

# Health care and competition law and policy:

## *A year-long dialogue*

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Health care is a large and important component of the nation's economy. Spending in this sector climbed to \$1.4 trillion in 2001, more than 14 percent of the U.S. gross domestic product (GDP) in 2001—an 8.7 percent increase in spending from the previous year. If growth in health care spending continues unchecked, experts predict that it will represent more than 23 percent of the GDP in 2011.<sup>1</sup>

Of course, most health care professionals know all too well that health care costs in the private sector are rising. The results of a national survey indicated that employers' health insurance premiums increased 12.7 percent from 2001 to 2002, even though the general inflation rate was only 1.6 percent. This jump in premiums was the highest since 1990.<sup>2</sup> The survey also showed that employers reacted to those increases by increasing their employees' deductibles and copayments, reducing benefits, or, in some cases, eliminating health insurance coverage completely. The end result, of course, is higher out-of-pocket costs for patients.

Although many factors are likely to have influenced increases in health care spending and costs, market competition plays a role in containing costs and promoting high-quality care. The Department of Justice (DOJ) and Federal Trade Commission (FTC) work to promote that competition by enforcing the antitrust laws. The agencies have considerable experience in the application of competition law and policy to health care. In the past decade, they have

brought dozens of cases annually. Together they drafted health care policy statements in 1993 and substantially revised them in 1996.<sup>3</sup>

### **Agencies review issues**

Earlier this year, the FTC and DOJ began public hearings in Washington, DC, to review the implications of competition law and policy for health care financing and delivery. These Health Care and Competition Law and Policy hearings are an extended examination of the state of the health care marketplace and the roles of competition, antitrust enforcement, and consumer protection in satisfying consumer preferences for high-quality, cost-effective care.

“Health care competition law and policy are critical to consumers,” explained Assistant Attorney General Charles A. James. “It is incum-

bent upon government policymakers to understand the implications of the actions they take in these areas, and we look forward to receiving valuable input from relevant medical, insurance, legal, academic, and government groups through these hearings.”<sup>4</sup>

The FTC and DOJ continued these hearings to enhance their understanding in this area and to promote learning among the relevant parties. They have broadly considered the impact of competition law and policy on the cost, quality, and availability of health care, as well as the incentives for innovation in the field. The College was pleased to accept an invitation to testify twice during the sessions, which will conclude next month.

Last September, the agencies held a short workshop on health care issues. That workshop dem-

## Topics at the Health Care and Competition Law and Policy Hearings

<i>February</i>	Overview of Issues Arising at the Intersection of Health Care and Competition Law. Perspectives on Competition Policy and the Health Care Marketplace. A Tale of Two Cities: Boston and Little Rock.
<i>March/April</i>	Defining Product and Geographic Markets for Hospitals. Single Specialty Hospitals. Contracting Practices. Issues in Litigating Hospital Mergers. Hospitals—Horizontal Networks and Vertical Arrangements; Non-profit Status; Joint Ventures and Joint Operating Agreements; Post-Merger Conduct.
<i>April/May</i>	Health Insurance Monopoly Issues—Market Definition; Competitive Effects; Entry and Efficiencies. Health Insurance Monopsony Issues—Market Definition; Competitive Effects. Health Insurance/Providers—Countervailing Market Power. Most Favored Nation Clauses. Physician Hospital Organizations.
<i>May/June</i>	Quality and Consumer Information: Overview; Hospitals; Physicians. Quality and Consumer Protection: Market Entry. Noerr Pennington/State Action. Long-Term Care/Assisted Living Facilities. Financing Design/Consumer Information Issues. Information and Advertising. Dietary Supplements. Mandated Benefits. Pharmaceuticals: Formulary Issues. Pro-protective Guidance.
<i>September</i>	Physician Product and Geographic Market Definition. Physician IPAs—Patterns and Benefits of Integration; Messenger Model. Physician Unionization/Collective Bargaining. Physician Information Sharing. Quality and Non-price Competition: Providers; Payors. Privacy Issues. Remedies: Civil; Criminal. Medicare and Medicaid. International Perspectives on Health Care and Competition Law and Policy.

Source: Federal Trade Commission, [www.ftc.gov](http://www.ftc.gov).

onstrated the range and complexity of issues arising from the intersection of health care and competition law and policy and revealed a diversity of views on the appropriate role and priorities for the administration in this important area of the economy. The agencies determined that further inquiry would help inform the framing and implementation of competition law and policy as applied to health care. This is only the second time that the DOJ and the FTC have jointly sponsored a series of hearings. Especially in the field of health care, the work of the two agencies is complementary.

"[T]hese hearings exemplify the benefits of having two separate agencies working on competition related issues," commented R. Hewitt Pate, Acting Assistant Attorney General.<sup>5</sup>

"Perhaps these benefits are unintended, as many observers have suggested that nobody would have designed a system with two separate antitrust enforcers having significant overlapping responsibility...some of life's most effective arrangements are less the product of elegant design than of historical accident and years of hard work."

