



Senate Antitrust Subcommittee Discusses Hospital Consolidation Concerns And Solutions

David Dahlquist and Nasir Hussain

June 1, 2021

On May 19, 2021, the U.S. Senate Subcommittee on Competition Policy, Antitrust, and Consumer Rights convened a hearing to discuss hospital consolidation. The hearing resulted in broad agreement in support increasing competition in the healthcare market while prioritizing patient care and outcomes, particularly in rural communities. There was significant disagreement, however, about the best legislative approaches for doing so.

In their opening remarks, Democratic Senator Klobuchar and Republican Senator Lee each emphasized the importance of centering quality of care in any discussions regarding hospital consolidation, noting the numerous instances where mergers have led to increased prices without any demonstrable increase in quality of care or in favorable patient outcomes. Senator Klobuchar noted that there have been approximately 1,600 hospital mergers in the U.S. in the past 20 years, that 90% of all metropolitan areas have "highly concentrated" hospital markets, and that, based on the fast pace at which hospitals have been acquiring physician practices, one-third of all doctors are now employed by hospitals. Senator Klobuchar also expressed concerns regarding what she referred to as the "cycle of consolidation," where insurer mergers result in bargaining power against hospitals, which encourages hospitals to merge to regain their power, which further encourages insurers to merge, and so on. Senator Lee noted the "perverse" role the government often plays in hospital mergers, inadvertently incentivizing mergers through its role in restructuring the healthcare market and then punishing hospitals for trying to consolidate.

The hearing-which largely focused on the potential links between hospital consolidation and various strains on the healthcare market-included testimony from individuals and experts from all sides of the issue, including medical professionals, an economist, and a patient. The testimony and questions posed by the senators revealed a broad bipartisan consensus on the importance of

efficient and careful pro-competitive regulation and demonstrated a particular recognition of the role health insurance companies play in these issues.

Opening Statements

The first witness-Martin S. Gaynor, E.J. Barone University Professor of Economics and Public Policy at Carnegie Mellon University and former director of the FTC's Bureau of Economics-discussed the widespread consolidation of hospitals over the past 20 years, including the acquisition of physician practices by hospitals. Professor Gaynor argued that this consolidation has led to "substantial price increases for hospitals, insurers, and physicians, without offsetting gains in improved quality or enhanced efficiency." He further noted the manner in which increased consolidation and contracts between health systems and insurers have hindered patients' options and abilities in terms of choosing their health care providers. Professor Gaynor advocated for ending policies that unintentionally incentivize consolidation or hamper new competitors. He also spoke in favor of strengthened and focused antitrust enforcement, suggesting, among other things, that the FTC be permitted to enforce anticompetitive actions by not-for-profit entities and that entities in healthcare markets be required to report small transactions that fall below the Hart-Scott-Rodino reporting requirements so that the agencies can track smaller physician-practice mergers and hospital acquisitions of physician practices.

The second witness-Ms. Beth McCracken, a patient-spoke about her experience dealing directly with the effects of insurers' influence and control on the healthcare market. Ms. McCracken lives in western Pennsylvania, where one of the two major health insurance companies, UPMC, has acquired many hospitals and doctors' practices-particularly specialized services-and has refused to allow subscribers to its primary insurance competitor, Highmark, to utilize these medical providers and services. Ms. McCracken described how this situation prevented her from accessing the care she needed to receive proper diagnosis and treatment for her cancer.

The third witness-Mr. Michael Cannon, Director of Health Policy Studies at the Cato Institute-argued that, while not all consolidation is harmful to consumers, it has played a role in "often unconscionable prices" and low-quality care. Mr. Cannon called this inefficient consolidation "the result of government interventions that disable the normal market mechanisms of entry, cost-consciousness, and competition from doing what they do in other sectors of the economy: improving quality while reducing prices." In particular, he argued that the high cost of compliance with government regulations encourages firms to consolidate, encourages more comprehensive health insurance than consumers would choose on their own, and leads to pricing errors based on overpayment by Medicare. Mr. Cannon suggested that "certificate of need" ("CON") laws should be repealed, as they protect incumbent providers from competition from new market entrants. He asked Congress to eliminate the government price control present in the Medicare Advantage program and the Affordable Care Act, and to repeal "network adequacy" laws, which he argued are counterproductive.

