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Between the ACA and Antitrust Enforcers: A Rock and a Hard Place or an Opportunity?

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With the Supreme Court having resolved the constitutionality of the individual mandate component of the Patient Protection and Affordable Care Act ("ACA"), interested parties are now turning their attention to trying to divine how the ACA, mandate and all, will work in practice, as it gets fully phased in over the next several years. One refrain we have been hearing is that the ACA will push health care organizations to consolidate and that this push is in direct conflict with the DOJ and FTC's resurgent efforts to vigorously enforce the antitrust laws in the health care industry. As antitrust attorneys, we have several reactions to this statement: (1) we need to unpack what is meant by consolidation because (2) different types of consolidation have different antitrust implications that (3) health care organizations considering a merger need to understand.

Since the passage of the ACA, experts have disagreed over the impact it will have on competition in the health care industry. In a recent example, in May of this year, Congress held a hearing entitled, "Health Care Consolidation and Competition after PPACA" to address just this issue. The chairman of the Judiciary Committee[2] and witnesses associated with the American Enterprise Institute[3] and the Heritage Foundation[4] argued, among other things, that various provisions of the ACA will create incentives for health care organizations, both providers and insurers, to consolidate their operations, leading to a decrease in competition and harm to consumers. In opposition, Professor Thomas Greaney of Saint Louis University College of Law argued that the trend in increased market concentration in health care stretches back decades before the advent of the ACA and that the ACA itself, whether it will lead to consolidation or not,

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[2] Health Care Consolidation and Competition After PPACA": Hearing Before House Subcommittee on Intellectual Property, Competition and the Internet (statement of Professor Scott Gottlieb) *available at* http://judiciary.house.gov/hearings/Hearings%202012/Gottlieb%2005182012.pdf.

[3] Health Care Consolidation and Competition After PPACA": Hearing Before House Subcommittee on Intellectual Property, Competition and the Internet (statement of Edmund F. Haislmaier, Senior Research Fellow Center for Health Policy Studies, The Heritage Foundation) Intellectual Property, Competition and the Internet United States House of Representatives, *available at* http://judiciary.house.gov/hearings/Hearings%202012/Haislmaier%2005182012.pdf.

[4] Health Care Consolidation and Competition After PPACA": Hearing Before House Subcommittee on Intellectual Property, Competition and the Internet (statement of Lamar Smith, Chairman Judiciary Committee), *available at* http://judiciary.house.gov/news/Statement%20IP%20Health%20Care%20Consolidation.html.

promotes competition in a number of ways, including through its creation of health care exchanges and fostering of new delivery systems.[5]

This debate has understandably raised concerns among industry participants about whether they are about to find themselves between Scylla and Charybdis, urged by one part of the federal government to merge while another part of it lies in wait, ready to pounce at any hint of an increased market share. Whatever the ultimate merits of the differing views on the impact of the ACA on incentives to consolidate, we feel it important to be precise about the meaning of consolidation, as some of the previous debate has failed to do.

As we will see in the discussion below, not all consolidation is created equal. There are, in fact, two principle forms of consolidation that the ACA may encourage. First, there is the traditional merger: As discussed above, according to some, the various incentives and regulatory burdens imposed by the ACA are likely to increase the need for market participants to rein in their costs, prompting smaller actors, whether providers or insurers, to merge to remain competitive. But consolidation also can refer to increased provider collaboration and integration in the form of Accountable Care Organizations ("ACOs"), which are specifically sanctioned under the ACA and tied to the Medicare Shared Savings Program, whereby providers can share in savings for the Medicare program resulting from ACOs' management of care. Armed with the understanding that there is not just one monolithic form of consolidation, we next turn to what the DOJ and FTC have signaled about their views in this arena.

