THIRD WAY

REPORT *Published June 6, 2023 • 12 minute read*

End Hospitals' Anticompetitive Business Practices

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Takeaways

Hospital consolidation and anticompetitive business practices have driven up hospital prices. Two-thirds of community hospitals are now part of a consolidated health system compared to 10% in 1970. Too often, these large chains use their market clout to prevent health plans from making the best deal for patients. Without competition between hospitals, prices climb higher without improvement in quality. Federal oversight has been inadequate to fight anticompetitive forces.

Congress should take four steps to deter hospitals from gaming the system and promote higher value care for patients:

1. Ban the use of anticompetitive clauses in contracts between hospitals and payers.
2. Give the Federal Trade Commission (FTC) enforcement authority over not-for-profit hospitals and health systems.
3. Provide the FTC more resources and tools to investigate and challenge anticompetitive actions.
4. Require the Administration to assess the competitiveness of health care markets in each state and prohibit state actions that discourage competition and prevent FTC oversight.

A New Orleans-based non-profit company recently finalized the purchase of three area hospitals including the renowned Tulane Medical Center. The deal brings its ownership to nine hospitals and increases its market share to 55%. [1] The deal was pursued under a state law that avoids federal antitrust law. The Federal Trade Commission (FTC) has challenged the merger over violations of federal notification procedures, but even if successful, the FTC will likely be unable to prevent the hospital purchase from creating undue dominance in the market. [2]

Every day, hospitals seek advantages in negotiations with employers, unions, and health plans resulting in less competition. They use techniques like mergers and acquisitions along with anticompetitive contracts to charge high prices without improving the quality of care. Congress can stop these unproductive hospital practices by strengthening antitrust enforcement and banning anticompetitive contracting. These fixes will move hospitals towards delivering better care at lower prices.

This report is part of a series called Fixing America's Broken Hospitals, which seeks to explore and modernize a foundation of our health care system. A raft of structural issues, including lack of competition, misaligned incentives, and outdated safety net policies, have led to unsustainable practices. The result is too many instances of hospitals charging unchecked prices, using questionable billing and aggressive debt collection practices, abusing public programs, and failing to identify and serve community needs. Our work will shed light on issues facing hospitals and advance proposals so they can have a financially and socially sustainable future.

The Problem

Currently, hospitals undermine competition by consolidating and demanding anticompetitive contracts with payers. But government monitoring of anticompetitive behavior is completely

inadequate. The result? High hospital prices without better quality care. Here's more on each aspect of the problem:

Hospital Business Practices Undermine Competition

For decades, hospitals have been consolidating into larger health care organizations by merging with or acquiring other hospitals. [3] Today, two-thirds of community hospitals are part of a consolidated health system compared to 10% in 1970. [4] As a result, nine out of ten metropolitan areas are now classified as consolidated for hospital services. [5] In addition, 59% of hospital systems own hospitals in different geographic areas. [6] While these mergers may pass federal antitrust review because the systems do not compete for patients, hospitals exert their combined market power in negotiations with health insurers, which purchase hospital services across markets. [7]

Hospitals are also purchasing physician practices to increase their market clout. [8] As of 2022, 52% of the nation's physicians work directly for hospitals—a rate that has been increasing since 2012. [9] Ownership of physician practices gives hospitals new opportunities to increase payment rates and feed business to the hospital. [10]

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Hospitals and health systems use the market power they accumulate through mergers and acquisitions to demand restrictive, anticompetitive contracts with insurers and other payers.

Examples include: [11]

- *All-or-nothing contracting*, in which health systems require a health plan to contract with all providers in that system or forgo contracting with any of them.
- *Anti-tiering clauses*, which require insurers to place all providers from a health system into the most preferred tier of providers even if they do not meet the requirements for that tier (usually related to lower costs and higher quality).
- *Anti-steering clauses*, which prohibit insurers from using cost-sharing incentives, such as reduced out-of-pocket costs, to direct enrollees to providers who offer higher value care.
- *Most-favored-nation clauses,* in which a hospital or health system locks in prices with a health insurer and agrees to not offer lower prices to any other health insurer.

Government monitoring is inadequate.

The government's ability to monitor anticompetitive behavior by hospitals and enforce antitrust law is limited by statute, under-resourced, and undermined by state laws.

