



Preventing Healthcare Consolidation: Strengthening State Antitrust Laws

Federal antitrust laws aim to preserve the benefits of competition by prohibiting anti-competitive mergers and other behaviors, however these laws are generally under-enforced.^{1,2} For a variety of reasons,³ a majority of proposed mergers and acquisitions are allowed by federal regulators to proceed, forcing state attorneys general to halt those that are potentially harmful or address the subsequent anti-competitive effects.⁴

In the healthcare sector, antitrust activity has primarily focused on mergers between competitors in a single market (a.k.a., horizontal mergers). Enforcement agencies at both the federal and state levels have hesitated to challenge mergers between providers that do not compete for the same patients (i.e., cross-market mergers) and mergers between organizations at different stages of the supply chain (i.e., vertical mergers) due to an insufficient understanding of the harms of these transactions (versus the benefits). However, recent evidence suggests that cross-market and vertical mergers can also have negative implications for consumers.⁵ Given the increasing prevalence of non-horizontal mergers, policy experts have identified a need to strengthen anti-trust enforcement in this area.⁶

Strengthening Oversight of Horizontal, Vertical and Cross-Market Mergers

While the majority of state antitrust laws closely resemble federal law, some states have passed broader legislation that permits increased scrutiny of provider mergers, including vertical and cross-market varieties. Connecticut, for example, requires hospitals and

medical group practices to notify the state's attorney general before finalizing a merger that involves: (1) any combination of group practices involving at least eight physicians or (2) a hospital acquiring any group medical practice. The monetary value of transactions involving group practices is typically lower than the threshold required for federal reporting, therefore laws like Connecticut's allow states to capture, and subsequently scrutinize, more instances of provider consolidation.^{7,8}

In addition to lowering the threshold for review, states can strengthen their resources for conducting that review. Berenson and colleagues recommend that states adopt and adapt certain federal requirements that would "grant state enforcers the time and information they need to fully analyze the implications of a proposed merger" (see text box).⁹ It is important to note, however, that more research is needed to understand the exact specifications that would allow notification and review processes to most effectively prevent harmful consolidation.¹⁰ States could also charge filing fees to supply the financial resources required to adequately conduct merger reviews.¹¹

State Options to Strengthen Merger Oversight

- Require organizations to notify antitrust officials when the value of a merger or acquisition exceeds a certain filing threshold.
- Impose waiting periods between the time a merger is filed and consummated.
- Authorize antitrust officials to compel document production from merging entities.

Banning Anti-Competitive Contracting Arrangements through Legislation

With most healthcare markets already consolidated and growing more concentrated, states also need tools to combat anti-competitive business practices already occurring in their markets.¹² States should consider banning specific anti-competitive practices like most-favored nation clauses, all-or-nothing clauses, gag clauses and anti-tiering/anti-steering provisions in contracts between insurers and providers.¹³

As of February 2020, 21 states have banned or regulated most-favored nation clauses.¹⁴ Only Massachusetts prohibits all three practices (anti-tiering, anti-steering and all-or-nothing language in provider-issuer contracts), however, the restrictions apply exclusively to specific plans.¹⁵

According to Berenson and colleagues, states have historically opted for litigation (over legislation) as the preferred method of challenging anti-competitive practices.¹⁶ While legislation adopts a one-size-fits-all approach, litigation “allows courts to carefully weigh the benefits and detriments to competition in a specific case.” This specificity may increase the likelihood that states will succeed when a legislative approach has failed (see California example in text box). Nevertheless, legislation “is the most effective way for states to broadly prohibit the use of terms that consistently harm healthcare markets.”¹⁷

Conclusion

Persistent consolidation in provider markets has contributed to high and rising healthcare costs. Economists and policy experts have called for stronger antitrust enforcement to preserve competition, and

Although California has struggled to pass legislation banning anti-competitive contract provisions,¹⁸ the state successfully banned all-or-nothing clauses, gag clauses and anti-tiering/anti-steering provisions in its 2018 lawsuit against Sutter Health.¹⁹

not only horizontal, but also vertical and cross-market mergers. Moreover, passing laws or pursuing legislation to ban anti-competitive contracting practices may reduce consumer harm in the 90 percent of provider markets that are already consolidated.

Note: Citations to the evidence can be found on our website at www.healthcarevaluehub.org/Strengthening-State-Antitrust-Laws

Amanda Hunt, Hub Senior Policy Analyst, authored this report. Special thanks to Robert Berenson, Jaime King, Katherine Gudiksen, Roslyn Murray, and Adele Shartzter, whose exceptionally thorough report, Addressing Health Care Market Consolidation and High Prices, heavily informed this work.

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