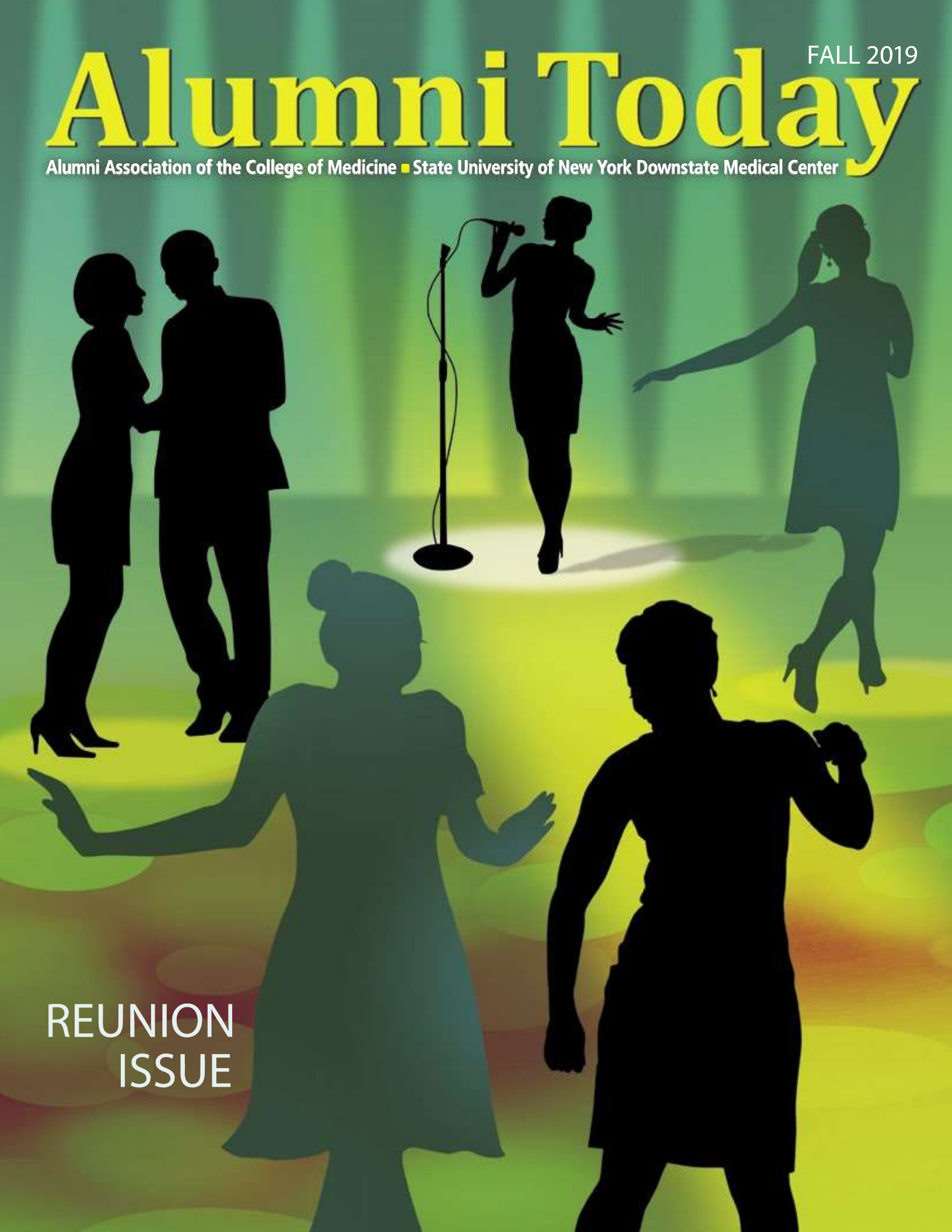
FALL 2019
Alumni Today
Alumni Association of the College of Medicine ■ State University of New York Downstate Medical Center
REUNION
ISSUE

Healthcare Consolidation Despite the Antitrust Laws Designed to Preserve Competition

