

State Center Health Care Antitrust Workshop – April 9, 2018

Outline for Panel 2 – Investigating with Limited Resources

Block 1: Keeping an Eye and Ear on the State Health Care Marketplace.

1. *Question: How do you determine what’s going on in the local marketplace?.....3*
2. *Question: What about physician group acquisitions, which are not always well publicized? What are some ways to keep informed of these transactions?.....3*
3. *Question: What can you do to prepare in advance, before a deal is announced?.....3*
4. *Question: How to you stay current about your local health care market?.....4*

Block 2: Screening a Transaction with Limited Resources.

1. *Question: What is the difference between an initial screening and a full blown investigation?.....5*
2. *Question: How do you conduct an initial screening? What is the general methodology?.....5*
3. *Question: What data and resources are required for an initial screening and where can you find it and what will it cost?.....6*
4. *Question: How do you screen for more traditional hospital mergers (inpatient), versus, transactions with outpatient components and/or vertical components such as physician groups merging; a health care system acquiring a physician group; or merger of already vertically integrated health care systems?.....8*
5. *Question: How do you know whether economic assistance is necessary for initial screening and, if so, what will it cost and where can you find it?.....9*
6. *Question: Who can provide initial assistance?.....9*

Block 3: Conducting a Full-Blown Investigation with Limited Resources.

1. *Question: How do you decide which matters are worth the expenditure of limited investigative resources?.....10*
2. *Question: What resources are necessary for an investigation (beyond info collected for screening? Where to do you find it, and how to do you go about collecting it?.....10*
3. *Question: What discovery should you seek from the subjects of the investigation, and how do you go about it?.....11*
4. *Question: What are some common tactics and justifications that should you expect to hear from the subjects of the investigation?.....11*
5. *Question: Is economic assistance necessary for a full investigation, and, if so, why, what will it cost, where can you find it, and how do you go about lining up an expert?.....12*
6. *Question: How much assistance can you expect from federal agencies?12*
7. *Question: What resources are generally available to guide merger analysis?.....12*
8. *Question: What resources are available to guide affiliations short of mergers?.....12*

Block 4: Being Proactive and Effective without Litigation.

1. *Question: If the investigation reveals anti-competitive concerns, what strategies can be used by states to be effective in preserving competition without litigation?.....13*
2. *Question: How can states be proactive and effective in the local health care marketplace, outside of investigation and litigation?.....13*

Block 1: Keeping an Eye and Ear on the State Health Care Marketplace.

Question: How do you determine what's going on in the local marketplace?

- Use publicly available sources to get overview of health care market(s)
 - Prior litigations
 - Obtain data from trade associations: hospital assoc., medical societies, etc.
 - Conduct informational (non-investigational) interviews of local health insurance brokers, academics, state regulators who might have insights.
 - Health care newsletters on the local level.
 - Determine what data is collected/maintained by the state (e.g., hospital discharge data, hospital financial reports, physician community needs assessments, network adequacy reports, certificate of need reporting, licensing bodies for physicians and facilities such as ASCs, APCDs)
 - Develop relationships with academics, brokers, insurance commissioner staff and health regulators who may have knowledge about health care markets
- Use public and news sources for learning about transactions (e.g. Becker's, State of Reform (for the NW region). business journals, google news alerts)
- Read trade press and health care newsletters on the local level
- Develop relationships with other state agencies and stakeholders, such as health policy commissions; charitable trust units, etc.
- Gain understanding of your local market; market studies. What players are already of significant size? Where are the competitors located and what patient populations do they serve?

Question: What about physician group acquisitions, which are not always well publicized?

What are some ways to keep informed of these transactions?

- Relationships with provider systems – they may volunteer information about acquisitions by competitors that may impact their own entity.
- Some states have notice requirements; Massachusetts, also adopted by Connecticut and Washington. attempted bill.
- Massachusetts notice requirements include physician groups over ~10 physicians.
- Relationship with payers.
- State payer association representatives

Question: What can you do to prepare in advance, before a deal is announced.

- Get familiar with health care antitrust law, health care industry, available resources.

