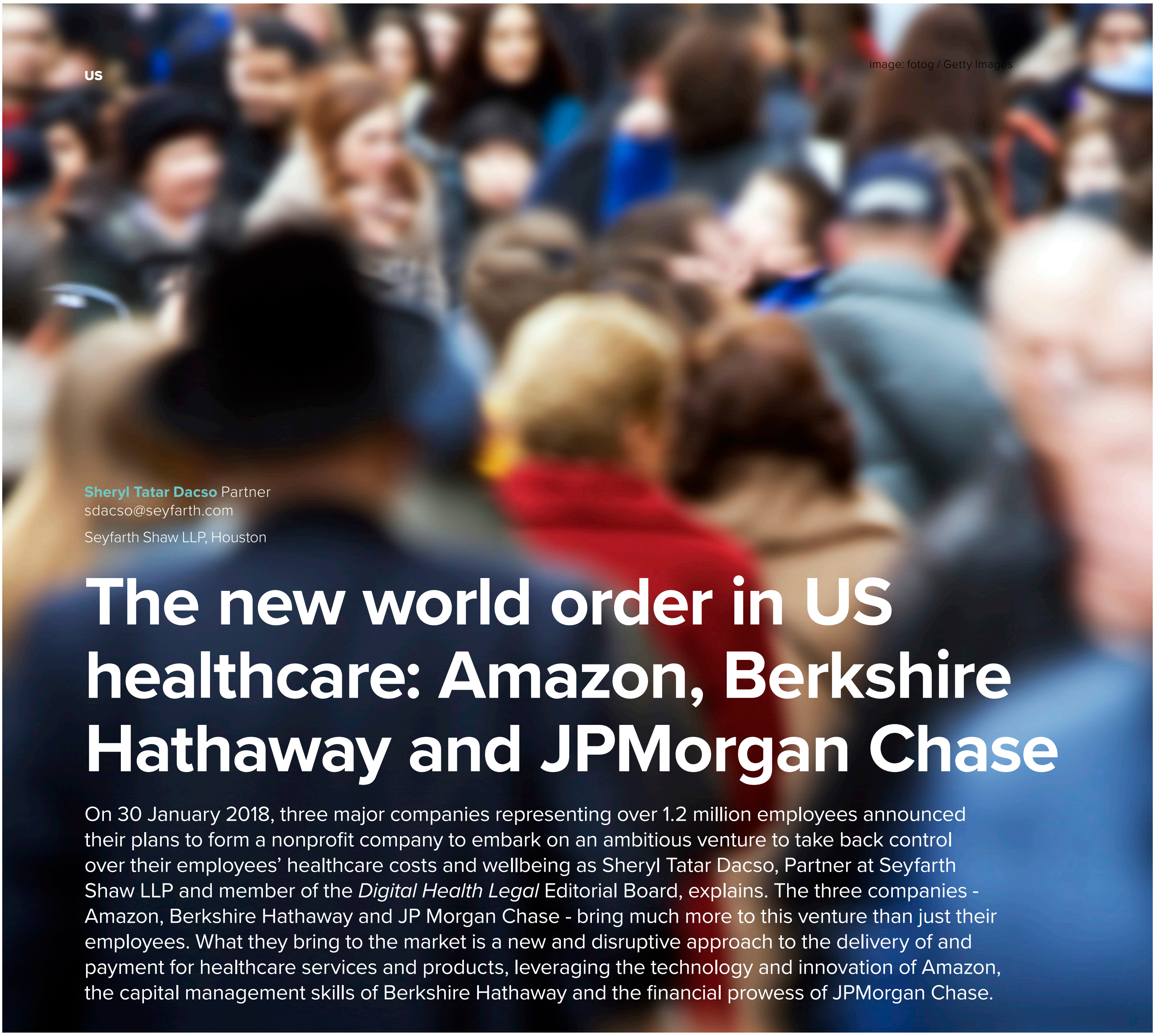

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The new world order in US healthcare: Amazon, Berkshire Hathaway and JPMorgan Chase

