ANTITRUST DEVELOPMENTS FOR HOSPITALS AND HEALTH SYSTEMS

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Topics

- Refresher on Antitrust Basics
- Healthcare Developments at the FTC and DOJ
- FTC and DOJ Priorities in the Biden Administration and the Biden Administration's Recent Executive Order on Competition
- FTC's Recent Track Record of Challenging Healthcare Mergers
- Friend or Foe: What Happens When the FTC or DOJ Calls
- Other Notable Developments in Healthcare Antitrust

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General Principles

- Antitrust law is concerned with the protection of the **competitive process**
- What general types of conduct are prohibited?
  - Contracts, combinations, and conspiracies "in restraint of trade or commerce"
  - Monopolization, attempted monopolization
- The antitrust laws are enforced by the FTC, the DOJ, state attorneys general, and private parties
- Corporate defendants may face **civil penalties**, **treble damages**, **legal fees**, **business disruption**, and **prohibitions** or **conduct restraints with respect to future practices**
- Corporate and individual defendants may face **criminal fines** and **jail time** in certain circumstances

What Constitutes Prohibited Conduct?

- Concerted Action: The antitrust laws prohibit **agreements** (written, oral, or otherwise) between market participants "in restraint of trade"
  - Examples include agreements to fix prices, rig bids, allocate markets, or restrict output
- Unilateral Action: **Monopolization** refers to actions by a dominant company to prevent or exclude competition
  - The possession of monopoly power—alone—is not illegal. But a monopolist cannot use (or attempt to use) its monopoly power to exclude competitors
- Whether challenged conduct has anticompetitive effects is typically assessed with reference to a "**relevant market**"

How Do Courts Assess Antitrust Cases?

Per Se Illegality vs. Rule of Reason

Price fixing, bid rigging, market allocation, output restriction

Anticompetitive effects outweigh procompetitive benefits

Procompetitive benefits outweigh anticompetitive effects

Healthcare Developments at the FTC and DOJ

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Healthcare Developments at the FTC and DOJ

- On June 15, 2021, Lina Khan became Chair of the FTC
  - Has promised more aggressive antitrust enforcement across the board
  - Has previously criticized hospital mergers for "rais[ing] consumer health prices" and "increasing the bargaining power of hospitals in negotiations with insurers"
  - Has proposed reforms to both the vertical and horizontal merger guidelines
- Follows aggressive agency posturing in the past year
  - Multiple high-level FTC officials have identified hospital mergers as a "high-priority" focus area in public speeches
  - In January 2021, the FTC launched study to assess impact of physician group and hospital consolidation since 2015, with the goal of understanding how different types of transactions can affect competition and pricing

Source: Lina Khan & Sandeep Vaheesan, *Market Power and Inequality: The Antitrust Counterrevolution and Its Discontents*, 11 Harv. L. & Pol. R. 235, 248 (2017).

Healthcare Developments at the FTC and DOJ

- Nontraditional merger theories of harm the DOJ and FTC could pursue
  - Nonhorizontal mergers (e.g., hospital merges with nearby physician group)
  - Horizontal mergers (e.g., two hospitals in two different PSAs/SSAs merge)
- Multiple proposed bills in Congress to reform antitrust laws
  - Increase HSR Act filing fees for mergers
  - Increase FTC Bureau of Competition and DOJ Antitrust Division budgets
  - Provide FTC with additional disgorgement tools following Supreme Court decision in *AMG Capital Mgmt., LLC v. FTC*
  - Flip the burden of proof in merger cases to the merging parties
  - Unclear whether (or in what form) any of these proposals will pass

FTC and DOJ Priorities in the Biden Administration

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Executive Order on Promoting Competition

- On July 9, 2021, President Biden signed a wide-ranging Executive Order on Promoting Competition in the American Economy
- Announces “whole-of-government” approach to combating what the Biden administration sees as excessive consolidation, abuses of market power, and the harmful effects of monopoly and monopsony power in certain segments of the economy

BRIEFING ROOM

Executive Order on Promoting Competition in the American Economy

JULY 09, 2021 • PRESIDENTIAL ACTIONS

Hospital Mergers Are Identified as Potentially Harmful

- In a Fact Sheet accompanying the Executive Order, the White House stated:

BRIEFING ROOM

FACT SHEET: Executive Order on Promoting Competition in the American Economy

JULY 09, 2021 • STATEMENTS AND RELEASES

Hospitals**:** Hospital consolidation has left many areas, especially rural communities ↗, without good options for convenient and affordable healthcare service. Thanks to unchecked mergers, the ten largest healthcare systems now control a quarter ↗ of the market. Since 2010, 139 ↗ rural hospitals have shuttered, including a high of 19 last year, in the middle of a healthcare crisis. Research shows that hospitals in consolidated markets charge far higher prices ↗ than hospitals in markets with several competitors.

