Merger Guidelines,¹ and in nearly half of the metropolitan areas examined, one insurer had at least a 50 percent market share.

¹ U.S. Department of Justice and Federal Trade Commission, Horizontal Merger Guidelines. Issued August 19, 2010.

Furthermore, insurer concentration is on the rise: independent researchers recently concluded that the fraction of local markets falling into the “highly concentrated” category increased from 68 percent to 99 percent between 1998 and 2006.² Those fractions were based on the 1997 Horizontal Merger Guidelines.³

The AMA believes that high insurer market concentration is an important issue of public policy because it facilitates insurers’ exercise of market power, which may have anticompetitive effects.

Barriers to entry into health insurance markets enable the exercise of market power. Barriers include: brand name acceptance of established insurers; the need to develop sufficient business to permit the spreading of risk; the need to contend with established insurance companies that have built long-term relationships with employers and other consumers; and the cost of developing a health care provider network.

Entry barriers were exemplified in the proposed merger between Highmark Inc. and Independence Blue Shield in 2008. In that case, a report commissioned by the Pennsylvania Insurance Department concluded that it was unlikely that any competitor would be able to step into the market after a Highmark / IBC merger:

[B]ased on our interviews of market participants and other evidence, there are a number of barriers to entry—including the provider cost advantage enjoyed by the dominant firms in those areas and the strength of the Blue brand in those areas.... On balance, the evidence suggests that to the extent the proposed consolidation reduces competition, it is unlikely that other health insurance firms will be able to step in and replace the loss in competition.⁴

Furthermore, contracting practices used by dominant health insurers exacerbate the harm caused by the exercise of market power. These practices include most favored nations clauses whereby physicians must agree to give the dominant payer at least as favorable a rate as they give to any other insurer, as well as products clauses, anti-assignment provisions, and minimum enrollment assurances. If physicians were to refuse the terms of the dominant buyer, they would likely suffer an irretrievable loss of revenue.

When considering the marketplace for medical services, it is also important to understand that medical services are unique in that they can neither be stored nor exported. This results in a considerable, and prohibitive, financial risk to physicians who wish to terminate a relationship with a health insurer because of low reimbursement rates. To make up the revenue loss, the physician would need to make up lost business by immediately switching to an alternative health insurer, and simultaneously retaining patients who subscribe to that insurer. Where those alternatives are lacking—in most

² Dafny L, Duggan M, “Paying a Premium on Your Premium? Consolidation in the US Health Insurance Industry.” National Bureau of Economic Research Working Paper 15434, October 2009.

³ U.S. Department of Justice and Federal Trade Commission, Horizontal Merger Guidelines. Issued April 8, 1997.

⁴ LECG Inc., “Economic Analyses of The Competitive Impacts From The Proposed Consolidation of Highmark and IBC.” September 10, 2008.

environments where insurers have market power—a health insurer will have the ability to reimburse physicians at rates that are below a competitive level.

Increased Costs for Patients

In an era of spiraling costs, it is tempting to conclude that anything that drives down medical fees is a good thing for consumers. However, many policy experts have asserted that, in fact, lower fees paid by insurers may result in higher premiums for patients. R. Hewitt Pate, a former Assistant Attorney General of the Antitrust Division, said in a 2003 statement before the Senate Judiciary Committee:

A casual observer might believe that if a merger lowers the price the merged firm pays for its inputs, consumers will necessarily benefit. The logic seems to be that because the input purchaser is paying less, the input purchaser's customers should expect to pay less also. But that is not necessarily the case. Input prices can fall for two entirely different reasons, one of which arises from a true economic efficiency that will tend to result in lower prices for final consumers. The other, in contrast, represents an efficiency-reducing exercise of market power that will reduce economic welfare, lower prices for suppliers, and may well result in higher prices charged to final consumers.⁵

This sentiment was repeated at the conclusion of the aforementioned Highmark/IBC hearings. In that case, the Pennsylvania Insurance Department was prepared to find the proposed merger to be anticompetitive in large part because it would grant the merged health insurer undue leverage over physicians and other health care providers. The Department released the following statement:

Our nationally renowned economic expert, LECG, rejected the idea that using market leverage to reduce provider reimbursements below competitive levels will translate into lower premiums, calling this an “economic fallacy” and noting that the clear weight of economic opinion is that consumers do best when there is a competitive market for purchasing provider services. LECG also found this theory to be borne out by the experience in central Pennsylvania, where competition between Highmark and Capital Blue Cross has been good for providers and good for consumers.⁶

In summary, the AMA believes that health insurer consolidation results in high market concentration and an increase in insurers' ability to exercise market power. Left unchecked, the exercise of market power can have anticompetitive effects such as low reimbursement rates for physicians relative to competitive levels, and increased costs for patients.

⁵ *Concerning Antitrust Enforcement in the Agricultural Marketplace*: Hearing before the Committee on the Judiciary, United States Senate. (October 30, 2003) (Statement of R. Hewitt Pate, Antitrust Attorney General, Antitrust Division). Available at <http://www.justice.gov/atr/public/testimony/201430.htm>.

⁶ Statement of Pennsylvania Commissioner Joel Ario on Highmark and IBC Consolidation. January 22, 2009. See also LECG Inc., “Economic Analyses of The Competitive Impacts From The Proposed Consolidation of Highmark and IBC.” September 10, 2008.