On 30 January 2018, three major companies representing over 1.2 million employees announced their plans to form a nonprofit company to embark on an ambitious venture to take back control over their employees' healthcare costs and wellbeing as Sheryl Tatar Dacso, Partner at Seyfarth Shaw LLP and member of the *Digital Health Legal* Editorial Board, explains. The three companies - Amazon, Berkshire Hathaway and JP Morgan Chase - bring much more to this venture than just their employees. What they bring to the market is a new and disruptive approach to the delivery of and payment for healthcare services and products, leveraging the technology and innovation of Amazon, the capital management skills of Berkshire Hathaway and the financial prowess of JPMorgan Chase.

Although the details of the venture are not yet published, those who follow these companies and this venture report the following:

1. This is not another employer purchasing cooperative. The parties are approaching this with a 'fresh palette' of technology solutions that will provide their US employees and families with simplified, high quality and transparent healthcare at a reasonable cost.
2. The organisation to be formed among the three companies is intended to be a not for profit company with a representative of each of the three companies appointed to lead its organisation. According to a report by Milliman[1], the new legal entity is intended to be a vehicle for deploying a different and disruptive approach to healthcare that leverages technology with business and financial acumen to change how healthcare is funded and delivered. Each company is self-insured and collectively they spend over $15 billion (US) on employee healthcare costs[2]. The report cites several key areas that will likely play to the venture's strengths:

a) Experience with internet based platforms for creating access and gathering information on users that can take advantage of the healthcare system's current use of electronic health records and other information;

b) Successful use of an online marketplace that can be transformed for the healthcare industry to create a more transparent cost structure by leveraging cutting edge technology to update provider fees in 'real time' to enable patients to compare cost/value across providers/suppliers to inform their choices;

c) Better management of pharmacy costs through value based contracting solutions that allow pharmacy manufacturers to achieve a longer term profit stream in return for improved pricing while a drug is under patent;

d) Use of data management and predictive analytics to improve patient behaviour (e.g. medication adherence, personalised medicine opportunities and better monitoring of outcomes) all of which help control costs;

e) Managing the supply chain process in return for better pricing terms and holding manufacturers accountable for clinical outcomes; and

f) Changing the reliance by providers and payors from a claims based process of payment to one relying on the electronic medical record which can be directly accessed by provider, payors and the patient.

Immediately following the announcement of the proposed alliance there was a drop in stock prices for certain major health insurers and pharmaceutical companies[3]. There may be regulatory issues affecting the structure and operations of the new company as it engages in competitive contracting for pharmaceutical products, durable medical equipment and provider services. Amazon was already evaluating becoming a retail pharmacy.

In one sense, the new company will function as a group purchasing organization ('GPO'). Some GPOs take title and resell products, while others negotiate terms under which members purchase directly from vendors. Other GPOs manufacture all or part of the products that members buy through the group, although it is more common for GPOs to outsource from independent suppliers, to exert significant pressure and purchasing power which may implicate federal antitrust regulations.

Although most GPOs are considered pro-competitive since they offer an efficient way to reduce transaction costs and prices for their members, the consolidation of too much purchasing power in one organisation can create monopsony or oligopsony power that can force prices below a competitive level[4]. Because the three companies are self-funded employers under the Employee Retirement Income Security Act of 1974 ('ERISA'), whose health plans are not subject to state insurance regulations, and because the 'business of insurance' is generally not subject to antitrust regulation, the application of antitrust laws to the new venture is unlikely. However, there are other regulations that apply, specifically ERISA, which affect self-funded plans[5]. It is unclear (and unlikely) that the companies will form a multi-employer welfare organization ('MEWA') sharing a common benefit plan, and more likely that each company will rely on the new company to manage its contracts and procurement processes to engage the goods and services required by its own employees under the terms of its own benefit plans[6].

