“Dominant Payer/Dominant Provider”:
Vertical Integration in an Evolving Healthcare Landscape

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Healthcare in Transition

- What macro factors are driving changes to healthcare markets?

- More specifically, what are some of the factors driving vertical integration?
Healthcare in Transition

- Healthcare is undergoing a transition from fee-for-service to payment for value
- Concepts such as population health management and care coordination are increasingly important
- ACA contains incentives to improve care and reduce costs
Healthcare in Transition

- Similar goals are reflected in the antitrust enforcement agencies’ enforcement statements
  - By way of example, the FTC/DOJ Accountable Care Organization guidelines provide for rule-of-reason treatment for ACOs that promote, among other benefits, enhanced reporting on quality and cost measures, and promotion of care coordination
  - Increasing focus on reducing costs and improving quality of care
Vertical Integration as a Response

- Shift from fee for service to payment for value caries incentives for providers and payers alike to think about vertical integration

- Integration can allow the parties to better manage care, more effectively align incentives, and promote investment
Vertical Integration as a Response

- One obvious example is the “Kaiser” model of a closed system including a payer and providers

- Other forms flourishing as well:
  - Payers acquiring or managing physician groups or other providers
  - Providers acquiring or creating their own insurance products
  - Preferred relationships and other collaborations short of acquisition
Where One or Both Firms Are “Dominant”

- Foreclosure concerns

- UPMC/Highmark example

  - In West Penn litigation, West Penn’s allegations of conspiracy and monopolization survived motion to dismiss in the Third Circuit:

    - “The complaint alleges that UPMC agreed to use its power in the provider market to prevent Highmark competitors from gaining a foothold in the Allegheny County market for health insurance, and in exchange Highmark agreed to take steps to strengthen UPMC and to weaken West Penn.”

    - UPMC “refused to enter into competitive provider agreements with Highmark’s rivals”

    - Highmark “vowed not to offer a health plan that did not include UPMC as an in-network provider”
Context Counts

- Vertical integration as a tool to promote the cost containment and care improvement goals of the ACA

- Improved care coordination and reduced costs may themselves tend to mitigate market power concerns
Context Counts

- Maintain focus on cost reduction and care quality
  - Antitrust has long history of casting a suspicious eye on conduct that appears to make sense only due to its tendency to disadvantage a rival
  - Do not characterize network decisions as intending to disadvantage a rival provider
- E.g., CareCore example in New York
- Documents and language matter