2020 HEALTH ANTITRUST YEAR IN REVIEW

January 2021

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SPECIAL REPORT

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INTRODUCTION

The federal antitrust enforcement agencies brought three hospital merger challenges and three criminal antitrust enforcement actions in health care in the past year. Combined with the incoming Democratic administration, healthcare antitrust enforcement is likely to remain strong in 2021.

Our Health Antitrust Year in Review:

- Examines specific antitrust challenges and enforcement actions that impacted hospitals and health systems, payors and other healthcare companies in 2020;
- Offers lessons learned from these developments in the midst of the COVID-19 pandemic; and
- Provides analysis of the enforcement trends, federal guidelines and state policy updates that are likely to shape the healthcare antitrust landscape in 2021.

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SPECIAL REPORT

HOSPITALS & HEALTH SYSTEMS

Takeaways: The Federal Trade Commission (FTC) challenged three hospital and health system transactions in 2020. While the outcome of the most recent challenged transaction is pending, in one of the other two transactions, the merging parties abandoned the deal after the complaint was filed, and in the other transaction the district court refused to grant a preliminary injunction to cease consummation of the transaction pending an administrative trial. Other than various strategic, cost, timing, and business reasons for why parties choose to defend a transaction or not, and the difference in case development, what lessons can be drawn from these recent enforcement actions? First, payor views—and the substantiation thereof—remain key. Parties to proposed in-market transactions should carefully analyze their historical contracting practices and network configuration. Second, geographic market definition has always been and remains critical to the antitrust analysis of these transactions, particularly in urban areas. Relevant geographic markets are analyzed first by the impact a merger may have on insurers, and second by the merger's potential impact on patients. Detailed economic analysis is part of antitrust due diligence in preparation for proposed transactions.

MEMPHIS HOSPITALS ABANDON PROPOSED MERGER AFTER FTC ACTION

In December 2020, the FTC announced that Methodist Le Bonheur Healthcare abandoned its efforts to acquire two hospitals known as Saint Francis in the Memphis, Tennessee area. In November 2020, the FTC sued the hospitals in Tennessee federal court to temporarily enjoin the merger.

The FTC alleged a geographic market of the Memphis Metropolitan Statistical Area, and that the merger would reduce the number of hospitals providing general acute care (GAC) services from four to three. The complaint alleged the combined system would have over 50% of the market for GAC services in Memphis.

The FTC's complaint heavily cited each system's internal documents, which allegedly describe the other hospital as one of two important competitors, and which closely track each other's quality scores, advertising and brand recognition. The FTC focused on direct competition between Methodist and Saint Francis for inclusion in payor networks and for patients, and that Methodist had allegedly provided price concessions to payors to exclude Saint Francis from narrow network products.

The FTC's economic (diversion) analysis showed that "a majority" of patients from Saint Francis would seek care from Methodist as an alternative, and a "significant fraction" of Methodist patients would seek care from Saint Francis.

FTC DENIED PRELIMINARY INJUNCTION TO BLOCK JEFFERSON/EINSTEIN MERGER

In February 2020, the FTC and Pennsylvania attorney general (AG) sought to enjoin a merger between Thomas Jefferson University (Jefferson Health) and Albert Einstein Healthcare Network (Einstein) in the Philadelphia, Pennsylvania area. In December 2020, the district court dismissed the motion for preliminary injunction to enjoin the proposed merger. The US Court of Appeals for the Third Circuit subsequently summarily denied the FTC's appeal for an emergency injunction to pause the merger pending an administrative trial. The Pennsylvania AG has since dropped his opposition to the merger, citing the parties' commitment to make investments in the community.

The FTC alleged two different geographic markets for GAC services and another geographic market for inpatient rehabilitation services. Specifically, the FTC alleged that the merger would give Jefferson Health control over 60% of the market for inpatient GAC services in North Philadelphia and 45% of the market for those services in Montgomery County, as well as 70% of the market for inpatient rehab acute care services in the Philadelphia area. The court did not agree with the FTC's geographic markets and held that, although Einstein "aspires to compete" with Jefferson, Jefferson actually competes with four other hospital systems, some of which were left out of the FTC's geographic market definitions.

