

**Senator Chuck Grassley, Ranking Member  
Questions for the Record**

**Question for Professor Gaynor**

**Martin Gaynor: Response to Question from Senator Grassley  
(Note: My response follows the Senator's question and is in *italics*.)**

1. The FTC currently does not have jurisdiction under the FTC Act to enforce against anticompetitive conduct for most non-profit organizations, such as non-profit hospitals. There have been arguments over the years for a need to grant the FTC the authority to examine anticompetitive behavior of non-profit hospitals. Professor Gaynor, in your testimony you recommend removing these restrictions on the FTC. What effect do you believe that would have on the healthcare marketplace?

*At present only the Antitrust Division of the Department of Justice is authorized to enforce against anticompetitive conduct by nonprofit firms. As you point out, the FTC does not have authority to pursue anticompetitive conduct by nonprofits. This means that only one of our antitrust enforcement agencies can address these kinds of problems. It has come to pass that many areas of our country are now dominated by a single large, powerful health care system, most frequently a nonprofit. This means that anticompetitive conduct has become the major concern and threat to competition, not horizontal merger, because in large parts of the U.S. consolidation has already happened. Therefore, in my opinion, it makes sense to have both of our antitrust enforcement agencies empowered and available to address these issues, which could be quite substantial.*

**Antitrust Applied:  
Hospital Consolidation Concerns and Solutions**

**Hearing before the Senate Committee on the Judiciary, Subcommittee on Antitrust,  
Competition Policy, and Consumer Rights**

**May 19, 2021**

**RESPONSES TO QUESTIONS FROM SENATOR BLUMENTHAL**

**Martin Gaynor**

Note: My responses follow the Senator's questions and are in *italics*.

**Questions for Professor Gaynor**

1. Hospital systems are increasingly buying solo and small group physician practices. These acquisitions often go undetected by antitrust enforcers because merging companies fall below federal reporting requirements. These unreported and unreviewed acquisitions add up quickly – accounting for a more than 30% increase of hospital-owned physician practices since the mid-2000s.
  - a. A few states require reporting of healthcare mergers below the federal thresholds to their state Attorney General's office. Would a comparable federal policy address this creeping consolidation?

*It would help, because federal antitrust enforcement agencies would have comprehensive information about such mergers, whereas present they have little to none. Reporting of "small" mergers that fall below the Hart-Scott-Rodino threshold should be required, in a simple, streamlined way. This would allow the U.S. antitrust enforcement agencies to monitor these mergers and investigate those where there may be cause for concern.*

- b. Would you support a federal reporting requirement for smaller acquisitions where the acquiring firm has made a series of such acquisitions over a defined period of several years?

*Yes. It can be the case that when there are a series of smaller acquisitions none of them appears to be a concern individually, but there can be a cumulative affect that harms competition.*

- c. Aside from reporting, what other steps can be taken to alleviate the problem of creeping consolidation?

*More enforcement, and more aggressive enforcement, overall. This cannot be done without a substantial increase in the budgets of the antitrust enforcement agencies. The agencies' budgets, adjusted for inflation, have barely increased in years. As a consequence they are barely able to keep up with existing enforcement areas, and do not have the capacity to pursue new agendas. A*

*substantial increase in resources is needed to permit the agencies to address the problem of creeping consolidation.*

*In addition, these issues should be addressed in the merger guidelines. The agencies are currently in the process of revising these guidelines. This is an area that should be included in the new, revised, version of the merger guidelines. Two things in particular the agencies may wish to consider on this topic are as follows. When there is a current acquisition that follows a number of prior acquisitions: 1) consider the impacts of past acquisitions, 2) consider the cumulative impacts of past acquisitions and the current one.*

2. As you have written, despite the FTC's strong record in hospital merger challenges, more than 1,600 hospital mergers have been consummated in the last 20 years, and over 90% of metropolitan areas are "highly concentrated."
  - a. What explains this dichotomy of litigation successes and policy failures?

*In my opinion one of the main reasons is that the antitrust enforcement agencies simply have not been able to keep up. As I mentioned above, their budgets haven't grown (adjusted for inflation) in years. Even if only a small fraction of the 1,600+ hospital mergers that have occurred over the last 20 years are likely to be problematic, the antitrust enforcement agencies simply do not have the resources to address them.*

- b. Would broad antitrust reform rectify this problem, or would a targeted, sector-specific policy solution be more beneficial?

*I think both are required. We need more, and more aggressive enforcement, and this includes a recognition by the courts of modern theories and evidence on competition and market power. However, many areas in the U.S. have become extremely consolidated, to the point that they are now dominated by one large, powerful health care system. Situations like this are very difficult for antitrust to address. In my opinion it's time for policymakers to consider options that include direct monitoring and oversight, including the possibility of price regulation.*

3. The FTC is prohibited from challenging anticompetitive practices of non-profit entities, which make up more than half of all United States hospitals.
  - a. How does the FTC's non-profit exemption affect patient care and costs?

*I don't think we know precisely how the prohibition on the FTC enforcing against anticompetitive conduct by nonprofit firms affects patient care and costs. However, at present only the Antitrust Division of the Department of Justice is authorized to do this. In addition, as I mentioned above, many areas of our country are now dominated by a single large, powerful health care system. The concern in areas like this is primarily anticompetitive conduct, not horizontal merger, because consolidation has already happened. As a consequence, it makes sense to have both of our antitrust enforcement agencies empowered and available to address these issues, which could be quite substantial.*

4. In 2019, the Trump Administration's Center for Medicare and Medicaid Services issued a final rule on hospital price transparency, but with penalties capped at \$300 per day, noncompliance has rendered the rule meaningless.
  - a. What can be done to ensure full compliance with both the hospital price transparency rule and upcoming insurance price transparency rule?

