EPSTEIN BECKER GREEN
health care & life sciences
CLIENT ALERT

Federal Trade Commission and Department of Justice Hold Joint Workshop on Payment Models and Competition Within the Health Care Sector

by Patricia M. Wagner, Daniel C. Fundakowski, Selena M. Brady, and M. Brian Hall, IV

April 2015

On February 24-25, 2015, the Federal Trade Commission ("FTC") and Antitrust Division of the Department of Justice ("DOJ") co-hosted a second public workshop as part of the "Examining Health Care Competition" series to study recent developments related to provider organization and payment models affecting competition in the health care sector. The workshop explored five key themes: (1) provider network design, contracting practices, and regulatory activity; (2) early observations regarding health insurance exchanges; (3) early observations regarding accountable care organizations ("ACOs"); (4) alternatives to traditional fee-for-service payment models; and (5) trends in provider consolidation.

Opening Remarks Emphasize Enforcement Stance of Agencies

Opening remarks on the first day of the workshop were provided by FTC Chairwoman Edith Ramirez, who reiterated that health care remains one of the FTC's top priorities and that the Affordable Care Act ("ACA") does not supplant antitrust laws. She noted that the goals of the antitrust laws are fully consistent with those of the ACA and health care reform generally. The Chairwoman bolstered this point by lauding the FTC's recent success in the *St. Luke's* decision from the U.S. Court of Appeals for the Ninth Circuit, where the court affirmed the FTC's position that any procompetitive benefits resulting from integration between an Idaho hospital and a physician group could have been otherwise achieved short of an organizational merger.[1] Ms. Ramirez noted that the FTC recognizes how health care innovation has the potential to lower health care costs and improve quality and that the agency is continuing to examine new network designs, such as ACOs, alternative payment models, and other innovations. Finally, Ms. Ramirez commented on the agency's growing concern about consolidation—not merely

[1] See *Saint Alphonsus Medical Center - Nampa Inc. v. St. Luke's Health System, Ltd.*, No. 14-35173 (9th Cir. Feb. 10, 2015), *available at:* https://www.ftc.gov/system/files/documents/cases/150210stlukeopinion.pdf.

horizontally but also by firms in non-overlapping markets, such as acquisitions by urban hospitals of suburban hospitals, and vertical consolidation.

The second day of the workshop began with remarks from William Baer, Assistant Attorney General for the DOJ's Antitrust Division. Mr. Baer noted that, while the health care industry is evolving, the DOJ and FTC will continue to monitor the industry closely to ensure that new reforms and innovations do not stifle competition. He voiced his support for new payment models and delivery system reforms that reduce costs, particularly the growing use of tiered and narrow provider networks as a way to increase competition. Mr. Baer also noted that the DOJ is concerned with the increasing trend of hospitals acquiring other providers, and that it is grappling with distinguishing between the procompetitive and anticompetitive effects of such transactions. While the DOJ is supportive of mergers that do not result in increased prices or reduced competition, it will intervene in transactions that harm competition. Mr. Baer noted that the DOJ is more likely to pursue structural remedies instead of behavioral remedies.

The workshop panels were comprised of distinguished antitrust experts, including economists, legal scholars, and both government and private practice antitrust attorneys. Each panel focused on one of five themes; the salient remarks from each are described below.

1) Provider Network Design, Contracting Practices, and Regulatory Activity

This panel focused chiefly on narrow and tiered provider networks, which are becoming increasingly prevalent by payors to address the rising cost of health care. First, the panel noted how these networks are likely to become more common post-ACA due to the rollout of health insurance exchanges and because the customers are extremely sensitive to out-of-pocket cost. One panelist remarked that almost 50 percent of all insurance networks sold through health insurance networks are narrow. Second, the panel noted that tiered network products may become preferable to narrow network products because they allow consumers to make provider choices in real time at the point of service—not in advance during annual enrollment. Third, the panelists emphasized the need for network transparency and consumer education, noting that consumers often lack a basic understanding about network adequacy and that consumers need good information to make informed decisions. Finally, the panelists discussed market power, and how these networks may trigger competition concerns if they increase market power and enable networks to command anticompetitive prices or contract provisions, such as anti-steering, anti-tiering, bundling, gag clauses, carve-outs, or exclusive dealing clauses.

2) Early Observations Regarding Health Insurance Exchanges

This panel offered preliminary observations on the impact of health care exchanges on competition. The panelists noted that, because health care exchanges are new and not much data on competition exists, it is difficult to do much more than comment on trends. Based on two years' worth of data, an estimated 11-12 million people have purchased health insurance through the exchanges. One of the trends discussed was consumer

price sensitivity, and the panelists noted that the expensive plans commanded a significantly smaller market share than the lower-priced plans. Another trend discussed is that new entrants in the exchanges are able to rapidly obtain significant market share by charging a lower price than competitors. One of the panelists remarked that this consumer inertia could result in insurers charging artificially low premiums to gain initial market share and then raising prices later, when consumers are unlikely to switch plans.