In the Order, the President:

- **Underscores that hospital mergers can be harmful** to patients and encourages the Justice Department and FTC to review and revise their merger guidelines to ensure patients are not harmed by such mergers.
- Directs HHS to **support existing hospital price transparency rules and to finish implementing bipartisan federal legislation to address surprise hospital billing**.

FTC and DOJ Are "Directed" to Take Certain Action

President Joe Biden hands a pen to Lina Khan, chair of the FTC, as he signs an executive order on "promoting competition in the "American economy" as members of his cabinet stand by at the White House on July 9. © Reuters

- The FTC and DOJ are directed to, among other things:
  - Enforce antitrust laws "fairly and vigorously;"
  - Consider revising horizontal and vertical merger guidelines; and
  - For the FTC specifically, consider using its statutory rulemaking authority to address "any . . . unfair industry-specific practices that substantially inhibit competition"
- Health and Human Services is directed to, among other things, support existing price transparency initiatives for hospitals, other providers, and insurers

Although Independent, The FTC and DOJ Are Poised to Act on the Directives in the Executive Order

"We must ensure that the merger guidelines reflect current economic realities and empirical learning and that they guide enforcers to review mergers with the skepticism the law demands. **The current guidelines deserve a hard look to determine whether they are overly permissive.** We plan soon to jointly launch a review of our merger guidelines with the goal of updating them to reflect a rigorous analytical approach consistent with applicable law."

"We will immediately begin implementing the interagency collaborations called for in the Executive Order. . . . This increased interagency coordination will promote robust competition in the American economy. For example, **working with the Department of Health and Human Services, we can promote high quality telehealth services that expand health care competition and lower prices for consumers and their employers.**"

Key Takeaways

1. Potential for The FTC and DOJ to become much more aggressive in *investigating* and *challenging* mergers, acquisitions, joint ventures, and other conduct in the healthcare industry

2. Agencies may begin to use novel or untested theories of anticompetitive harms

3. Redrafting horizontal and vertical merger guidelines may have a substantial impact on enforcement going forward

FTC's Recent Track Record of Challenging Healthcare Mergers

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Overview of Provider Merger Challenges

- Investigating mergers and other affiliations among hospitals and other healthcare providers continues to be a major focus of **federal** and **state** antitrust enforcers, along with **private plaintiffs**
- Historically, government regulators have focused primarily on "horizontal" theories of competitive harm, contending that mergers or affiliations among competing providers provides enhanced negotiating leverage in managed care contract negotiations:
  - Mergers among competing health systems and hospitals
  - Acquisitions of independent medical groups by integrated health systems
  - Other mergers and affiliations among competing providers

Applicable Laws

- **Section 7** of the **Clayton Act** prohibits mergers and acquisitions where the effect "may be substantially to lessen competition, or to tend to create a monopoly," 15 U.S.C. § 18
- The **FTC** may seek a preliminary injunction in federal court pending administrative review where the FTC has reason to believe the transaction would violate the Clayton Act, 15 U.S.C. § 53(b)
  - Burden-shifting approach is employed; preliminary injunction may be issued "[u]pon a proper showing that, weighing the equities and considering the Commission's likelihood of ultimate success, such action would be in the public interest," 15 U.S.C. § 53(b)
  - **States** and **private parties** also have standing to pursue preliminary injunctions under the Clayton Act, 15 U.S.C. § 26
- **Hart-Scott-Rodino Antitrust Improvements Act of 1976 (HSR Act):**
  - $92 million size of transaction threshold; $368 million size of the parties threshold
  - Certain states, namely Connecticut and Washington, have their own reporting requirements specific to healthcare; other states such as California and Florida are considering enacting similar requirements
- **Types of Remedies:**
  - Antitrust enforcers have a strong preference for structural remedies
  - Preference for sale of intact business unit or all assets needed to replicate existing competition