First, the FTC is statutorily prohibited from regulating anticompetitive activity by not-for-profit organizations. [12] This hamstrings the FTC's efforts in the hospital sector because most hospitals open to the public (known as community hospitals) are nonprofits. [13] While the Department of Justice Antitrust Division is authorized to investigate nonprofits, this fragments the government's efforts and bars the FTC, which has arguably greater health care expertise, from this important work. [14]

Second, antitrust investigation and enforcement resources have not kept pace with merger and acquisition activity. From 2010-2016, the number of merger filings increased by 57.1% while inflation-adjusted appropriations for the FTC and Department of Justice Antitrust Division fell by 12.4%. [15] Last year, Congress increased the FTC's budget but only by 60% of the increase the FTC requested for Fiscal Year 2024. [16]

Third, some state laws shield anticompetitive activity from federal investigation and enforcement. Certificate of public advantage statutes, which take legal authority from a 1943 Supreme Court decision (*Parker v. Brown)*, protect proposed mergers and acquisitions from federal antitrust scrutiny. [17] This kind of statute is the basis for Louisiana's recent approval of the merger of nine New Orleans hospitals. [18] In approving a merger under a certificate of public advantage, states may impose terms and conditions "to mitigate the potential for anticompetitive harms" such as regulating payment rates, prohibiting anticompetitive contracting clauses, or requiring quality improvement or community investment. However, such requirements are often difficult to implement and monitor, the oversight is often lax, and the state laws underlying the certificate of public advantage may be revised or repealed, ending the state's oversight but allowing the merged entity to continue doing business. [19] Case studies of these state laws show that hospital prices rise 25% to 38% when states approve mergers under a certificate of public advantage due to lax oversight, and 38% to 51% after all oversight ends. [20]

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Another type of state law, certificate of need, results in less competition and discourages new entrants into concentrated markets. These laws require health care providers to obtain permission from a state entity to expand existing facilities, build new ones, or offer certain types of health care services. [21] While these laws were initially enacted in response to a federal requirement aiming to

control health care cost increases, the federal mandate was subsequently repealed, and evidence suggests that certificate of need requirements often serve as a barrier to entry and discourage market competition. [22]

The Result: High Prices Without Better Care

Research confirms that provider consolidation, both through hospital mergers and hospital ownership of physician practices, leads to higher prices for private insurance. [23] These higher hospital prices have an outsized impact because hospital care is the largest portion of health care spending—about 30 cents of every dollar. [24]

In other markets across the economy, higher prices signal higher quality. But it is not always the case in hospital markets because patients face substantial barriers to determining quality. With insurance, they do not pay for the entire cost of their care, and they do not always choose their health plan, whose provider network can be a proxy for quality. [25] Furthermore, hospital prices have not been publicly available until recently. And while the Biden Administration is stepping up enforcement of the price transparency rules, it remains to be seen whether all hospitals will fully comply. [26]

An emerging body of research shows that consolidation-driven hospital pricing and quality are either not directly related or may be negatively associated. A January 2023 study from the Centers for Medicare and Medicaid Services (CMS) found that prices were substantially higher for physicians and hospitals that were part of a health system, but their performance on clinical quality and patient experience measures was only marginally better. [27] One of the few papers to find a positive relationship between price and quality showed that higher-priced hospitals with more physicians from top medical schools had a lower rate of death from emergency room admissions, but only for hospitals in competitive markets; high-priced hospitals in concentrated markets did not have a lower death rate. [28] Additional findings:

- Hospitals with higher prices performed worse on "readmission rates, patient-safety indicators, and post-surgical complications, including deaths;" [29]
- Hospitals with the highest "markup ratios" (the ratio of costs to charges) had greater morbidity for cardiothoracic and gastrointestinal surgeries; [30] and
- Higher hospital prices are negatively associated with quality as measured by the Hospital Value Based Purchasing Total Performance Score, which aggregates several quality metrics. [31]

The Solution: End hospitals' anticompetitive business practices.

Congress should take four steps to deter hospitals from gaming the system and promote higher value care for patients.

1. ***Ban the use of anticompetitive clauses in contracts between hospitals and payers.*** For example, the Healthy Competition for Better Care Act, introduced by Senators Mike Braun (R-IN) and Tammy Baldwin (D-WI), would prohibit use of anticompetitive clauses in new contracts by health plans and employers. [32] This bill would begin to restore a level playing field in negotiations between hospitals and payers by prohibiting all-or-nothing, anti-tiering/anti-steering, and most-favored-nation contracting clauses.

