

Antitrust Applied: Hospital Consolidation Concerns and Solutions

Statement before the Judiciary Committee
Subcommittee on Competition Policy, Antitrust, and Consumer Rights
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by

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Senator Klobuchar, Senator Lee, and Members of the Subcommittee, thank you for holding a hearing on this important topic and for giving me the opportunity to testify before you today.

I am the Director of Strategic Initiatives at the Service Employees International Union (SEIU). SEIU is the largest healthcare union in the country. Our union represents more than a million healthcare workers including physicians, nurses, service and maintenance workers and many other hospital-based employees. I am testifying today to comment on how concentration in hospitals may impact the wages, benefits, working conditions of SEIU members as well as millions of other healthcare workers.

Over the last ten years health systems have been consolidating at a brisk pace, with consolidation particularly acute at the largest health systems. Deloitte estimated that between 2013 -2018 the average number of hospitals in health systems was stable, but in the largest systems (those with over 30 hospitals) the average number of hospitals increased significantly.¹ In short, among health systems, as in many other parts of the economy, big firms are getting bigger.

Consider a description from Samuel Hazen, the CEO of HCA Healthcare Inc, the largest hospital system in the country. Hazen said to investors during his firms' 2021 Q1 conference call, "We are operating at an all-time high on market share... we're pushing the overall market share for the company across the 43 domestic markets into the low 27 percent zone, so a very high watermark".² HCA's CFO also told investors that HCA hospitals were an important part of the fabric of the communities in which they operate and often one of the biggest employers in the community.³

There is substantial empirical evidence that when employment is concentrated among fewer firms and workers have fewer employment options it leads to lower wages for workers. A 2017 study demonstrated that moving from the 25th percentile of concentrated labor markets to the 75th percentile is associated with a 15-25 percent decline in wages. Simply put as employer concentration rises, wages fall.⁴

A 2020 study estimated that more than 10 percent of the US workforce are likely in labor markets where employer concentration suppressed wages by at least 2 percent. Furthermore several million workers are in markets where employer concentration

¹ Deloitte Insights, Tracy Prevost, Ion Skillrud, Wendy Gerbhardt, and Debanshu Mukherjee, The Potential for Rapid Consolidation of Health Systems (December 10, 2020) available at

<https://www2.deloitte.com/us/en/insights/industry/health-care/hospital-mergers-acquisition-trends.html>

² HCA Healthcare, Inc. NYSE:HCA FQ1 2021 Earnings Call Transcripts, (April 22, 2021) S&P Global Market Intelligence, comments by Samuel P. Hazen pg. 13.

³HCA Healthcare, Inc. Presents at Raymond James 41st Annual Institutional Investors Conference, (March 3, 2020) S&P Global Market Intelligence, page 4.

⁴ José Azar, Ioana Marinescu, Marshall I. Steinbaum (2020). *Labor Market Concentration*. Journal of Human Resources, available: https://www.nber.org/system/files/working_papers/w24147/w24147.pdf. David Arnold (2021) *Mergers and Acquisitions, Local Labor Market Concentrations, and Worker Outcomes*, available: <https://darnold199.github.io/jmp.pdf> .

suppressed wages by at least 5 percent.⁵ The research on employer concentration in the hospital industry is consistent with empirical findings about the broader economy.

An American Economic Review article examined the effects of hospital mergers between 2000 and 2010 on the wages of hospital workers. The study looked at more than 1,300 hospitals and found that mergers that increased hospital concentration to high levels reduced the wages of nurses and other healthcare occupations.⁶

The negative effects of employer concentration are not limited to wages, but also include benefits and working conditions. A 2021 paper demonstrated that workers in concentrated labor markets are more likely to experience wage theft, health and safety code infractions, and other contraventions of labor laws.⁷ I want to emphasize that excessive employer concentration does not just lead to lower wages and benefits but also diminishes the quality of life of workers, their families and their communities.

For instance, Pittsburgh is one the most highly concentrated hospital markets in the country and UPMC the largest health system in the area. Workers at UPMC describe wages and benefits so low that many workers rely on food stamps and incur medical debt. Leslie Poston, an administrative assistant described, “UPMC is my employer, my insurer, and my healthcare provider — not to mention the largest private sector employer in Pennsylvania. They know how much I make and that I’m thousands of dollars in debt to the hospital I work at.” Poston and other UPMC workers describe circumstances where wages and benefits are so low that it creates a need for charity among the hospital’s employees.⁸

In spite of the problems caused by labor market concentration, labor market antitrust litigation against employers is rare. Since 1960 there have been fewer than 100 labor market cases but over 2,300 product market cases.⁹ Not a single labor market case brought under Section 2 of the Sherman Act survived summary judgment.¹⁰ This “litigation gap” is exacerbated by the lack of attention to labor market effects in the

⁵ Anna Stansbury, Gregor Schubert and Bledi Taska, (2021) Employer Concentration and Outside Options, available: <https://scholar.harvard.edu/stansbury/concentration-options> . Anna Stansbury, *Employer concentration suppresses wages for several million U.S. workers: antitrust and labor market regulators should respond* (January 26, 2021) available: <https://equitablegrowth.org/employer-concentration-suppresses-wages-for-several-million-u-s-workers-antitrust-and-labor-market-regulators-should-respond/>.

