In Health Care, Let Regulators Make Competition Work

by Martin Gaynor and Deborah Haas-Wilson*

While policy makers and the public battle over Medicare, Medicaid and insurance reforms, physicians, hospitals and insurers have been aligning at an unprecedented rate in a variety of mergers, networks and joint ventures. The implications for health care competition--and thus for costs and quality--are profound.

Two recent developments in Washington bring the issue into sharp focus--one, a freshly revised set of antitrust guidelines that relax the regulation of physician networking activities; the other, pending legislation that would preclude effective oversight in the future. The key question on which regulators and the sponsors of these bills diverge is, to what extent will consolidation improve efficiency and quality, and to what extent will it facilitate collusion, monopoly power, higher prices and lower quality?

One of the most controversial of the new types of provider organizations is the physician network--a group of physician practices that have joined together to market themselves collectively to health insurers or, in some cases, directly to employers. The big question in such scenarios is whether or not these otherwise independent competitors should be allowed to jointly set prices.

Price-fixing is generally detrimental to competition, thus it traditionally has been considered "per se" illegal under antitrust laws, meaning that the courts presume the activity to be unlawful. In recent years, however, recognizing that physician networks have the potential to enhance efficiency and quality, and that in many markets such networks may not even pose significant threats to competition, the Department of Justice (DOJ) and the Federal Trade Commission (FTC) have revised their policies.

In a set of guidelines released just this summer, in fact, the agencies extended the considerably more lenient "rule of reason" treatment to networks that participate in extensive "clinical integration"--programs to monitor, evaluate and change clinical practices by the network's physicians. Under this approach, legality is judged on the basis of the activity's ultimate market impact. In other words, these networks will be judged on the basis of their impacts on efficiency and competition.

By recognizing broader grounds on which physician networks can be judged, these guidelines take an important deregulatory step. The danger is that unduly relaxing enforcement will work to the detriment of

competition.

Why? Because physicians, as a group, do not have a great pro-competition track record. In fact, in the last five years, the agencies have brought numerous actions challenging price-fixing and boycotts by groups of physicians who portrayed themselves as networks or independent practice associations. Often, these "networks" were found to be sham entities, created solely to raise costs or to deter the entry of organizations offering new forms of health care delivery and financing.

Despite the willingness of the FTC and the DOJ to modify enforcement policy in response to the changing realities of the health care marketplace, federal legislation has been introduced that would diminish the agencies' authority to challenge anti-competitive conduct by physicians.

One of these bills, H.R. 2925, sponsored by Rep. Henry Hyde, R-IL, would have all physician networks judged on a rule of reason basis, thus eliminating the agencies' ability to prosecute network price-fixing as per se illegal. Aside from the fact that this sort of legislative directive is almost without precedent in the world of antitrust law, it ignores the fact that the existing law plays an important role in sending a loud and clear message to market participants that certain kinds of anti-competitive conduct will not be tolerated.

Another bill, H.R. 3770, introduced by Rep. Thomas Campbell, R-CA, would exempt physician networks from antitrust prosecution entirely in markets where insurers have monopoly power. What the backers of this bill fail to understand is that the purpose of antitrust law is to protect competition, not competitors.

To be sure, healthy competition among physicians is good for health care consumers, because competition provides physicians with strong incentives to keep their fees in line and to provide appropriate care. However, unregulated markets do not necessarily lead to healthy competition. When Congress reconvenes next year, it would do well to remember this and let market forces and federal regulators work together to achieve the goal of cost-effective, high-quality health care.

** Martin Gaynor is the E.J. Barone Associate Professor of Economics and Health Policy at the H. John Heinz III School of Public Policy and Management at Carnegie Mellon University in Pittsburgh. Deborah Haas-Wilson is Associate Professor of Economics at Smith College in Northampton, Mass.*