2. ***Give the FTC enforcement authority over not-for-profit hospitals and health systems***. Representatives Pramila Jayapal (D-WA) and Victoria Spartz (R-IN) have introduced legislation to give the FTC authority over not-for-profit hospitals. [33] This legislation would end the bifurcated regulatory structure that exists today and allow the FTC to investigate anticompetitive activity throughout the health care marketplace.

3. ***Provide the FTC more resources and tools to investigate and challenge anticompetitive actions.*** Organizations like the American Enterprise Institute, the Council on Health Spending & Value, and The 1% Steps for Health Care Reform Project have noted the critical importance of providing the FTC with adequate funding and staff to monitor market competitiveness and scrutinize proposed hospital mergers. [34]

Additional staff and resources would help the FTC investigate and take enforcement action against already-finalized mergers and acquisitions that may have violated antitrust law. In a July 2021 Executive Order, President Biden reaffirmed that "the United States retains the authority to challenge transactions whose previous consummation was in violation of" various antitrust laws. [35] While such post-merger unwinding is uncommon, it is not unprecedented. Examples in the health care sector include the FTC's 2007 ruling that Evanston Northwestern Healthcare's 2000 acquisition of Highland Park Hospital was anticompetitive, and the FTC's successful legal challenges of ProMedica's 2010 purchase of St. Luke's Hospital in Toledo, OH, and the 2012 acquisition of Saltzer Medical Group Nampa, ID, by St. Luke's Health System. [36]

The FTC has already moved to ban non-compete clauses through a proposed regulation. [37] Non-compete clauses typically prohibit an employee from working for a competing employer or starting a competing business within a certain time period and geographic area after leaving employment. The FTC will require additional resources to monitor and enforce this prohibition, assuming it is finalized.

The FTC also needs better data on health care prices to monitor hospital markets. While compliance with recent hospital price transparency regulation has improved, CMS must continue to step up enforcement. [38] Leaders of the House Energy and Commerce Committee, Chair Cathy McMorris Rodgers (R-WA) and Ranking Member Frank Pallone (D-NJ), have introduced the Transparent Prices Required to Inform Consumer and Employers (PRICE) Act, which would codify and build on existing transparency rules. [39] In addition, to make this newly available data as useful as possible, CMS must standardize data elements so that researchers and others can link datasets.

1. ***Require the Administration to assess the competitiveness of state health care markets and prohibit state action that discourages competition and undermines FTC enforcement.*** To help focus the government's oversight and enforcement activity, Congress should measure the competitiveness of state health care markets. Rep. Victoria Spartz's (R-IN) Competition in State Healthcare Markets Act (H.R. 8130, 117 th Congress) would direct the Department of Health and Human Services to work with the FTC and the Antitrust Division of the Department of Justice to collect data on health care competition and consolidation at the state level. The data would be updated annually and made publicly available, providing insight into the competitiveness of individual state markets.

Congress should also end state practices that foster anticompetitive behavior like certification of public advantage and certificate of need laws. The FTC has urged states not to use certificate of public advantage laws to shield otherwise anticompetitive hospital mergers from scrutiny, including as recently as an August 2022 staff policy paper. [40] Similarly, the FTC and Department of Justice have urged states to reconsider whether their certificate of need programs are "best serving their citizens' health care needs," pointing to research finding that these laws limit access to care, reduce quality, and contribute to health care cost increases. [41]

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Both types of laws undermine the nation's interest in fostering competitive health care markets across state lines. Congressional and administrative efforts to enforce antitrust laws are hindered by states that use these types of laws to permit otherwise anticompetitive activity. States have a responsibility to use their authority to encourage competition in health care markets.

Additional measures will be necessary to curb excessive hospital prices. With extensive consolidation, the FTC will not be able unwind all anticompetitive deals any time soon. One possibility is more flexibility with anti-trust law for employers, unions, and health plans need to negotiate in large groups where competition has failed.

Conclusion

Through mergers and acquisitions, hospitals continue to amass market power and use their leverage with payers to make anticompetitive contracts resulting in higher prices without improving the quality of care. The government's ability to monitor market dynamics and restore

competition is limited by statute, under-resourced, and undermined by some state laws. Congress must act to ban anticompetitive contract clauses, restrict state laws that shield anticompetitive behavior, and improve market oversight by ensuring agencies have adequate resources.

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