Healthcare Antitrust Bootcamp Webinar Series, Part II: Mergers, Affiliations, and Acquisitions

This webinar series is brought to you by the Antitrust Practice Group and is co-sponsored by the Physician Organizations (Physicians) Practice Group

October 13, 2011 · 12:00-2:00 pm Eastern

Presenters:
Joseph Miller, America’s Health Insurance Plans
Washington, DC, jmiller@ahip.org

Douglas C. Ross, Esquire, Davis Wright Tremaine LLP
Seattle, WA, douglasross@dwt.com

Moderator:
Christine L. White, Esquire, Federal Trade Commission
New York, NY, clwhite@ftc.gov
Two Merger Programs

- This program: law
- November program: process
Two Merger Programs

- This program: law
  - Mergers in healthcare
  - Legal framework for analysis
  - Analysis of a horizontal merger
- November program: process
Mergers in Healthcare

- Providers
  - Hospitals
  - Physicians
  - Ancillary providers (e.g. lab companies)

- Health plans

- Kinds of mergers
  - Horizontal
  - Vertical
Legal Framework

- Federal statutes
- Case law
- Federal enforcement agencies
  - Horizontal merger guidelines
  - Policy statements
  - Enforcement actions
  - Agency advice
- State enforcement
- Process
  - Hart Scott Rodino Act
Analysis of a horizontal merger

- Theories of competitive harm: unilateral and coordinated effects
  - Ability to raise price (lower quality), not actual exercise
- Analysis: usually prospective
  - Can be retrospective
Traditional Analysis

- Define a market and measure market shares as a method of inferring market power

- Market definition
  - General principle – reasonable substitutability
  - Hypothetical monopolist test
    - Small but significant and non-transitory increase in price ("SSNIP")
Product Market

- Hospitals
  - Cluster?
  - Service lines?
  - Outpatient facilities; ASCs
- Physicians
  - By specialty?
  - Is there overlap?
- Health plans
Geographic Market

- Patient flow statistics
  - Elzinga-Hogarty
Geographic Market

- Patient flow statistics
  - Elzinga-Hogarty
- Criticisms of patient flow statistics
  - Recent FTC complaints focus on sale of services to health plans
Market Power

- Market shares
- Herfindahl-Hirschman Index (HHI)
## HHI

<table>
<thead>
<tr>
<th></th>
<th>Share (%)</th>
<th>HHI</th>
<th>Post merger share (%)</th>
<th>Post merger HHI</th>
</tr>
</thead>
<tbody>
<tr>
<td>Hospital A</td>
<td>10</td>
<td>100</td>
<td>30</td>
<td>900</td>
</tr>
<tr>
<td>Hospital B</td>
<td>20</td>
<td>400</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Hospital C</td>
<td>30</td>
<td>900</td>
<td>30</td>
<td>900</td>
</tr>
<tr>
<td>Hospital D</td>
<td>40</td>
<td>1600</td>
<td>40</td>
<td>1600</td>
</tr>
<tr>
<td></td>
<td>100</td>
<td>3000</td>
<td>1000</td>
<td>3400</td>
</tr>
</tbody>
</table>
Significance of Increases in HHI

Below 1500
- Unlikely to have anticompetitive effects

1500-2500
- >100 points: potentially raise significant concerns, often warrant scrutiny

Above 2500
- 100-200: see above
- > 200: presumed likely to enhance market power (rebuttable)
Market Power

- But:
  - Assumes a reliable market definition
  - And, HHI is primarily useful for coordinated effects cases
    - Hospitals: differentiated products – unilateral effects more likely to be the theory of harm
  - Used as a screening mechanism
New Approaches

- Is market definition necessary?
  - Evanston
  - The new Horizontal Guidelines
  - Extension from *Indiana Federation of Dentists*

- What else can assist in determining market power?
  - Two-stage competition
  - Simulations
Efficiencies

- **Typical claimed efficiencies**
  - Acquired hospital will obtain acquiring hospital’s expertise
  - Substantial investment in one party
  - New services
  - Cost savings/avoidance of duplicative spending

- **How are they treated?**
  - Merger specific

- **Can efficiencies overcome a diminution in competition?**
  - When do they matter?
Ease of Entry

- Theory: is there a competitive response that would undermine an exercise of market power?
- Timely, likely, and sufficient
- Barriers to entry
- Questions
  - Can ASCs and other providers be a sufficient response to a hospital merger?
  - What barriers exist to physician entry?
  - Health plan mergers: can a small plan reposition to undermine competitive effects?
Failing Firm

- Two prongs
  - Failed – unable to meet financial obligations and could not reorganize in BR under Chapter 11
  - There is no less anticompetitive purchaser

- FTC investigation
  - Scott & White acquisition of Kings Daughter (Texas 2009)
Flailing Firm

- Hospital’s financial weakness or declining position may reduce competitive concerns
- **General Dynamics**
  - Past or current strength as a competitor is *not* good predictor of future
Vertical Mergers

- Examples
  - Hospital acquisition of physician groups
  - Health system acquisition of health plan

- Why the push to integrate?
  - Continuum of care
  - Influence physician behavior
  - Stark; fraud & abuse
  - Medicare reimbursement

- Theories of harm
A Brief History of Litigated Hospital Mergers/Issues

- 1980s – 1990s: Government litigated and entered into consent decrees on multiple hospital mergers
  - Three FTC cases
  - Two DOJ
  - One California
- Lost on:
  - Relevant geographic market
  - Nonprofit status
A Brief History of Litigated Hospital Mergers/Issues

- FTC retrenched, then:
  - Evanston
  - Inova
  - LabCorp
  - Lundbeck (Ovation)
  - Phoebe Putney
  - ProMedica

- Antitrust Division:
  - Health plan mergers
Other

- Small hospital safety zone
- State action
  - *Phoebe Putney*
- State COPA statutes
Sources of Evidence

- Data
- Testimony from customers, competitors, and others
- Internal documents
Internal Documents

Avoid:

- Merger will build “negotiating strength with payers.”

  *Highland Park management*
Avoid:

- Merger will “strengthen negotiation capability with managed care companies through merged entities.”

  *Evanston management*
Documents

- ProMedica offers “incredible access to outstanding pricing on managed care agreements. Taking advantage of these strengths may not be the best thing for the community in the long run. Sure would make life much easier right now though.”

  St. Luke’s CEO
Documents

“A ProMedica ... affiliation could still stick it to employers, that is, to continue forcing high rates on employers and insurance companies.”

St. Luke’s Marketing/Planning Director
Questions?
Reading

Hospital Merger Cases

- *In re Hospital Corporation of America*, 106 F.T.C. 361 (1985), aff’d, 807 F.2d 1381 (7th Cir. 1986)
- *United States v. Rockford Memorial*, 717 F. Supp. 1251 (N.D. Ill. 1989), aff’d, 898 F.2d 1278 (7th Cir. 1990)
Reading

Hospital Merger Cases (cont.)

- *FTC v. Freeman Hospital*, 1995-1 Trade Cas. ¶71,037 (W.D. Mo.), *aff’d*, 69 F.3d 260 (8th Cir. 1995)
- *FTC v. Tenet Healthcare Corp.*, 186 F.3d 1045 (8th Cir. 1999)
Reading

Hospital Merger Cases (cont.)


Reading

Other

- In the matter of the application for a certificate of public advantage by the Columbus Hospital and Montana Deaconess Medical Center, Great Falls, Montana (Montana Department of Justice, 1996)
Reading

Government Guidelines and Reports