FTC's Track Record

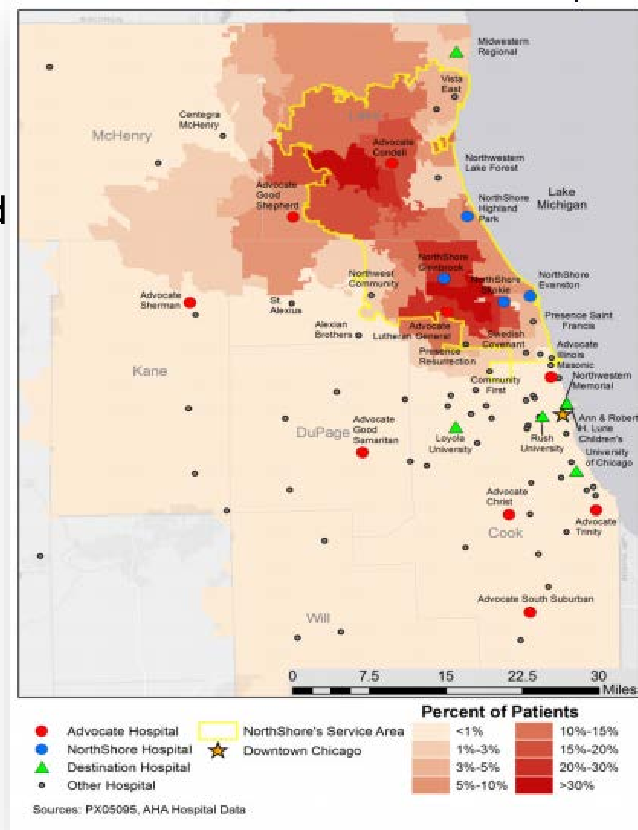
- Over the last decade, the FTC and states have had a strong track record of successfully challenging provider mergers
- Challenges have resulted in a decision enjoining the transaction, the parties voluntarily abandoning the transaction after enforcers move forward with legal action, or a negotiated resolution, for example:
  - Atrium Health/Houston Healthcare (FTC; 2021) (abandoned)
  - Methodist Le Bonheu Healthcare/Tenet (FTC and La.; 2020) (abandoned)
  - Beth Israel/Leahy Health (FTC and Mass., 2018) (negotiated resolution with Mass.)
  - Sanford Health/Mid-Dakota Clinic (FTC, North Dakota; 2017) (abandoned)
  - Penn State Hershey Medical Center (FTC and Pa.; 2016) (litigation)
  - Advocate Health Care/North Shore Medical (FTC and Ill.; 2016) (litigation)

FTC's Win Streak Came to an End in Philadelphia

- In September 2018, Thomas Jefferson University (TJU) and Albert Einstein Healthcare Network (Einstein) signed a System Integration Agreement under which TJU would become Einstein's sole member and ultimate parent
- On February 27, 2020, the FTC initiated an administrative proceeding to enjoin the proposed merger, and thereafter the FTC and PA AG filed an action in federal court
- TJU and Einstein operate in the densely populated southeastern Pennsylvania region with several other world-class healthcare providers located nearby
- Enforcers proposed distinct geographic markets for the same services, something the District Court observed the FTC had "never attempted" before:
  1. Inpatient general acute care (GAC) sold to commercial insurers and their members in the "Northern Philadelphia Area"
  2. Inpatient GAC sold to commercial insurers and their members in the "Montgomery Area," an area consisting of parts of Philadelphia and neighboring Montgomery County
  3. Inpatient acute rehabilitation sold to commercial insurers and their members in the "Philadelphia Area"

Relevant Market

- Key battleground, as in most provider mergers, is market definition
  - The FTC defines geographic market with the **Hypothetical Monopolist Test** (HMT), which asks whether a hypothetical monopolist of a given service could profitably raise prices if it controlled the service in a specific geographic area
  - **Diversion ratios** are used to measure closeness of competition, i.e., where patients go when their first choice is no longer available
  - **Market share** and measures of market concentrations before and after the transaction are used as proxies for potential harm
  - **Documents** and **testimony** from merging parties and third parties can also be used to support market definition
- HMT can lead to some odd market definitions
  - Source: Exhibit in Advocate Health Care/North Shore Medical (FTC and Ill.; 2016) (litigation)