As has been reported widely, the antitrust agencies have been especially aggressive—and successful—in challenging health care mergers over the last several years. Investigations by the DOJ and FTC have scuttled a proposed health insurance merger in Michigan in 2010[6] and a proposed hospital merger in Rockford, Illinois in 2012,[7] and the FTC also recently issued an order forcing the unwinding of a consummated merger of health systems in Ohio.[8] We have even seen the Supreme Court take up its first hospital merger case in many years, after the FTC was granted certiorari in the *Phoebe Putney* case.[9]

What effect, then, will the ACA have on this uptick in merger enforcement in health care? In other words, will the ACA prompt the antitrust agencies to withdraw in the face of a clear statutory imperative encouraging mergers? The answer, in short, is "probably not." While there

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[5] Health Care Consolidation and Competition After PPACA": Hearing Before House Subcommittee on Intellectual Property, Competition and the Internet (statement of Thomas L. Greaney), *available at* http://judiciary.house.gov/hearings/Hearings%202012/Greaney%2005182012.pdf.

[6] Press Release, Department of Justice, Blue Cross Blue Shield of Michigan and Physicians Health Plan of Mid-Michigan Abandon Merger Plans (Mar. 8, 2010), *available at* http://www.justice.gov/atr/public/press_releases/2010/256259.htm.

[7] Press Release, Federal Trade Commission, OSF Health care System Abandons Plan to Buy Rockford in Light of FTC Lawsuit; FTC Dismisses its Complaint Seeking to Block the Transaction (April 13, 2012), *available at* http://www.ftc.gov/opa/2012/04/rockford2.shtm.

[8] Press release, Federal Trade Commission, Citing Likely Anticompetitive Effects, FTC Requires ProMedica Health System to Divest St. Luke's Hospital in Toledo, Ohio, Area (March 28, 2012) *available at http://www.ftc.gov/opa/2012/03/promedica.shtm*.

[9] *F.T.C. v. Phoebe Putney Health System, Inc.*, 63 F.3d 1369 (11th Cir. 2011), *cert granted,* 567 U.S. __ (U.S. Jun. 26, 2012) (No. 11-1160).

are a variety of provisions in the ACA that may cause some actors to examine merging as a way to control costs, and while a goal of the ACA is certainly increased integration of care, there is nothing in the ACA that specifically urges parties to merge. Accordingly, the agencies have taken the view that nothing has changed with respect to health care mergers post-ACA. As FTC Chairman Leibowitz has explained, "there is nothing in the Affordable Care Act that suggests that hospitals need to merge to become ACOs and CMS has made that clear in its regulations. We will continue to analyze hospital mergers under our merger guidelines."[10] DOJ too has trumpeted its recent efforts in the industry and pledged its "commitment to going to court to block those health insurance mergers that will substantially reduce competition and harm consumers."[11] Thus, the agencies have hung their collective hat on the absence of any command to merge in the language of the ACA, and are feeling unencumbered in their quest to hunt down anticompetitive health care mergers.

By contrast, the agencies have used far less bellicose language in their comments regarding ACOs. As we have written about previously in this space, there is a new antitrust regime in place with respect to ACOs, spelled out in a joint FTC/DOJ policy statement released in October of last year.[12] This policy statement was crafted in coordination with the Center for Medicare and Medicaid Studies ("CMS") and, in its preamble states that the agencies, "recognize that ACOs may generate opportunities for health care providers to innovate in both the Medicare and commercial markets and achieve for many other consumers the benefits Congress intended for Medicare beneficiaries through the Shared Savings Program" and thus intended to create a policy to "maximize and foster opportunities for ACO innovation and better health for patients."

This conciliatory tone has persisted: In a speech in March 2012, Sharis Pozen, the then-Acting Assistant Attorney General, DOJ Antitrust Division, articulated the agencies' desire to strike a balance, stating that the Policy Statement, "seeks to help providers form procompetitive ACOs that can benefit both Medicare beneficiaries and patients with private health insurance while protecting health care consumers from higher prices and lower quality."[13] Chairman Leibowitz also sounded a similar note when he stated that the FTC's goal is "to help health care providers form cooperative associations that have the potential to achieve efficiencies without running afoul of the antitrust laws."[14] ACO's, then, appear to represent an exception to the agencies' otherwise aggressive stance toward collaboration among competitors in the health care industry, as long as they are not seen as enhancing provider market power.[15]

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[10] Are Titanic Health Care Costs Sinking Us? What the FTC is Doing to Keep Patients Afloat. Remarks of FTC Chairman Jon Leibowitz (As Prepared for Delivery) Antitrust in Health care Conference, American Bar Association/American Health Lawyers Association, May 3, 2012 [hereinafter "Leibowitz, May 3 remarks].

