McCann
HEALTH LAW

ANTITRUST **UPDATE**

Do health system mergers in separate geographic markets create antitrust problems?

Some antitrust experts say "yes." What does that mean for system mergers going forward?

By Robert McCann and Kenneth Vorrasi

A decade and a half ago, the federal antitrust agencies re-imagined the theories of competition that underpin their enforcement decisions concerning hospital and health system mergers. The result was a striking change in direction that has allowed few challenged health system mergers to survive. The federal courts have largely lined up behind the assumed expertise of the regulators.

The Federal Trade Commission (FTC) may be evolving its theories of hospital competition again. Within the last few years, some antitrust economists and the FTC have expressed an increasing interest in a theory of "cross-market effects" in hospital mergers. This theory posits that mergers between hospitals in entirely separate geographic markets nonetheless can create market power that results in higher prices for health plans and, indirectly, for consumers. Essentially, it's a theory that says some payors have a need for broad geographic coverage, and cross-market provider combinations create leverage that limits payors' options. Several leading economic experts have attempted to prove the existence of cross-market effects and explain how their observations can be explained as a loss of competition.

But even if we assume that cross-market effects can occur as an empirical matter, do the antitrust laws prohibit cross-market transactions?

In contrast to the traditional notion that hospitals compete directly for patients, the FTC (as reflected in its *Merger Guidelines)* considers payors the "most relevant" customers of the hospitals' services. Their traditional enforcement model is based on an understanding that prices for a hospital's services are determined by the relative bargaining strength of the hospital and health plan during contract negotiations. Thus, for a merger to have an anticompetitive effect, the merging hospitals must be in-network substitutes. By definition, then, a "cross-market" merger should pose no competitive issues. The significant tension between the FTC's existing approach (which the courts have largely adopted) and the empirical research claiming to support cross-market effects, will require more research and analysis for the new theory to be viable in the federal courts.

Any hospital or health system contemplating a partnership or combination must understand the fundamentals of antitrust enforcement. That understanding is essential to fulfilling the duty of care imposed on directors and executive leadership. Today, this duty includes understanding the FTC's potential assault on cross-market transactions.

Rob McCann and co-author Ken Vorrasi published an article in the 2018 *Health Law Handbook* that explains the origins of the cross-market effects question, the basis for the theory, some of the current evidence that arguably supports the theory, and the practical difficulties that could arise in attempting to challenge a health system merger on the basis of a theory that has no direct support in case law or the federal *Merger Guidelines*.

Read *Cross-Market Effects in Hospital Mergers: A Collision of Economic and Legal Theory here*.