*One thing that can be done is to increase the penalties for noncompliance substantially, to the point where they matter to hospitals. The penalties could be scaled to the size of the hospital/health system, since it may take larger penalties to induce larger hospitals/health systems to comply, and vice versa.*

*Another approach is to create a national health care data warehouse, funded and overseen by the federal government. This is the information age, and data are part of our national infrastructure, just like roads, bridges, railroads, and airports. Health care is a vitally important part of our society – it's time to invest in the information infrastructure we need for this critical sector.*

## Questions for the Record

Senator Mike Lee

**Martin Gaynor: Response to Question from Senator Lee**  
(Note: My response follows the Senator's question and is in *italics*.)

**To Prof Gaynor:**

- 1) Two days after our hearing, the New York Times reported that some hospitals may be using funds they received under the CARES Act Provider Relief Fund to buy up their competitors.<sup>1</sup> I am concerned that the government has yet again directly facilitated consolidation in the hospital industry. Do you share these concerns, and how can policymakers avoid such mistakes in the future?

*I am not knowledgeable enough about specific evidence on this point to respond to this question.*

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<sup>1</sup> <https://www.nytimes.com/2021/05/21/health/covid-bailout-hospital-merger.html>

## Questions for Professor Martin Gaynor

### Martin Gaynor: Response to Questions from Senator Tillis (Note: My responses follow the Senator's questions and are in *italics*.)

1. One concern that arises from hospital mergers is the impact it has on the prices insurers, and ultimately, consumers and taxpayers, pay for care. Can you share your perspective on the impact mergers and acquisitions of hospitals, particularly local, community-based hospitals, have on the cost of care?

*There is extensive research evidence that mergers of hospitals that are close competitors cause prices to increase substantially, thereby substantially increasing the cost of care. As hospital markets have become increasingly consolidated, there are fewer competitors left, so it's more likely that mergers are between close competitors, thereby causing substantial harm to competition and driving up health care costs.*

*It's important to note that when health care costs increase, these are incorporated by insurers into higher premiums, and that employers who provide insurance to their workers pass those higher expenses on to their employees in the form of smaller (or no) pay increases, increased shares of health insurance premiums, or reduced health insurance benefits.*

2. I am particularly interested the impact mergers have on the cost of healthcare for rural and underserved communities. Can you share your thoughts on the costs mergers may impose on rural and underserved communities?

*The impacts of mergers on rural and underserved communities may be particularly acute, because those communities often face a severe loss of competition due to hospital mergers. That can result not only in higher prices and costs, but reduced quality of care, and the loss of important health care services for those communities.*

3. Is it possible that government regulations actually caused the consolidation of hospitals?

*There are multiple factors that have led to consolidation in the hospital sector – one cannot say specifically which factors have been the primary drivers of this phenomenon. There are ways some government programs pays providers (specifically Medicare site-specific payments for physician services and the way the 340B program pays providers) that have encouraged certain kinds of consolidation.*

4. Looking past antitrust remedies and enforcement, are there are other laws we should consider modifying and changing? In other words, looking holistically at our healthcare system, what statutory changes should we consider making in order to deal with the issue of hospital mergers and acquisitions?

*Antitrust is a key part of preserving and promoting competition. If the U.S. antitrust enforcement agencies are to be able to do their jobs they need substantially more funding – their budgets, adjusted for inflation, have essentially been stagnant for years. More resources are needed so the agencies can do their jobs preserving competition and protecting consumers.*

*However, at present many geographic areas in the U.S. have become extremely consolidated, to the point that they are now dominated by one large, powerful health care system. Situations like this are very difficult for antitrust to address. In my opinion it's time for policymakers to consider options that include direct monitoring and oversight, including the possibility of price regulation.*

*Information will be needed to do this, and that means a national health care database will be needed. An investment will have to be made in this critical resource. This is the information age, and data are part of our national infrastructure, just like roads, bridges, railroads, and airports. Health care is a vitally important part of our society – it's time to invest in the information infrastructure we need for this critical sector.*

5. How have federal government healthcare policies—again, looking at them holistically— influenced the closure of hospitals in rural and underserved areas?

*I am not knowledgeable enough about specific evidence on this point to respond to this question.*

6. Can you explain the impact hospital mergers and acquisitions have on the quality of care for patients? I am particularly interested in the impact on care for rural areas.

*The research evidence shows that lack of hospital competition has a negative impact on patient quality of care. This evidence is most clear for Medicare patients. The evidence is more mixed for privately insured patients, but in my opinion the best evidence shows negative impacts on the quality of care for privately insured hospital patients due to lack of competition.*

7. Do mergers actually improve patient access to comprehensive, integrated care? For example, a merger between two local hospitals may reduce choice, but the consolidation might also allow the new merged hospital to commit resources to the development of more comprehensive treatment methods and specialties. How do mergers affect access to more comprehensive, integrated treatment?

*This is a claim commonly made by merging parties. However, I am not aware of evidence that shows that mergers lead to this result. Overall, the research evidence does not demonstrate that hospital mergers systematically lead to more integrated care, or better care, or less expensive care.*