

Health Care and Competition Law and Policy

**David A. Hyman
Special Counsel, FTC
Professor, University of Illinois**

What Is Competition Law?

Antitrust

+

Consumer Protection

=

Competition Law

What Does Competition Law Prohibit?

Private Anticompetitive Behavior

Sherman/Clayton/FTC Acts

Not: Public (State) Action or
Petitioning For Same

Who Enforces Competition Law?

- Federal Trade Commission
- Department of Justice
- State Attorneys General
- Private Plaintiffs

Health Care Hearings and Report

- ❑ September 2002: FTC held 2-day workshop
- ❑ February 2003 – October 2003: 27 days of FTC/DOJ joint hearings, covering both antitrust (19 days) and consumer information issues (8 days)
- ❑ Joint Report: July 23, 2004

Health Care Hearings

Some Basic Statistics

250 Witnesses

300 Presentations

150 Powerpoint Presentations/Hand-outs

4900 Pages of Transcripts

All available at www.ftc.gov

Improving Health Care: A Dose of Competition



**A Report by the
Federal Trade Commission
and the Department of Justice**

July 2004

Report Overview

- ❑ Executive Summary and 8 Chapters
 - Chapter 1: Overview and Background
 - Chapter 2: Physicians
 - Chapter 3: Hospitals
 - Chapter 4: Hospitals – Competition law
 - Chapter 5 – Insurance Industry Overview
 - Chapter 6 – Insurance – Competition law
 - Chapter 7 – Pharmaceuticals
 - Chapter 8 – Miscellaneous

Why Conduct Health Care Hearings?

- ❑ \$1.6 trillion industry in 2002 (15% GDP)
- ❑ Provides the Agencies with deeper understanding of health care markets
- ❑ Helps the Agencies answer two key questions
 - ❑ What is the current role of competition and how can it be enhanced to increase consumer welfare?
 - ❑ How should antitrust enforcement work (and has it) to protect existing and potential competition?

Why Do A Report?

Greater transparency on:

- ❑ What we know about health care
- ❑ How we think competition is working
- ❑ How the Agencies think competition could be improved
- ❑ Enforcement and advocacy priorities

Chapter 1: Overview and Background

- ❑ Developments in health care financing and delivery
- ❑ Quality
- ❑ Introduction to competition law and health law

Chapter 2: Physicians

- ❑ Independent Practice Associations
- ❑ Physician Hospital Organizations
- ❑ Compensation
 - Payment arrangements
 - Messenger model
 - Collective bargaining/countervailing power
- ❑ Licensure, market entry, and practice restrictions
- ❑ Antitrust enforcement
 - Private litigation involving physician privileges and credentialing
 - Provider network joint ventures
 - Physician information sharing
 - Physician-related conduct implicating the state action doctrine

Chapter 3: Hospitals

- ❑ Payment issues: a historical perspective
- ❑ Rising prices
- ❑ Pressures on hospitals
- ❑ Reorganization of the hospital system
- ❑ Specialty hospitals and ambulatory surgery centers
- ❑ Impact of government purchasing
- ❑ Hospital/Payor contracting
- ❑ Consumer price info and sensitivity
- ❑ Hospital pricing
- ❑ Cross subsidies and competition

Chapter 4: Hospitals – Competition law

- ❑ Geographic market definition
- ❑ Product market definition
- ❑ Entry
- ❑ Efficiencies
- ❑ Nonprofit status
- ❑ Group Purchasing Organizations
- ❑ Tiering and pay-for-performance

Chapter 5 – Insurance Industry Overview

- ❑ Regulatory framework
- ❑ Employment based coverage
- ❑ Individual insurance
- ❑ Publicly-funded programs
- ❑ Preferred provider organizations
- ❑ Uninsured
- ❑ Consumer driven health care

Chapter 6 – Insurance – Competition law

- ❑ Health insurer mergers
- ❑ Monopsony power
- ❑ Current controversies
 - Most Favored Nations clauses
 - Mandated benefits

Chapter 7 – Pharmaceuticals

- ❑ Innovation
- ❑ FTC initiatives to ensure benefits of competition
- ❑ Pharmacy Benefit Managers
- ❑ Direct to consumer advertising

Chapter 8 – Miscellaneous

- ❑ Certificate of Need
- ❑ State Action/Noerr Issues
- ❑ Long-Term Care
- ❑ International Perspective
- ❑ Remedies

The Bottom Line

- ❑ Six Recommendations and 11 Antitrust Observations
- ❑ Recommendations Directed at Other Government Agencies, Providers, and Payors

Recommendations – 1/2

- #1 Private payors, governments, and providers should continue experiments to improve incentives for providers to lower costs and enhance quality and for consumers to seek lower prices and better quality.**
- #2 States should decrease barriers to entry into provider markets (licensure, CON, reciprocity).**

Recommendations – 3/4

- #3 Governments should reexamine the role of subsidies in health care markets in light of their inefficiencies and potential to distort competition.**

- #4 Governments should not enact legislation to permit independent physicians to bargain collectively.**

Recommendations – 5/6

#5 States should consider the potential costs and benefits of regulating pharmacy benefit manager transparency.

#6 Governments should reconsider whether current mandates best serve their citizens' health care needs. . . governments should consider that such mandates are likely to reduce competition, restrict consumer choice, raise the cost of health insurance, and increase the number of uninsured Americans.