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Introduction

The antitrust laws are among the most important laws that determine how healthcare is delivered. They determine how organizations can merge and consolidate without legal consequences. One of the unfortunate consequences of current antitrust laws and regulations is that they prevent independent physicians from joining forces to bargain collectively. Despite the goal of antitrust law of preserving competition the opposite is occurring. Competition in the entire healthcare industry is decreasing because of the consolidation of insurance companies and hospitals. The consolidation of hospitals has resulted in higher reimbursement levels which combined with the inflation adjusted decline of reimbursement to independent physicians and the increase in regulatory burdens facing physicians has resulted in the acquisition by hospitals of independent practices.

Despite the major impact the antitrust laws have on healthcare and how physicians practice these laws are not well understood by the physician community. This article is intended to educate physicians about the antitrust laws and pose solutions to increase competition in healthcare to achieve the goal of increasing competition, increase consumer and physician choice how healthcare is delivered, to make healthcare more cost effective and improve quality.

Purpose of Antitrust Laws

According to their website the Federal Trade Commission and the Department of Justice are charged with the enforcement of the Antitrust Laws. The basic premise under which they operate is that "Competition in healthcare markets benefits consumers because it helps contain costs, improve quality and encourage innovation. The Federal Trade Commission's job as a law enforcer is to stop firms from engaging in anticompetitive conduct that harms consumers".[1] To better understand how this law is being applied and how effective this process is achieving this goal requires knowledge of the relevant laws, how they are applied and the outcome.

Antitrust Laws

There are three federal laws and a state action doctrine that form the foundation of antitrust law. These are:

The Sherman Act[2]

The Clayton Act[3]

The Federal Trade Commission Act[4]

State Action Doctrine[5]

Antitrust Regulation

Federal laws are often complex, ambiguous and sometimes inconsistent. The goal of interpreting these laws and creating the nuts and bolts rules that enable those that are subject to these laws to know the ground rules. Interpretation and enforcement of these laws is placed in the hands of regulatory agencies. These agencies take the written law and draft rules based on their interpretation of them. These proposed regulations are then published in the Federal Register and all those that could be affected by them have a period of time in which they can comment about the proposed regulations. The agency reviews the comments, can make changes and then publishes the final rules. The agency that regulates the antitrust activities of physicians is usually the Federal Trade Commission (FTC). In cases where there is criminal activity the Department of Justice can get involved. It is the Federal Trade Commission that investigates violations, files charges, holds hearings, renders decisions and determines the punishment for violations of the antitrust laws by physician organizations. There is a right of appeal to the federal courts.

Current Situation and Trends in Healthcare

Health insurance companies have merged and consolidated to the point that five insurance companies control the market. In some markets one insurance company dominates the entire market. In consolidated markets premiums are higher, professional fees are lower and sometimes the fees are so low that there is not sufficient funding available to upgrade and maintain the healthcare infrastructure.[6] To counterbalance the strong bargaining power of the insurance companies hospitals have merged and consolidated. In consolidated markets costs are higher.[7]

The higher reimbursement levels , including facility fees, that hospitals receive for physicians services combined with the lower independent physician fee levels and increased regulatory requirement have led to hospitals acquiring physician practices. Hospitals are further incentivized to acquire physician practices because on the average each physician generates an average of 2.4 million dollars in downstream revenue for the hospital system.[8] This loss of the independent practices combined with the higher hos-

"This loss of the independent practices combined with the higher hospital reimbursement for the same services leads to higher costs, less choice and reduced competition."

pital reimbursement for the same services leads to higher costs, less choice and reduced competition.

