



Provider Consolidation: Enforcement and Policy Perspectives from the Federal Trade Commission

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** This presentation reflects my own views, not necessarily those of the Commission or any individual Commissioner.*

Overview

- Mission and jurisdiction
- Health care industry expertise
- Perspectives on provider consolidation and collaboration
- Recent enforcement activities
- Recent policy activities



About the FTC

- Independent, bipartisan, consensus-driven
- Attorneys + economists
- Dual mission
 - Promote competition
 - Protect consumers
- Shared civil jurisdiction with DOJ regarding competition in health care markets



FTC Scope and Tools

- Law enforcement authority
- Policy development via research and scholarship
 - FTC Act Section 6 (“institutional DNA”)
- Various policy tools at our disposal, including
 - Workshops, roundtables, other public events
 - Studies, reports, policy papers, etc.
 - Advocacy, both formal and informal
- Routine collaboration with other stakeholders



FTC Health Care Expertise

- All of our tools, over many years
 - Enforcement
 - Research and study
 - Advocacy
 - Policy development
- Wide range of products and services
 - Including various forms of provider consolidation, integration, coordination, collaboration, etc.



Key Features of Health Care Marketplace

- Industry participants at all levels are rethinking how to deliver and pay for health care services
- Shift from volume to value is key to achieving “triple aim” goals
- Increased coordination and collaboration at all levels will drive health care reform
- Competition remains critically important, as in all rapidly evolving industries
 - Promote innovation, quality, efficiency
 - Prevent harmful accumulations of market power



False “Tension” Narrative

- “The antitrust laws prohibit the kinds of collaboration that are necessary to achieve the goals of health care reform”
- “Antitrust is a barrier to reform efforts”
- The antitrust agencies don’t understand the reality of our financial and political pressures”
- “The government’s position is inconsistent; do you want more integrated care, or not?”



The FTC Rejects This Fallacy

- Bona fide efforts do not violate the antitrust laws
 - Many forms of collaboration, coordination, and/or integration are procompetitive or competitively benign
 - FTC challenges very (!!!) few arrangements
- Laudable goals of health care reform can be achieved without engaging in anticompetitive consolidation and collaboration that would run afoul of the antitrust laws
 - E.g., ACA itself recognizes that ACOs may be formed through contractual arrangements short of merger



Harmful Consolidation/Collaboration

- Reduces price and/or quality competition
- Increases market power and bargaining leverage
 - Enables negotiation of higher reimbursement rates, without corresponding quality improvements
- Does not generate offsetting efficiencies
 - Speculative or less than claimed
 - Outweighed by magnitude of competitive harm
 - Could be achieved through less restrictive means



In What Contexts Might Harm Arise?

- Mergers/acquisitions in concentrated markets
 - Literature supports concern that consolidation often raises prices without improving quality or efficiency
- Alliances and other forms of conduct that thwart competition among independent providers
 - Agreements on price
 - Joint negotiations with payers
 - Price “transparency” initiatives that facilitate coordination among competitors (especially when the information is not meaningful to consumers)



Enforcement: Hospital Mergers

- Long string of successes, beginning with reboot following retrospective study and *Evanston* case
- *ProMedica* (Toledo, OH)
 - General acute care + inpatient obstetrics
 - Concentration = higher prices but not higher quality
 - Merger would have left payers “with no walk-away option in post-merger negotiations”
- *Cabell Huntington/St. Mary’s* (WV/OH) (new!!!)
 - Near-monopoly in general acute care inpatient + outpatient surgical
 - “Gentlemen’s agreement” to limit competition
 - Rate review, conduct commitments won’t replicate competition



Enforcement: Hospitals Acquiring Physicians

- *St. Luke's* (Nampa, ID)
 - Dominant health system with many primary care physicians acquired even more, leading to 80% share
 - Higher rates likely for primary care physician services
 - Payors, lacking other options, would be unable to resist *St. Luke's* demands
 - Horizontal theory based on combination of primary care physicians
 - FTC has acknowledged, but not pursued, vertical theory
 - 9th Cir. affirmed in most respects
 - Including failure to prove efficiencies that would outweigh likely harm to competition



Enforcement: Other Merger Examples

- *OSF/Rockford* (IL): primary care physicians
- *Community Health Systems* (AL/SC): general acute care inpatient services
- *Renown Health* (NV): adult cardiology services
- *Surgery Partners* (FL): ambulatory surgical centers
- *Universal Health Services* (TX/NM; DE/NV/PR): acute inpatient psychiatric care
- *Surgical Institute of Reading* (PA): inpatient and outpatient surgical services



Enforcement: Conduct Examples

- *North Texas Specialty Physicians*: 5th Circuit affirmed findings of price fixing agreements and refusals to deal
- *PR nephrologists*: collective negotiations; price fixing agreements; group boycott
- *PR Coopharma pharmacy owner co-op*: collective negotiations; threats of collective action
- *MN Rural Health Cooperative*: price fixing agreements; refusals to deal; threats to terminate contracts
- *CO Roaring Fork Valley Physicians IPA*: price fixing agreements; collective negotiations; refusals to deal
- And many more . . . but none since 2013



Health Care Competition Policy

- While the FTC is primarily an enforcement agency, we also maintain a sizeable policy docket, especially in health care
- Various forms of research, study, advocacy, and related policy work



Policy: Research and Study

- Workshop series in March 2014 and February 2015 (with DOJ) studied certain activities and trends that may affect competition in the health care industry, including:
 - Measuring and assessing health care quality
 - Evolving provider and payment models
 - Trends in provider consolidation
- All materials available on FTC website



Policy: Competition Advocacy

- Important component of our competition mission
 - Ensure competition perspectives are acknowledged and included in policy-making decisions
 - Leverage and share FTC's competition, economic, and subject matter expertise
 - Prevent harm to competition before it happens
- Framework: fulfill legitimate public policy goals, without placing unnecessary restrictions on competition
- Typically involves comments (upon request) to state legislators and regulators
 - We also engage with sister federal agencies



Advocacy: COPAs

- Recent comments in TN and VA
 - Developing respective COPA application processes
- Ensure that evaluation of COPA applications “includes a rigorous competition analysis based on well-accepted legal and economic principles”
- Emphasize that mergers to monopoly or near-monopoly are more likely to harm consumers
 - Need greater cognizable efficiencies (and pass-through to consumers) to offset competitive harm



Advocacy: Antitrust Exemptions

- Recent comments in NY, OR, CT, TX
- FTC opposes antitrust immunity for collaborations and agreements among competing health care providers
 - Procompetitive (or competitively benign) collaborations already are permissible under the antitrust laws
 - Exemptions immunize conduct that likely would not generate countervailing efficiencies



Advocacy: CON

- Recent comments in NC, VA (joint with DOJ) suggest repeal or retrenchment
- CON laws create barriers to entry and expansion, limit consumer choice, and stifle innovation
- Can be used by incumbents to block entry
- Can thwart effective merger remedies
 - Phoebe Putney merger-to-monopoly example in GA
- Available evidence does not suggest that CON laws control costs or improve quality



Summary

- The FTC takes a multifaceted approach to provider consolidation issues
 - Full range of jurisdiction, theories of harm, and tools
 - Judicious, careful, highly fact-specific enforcement
 - Policy efforts complement and enhance enforcement
- We will stand our ground; competition among providers is more important than ever
- Never stop learning, to maintain our credibility





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