

Antitrust Alert

Antitrust and Health Care: An Update from the Federal Trade Commission

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The interplay between the Affordable Care Act (ACA), Accountable Care Organizations (ACOs), and antitrust has been a matter of great moment for several years. It has been an issue in litigation such as the Federal Trade Commission's (FTC) St. Luke's case.¹ Recently, in a conference, Deborah Feinstein, Director of the FTC's Bureau of Competition, had an opportunity in a policy speech to address arguments that the ACA's goals of controlling costs and improving quality are at odds with antitrust enforcement.² Recognizing the complexity of the antitrust issues in such a rapidly evolving environment, Feinstein also sought to articulate up-to-date antitrust guidance for health care providers. She focused the FTC's approach toward provider collaborations; discussed the types of collaborations necessitating FTC enforcement action; explained the details behind two common defenses — efficiencies and flailing/failing firm; and described the FTC's preference for structural over conduct remedies. While not breaking new ground, her policy speech provided a very useful articulation of the FTC staff's current thinking.

Accountable Care Organizations

The Affordable Care Act proposed the use of ACOs to control health care costs, and the FTC (along with the Department of Justice (DOJ)) thereafter articulated how they intended to apply antitrust enforcement policy towards ACOs.³ Director Feinstein's remarks focused on three points of the ACO policy statement: (1) analysis under the more lenient rule of reason standard for ACOs meeting certain criteria; (2) safety zones for ACOs that are unlikely to raise significant competitive concerns based on market share; and (3) identification of certain ACO structures or behavior that raise red flags for the agencies. The ACO Policy Statement also provided for expedited, voluntary antitrust review for ACOs formed after March 2010. Director Feinstein noted that only two ACOs requested review under these provisions, and that the FTC has not yet opposed the formation of an ACO, nor has it taken enforcement action against any ACO.

Enforcement Actions Against Other Provider Collaborations

Director Feinstein summarized the FTC's enforcement actions over the past seven years, including past litigated cases as well as examples of collaborations that were not challenged by the FTC. She emphasized that the FTC has challenged less than 1% of hospital deals — and only two challenges to physician combinations. Citing three hospital mergers (Evanston, ProMedica,⁴ and Rockford⁵) and a physician acquisition⁶ challenged successfully, Feinstein noted that the FTC's focus has primarily been on markets with a small number of providers, particularly those where the number of providers decreases from 4 to 3, 3 to 2, and particularly 2 to 1.

Feinstein also articulated some provider collaborations that have not been challenged by the FTC, but could be of potential concern. She observed that the Commission has not yet challenged a vertical merger involving a hospital and physician practice, but did not rule them out. She also noted that if a hospital manages another hospital with which it competes and a single entity negotiates prices with payors on behalf of both, the management contracts could raise issues similar to those in a horizontal merger context.

Finally, Feinstein described two examples of collaborations that did not raise concerns, making it clear that the FTC's decision to pursue enforcement action is a fact-specific one, and takes into account many factors,



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including the concerns of third parties, such as payors, the community, and employers.

Defenses

Director Feinstein made clear that although the FTC will consider merger specific efficiencies and flailing/failing firm defenses to balance concerns of market power, the agencies take a more stringent approach to how these defenses outweigh competitive harm. Feinstein noted that efficiencies under the Horizontal Merger Guidelines must be merger-specific, not vague or speculative, and cognizable. She also observed, however, that in the transactions challenged by the FTC, all three of these factors has never been achieved. She also cited the Idaho district court's opinion in St. Luke's Hospital's acquisition of physician group Saltzer on moving toward more integrated care and the greater use of electronic medical records: "St. Luke's is to be applauded for its efforts to improve the delivery of health care.... But there are other ways to achieve the same effect that do not run afoul of the antitrust laws and do not run such a risk of increased costs." Similarly, with regard to flailing/failing firms, or hospitals that are struggling financially, Feinstein noted that only in "limited circumstances" would the agencies consider a hospital so far financially down as to be of limited competitive significance.

Remedies

The FTC has expressed a strong preference for structural remedies over conduct: that is, the agency requires the parties to abandon the deal or if already consummated, divestiture. Feinstein noted that the FTC believes that conduct remedies "do not restore the competitive status quo and raise...concerns," such as the difficulty involved in mandating market behavior. For example, if the providers enter a consent agreement promising not to raise prices above a certain metric, determining the competitive price absent the transaction is nearly impossible. Moreover, conduct remedies frequently only focus on price and fail to take into account quality and incentives to innovate.

Endnotes

¹Bruce Sokler, *FTC Successfully Obtains Divestiture of Physician Group Previously Acquired by Hospital System*, Jan. 30, 2014, Mintz Levin Antitrust Alert, [view here](#).

²Deborah L. Feinstein, Director, Bureau of Competition, Fed. Trade Comm'n, *Antitrust Enforcement in Health Care: Proscription, not Prescription*, Remarks at the Fifth National Accountable Care Organization Summit, June 19, 2014.

³Fed. Trade Comm'n & Dep't of Justice, *Statement of Antitrust Enforcement Policy Regarding Accountable Care Organizations Participating in the Medicare Shared Savings Program*, 76 Fed. Reg. 67026 (Oct. 28, 2011) ("ACO Policy Statement").

⁴Bruce Sokler, Helen Kim, and Timothy Slattery, *Antitrust Hospital Merger Policy Gets a Judicial Boost — Sixth Circuit Upholds FTC Decision Challenging Hospital Merger*, Apr. 23, 2014, Mintz Levin Antitrust Alert, [view here](#).

⁵Bruce Sokler, Christi Braun, and Helen Kim, *Rockford Returns — Part II: Court Grants FTC's Preliminary Injunction Against Hospital Merger to Preserve Status Quo for Preliminary Hearing*, April 9, 2012, Mintz Levin Antitrust Alert, [view here](#); Bruce Sokler, Robert Kidwell, and Helen Kim, *Rockford Rerun: The FTC on Hospital Mergers*, Dec. 12, 2011, *Law360*, [view here](#)

⁶See *supra* note 1.

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