United States of America

Federal Trade Commission

Protecting Consumer Welfare in the U.S. Health Care Sector

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before
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I. Introduction

Good afternoon. Thank you to Thomas Kosmo and The Mentor Group for inviting me to participate in this wonderful forum. I am delighted to speak to you today about the Federal Trade Commission's recent efforts to protect consumer welfare in the U.S. health care sector.

That sector happens to represent a significant portion of the U.S. economy. And, as I am sure you have heard, the U.S. health care sector is currently undergoing a non-trivial amount of change with the passage of the Patient Protection and Affordable Care Act,[2] often referred to as "Obamacare." Partly due to the Affordable Care Act, the health care sector has seen a fairly significant amount of consolidation – among hospital systems and among physician groups, as well as combinations of hospitals and physician groups.

Because of the importance of health care competition to the economy and consumer welfare, anticompetitive conduct and regulation in health care markets has long been a key focus

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[1] The views expressed in these remarks are my own and do not necessarily reflect the views of the Commission or any other Commissioner.

[2] Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010), *amended by* Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (2010).

of FTC law enforcement, research, and advocacy. The FTC has investigated and litigated antitrust cases in markets across the country involving hospitals, physicians, pharmaceuticals, and other health care goods and services.[3] We regularly issue informal advisory opinions on the application of the antitrust laws to health care markets.[4] In addition, we have conducted hearings, undertaken research, and issued reports and policy statements on various issues in health care competition, often in conjunction with the U.S. Department of Justice.[5] Through this work, we have developed a substantial understanding of the competitive forces that drive innovation, costs, and prices in health care.

This afternoon, I would like to focus on a handful of recent FTC efforts that have demonstrated not only the importance we place on competition in the health care sector, but also the many tools that the agency has to address competitive issues that arise in the health care area or any other part of the economy. The FTC's tools include filing enforcement actions, engaging in competition advocacy, and issuing advisory opinions, among others. I will discuss recent examples of the FTC's use of each of these tools in the health care space.

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[3] *See, e.g.*, FED. TRADE COMM'N STAFF, OVERVIEW OF FTC ANTITRUST ACTIONS IN HEALTH CARE SERVICES AND PRODUCTS (2013), *available at* http://www.ftc.gov/bc/healthcare/antitrust/hcupdate.pdf; FED. TRADE COMM'N STAFF, OVERVIEW OF FTC ANTITRUST ACTIONS IN PHARMACEUTICAL SERVICES AND PRODUCTS (2013), *available at* http://www.ftc.gov/bc/healthcare/antitrust/rxupdate.pdf.

[4] Information regarding the Commission's competition advisory opinion program is available at http://www.ftc.gov/bc/advisory.shtm.

[5] *See, e.g.*, FED. TRADE COMM'N & U.S. DEP'T OF JUSTICE, STATEMENTS OF ANTITRUST ENFORCEMENT POLICY REGARDING ACCOUNTABLE CARE ORGANIZATIONS PARTICIPATING IN THE MEDICARE SHARED SAVINGS PROGRAM (2011), *available at* http://www.ftc.gov/opp/aco/; FED. TRADE COMM'N & U.S. DEP'T OF JUSTICE, IMPROVING HEALTH CARE: A DOSE OF COMPETITION (2004), *available at* http://www.ftc.gov/reports/healthcare/040723healthcarerpt.pdf; U.S. DEP'T OF JUSTICE & FED

challenges, including federal court victories in the *Rockford*[8] and *ProMedica*[9] cases and abandoned mergers in other matters.[10]

In *Phoebe Putney*, the Supreme Court issued a unanimous decision last February, siding with the FTC in its challenge of a merger that resulted in a near-monopoly in general, acute-care hospital services in the area around Albany, Georgia.[11] The Commission first sought to stop this merger in April 2011, but the federal district court denied the FTC's motion for a preliminary injunction.

At issue was whether the Georgia legislature had shielded the local hospital authority from federal antitrust review by granting it general powers to acquire hospitals. Under the state action doctrine, actions of the state or its subdivisions are not subject to the federal antitrust laws if the legislature clearly articulates and affirmatively expresses a policy to displace competition with regulation. The district court found that the state action doctrine prevented the FTC from challenging the local hospital authority's approval of the merger, and an appellate court agreed. The Supreme Court, however, reversed, finding no evidence that the state legislature contemplated that Georgia hospital authorities would displace competition by consolidating

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[8] FTC v. OSF Healthcare Sys., 852 F. Supp. 2d 1069 (N.D. Ill. 2012) (*Rockford*) (granting FTC's motion for preliminary injunction). In November 2011, the FTC challenged OSF Healthcare System's proposed acquisition of Rockford Health System, which would have combined two of the three acute-care hospitals in the Rockford, Illinois area. On April 5, 2012, the district court granted the FTC's request for a preliminary injunction, pending a full administrative trial on the merits. OSF Healthcare subsequently abandoned the proposed transaction, and the FTC dismissed the complaint.

[9] FTC v. ProMedica Health Sys., 2011 WL 1219281 (N.D. Ohio Mar. 29, 2011) (granting FTC's motion for preliminary injunction). In January 2011, the FTC challenged the acquisition of St. Luke's Hospital by ProMedica Health System, arguing that the transaction would reduce the number of acute-care hospitals in the Toledo, Ohio, area from four to three. After the federal court granted the preliminary injunction, the matter was litigated before an administrative law judge, who ordered ProMedica to divest St. Luke's. The Commission affirmed this decision and the matter is currently on appeal to the Sixth Circuit.

