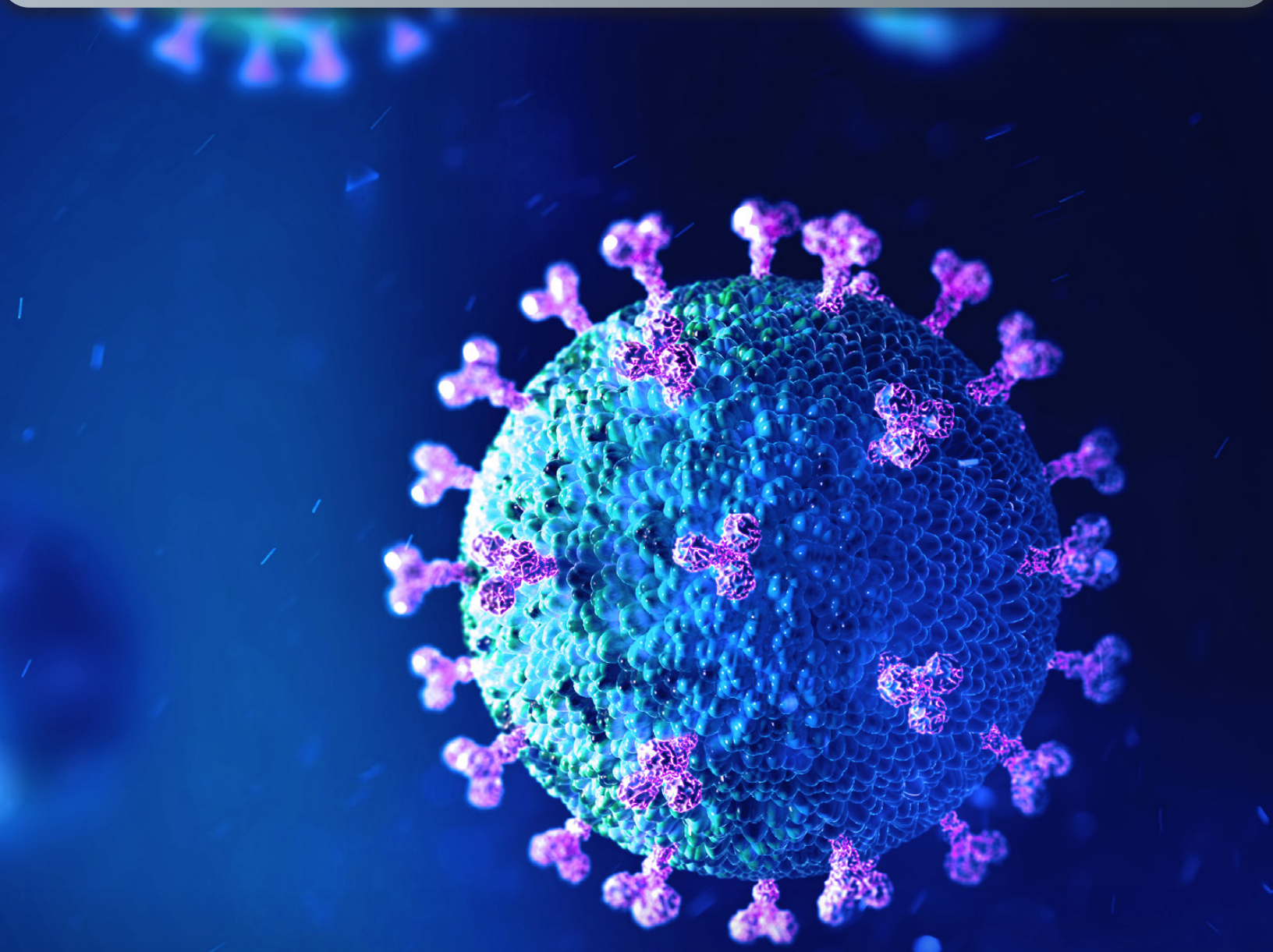
ANTITRUST & COVID-19 IN THE U.S.: FOUR KEY ISSUES FOR HEALTHCARE PROVIDERS



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I. INTRODUCTION

The COVID-19 pandemic continues to disrupt industries around the globe, and the impact on the healthcare industry has been especially profound. Healthcare providers are working to combat the virus and treat patients while dealing with significant challenges, such as keeping their staff healthy and supplied with equipment, as well as broader issues, such as continuing operations and executing on strategic plans. The COVID-19 pandemic is not just affecting clinical and business operations, but also the legal environment in which businesses operate.

