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
FEDERAL TRADE COMMISSION
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