Antitrust Challenges to Hospital Transactions: Strategic Choices and Opportunities

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"Typography" of Recent Antitrust Enforcement

- Enforcement often focused on less densely populated areas:
  - FTC
    - *Phoebe Putney Health System* (U.S. 2012)
    - *OSF/Rockford* (N.D. Ill. 2012)
    - *ProMedica Health System* (N.D. Ohio 2011)
  - DOJ
    - *United Regional* (2011)
    - *Blue Cross/Blue Shield of Montana* (2011)

- **Exception:** MA-AG, *Partners HealthCare/South Shore*
Keys to the FTC/DOJ Successes

• Selected cases with easy to define “relevant geographic markets”
• Chose deals with high combined market shares/concentration levels
• Documents said mergers would produce “leverage” over health plans
• *State AGs generally supported the cases*
• Health insurance companies provided testimony
• Econometric modeling predicted price increases
• Parties’ quality/efficiency defenses appeared vague
State AGs Have Active Enforcement Programs

- State AGs reflect concern about controlling health care costs
- Have more flexibility to bring “novel” types of cases
  - *E.g.*, Massachusetts AG’s bundling case against *Partners HealthCare*
- Willing to require broader remedies than the FTC/DOJ
  - FTC requires a “structural” remedy – *i.e.*, the sale of a facility
  - State AGs may agree to “conduct” remedies – *i.e.*, price-caps, prohibitions on “all-or-nothing” contracting, physician contracting requirements
Hospital Responses to Merger Challenges

• Emphasize that there are important factors in addition to “nominal” prices - quality, access, choice, and integrated care
• Hospitals increasingly under financial stress:
  – Reduced government reimbursements
  – Substantial future investments required – *e.g.*, EMR
• “Failing/flailing” firm standards do not reflect market realities
• Transaction needed to implement goals of health care reform:
  – ACOs/clinical integration
  – Financial risk sharing (capitation)
  – Narrow-panel plans
Strategies for Minimizing Antitrust Deal Risk

1. Identify, analyze, and quantify cost control and quality improvement opportunities during acquisition planning
   – Leverage internal clinical and medical staff leadership and use consultants to collect and develop cost and quality control facts.
   – Discuss efficiencies in ordinary course of business documents.

2. Explain Benefits of Transaction to Payors and Employers
   – Implement partnerships regarding clinical protocols, sharing the benefits of cost savings and quality improvements, and risk sharing.
   – Explain to employers and consumers that defragmenting provider markets and increasing scale benefit patients and employers.

3. Perform econometric analysis early
   – If the FTC/AG is likely to consider issuing a Second Request, retain an economist to run and challenge the results of the willingness-to-pay (“WTP”) model.
Strategies (cont.)

4. Prepare a robust demonstration that the merger will lower costs and enhance clinical quality
   – Use clear cost and clinical quality metrics.
   – Adjust for case mix and avoid skewed patient populations.
   – Show efficiencies achieved from prior acquisitions.
   – Demonstrate successful implementation of shared savings programs.
   – Demonstrate ability to manage financial risk.
   – Show how higher quality hospital will extend superior processes to lower quality facilities.

5. Implement a proactive strategy during the initial 30-day HSR waiting period
   – Promptly explain the market dynamics and benefits of the transaction.
   – Provide the FTC/AG with immediate responses to their standard voluntary access letter.
   – If needed, meet to explain why the FTC should not issue a Second Request.
Future of Health Care Antitrust Enforcement

• 2016 election results unlikely to affect the level of antitrust enforcement in the health care sector
  – FTC/AGs will continue aggressive review of provider transactions
  – DOJ/AGs will continue to focus on health insurance mergers
• Possible increase in scrutiny of vertical transactions/agreements
  – *Highmark/West Penn* - DOJ closing statement explained in detail why it allowed the largest health insurer to acquire the second largest hospital network
  – DOJ scrutinizing payor/provider MFNs, other restrictions
Need for FTC/DOJ/AGs to Engage in Policy Work

- Enforcement alone is an incomplete “competition” policy
- Employers/consumers lack sufficient information to evaluate narrow-panel and risk-sharing networks
- Enforcement agencies should:
  - Work with the industry to study quality/cost metrics
  - Analyze mechanisms to improve transparency
  - Study and report on “efficient” network size and effective clinical protocols
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From 2007 to 2012, Mr. Soven was Chief of the Litigation I Section of the Antitrust Division of the Department of Justice. In this role, he was responsible for all antitrust investigations and enforcement actions that involved hospitals, physicians, and health insurance companies. He directed numerous investigations and prosecutions in these sectors, including United States v. United Regional Health Care System (N.D. Tex. 2011) and United States v. Blue Cross Blue Shield of Michigan (E.D. Mich. 2010). From 2004 to 2007, Mr. Soven was an Attorney Advisor to Federal Trade Commission Chairman Deborah Platt Majoras, where he advised the Chairman on investigations of and antitrust challenges to transactions involving hospitals, physicians, pharmaceutical companies, and medical device manufacturers, including Evanston Northwestern Healthcare (2007).

Mr. Soven is a Vice Chair of the ABA Antitrust Section’s Federal Civil Enforcement Committee and has served as a Senior Editor of the Antitrust Law Journal. He clerked for Judge Robert G. Doumar of the U.S. District Court for the Eastern District of Virginia. Mr. Soven earned his J.D. from the University of Virginia and B.A. from the University of Pennsylvania.