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Emboldened Antitrust Scrutiny of Healthcare Transactions

While healthcare transactions involving physicians have continued to accelerate over the past several years, these alignments have been fraught with regulatory concerns stemming from the federal government's significant scrutiny of transactions from a fraud and abuse perspective. More recently, government agencies have been increasing their antitrust scrutiny of these deals as well, further complicating the healthcare transactional arena. This intensifying scrutiny has been exemplified through a number of recent actions taken by government agencies, as well as the courts, to stifle physician practice purchases by hospitals and payors. This *Health Capital Topics* article will briefly review these actions, as well as the state of antitrust enforcement generally, and discuss potential implications for future healthcare transactions.

Antitrust law aims to combat anticompetitive behavior conducted by businesses. The *Sherman Antitrust Act* (Sherman Act), which prohibits any "*contract, combination...or conspiracy, in restraint of trade or commerce*;"[1] Section 5 of the *Federal Trade Commission Act* (FTCA), which prohibits "*unfair methods of competition in or affecting commerce*;"[2] and, Section 7 of the *Clayton Act*, which prohibits acquisitions that are likely to "*substantially lessen competition, or tend to create a monopoly*,"[3] are the federal government's three primary means of combating unfair competition and abuse of monopolistic power, through two principal government agencies, *the Federal Trade Commission* (FTC) and the *U.S. Department of Justice* (DOJ). In the healthcare context, these statutes have also been used to combat kickbacks and self-referral joint ventures, which have been recognized as an impediment to competition by providers outside the self-referral or kickback network,[4] as well as other anticompetitive healthcare arrangements including: physician integration under physician hospital organization models, *independent practice associations* (IPAs), and healthcare organizations negotiating on behalf of their physician members.[5]

The most recent wave of healthcare antitrust enforcement is comprised of four (4) actions by the FTC and the DOJ, all of which occurred over a two-month period:

(1) In June 2019, the FTC settled with UnitedHealth Group (UHG) and DeVita Medical Group to unwind UHG's acquisition of DaVita's Las Vegas operations;

(2) In June 2019, Colorado's Attorney General imposed conditions on UHG's acquisition of DaVita's Colorado Springs physician groups;

(3) In June 2019, the Eighth Circuit upheld a lower court ruling that blocked Sanford Health's proposal to acquire a multispecialty physician practice in Bismarck, ND, granting the FTC and North Dakota Attorney General's antitrust lawsuit to block the acquisition; and,

(4) In May 2019, Washington's Attorney General settled an antitrust lawsuit against CHI Franciscan, which imposed conditions on both CHI's affiliation with a multispecialty physician group and its purchase of an orthopedics group.[6]

Of note, the UHG deals were both challenged under the FTC's *vertical merger review*, a seldom-utilized theory (employed to challenge only 22 mergers since 2000) that focuses on the question of whether "*the vertically integrated firm is likely to exclude or collude*."[7] This theory includes three "*theories of vertical harm the FTC has used to challenge a vertical merger*," i.e.:

(1) "*A vertical merger may reduce the likelihood of beneficial entry*," meaning that, post-merger, it may be difficult for new firms to enter the market, because they would have to enter in post segments of the market to compete with the vertically-merged firm;[8]

(2) "*A vertical merger may result in anticompetitive foreclosure*," that is, whether the merger may result in increased costs for their competition, or otherwise negatively impact market entry;[9] and,

(3) "*A vertical merger may lead to anticompetitive behavior due to information sharing about a rival*," wherein two previously competing firms now have access to the other firm's competitor information (upstream or downstream) that it did not have prior to the merger.[10]

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This recent uptick in antitrust scrutiny of healthcare transactions may be the result of a number of factors. First, recent research indicates that healthcare consolidation results in higher prices for patients. For example, a 2018 study found that hospital purchases of physician groups resulted in a 35-63% increase in outpatient physician prices in highly-concentrated markets in California, as compared to less-concentrated markets.[11] Other studies have indicated that consolidations lead to increased pricing due to more negotiation leverage,[12] as well as poorer healthcare outcomes (higher rates of mortality, higher readmission rates, etc.).[13]

Second, antitrust scrutiny may have increased in an attempt to repress further consolidation in the already-concentrated healthcare markets in parts of the urban/suburban U.S. As of 2018, 65% of metropolitan statistical areas (MSAs) were considered to have high concentrations of specialists, while 39% of MSAs were considered to have high concentrations of primary care physicians; additionally, most urban areas are now dominated by one to two large hospital systems.[14] Further, the average size of physician practices has grown, with 61% of physicians in practices of 10 doctors or fewer in 2014 (down from 80% in 1983), which concentration was found to have occurred through numerous small acquisitions that did not warrant the attention (or scrutiny) of federal regulators.[15]

