

FTC's Renewed Focus on Hospital Merger Enforcement Reflected in Appointment of Its First Deputy Director for Health Care and Antitrust

June 27, 2012

This note briefly analyzes the scholarly work of Leemore Dafny, who recently has been appointed as the FTC's first Deputy Director for Health Care and Antitrust, beginning August 1. [\[1\]](#) A Harvard- and M.I.T.-educated economist, Dafny was previously a research professor specializing in hospital and health services at Northwestern University's Kellogg School of Management and a Faculty Research Associate at the National Bureau of Economic Research. Dafny has published more than a dozen articles about hospitals and health care economics. As detailed more fully below, her research, using empirical data and statistical methods, supports the structural proposition that greater market concentration leads to higher prices for consumers.

Throughout her career, Dafny's research has focused on hospitals and health insurance plans. While the FTC does not have authority over the health insurance industry, it can investigate and block mergers between hospitals or between other health care providers. Dafny's scholarly work relies on empirical methods and statistical tools and tends to show such mergers are bad for consumers because concentrated markets lead to increased costs.

In one of her most recent articles, Dafny focused on the value of consumer choice regarding health care providers and insurers. [\[2\]](#) The study found people value choice in health care so much that they would be willing to pay more than 20 percent higher premiums if they got the choice of plans and services they wanted. Another article tried to quantify the cost of a lack of choice for consumers and found fewer choices in health insurance providers, on average, led to a seven percent increase in premium costs. [\[3\]](#)

In another article, published in the *New England Journal of Medicine*,^[4] she and her co-author argued price transparency in hospitals can be bad for consumers because it encourages hospitals and insurers to raise prices. Indeed, in a paper prepared for the Alberta Health Service in Canada, she advocated creating a sealed bid system for the state health service, where doctors would bid for the right to perform surgeries and charge a fixed cost, including all follow-up services and complications.^[5] In a limited market such as health care, Dafny has argued that when everyone has the same information, hospitals have less of an incentive to offer even one insurance company a discount.^[6] If a hospital charged one price to company A and a lower price to company B, in a transparent system company A would know immediately and, most likely, demand the lower price. Rather than give in to the lower price, Dafny argues hospitals are more likely to not offer a discount to anyone and keep prices higher.

The *New England Journal of Medicine* article also attacked "most favored nation" clauses in hospital/insurance company contracts where a hospital promises to always charge an insurance company the lowest prices offered to any insurer. Dafny argued such clauses are anti-consumer because they keep new competitors out of the health care market (by destroying a new company's ability to compete on price) and remove any incentive to lower prices charged to consumers. The FTC's sister agency in enforcing antitrust laws, the Department of Justice, recently has brought actions against insurance companies for using such clauses.^[7]

The general theme in Dafny's research is that bigger may be better for some entities in the health care industry, but not for consumers. Two of Dafny's articles found that large health insurers can become so powerful that they dictate the prices they are willing to pay (to doctors and hospitals)^[8] and the prices they are willing to accept (to employers who offer health plans to employees).^[9] This high level of market power, Dafny's research found, gives health insurance companies the ability to squeeze employers in good times as well as bad. Without a meaningful choice, Dafny found employers simply accept increased premium costs without the insurer having to risk losing the employers' business.

While the FTC does not have the ability to regulate the insurance industry, it has signaled its willingness to look closely at other aspects of the health care industry, particularly hospital mergers.^[10] In hiring an empirical economist whose research shows concentrated health care markets lead to higher prices, Dafny's appointment signals an even stronger likelihood that the FTC will closely scrutinize further health care consolidations, including monopsony or power buyer effects.^[11]

[1] Press Release, Federal Trade Commission, FTC Names Heyer and Dafny Deputy Directors of the Agency's Bureau of Economics (June 12, 2012), *available at* <http://www.ftc.gov/opa/2012/06/bedeputies.shtm>.

[2] Leemore Dafny, Katherine Ho, & Mauricio Varela, *Let them Have Choice: Gains from Shifting Away from Employer-Sponsored Health Insurance and Toward an Individual Exchange* (Nat'l Bureau of Econ. Research, Working Paper No. 15687, 2010).

[3] Leemore Dafny, Mark Duggan, & Subramaniam Ramanarayanan, *Paying a Premium on Your Premium? Consolidation in the U.S. Health Insurance Industry* (Nat'l Bureau of Econ. Research, Working Paper No. 15434, May 2010).

[4] David Cutler & Leemore Dafny, *Designing Transparency Systems for Medical Care Prices*, 364 *New Eng. J. Med.* 894 (2011).

[5] David Dranove, Cory Capps, & Leemore Dafny, *A Competitive Process for Procuring Health Services: A Review of Principles with an Application to Cataract Services*, 5(2) SPP Research Paper: The Health Series (Univ. of Calgary, Dec. 2009).

[6] See Cutler & Dafny, *supra*, note 4 at 894-95.

[7] See, e.g., Complaint, *United States v. Blue Cross Blue Shield of Mich.*, 809 F. Supp. 2d 665 (E.D. Mich. 2011) (No. 2:10-cv-15155-DPH-MKM) (challenging Blue Cross Blue Shield of Michigan's use of MFNs), *available at* <http://www.justice.gov/atr/cases/f263200/263235.pdf>. See Fiona Scott Morton, Deputy Asst. Att'y Gen. for Econ. Analysis, U.S. Dep't of Justice, *Contracts that Reference Rivals*, Remarks at the Georgetown University Law Center Antitrust Seminar 2 (Apr. 5, 2012), <http://www.justice.gov/atr/public/speeches/281965.pdf>; see also Interview with Fiona Scott Morton, DAAG for Economic Analysis at the DOJ, ANTITRUST, Spring 2012, at 14, 17-18.

[8] See Dafny, Duggan, & Ramanarayanan, *supra*.

[9] Leemore Dafny, *Are Health Insurance Markets Competitive?* (Nat'l Bureau of Econ. Research, Working Paper No. 14572, 2008).

[10] The FTC has required divestitures, or blocked mergers, several times in the past four years, marking a departure from past practice. See Press Release, Federal Trade Commission, Statement by FTC Bureau of Competition Director Richard Feinstein on the Court Ruling Granting a Preliminary Injunction in the OSF/Rockford Hospital Matter (Apr. 5, 2012) available at <http://www.ftc.gov/opa/2012/04/rockford.shtm>; Press Release, Federal Trade Commission, citing Likely Anticompetitive Effects, FTC Requires ProMerica Health System to Divest St. Luke's Hospital in Toledo, Ohio, Area (Mar. 28, 2012) available at <http://www.ftc.gov/opa/2012/03/promedica.shtm>; Press Release, Inova Health System, Statement from Inova Health System and Prince William Health System About the Proposed Merger (June 6, 2008) available at <http://www.inovanewsroom.org/2008/06>. See also Remarks of FTC Chairman Jon Leibowitz (As Prepared for Delivery) Antitrust in Healthcare Conference, American Bar Association/American Health Lawyers Association Ritz-Carlton Hotel, Pentagon City (May 3, 2012), during which Leibowitz described the FTC's "renewed focus on hospital merger enforcement," available at <http://www.ftc.gov/speeches/leibowitz/120503antitrusthealthcare.pdf>.

[11] Indeed, the FTC created Dafny's position to "enhance the agency's efforts to promote competition in the health care sector." Press Release, Federal Trade Commission, FTC Names Heyer and Dafny Deputy Directors of the Agency's Bureau of Economics (June 12, 2012), available at <http://www.ftc.gov/opa/2012/06/bedeputies.shtm>.

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