

Sixth National ACO Summit

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Pre-Conference

12:40–1:40

PM

The FTC's Health Care Enforcement Program & Implications for ACOs

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Major Themes and Questions To Be Discussed During the Panel

1. Role of Quality as a Defense in Antitrust Reviews

Healthcare providers often say that collaborations with other providers will allow them to improve clinical quality of care and generate other pro-competitive benefits. In blocking St. Luke's acquisition of the Saltzer Clinic in Nampa, Idaho, two federal courts weighed in on the role of efficiencies in antitrust merger enforcement.

- What is the role of efficiencies in merger review after the *St. Luke's* decision?
- Is the FTC going to change how it evaluates efficiencies in light of the Ninth Circuit opinion?
- What is your view of the role that claimed quality improvements should play when considering whether a merger on balance is anti-competitive?
- What types of evidence should the merging parties provide in support of these claims?

2. Ways to Obtain Clinical Benefits: Contract vs. Merger

One issue that comes up frequently, in both agency review and in court decisions, is whether claimed benefits could be obtained without merging. The *St. Luke's* district court concluded that the efficiencies that St. Luke's hoped to achieve through the Saltzer acquisition could be achieved through less restrictive means (e.g., either independently or through other contracts).

- Why is this concept of "merger-specificity" part of the antitrust analysis?
- Do you agree with the approach the *St. Luke's* court took on this concept in its decision to block the merger? Why or why not?
- What facts would providers need to show that such efficiencies are not likely to be obtained through contract (or independently)?

3. Antitrust Exemptions and Immunities

Recently, the FTC has written letters to certain states voicing objections to exempting or immunizing providers for certain collaborations. For example, the FTC opposed provider collaborations in New York seeking exemptions under the state law from antitrust laws (see, e.g., Certificate of Public Advantage Applications filed under New York Public Health Law). Likewise, the FTC staff wrote a letter to a legislator in Oregon expressing concern about an antitrust immunity provision in a bill that seeks to promote more collaborative care through something called a primary care transformation initiative.

- What are the concerns regarding these antitrust exemptions?
- After the Supreme Court's decision in *NC Dental*, it may be that existing organizations are not sufficiently subject to "active state supervision" to excuse conduct under the antitrust laws. What are the next steps to ensure organizations receiving antitrust immunity from the state today are actually actively supervised? (FTC litigation, private litigation)?
- When would you advise healthcare organizations to seek an antitrust exemption when available under state law? What are the benefits to providers for doing so?
- Do you think healthcare is different from other industries, and more deserving of antitrust exemption?

4. Financial Condition of Providers

Another challenge faced by some healthcare providers, particularly by certain community hospitals, is fewer financial resources.

- How should the FTC take into account the financial condition of merging providers into its antitrust review?
- What facts or information should providers use to demonstrate that the merger is needed because one hospital is failing or flailing?

5. Vertical Healthcare Collaborations

In *St. Luke's*, the FTC did not pursue a vertical theory of harm (that is, the FTC was concerned about the combination of competing primary care physicians, and not about the combination of the hospital with the physicians). There are numerous vertical mergers, acquisitions, and other collaborations in healthcare today.

- When does it make sense to look at collaborations among different types of providers (e.g., hospitals and primary care physicians)?
- Historically the FTC has not seemed focused on vertically-integrated provider networks that have a substantial share of the providers, so long as it was truly nonexclusive. Many ACOs are building on this concept and include very large numbers of players in a market. Does this raise new concerns? Do we need to think differently about exclusives?

6. Price Transparency Legislation

Many states are considering passing (some already have enacted) laws to promote transparency – requiring the disclosure of payer contract terms, and/or transaction-specific price information.

- Do these bills help or hurt competition? Does it depend on market structure? How?
- In the past, the FTC has warned (in the 1996 Statements) that disclosing specific health care prices in markets with few players could lead to higher prices. What are the issues these bills raise for the antitrust authorities?
- Because of the FTC's concern, some of these statutes contain antitrust immunity provisions. What are the panels' thoughts about that?