It is speculated by some that success with managing their own employees' healthcare costs may create an opportunity for expansion of the new company's services to other self-funded employers. This is what happened with the development of the Kaiser Health Plan, which evolved from Henry Kaiser's post World War II initiative to insure his own shipyard employees to a major healthcare system that offered insurance products and benefits through its own program to other employers, primarily on the West Coast[7].

The arrangement must be structured to satisfy federal and state privacy laws[8]. We can expect these companies and the new business to pay close attention to compliance with the myriad of laws, rules and regulations that already apply to the aggregation and storage, transmission and use of electronic health information. Patient engagement is a key component of the proposed program and will likely result in the expansion of on-site or remote access healthcare services via telemedicine and other digital health technology such as 'wearables' for the employees of the three companies.
A similar effort by 40 major employers associated with the Health Transformation Alliance ('HTA') was announced in 2016 to focus on managing drug costs by contracting with the large pharmacy benefit companies (Express Scripts and OptumRx), provider networks associated with United Healthcare and Cigna using Watson Health Technologies (IBM) to manage the data and analytics[9]. It is unclear how the new nonprofit venture proposed by the three large companies will affect (or be affected by) the HTA initiative as there is overlap with members of the new venture and the HTA organisation and its contractors. However, these can probably be reconciled based on the use of a separate legal entity by the new venture and a different strategy for its purpose. It remains to be seen how the three companies will utilise the new company but it may be able to offer a menu of options to each of the three employers.

However, it is unlikely that changes would be made to each company's existing contracts for now. It is worth noting that the desire to control escalating costs in healthcare has also expanded to other initiatives. For example, it was recently announced that groups representing more than 450 hospitals (including the US Veterans Administration) plan to form their own generic drug company[10]. The new company is looking to create generic versions of about 20 existing drugs that the hospitals say cost too much now or are in short supply. The new company expects the first of its pharmaceutical products to become available in 2019. In another approach, Apple has opened medical clinics for its employees[11]. Taking control of the greatest costs to healthcare - pharma, insurers/administrators and access to providers, sprinkled with a bit of wellness programming, appears to be a common strategy by the larger employers who seek to better manage and control their healthcare spending. It will be interesting to see how these different approaches ultimately affect healthcare costs.

1. http://www.milliman.com/Five-ways-the-Amazon-Berkshire-Hathaway-JPMorgan-Chase-deal-could-change-healthcare-in-the-US/
2. It is estimated by Willis Towers Watson that the combined healthcare costs are more than $15 billion for the three companies.
3. See https://www.nasdaq.com/article/what-to-make-of-the-amazon-berkshire-hathaway-and-jp-morgan-healthcare-company-cm913986
4. See generally Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.,Inc., 549 U.S. 312, 320–21 (2007) ("A predatory bidder ultimately aims to exercise the monopsony power gained from bidding up input prices. To that end, once the predatory bidder has caused competing buyers to exit the market for purchasing inputs, it will seek to 'restrict its input purchases below the competitive level,'" thus "reduc[ing] the unit price for the remaining input[s] it purchases." (quoting Steven Salop, Anticompetitive Overbuying by Power Buyers, 72 ANTITRUST L.J. 669, 672 (2005)); ASSOCIATIONS HANDBOOK, supra note 10, at 166–67 (discussing 'buyer power' issues).
5. https://www.dol.gov/general/topic/retirement/erisa
6. Although ERISA does not prohibit MEWAs, most states prohibit its use for employee benefit arrangements among multiple employers. See discussion of plans maintained pursuant to collective bargaining agreements - MEWAs Multiple Employer Welfare Arrangements under the Employee Retirement Income Security Act ('ERISA'): A Guide to Federal and State Regulation, FR Doc. 2013-04863, www.dol.gov/ebsa/pdf/mwguide.pdf, p. 24.
7. See https://en.wikipedia.org/wiki/Kaiser_Permanente
8. See https://www.hhs.gov/hipaa/for-professionals/privacy/index.html (US) and https://en.wikipedia.org/wiki/General_Data_Protection_Regulation (EU)
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