Federal Antitrust Scrutiny of Healthcare Industry Intensifies During Pandemic

The COVID-19 pandemic has brought national attention to the inner workings of the healthcare industry, exposing many of its shortcomings and issues. Many are now taking a renewed look at the U.S. healthcare system as a whole and the underlying problems that arise from the actions of its various players. Early this year, healthcare transactions that have largely escaped federal antitrust review are now being hauled into the spotlight in new attempts to promote greater competition in the healthcare market.

Physician Consolidation Garners Attention as the FTC Seeks to Study Its Effect on Competition

The coronavirus pandemic has put stress on the healthcare industry in many different ways. As smaller entities undergoing economic strains fold into larger health systems, it has become increasingly important to monitor the effects of such consolidation. This is particularly true for the acquisition of physician practices by hospitals and health systems. Last month, The Source highlighted a recent study published in *Health Affairs* that found a significant increase in physician groups being subsumed into health systems between 2016 and 2018.[1]

This has not gone unnoticed by enforcement agencies, as the Federal Trade Commission (FTC) recently issued an order titled "Resolution Directing Use of Compulsory Process to Collect Information Regarding Physician Group and Healthcare Facility Mergers." This order requires six insurance companies – Cigna, Aetna, United Healthcare, Anthem, Florida Blue, and Health Care Service Corporation – to file a special report with the FTC by April 20, 2021 to assist the Commission in studying the competitive impact of physician and healthcare facility consolidation. The FTC required the insurance companies to report patient claims

data for inpatient, outpatient, and physician services from 2015 to 2020, including how much patients paid for services, what hospitals billed patients, whether physician services were included in the bill, what the insurers actually paid, and how patients chose their insurer. In addition, the order directs insurers to identify in their reports "capitation, risk-sharing, bundled payment, ACO payment, value-based payment, lump-sum payment, increased reimbursement or bonuses for meeting quality objectives, or any reimbursement contracts other than fee-for-service with providers."

Ultimately, studying this data will help shed light on appropriate thresholds for enforcement action and help strengthen merger review of physician practices, which has, more often than not, fallen through the cracks.

Health Insurers Stripped of Federal Antitrust Immunity under New Law

Not only are providers receiving more scrutiny in the antitrust realm, but insurers are also feeling the heat with the recent enactment of the bipartisan Competitive Health Insurance Reform Act of 2020 (HR 1418), which now subjects health insurers to federal antitrust laws. The new law amends the McCarran-Ferguson Act of 1945,[2] which had long exempted health and dental insurers from federal laws including the Sherman Act, Clayton Act, and Federal Trade Commission Act, leaving the regulation of the business of insurance to the states. But with the elimination of this exemption, health insurers are shielded no more. Additionally, the new law states "[p]rohibitions against unfair methods of competition apply to the business of health insurance without regard to whether the business is for profit." While the amendment does not repeal antitrust immunity for certain activities, including the insurance underwriting process, it affords federal agencies including the FTC and DOJ greater enforcement power to challenge anticompetitive conduct.

While opponents argue the law may undermine state regulation, cause confusion, and add administrative costs,[3] proponents believe it merely adds federal oversight on top of state regulation. This is particularly important as federal agencies have considerably more resources than states antitrust authorities. The Amendment could also have huge implications as more attention is drawn to anticompetitive

contracting practices between providers and insurers, with increased scrutiny of the use of provisions such as most-favored nation, anti-steering/anti-tiering, all or nothing, and gag clauses.[4] Insurers and providers should be held equally accountable for collusive and anticompetitive practices. At the very least, the law promises to afford the insurance industry the same level of antitrust scrutiny given to the providers and will bring more litigation from both private parties and the government.

As federal enforcement agencies step up their scrutiny of these healthcare market players, it hopefully also creates incentives for providers and insurers to curb potentially anticompetitive behaviors. As many experts and reports indicate that antitrust enforcement is expected to be a significant focus of the new Biden administration,[5] this may be a promising step toward achieving greater healthcare affordability for all Americans.

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[1] Laura Kimmey et al., *Geographic Variation in the Consolidation of Physicians into Health Systems, 2016–18*, Health Affairs (January 5, 2021). Available at: https://www.healthaffairs.org/doi/10.1377/hlthaff.2020.00812.

[2] 15 USC §§ 1011-1013 (1945).

[3] Nona Tepper, *Billing, antitrust exemption changes upend negotiations between insurers and providers*, Modern Healthcare (January 25, 2021). Available at https://www.modernhealthcare.com/insurance/billing-antitrust-exemption-changes-upend-negotiations-between-insurers-and-providers.

[4] See Gudiksen et al., *Preventing Anticompetitive Contracting Practices in Healthcare Markets*, The Source on Healthcare Price and Competition (2020).

[5] Leslie E. John, *What to Expect in Antitrust Policy, Enforcement From Biden Administration*, Bloomberg Law (February 2, 2021). Available at

https://news.bloomberglaw.com/health-law-and-business/what-to-expect-in-antitrust-policy-enforcement-from-biden-administration.