According to a 2010 study by the Attorney General of Massachusetts there is up to a 300% difference in costs with no difference in quality based on bargaining power.[9] This cost differential was not dependent on the fee model ie. capitation or fee for service.[10]

Issues Regarding the Current Antitrust Landscape

Antitrust laws were written in the late 19th and early 20th centuries. Economic models and business operations have changed since then. There are flaws, gaps and unintended consequences in the law that can be exploited to achieve results that are counter to the intention of the laws. Current antitrust law and enforcement is complaint driven and not policy driven. The FTC investigates activities based on a complaint filed by an affected party ie. an insurance company facing a demand for higher fees or a competitor who feels that a merger will negatively affect them. The FTC does not proactively look at markets to see if anticompetitive activity is harming consumers and raising prices. The FTC does not have unlimited resources and cannot investigate every potential antitrust violation because of the size of the healthcare industry. There has not been any breakups of consolidated markets once they have formed.

> "The FTC does not proactively look at markets to see if anticompetitive activity is harming consumers and raising prices."

Antitrust Basics

Horizontal Integration

Horizontal integration is the merger of entities at the same level. For example, hospitals merging with other hospitals, insurance companies merging with other insurance companies, and physician practices merging with other physician practices including physician practices owned by hospitals.

Vertical Integration

Vertical integration is the merger of entities at different levels. For example insurance companies merging with pharmacies or insurance companies buying medical practices.

Problem

Antitrust laws and enforcement work better in dealing with horizontal integration and have not been as effective in dealing with vertical integration.

Monopolies

From an antitrust perspective monopolies are situations

where the seller of goods or service has enough market share that they can raise the price above competitive levels. An example of this is a hospital system or group practice which dominates a local market and raises prices significantly above those charged in comparable markets. Monopolies are a violation of the Clayton Act.[11]

Monopsonies

Monopsonies are when the purchaser of goods or services have large enough market share that they can lower the price below competitive levels. For example when an insurance company dominates a local market and it lowers reimbursement to physicians and hospital systems. These low reimbursement sometimes are not sustainable and can result in hospital closures and physician shortages.

Collective Bargaining

Under the Antitrust Laws when competitors get together and agree to raise prices or boycott an entity that does not pay them what they think is fair the competitors are in violation of the Sherman and FTC Acts and subject to prosecution. This is not always fair and sometimes small groups of physicians or other healthcare professionals engaging in these joint boycotts against large entities are prosecuted. [12] Unfortunately in some of these cases the law is protecting the strong against the weak.

Examples of Antitrust Actions Against Physician Organizations

Many FTC cases involve enforcement actions against Messenger Model IPAs that attempt to bargain collectively for their members. A Messenger Model IPA is an organization where the IPA conducts surveys of its members to collect data to determine the fees and terms that would be acceptable to its members. This information is held by the

negotiators and not shared with the membership. The IPA then negotiates with an insurance company and the insurance company then offers a fee schedule and terms to the IPA. The IPA is then supposed to present that offer to all of its members and each member then decides individually whether or not to participate in the plan. When a Messenger Model IPA tells the insurance company that unless they come to an agreement that none of its members will participate in the plan and then tells its members not to participate in a particular plan under the current terms and conditions that Messenger Model IPA and it's members have violated the antitrust laws.[13]

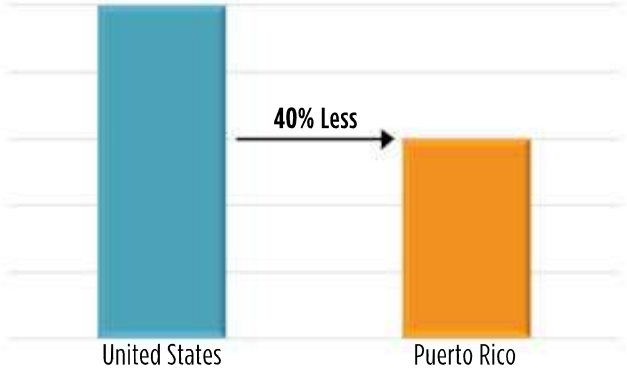
In North Texas Specialty Physicians, a dual purpose entity, could legally negotiate collectively for capitated contracts but could only negotiate as a Messenger for fee for service contracts. Despite this prohibition they negotiated collectively for a fee for service contract. Members of the IPA agreed only to accept an agreement only if the IPA approved it. Because the IPA exceeded its legal authority and did not negotiate as a messenger and the physicians agreed to jointly boycott any agreement not approved by the IPA they were found to be in violation of the antitrust laws.