Third, perhaps in response to the first two factors, the government's renewed interest in antitrust enforcement may be a manifestation of the Trump Administration's efforts to increase competition and drive down healthcare industry prices. On December 3, 2018, the departments of *Health and Human Services* (HHS), *Treasury*, and *Labor*, issued a report entitled, "*Reforming America's Healthcare System Through Choice and Competition,*" resulting from an executive order that President Donald Trump issued over a year prior.[16] The 119-page report, comprised of over 50 policy recommendations to increase quality and decrease costs in healthcare, included a summary of the research related to competition and pricing (some of which is also noted above), and stated that "*[t]hese studies lend support for vigorous antitrust enforcement to prevent the accumulation of market power in healthcare markets.*"[17] Specifically, the report recommended that the Trump Administration continue to monitor competition in the healthcare market, "*especially in areas that may be less competitive*," and "*ascertain the impact of horizontal and vertical integration among provider practices on competition and prices*."[18]

In the midst of the current shift in the U.S. healthcare market from volume-based to value-based care, providers are likely to continue consolidating as needed (and required) to amass the requisite economies of scope and scale to provide efficient, high-quality patient care in order to survive. At the same time, however, the government is beginning to ramp up its opposition to this growing consolidation, as it is resulting in increased prices, but also poorer outcomes.[19] In fact, the FTC and the DOJ stated in March 2019 that they are updating the current vertical merger guidelines, "*which outline how antitrust enforcers assess the impact of deals between companies that compete in different markets*," and which were last revised in 1984.[20] This may indicate even more intense antitrust scrutiny related to healthcare transactions going forward, and further complicate potential healthcare transactions.

1 "Sherman Antitrust Act" 15 U.S.C. § 1 (2013).
2 "Federal Trade Commission Act" 15 U.S.C. § 45 (2013).
3 "Clayton Act" 15 U.S.C. § 18 (2013).
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5 "Health Care Fraud and Abuse: Practical Perspectives, 2003 Supplement" By Linda A. Baumann, Washington, DC: BNA Books, 2003, p. 61.
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7 "Vertical Merger Enforcement at the FTC (as prepared for delivery): Remarks of D. Bruce Hoffman Acting Director, Bureau of Competition" Federal Trade Commission, Credit Suisse 2018 Washington Perspectives Conference, Washington, DC, January 10, 2018, available at: https://www.ftc.gov/system/files/documents/public_statements/1304213/hoffman_vertical_merger_speech_final.pdf (Accessed 7/12/19), p. 4.
8 *Ibid*, p. 4-5.
9 *Ibid*, p. 5.
10 *Ibid*, p. 6-7.
11 The outpatient prices were as of 2014. "Consolidation in California's Health Care Market 2010-2016: Impact on Prices and ACA Premiums" Nicholas C. Petris Center on Health Care Markets and Consumer Welfare School of Public Health University of California, Berkeley, March 26, 2018, http://petris.org/wp-content/uploads/2018/03/CA-Consolidation-Full-Report_03.26.18.pdf (Accessed 7/12/19).
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13 "Physician Market Structure, Patient Outcomes, and Spending: An Examination of Medicare Benefits" By Thomas Koch, et al., Health Services Research, Vol. 53, No. 5, Part I (October 2018), p. 3549; "Hospital Consolidation, Competition, and Quality: Is Bigger Necessarily Better?" By Thomal Tsai and Ashish Jha, The Journal of the American Medical Association, Vol. 312, No. 1, (July 2014), p. 29. For more information on these studies, see "Hospital Prices Drive Healthcare Spending" Health Capital Topics, Vol. 12, Issue 2 (Feburary 2019), https://www.healthcapital.com/hcc/newsletter/02_19/HTML/PRICE/convert_hc_topics_hospital_prices_2.20.19.php.
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15 *Ibid*; "Physician Practice Consolidation Driven By Small Acquisitions, So Antitrust Agencies Have Few Tools To Intervene" By Cory Capps, David Dranove, and Christopher Ody, Health Affairs (Summer 2017), https://www.healthaffairs.org/doi/pdf/10.1377/hlthaff.2017.0054 (Accessed 7/12/19).
16 "HHS Unveils Plans to Increase Healthcare Competition, Choice" By Jacqueline LaPointe, RevCycle Intelligence, December 5, 2018, https://revcycleintelligence.com/news/hhs-unveils-plans-to-increase-healthcare-competition-choice

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19 Koch, et al., October 2018; Tsai and Jha, July 2014.

20 "Justice Department, FTC Working on New Vertical Merger Guideline" By Victoria Graham, Bloomberg Law, March 29, 2019,https://news.bloomberglaw.com/mergers-and-antitrust/justice-department-ftc-working-on-new-vertical-merger-guideline (Accessed 7/12/19).

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