CORNERSTONE RESEARCH

Economic and Financial Consulting and Expert Testimony

Healthcare

Cornerstone Research prepares economic and financial analyses in litigation and regulatory matters involving companies in the healthcare industry. We work with counsel for insurers, hospitals, physician groups, and other providers. Our experts and staff possess a deep knowledge of the regulatory framework and an understanding of the complex network of entities involved in the provision and coverage of healthcare.

cornerstone.com/healthcare

ANTITRUST AND COMPETITION

Clients draw on our expertise in competition issues involving the healthcare sector, including hospitals and insurance providers. Our staff and experts address allegations of:

- Predatory and discriminatory pricing
- Price fixing by physicians' associations or hospitals
- Price fixing of healthcare workers' wages
- Exclusionary practices
- Monopolization

In our analyses, we define relevant markets, assessing existing market power and determining the competitive effects of mergers and acquisitions as well as allegedly anticompetitive behavior involving:

- Hospital systems
- Outpatient care facilities
- Physician services
- Insurers

PRODUCT LIABILITY AND MISREPRESENTATION

Clients seek our expertise in class certification and damages analysis for cases involving claims of product liability, misrepresentation, and false advertising pertaining to medical institutions and healthcare products.

MERGERS

When healthcare organizations merge, complicated issues arise among patients, providers, and insurers. Such mergers involve complex empirical analyses to assess competitive effects, including questions related to bargaining, quality of care, risk-sharing, and efficiencies.

REIMBURSEMENT DISPUTES

Our staff and experts consult to clients in a variety of reimbursement-related matters on issues of liability, impact, damages, and class certification. These matters include:

- False Claims Act and Anti-Kickback Statute investigations
- Disputes between payers and healthcare providers
- Interpretation and alleged breach of contracts
- Partnership profit sharing

Clients also engage us to assess allegations relating to:

- Unnecessary treatment and testing, and upcoding
- Reasonable rates for out-of-network claims
- Cost shifting
- Waiver of patient coinsurance and co-payments

We partner with physicians and medical billing experts to assess and integrate their opinions of medical necessity and claims coding into our damages and liability analyses.

.

Featured Expert

Mark Duggan
Wayne and Jodi Cooperman Professor of Economics,
Trione Director,
Stanford Institute for Economic Policy Research,
Stanford University

Mark Duggan is an expert in health economics. His research areas include Medicare, Medicaid, disability insurance, the Affordable Care Act, pharmaceutical and hospital pricing, and patent reform. He has provided expert testimony as a damages expert in pharmaceutical average wholesale price litigation. Professor Duggan served as the senior economist for healthcare policy on the President's Council of Economic Advisers.

ANTITRUST AND COMPETITION

ALLEGED EXCLUSIONARY CONTRACTING FOR OUTPATIENT SERVICES

The defendant, the largest hospital system in the region, had negotiated exclusive contracts with four of the area's largest commercial health plans, making it the only in-network provider of outpatient surgical services for subscribers of those plans. Richard Arnould of the University of Illinois at Urbana-Champaign examined the relevant geographic markets for inpatient and outpatient services to assess whether the hospital system restrained competition and foreclosed a substantial share of the market.

Professor Arnould also evaluated whether the exclusive arrangements raised prices for outpatient surgical services. He reviewed price data for similar services paid by the same plans in other regions. He also estimated the rates that the stand-alone surgical center would likely have negotiated with the plans at issue and found them to be lower than the rates charged by the defendant hospital system.

Professor Arnould assessed market power and evaluated evidence that the exclusive arrangements raised prices.

He concluded that the hospital system was able to foreclose a substantial share of the market for outpatient surgical services. Finally, Professor Arnould estimated the damages that the surgical center incurred due to reduced patient referrals, given its out-of-network status.

ANALYSIS OF PHYSICIAN GROUP'S MARKET SHARE AND ALLEGED MARKET POWER

Counsel for a physician group retained Michael Keeley, a senior vice president of Cornerstone Research, to address allegations that it had illegally obtained and exercised market power for inpatient services at local area hospitals.