In the United States, the healthcare industry has been a primary focus of federal and state antitrust enforcement and litigation, with antitrust enforcement agencies aggressively scrutinizing provider transactions and various types of conduct (e.g. exclusive contracting arrangements). This scrutiny has continued, and will continue, during the COVID-19 pandemic, with the Federal Trade Commission (the "FTC") and Department of Justice (the "DOJ," together, the "Agencies") adopting various measures to adjust their processes—but not their standards—for investigating competitive issues. Indeed, the Agencies issued a joint statement on April 13 stating that they would be "on alert" for employers, staffing companies, and recruiters, among others, who might engage in collusion or other anticompetitive conduct in labor markets, such as agreements to lower wages or to reduce salariesbenefits or hours worked.[2]

This article provides an overview of four key antitrust issues for healthcare providers in the United States in light of the COVID-19 pandemic.

II. ISSUE 1: COMPETITOR COLLABORATIONS

Competitor collaborations have historically been subject to antitrust scrutiny, as such collaborations may lead to competitors exchanging competitively sensitive information or jointly setting prices. With that said, as articulated in the Agencies' *Antitrust Guidelines for Collaborations Among Competitors* (2000), antitrust enforcers recognize that competitor collaborations are often pro-competitive, leading to greater efficiency, increased production, higher quality, and lower prices.

More so than ever, the COVID-19 pandemic requires that healthcare providers coordinate and share information to treat their patients. But the antitrust laws remain in effect, and providers should avoid coordinating inappropriately in violation of federal or state antitrust laws (e.g. allocating markets or services, fixing prices charged to payers), including sharing information that may create an inference that such coordination is occurring (e.g. managed care rates). Still, the Agencies recognize that there are exigent circumstances.

2 https://www.ftc.gov/news-events/press-releases/2020/04/federal-trade-commission-justice-department-issue-joint-statement.

Accordingly, on March 24, 2020, the Agencies issued guidance and outlined an expedited review process for companies seeking to work together on COVID-19-related collaborations (the "Joint Statement"), which also reminds healthcare providers and other companies that the antitrust laws still apply to ventures between competitors. The Joint Statement does not provide an antitrust exemption regarding COVID-19 collaborations, but it does acknowledge the urgency of the public health crisis by committing the FTC and DOJ to a seven calendar day turn-around, once all necessary information is received, for written guidance (DOJ Business Review letters and FTC Advisory Opinions) related to COVID-19-related collaborations. Previously, such guidance would typically take at least several months to complete, as companies or providers worked with the reviewing agency and responded to their requests in assessing competitive issues.

According to the Agencies, collaborations by healthcare providers or combinations of production capacity by businesses are examples of potentially necessary responses to the spread of the disease. The Joint Statement provides: "These sorts of joint efforts, limited in duration and necessary to assist patients, consumers, and communities affected by COVID-19 and its aftermath, may be a necessary response to exigent circumstances that provide Americans with products or services that might not be available otherwise." So long as such joint efforts are limited in duration and required to address the health crisis, the Joint Statement indicates that the Agencies will be more accommodating to such collaborations.

Finally, the Joint Statement makes clear that the Agencies will be vigilant in policing anticompetitive conduct in during the crisis, including competitor collusion and any fraudulent or illegal schemes targeting vulnerable Americans.

The Agencies' first Business Review Letter following the Joint Statement was issued by the DOJ on April 4 to several U.S. healthcare distributors of personal protective equipment ("PPE") and medications (e.g., McKesson). The Business Review Letter describes the ways in in which the requesting parties seek to cooperate and concludes that the proposed cooperation likely would not raise competitive concerns because, among other factors, the proposed collaboration is limited in scope and duration; is necessary to address COVID-19-related scarcity of supplies; will not extend beyond what is needed to make supplies more available; and is not being used to increase prices, reduce output or quality, or engage in profiteering.[3]

As healthcare providers continue to coordinate their care to enhance their ability to treat patients during the COVID-19 pandemic, they can take some comfort from the Agencies' guidance that their collaborations will not raise antitrust concerns, unless they veer into inappropriate areas, such as discussions regarding managed care rates, or extend beyond the time of the exigent circumstances of the pandemic.

