Antitrust and Health Care Consolidation

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Overview

• Provider consolidation
  – Hospitals
  – Physicians
  – Hospitals/Physicians
  – “Clinically-integrated” networks
• Certificates of Public Advantage (COPAs)
• Health plan mergers
• Questions
Reasons for provider mergers and transactions

- Reduce costs (supply chain savings, IT costs, back office services)
- Capital access and avoidance
- Clinical standardization to reduce costs and improve quality
- Participate in risk-bearing arrangements
  - Obtain greater reimbursement under MACRA (for physicians)
- Fear of being without a “dance partner”
- Greater leverage with payers

All of these likely will continue no matter what happens to the ACA
Geographic market is the “Harrisburg Area,” consisting of Dauphin, Cumberland, Perry, and Lebanon Counties in PA
- Even though 43.5% of PSH’s patients came from outside the area

Reject efficiency claim based on capital avoidance
Geographic market:

- Government: the “North Shore Area”—an area bounded by 6 hospitals north of downtown Chicago

- Parties claim: this market arbitrarily excludes hospitals other than those included in the market, e.g. Northwestern Memorial, Rush University

Hospitals claimed merger was needed for them to offer risk-based product throughout Chicagoland
Hospital mergers – key issues

• Geographic market
  – How well do the new economic models and Merger Guidelines “hypothetical monopolist” test work – especially in “non-obvious” markets?

• Product market
  – Role of outpatient care
  – What if hospitals are just an element of a “population health strategy”?

• Efficiencies
  – How to analyze them, and how much credit to give them?
  – How rigorous to be re merger-specificity, cognizable, and verifiable requirements
  – How to weigh alleged effect on quality?
Physician practice mergers

• Increasingly common as single-specialty groups consolidate
  – Can bring important efficiencies and scale
  – But can create “must have” practices

• Raise difficult issues
  – Often not HSR-reportable
  – Product market definition
  – Geographic market
  – How high are entry barriers?
  – What remedies?

• State AGs can play particularly important role
Hospital acquisition of physicians

• New wave of hospital acquisitions
  – Assures hospitals of referral base
  – Facilitates clinical integration

• But can create tough antitrust issues
  – Horizontal overlap
  – Vertical foreclosure
  – Could increase hospital market power concerns

• Example: FTC/ID AG challenge in St. Luke’s/Salzer Clinic transaction in Nampa, Idaho
Clinically integrated networks

• Providers coordinate care short of fully integrating
  – But typically will jointly negotiate rates and may coordinate competitive strategy

• Non-exclusivity and ability to terminate may lessen antitrust concerns
  – But can also reduce potential for efficiencies

• Antitrust issues
  – Traditionally – is there enough integration for network to be more than just price-fixing?
  – Now – market power and competitive effects
Certificates of Public Advantage (COPAs)

- Confer antitrust immunity *if*
  - State legislature has clearly articulated and affirmatively expressed the intent to displace competition
  - Conduct is subject to active ongoing supervision by the state

- An alternative to competition in rural markets?

- FTC has a long history of opposing antitrust exemptions, including COPAs
  - More recently it is weighing-in on merits of specific COPA applications

- State AGs play an especially important role
  - Addressing antitrust issues, but also advising on health care issues

- Extent of ongoing supervision can be a real challenge
Wellmont/Mountain States Health Alliance seek COPA

Two systems with facilities covering two counties in southwestern Virginia and northeastern Tennessee

- Both states pass legislation providing for COPAs to be issued when advantages outweigh disadvantages
- States enact detailed regulations governing the COPA process
- Parties submit applications to both states
- FTC submits detailed comments opposing grant of COPAs; supplemented in January 2017
- Southwest Virginia Authority recommends approval of Cooperative Agreement in Virginia
- Time for review of applications extended, likely to at least June 2017
DOJ/State AGs challenges to health plan combinations

**Key Issues**

**Anthem-Cigna (on appeal)**
- **Product market**
  - Commercial insurance for national accounts and large employer groups
- **Efficiencies were rejected**
  - Medical cost savings were insufficient to overcome potential competitive harm
  - Insufficient evidence they would be passed on to consumers

**Aetna-Humana**
- **Product market**
  - Medicare advantage separate product from traditional Medicare
  - Overlap in exchange products in certain states
- **Insufficient remedy proposal**
  - Parties proposed to divest certain MA business to Molina, but court rejected remedy
Questions/Discussion?
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Bob Leibenluft’s antitrust practice is unusual in that it focuses on only one industry — healthcare and life sciences — yet it spans all industry sectors, including providers, payers, and drug and device manufacturers. He brings over 35 years of experience, including heading the FTC Healthcare Division, to his representation of clients in counseling, investigations, transactions, and litigation matters.

Starting at the firm in 1981 as a health regulatory lawyer, Bob became a nationally recognized lawyer on Medicare issues. His deep understanding of the industry was a reason he was asked to lead the FTC Healthcare Division in the mid-1990s, where he supervised drafting of the FTC/DOJ Health Policy Statements, which first addressed clinical integration, and led investigations of hospital mergers and physician networks.

On a pro bono basis, Bob has led a 10-year review of the D.C. government’s response to HIV/AIDS, advised the Government of Liberia on a new public health law, and provided antitrust advice to the CEO Roundtable on Cancer.

Chambers USA describes Bob as "renowned for his expertise in healthcare antitrust and is singled out by a source as someone who really knows how the system works" and who is hailed by peers as a "terrific healthcare antitrust lawyer."

Bob is an inaugural fellow and former vice president of the American Health Lawyers Association. He is a former Chair of the ABA Antitrust Section’s Health and Pharmaceuticals Committee, Joint Conduct Committee, and State Enforcement Committee. Bob also has served as Chair of the Board of Directors of HC13, the parent of Prometheus Payment, and Bridges-to-Excellence. He teaches a course on Antitrust in the Healthcare Sector at George Washington School of Law, where he is an adjunct professor.

Areas of Focus
Regulatory
Antitrust and Competition
Life Sciences and Healthcare

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