Dr. Keeley established that the physician group's market share flowed from its offering a superior product and was not anticompetitive.

Dr. Keeley demonstrated that, because hospitals choose which physician group will serve their patients, the relevant product and geographic market must be assessed from the perspective of hospitals. He then showed that physician groups can provide both inpatient and outpatient services, and therefore the relevant product market also comprised physician groups providing outpatient services. His analysis of patient discharge data indicated that the physician group at issue had a share within this broader market that was not plausibly large enough for it to exercise market power. In addition, Dr. Keeley showed physician groups competed nationally to provide services to hospitals and thus the relevant geographic market was the entire United States.

Further, Dr. Keeley's analysis of claims data demonstrated that the physician group did not overcharge for its services because its prices in this market were equivalent to those it charged in regions where it was not alleged to have market power.

Dr. Keeley also established that a large portion of the growth of the physician group's market share came from hospitals actively seeking its services, rather than from acquisition. Thus, to the extent the physician group had established market power, it flowed from its offering a superior product and was not anticompetitive. The case settled before trial.

Featured Expert

Gautam Gowrisankaran
Professor of Economics,
Columbia University

Senior Advisor,
Cornerstone Research

Gautam Gowrisankaran is an expert on industrial organization and competition, with particular focus on healthcare economics. His market research and analysis includes hospitals, Accountable Care Organizations (ACOs), and health insurance. He has been an expert witness and consultant in several matters involving the competitive effects of mergers in the healthcare industry.

CLASS CERTIFICATION OPPOSED ON BEHALF OF HEALTHCARE PROVIDER

A large provider of healthcare services retained Laurence Baker of Stanford University and Cornerstone Research to respond to a motion to certify a class of patients. The plaintiffs alleged that a large healthcare provider reordered physician diagnosis codes when submitting claims for insurance payment, resulting in patient cost sharing for services that should have been provided at no cost to patients.

Professor Baker demonstrated that many putative class members would not have been harmed by the challenged conduct.

Professor Baker submitted a declaration for the defendant, showing that it was not possible to ascertain which patients were in the proposed class based on the definitions provided by the plaintiffs. He also demonstrated that, given the heterogeneity in insurers, plans, and the circumstances of putative class members, one could not determine using a common method whether a given class member was affected at all by the challenged conduct, let alone suffered damages.

Professor Baker showed that any determination of impact or damages would require an individualized analysis, patient by patient and service by service, of what the patient's responsibility would have been under an alternative ordering of codes. Such an analysis could only be done by each specific insurer, since only that insurer would know whether the order of codes may have mattered for a particular patient, and what the impact of an alternative ordering would have been, if any. Finally, Professor Baker showed that many putative class members would not have been harmed by the challenged conduct.

OSCAR INSURANCE COMPANY OF FLORIDA V. BLUE CROSS AND BLUE SHIELD OF FLORIDA, INC. ET AL.

A new entrant in the Orlando health insurance marketplace alleged that the defendants attempted to monopolize the sale of individual plans through its use of exclusive agents. Defense counsel for Blue Cross and Blue Shield of Florida Inc. retained Cornerstone Research to support expert testimony by Laurence Baker of Stanford University.

Professor Baker testified that Florida Blue's exclusive agents were only a small fraction of the available pool of agents and brokers and that numerous other insurers had entered and succeeded in Florida.

In denying the plaintiff's motion for preliminary injunction, the judge concluded that Oscar "failed to carry its burden of proving irreparable harm and a substantial likelihood of success of the merits." The judge later dismissed the case on the grounds that that Florida Blue's exclusive contracts were covered under the McCarren-Ferguson Act.

