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Growing Your Health Care System

What you need to know about antitrust

By John Carroll

Health care systems continue to face pressure to grow revenues and reduce costs without decreasing quality. Systems have implemented several strategies to achieve these objectives, such as improving physician utilization or revenue cycle management.

Although these efforts have achieved some success at some systems, many systems have found that achieving meaningful growth requires expansion. Such expansion can take many forms, including merging with a competing hospital or system, acquiring one or more physician groups, forming a network of physicians or hospitals with other providers, or offering new products or services, such as insurance products. Each transaction is not without legal risk and may raise antitrust concerns.

Health care antitrust enforcement continues to be a priority of the Federal Trade Commission (FTC), as evidenced by its recent challenges to provider consolidations [*See, e.g., In the Matter of Sanford Health/Mid Dakota Clinic*, D.ND. CV 1:17-cv-00133 (2018).] and statements from FTC officials ["Not surprisingly, given the prominence of health care, including pharmaceuticals, in the economy, I think it is appropriate that the FTC has focused a lot of its attention in the health care area—on both the enforcement side and the policy side." Interview with Chairwoman M. Ohlhausen, available at: *https://www.ftc.gov/system/files/documents/public_statements/discussion-ftc-commissioner-maureen-k.ohlhausen/1311antitrusthcc-mko.pdf.*].

Antitrust Consideration 1

Although systems should evaluate potential antitrust issues associated with a transaction or strategy with their counsel, antitrust should not be the driver. For example, when business leaders are exploring how to structure a network or affiliation, the threshold question should be, "What makes strategic sense from a business and clinical perspective?" and then they should work with their counsel to understand the antitrust implications of a particular strategy.

This issue is common for providers considering forming a clinically integrated network. Fundamentally, clinical integration requires creating an interdependent provider network that improves quality and lowers costs. There is some guidance from the FTC in the 1996 *Statements of Antitrust Enforcement Policy in Healthcare* and advisory opinions [*e.g.*, Medsouth, Inc. advisory opinion 2002, available at: *https://www.ftc.gov/policy/advisory-opinions/medsouth-inc.*] that sets forth the basic requirements of clinical integration under federal antitrust laws, including measuring quality across the network, creating a system that rewards high achievers and punishes low performers, and implementing an information

technology infrastructure that ties disparate physician practices together.

That said, there is no one-size-fits-all recipe for clinical integration. Instead, a clinical integration program must be tailored specifically to the capabilities and needs of a particular group of providers. For instance, some networks may consist mostly of primary care physicians and, thus, using quality metrics from the Medicare Shared Savings Program may be sufficient to measure performance. Systems with a diverse group of specialists may require specialty-specific metrics.

This is not to say that antitrust concerns are irrelevant in putting together a network or in deciding how to structure a possible combination, particularly one that involves a competitor. Providers should understand the antitrust issues associated with certain transaction structures.

The general principle is that the more integrated providers in a transaction will be, the more the parties can restrict competition between them without raising concerns under Section 1 of the Sherman Act, which prohibits contracts or conspiracies in restraint of trade between two or more parties. Transactions that create a single entity (*i.e.*, a merger or acquisition) confer immunity from Section 1 liability on the parties, because a single entity is incapable of conspiring with itself under the antitrust laws.

In other words, parties that merge are free to contract jointly with managed care companies or consolidate service lines post-merger. On the other end of the spectrum, if parties are merely forming a loose affiliation that does not pool their assets or integrate their finances or clinical operations, the parties would continue to be considered separate competitors. As such, these parties must take care to avoid restricting competition between them, including coordinating on managed care negotiations or agreeing not to compete for certain services.

In addition, parties should work with antitrust counsel to assess the "competitive effects" of a transaction. A merger may result in the parties being immune from Section 1 of the Sherman Act, but the FTC could still examine whether the transaction violates the antitrust laws—specifically, Section 7 of the Clayton Act—by substantially reducing competition. This antitrust analysis centers on the extent to which the parties actually or potentially compete, taking into account the parties' market share and whether the merger would create a "must-have" provider for managed care companies. [*See* David A. Argue & Richard T. Shin, *An Innovative Approach to an Old Problem: Hospital Merger Simulation*, 24:1 ANTITRUST 49 (fall 2009).]