⁶ Elena Prager and Matt Schmitt, (2021) *Employer Consolidation and Wages: Evidence from Hospitals*, American Economic Review available: <https://www.aeaweb.org/articles?id=10.1257/aer.20190690>.

⁷ Ioana Elena Marinescu, Yue Qiu, Aaron Sojourner (2020) Wage Inequality and Labor Rights Violations available: <http://www.marinescu.eu/publication/marinescu-wage-2020/>.

⁸ Sarah Boden, UPMC Workers Say Debt To Their Employer An Example Of Hospital System Exploiting Tax-Exempt Status. 90.5 WESA & seiu.org/2020/02/27/seiu-announces-150-million-national-investment-in-2020-cycle-with-pennsylvania-as-one-of-eight-top-targeted-states/

⁹ Eric A. Posner, *Why the FTC Should Focus on Labor Monopsony*, *Pro Market* (November 5, 2018), available at <https://promarket.org/2018/11/05/ftc-should-focus-labor-monopsony/>.

¹⁰ See Marinescu, Ioana Elena and Posner, Eric A., *Why Has Antitrust Law Failed Workers?*, 105 CORNELL L. REV. 1343, 1365 (2020), available at <https://ssrn.com/abstract=3335174>.

current Horizontal Merger Guidelines.¹¹ Indeed, despite decades of increasing consolidation in the hospital sector there is no record of a hospital merger ever being blocked based on anti-competitive labor market impacts.

Antitrust regulation has not been an effective bulwark against the negative labor market effects of employer consolidation. Antitrust laws have weakened dramatically over the last several decades because courts have reinterpreted antitrust statutes increasingly narrowly. A defining feature of “modern” antitrust law is a singular focus on the consumer welfare standard to the exclusion of myriad other forms of harm including anti-competitive employer concentration and conduct in labor markets.

As Senator Klobuchar pointed out in her book there are notable instances where antitrust laws protected workers. In the 1960’s African-American doctors brought suit under the Sherman Act to force staff integration at Chicago hospitals. In 2006, SEIU brought suit against hospitals for colluding to depress wages for nurses.¹² But these are isolated examples. Much more could be done to expand the available policy tools for promoting fair and competitive labor markets.

Let me touch on some specific solutions that would address the concerns of workers in healthcare and other segments of the economy. An important step would be requiring that all merger reviews include an analysis of labor market impacts. Because there is a limited history of antitrust labor enforcement it is also important that bright-line standards are established for anti-competitive consolidation and practices in labor markets. Additionally, directives prohibiting anti-competitive restraints such as worker non-compete restrictions and other vertical restraints are important to counteract key ways that employers abuse their power over workers, exacerbate power imbalances and further distort competition in labor markets.

Empowering workers lessens the negative labor market impacts of consolidation. Antitrust enforcement in labor markets need not be an all or nothing endeavour. Negative labor market effects can be offset by collective bargaining agreements. Likewise wage boards, sectoral working standards for working conditions, broad-based bargaining and other labor market supports can attenuate the negative impacts of employer concentration. But, at this moment, it is important to strengthen antitrust law to explicitly protect competition in labor markets, through readily available tools including merger reviews, providing clear causes of action for monopsony, and preventing employer abuses such as restrictions on workers seeking the best job they can find.

Throughout the Covid-19 pandemic healthcare workers have cared for us. They have tended our families. They have kept us alive. In communities across the country we clapped for healthcare workers as they ended their shifts. But they deserve much more than praise and gratitude. They deserve living wages, good benefits, and safe

¹¹ *Horizontal Merger Guidelines* (Revised April 8, 1997). Department of Justice / Federal Trade Commission, available at <https://www.justice.gov/atr/horizontal-merger-guidelines-0>.

¹² Amy Klobuchar, *Antitrust: Taking on Monopoly Power from the Gilded Age to the Digital Age*, Alfred P. Knopf, New York, 2021 see pages 195 & 231.

workplaces. Empirical research shows that excessive employer consolidation can negatively impact wages and working conditions. I hope you will consider strengthening antitrust applications that have potential to protect workers from exploitation and abusive employer concentration.