Featured Expert

Laurence C. Baker
Bing Professor of Human Biology, Stanford University;
Associate Chair for Education, Stanford School of Medicine;
Senior Fellow, SIEPR, Stanford University;
Senior Advisor, Cornerstone Research

Laurence Baker is an expert in the areas of antitrust, health insurance markets, medical services pricing, and the effects of regulation on healthcare markets. Professor Baker has consulted and testified on competition issues, such as mergers between hospitals and physician groups, and alleged exclusionary contracting practices. His experience also includes matters involving healthcare financing issues, including plan design, provider payment systems, and billing disputes.

PRODUCT LIABILITY

ANALYSIS OF CONSULTING SERVICES TO SELF-INSURED STUDENT HEALTH PLAN

A university system claimed that an actuarial consultant gave allegedly negligent advice that caused a student health plan to accumulate a significant funding deficit over three years. Defense counsel retained Cornerstone Research and four experts to provide analysis and testimony on healthcare and actuarial issues.

Professor Bundorf determined that self-funding was reasonable for the university.

Cornerstone Research worked with healthcare experts M. Kate Bundorf of the Stanford School of Medicine, and Daniel P. Kessler of the Stanford Graduate School of Business, also a Cornerstone Research senior advisor. In addition, we supported Jeffrey Petertil, an independent healthcare actuary; and Cecil Bykerk, a former president of the Society of Actuaries. Professor Bundorf explained the fundamental economic features of health insurance plans and the possible causes of a funding shortfall. She also reviewed the actuarial consultant's advice to the university system to self-insure its student health plan. She determined that the move to self-funding was a reasonable decision for the university, but that there were substantial deficiencies in the university's implementation of the plan that likely contributed to its poor financial performance.

Professor Kessler assessed the potential damages incurred by the university as a result of the consultant's recommendation to self-insure and alleged actuarial errors. He showed that the alleged errors had a limited impact on the premium shortfall and that the damages model presented by the university's actuarial expert greatly overstated any damages resulting from the alleged negligence.

Professor Kessler showed that the university's model greatly overstated any damages from the alleged negligence.

Mr. Petertil reviewed the actuarial work performed by the consultant for the university. He opined that the consultant acted within the scope of its role and responsibilities. He also found that its analysis of expected medical costs and its advice on student health insurance premiums were reasonable.

Mr. Bykerk provided background on the actuarial profession, in particular, its inherently judgment-based nature. He explained how the consultant's conduct should be assessed in light of the guidance set forth by professional actuarial organizations, and concluded that its work was consistent with what one would expect of a reasonable and careful actuary under the circumstances.

In addition to supporting the defendant's experts in their analyses, Cornerstone Research staff reviewed the expert analyses submitted by the university and identified significant errors. We also assisted counsel leading up to trial, including preparing for the cross-examination of the plaintiff's experts.

The case settled shortly after trial began.

Featured Expert

M. Kate Bundorf
J. Alexander McMahon Distinguished Professor of Health Policy and Management, Sanford School of Public Policy, Core Faculty Member, Duke-Margolis Center for Health Policy, Duke University

Kate Bundorf is an expert on health insurance markets, and the economics of healthcare systems and healthcare delivery. Professor Bundorf has analyzed the determinants and effects of consumer choices, the impact of regulation, the interaction of public and private systems, incentives for insurers to improve healthcare quality, and the organization of provider markets. She has served as an expert witness on healthcare matters, including cases with allegations of False Claims Act violations, reimbursement disputes, and has testified at deposition.

DISCOUNTING OF PRICES IN HEALTHCARE PRODUCTS AND SERVICES

In a class action against a large manufacturer and retailer of consumer healthcare products and services, the plaintiffs alleged that the defendant's everyday discounting of prices misled consumers about the magnitude of the "true" discount that members of the proposed class received. In addition, the plaintiffs alleged that some members of the proposed class did not receive the full value of certain discounts that had been negotiated by insurance companies.

Cornerstone Research worked with Dominique Hanssens of the University of California, Los Angeles, to evaluate whether common evidence could be used to determine if the challenged conduct misled consumers. His analysis involved examining the different factors that influence consumers' purchasing decisions and determining if a common method could be used to evaluate whether the decisions were affected by an everyday discount.