III. ISSUE 2: MERGERS & ACQUISITIONS

Prior to the COVID-19 crisis, health system merger and acquisition activity remained healthy. According to Kaufman Hall, there were 92 announced hospital transactions in 2019, slightly above the number in 2018.[4] These transactions were often driven by attempts to achieve geographic scale and efficiencies, and several of these transactions combined health systems that were already financially strong. The COVID-19 pandemic is likely to change significantly the number of deals and deal rationales.

One effect of the crisis is likely to be a slow-down in the number of transactions, for a variety of reasons, including health systems and hospitals focusing on serving patients, securing critical supplies, and trying to keep their staff healthy—leaving little time for deal-making and due diligence.

On the other hand, the crisis is also likely to force some hospitals—particularly rural hospitals, small community hospitals, and those with a high COVID-19 patient population—to look for an affiliation partner for financial reasons. The COVID-19 pandemic will put many hospitals under financial pressure because relatively profitable elective procedures have been put on hold (though some loosening may soon occur in some areas), while operating costs have increased as many hospitals pay staff for overtime, hire additional staff, serve more patients with acute conditions, and pay higher prices for supplies and new equipment. Indeed, credit-agency ratings posit a negative outlook for nonprofit and for-profit hospitals.

3 https://www.justice.gov/atr/page/file/1266511/download.

4 https://www.kaufmanhall.com/2019-healthcare-mergers-acquisitions-in-review.

A merger with, or acquisition by, a financially healthy partner can be a lifeline for a struggling hospital. But when it comes to such transactions, COVID-19 has not put the antitrust laws in quarantine or weakened the standard of merger review. Antitrust enforcers have made that clear.

For example, in announcing certain steps to protect the health and safety of its staff as the COVID-19 crisis deepened, the FTC said that the "the protection of competition, and the welfare of American consumers, is as important now as ever." In a March 27 blog post about merger reviews, the Director of the FTC's Bureau of Competition wrote that "[c]ompetitive concerns will be fully investigated in every case" and "[n]either the legal standards that apply to transactions nor the Bureau's investigational standards have been relaxed in light of the coronavirus pandemic."[5]

In a similar announcement, the DOJ stated that they were taking steps to "ensure that the Division can continue to review transactions efficiently and effectively" and said that the DOJ would "continue to carry out our mission to protect competition and the American consumer."[6]

The Agencies have, however, acknowledged that the crisis has changed how they are conducting their work, resulting in procedural and timing changes that parties to contemplated mergers need to consider.

For example, the FTC initially announced in mid-March that it was implementing an electronic filing system for Hart-Scott-Rodino ("HSR") premerger filings and that it would not be granting early terminations of the 30-day HSR waiting period. By the end of March, the FTC announced that early terminations would again be granted in appropriate circumstances, but noted that early terminations would be available "on a more limited basis than has historically been the case"—meaning granted in fewer cases and more slowly.

Moreover, both Agencies appear to be seeking additional time to review transactions that raise questions or potential competitive concerns. By statute, if the FTC or DOJ issues a Second Request, the parties cannot close their transaction for at least 30 days after "substantially complying" with the Second Request. Often, though, the Agencies negotiate a "timing agreement" with merging parties to extend this period, often for another 30 days (i.e. 60 days post-compliance in the aggregate).

Now, however, the Agencies are seeking more time to review transactions by extending these timing agreements. In mid-March, the FTC said it was conducting a matter-by-matter assessment of investigations and litigated cases to "consider appropriate modifications of statutory or agreed-to timing." The FTC hoped merging parties would be flexible, but said that the FTC would take "affirmative action" when an unmodified time period would not allow the FTC to address competitive concerns—implying that the Agency would go to court to obtain a preliminary injunction to prevent a transaction from closing if necessary. And a recent report says that the FTC has started to seek timing agreements that would give it up to 120 days to review transactions after the parties substantially comply with a Second Request.[7]

The DOJ modified its model timing agreement in 2018 to provide a default 60 days review period after substantial compliance with a Second Request. In its March announcement, the DOJ said that it would request an additional 30 days in timing agreements—thus, a total of 90 days—to compete the review of currently pending or future mergers.