When a poorly organized COOP Cooperativa de Medicos Oftalmologicos de Puerto Rico organized its members

to jointly reject a 10% fee cut from a Medicare Advantage Plan they were found in violation of the antitrust laws that prevent joint boycotts.[14]

The Puerto Rican situation is an unfortunate example of how strict enforcement of the antitrust laws actually exacerbated a physician shortage. In Puerto Rico Medicare fees were 40% less than the average Medicare fee in the US and declining.[15] Even before the hurricane these low fees were causing an exodus of physicians to the mainland. This case demonstrates the unintended consequence of

Average Medicare Fee Comparison



physicians leaving and a healthcare shortage exacerbating because of the strict enforcement of current antitrust law without considering the effect of the enforcement on the overall marketplace.

Effect of Antitrust Actions Against Insurance Companies

Insurance companies can be both monopolies and monopsonies. In a consolidated market the insurance company can be a monopoly seller of insurance policies to employers and subscribers while being a monopsony purchaser of healthcare from providers.

Five insurance companies have an 83% share of the national market and sometimes a single insurance company can dominate a local market.[16] According to a Commonwealth Fund study insurance company consolidation reduces payments to providers but does not lower premiums.[17] When payments are too low care suffers and in the above example in Puerto Rico low fees drove physicians out and exacerbated a shortage.

In recent years there have been two attempted horizontal mergers of major insurance companies that were effectively blocked by the Federal Courts.

In U.S. v. Aetna (2017) a proposed merger between Aetna and Humana was challenged in Federal District Court by 8 states, D.C., and the DOJ. They all filed suit against and successfully blocked the merger between these two large insurance companies.[18]

In U.S v. Anthem 2017 Circuit Court Appeals 11 states, D.C. and DOJ all filed suit to block the merger and they won in Federal District Court. The insurance companies appealed the decision and the Federal Circuit Court of Appeals upheld the decision by the Federal District Court to block proposed merger of 2 of the 4 largest insurance companies.[19]

Cases against vertical Integration in healthcare do not do as well in the courts. The FTC attempted to block the merger between Aetna and CVS in the Federal Courts and they were unsuccessful.

Effect of Antitrust Actions Against Hospital Mergers

Horizontal mergers of community hospitals and academic medical centers are analyzed under different standards using a rule of reason analysis method. This is a three part test consisting of determining the local market, the effect of the merger on the local market in reducing competition and any procompetitive offsets of the merger.

In FTC v Advocate Health (2016) a merger of commu-

nity hospitals in the North Shore suburbs of Chicago which would have resulted in the new entity having a 55% market share of the General Acute Care(GAC) market with the next largest competitor only having a 15% market share of the GAC market was successfully blocked.

- 3 part test
- In this case the Relevant Market was the North Shore suburb of Chicago
- In this case Market Share in the Relevant Market was 55%
- There were insufficient Procompetitive Advantages of Merger.
- The merger failed the test and was blocked

In the case of University Hospital Mergers there is a different Relevant Market. Because they offer tertiary care and specialized care that patients are expected to travel to the geographic size of the market is expanded. Their Relevant Market is expanded to encompass a regional markets ie, NYC Metropolitan area is considered a region. As a result of this expanded regional size of the relevant market all of the NYC medical schools except Downstate have acquired

large hospital networks throughout the NYC region. These huge entities serve large patient populations, have strong market power and generate higher reimbursements for the hospitals that they acquired. Because there are at least five major hospital systems in the NYC Metropolitan area none will likely ever have a large enough market share to create a monopoly in the relevant market and be subject to antitrust prosecution.