- Review available handbooks, federal antitrust guidelines.
 - Statements of Antitrust Enforcement Policy in Health Care (1996)
 - Improving Health Care: A Dose of Competition (FTC & DOJ 2004)
 - Miles Treatise - Healthcare and Antitrust Law Principles and Practice
 - FTC advisory opinions.
- Talk to colleagues in other enforcers/regulators: other states (NAAG Healthcare Antitrust Group); federal sources.
- Be aware of the different kinds of combinations & markets:
 - Mergers and joint ventures.
 - Horizontal, vertical, cross market.
 - Hospital/acute; health care delivery systems; physician practices; ancillary services.
- Figure out who are the stakeholders: providers (hospitals; systems; independent physician groups); commercial payers; brokers.
- Create prepackaged materials, e.g., witness interview outlines for various stakeholders, and state agencies like insurance department; department of health and human services; department of insurance.
- Get familiar with some economic methods for diversion analysis .
- Figure out what state data is available, and whether there are any holes in that data. Is it reliable? How do you access it and can it be accessed fairly quickly?
- Develop connections with economists and learn how to access them fairly quickly.

Question: *How to you stay current about your local health care market?*

- Collect data annually, such as:
 - hospital discharge data; commercial payer claims data; Medicaid data;
 - licensed physician lists from medical boards;
 - other state level health care agency that may have useful info. MA recently began requiring physician provider organizations to provide info to a provider registry. Imperfect but can be helpful;
 - national data bases;
 - charitable trust reports by nonprofits; and
 - hospital association information, medical societies, etc.
- Conduct informational (non-investigational) interviews of local health insurance brokers, academics, state regulators who might have insights; state employee health plan agency.
- Stay connected with local stake holders.

Block 2: Screening a Transaction with Limited Resources

Question: What is the difference between an initial screening and a full blown investigation?

- Goal is to get good info, as efficiently as possible, on market shares for all markets, amount of head to head competition, barriers to entry, prior history of competition: all the key facts that could allow a quick no-go decision. At prelim stage, no need to turn over every rock, want quick review.
- Use the sources discussed previously to develop a preliminary assessment of the possible competitive harm from the deal or practice in question.
- Know the law and ask the critical questions up front; there are usually key facts that can make the triage on a deal very efficient. Are the merging parties a significant distance apart [check drive times] or otherwise find credible evidence that they don't really compete with each other, are the barriers to entry very low for the market in question, is the deal exclusive or non-exclusive, etc.
- Make a scope/sequence plan for screening to determine the most pressing threats.
 - Three buckets of evidence to think about in a merger review: (1) Quantitative [data] analysis, (2) Qualitative evidence [witnesses, payer testimony etc., and (3) documents from the parties. Hot or not party documents re the proposed merger [increased Market Power]
 - In an initial screening usually focus on (1) data and (2) interviews. The more concerning that is, more will want to also get (3) documents.
- Time spent will depend on where on the spectrum of anticompetitive to innocuous the proposed deal is. Can be pretty quick if the map and some confirmatory data analysis and phone calls with payers shows no issue. But the more red or pink flags found, the more need to dig. If parties are trying to jam you on time, that itself is a red flag.

Question: How do you conduct an initial screening? What is the general methodology

Initial Focus:

- Determine the type of transaction you are dealing with - the extent of the integration:
 - merger/acquisition/combination of corporate governance
 - joint contracting
 - joint venture
 - professional services agreement
- Determine the types of entities involved:
 - hospital-based services;

- physician group;
 - outpatient professional and ancillary services
 - ASC;
 - System that is already vertically integrated (inpatient/outpatient/ancillary services).
- Horizontal, vertical, cross market considerations
- Determine probable geography and product market(s) implicated.
 - During an initial screen – get a qualitative sense from payer interviews
- Identify surrounding competitors for relevant market(s) implicated.
- For Hospital mergers, if possible, run a diversion choice model analysis to show the extent of head-to-head competition.
- General Method:
 - Determine the types of information you need to collect; and what public sources are available.
 - Subpoena/CID the parties & create a general profile for each entity (locations, health care service lines).
 - If HSR reportable, work with federal agency (or just subpoena material supplied to FTC). Form 712; get HSR materials quickly.
 - Good hygiene to CID parties even where working with a federal enforcer so have independent authority for all documents. Be sure to include “all documents and information produced to federal antitrust enforcement authority” and to any state authority that may be involved. Trust and collegial relationships are important – but verify with CIDs.
 - Interview competitors and customers of parties to the deal, and payers.
 - Find an economist from local university or State Center to do preliminary review.

