

Blog Post

Healthcare Antitrust – What to Expect in 2021

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The year 2020 was an eventful one in the world of healthcare antitrust. The year began with the announcement of the precedent-setting settlement of the California Attorney General’s action against Sutter Health and ended with the settlement of multi-district antitrust litigation against the Blue Cross Blue Shield Association (and its member Blues). Along the way, Congress passed legislation repealing the antitrust protections that health insurers had enjoyed for 75 years under the McCarran Ferguson Act, the Federal Trade Commission lost its first hospital merger challenge in many years, and the Department of Justice Antitrust Division made good on its threats to bring criminal antitrust actions in healthcare. After such an eventful year, what is 2021 likely to bring in the way of further developments? Look for these issues to dominate the healthcare antitrust headlines in 2021:

A New Administration Brings New Leadership to Federal Antitrust Enforcers

President Biden will quickly be able to set a new agenda for federal antitrust enforcers with the appointment of new leadership at both the Department of Justice Antitrust Division and the Federal Trade Commission. While the departure of Makan Delrahim, who led the Antitrust Division, was anticipated, the decision by Joseph Simons, Chairman of the Federal Trade Commission, to

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resign was not as certain. Simons' term was not scheduled to expire for several more years and, while President Biden certainly could have named another Commissioner the new Chair, Simons could have remained a commissioner. However, his decision to resign, along with the announcement that another commissioner – Rohit Chopra – will also be leaving his post to chair the Consumer Financial Protection Board means that the FTC will see significant leadership changes in 2021 as well.

McCarran Repeal Repercussions

For 75 years, the McCarran Ferguson Act has provided health insurers with an exemption from the federal antitrust laws for conduct that constituted “the business of insurance,” so long as it was “subject to state regulation” and did not constitute an act of “boycott, coercion or intimidation.” With President Trump signing the “Competitive Health Insurance Reform Act” into law on January 13, the exemption no longer exists. And, while the scope of that exemption has been watered down, to some degree, over the last decade, its existence served not only to chill the filing of many potential antitrust cases against health insurers, but also often constituted a winning defense to those that were filed. So, look for a possible uptick in antitrust cases against health insurers in 2021.

Increased Attention to Healthcare Provider Mergers at the State Level

In 2020, legislation was introduced in California (S.B. 677) that would have required Attorney General approval of mergers between healthcare providers. Had the bill passed, California would have joined only Washington and Connecticut as states requiring such approval. In only the first few weeks of 2021, similar legislation has been introduced around the country – In Indiana, for example, as H.B. 1421 – that would require the State Attorney General's pre-approval of healthcare mergers. Look for more states to consider such legislation going forward, and even in states without such laws, expect State antitrust

enforcers to be active in this space, both in conjunction with federal enforcers and on their own initiatives.

Retrospective Reviews of Consummated Deals

In the Spring of 2020, the FTC announced that further study of previously consummated healthcare deals was warranted to determine whether, in fact, these transactions had anticompetitive consequences. To that end, the FTC recently announced that it had sent requests for information to several health insurers, seeking information about the prices charged by providers for their services. In particular, the FTC stated that it was interested in determining whether provider mergers in local markets had led to higher prices. Expect more on this issue as the health insurers begin to provide the requested information to the FTC and its economists analyze the data received.

Criminal Enforcement Actions in Healthcare

Over the last several years, the DOJ Antitrust Division has repeatedly cautioned that “hardcore” antitrust violations in healthcare would be met with criminal enforcement actions, and in the Spring of 2020, as the COVID-19 crisis was beginning, the DOJ Antitrust Division published guidance that included a warning that they were closely watching healthcare labor markets for anticompetitive behavior as well. True to their word, the Antitrust Division brought its first criminal antitrust cases in healthcare in the latter half of 2020. Having “broken the ice” on such actions in 2020, look for additional enforcement in this area in 2021.

Repercussions of the BCBSA Settlement

In November of 2020, a proposed settlement of the Blue Cross Blue Shield Association’s multi-district antitrust litigation was granted preliminary approval by the Court, bringing to an end eight years of litigation over whether restrictions contained it

BCBSA's license agreements with its Blue Cross licensees were anticompetitive. While the settlement does not include any admission of liability on the part of the Blues, it does contain injunctive relief provisions that are intended to stimulate Blue v. Blue competition in local markets (among other things). Final approval of the settlement is likely to be granted in the Spring of 2021, so look for developments in the way health insurance markets are operating later this year.

Will the FTC Rebound from its Hospital Merger Challenge Loss?

As noted above, in November the FTC lost its challenge to the Thomas Jefferson/Albert Einstein Northern Philadelphia hospital merger. This was the FTC's first loss of a hospital merger challenge in many years (while the FTC did lose a challenge at the trial level several years ago, that loss was erased on appeal and the challenged merger was subsequently abandoned by the parties). Over the last ten years, the FTC's use of detailed economic evidence to support their merger challenges was pointed to as a strong contributing factor to their trial successes, but the Court in the North Philadelphia case appeared to be much less interested in that evidence than the parties' documents describing the rationale for the deal. Will the FTC change its approach when litigating hospital mergers in 2021, or consider the North Philadelphia case an anomaly? In 2021 we should learn the answer to that important question.

Continued Focus on Contracting Practices by "Dominant" Health Systems

While the primary focus of the antitrust laws has always been, and will continue to be, on alleged agreements among competitors that adversely impact consumers, over the last several years greater attention has been given to single-firm conduct that has anticompetitive effects. For example, the Antitrust Division brought actions against Blue Cross of Michigan and Carolinas Health

System (now Atrium) for allegedly using contracting practices in anticompetitive ways. More recently, the California Attorney General just settled its action against Sutter Health that raised similar arguments. Particularly with even greater attention being given to single-firm conduct in the high-tech industries, expect continued interest from federal and state regulators in the competitive effects of actions taken by “dominant” local and regional health systems.

Given all of these issues, expect that healthcare antitrust will continue to be a priority for federal and state antitrust enforcers in 2021 and that private actions based on these same theories/issues will also return with a vengeance. Stay tuned.

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