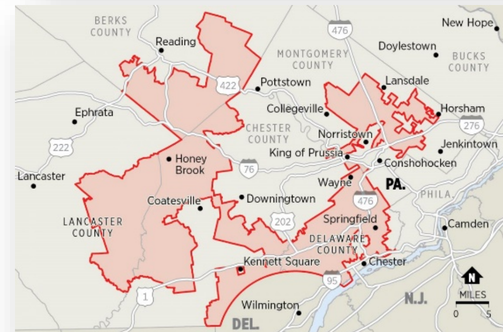
TJU/Einstein Court's Analysis

- Court in TJU/Einstein merger recognized that there are two stages of competition for providers:
  - (1) competition to be included an insurer's network, and
  - (2) competition for patients
- In assessing these commercial realities, the District Court concluded, as have other courts, that insurers are the primary payors that will directly feel the impact of any cost increases
- As a result, the antitrust analysis primarily focused on **potential harm to insurers** and looked to see if TJU/Einstein, under the HMT, could profitably increase prices without insurers turning to alternatives outside the alleged geographic markets

TJU/Einstein Court's Analysis

- Enforcers focused on how **patients** viewed healthcare providers as substitutes, using diversion ratios on the theory that insurers woul look at switching patterns in determining substitutes
- This approach was rejected:
  - Enforcers' economist failed to show that patient choice, as seen in diversion ratios, was correlated to the behavior of insurers
  - Analysis failed to capture commercial realities of the market:
    - There are only four major insurers in the Philadelphia area with extensive healthcare provider competition
    - TJU and insurer documents did show Einstein as a competitor
    - Some insurer witnesses testified that they had no concerns about a combined TJU/Einstein
    - Insurer witnesses did not say they would have to accept a price increase post merger
    - Testimony from insurers about potential harms was viewed as unpersuasive when contrasted with documents

I'M AN
ECONOMIST
TO SAVE TIME LET'S JUST
ASSUME THAT I'M NEVER WRONG



Aftermath of the TJU/Einstein Trial

- Enforcers initially appealed to the Third Circuit
  - PA AG settled for a commitment by TJU/Einstein to invest $200 million over seven years in Einstein's facilities in North Philadelphia
  - Request to enjoin the merger pending appeal was rejected, with the FTC quietly dropping its appeal thereafter
- Case highlights difficulties enforcers can have when seeking to block hospital mergers in densely populated areas
- Testing enforcers' economic model against the evidence is critical
  - Enforcers were able to construct markets that passed the HMT test, but
  - Court concluded that the enforcers did not satisfy their initial burden because the documents and witness testimony, primarily from insurers, did not support the alleged markets

Impact on FTC Enforcement Going Forward

- Enforcers in future cases will place extra emphasis on the substance and credibility of payor testimony
- The next test: the FTC's trial against the Hackensack Meridian Health and Englewood Healthcare merger occurred in June 2021; a decision is anticipated soon
- The FTC remains committed to enforcement in healthcare:
  - As noted earlier, FTC has launched a research initiative that will focus on the effects of physician and non-inpatient healthcare facility mergers and acquisitions by looking at:
    - Changes in provider prices in different specialties after horizontal mergers
    - Nonprice outcomes, i.e., better outcomes for patients, after horizontal mergers
    - How vertical mergers have affected competition generally
    - Impact of horizontal, non-inpatient healthcare facility mergers on prices and quality
  - FTC Commissioner Christine Wilson has publicly stated that the FTC will "step up" its oversight and scrutiny of potential hospital mergers and will look at past healthcare mergers

A Cautionary Tale on Creative Deal Structures

- In February 2019, Geisinger announced a partial acquisition of Evangelical
  - Geisinger would pay $100 million for a 30% interest in Evangelical and for investment and IP licensing arrangements
  - Geisinger received six seats on Evangelical's board, Evangelical was required to share business plans, and Geisinger would receive right of first refusal for any future joint venture or sale
- In August 2020, the DOJ sued, claiming that partial acquisition was structured to avoid antitrust scrutiny, since the arrangement did not require antitrust review at the state or federal level
  - Geisinger had been considering an acquisition of Evangelical since 2016 but, in documents produced to the DOJ, recognized that it could not acquire Evangelical for antitrust reasons
  - The DOJ alleged that "partial acquisition" would reduce incentives to compete aggressively
- In March 2021, a resolution was announced whereby Geisinger's investment was capped at 7.5% and the above referenced entanglements were eliminated; the parties also were required to institute antitrust compliance programs

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Friend or Foe: When the FTC or DOJ Calls

CONCERNS
of the Agencies

1. Mergers hamper future competition
2. Mergers raise prices or lower quality of care
3. Mergers increase incentives and opportunities for coordinated conduct

Primary Information Needed in Enforcement

Types of Information

- ✓ Data
  - ✓ Market shares and HHIs
  - ✓ Diversion ratios
  - ✓ Patient switching history
- ✓ Relevant product and geographic markets
- ✓ Market entry, expansion, or exit
- ✓ Customer reaction (patient and insurers)
- ✓ Competitor reaction