[10] *See, e.g.*, Press Release, Fed. Trade Comm'n, Statement of FTC Competition Director Richard Feinstein on Today's Announcement by Capella Healthcare that It Will Abandon its Plan to Acquire Mercy Hot Springs (June 27, 2013), *available at* http://www.ftc.gov/opa/2013/06/capella.shtm; Press Release, Fed. Trade Comm'n, FTC Approves Order Dismissing Administrative Complaint Against Inova Health System Foundation and Prince William Health System, Inc. (June 17, 2008), *available at* http://www.ftc.gov/opa/2008/06/inovafyi.shtm.

[11] *Phoebe Putney*, 133 S. Ct. 1003.

hospital ownership, but rather that Georgia had conferred on its hospital authorities only general powers routinely conferred on private corporations. The Court found that was insufficient to displace the antitrust laws, holding that the state action doctrine applies only when the displacement of competition was the inherent, logical, or ordinary result of the exercise of authority delegated by the legislature.[12] Although the FTC recently settled its case against Phoebe Putney without a divestiture of the acquired hospital,[13] the Supreme Court decision on the state action doctrine obtained in this case remains a significant victory for consumers – not only in the hospital merger setting, but across all of the many industries subject to regulation by the states.

In another recent matter, the Commission voted to file an administrative complaint against the Reading Health System in Pennsylvania to stop the purchase of a local specialty hospital, the Surgical Institute of Reading. As alleged in the complaint, Reading Health was a dominant, vertically-integrated system in eastern Pennsylvania with several profitable medical facilities. Despite being small, the Surgical Institute had entered the area in 2007 and successfully challenged Reading in several surgical specialties. Its presence had pushed down rates for these procedures and increased quality of care, allowing it to draw significant volumes of surgical patients away from the Reading Health System.[14]

According to the FTC's complaint, Reading pulled no punches in trying to eliminate the increased competition it faced from the Surgical Institute. Reading offered health plans

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[12] *Id.*

discounts to exclude the Surgical Institute from their networks. Reading also attempted to steer patients covered by its partially-owned health plan away from the Surgical Institute (a meaningful issue, considering Reading was the largest employer in the area). Reading's primary care doctors also refused to refer patients to Surgical Institute specialists, unless the surgeries took place at one of Reading's facilities.[15] When these measures failed, Reading decided to buy its way out of the problem of increased competition.[16] The FTC filed suit to block the transaction on November 16, 2012,[17] and the parties announced their abandonment of the deal the next business day.

Broadly speaking, advocacy at the FTC involves the use of our expertise in competition, consumer protection, and economics to persuade other government actors to pursue policies that promote competition and consumer welfare. Sometimes, this advocacy is conducted in support of a particular law or regulation that would benefit competition and consumers. All too often, however, this advocacy is directed to proposed laws or regulations that would limit choices and make consumers worse off – by, for example, restricting certain business practices or prohibiting some business models altogether, or even seeking to immunize certain anticompetitive conduct from the federal antitrust laws. Even if well-intentioned, these government-imposed restraints can inflict as much, if not more, harm on consumers than private anticompetitive conduct. And, as statutes or regulations enacted by the government, these restraints are, of course, more durable than any private conduct could be.

Not surprisingly, a significant portion of the FTC's competition advocacy work is focused on the health care sector. Within that space, we often encounter federal and state legislative proposals seeking to create antitrust immunity for certain health care providers to bargain collectively over reimbursement rates with health insurers and other third-party payers. The FTC has long advocated against such immunity because it is likely to harm consumers.[24]

A recent letter issued by FTC staff addressed such a proposed exemption from the antitrust laws in the state of Connecticut.[25] The legislation there provided for the formation of so-called "health care collaboratives" or joint ventures comprising otherwise independent health care practitioners, such as physicians. The bill would authorize members of these collaboratives

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[24] *See, e.g.*, Prepared Statement of the Federal Trade Commission

jointly to negotiate prices and other terms with health plans. It also attempted to immunize these joint negotiations from scrutiny under the antitrust laws.[26]

As the FTC staff acknowledged in their advocacy letter, collaborations among physicians and other health care professionals can be beneficial. At the same time, the letter made two primary arguments against the proposed bill. First, the antitrust laws are not a barrier to the formation of efficient health care collaborations that benefit consumers. As explained in extensive guidance issued by the FTC and the Justice Department, competitor collaborations – including health care provider collaborations – often are entirely consistent with the antitrust laws.[27] That is, the antitrust laws do not stand in the way of health care providers who form collaborative arrangements that are likely to reduce costs and benefit consumers through increased efficiency and improved coordination of care.

Second, a central purpose of the proposed legislation appeared to be to permit physicians to extract higher reimbursement rates from health plans through joint negotiations, not to integrate their practices to reduce costs or better coordinate care for their patients. The joint negotiations contemplated by the bill were likely to lead to increased health care costs and decreased access to services for consumers. Because procompetitive health care collaborations already are permissible under the antitrust laws, the bill's main effect thus would have been to foster precisely those types of collective negotiations that would not generate efficiencies and therefore would not pass muster under the antitrust laws. Given the substantial risk that the bill would encourage the

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[26] *See id.* at 3.

[27] *See, e.g.*, FED. TRADE COMM'N & U.S. DEP'T OF JUSTICE, ANTITRUST GUIDELINES FOR COLLABORATIONS AMONG COMPETITORS (2000), *available at* http://www.ftc.gov/os/2000/04/ftcdojguidelines.pdf.