Professor Hanssens showed that most proposed class members were unlikely to have been misled.

Professor Hanssens analyzed the defendant's range of promotions and marketing materials used to advertise these programs. He demonstrated that proposed class members were offered different discounts and would have been exposed to different information about these discounts. He also analyzed a wide array of public information on prices and showed the variety of pricing information available to different members of the proposed class. This analysis showed that most proposed class members were unlikely to have been misled as the plaintiffs had alleged. Professor Hanssens also noted that the level of discount implied by the plaintiffs would result in below-cost pricing.

Claims Data Analytics

Clients rely on our decades of experience with complex cases requiring data management, integration, sampling, digitization, production, and analysis, including advanced empirical modeling and statistical techniques.

Cornerstone Research regularly analyzes databases containing hundreds of billions of records. We have the staff expertise and state-of-the-art, secure computing facilities to quickly and efficiently handle large volumes of sensitive healthcare data. This includes experience with data masking and anonymization as well as applying AI and machine learning to create structured data through supervised record linkage, resolving distinct entries to a common entity. We also have experience implementing state-of-the-art econometric techniques utilizing algorithmic methods.

Cornerstone Research's expertise includes major price and claims databases, such as MarketScan, FAIR Health, and Medicare, as well as insurer-specific claims datasets, internal provider billing systems, Medicaid data, and other large discharge databases.

Featured Expert

Sean Nicholson
Professor, Department of Economics and Brooks School of Public Policy,
Director, Sloan Program in Health Administration,
Cornell University
Senior Advisor,
Cornerstone Research

Sean Nicholson conducts research on the determinants of healthcare spending, healthcare financing, and the valuation of medical technologies. He served as the research director of the Upstate Health Research Network, a consortium of universities and researchers focused on healthcare policy, pricing, and market structure, as well as Medicare and private insurance.

MERGERS

IN THE MATTER OF OTTO BOCK HEALTHCARE NORTH AMERICA INC

The Federal Trade Commission issued a complaint related to the acquisition of Freedom Innovations (Freedom) by Otto Bock HealthCare North America Inc. (Otto Bock) in September 2017. The FTC retained Cornerstone Research and Christine Hammer, a certified public accountant and senior advisor with Cornerstone Research.

Christine Hammer analyzed the parties' claims relating to their "failing firm" defense and alleged merger-specific efficiencies.

In a hearing before the Chief Administrative Law Judge, Ms. Hammer provided testimony related to:

- Whether Freedom qualified as a "failing firm" as defined by the US Department of Justice and FTC Horizontal Merger Guidelines.
- What, if any, efficiencies were likely to result from Otto Bock's acquisition of Freedom and be cognizable under the Merger Guidelines.

Ms. Hammer concluded that Freedom did not meet any of the three circumstances to be considered a failing firm under the Merger Guidelines. She found that Freedom would have been able to meet its financial obligations in the near future and there was no evidence that Freedom initiated or seriously considered a Chapter 11 reorganization. She also determined that Freedom did not make "good faith" efforts to elicit reasonable alternative offers during the sales process.

With regard to alleged merger-specific efficiencies, Ms. Hammer opined that Otto Bock had not presented any verifiable efficiency claims. Because Otto Bock only presented ambiguous assertions, it was not possible to evaluate the merger specificity of the claims. The efficiencies as alleged were therefore not cognizable under the Merger Guidelines.

In an April 2019 decision, as a remedy, the Chief Administrative Law Judge ordered Otto Bock to fully divest Freedom to a FTC-approved acquirer, with limited potential exceptions to a complete divestiture of all of Freedom. The Chief Administrative Law Judge cited Ms. Hammer's expert report and testimony throughout his decision.

In November 2019, the FTC issued its opinion, stating "We hold that, to fully restore the competition lost from the Acquisition, Respondent must divest Freedom's entire business with the limited exceptions granted by the ALJ. We enter an order consistent with this Opinion."

USA V. CABELL HUNTINGTON HOSPITAL INC. AND ST. MARY'S MEDICAL CENTER INC.