Beyond these extended deadlines, the Agencies staffs' need to conduct their work remotely, as well as the challenge of interviewing industry participants who themselves are working remotely and whose contact information may not be so readily available to staff, also add a level of inefficiency and delay to antitrust investigations. Even before the COVID-19 crisis, substantial merger investigations took, on average, approximately 10-11 months, according to available statistics. COVID-19 is likely to extend transaction timeframes.

Consequently, merging parties should be prepared for lengthy reviews if their transaction raises competitive questions or concerns. And they should be prepared for the Agencies to conduct investigations that are no less vigorous, and under standards that are no less stringent, than those prior to the health crisis.

5 https://www.ftc.gov/news-events/blogs/competition-matters/2020/03/resuming-early-termination-hsr-reviews.

6 https://www.justice.gov/opa/pr/justice-department-announces-antitrust-civil-process-changes-pendency-covid-19-event.

7 https://www.mlex.com/GlobalAntitrust/DetailView.aspx?cid=1175932&siteid=191&rdir=1.

IV. ISSUE 3: FAILING-FIRM DEFENSE

The COVID-19 crisis is putting a huge financial strain on health systems and community hospitals, with several on the brink of collapse. One hospital recently announced it would shut its doors if it didn't receive a cash infusion within days. Other hospitals have announced furloughs of hundreds of staff. Even before the pandemic, one report estimated that a quarter of all rural hospitals in the U.S. were "at a high risk of closing unless their financial situations improve," and that the pandemic and economic downturn was only going to make this worse.[8]

While merger-review standards will remain vigorous during the COVID-19 crisis, there are likely to be more hospitals that, unfortunately, will need to avail themselves of the failing-firm defense to obtain antitrust clearance and close transactions that might otherwise lessen competition. Still, there is a high standard for the defense to be satisfied, and the uncertainties of the COVID-19 crisis will pose interesting issues—and challenges—for the Agencies when evaluating the defense.

Under the Agencies' Horizontal Merger Guidelines, the elements of the failing-firm defense are that the financially troubled firm (1) be unable to meet its financial obligations in the near future; (2) not be able to reorganize successfully in bankruptcy; and (3) have made unsuccessful good-faith efforts to elicit reasonable alternative offers that would keep the troubled assets in the relevant market and pose a less severe threat to competition.

With respect to the first prong, litigated cases and agency enforcement actions show that the financial condition of the troubled firm must be severe enough to portend its imminent exit from the market. The agencies have not clearly defined the severity of the financial condition and the imminence of the exit that suffices. Prior agency officials have explained in speeches that the defense is "limited"; requires more than a temporary dip in profitability; and the mere fact that firm has been losing money does not mean that it satisfies this prong.

Certainly, the more "financial indicators"—revenues, profits, days cash on hand, discharges, capital expenditures, pension funding, etc.—that are trending steeply and consistently downward, the more likely it is that merging parties can satisfy this prong. The challenge with the current COVID-19 crisis is that no one knows how long it will last. Therefore, the Agencies may have more trouble assessing—and merging parties may have a harder time showing—whether any financial and operating declines are temporary or sufficiently dire and lasting to satisfy the first element of the defense.

With respect to the third prong, the Agencies assess the thoroughness of the seller's search for an alternative purchaser. The Agencies require more than a cursory search for an alternative purchaser,[9] and they require that potential acquirers be given a reasonable opportunity to conduct due diligence. Merging parties can bolster their failing-firm defense by demonstrating that the seller used a consultant or investment banker to find alternative purchasers. Because COVID-19 has limited potential purchasers' ability—indeed, their capacity—to evaluate mergers and acquisitions, the agencies will have to consider how to assess the thoroughness of the seller's search for potential partners under these exigent circumstances.

The agencies have a high standard for accepting failing-firm defense, but there is also some prosecutorial discretion that the Agencies may apply, especially (at least in one author's experience) when the transaction involves a financially troubled hospital. The FTC will vigorously assess failing-firm claims by merging hospitals, but it also does not want to be responsible for blocking a transaction if it would result in a hospital shutting its doors to patients. That consideration may be particularly compelling for transactions involving a failing hospital during the COVID-19 crisis, when it is more critical than ever for hospital doors to remain open to patients.

