

Competition Policy in Health Care in an Era of Reform

IU School of Law – Indianapolis
Hall Center for Law and Health
American Antitrust Institute

OVERVIEW

Roundtable discussion/CLE
December 10, 2009
3 p.m.-5 p.m.
2 hours CLE credit (approval pending)

On December 10 at 3 p.m., the IU School of Law – Indianapolis and the Hall Center for Law and Health, together with the Washington, D.C.-based American Antitrust Institute, are putting on a roundtable discussion dealing with the future of antitrust enforcement in light of the reality of changes in the health care landscape. *This is the first such event dealing with this important topic being held anywhere in the country.*

We will begin with an overview of the state of health care reform as of December 10. The event will then cover four broad topics. First will be the impact of then-extant health care reform proposals on the health insurance industry. The second topic on the agenda is the impact of health care reform on competition among health care providers. Third, we will discuss the impact of health care reform on consumers of health care. Our fourth and final topic for the gathering will be to outline a possible antitrust enforcement agenda for healthcare for 2010 and beyond.

Discussants will include law professors, economists, think-tank fellows, authors, and professionals and practitioners in the health-care industry. Discussants will have gathered prior to the public panel discussion to brainstorm on the issues being discussed. An edited transcript of the panel discussion will be published in the *Indiana Health Law Review*.

CONFERENCE FACULTY*

Mr. Albert Foer, President, American Antitrust Institute
Professor William Comanor, UCLA
Professor Ted Frech, UC Santa Barbara
Professor Thomas Greaney, St. Louis University College of Law
Professor Barak Richman, Duke University School of Law
Mr. David Balto, Senior Fellow, Center for American Progress

* The list includes confirmed participants as of the date of drafting. Not all confirmed participants will attend both the morning and afternoon sessions. The faculty will likely increase in size.

Mr. Paul London, Author, *The Competition Solution*
Professor Chris Sagers, Cleveland-Marshall College of Law
Professor John Connor, Purdue University
Professor David Orentlicher, IU School of Law – Indianapolis
Professor Emily Morris, IU School of Law – Indianapolis
Professor Max Huffman, IU School of Law – Indianapolis
Adjunct Professor Syd Arak, IU School of Law – Indianapolis
Ms. Gayle Reindl, Attorney, Taft, Stettinius & Hollister LLP

SCHEDULE

Dec. 9, 2009

7 p.m. (approx.): informal dinner for those participants who are located in Indianapolis or have arrived in time at a local eatery.

Dec. 10, 2009

8:45 a.m.: continental breakfast for participants at the University Place Conference Center and Hotel

9:30 a.m.: brainstorming session begins.

12:00 p.m.: box lunches served.

1:30 p.m.: brainstorming session concludes.

3:00 p.m.: public panel discussion begins.

5:00 p.m.: public panel discussion concludes; reception until 5:30 p.m.

CONFERENCE AGENDA

Introduction: The reform picture in health care is in a state of considerable flux. We will begin our event with a summary of the state of health care reform as it exists on December 10, 2009, the progress of its development to that point, and possible predictions for the final reform legislation.

Topic One: What is the impact of health care reform on the health insurance marketplace?

This topic raises, among other possible issues, the following specific questions:

1. What is the fate of the antitrust exemption for insurance under the McCarran-Ferguson Act? What is the impact of that on competition in health insurance?
2. If some form of public health insurance is part of the reform picture, what is the impact of public health insurance on competition in the marketplace?
3. How does health insurer buyer power counter market power by suppliers of health care?
4. What is the competitive consequence of expanded demand for health insurance under reform?
5. What possibilities exist for courts finding regulatory preemption? Is the antitrust savings clause sufficient to prevent that happening?

Topic Two: What is the impact of health care reform on suppliers of health care products and services?

This topic raises, among other possible issues, the following specific questions:

1. How does the reform agenda impact competition among hospitals?
2. What is the impact on buying groups, including Pharmacy Benefit Managers and Group Purchasing Organizations? Does the bill incentivize low cost purchasing options and reduce conflict-of-interest concerns for service suppliers with investments in supply cooperatives?
3. Is computerized record-keeping likely to assist in competition among service suppliers by facilitating switching and decreasing costs?
4. Will price competition among substitutable but non-equivalent drugs (as well as between generics and their branded equivalents) help to decrease drug costs?
5. What impact can the reform legislation have on expenses associated with technological enhancements?

Topic Three: What is the impact of health care reform on consumers of health care products and services?

This topic raises, among other possible issues, the following specific questions:

1. What impact does the fact of the Government as a purchaser of health care services have on the marketplace?

2. If some form of compelled provision of health care by employers is included in the final reform bill, what impact does that have on consumer who are employed? Consumers who are not employed? Are employers as consumers impacted differently from end user consumers?
3. Does the reform bill, in whatever form it exists, promise sufficient comparability of health care plans to allow for vigorous competition on aspects – price, quality, flexibility, and c. – that are relevant to end user consumers?
4. Does the reform bill create or permit a national market place that enhances opportunities for medical tourism, arbitraging geographic cost or quality differences?

Topic Four: How should we define an enforcement agenda for health care from 2010 on?

This topic raises, among other possible issues, the following specific questions:

1. What should be courts' and enforcers treatment of reverse patent settlements that delay entry of competing generic pharmaceuticals?
2. How should courts and enforcers treat clinical integration among health care providers, which both offers efficiencies and threatens possible anticompetitive conduct?
3. What should be done about mergers among health care providers, including hospitals, whether consummated or not yet announced? If enforcers challenge consummated mergers, what remedy should be pursued?
4. What competitive benefits and concerns are presented by pharmacy benefit managers, including through vertical or horizontal concentrations?
5. What is the role of competition advocacy programs in a health care enforcement agenda?