In its review of the merger of two local hospitals, the West Virginia Health Care Authority was "persuaded by the common sense opinions" of Gautam Gowrisankaran of the University of Arizona.

The West Virginia Health Care Authority agreed with Professor Gowrisankaran in this hospital merger review.

The Authority approved the merger and extended state action immunity to the deal. The Federal Trade Commission subsequently dropped its challenge of the transaction.

Featured Expert

Christine Hammer
Certified Public Accountant;
Senior Advisor,
Cornerstone Research

Christine Hammer is a certified public accountant with expertise in cost accounting, intellectual property, and lost profits. She specializes in applying accounting and economic theory to issues arising in business litigation. Ms. Hammer has addressed issues related to merger efficiencies, predatory pricing claims, and lost profit damages.

PROPOSED MERGER OF AETNA AND HUMANA ENJOINED

After a thirteen day trial, the U.S.D.C. for the District of Columbia enjoined the proposed merger of health insurers, Aetna and Humana. In accepting the plaintiffs' arguments, the court relied on the analyses and rebuttal critiques of Cornerstone Research experts and senior advisors, Aviv Nevo of the department of economics and the Wharton School of the University of Pennsylvania, and Christine Hammer, CPA. Following the ruling, the parties abandoned the merger.

The court's opinion relied on Professor Nevo's testimony in multiple areas.

Professor Nevo analyzed the likely effects of the proposed merger on competition involving Medicare Advantage plans and plans sold on the Affordable Care Act exchanges. He testified in the plaintiffs' case in chief and as a rebuttal witness. The court's opinion relied on Professor Nevo's testimony in multiple areas.

Relevant Market. "Professor Nevo has performed a battery of tests that all point to the same conclusion: the sale of individual Medicare Advantage plans satisfies the hypothetical monopolist test and thus is a relevant product market. That result generally holds up whether Nevo uses a critical loss analysis or a merger simulation, and whether he uses his own estimates, [the defendants' expert's], or those from the academic literature."

Competitive Effects. "Nevo's (largely uncontroverted) analysis suggests that there is substantial competition between Aetna and Humana. Given Nevo's analysis, it is not surprising to find significant evidence of head-to-head competition between Aetna and Humana throughout the country."

Entry: Not Likely. "Hence, based on the expert analysis that the Court finds persuasive [Nevo's analysis]....entry is not likely enough to allay these concerns."

Entry: Not Timely. "The Court finds Nevo's critique of [the defendants' expert's] model for equilibrium and timely entry to be persuasive." Not Sufficient. "[Nevo's] analysis is persuasive, and alone is enough to conclude that entry is not likely to be sufficient."

The court found that Ms. Hammer raised valid issues regarding "several categories of claimed efficiencies."

Ms. Hammer evaluated whether the defendants' efficiency claims were verifiable and merger-specific, among other areas. The court found that Ms. Hammer raised valid issues regarding "several categories of claimed efficiencies" as well as "the companies' analyses...that serve to further undermine the reliability of the efficiency claims."

Verifiability. "Hammer supported her analysis [of the defendants' efficiency claims relating to drug rebates] with a series of illustrative examples that, in the Court's view, raise real concerns about the reliability of the companies' pharmacy rebate maximization efficiencies."

Merger Specificity. "On balance, the Court is unpersuaded that the efficiencies generated by the merger will be sufficient to mitigate the transaction's anticompetitive effects for consumers in the challenged markets."

Featured Expert

Aviv Nevo
George A. Weiss and Lydia Bravo Weiss University Professor,
Professor of Economics and Marketing,
University of Pennsylvania

Senior Advisor,
Cornerstone Research

Aviv Nevo was formerly chief economist at the Antitrust Division at the DOJ, where he advised on merger, as well as civil and criminal, investigations. Professor Nevo has been retained as an expert by the Department of Justice, the Federal Trade Commission, and private firms in cases related to antitrust merger review, conduct investigations of dominant firms, and antitrust and other litigation matters.

