

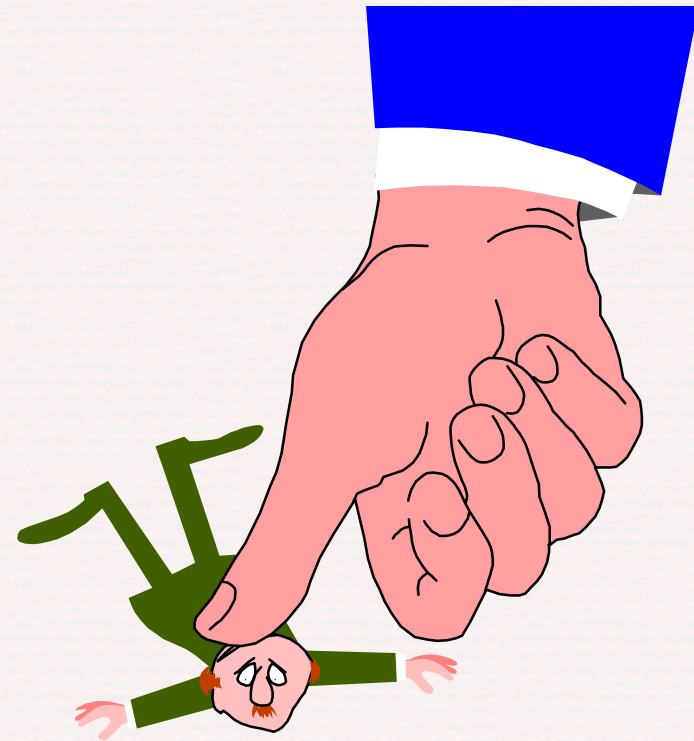
# **HEALTH PLAN POWER AND PRACTICES**

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- A few plans have high percentage of covered lives
- “Take it or leave it” deals offered by plans
- Information and leverage gap
- Desire to “level the playing field”



“Health care providers who must deal with consumers . . . through [managed care] plans . . . face an unusual situation that may legitimate certain collective actions. . . . In light of [the] departures from a normal competitive market, . . . health care providers are entitled to . . . take some joint action . . .

## Feel the tension (2)

*(short of price fixing or a group boycott)* to level the bargaining imbalance . . . . Providers might . . . band together to negotiate [non-price points] . . . such as payment procedures, the type of documentation they must provide, the method of referring patients and the mechanism for adjusting disputes. Such concerted actions . . . must be carefully distinguished from efforts to dictate terms by explicit or implicit threats of mass withdrawals . . . .

*United States v. Alston* (9th Cir. 1992) (emphasis added)



## High shares of what?

A market is a product or group of products for which a hypothetical profit-maximizing firm, not subject to price regulation, that was the only present and future producer or seller of those products likely would impose at least a "small but significant and nontransitory" increase in price, assuming the terms of sale of all other products are held constant.

FTC-DOJ Merger Guidelines

## Market definition focuses on customers

- “Customers” could be viewed either as purchasers of services from MCOs or as providers selling services to MCOs
- Market definition focuses solely on demand substitution factors -- i.e., possible consumer responses.
- Supply substitution factors -- i.e., possible production responses – are considered in the identification of firms that participate in the relevant market and the analysis of entry.

All inclusive:           HMO  
                                  Proprietary insured PPO

Modular:           Insured rental PPO  
                          TPA/rental PPO/stop-loss carrier

Employers can mix and match

- **Case law -- broad definition**

- Blue Cross & Blue Shield United v. Marshfield Clinic
- Ball Memorial Hospital v. Mutual Hospital Ins.
- U.S. Healthcare, Inc. v. Healthsource, Inc.
- Reazin v. Blue Cross & Blue Shield
- Coventry Health Care v. Via Christi Health System

- Hassan v. Independent Practice Ass'n
- Gateway Contracting Services v. Sagamore Health Network

## **DOJ**

- HMO and HMO-like POS products (Aetna/Pru)
- All managed care, but not service to self-insured? (recent United/Oxford review)

|     | Insured    | Network | Gatekeeper | UM/QA | 00N   |
|-----|------------|---------|------------|-------|-------|
| HMO | Usually    | Yes     | Usually    | Yes   | Often |
| POS | Very often | Yes     | Often      | Yes   | Yes   |
| PPO | Often      | Yes     | Rarely     | Yes   | Yes   |

## Even narrower markets?

- Medicare Advantage?
- Medicaid managed care?
- Small business?
- Individual market?

- Plan with 50% of local commercial health insurance business may only represent 20% of “purchases” of health services
- Plan with 50% of local Medicare Advantage business may only represent 2% of purchases of health services
- Leverage over particular providers/dependence of particular providers may not reflect “monopsony” power
  - E.g., if a law firm’s biggest customer gets discount, is that an exercise of monopsony power

If data show provider reimbursement levels are lower in one metropolitan area than in a similar one, does that suggest:

- Monopsony power by payors in the first market?
- Collusion by payors in the first market?
  - Lawsuits in Kansas, Missouri, Kentucky and Ohio have included such allegations
- Market power by providers in the second market?
- Differences in supply and demand?
- Bad data?

# What about monopsony power?



- Monopsony power is not illegal
  - But antitrust law disfavors mergers that would create it
  - Antitrust would proscribe agreements that unreasonably restrain competition to enable its exercise

## Are there barriers to entry?

- Need for strong provider network?
- Need for full range of health products?
- Know-how and infrastructure demanded by employers?
- Sales force
- Licensure requirements?

## What follows from suspicions of payor power?

- Benefit of the doubt to provider networks claiming to be “clinically integrated”?
- Tough time for govt. in challenges to hospital mergers?
- Scrutiny of health insurer mergers
- Search for antitrust theory for challenges to “all product clauses”?
- Judicial tolerance for broad-based provider RICO challenges to alleged Standard Operating Procedures of managed care?
- Allegations of conspiracy?