

Physicians key to analysis of insurance mergers' effect on care

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Troy Parks

News Writer

“How will this affect my patients?” This question arises in the mind of a physician whenever a threat to providing quality care to patients is revealed. The potential health insurance mergers currently in federal court triggered a wave of opposition from medical societies, state attorneys general, and now the Department of Justice. However, what role can individual physicians play in the review and analysis of potential mergers in health care?

Resistance to the mergers—Aetna’s acquisition of Humana and Anthem’s acquisition of Cigna—recognizes the “systemic concerns that are really permeating the health care supply chain,” said Diana L. Moss, PhD, president of the American Antitrust Institute. Moss and two of her colleagues discussed the impact of consolidation on the health care market at the 2017 AMA State Legislative Strategy Conference in Amelia Island, Fla.

“We’ve seen this with health insurance mergers; a lot of incentives for providers to bulk up to become bigger and better bargainers,” Moss said. “Obviously, the health insurance mergers themselves are motivated in part by the desire of insurers to be larger and more powerful bargainers.”

Moss sees the health care supply chain as important not only to patients but to the economy as a whole. She equates it to food and agriculture. The potential harms and benefits of consolidation should focus on patients, she said. “Will they pay higher prices? Will they get lower quality? What will happen to innovation? What happens to choice?”

“This, of course, is the concern in the insurance mergers—that bigger, more powerful insurance companies would be able to exercise their power over physicians, lower reimbursement rates, stifle innovation, almost to the point where it might be less attractive for people to consider going into the medical profession,” Moss said. “This would have a deep and concerning effect on the medical professions. That is a message I think that the AMA has been very effective in conveying not only to federal-level enforcers but also to state-level enforcers.”

One question with respect to any merger is whether it’s going to have the likely effect of substantially

lessening competition in a properly defined relevant market, said Rich Feinstein, former director of the Bureau of Competition at the Federal Trade Commission.

“Ultimately, the question is, assuming the merger goes forward, what choices will consumers be left with, and are those choices sufficient to defeat any attempt on the part of the merging parties to exercise market power?” Feinstein said. For example, if they attempted to raise rates or decrease quality, could the patients, physicians and hospitals adjust to defeat that use of market power?

“If the answer to that question is no, they don’t really have active alternatives, then you have a problem,” Feinstein said. “With respect particularly to the Anthem-Cigna transaction, there’s a focus on two sets of markets.” In one market, they are sellers of health plans. In another market, they are purchasers of medical services.

“The Justice Department has specifically alleged, very much based on reviews by the AMA and others, that one of the potential harms” of the merger—called monopsony—is in the purchasing market. “It’s a buyer with too much buyer power.”

How physician voices are heard

Officials in a position of enforcement can often be understaffed and underfunded, Moss said. This is where other stakeholders come into the mix. They can tell stories about how physicians, patients, or the competitive process might be harmed.

“The role of trade associations, of societies, of professionals, in advocating before regulators and antitrust enforcers is really the key,” Moss said. “The AMA’s role through the state medical societies on the health insurance mergers has really been quite remarkable.”

“If you only remember one thing about this specific topic,” Feinstein said, “remember that the more you can present your interests as aligned with those of consumers, the more weight they will be given.”

What are some of the ways that physicians can collectively or individually contribute to the analysis and review process? Feinstein offered five issues that antitrust enforcement officials want to hear about from physicians.

Product market definition: Over time, some services that were previously provided in inpatient care have become outpatient services, Feinstein said. “That suggests that the product market definition is in a constant state of flux. You can look at that empirically, but doctors are probably as well informed as anyone about what kinds of procedures can safely and efficiently be done in the outpatient setting.”

Geographic market: “There’s going to be a lot of data about patient flow,” he said. “Doctors who refer patients to hospitals are a very good source of anecdotal evidence about what the options are going to be for their patients.”

Quality: Doctors can provide a lot of important anecdotal evidence about ways in which potentially merging hospitals may affect the quality of care, Feinstein said.

Efficiencies: Defendants can make the argument that even if competition is reduced to some extent, the resulting transaction will generate efficiencies—typically in the form of reduced costs and/or enhanced quality—and that patients will thereby benefit, Feinstein said. “That assumes, of course, that there’s enough competition remaining in the market so that the merging parties will have the incentive to pass the benefits of those reduced costs through to consumers.”

Physicians are well positioned to have a view about whether efficiencies in IT systems or electronic health records will be merger specific or “whether the merger is necessary to achieve the benefits of increased technological innovation,” he said.

Monopsony: “If the effect of a merger, particularly amongst insurers, is to not just reduce the level of reimbursement for doctors but to do it in a way that reduces the quality and reduces the supply of physician services,” Feinstein said, “doctors are uniquely qualified to tell that story and they’ve taken on that role particularly in the Anthem-Cigna case.”

Why Pennsylvania shut down a merger

Health insurance companies Highmark and Independence Blue Cross filed a merger application with the Pennsylvania Department of Insurance. The insurance commissioner of the state at that time was Joel Ario, now managing director at Manatt Solutions.

“If they had merged, they would have been the single largest insurer in a single state anywhere in the country,” Ario said at the AMA conference. “The federal government was quick to sign off on the deal and it came back to the state” and through an intense, two-year review process, Pennsylvania rejected the merger.

The Pennsylvania Department of Insurance, under Ario’s leadership, applied seven standards to the review. The deal passed several of those standards, including licensing and financial stability, among others.

But the deal failed two standards and that was all that state officials needed. “One was the competition standard,” Ario said. “This was not going to be good for competition in the state ... it was

anticompetitive, so they failed that test.”

“The second test they failed,” he said, “was that this particular merger would have been prejudicial to the public because it would have given these two companies undue leverage over the providers. When you squeeze providers down to a certain level, it’s simply not good for the insurance-buying public.”

“Insurance regulation is a numbers business in many respects, so the more you can bring numbers on the competition issues the better off you are,” Ario said. Patients, physicians and hospitals all testified against the mergers. “That kind of adds up over time and, most of all, you build the record. We had thousands of pages on the record.”