3) Early Observations Regarding Accountable Care Organizations

This panel discussed the success of ACOs to date at providing higher-quality care at a lower cost due to increased provider coordination. The panelists provided an overview of the various ACO models, including the government's Pioneer ACO Model and Medicare Shared Savings Program as well as various private ACOs. While ACOs have seen marked success, the panelists noted that the ACO model is still nascent. There is no "one size fits all" model for ACOs, and some ACOs have found success focusing on infrastructure investment, while others have focused on developing a collaborative culture with physicians in leadership positions. Although a government goal for ACOs continues to be increasing the number of participating providers, as we previously reported,[2] there is also an effort underway to push providers to take on higher levels of risk.

4) Alternatives to Traditional Fee-for-Service Payment Models

This panel provided an overview of various new payment models that are designed to reward quality and lower costs, including bundled payments, pay for performance, and patient-centered medical homes. The panelists noted that no one payment model appears ready to supplant fee-for-service models and that we are more likely to see various combinations of these models blended together. While adoption of these new models is expected to provide savings and improved quality in the first few years, the panelists noted that gains become much more difficult once the easy areas for improvement (the "low hanging fruit") have been addressed. Organizations that are already operating at a high-quality/low-cost level find it very difficult to achieve savings, which has also been the same experience for ACOs.

5) Trends in Provider Consolidation

This panel examined the issue that was mentioned in almost every workshop session—the increasing trend of provider consolidation. The panelists discussed a range of issues, including provider-hospital and provider-health plan arrangements that are becoming more prevalent. Cross-market consolidation among providers that do not compete in the same geographic market is also increasing, but panelists noted that more research is necessary in this area before any enforcement actions should be pursued. One of the most significant research findings presented by the panelists during this session is that provider consolidation does not result in lower costs or greater

[2] See the Epstein Becker Green Client Alert titled "'Next-Generation ACO' Model Is CMS's Newest Effort to Encourage More ACO Risk," available at http://www.ebglaw.com/publications/next-generation-aco-model-is-cmss-newest-effort-to-encourage-more-aco-risk/.

efficiencies, with some markets showing that the exact opposite is true. This raises the question as to why providers would pursue consolidation when the same kind of results can be achieved through more traditional contracting arrangements (e.g., a physician-hospital organization, an independent practice association, etc.)

The panelists noted that provider consolidation typically increases when there is uncertainty about the regulatory environment, but they categorically rejected the notion that the ACA is forcing providers to consolidate. Instead, the panelists contended that the Medicare hospital outpatient provider-based ("HOPB") fee schedule is currently the largest driver of consolidation among providers (an issue noted in several sessions). Because hospital-employed physicians receive a higher reimbursement under the HOPB fee schedule compared to the physician fee schedule, independent physicians find it difficult to compete against practices that have been purchased by hospitals. Finally, the panelists remarked that CMS does not contemplate the competitive impact of its payment policies on the market and its participants, and some panelists noted that this would be a prudent change.

Summation Roundtable

The final session of the workshop discussed several of the key themes that arose during the two days of discussion. The panelists addressed the *St. Luke's* decision and continued the debate over the impact of the Ninth Circuit's decision and the effectiveness of the efficiency justification in future merger challenges. The panelists also discussed the need for the FTC and DOJ to continue to allow for the implementation of new health care delivery systems and payment models and to focus on the promise of ACOs and other innovative arrangements to help lower costs while increasing care quality. The anticompetitive effects of CMS's payment policies were also touched on again by the panelists, with some advocating for increased coordination between CMS and the FTC and DOJ. The panelists also pointed out that federal regulators should work with state regulators and assist them in promoting competition in their markets, particularly since so much regulation of the health care industry is conducted at the state level.

Key Workshop Takeaways

The joint workshop provided valuable and practical insight into the views of the federal antitrust regulators and various antitrust experts. The following are several of the key perspectives and ideas broached during the workshop:

- Amidst the many new and novel payment models being piloted, the FTC and DOJ made it known that, while appreciating innovation, they are monitoring to ensure that these arrangements do not produce anticompetitive effects.

- Provider consolidation has become, and will remain, a major area of focus for the FTC and DOJ.

- Provider consolidation does not always result in lower costs or greater efficiencies, and traditional contracting arrangements between providers may be more advantageous.

- The goals of the antitrust laws are fully consistent with the ACA, and the FTC and DOJ will not allow providers to rely on the ACA as a means for stifling competition.

Parties interested in submitting written comments to the DOJ and FTC relating to the workshop may do so until April 30, 2015.[3]

* * *

This Client Alert was authored by **Patricia M. Wagner, Daniel C. Fundakowski, Selena M. Brady,** *and* **M. Brian Hall, IV**. *For additional information about the issues discussed in this Client Alert, please contact one of the authors or the Epstein Becker Green attorney who regularly handles your legal matters.*

[3] For more information on how to submit comments, please go to https://www.ftc.gov/news-events/events-calendar/2015/02/examining-health-care-competition and click the "Public Comments" tab under "Event Details."