Question: What data and resources are required for an initial screening and where can you find it and what will it cost?

- Need to account for limited financial resources (for quantitative/empirical data and analysis); **and** limited staff/time resources (for qualitative/contextual information).
- At preliminary stage, no need to turn over every rock, want quick review.
- Market share data, how payors are likely to view deal (interviews), entry stories; existing degree of consolidation of service market lines and geographic areas; number of surrounding competitors. In some geographies, market definition may be easy and clear (urban hub surrounded by largely rural areas) but in others an appropriate geographic market may be difficult to discern. Elzinga Hogarty discredited.
- If you can set this up in house, or inexpensively outside, diversion analysis for hospital merger screening is extremely useful. Will tell you a measure of direct competition lost through the merger. Is a direct (and better) measure of loss of competition than market

shares (which is indirect). Economists don't think in market share analysis, they think in measuring loss of direct competition. Unless market share analysis is clear and easy to do, market share definition may follow high diversion results, and is skipped when matter closed if very low diversions.

- Q. for Steve: Can the State Center set up economist[s] who can run choice modeling, and maybe have access to lower cost personnel (grad students?) who can clean/format the data as necessary and merge discharge data with other needed data (hospital info, census data, CMS data re DRG weights, etc.) for the economist to run a preliminary diversion for any state? Is this in part what is contemplated by 20 hours consultation mentioned later?
- FTC may be willing to run a diversion analysis for a state if they have the hospitals in the area already set up from prior work, may be out of date but directionally useful.
- In many cases, best evidence of potential competitive harm is whether payors perceive deal as causing them to lose leverage in negotiations with providers;
- St. Luke's: David Dranove's model of two-stage competition in health care
 - Health plans form networks through negotiations with providers
 - Health plans market networks to employers and individuals
 - In-network providers compete for patients
- Loss of payor leverage means payors pay more, employers and individuals pay more
- Practice point: Find out what the payors think about deal
- Be mindful of relationships in the marketplace. For example, payor/provider equity relationships, or provider/provider joint purchasing contracts that may color the interviews.
- Focus on network adequacy and network marketability; insurance department may be of help. The composition of narrow networks or tiered networks may give insight on who are more direct competitors; interviews with payers and providers may be of help.
- Need to account for the nature of the transaction:
 - Hospital-acute care: need data for acute care/inpatient services.
 - Physician Group; integrated delivery systems - need data for outpatient services.
- Sources for empirical data (primary sources; secondary sources) include the following, but you will need to determine what is readily available and actually needed for a preliminary review.
 - Hospital Discharge data – inpatient services; somewhat of guidepost for outpatient services.
 - All Payer Claims Data (“APCD”). Difficult, expensive to work with, may be less complete following S. Ct. *Gobeille* decision.
https://www.supremecourt.gov/opinions/15pdf/14-181_5426.pdf
 - May be able to better distinguish outpatient from inpatient services
 - State Health Plan data – both inpatient & outpatient usage.

- State licensure boards – doctors, nurse practitioners, license professionals (Allied Health Professionals like physical therapists) – list of licensed/active practitioners, and location.
- National data bases (at a cost?): for example -
 - NPI (National Practitioner Identification) – to isolate services provided by particular practitioners and provider entities.
 - SK & A data base
- Sources for qualitative/contextual information – again, you will need to determine what is actually needed for a preliminary review. Interviews of the parties, competitors and payers can help focus the information requests/CIDs.
 - Examples – ask competitors for patient leakage reports; ask parties for the same and for market share/strategy presentations to boards. For focusing on outpatient physician services, ask the parties and competitors for information that helps identify of owned physicians and subsidiaries (NPI) and area of specialty; service locations where physicians (and substitutes) deliver care to patients
 - State employee health plan Interagency may be helpful if runs large employee health benefits like a payer.
 - What about payers? For example, for outpatient services, get data related to the volume of patient visits by service location of each provider.

