

Antitrust & Health Care Quality: Building a Competition Policy

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Antitrust Statutes

- Section One Sherman Act
 - prohibits contracts combinations and conspiracies in restraint of trade
- Section Two Sherman Act
 - prohibits monopolization and attempted monopolization
- Section Five FTC Act
 - prohibits unfair methods of competition

Antitrust Violations

- Sherman Act Section One (*per se*)
 - Price fixing
 - Territorial allocations
 - Tying arrangements
 - Group boycotts
- Sherman Act Section Two
 - Hospital mergers (large market share)

Medical Antitrust Study

- Objectives:
 - describe medical antitrust litigation between 1985 and 1999
 - determine how courts address quality and non-price concerns
 - outline components of a “competition policy”

Medical Antitrust Litigation - Findings

- **Business conduct:**
 - Litigation dominated by hospital-related cases
 - staff privileges
 - exclusive contracting
 - Managed care only small percentage of cases
- **Outcomes:**
 - Plaintiffs lose (no matter how winning and losing are defined)

Medical Antitrust Litigation - Findings cont.

- **Public Antitrust Enforcement:**
 - Government only small percentage of cases
 - Government more successful than private plaintiffs, but less successful than historic benchmarks
- **Caveats:**
 - Judicial opinions only a partial picture
 - Enforcement agencies act as “regulators” as well as prosecutors

How Do You Code for Quality?

- **Ideological Conflicts**

- Professional paradigm: absolute, objective, quality as “*apart from*” competition
- Antitrust paradigm: quality as “*a part of*” the competitive process

- **Health Services Research**

- Structure (accreditation, physical facilities)
- Process (malpractice, preventative services)
- Outcome (mortality, surveys and consumer rankings)

- **Economic Perspectives**

- Choice (product differentiation, location)
- Information (credentialing, disclosure)
- Innovation (technological and organizational)

Antitrust Treatment of Quality

- Orthodox beliefs about competition trump unorthodox beliefs
- Hospital mergers reflect substantial, *but isolated*, skepticism about benefits of competition
- Judicial tension between quality as “*apart from*” as opposed to “*a part of*” competition
 - Staff privilege - quality as “*apart from*” competition
 - Exclusive contracting - quality as “*a part of*” competition

Treatment of Quality - Cont.

- Courts pay no attention HSR view of quality - structure, process, and outcome
- Courts employ economic heuristics - (1) consumer choice, (2) information, and (3) market-driven innovation
- Antitrust cases plays little role in managed care and insurance industry

Designing A Health Care Competition Policy

- Rethinking Medical Antitrust Law
 - Revise doctrine to better address medical quality and non-price concerns?
 - Integrate antitrust policy with government's role as a regulator and purchaser of health care services?
- Markets/Regulation as a Dynamic Interface
 - Reject artificial “boundaries” between market and non-market institutions

2 Observations + 1 Question

- Observation 1 = Health is Complicated
 - Private Markets *plus*
 - Regulation (State and Federal) *plus*
 - Public Subsidies
- Observation 2 = Multiple Market Failures
- Question: How Build a Competition Policy?

Analytic Economic Framework

- General Equilibrium Theory
 - competitive markets are efficient - Arrow & Debreu (1954)
 - but, numerous restrictive conditions
- Market Failure = violation of conditions
- Problem of Second Best
 - Lipsey & Lancaster (1956)
 - close is not good enough

Analytic Framework - cont.

- Role of Social (Non-Market) Institutions
 - Arrow (1963)
 - Optimality-gap-filling function
- Building a Competition Policy
 - proper blend of market and non-market institutions
 - evolutionary path dependence (accidental)?
 - coordinated intervention (intentional)?

Medical Market Failures

- information
- moral hazard
- adverse selection
- agency failures
- market power
- public goods (trust)
- externalities
- innovation/technology
- Private Contract
 - Coase Theorem
 - contract failure (Havighurst)
- Structure of Firm
 - physician/hospital
 - managed care
- New Product/Markets
 - non-marketability
 - restricted commodity space

The FTC's Dual Challenge

- Internal: Antitrust Enforcement

- doctrinal questions
- second best problems
- competition v. total welfare
- market facilitating v. market displacing
- state action defense
- Noerr-Pennington

- External: Interagency Coordination

- monopsony power in lieu of regulation
- Medicare conduct as market shaping
- Medicare conduct as market facilitating
- competitive effects of technology/innovation

Rational Division of Labor

- What can antitrust courts realistically accomplish?
- What is better left to political/administrative processes?
- Who speaks for “competition” in areas outside the antitrust domain?

What Antitrust Courts Do Well (quality “apart of” competition)

- Create Space for Private Medical Markets
 - foster active price competition
 - police naked restraints
- Protect Limited Quality Concerns
 - use (1) choice and (2) information as proxies for non-price concerns
 - demand-side models of non-price competition

What Courts Do Not Do Well

- Acknowledge Market Failures
 - but see California Dental (1999)
- Appreciate “Supply-Side” Quality Concerns
 - what is the production function?
 - (technology, innovation, the knowledge-base of medicine, practice guidelines, medical errors)
 - quality as “apart from” competition
- Address Price-Quality Tradeoffs
 - assume price-quality work in tandem
 - no framework for price-quality tradeoffs

Competition Policy: Engineering the Public-Private Interface

- Arrow: *public* and *private* institutions can serve optimality-gap-filling roles
- Antitrust challenge: be more open to private responses to market failures
- Public policy challenge: better calibrate social institutions to bridge rather than widen the optimality gap

Plausible Private Initiatives

- Information failures
 - accreditation, report cards
- Risk selection
 - standard insurance products
 - coordinated restrictions on choice
- Public goods
 - R&D, practice guidelines
- Organizational innovation
 - contracting practices, integration and new product offerings

Public Policy Challenges

- What is the public interest?
- Economic v. non-economic values?
- Special interest capture?
- Public action that decreases social welfare?
- Public action that frustrates private efforts to remedy market failures?

Law Can Impede Private Action

- Havighurst: obstacles to private contracting
 - lower standard of care (tort, licensing)
 - limits on provider choice (AWP laws)
- Constraints on “firm” organization
 - organization of hospital-physician relations
 - fraud & abuse, self-referral prohibitions
- Restrictions on the commodity space
 - licensing laws, insurance regulations

Concluding Thoughts

- Challenge: How to successfully build on (market) failure?
- Critical role of CMS
- Future of public-private hybrids
- Greater antitrust flexibility
- Competition policy and dynamic efficiency