Observations 1 - 5

- ❑ P4P may = Financial Risk-Sharing
- ❑ Clinical integration Questions
- ❑ Hospital product markets (SSH, Outpatient)
- ❑ Hospital geographic markets should be defined properly (E/H; critical loss; types of evidence)
- ❑ Institutional form and antitrust: Behavior v. Status

Observations 6-8

- ❑ Community commitments (“an ineffective, short-term regulatory approach to what is ultimately a problem of competition.”)
- ❑ GPOs and Statement 7
- ❑ Countervailing power (“the available evidence does not indicate that there is a monopsony power problem in most health care markets. Even if it were assumed that providers confront monopsony health plans, the Agencies do not believe that allowing providers to exercise countervailing power is likely to serve consumers’ interests.”)

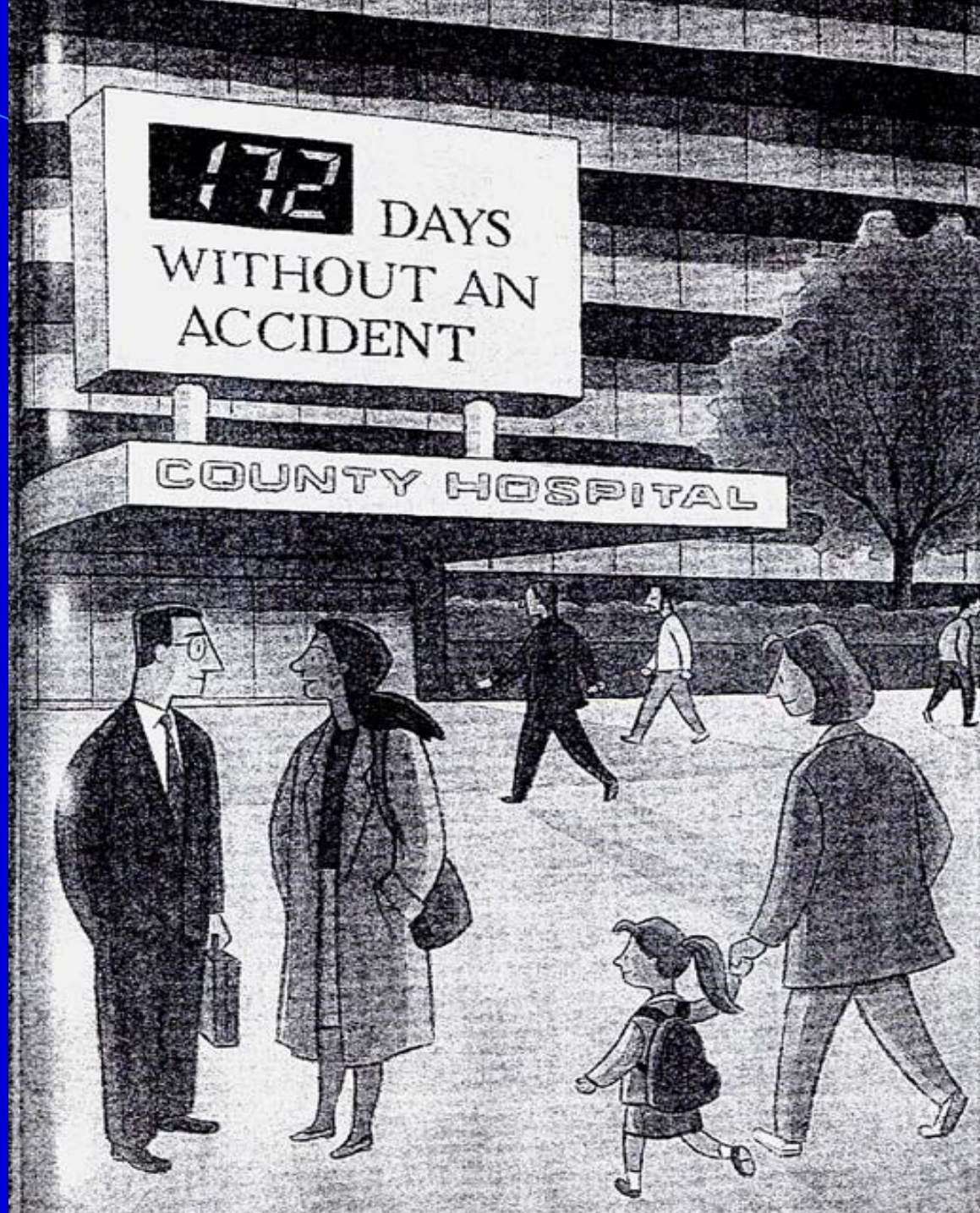
Observations 9-11

- ❑ Anticompetitive behavior and marketplace developments
- ❑ State Action/Noerr should be interpreted in light of their justifying principles
- ❑ Remedies should “resolve the anticompetitive harm, restore competition, and prevent future anticompetitive conduct.”

Market Failure v. Barriers to More Effective Competition

- ❑ Highly Regulated Market
- ❑ Incentive Problems
- ❑ Informational Problems
- ❑ Societal Attitudes

Maybe
Health
Care Can
Learn
from
Other
Industries



“Consumer welfare is maximized by open competition and consumer sovereignty – even when complex products and services such as health care are involved. The Agencies play an important role in safeguarding the free-market system from anticompetitive conduct, by bringing enforcement actions against parties who violate the antitrust and consumer protection laws. . . [The Agencies also play an important role when regulation is employed] by making policy makers aware of the costs of impediments to competition, and by advocating for competitive market solutions.”

Misconceptions

- ❑ The Report doesn't call for dramatic changes in antitrust enforcement or rules, let alone tell providers how best to structure their operations.
- ❑ The Agencies aren't picking on anyone in particular.

Lessons Learned

- ❑ Health care is complex.
- ❑ Government as both source and solution of problems – sometimes simultaneously, and sometimes both vertically and horizontally.
- ❑ Everyone thinks they're special.
- ❑ Enforcement agencies get their phone calls returned.