Antitrust 101 for Health Care Joint Ventures

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More health care organizations are facing antitrust scrutiny by state and federal regulators. Take some precautionary steps before embarking on a joint venture.

The number of antitrust cases and investigations in the health care industry has increased during the past two years. Hospitals and their venture partners would be wise to carefully consider antitrust laws before they embark on a joint venture. While health care joint ventures come in many shapes and sizes, four issues commonly arise that organizations should be aware of. There are steps that can be taken to reduce antitrust risk before the venture opens its doors.

Why Antitrust Law Matters for Joint Ventures

The federal Sherman Act is the primary antitrust law in the United States, although each state has its own antitrust laws generally mirroring the Sherman Act. The Sherman Act prohibits agreements that unreasonably restrain trade and monopolization, attempted monopolization and conspiracies to monopolize.

The Sherman Act is enforced by the Federal Trade Commission (FTC), the U.S. Department of Justice, state attorneys general or private parties. Penalties for violating the Sherman Act include mandatory treble damages (three times the amount of the financial damages caused by the anticompetitive behavior) and the other side's attorneys' fees; injunctive relief designed to stop the anticompetitive behavior or to undo the violation through divestiture; or, for hard-core violations, criminal penalties, including jail time of up to three years and substantial monetary fines.

Joint ventures in health care can trigger antitrust concerns for two reasons. First, parties to a joint venture are typically (but not always) competitors in at least one service market, and the purpose of the venture is to derive some joint economic benefit by pooling resources and achieving economies of scale. However, the venture partners might continue to compete outside of the venture or with the venture itself, in which case antitrust laws will impose certain restrictions on conduct between the partners/competitors.

Second, given the trend of greater integration between hospitals and physicians, it is also possible that at least one partner to the venture might have or obtain market power—the ability to set prices above a competitive level for a significant time—in the relevant market. If that is the case, then the antitrust laws might impact the structure of the venture or determine whether the venture can go forward at all.

Four issues that commonly arise in health care joint ventures and that have antitrust implications are:

- knowing your competitors and market presence;

- establishing a justification for the venture;
- understanding the issues regarding who controls the venture; and
- recognizing limits on information sharing and implementing safeguards.

Competitors and Market Presence

A joint venture will be evaluated in the context of every market it affects, so the first step is to identify each such relevant market. A relevant market is simply the place where certain sellers and buyers of certain products or services meet. The difficulty comes in determining what those certain products or services are and where the sellers and buyers meet.

The relevant market consists of a relevant service market and a relevant geographic market. The relevant service market is that market of services that are reasonably interchangeable. For example, regulators have viewed family practitioners and internists within the same primary care service market. The relevant geographic market is the "area of effective competition where buyers can turn for alternate sources of supply" of the relevant service.

The relevant market answers the question "How far and to whom would a patient travel (or would a payer require a patient to travel) for the same services you are providing them?" Market share is a measure of a competitor's share of the relevant services within the relevant market. Antitrust enforcers become concerned when a provider's market share results in market power.

By knowing what the relevant market is, you will be able to understand the impact of antitrust law on the venture. For example, if the venture owners are competitors outside of the venture, then antitrust concerns arise in how the venture should be structured and how information relating to the venture should (or should not) be provided to the owners. If the venture owners do not compete with each other in any relevant market, antitrust concerns can still arise if the venture creates or enhances the ability to exercise market power.

Justification for the Venture

The parties' business reasons for entering the joint venture play a critical role as well. If the parties' only reason for the joint venture is to generate higher fees, then the parties should not be surprised to be on the receiving end of a lawsuit or government investigation.

One of the basic concerns of antitrust law and antitrust regulators is the effect of commercial activity on price. Does the activity result in higher prices? Does it result in static prices that limit output and choice for consumers? Although antitrust law is concerned with anticompetitive behavior resulting in reduced output, reduced quality and generally inefficient markets as well as price, price is more immediately visible and readily quantifiable—and drives plaintiffs to the courthouse.

In health care, the typical plaintiffs are providers excluded from a joint venture and commercial payers who are concerned that the venture will result in higher prices. Remembering this simple fact can help the prospective joint venturer avoid conduct that could result in antitrust violations.

This is not to say that a joint venture that is followed by higher prices has necessarily run afoul of the antitrust laws. Higher prices might be justified by the creation of a new service, and higher unit prices may result in an overall reduction in costs to consumers because of improved care and reduced utilization of services.

For example, the FTC chose not to challenge the activities of Greater Rochester Independent Practice Association (GRIPA), a physician-hospital provider network in New York state, despite the network's statement that it "seeks and expects to be able to contract at higher fee levels." The FTC believed that GRIPA's significant clinical integration activities would produce improved quality and lower total costs "(e.g., through elimination of unnecessary and inappropriate utilization of services)." The FTC's GRIPA opinion is illustrative of how a well-documented justification can explain what otherwise could be improper behavior.

However, parties to a joint venture should tread carefully in those instances where there is not a persuasive and verifiable justification for higher prices. The FTC's successful challenge to the merger between Evanston Northwestern Healthcare Corporation and Highland Park Hospital in Illinois explains why understanding the purpose of the venture is critical. The crux of the case was that, post-merger, the merged hospitals substantially raised prices. Although the merged hospitals claimed that the post-merger price increases were, in part, the result of improved quality, the FTC found insufficient evidence that this was the case, based on post-merger analysis and on the parties' justification for the merger.

