Recent lawsuits focus on key competition issues

This spring, court cases are dealing with a variety of issues relevant to healthcare marketplace competition issues. These include a Federal Trade Commission's (FTC's) action to block a sale of hospitals in North Carolina, examining the fiduciary duties employer-sponsored health plans have in selecting drug plans, and looking at the acceptability of non-compete clauses in physician contracts.

FTC Files suit in North Carolina

In February, the FTC authorization of a suit to block Novant Health's proposed acquisition of two hospitals owned by Community Health Systems (CHS) in North Carolina. On March 25, the FTC acted on that authorization by filing a request for a preliminary injunction with the United States District Court for the Western District of North Carolina to block the sale. In its complaint, the FTC stated that the sale would "would irreversibly consolidate the market for hospital services in the Eastern Lake Norman Area in the northern suburbs of Charlotte." In the filing, the FTC argued for the injunction for two reasons: one, that the deal was unlawful "because it would result in a combined entity with an eye-popping 64% share of the market in the Eastern Lake Norman Area" where "The Supreme Court has held that mergers are presumptively unlawful if they result in a single entity controlling a 30% market share." And two, that the deal "would immediately wipe out … competition" between Novant Huntersville and Lake Norman Regional "reducing defendants' incentives to invest in quality and leaving fewer options for patients." The Court has scheduled an evidentiary hearing for the case on April 29.

Class action suit filed over high employee drug costs

Also in February, a class action suit was filed in the United States District Court for New Jersey against Johnson & Johnson (J&J) in its capacity as the sponsor of employee group health and prescription drug plans, claiming breaches of fiduciary duties and other violations under the Employee Retirement Income Security Act (ERISA), which establishes a duty to prudently manage employee benefit plans. The suit claims that J&J violated its fiduciary duty to keep health plan drug prices reasonable, and that lack of oversight resulted in higher premiums, higher out-of-pocket costs and limits on employee wage growth, which harmed its beneficiaries (e.g. employees).

The suit gives specific examples of markup for costs of particular medications, and claims that an analysis shows that J&J agreed to a 498% markup for drugs when compared to pharmacy acquisition costs. The suit mentions J&J failure to use prudence in the selection of a Pharmacy Benefit Manager, a failure to negotiate better pricing terms, and a failure to use prudence in prescription drug plan design as failures to meet ERISA fiduciary obligations. The suit raises questions about an employer's duty in selecting and overseeing health plan vendors, which include PBMs. These relationships can be tricky for employers to manage, as they often aren't able to review the terms of contracts between PBMs and drug manufacturers, creating challenges for employers to be good stewards of benefit plans. Fiduciary duties under ERISA do not necessarily require using the lowest cost vendor – other factors can be considered including claims processing, drug formulary selection, and network access – simply showing that the plan paid high rates for drugs would not be enough to establish a violation of a fiduciary duty. This case could potentially open the door for other lawsuits over excessive healthcare prices (beyond just pharmaceutical benefits) for self-funded employers.

Physician non-compete clauses coming under increased scrutiny

Non-compete clauses are terms, typically in an employment contract, stating that an employee (i.e. a physician) will not compete with his or her current employer (i.e. current practice group or hospital) within a geographic area for a limited amount of time. Physician non-compete clauses raise concern among antitrust enforcers and lawmakers, as they can stifle competition among health systems, allowing dominant systems to control the market for needed healthcare providers. They can also harm patients when their physician of choice is forced to leave a geographic area. Many states have passed laws either forbidding or limiting non-compete provisions, and there is an ongoing push to reconsider them. State courts are also grappling with this issue. Both the FTC and Congress have been considering federal action on this topic, and antitrust law can be used to pursue the issue.