Question: How do you screen for more traditional hospital mergers (inpatient), versus, transactions with outpatient components and/or vertical components such as physician groups merging; a health care system acquiring a physician group; or the merger of already integrated health care systems?

- Quick explanation of diversion and HHI.
- Hospital mergers – pure inpatient analysis.
 - Answer the geography overlap question (how many site locations are owned/controlled by each target entity and where are they located).
 - Answer the product/service line overlap question (what services are provided by each hospital and which do both provide). Answer the competitor question – which providers are in the geography market and provide same service lines.
 - Consider whether either party provides unique services (such as top level cardiac care).
- Mergers with outpatient and/or vertical features.
 - In answering the geography and service overlap questions, find out the physicians (and substitutes) that are owned/controlled by the parties and the competitors (to include physicians of any parent/subsidiaries), and the specialty classifications of each. NPI info of the physicians and entities, used in conjunction with payer claims data, can help identify service lines and zip codes of interest.

- Reviewing websites of the parties and significant competitors may give an initial sense of potential product and geography markets of concern.
- Local hospital associations may have publicized reports that are germane to the issues.

Question: How do you know whether economic assistance is necessary for initial screening and, if so, what will it cost and where can you find it?

Economists can be very expensive for full-blown analysis. Good ones provide preliminary review that can be quite informative and can provide a roadmap for what questions to ask and key issues.

- Economists can provide assistance for subpoena/CID requests and templates for uniform, usable, reliable usable data collection
- Distinguish between full-blown economic analysis & preliminary economic review for roadmap of key questions/issues.
- Low-cost, quality options for preliminary expert analysis include –
 - State Center experts, by grant (20 hours, free to state).
 - Academic/University economists.
 - State insurance department, analysts.
- Develop resources for in-house economic analysis, at least for initial screening purposes

Question: Who can provide initial assistance (summary)?

- Other states. NAAG.
- State agencies: HHS; insurance dept; medical licensing boards.
- State Center & Academics (legal and economic)
- Industry stakeholders; State health plan; Medical societies.
- Federal agencies – pointers for working efficiently & effectively together.

Block 3: Conducting a Full-Blown Investigation with Limited Resources

Question: How do you decide which matters are worth the expenditure of limited investigative resources?

If preliminary investigation suggests the deal will cause anticompetitive harm, full-blown investigation should be considered.

- Quantitative analysis indicates meaningful and likely harmful loss of competition, increase in MP and likely ability to increase rates
- Qualitative interviews reveals market participants who say or who are concerned about the same thing. Have narratives that hold together and explain how the data concerns will likely play out in the market, increased market power/loss of competition enabling increased rates. Payer/buyer witnesses stronger than competitors.
- If have these two, likely worth full CID for documents, additional data.
- If federal agency is investigating, perhaps state can ride coattails or defer, especially if they have other pressing needs .
- If competitors are complaining, ask them to articulate consumer harm and provide additional help if appropriate.
- Same with payers.
- Identify your office’s threshold for transactions considered to be more problematic in the marketplace, such as consolidation of primary care physicians.
 - Give some examples of the more problematic health care transactions; and also of the low-hanging fruit:. Acquisition where party would gain significant control and market power in a line of business in a meaningful or fairly obvious geographic area. Recent successful health care merger challenge cases are examples. Look out for large provider networks (Hospital[s] with owned or joint contracting physician groups especially pcps) seeking to acquire a competitive physician group, especially pcps.
- Give a quick explanation of HHI analysis, which accounts for existing consolidation.

Question: What resources are necessary for an investigation (beyond info collected for screening)? Where to do you find it, and how to do you go about collecting it?