The FTC also offered expert economic analysis and witness testimony from two of the four major commercial insurers in the region. Notably, the district court found the FTC's insurer-witness testimony to be unpersuasive because it contradicted the insurers' own documents, and was not unanimous, in that only two of four insurers in the Philadelphia area testified. The court further held that the expert economist should not have relied substantially on that testimony in his geographic markets analysis. The court found that FTC failed to prove that commercial insurers would be forced into paying more for hospital services as a result of the merger. The court noted that the Philadelphia area is somewhat unique in that there a small group of large insurers with bargaining leverage vis-à-vis hospital providers.

FTC SUES TO BLOCK HOSPITAL MERGER IN NORTHEAST NEW JERSEY

In December 2020, the FTC filed an administrative complaint challenging a proposed merger between two health systems in New Jersey. The FTC also filed suit in New Jersey federal district court to temporarily enjoin the transaction. The FTC argues that the merger would give the combined system control of 50% of the inpatient GAC hospitals in Bergen County, New Jersey. The FTC complaint alleges that the acquiring party is the largest healthcare system in New Jersey and the largest provider of inpatient GAC services in Bergen County, and operates two hospitals within 10 miles of the acquired party. The FTC further alleges that the acquired party is the third-largest provider of inpatient GAC services in Bergen County, that the two systems provide similar services, and that the acquisition would allow the combined system to demand higher rates from insurers, which would result in passed-down cost increases to subscribers.

PAYORS

Takeaways: If finally approved by the court, the proposed Blues plans' subscriber settlement may change the competitive dynamic in the healthcare services insurance markets. Employers would be able to request bids from and providers may negotiate rates with multiple insurance providers even under the same umbrella. Insurance licensees may be able to make inroads into new markets and offer new products.

BLUES PLANS TO SETTLE SUBSCRIBER CLASS ACTION FOR $2.7B

In a class-action lawsuit brought by both providers and subscribers, a federal judge in the US District Court for the Northern District of Alabama gave preliminary approval to a settlement agreement with the subscriber class of plaintiffs. The plaintiffs accused 36 Blue Cross member firms across the country of conspiring to allocate markets and limit competition for insurance coverage. The firms allegedly agreed not to compete with other states' Blue Cross licensees, giving each state's member firm a geographic monopoly over Blue Cross health insurance coverage. As a result, member firms allegedly raised premiums on subscribers and negotiated lower reimbursements to healthcare service providers.

Prior to the subscriber settlement, the court ruled that the *per se* rule applies in this litigation, meaning that the plaintiffs need only prove an anticompetitive market allocation/price fixing agreement, without having the additional burden to prove anticompetitive harm on a specific market. *Per se* illegal agreements are those that are so inherently anticompetitive on their face that no further analysis of their effect on markets is necessary.

The subscriber settlement includes a $2.67 billion damages award and certain injunctive relief, including the abolition of Blue's "National Best Efforts" pact, which required members to derive a minimum of two-thirds of their revenue from Blue-branded services. The settlement also eliminates the Blue Card program, which required states to treat members of another state's program as in-network, eliminating incentives to compete for those members.

Provider plaintiffs are still seeking class certification from the court.

An ongoing class action against Delta Dental in the US District Court for the Northern District of Illinois in large part mirrors the allegations in the Blue Cross litigation. The plaintiff class of providers allege that Delta Dental Association and its state entities divided markets and fixed reimbursement rates to dentists below competitive levels. The Delta Dental court has likewise ruled that the *per se* rule applies.

CRIMINAL ENFORCEMENT

Takeaways: The Department of Justice (DOJ) has brought several criminal charges against healthcare companies in the past couple of months, including for wage-fixing, nonsolicitation/no-poach agreements and market allocation. General counsels (GCs) and human resources (HR) professionals should emphasize company-wide training and familiarity on how the sharing of nonpublic wage and employment term information with competitors can lead to antitrust violations for individuals as well as the company. Enforcement agencies, as well as private plaintiffs, can challenge agreements as anticompetitive irrespective of whether they challenge any underlying transaction. The federal government and state AGs are ramping up criminal enforcement in healthcare markets. Healthcare organizations should consider their internal corporate compliance programs and education.