Friend or Foe: When the FTC or DOJ Calls

- A peer hospital or practice is merging:
  - Documents or data about competition with one or both of the merging parties, e.g., strategy plans
  - Keep in mind that arguments you use to lobby against a competitor's deal could be used by regulators in opposition to your future deals
  - When in doubt, consult with outside antitrust counsel
- Information healthcare providers may give to agencies for insurer mergers:
  - The DOJ may be concerned that combined insurers could exert too much bargaining leverage in negotiations with hospitals
  - Documents regarding payor relationships (e.g., payor contracts)
  - Data regarding claims and reimbursements

Other Notable Developments in Healthcare Antitrust

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Other Notable Developments in Healthcare Antitrust

- No poach and wage fixing
  - The DOJ brought first criminal cases in early 2021 against healthcare providers
  - Private plaintiffs have also filed class actions related to no poach and wage fixing
- CMS price transparency rules
  - Potential to increase antitrust risk
  - Penalty for nonparticipation may increase
- Antisteering litigation
- FTC to continue study of effects of COPA/CON on price, quality, access, and innovation in the healthcare sector
- Health system challenges
  - Deborah Heart & Lung (3rd Cir.)
  - Indiana University Health (7th Cir.)

Questions?

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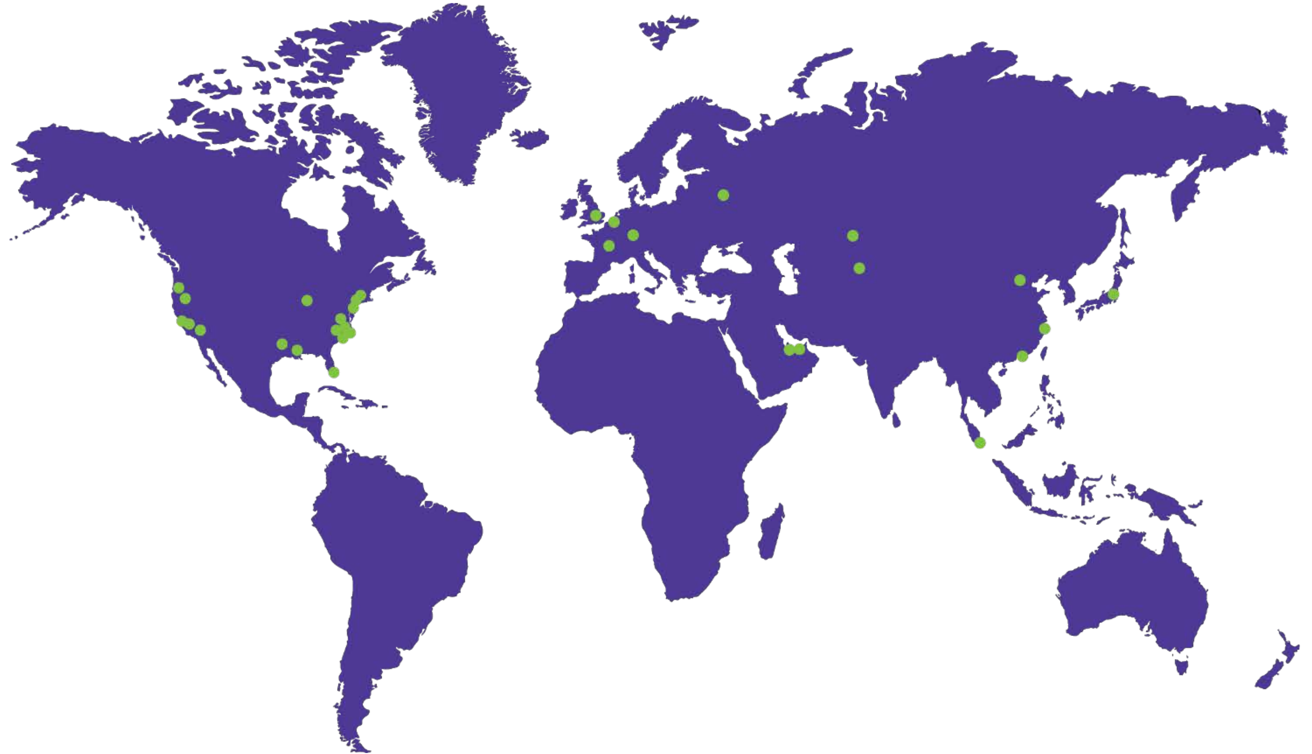

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