Many experts believe that the overlapping efforts of the FTC and DOJ will complement each other and provide real benefits in terms of promoting competition for the benefit of consumers. The jurisdiction of the agencies, of course, differs. The DOJ is exclusively charged with criminal antitrust enforcement, while the FTC spearheads the consumer protection functions. The former focuses more on law enforcement, while the latter concentrates on policy and empirical research.

"There are substantial consumer benefits and synergies from creating an agency combining administrative expertise and enforcement authority, addressing antitrust, consumer protection, and competition advocacy," explained FTC Chairman Timothy Muris in a speech last November outlining his plans for the hearings.<sup>6</sup> "Since 1975, when

### *Additional resources*

#### **U.S. Department of Justice**

<http://www.usdoj.gov/atr/hc hearing.htm>

#### **U.S. Federal Trade Commission**

<http://www.ftc.gov/ogc/healthcarehearings/index.htm>

#### **ACS Testimony**

Frank G. Opelka, MD, FACS

<http://www.facs.org/ahp/testimony/opelka.html>

LaMar S. McGinnis, Jr., MD, FACS

<http://www.facs.org/ahp/testimony/mcginnis.html>

the commission sharpened its focus on this area, through six presidents and eight chairmen, the commission has maintained a leadership role in implementing competition law and policy in health care," he said.

Over the course of the year, the agencies have had the opportunity to examine a myriad of health care issues. The specific subjects considered include hospital mergers, the significance of not-for-profit status, vertical integration, quality and efficiencies, monopsony power, the adequacy of existing remedies for anticompetitive conduct, and the implications of the FTC's consumer protection mandate with regard to the performance of the health care financing and delivery markets. (See box, p. 9.)

#### **College testifies**

Several sessions dealt specifically with physicians. Frank G. Opelka, MD, FACS, and LaMar S. McGinnis, Jr., MD, FACS, both testified on behalf of the College. In February, Dr. Opelka's remarks examined the state of the health care marketplace and the role of competition, antitrust, and con-

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sumer protection in satisfying consumer preferences for high-quality, cost-effective care. Dr. McGinnis focused on the competitive aspects of physician quality improvement initiatives at the May session.

“Without sufficient leverage, insurers offer surgeons a take-it or leave-it medical service agreement. Insurance companies set policies and prices for surgical care with little or no direct relationship to the actual costs of providing the service. In an increasing number of markets, physicians find themselves with very little left on the table to negotiate,” remarked Dr. Opelka. His comments addressed a number of marketplace issues, including consolidation of the health insurance industry, all-products clauses, undisclosed fee schedules, unilateral amendments by payors, delayed payments, and insurance antitrust exemptions.

“As a physician, I am forced to accept lower fees with no relationship to the cost of service. I have waded through stacks of paperwork and managed countless administrative burdens. Frankly, as an individual physician, I feel powerless. I alone lack the bargaining power to compel change for the good of care delivered to my patients,” Dr. Opelka concluded.

Dr. McGinnis participated in a panel devoted exclusively to quality measurement, reporting, and improvement, stating, “The College takes its responsibility to share information with patients seriously. To that end, the College has produced information that enables patients to protect themselves from unfair, deceptive, and fraudulent practices.” He explained that the College publishes a range of tools designed to educate consumers about quality and enable them to make informed decisions about their surgical care. He also went on to describe some of the College’s past and current activities to improve the quality of surgical patient care.

“Comprehensive and systemwide efforts to measure, and ultimately improve, health care quality have really just begun,” Dr. McGinnis explained. “As a result, the availability of truly useful comparative information for consumers is very limited. Nonetheless, quality improvement is a founding principle of the College and will continue to remain an essential part of our initiatives in the future.”

Overall, these hearings will assist the agencies by providing timely information from varying perspectives on how competition law and policy affects health care markets and patient welfare. The goal is to promote dialogue, learning, and consensus-building among all interested parties. These communities include patients, physicians, other providers, business, government, and insurers. The College was pleased to be invited to participate and will continue to work with both agencies to protect physicians and patients. 

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## References

1. *BNA Health Care Daily Report*, Wednesday, January 8, 2003 (citing January 8, 2003 release by Centers for Medicare & Medicaid Services).
2. *The Kaiser Family Foundation and Health Research and Education Trust Survey of Employer-Sponsored Health Benefits: 2002* (pamphlet). See “Employer Health Benefits: 2002 Annual Survey,” p. 5, 12-15.
3. *Statements of Antitrust Enforcement in Health Care*, Washington, DC: U.S. Dept. of Justice and Federal Trade Commission, 1996.
4. Department of Justice: “Antitrust Division to Co-host Hearings on Health Care Competition Law and Policy.” Washington, DC: U.S. Dept. of Justice press release, November, 7, 2002.
5. Opening day comments by R. Hewitt Pate, Joint DOJ/FTC Hearings on Health Care and Competition Law and Policy, Federal Trade Commission Conference Center, Washington, DC, February 26, 2003.
6. “Everything Old Is New Again: Health Care and Competition in the 21st Century.” Speech given by Timothy J. Muris, Seventh Annual Competition in Health Care Forum, Chicago, Illinois, November 7, 2002. Web site: <http://www.ftc.gov/speeches/muris/murishealthcarespeech0211.pdf>.