In February of this year, two hospitals in the Trinity system (St. Joseph's Hospital in Syracuse, NY, and Holy Cross Hospital in Fort Lauderdale, FL) sued North American Partners in Anesthesia in Federal Court claiming that the anesthesia group's use of physician noncompete clauses violate antitrust laws and suppresses competition. According to the suits, the defendant's use of noncompete and non-solicitation clauses in contracts with providers prevented anesthesiologists and nurse anesthetists from working directly for the hospitals, allowing the defendant to "demand exorbitant payments for critical and understaffed patient services." The suits claim the Anesthesia group offered to waive the non-competes to allow the hospital to employ the providers directly, but "demanded an exorbitant multi-million payment" to do so. The Trinity hospitals claim the suit is necessary for them to be able to offer employment to the anesthesia providers. In 2019, a Trinity hospital in Michigan filed a similar suit regarding noncompete clauses against Anesthesia Associates of Ann Arbor, which was ultimately settled out of court.

There has been pressure for states to ban non-compete clauses

for some time, and states currently take a wide variety of approaches. In 2023, Indiana enacted Senate Bill 7 to add restrictions on physician noncompete agreements and Minnesota passed legislation preventing new non-compete agreements for all workers, although the ban was not retroactive. Also in 2023, the FTC proposed a rule to ban the imposition of non-compete clauses. Furthermore, the American Medical Association voted in 2023 to oppose non-compete contracts for physicians. While parties are open to contest individual noncompete clauses, there is pressure to ban them entirely, but as is so often the case, approaches will vary from state to state unless the Federal government chooses to step in.

The states on the forefront of 2024's noncompete battle

SB 228

Health Insurance Cost Sharing: Defining the term "cost-sharing requirement"; requiring specified individual health insurers and their pharmacy benefit managers to apply payments by or on behalf of insureds toward the total contributions of the insureds' cost-sharing requirements; providing disclosure requirements for specified health insurers and their pharmacy benefit managers; requiring that specified contracts require pharmacy benefit managers to apply payments by or on behalf of insureds toward the insureds' total contributions to cost-sharing

HB 363

Health Insurance Cost Sharing: Requires specified individual health insurers, group insurers, HMOs & their pharmacy benefit managers to apply payments of prescription drugs by or on behalf of insureds & subscribers toward total contributions of insureds' & subscribers' cost-sharing requirements under certain circumstances; provides disclosure requirements; requires specified contracts to require PBMs to apply payments by or on behalf of insureds & subscribers toward insureds' & subscribers' total contributions to cost-sharing requirements.

SB 1502

Establishing a 3-year statute of limitations for an action to collect medical debt for services rendered by a health care provider or facility; providing additional personal property exemptions from legal process for medical debts resulting from services provided in certain licensed facilities; requiring a licensed facility to post on its website a consumer-friendly list of standard charges for a minimum number of shoppable health care services; prohibiting certain collection activities by a licensed facility, etc.

SB 1608

Prohibiting certain actions by health insurance issuers, pharmacy benefit managers, or other third-party payors, or their agents, relating to reimbursement to a 340B entity for 340B drugs; prohibiting certain actions by manufacturers relating to interference with the acquisition of a 340B drug; prohibiting a manufacturer’s interference with a pharmacy’s right to contract with a 340B entity, etc.

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2 Trinity hospitals sue North American Partners in Anesthesia

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Noncompete laws continue to evolve nationwide

HB 11

A bill specifying that certain restrictive covenants in employment agreements relating to certain licensed physicians are not supported by a legitimate business interest;

specifying that such restrictive covenants are void and unenforceable; providing applicability; defining the term “compensation”; providing an effective date.

HB 1475

Provides requirements related to utilization review entities authorization process for accepting electronic prior authorization; provides requirements related to payment adjudicators; authorizes OIR to investigate & take appropriate actions; authorizes provider to bring private cause of action; revises requirements of insurer contracts; revises requirements for health insurers submitting claims electronically & nonelectronically; removes prohibition against waiving, voiding, or nullifying certain provisions by contract; prohibits health insurer from retrospectively denying claim; revises procedures for investigation of claims of improper billing; prohibits insurer from requiring information from provider before provision of emergency services & care.