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# ANTITRUST ISSUES FACED BY ACCOUNTABLE CARE ORGANIZATIONS

## FOR THE NEW JERSEY HOSPITAL ASSOCIATION

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# ACOs – THE BENEFITS FROM ANTITRUST PERSPECTIVE

- Antitrust is ultimately concerned with how practices effect consumers, which in health care means patients/insurance subscribers.
- Most ACOs are procompetitive as they offer a network of medical providers that efficiently integrate their expertise to benefit patient care.
- ACOs promote patient/consumer welfare when they increase quality and/or lower costs.

# CAN ACOs RAISE ANTITRUST CONCERNS?

An ACO can raise antitrust concerns:

- When it wields market power.
- When its members integrate pricing operations: collective negotiations of price.

# WHAT IS MARKET POWER?

- A firm has market power when it has the "[a]bility to exclude competition or control price" through its actions.

- Market power Can be presumed where an entity possesses a substantial share of a relevant market.

# WHAT IS MARKET POWER?

- A relevant market is the "pie." It consists of the area in which a group of sellers/buyers compete. A relevant market has two dimensions:
  - Product: what products are interchangeable with the product at issue from consumer perspective? (e.g., are cardiology services and diagnostic imaging services interchangeable?)
    - The manner in which products are priced is a key factor in the product market question.
  - From which geographic area do most consumers buy the products at issue?

# WHAT IS MARKET POWER?

- In health care provider cases, a big issue is whether there are separate relevant markets for different types of insurance, i.e., separate markets for patients covered by commercial, government, no fault, etc.

# ARE THERE ACOs THAT CANNOT POSSIBLY WIELD MARKET POWER?

- The FTC/DOJ Statements on Antitrust Enforcement in Health Care give guidance.
    - Generally, a physician group that accounts for less than 20% of physicians in given specialty will not be deemed to have market power over health plans.

- But even small physician groups can have market power if they control a sufficient number of patients (via exclusives with insurance companies).

# WHAT ACTIONS TAKEN BY ACOs CAN RAISE ANTITRUST CONCERNS

- **Illegal price-fixing**. This can occur through the use of MFN clauses or collective refusals to deal.

- **Exclusive agreements** by entities with market power. These can foreclose competition in provider or insurance services.

- **Anticompetitive bundled pricing** by entities with marker power (i.e., anticompetitive predatory bundling). These can also foreclose competition on the merits.

# ILLEGAL PRICE-FIXING

- A collective refusal to deal by members of an ACO absent receiving preferential pricing (e.g., favorable reimbursement rates from insurers) may constitute illegal price-fixing.

- Most Favored Nation ("MFN") clauses may constitute illegal price-fixing demanded by or given to insurers.

    - See Compl., at 3-4, *United States v. Blue Cross Blue Shield of Michigan* (E.D. Mich., No. 10-CV-14155) (DOJ alleging that BCBS's MFNs guaranteeing that it would receive providers' best prices harmed competition).

# EXCLUSIVE AGREEMENTS

- Exclusive agreements may raise antitrust concerns if entered into by entities with market power.
    - See, e.g., *U.S. v. Microsoft Corp.,* (D.C. Cir. 2001) (affirming holding that Microsoft's exclusive agreements with Internet access providers, software vendors, and original equipment manufacturer essentially requiring the use of Microsoft's "Internet Explorer" browser violated the Sherman Act).

# EXCLUSIVE AGREEMENTS

- Exclusive arrangements in health care markets has been the focus of recent litigation:
    - *West Penn Alleghany Hosp. Sys. V. Univ. of Pittsburgh Med. Sys.*, (3d. Cir. 2010) (court holds that exclusive arrangement between allegedly dominant hospital system and insurer can be subject of Sherman Act Claim).

# EXCLUSIVE AGREEMENTS

- *Stand Up MRI et al. v. CareCore National, LLC* (E.D.N.Y.) ($40 million jury verdict finding dominant benefit manager controlled by group/cartel of radiologists liable for Sherman Act violations where organization excluded providers from health plans).

- *United States v. United Regional Health Care System* (N.D. Texas) (Antitrust Division sues dominant hospital by economically coercing insurers into exclusivity via bundling arrangements).

# EXCLUSIVE AGREEMENTS

- Why does antitrust care about exclusive deals?
  Exclusive agreements used by dominant hospitals/insurance companies may raise antitrust concerns because they can:
    - Lead to market-wide effects on price.
    - Limit patient access to particular medical services.
    - Foreclose providers from effectively competing.

# PREDATORY BUNDLING

- Bundled pricing can lead to lower prices and be procompetitive.
- But steep bundling discounts offered by a dominant hospital on the condition that insurers will forego dealing with hospital competitors may be anticompetitive.
    - See, e.g., *United States v. United Regional Health Care System* (N.D. Tx.), in which a settlement agreement was reached prohibiting United Regional from entering into contracts that improperly inhibit health insurers from contracting with United Regional's competitors.

# ADVICE FOR ACOs

- If hospital is dominant in the relevant market (i.e., has large share in type of services):
    - It should be wary of entering into exclusive agreements or vertical merger (i.e., merger with insurer).
    - Have pricing reviewed by counsel to ensure that charges cannot be made that pricing is predatory.
    - Tie price increases to cost factors to dissuade enforcers from concluding that leveraging is occurring.

# THE GOOD NEWS ABOUT ACOs

- The PPACA authorizes the agencies most likely to enforce antitrust laws to develop waiver programs and safe harbors in order to implement the ACO concept.

- The FTC is trying to clarify antitrust guidelines for ACOs, and the Justice Department's antitrust division has offered to provide an expedited antitrust review process for ACOs.

# BUT. . .

- Safe harbors and guidelines do not provide immunity from private suits.

- As ACOs are often made up of competitors that are collaborating, it may be difficult for them to convince courts to dismiss antitrust challenges prior to the costly discovery phase of litigation.

# FINAL CONCLUSIONS

- Consider whether your entity has a significant market share in its geographic area in any particular medical service.
- If so, beware of:
  - Illegal price-fixing, such as through MFN clauses or collective refusals to deal;
  - Exclusive agreements that foreclose competition or otherwise restrain trade, particularly those with an impact on price and/or patient access to medical services;
  - Anticompetitive predatory bundled pricing/discounts.
- If not, beware of competitors, particularly dominant hospitals and insurers in the area, engaging in the above-described conduct.