[11] Competition and Health Care: A Prescription for High-Quality, Affordable Care. Remarks as Prepared for the World Annual Leadership Summit on Mergers and Acquisitions in Health Care, Sharis Pozen, March 19, 2012 [hereinafter "Pozen, March 19 remarks"].

[12] Statement of Antitrust Enforcement Policy Regarding Accountable Care Organizations Participating in the Medicare Shared Savings Program, 76 Fed. Reg. 67026 (Oct. 28, 2011), *available at* https://www.federalregister.gov/articles/2011/10/28/2011-27944/statement-of-antitrust-enforcement-policy-regarding-accountable-care-organizations-participating-in [hereinafter "FTC/DOJ Joint Policy Statement"].

[13] Pozen, March 19 remarks.

[14] Leibowitz, May 3 remarks.

[15] *See* FTC/DOJ Joint Policy Statement.

So, where does that leave us? For insurers, it leaves us in about the same place as before the passage of the ACA. Whatever your incentive to merge, the DOJ appears ready to apply the same level of scrutiny it has applied over the last several years, and "Obama made me do it," seems unlikely to sway that thinking. However, insurers may look to commentary like Professor Greaney's to help find new pro-competitive justifications for merging. For example, if a merger better enables two insurers to offer a variety of low cost plans through the health care exchanges or if the merged entity will be in a better position to experiment with new reimbursement models, the parties can argue that the merger will further the goals of the ACA.

With respect to providers, who, unlike insurers, have the choice of merging or affiliating with an ACO, one obvious question is: Which is better from an antitrust perspective? Of course, this will be a case-by-case assessment, but there are some general points to consider. On one hand, merger, at this juncture, offers a somewhat greater degree of predictability, at least in a process sense, and in terms of how likely one of the agencies will be to challenge a particular transaction; the ACO process is new, so we do not have much experience from which to draw. On the other hand, we have seen ample evidence—and heard from both agencies—that they are looking to enforce the antitrust laws aggressively with respect to health care mergers, and, as noted above, they are on a winning streak; with respect to ACOs, the agencies will likely be treading more carefully, not wanting to undermine a signature feature of the ACA.

This dichotomy between the agencies' emphasis on going after health care mergers and wanting to give ACOs room to develop may mean that two providers integrating through an ACO may have a better chance of avoiding an antitrust challenge than if they had decided to merge, assuming the ACO is structured correctly. We should note here that the process of becoming an ACO subjects ACO participants to substantial scrutiny and monitoring, so it is not the case that forming an ACO allows providers to escape antitrust investigations entirely. Nevertheless, while pre-ACA, smaller providers who could not keep up with rising costs may have had to look to merge, such providers now have an additional option, namely affiliating with an ACO. Such providers should take advantage of this added choice and weigh the costs and benefits of each option carefully.

While the back and forth about whether the ACA will lead to greater consolidation and whether that is a good or bad thing remains an interesting debate, we feel confident that, whatever the answer, the agencies will not be persuaded to clear a merger or an ACO simply because the parties felt as if the ACA forced them into it. Going a step further, it may be altogether incorrect for health care organizations to conceive of the ACA as putting them in an untenable position between an administration pushing for increased mergers and the antitrust agencies' fervor for blocking health care mergers The same goals that animate the administration's push for consolidation in the health care industry, namely greater efficiency, lower costs, and higher quality care, would be considered important pro-competitive justifications for a merger on which the agencies would likely look favorably. Thus, the savvy health care organization considering merger or ACO affiliation should ponder to what extent it can characterize its goals as being in concert with those of the ACA; perhaps such a mindset can aid parties in harmonizing what at first appears to be the very disparate treatment health care mergers are accorded under the ACA and by the antitrust agencies.