8 https://guidehouse.com/insights/healthcare/2020/rural-hospital-sustainability-index.

9 See, e.g. https://www.ftc.gov/news-events/blogs/competitionmatters/2015/03/power-shopping-alternative-buyer.

V. ISSUE 4: PRICE GOUGING

"Price Gouging" laws, which have been adopted by approximately three dozen states, are aimed at protecting consumers by prohibiting businesses from taking advantage of emergency condition to unfairly charge artificially inflated prices for certain goods and services. These laws often carry serious civil penalties, and sometimes even criminal penalties.

The COVID-19 pandemic has already resulted in the triggering of state price gouging laws that directly control the prices that businesses may legally charge for goods and services. As businesses and consumers scramble to purchase essential products and services, state regulators are looking closely at any allegations of price gouging across supply chains. For instance, over 4,000 price gouging complaints related to the pandemic have been lodged in Texas since March 13.[10]

Healthcare providers may be victim of price gouging by medical equipment companies seeking to substantially raise the prices of masks or other medical supplies, or may themselves face allegations of price gouging if they attempt to substantially raise the rates of the medical services they are providing.

Although there is no federal price gouging statute and nothing in the federal antitrust laws prohibits charging "excessive" prices for goods or services, the Federal Trade Commission Act ("FTC Act") grants the FTC the power to prevent "unfair or deceptive acts or practices," and a number of elected officials have urged the FTC to take action. In fact, U.S. Senators Catherine Cortez Masto (D-Nev.) and Jacky Rosen (D-Nev.) recently joined a letter led by Senator Amy Klobuchar (D-Minn.) urging the FTC to protect consumers from price gouging during the coronavirus pandemic. In the letter, the senators call on the Agency to use the full extent of its authority to prevent abusive price gouging on consumer health products that members of the public need to protect themselves and their loved ones from the spread of the coronavirus. Specifically, the letter states, "Under normal circumstances, the FTC has been reticent to employ the full extent of its authority under Section 5 of the FTC Act. But these are not normal circumstances. If ever there was a time to explore the limits of the FTC's consumer protection authority, that time has come. The FTC must take urgent action to address these abuses."[11]

In addition, FTC Chairman Joe Simons released a statement outlining current enforcement efforts. Per the chairman's statement, the FTC is working with both federal and state law enforcement, as well as business and community stakeholders, to protect consumers from unfair and deceptive commercial practices and to educate the public about such practices. In short, the FTC "will not tolerate businesses seeking to take advantage of consumers' concerns and fears regarding coronavirus disease, exigent circumstances, or financial distress." The chairman added that "the FTC will remain flexible and reasonable in enforcing compliance requirements that may hinder the provision of important goods and services to consumers." While this does not give businesses carte blanche in how they advertise or market important goods and services, Chairman Simons noted that "good faith efforts undertaken to provide needed goods and services to consumers will be taken into account in making enforcement decisions."[12]

VI. CONCLUSION

Healthcare providers are at the front lines of the battle against COVID-19. Their services are more important than ever to meet critical patient and community health needs. The pandemic will present numerous challenges, and even some opportunities, for providers. Meanwhile, antitrust enforcers remain on the job (even if from home) and vigilant for potential violations of antitrust laws. Consequently, healthcare providers will need to assess the challenges and opportunities before them with antitrust considerations in mind. Even though antitrust standards remain strict during the COVID-19 pandemic, there remains wide scope for healthcare providers to engage in collaborations, mergers, and other transactions with competitors and other partners in the healthcare industry.

10 https://www.khou.com/article/news/health/coronavirus/4000-price-gouging-complaints-have-been-filed-in-texas-during-covid-19-emergency/285-fcf921fb-7587-4463-81f4-2026ce4498f6.

11 https://www.klobuchar.senate.gov/public/_cache/files/1/1/114a671c-446c-4d89-89d2-a6a138e52fdc/D0CBBF2D657990AB0AA905FF3D11525A.2020.03.27-letter-to-ftc-re-pricegouging.pdf.

12 https://www.ftc.gov/system/files/documents/public_statements/1569773/final_chairman_covid_statement_3262020.pdf.

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