The fourth witness-Dr. Rodney Hochman, President and CEO of Providence and Chair of the American Hospital Association-was the only witness who argued wholly in favor of hospital mergers, noting that "[i]ntegration is necessary to assure that both the human and financial capital is available to stand up, reconfigure, or even reimagine the services needed and how best

to deliver them in a field facing increasing competition." He emphasized the role of hospitals as "this nation's most trusted public health safety net." Dr. Hochman highlighted the risks associated with new entrants, such as commercial health insurers that have acquired physician practices and technology companies, which have increased pressure on hospitals to fill the gaps these competitors would leave behind. He also noted that hospital mergers and acquisitions, which are highly monitored and discouraged by the FTC, are often prompted by financial strains placed on hospitals, especially in rural areas. Dr. Hochman noted the strains put on hospitals by the consolidation of health insurers, contrasting this with the benefits to patients and health system employees that health system and hospital consolidation can provide, such as lower costs, improved care, better access to providers, and increased investment in technology and equipment.

The fifth witness-Mr. Ahmer Qadeer, Director of Strategic Initiatives, Service Employees International Union-focused his testimony on the potential impact of hospital consolidation on wages, benefits, and working conditions for health care workers. He cited several studies indicating a link between employer consolidation and decreased worker wages, including in the healthcare space. He urged lawmakers to consider how antitrust laws and regulations can be shaped and enforced to protect workers and labor markets and to strengthen "antitrust applications that have potential to protect workers from exploitation and abusive employer concentration."

The sixth witness-Dr. Brian Miller, Assistant Professor of Medicine at Johns Hopkins School of Medicine-focused on potential harms of hospital consolidation, strategies for combatting them through competition policy, and strategies to promote market entry through reform of anti-competitive laws. He noted that consolidated healthcare markets limit patient options and applauded the types of bipartisan proposals suggested by Alden Abbott, a Senior Research Fellow at the Mercatus Center, at the April 29 hearing on consolidation in healthcare markets before the House of Representatives Subcommittee on Antitrust, Commercial, and Administrative Law. (See [here](#) for our prior blog post about the House hearing.) In particular, he advocated for site-neutral payment requirements to disincentivize consolidation for the sake of maximizing on out-of-network fee collection. He also suggested reforms to the Stark Law, which prohibits physicians from referring designated health services to an entity in which they have a financial relationship and subsequently billing Medicare. Dr. Miller emphasized the outdated nature of the Stark Law and the limitations it places upon the decision-making power of physicians. Dr. Miller also advocated for the repeal of limitations on physician-owned hospitals, as these limitations serve as a block on potential market entrants.

Questioning

Senator Klobuchar's questioning focused on increasing resources for antitrust agencies to address anticompetitive mergers in the healthcare industry. Professor Gaynor, Mr. Qadeer, and Dr. Miller all agreed that increased resources would be beneficial. In particular, Dr. Miller noted that mergers are sometimes denied without complete investigations solely due to lack of resources and staffing within the regulatory bodies, and Mr. Qadeer noted the manner in which increased resources could help increase the enforcement of labor-market cases.

Senator Lee focused on alternative methods to increase competition, such as alterations to state-level physician-licensing requirements. Mr. Cannon discussed the manner in which state-by-state requirements limit opportunities for physicians to compete and do not significantly improve quality of care.

Senators Blumenthal and Hawley questioned Professor Gaynor on the effect of private equity on hospital consolidation. Professor Gaynor agreed with the senators that more information is needed to evaluate the effect of the application of the private equity model to hospitals, noting that the priorities of private equity firms are not always aligned with those of patients or hospital workers.

Senators Klobuchar, Blackburn, and Hawley also asked about the effect of hospital consolidation on rural areas. Professor Gaynor shared concerns that hospital consolidation could decrease options for both patients and employees, emphasizing the manner in which this could impact workers' wages and the overall economies of these regions. Dr. Hochman noted the benefits of telehealth, which has expanded during the COVID-19 pandemic, as a tool to ensure continued access to health care, particularly in rural communities, in the face of hospital consolidations and closures.

Takeaway

While there is consensus that antitrust rules and enforcement need to be updated with regard to the healthcare market, to keep costs low and better protect both patients and workers, the precise mechanisms for doing so are less clear. Substantial emphasis was placed on the role of insurance companies in the consolidation of the market and associated increases in prices. Lawmakers on both sides of the aisle emphasized the importance of a healthcare market that provides patient choice and accessibility, especially in rural communities and other locations that are particularly vulnerable. Scrutiny of market concentrations and enforcement actions to preserve competition among hospitals, healthcare systems, physician groups, and other healthcare industry participants continue to be a key area of focus under both the Biden Administration and the current Congress. Hospitals and other players in the healthcare industry must continue to keep these important aspects in mind as they contemplate mergers and acquisitions, to ensure they are prioritizing efficiencies, lower costs, improved patient care, and improved conditions for health care workers.