Hospital Consolidation

The Committee's review of the issue of hospital consolidation is timely. While our most recent data shows that 78 percent of office-based physicians in the U.S. work in practices of nine physicians or less, and the majority are in solo practices or practices of four or less,⁷ hospitals are increasingly hiring physicians as employees and acquiring physician practices.

Many physicians cite decreased administrative duties and less time spent complying with regulation as reasons for seeking hospital employment instead of private practice. Whatever the reasons, hospitals have increased their efforts to hire physicians, and the trend of physician employment by hospitals is growing.

Hospital acquisition of physician practices has also grown in the past several years, in large part due to the prohibitive cost for physician practices of implementing health information technology and regulatory compliance. These acquisitions have, in some markets, given hospitals significant market power over both facility and physician markets. Importantly, because each such acquisition is small, this consolidation occurs under the radar of antitrust enforcement.

Hospital mergers also often have negative effects on physicians. For example, consolidation of services can mean the deterioration of the physician / patient ratio, and physicians are likely to lose leverage with, and have their practices more closely controlled by, the hospital. Many physicians reported that, following the "merger-mania" of the 1990s, they experienced an overall loss of practice autonomy and clinical decision-making. Moreover, in regard to anticompetitive concerns, some physicians can be shut out entirely if one hospital becomes "the only game in town."

In all three of these hospital consolidation scenarios—physician employment, physician practice acquisition, and hospital mergers—patient care is increasingly delivered in the hospital, as opposed to the private practice setting. Health policy experts generally agree that hospital care is more expensive for patients, and, in the context of the federal health programs, the taxpayer. The AMA believes that these consolidation issues merit further review.

Innovative Delivery Models

The health care system is currently exploring new payment and delivery models that mean to increase quality and efficiency. The AMA believes that physician leadership in

⁷ The AMA Physician Practice Information Survey (2009). Available at <http://www.ama-assn.org/ama/pub/physician-resources/solutions-managing-your-practice/coding-billing-insurance/the-resource-based-relative-value-scale/physician-practice-information-survey.page?>

these new models is imperative for their success, and that current antitrust law and enforcement, if not revised, will be an obstacle to physician participation.

Value of Physician Participation in Innovative Delivery Models

The AMA has long advocated for physician leadership in new payment and delivery models that focus on quality and efficiency. Physician leadership ensures that a physician's medical decisions are not based on commercial interests but rather on professional medical judgment that puts patients' interests first. Physicians are the medical professionals best qualified by training, education, and experience to provide diagnosis and treatment of patients. The AMA believes that clinical decision-making autonomy is best fostered in a physician-led environment.

Physician-led models are also widely believed to lower costs. On average, patients who receive care from a physician practice incur a lower cost than those who receive hospital care for the same condition. In the context of the Medicare Shared Savings Program for Accountable Care Organizations (ACOs), the Centers for Medicare and Medicaid Services (CMS) has recognized that "the savings generated by ACOs, in many cases, are expected to result from reduced inpatient admissions."⁸ MedPAC has also observed that, in the context of outpatient care, total payment (Medicare and patient) for a level three visit in a physician's office is \$68.97 compared to \$124.40 in a hospital-owned clinic or hospital-based entity.⁹

CMS has also said that one goal of the new delivery models is to "raise the likelihood of preserving alternatives in the market, ultimately leading to the emergence of better procedures and treatments."¹⁰ If physicians are enabled to participate, and establish competing models in the marketplace, reduced costs and increased quality will result.

Antitrust Laws are a Barrier to Physician Participation

Generally, under antitrust law, physicians may not collaborate regarding payer negotiations unless they are integrated, either financially or clinically. While some innovative delivery systems have sought and obtained conditional antitrust clearance from the Federal Trade Commission (FTC) pursuant to a showing that they are clinically integrated, the current rules regarding clinical integration are unnecessarily restrictive and ultimately prohibitive to physician participation in new delivery models. The consequence of this is two-fold: physicians will not be able to lead these models or bring about the benefits discussed above, and hospitals and very large health systems will become the only players in the market. The latter consequence will likely exacerbate the problem of hospital market dominance and acquisition of physician practices.

The AMA has advocated that the FTC and the Department of Justice (DOJ) set forth clear and common sense antitrust rules concerning the formation of innovative delivery

⁸ 76 FR 19537.

⁹ Available at http://www.medpac.gov/chapters/Jun11_Ch06.pdf.

¹⁰ 76 FR 19630.

models so that physicians can pursue integration options that are not hospital driven.¹¹ Physicians should not have to become employed by a hospital or sell their practice to a hospital in order to participate in innovative delivery models.

Conclusion

The AMA applauds the Committee for examining the important issues of health insurer consolidation, hospital consolidation, and antitrust barriers to physician engagement in innovative delivery models. As Congress continues to examine health care delivery, the AMA urges the Committee to be mindful of the vital role that physicians play in patient care. Physicians are critical in efforts to improve quality and to provide coordinated care for patients, and should be supported in these efforts, rather than penalized, by antitrust law and enforcement. We have been encouraged by the FTC and the DOJ's willingness to work with us on these issues, and look forward to working with the Committee to address any questions on our comments.

¹¹ The AMA recently submitted comments to the FTC and DOJ on antitrust barriers to physician leadership in innovative delivery models. Available at <http://www.ama-assn.org/resources/doc/washington/aco-antitrust-reform-proposal-comment-letter.pdf>. See also <http://www.ama-assn.org/ama1/pub/upload/mm/399/aco-comments-27sept2010.pdf>.