Future

We are heading towards greater and greater consolidation in healthcare. ■ Hospital systems especially Academic Medical Centers that cover regional markets continue to acquire more hospitals and more physician practices. ■ Independent physicians who are not part of a collaborative joint venture that can legally collectively negotiate on their behalf are continuing to decline. ■ Vertical Integration between insurance companies, pharmacies, healthcare providers will continue unchecked further reducing competition in healthcare. This impacts not only physicians but also independent pharmacies. ■ Consolidation and less competition will result in rising healthcare costs will and patient and physician choices of how care will be delivered will become more limited. ■ The goals of the antitrust law of fostering competition, and controlling cost is not working.

"The goals of the antitrust law of fostering competition, and controlling cost is not working."

Solutions

More competition not less competition is better for healthcare quality and cost. Legislation to change the antitrust laws to apply to the 21st century would be ideal and not likely but should be pursued by physicians, patients and payors. ■ The State Action Doctrine where states,

which have a vested interest in their local market, can pass legislation to take over antitrust supervision of healthcare entities ie. Minnesota Healthcare Cooperative Act should be enacted. ■ Independent physicians need to understand the rationale for and form legally permissible collaborative joint ventures to preserve competitive cost effective care with greater consumer choice. ■ Educating the public and physician community to a better understanding of the problem with current healthcare trends. Physicians and patients need to work together to preserve what is good in our healthcare system and advocate for changes that will both improve care and make as cost effect as possible.

Conclusion

Despite the goals of the antitrust laws to preserve competition it is lessening in the healthcare marketplace. ■ Proactive action by all stakeholders is necessary to reverse this trend. ■ The FTC and DOJ need to reassess their current practice of being complaint driven regulatory agencies to becoming strategy based. ■ Anticompetitive loopholes that permit vertical integration need to be closed. ■ Anticompetitive markets need to have competition restored. ■ State Action Doctrine needs to step in where Federal efforts are not working. ●

1 Available at https://www.ftc.gov/tips-advice/competition-guidance/industry-guidance/health-care.
2 Sherman Antitrust Act, 15 U.S.C. §§ 1-2.
3 §7 Clayton Act, 15 U.S.C. § 18,
4 Section 5 15 U.S.C. § 45 FTC Act
5 Minnesota Rural Health Cooperative C-4111, FTC File No.0510199(final order issued December 28, 2010).
6 L.S. Dafny, Evaluating the Impact of Health Insurance Industry Consolidation: Learning from Experience. The Commonwealth Fund, November 2015.
7 D.R. Austin and L.C. Baker, Less physician Practice Competition is Associated with Higher Prices Paid for Common Procedures, Health Affairs, 34(10):1753-60 Oct. 2015.
8 Vatorella, L, Physicians generate 2.4 million annually for their hospitals study finds, Becker' Hospital CFO report, February 25, 2019 available at https://www.beckershospitalreview.com/finance physicians-generate-2-4m-annually-for-their-hospitals-study-finds.html.
9 Examination of Health Care Cost Trends and Cost Drivers, Report for Annual Public Hearing, Office of Attorney General Martha Coakley, March 16, 2010.
10 Id.
11 §7 Clayton Act, 15 U.S.C. § 18 prohibiting activities that substantially to lessen competition, or to tend to create a monopoly.
12 US v. Alston 974 F.2d 1206(9th Cir.1992).
13 Available at https://www.ftc.gov/enforcement/cases-proceedings/0210075/north-texas-specialty-physicians-matter
14 Cooperativa de Medicos Oftalmologicos de P.R.. C4603, FTC file no 1410194 Final Order issued February 27, 2017.
15 E. Richman, Medicare Advantage Enrollment Soared in Puerto Rico, Now it is Starving the Island's Healthcare System, August, 2018
16 L.S. Dafny, Evaluating the Impact of Health Insurance Industry Consolidation: Learning from Experience. The Commonwealth Fund, November 2015.
17 Id.
18 US v. Aetna 16-494 US DC DC 2017.(Aetna DC)
19 US v. Anthem et al, 17-5024, 17-5028 DC Circuit 2017. (Anthem DC).