

Joint FTC/DOJ Hearings on Health Care and Competition Law and Policy

Health Insurance Monopoly Issues - Market Definition

Arthur Lerner
Crowell & Moring LLP

April 23, 2003

Is “It” a market?

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

Focus on customer response

- 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.

Evaluating customer response

- 1) Do buyers shift or consider shifting purchases between products in response to relative changes in price or other competitive variables?

- (2) Do sellers base business decisions on the prospect of buyer substitution in response to relative changes in price or other competitive variables?

- (3) What is the influence of downstream competition faced by buyers in their output markets; and

- (4) What are the timing and costs of switching products?

Keep eye on ball

- Price or other product differences do not indicate different market
- Need to ask whether change in price of one “product” would result in enough shifts to other “product” to constrain price increase

Digging in

- How substitutable are various health benefit products?
- What is the product?
- Are there discernable differences between products in the first place, and if so, are products still considered substitutes for each other?
- What different configurations are purchased?

Key features

- Insurance function
- Access to network of providers
- Utilization management/quality improvement
- Claims processing
- “Gatekeeper” requirements
- Benefit design
 - In network or nothing
 - In network and reduced benefit if out of network (OON)
 - Multi-tier benefit designs

Alternate configurations

All inclusive: HMO
Proprietary insured PPO

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

Employers can mix and match

Convergence/Spectrum

	Insured	Network	Gatekeeper	UM/QA	OON
HMO	Usually	Yes	Often	Yes	Often
PPO	Often	Yes	Sometimes	Yes	Yes



What's been proven?

- **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.

- Gateway Contracting Services v. Sagamore Health Network

- **HMO and HMO-like POS products**

- DOJ settlement in Aetna-Prudential

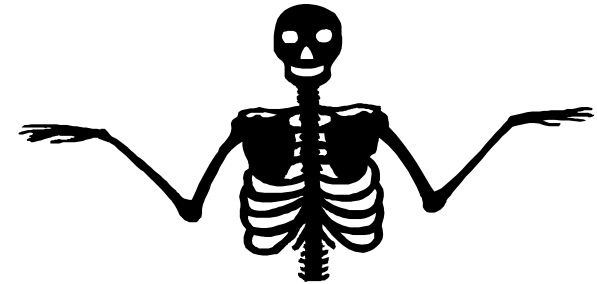
- **What do the FACTS show?**

Who is “in” the market?

- Sellers already selling the defined products
- “Production substitution”
- “Uncommitted entrants”

Even narrower markets?

- Medicare + Choice?
- Medicaid managed care?
- Small business?
- Individual market?



Similar analysis to be done to test each -- both for market and for who is "in"