JUSTICE DEPARTMENT OBTAINS FIRST-EVER WAGE-FIXING INDICTMENT

On December 9, 2020, a grand jury in the US District Court for the Eastern District of Texas indicted Neeraj Jindal, the former owner of a therapist-staffing company, for conspiring over a 5-month period to fix physical therapist and therapist assistants' wages below competitive levels in the Dallas-Fort Worth area. Jindal and his co-conspirators allegedly shared nonpublic information on wage rates, and as a result paid lower rates to therapists and assistants. It is notable that Jindal also was charged with obstructing a separate FTC investigation into the alleged wage-fixing. This is the first indictment from DOJ of an individual for a wage-fixing agreement, so it remains to be seen whether the obstruction charge tipped the scales in the DOJ's decision to pursue criminal charges against an individual in a wage-fixing case.

As a reminder, in 2016, the Antitrust Division and FTC jointly announced updated enforcement guidelines that emphasize that wage-fixing and no-poach agreements are illegal on their face, and that wage information sharing between competitors can give rise to wage-fixing. Even innocent information sharing may bring civil liability.

More recently, in 2019, the Justice Department announced a Procurement Collusion Strike Force, an interagency group dedicated to prosecuting antitrust violations, like price-fixing and bid-rigging, by firms contracting with federal, state, and local government agencies.

These steps make it clear that the Justice Department will continue to pursue wage-fixing and no-poach and price-fixing and bid-rigging enforcement actions.

$100M CRIMINAL MARKET ALLOCATION SETTLEMENT

DOJ brought criminal charges against an oncology practice alleging an illegal market allocation agreement with another oncology practice. The DOJ alleged that from 1999 to 2016, the practice agreed to treat cancer patients with chemotherapy, while the other practice would handle radiation treatment in three southwest Florida counties, and that the two practices agreed not to hire or solicit each other's employees. Under a deferred prosecution agreement with DOJ, the oncology group paid the maximum fine of $100 million to the DOJ and $20 million to the state of Florida as part of a separate civil consent decree with the Florida Attorney General. The group agreed not to enforce

noncompete agreements against any employees in the three counties. The DOJ also indicted the former CEO of the one oncology practices.

The DOJ's actions are a reminder that it will aggressively pursue antitrust violations that diminish competition and maintain higher prices for healthcare services. Violators not only face the prospect of criminal liability and imprisonment, but also debarment from participating in federal healthcare programs. Likewise, the Florida Attorney General's consent decree shows that the DOJ is not the only antitrust enforcer violators must fear. Lastly, the DOJ and Florida Attorney General actions followed an earlier private civil antitrust class action suit against the practices that resulted in its own multi-million dollar settlement against similar allegations.

VERTICAL MERGERS

Takeaways: In analyzing the potential harm of a vertical transaction, the antitrust enforcement agencies will ask whether the parties, after they have merged, will have the ability or incentive to foreclose rivals. For example, if a hospital system acquires an ambulatory care provider in the same geographic area, a key inquiry would be whether the merged entity will have the ability to force payors into an exclusive arrangement that limits the payors' ability to contract with other hospitals or ambulatory care providers. Another relevant question is whether the merged entity would have the ability to cherry-pick profitable cases and refer less profitable cases to other entities. In a vertical merger between an insurer and a pharmacy, a key concern would be whether insurer enrollees could use only the payor's pharmacy, or have to pay higher fees to use a different pharmacy. Parties to vertical transactions should engage in antitrust planning to assess potential competitive effects.

VERTICAL MERGER GUIDELINES FINALIZED

The FTC and DOJ released their final Vertical Merger Guidelines in June 2020. These Guidelines address mergers between different firms along the supply chain. The guidelines codify existing theories of potential harm, and identify potential efficiencies and price benefits from vertical integration.