In fact, the FTC found that statements made by hospital executives pre- and post-merger bolstered its case. For example, pre-merger, the hospitals described the merger as "an opportunity to join forces and grow together rather than compete with each other." Post-merger, hospital executives stated that "the larger market share created by adding Highland Park Hospital has resulted in better managed care contracts." These statements, along with evidence of price increases and no countervailing pro-competitive evidence, in the opinion of the FTC, resulted in a win for the government.

To avoid a similar outcome for your venture activity, the first step should be for the parties to identify and document the benefits of the joint venture and reasons the joint venture is necessary to accomplish such benefits.

- Will the venture achieve quality objectives that could not be achieved independently? If so, identify what those objectives might be and how the venture will measure them.
- Will the venture create a new service or deliver services in a different and more efficient manner?
- Will the venture provide increased access to a particular service for the community or a segment of the community?

For example, if the parties structure the venture to comply with a tax-exempt hospital's policies, undoubtedly the hospital's charity care policies will apply. Determine how the application of these policies will provide additional benefit to the community. Not only will identifying real benefits help defend against possible antitrust lawsuits, but you can use the evidence of such benefits for marketing to consumers and payers and for recruiting staff.

Control

Everyone brings something to a joint venture, whether it be capital, management expertise or clinical excellence. One thing that hospitals often bring to joint ventures is their relationships with commercial payers. The parties might simply assume that the partner with the best payer relationship will handle contract negotiations on behalf of the venture—that the venture will be included by that partner's existing, and preferential, contracts. Assuming this without structuring the venture correctly can result in a per se or automatic antitrust violation for price fixing. Although it might seem counterintuitive, the courts have held that an agreement between a joint venture and one of its members can be illegal if the member is also a competitor of the joint venture within the relevant market.

Fortunately, the parties can usually structure the venture to avoid this situation. Whether a venture partner and the venture are "unitary" or a single actor incapable of conspiracy depends on the degree of economic integration and unity of purpose existing between the venture partner and the venture.

Courts have struggled to determine when there is unilateral action between a venture partner and the venture, and therefore no antitrust liability, and when there is concerted action, and possible antitrust liability. As noted by one court, on one end of the spectrum of unilateral action to concerted activity are the parent and wholly owned subsidiary relationships, which are completely unilateral actors, and "somewhere in the middle of unilateral and concerted activity" are mergers and joint ventures. Ultimately, the issue of whether there may be antitrust liability is a matter of control.

To achieve the "complete unity of interest" and limit antitrust risk, the parties must structure the venture so control is given to the party that desires to treat the venture as it would its own subsidiary for contracting or other purposes. Elements of control may include whether the majority owner has the power to approve budgets, implement policies, approve major contracts, and appoint officers and key management personnel, along with whether the venture is perceived by the public as part of the majority owner's operations.

The issue of control can be a sticking point in joint ventures, especially between hospitals and physician groups. There may be business reasons why the parties do not want to structure the venture in a manner to provide sufficient control for antitrust purposes to one partner. If that is the case, then the parties must realize that the operations of the venture are independent of either party's other activities outside of the venture.

Limits on Information Sharing and Safeguards

Realizing that the joint venture activity is separate from that of an owner's other activities is difficult but crucial. While partners to a venture may agree to provide a particular service, the partners might still be competitors outside of the venture or even with the venture. This type of scenario requires venture partners to consider what, if any, information is off-limits for discussion and who should have access to joint venture information.

Sharing competitive information, such as fee schedules, between joint venture partners increases the possibility of anticompetitive illegal behavior—specifically, the ability to fix prices in the markets where the parties continue to compete outside of the joint venture. The general rule should be to resist giving sensitive competitive information to the joint venture or exchanging it with your venture partners. Communications should be focused on the goals of achieving the purpose of the joint venture. Disseminating competitively sensitive information and communications about competition outside of the joint venture are rife with antitrust concerns.

Joint venture partners should agree to—and document—communication guidelines concerning competitively sensitive information. The partners may still discuss the financial goals of the joint venture, the revenue distribution between the partners, marketing of joint venture services, or pricing of the joint venture's services (as opposed to the pricing of each partner's and the joint venture's services).

Being able to predict financial performance of the joint venture is an important objective for the partners of a joint venture. To the extent the joint venture requires the partners to provide price-related data, the partners should provide only aggregate price data. Aggregate data avoids the significant risks associated with the exchange of pricing schedules while providing the partners some understanding of the joint venture's projected performance.

The partners should adopt a bright-line rule of not sharing specific payer rates: no exchange of fee schedules. For all other potentially sensitive information, a simple test is to ask yourself this question when faced with a request to provide information: "Would I be able to reasonably determine what my partner's (and current competitor's) rates are by receiving the same type of information my partner wants to receive from me?" If the answer is yes, then you should not provide (or ask for) such information without guidance from legal counsel.

In addition to limiting the type of information provided to the joint venture or among partners, the joint venture should maintain appropriate safeguards to prevent the exchange of sensitive competitive information between the partners. An example of a safeguard is for the joint venture to either have its own employees, who will handle competitive information, or to use employees of the partners designated to act on behalf of the joint venture only, and who will not disclose such sensitive information to any of the partners.

Planning Ahead

Because of the position of health care in the economy and the potentially severe consequences for violations of the antitrust laws, health care venturers should consider antitrust law as carefully as they would Stark or the anti-kickback statute. Recognition of the impact of antitrust laws on joint ventures and some additional planning will help you sleep better at night and allow you to focus on caring for the first patient who walks through the joint venture's doors.

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