- Distinguish use of resources already used during screening stage.
- Distinguish between data needs for traditional hospital merger analysis, and vertical alignment of health care delivery systems and physician groups.
- Data Sources for empirical analysis – primary sources; secondary sources:

- Hospital Discharge data – inpatient services; somewhat of guidepost for outpatient services.
- All Payer Claims Data – can better distinguish outpatient from inpatient services
- State Health Plan data – both inpatient & outpatient usage.
- State licensure boards – doctors, nurse practitioners, license professionals (Allied Health Professionals like physical therapists) – list of licensed/active practitioners, and location.
- National data bases (at a cost?): for example -
 - NPI (National Practitioner Identification) – to isolate services provided by particular practitioners and provider entities.
 - SK & A data base
- Information Sources for qualitative/contextual analysis
 - Interviews and Subpoenas/CIDs of Party-Providers
 - Interviews and Subpoenas of Payers
 - Employers / brokers / other market players (such as competitors, independent practices, etc.)
 - Asking key competitors, customers, payors, and others knowledgeable about the market and possible effects of a deal or course of conduct are key. This will allow one to identify the best witnesses. Most folks tend to be cooperative. If not, use appropriate process to compel testimony.

Question: What discovery should you seek from the subjects of the investigation, and how do go about it?

- Discovery from subjects of investigation:
 - Org charts, underlying agreements
 - Physician rosters w/ NPI, specialties, practice locations, and who they contract through
 - Payer contracts
 - Payer mix
 - Commercial payer revenues
 - Board/committee meeting minutes, presentations – helpful to ascertain intent of deal
 - Market reports, analyses
 - Communications about the transactions
 - Integration plans
 - Efficiencies
 - Financial statements

Question: What are some common tactics and justifications that should you expect to hear from the subjects of the investigation?

- markets do not overlap, at least not significantly

- distinct geographic markets
- failing/ flailing finances
- expense of EMR technology
- ACA promotes consolidation – population health/value based.
 - Integration wonderfulness will lower utilization, improve care, cure common cold
 - Question whether claimed efficiencies are merger specific and timely. What evidence to support claimed future achievements? Believe evidence generally shows not worked where studied. Often aspirational without much support.
- Merger will enable “right care, right place, right cost.” Redirect secondary care from AMCs to owned/acquired Community Hospitals. Share bottom line so AMC not seek care not need to be there / divert to local owned Community Hospitals.

Question: Is economic assistance necessary for a full investigation, and, if so, why, what will it cost, where can you find it, and how do you go about lining up an expert?

- Generally speaking, in most non-per se cases, economic expertise and testimony will be needed (i.e., the other side will have it).
- Distinguish between full-blown economic analysis & preliminary economic review for roadmap of key questions/issues.
- Perhaps discuss differences between consulting expert and testifying expert?
- Finding the right person: State Center, federal agency, nice people like Roger?

Question: How much assistance can you expect from federal agencies?

- To be taken seriously by FTC/DOJ, state needs to be into the local data and have your own economist.
- HSR 30 day window is quick and meaningful data needs to be made available pretty quickly to keep federal agency engaged.
- If market concentrations are below HHI levels, state will be on its own.
- Query what vertical or cross market issues may keep the federal agency involved?

Question: What resources are generally available to guide merger analysis?

- See State Center Health Care Antitrust Resource List.
- ABA Antitrust Law Section’s Health Care Mergers and Acquisitions Handbook (2d edition).

Question: What resources are available to guide affiliations short of mergers?

- Statements of Antitrust Enforcement Policy in Health Care (1996)
- Miles Treatise - Healthcare and Antitrust Law Principles and Practice
- FTC advisory opinions

Block 4: Being Proactive and Effective without Litigation.

Question: *If the investigation reveals anticompetitive concerns, what strategies can be used by states to be effective in preserving competition, without litigation?*

- Consent decrees
- Cooperation with other state arms, such as charitable trust units or health policy commissions

Question: *How can states be proactive and effective in the local health care marketplace, outside of investigation and litigation?*

- Build relationships in the state and within your own AG office.
- Identify how State AAGs play a role within their offices and with state healthcare regulatory agencies outside the context of an investigation of a specific deal
- Identify how AG offices play multiple roles concerning health care services and insurance when advising state agencies or representing them in health care contexts (e.g., insurance commissioner, COPA, CON, Departments of Health, to the extent they exist in a state). Antitrust AAGs can often assert competition values in these processes. Although it can be complicated at times (see, e.g., NCAA Dental's impact on state offices), it can also result in more bang for the buck if done correctly.
- Identify other non-antitrust AAGs to learn what is going on in these cases.
- Influence statute statutes and regulations.