

Resources

Recent Antitrust Enforcement in Health Care

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The Federal Trade Commission (FTC) and the Antitrust Division of the Department of Justice (DOJ) have actively enforced the antitrust laws in the healthcare industry in the first half of 2016. As the developments below make clear, businesses in the healthcare sector should be aware of the antitrust risk associated with direct interactions with competitors, contracts that may impact competitors, and business combinations that may alter the competitive landscape. Should your organization desire to undertake any such activity, Dykema's Antitrust and Healthcare attorneys can assist in developing strategies to mitigate potential antitrust risk.

FTC Loses Two Hospital Merger Challenges

Federal courts in Chicago and Pennsylvania recently decided to let major healthcare providers merge, despite challenges from the FTC. The FTC has appealed both rulings. In both cases, the court rejected the FTC's definition of the "relevant geographic market," which is necessary for assessing the competitive impact of a proposed transaction. Both courts concluded the FTC had defined the market too narrowly and excluded actual and potential competitors from its analysis of the competitive effects of the proposed mergers. Thus, both courts found the FTC had failed to show it was likely to establish that the mergers would reduce competition. The Pennsylvania court also recognized the hospitals' argument that the merger was needed to adapt to the changing healthcare landscape, including the Affordable Care Act and adoption of risk-based contracting. The providers have agreed to put the mergers on hold pending the outcome of those appeals. While these losses represent an end to the FTC's recent winning streak in challenging hospital mergers, the FTC continues its battle against consolidation in the healthcare industry, as evidenced by its appeals in both of these cases.

FTC Abandons Hospital Merger Challenge After West Virginia Passes Law Exempting Certain Hospitals

The FTC recently dropped its challenge to a merger of two West Virginia hospitals after the state passed a law aimed at exempting the hospitals from federal antitrust regulations. The state legislature drafted the bill shortly after the FTC took issue with the merger. The bill, which became law in March, protects the actions of the West Virginia Health Care Authority and the hospitals under its jurisdiction from FTC interference. The FTC's decision to drop its challenge to the merger may encourage others to pursue a similar route to protect mergers facing federal antitrust scrutiny. It is not clear whether the law would withstand a court challenge, and the FTC has stated it may pursue future cases despite these laws or similar laws that other states may pass.

DOJ Sues Hospitals for Agreements That Limit Advertising

The DOJ sued two West Virginia hospitals, alleging they agreed not to advertise on billboards or in print in the county in which the other hospital was located. The DOJ alleged the agreement disrupted the competitive process by depriving patients of information about their healthcare choices and by denying physicians the opportunity to advertise their services. Both hospitals settled the case by agreeing not to reach any agreement with a competitor to limit marketing, not to communicate with each other regarding marketing, and to appoint a compliance monitor that will send regular reports to the DOJ. This case followed a similar case brought by the DOJ last year, in which the DOJ alleged four Michigan hospitals had multiple agreements limiting advertising of certain services near the other hospitals. Three of the Michigan hospitals settled under terms similar to those in the West Virginia case; one hospital continues to fight the claims in court.

DOJ Challenges Anti-Steering Clauses in Managed-Care Contracts

The DOJ sued the largest hospital system in the Charlotte, North Carolina, area, alleging the system used its market power to force insurers to agree to contract clauses aimed at preventing the insurers from incentivizing patients to use lower-priced, competing providers. According to the DOJ, these "anti-steering clauses" prevent insurers from offering tiered

network products that include competitors of the dominant hospital system in the top tier and from offering narrow-network products consisting solely of the dominant hospital's competitors. The DOJ claims these provisions restrain competition by limiting or eliminating products that would steer patients to lower-cost providers and thereby put more competitive pressure on the dominant hospital system. This ongoing case illustrates another avenue by which the DOJ can use antitrust laws in an attempt to control rising health care costs. In addition to government enforcement, payors and competitors may file private lawsuits that can be as costly and time-consuming as government investigations. Therefore, it is important for providers, particularly those with large market shares, to understand the antitrust risks when contemplating arrangements that may adversely impact or disadvantage competing providers.

Hospitals Operating Under a Joint Operating Agreement Must Face Antitrust Trial

A federal appellate court recently held that a Dayton, Ohio, area hospital's antitrust claims against four competitors may proceed to trial. The four hospitals entered into a joint operating agreement that combined some, but not all, aspects of their businesses. The plaintiff hospital alleged the four competitors used their collective market power to force insurers to deny plaintiff access to insurance networks and to prevent physicians from affiliating with and admitting patients to the plaintiff hospital. The court ruled the issue of whether the four hospitals were capable of conspiring under the antitrust laws as a result of the joint operating agreement must be decided at trial. The court based this conclusion on evidence that one purpose of the joint operating arrangement was to keep plaintiff hospital from competing, as well as the fact that the four hospitals retained some independent and competing operations and had stated that they viewed themselves as separate entities. Healthcare providers contemplating collaborations should be aware of the risk associated with crossing the sometimes unclear line between lawful collaboration and illegal agreements to restrain competition.

Certificate-of-Need Laws in the DOJ's and FTC's Crosshairs

The DOJ and FTC issued a joint statement on Certificate-of-Need (CON) laws after South Carolina introduced a bill to narrow and eventually eliminate its CON law. The agencies issued a similar statement last year when Virginia announced it was considering the same type of law. In their most recent statement, the FTC and DOJ declared that empirical evidence demonstrates that CON laws do not result in greater efficiency or quality of care. Instead, according to the agencies, the laws function as a barrier to market entry limiting consumer choice and innovation, may be used by incumbent firms to delay or prevent competitor entry by several years, and may even prevent the enforcement of merger remedies after an anticompetitive merger is consummated. The DOJ and FTC rejected the argument that CON laws prevent "overinvestment" and assure quality care. The agencies contend instead that the CON process is extremely time-consuming and expensive, and competition in health care markets results in better care and lower prices for consumers and generates innovation and efficiency. Whether South Carolina or Virginia ultimately loosens or eliminates its CON laws—and whether other states follow—remains to be seen. But changes in states' CON laws could significantly impact the regulatory process associated health care provider acquisitions and expansion efforts.

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