Antitrust Consideration 2

To raise antitrust concerns in the modern era of antitrust enforcement, it generally has been necessary for transactions to combine providers that are in the same geographic market. In the 1960s, mergers were examined for their potential "conglomerate effects" in certain industries [*e.g.*, *FTC v. Consolidated Foods Corp.*, 380 U.S. 592 (1965).], but the FTC and the Department of Justice abandoned this theory of harm decades ago. Since then, as with other industries, providers in different markets have not been considered competitors under Section 7 of the Clayton Act, because patients do not choose between them for services and, therefore, there is no potential loss of competition between the merging parties. [*See Evanston Northwestern Healthcare Corp.*, FTC Docket No. 9315, Commission Decision (April 28, 2008).]

In other words, if providers in different states choose to merge or form a multiregional network, such transactions would not usually raise competitive concerns because the antitrust laws are concerned with reducing competition, and the providers simply do not compete.

Recently, however, transactions that involve providers in separate geographic markets (or services), or so-called "cross-market" mergers, have become the focus of renewed antitrust attention. In the past few years, a number of antitrust health care economists have published studies evidencing antitrust concerns with cross-market hospital mergers. [*See, e.g.*, Leemore Dafny, Kate Ho & Robin S. Lee, *The Price Effects of Cross-Market Hospital Mergers*, NBER WORKING PAPER NO. 22106 (March 2016).]

These studies were based on empirical research that appeared to confirm that that certain cross-market hospital mergers have resulted in higher prices. One theory for the higher prices posits that because employees live in different areas, their employers must offer insurance products

with provider coverage across several areas so that their employees can get care where they live. Thus, mergers that create such provider coverage across these areas result in provider networks with potential leverage with insurance companies.

In addition, plaintiffs have brought cases alleging that cross-market mergers violate the antitrust laws, though to date none has been successful. [*See St. Alphonsus v. St. Luke's*, 778 F.3d 775 (9th Cir. 2014).] While it has not brought a cross-market case, the FTC has raised concerns, with the former chairwoman of the FTC stating, "Provider consolidation in non-overlapping product or geographic markets may also lead to higher prices." ["Retrospectives at the FTC: Promoting an Antitrust Agenda," Remarks of Chairwoman Edith Ramirez, ABA Retrospective Analysis of Agency Determinations in Merger Transactions Symposium George Washington University Law School (June 28, 2013).]

At bottom, if the formation of a multiregional network or a merger with a hospital or physician group would give the providers some perceived bargaining advantage, the transaction may receive scrutiny from the FTC.

Antitrust Consideration 3

Reaction from commercial managed care companies is a critical factor in gauging antitrust risk for a transaction. If payors submit evidence of competitive effects concerns to the FTC about a transaction or network (*i.e.*, that a merger would create a must-have system that would be able to impose higher rates), an FTC investigation is likely and a challenge is possible. Therefore, developing a comprehensive payor communication plan that includes explaining the transaction or networks' benefits can go a long way to minimizing antitrust risk.

In addition, it is important to understand and strategize how managed care contracting would work once the network is set up or the merger is complete, as different forms of contracting may materially affect the antitrust risk. For example:

- Will the clinically integrated network engage in value contracting with payors and use claims data and metrics to further network integration?

- Or, does the network intend to immediately engage in exclusive fee-for-service contracting such that payors must contract with the network to access any of its physicians?

If it is the former, the antitrust risks of the network likely are fairly low. If it is the latter, antitrust lawyers should carefully evaluate both the degree of clinical integration and the competitive effects of the network to assess its potential antitrust risk.

Summary

Although the rampant growth and consolidation of health care systems to make them targets for the FTC's focus on health care antitrust, providers should not consider antitrust to be an impediment to achieving business and clinical objectives. Rather, systems should focus on how to accomplish their strategic goals while understanding the antitrust risks of their possible ventures. ■

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