REIMBURSEMENT DISPUTES

HEALTHCARE INSURANCE PAYMENTS KICKBACK TRIAL

Our client, a major health insurance company, alleged that the defendants billed them at excessive rates and caused physicians to improperly refer medical care out of network. After a month-long trial, the jury found for the insurance company on all counts and awarded the precise amount of damages calculated by healthcare expert Daniel Kessler of Stanford University and Cornerstone Research senior advisor.

The jury awarded the precise amount of damages calculated by healthcare expert Daniel Kessler.

The insurance company alleged the defendants used kickbacks to induce in-network physicians to refer patients to out-of-network ambulatory surgery centers. Specifically, the surgery centers provided financial incentives to physicians in the form of discounted ownership stakes and payments in proportion to the volume of surgeries they referred to the centers. The defendants also allegedly waived patient coinsurance payments without disclosing this to the insurance company.

Professor Kessler's trial testimony demonstrated that the ownership stakes influenced physician referral patterns. In addition, he calculated the amount that the insurance company overpaid relative to in-network benchmark prices at other area providers.

ALLEGATIONS THAT PHARMACY SERVICES PROVIDER PAID KICKBACKS AND FILED FALSE CLAIMS

Counsel for Omnicare Inc., retained Cornerstone Research and two experts to respond to claims that Omnicare violated the Anti-Kickback Statute and False Claims Act in sourcing business from skilled nursing facilities (SNFs). The relator alleged that Omnicare intentionally failed to collect Medicare Part A debt from the SNFs for which it provided long-term-care pharmacy services in order to maintain or extend its Medicare Part D business with those facilities.

The court granted summary judgment for the defendant in this case involving healthcare payment and billing practices.

Cornerstone Research worked with an expert on the billings and collections practices of pharmacy services providers in conducting an extensive review of the document record. The expert concluded that Omnicare was actively engaged in collections throughout the period of alleged kickbacks and that Omnicare's practices were both reasonable and consistent with industry practices. He also explained why the dissemination of confidential company and customer information taken by the relator would likely cause significant harm to Omnicare. An expert on skilled nursing facility management concluded that the document record did not reveal business conduct outside of what is normal in the SNF and pharmacy services provider industries with regard to billing and payment practices.

The judge in the U.S. District Court for the Southern District of Texas, Houston Division, granted summary judgment for Omnicare. In his opinion, the judge concluded that the "collection practices of Omnicare…would not seem exceptional, much less fraudulent." The court also denied the relator's motion for summary judgment on Omnicare's counterclaims, citing the billing expert's opinions related to the potential for harm to Omnicare if its internal documents were made public.

Featured Expert

Daniel P. Kessler
Professor of Political Economy,
Graduate School of Business,
Stanford University

Senior Advisor,
Cornerstone Research

Daniel Kessler's research focuses on health policy, healthcare finance, antitrust law, and law and economics. He has consulted and testified for hospitals, physician groups, integrated delivery systems, and insurers on cases involving antitrust law, billing and contracting disputes, and insurance regulation. He has also served as a consultant to trade associations, foundations, and the Federal Trade Commission.

About Cornerstone Research

Cornerstone Research provides economic and financial consulting and expert testimony in all phases of complex litigation and regulatory proceedings. The firm works with an extensive network of prominent faculty and industry practitioners to identify the best-qualified expert for each assignment. Cornerstone Research has earned a reputation for consistent high quality and effectiveness by delivering rigorous, state-of-the-art analysis for more than thirty years. The firm has over 700 staff and offices in Boston, Chicago, London, Los Angeles, New York, San Francisco, Silicon Valley, and Washington

CONTACT

Dina Older Aguilar | dolder@cornerstone.com | 415.229.8101
Zoya Marriott | zmarriott@cornerstone.com | 617.927.3053
Maria Salgado | msalgado@cornerstone.com | 415.229.8149
Sally Woodhouse | swoodhouse@cornerstone.com | 617.927.3081