FEDERAL AND STATE POLICY & ENFORCEMENT

Takeaways: With Xavier Becerra nominated to Secretary of the Department of Health and Human Services (HHS), states pursuing antitrust enforcement in the provider marketplace will be likely to receive support (e.g., briefs, public statements, parallel federal enforcement actions) from the federal government. Moreover, the injunctive relief included in the settlement terms of a lawsuit Becerra joined as California Attorney General could very well lead states to pass tighter transparency regulations and price controls. Providers should examine their ordinary course and post-closing managed care contracting practices.

XAVIER BECERRA, CALIFORNIA ATTORNEY GENERAL WHO JOINED THE LAWSUIT AGAINST SUTTER HEALTH, NOMINATED AS HHS SECRETARY

President-Elect Joe Biden has nominated Xavier Becerra, the California Attorney General, for HHS Secretary. Now that the Democrats have secured control of the Senate, Mr. Becerra is likely to be confirmed.

Mr. Becerra has a history of challenging healthcare provider transactions and practices, including Sutter Health's contracting practices. For example, Mr. Becerra joined a class action lawsuit against Sutter Health that resulted in a $575 million dollar settlement (which is pending court approval). That case challenged Sutter's contracts with payors, which, among other things, prevented the payors from using steering and tiering to reduce costs, and included clauses that required payors to contract with all Sutter Health facilities. If the landmark settlement receives final approval, it may serve as a guide for other states pursuing enforcement actions against hospital systems.

Mr. Becerra also has a history of being a strong proponent of the Affordable Care Act, and, as a US Congressman, supported its passage. If confirmed, Mr. Becerra's first and largest priority will be leading a comprehensive vaccination program for Americans.

As California Attorney General, Mr. Becerra has focused on monitoring companies' compliance with coronavirus safety measures.

PRICE TRANSPARENCY AND ANTITRUST ENFORCEMENT

The new Centers for Medicare & Medicaid Services (CMS) price transparency rules are likely to shape private antitrust litigation. The rules require hospitals to provide their prices online in an Excel or other machine-readable form with all items and services, as well as in a consumer-friendly format. The prices to be disclosed include: (1) the chargemaster price; (2) discounted cash price; (3) payor-specific negotiated price; (4) the lowest charge a hospital has negotiated with a payor; and (5) the highest charges a hospital has negotiated with a payor. We may also see an uptick in litigation against healthcare providers from competing providers and other payors learning about providers' rates.

CALIFORNIA BILL TO EXPAND THE CALIFORNIA ATTORNEY GENERAL'S REVIEW OF HEALTHCARE TRANSACTIONS DELAYED

California Senate Bill (SB) 977 failed to pass in the 2020-2021 legislative session. The bill would have given the California Attorney General the ability to review and prohibit certain healthcare system transactions exceeding $500,000. It specifically targeted alleged anticompetitive practices and over-consolidation in the healthcare industry. The bill would have required the California Attorney General to deny consent to acquisitions that did not have a substantial likelihood of "clinical integration," as defined in the bill, or of increasing the access to services for an underserved population. The bill also provided for the creation of a Health Policy Advisory Board dedicated to analyzing healthcare markets and transactions.

The bill was opposed by a number of hospitals, physician groups, and the American Investment Council, the private equity trade and lobbying group. Opponents argued that the bill gave the Attorney General too much power, and that it would make it hard for smaller facilities and providers to stay in business or to merge with larger systems if they go out of business.

FTC ISSUES ORDER TO SIX PAYORS FOR CLAIMS DATA TO STUDY ACQUISITION EFFECTS

On January 14, 2021, the FTC issued orders to six payors for patient-level commercial claims data for inpatient, outpatient and physician services in 15 states from 2015 to 2020. The order is in connection with the FTC's periodic retrospective review of mergers. Key to the review is whether acquisition of certain hospitals, outpatient facilities or physician practices led to post-closing price increases. A prior retrospective review led to the FTC's post-closing challenge of then-Evanston Hospital's acquisition of Highland Park Hospital.

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