Certainty and (or?) Change: Antitrust Developments in 2019[1]

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The evolution (or devolution, depending on one's point of view) of antitrust jurisprudence in the United States is rarely the result of momentous judicial reinterpretations of the law. Rather, the forces of nature and nurture that shape antitrust law are found in a range of influences. The potential for political debate to influence legal thinking, for example, is quite clear as we head into the next national election cycle. But interesting questions and ideas also arise in the smaller details of arguments presented to the courts and the views of enforcement agencies. In this paper, we consider some developments from the past year that may influence the law's continuing evolution.

I. Market Power and the Antitrust Reform Debate

Antitrust policy discussions currently revolve around the

[1]"Madness is the result not of uncertainty but of certainty."—*Friedrich Nietzsche*.

so-called "FANG" companies (Facebook, Amazon, Netflix, and Google) and the question of whether the antitrust laws should be used (and perhaps modified) to more closely regulate the behavior of dominant technology companies. As we discussed in this publication last year,[2] the implications of the debate are not necessarily confined to the technology (or "big data") sectors but have significant potential spillover implications for all industries prone to market concentration, including health care.

Within the past year, it has become clear that the Federal Trade Commission (FTC) and the Antitrust Division of the U.S. Department of Justice (DOJ) are taking different paths on this question, with the FTC moving aggressively and the DOJ giving more measured signals. In 2018, the FTC commenced a series of public hearings on a variety of monopolization-related topics focused on technology, communications, and platform markets.[3] The FTC followed in 2019 by establishing a Technology Task Force specifically to monitor competition, and investigate potential anticompetitive conduct, in U.S. technology markets.[4] FTC Commissioners have spoken publicly about protecting nascent competition in markets with dominant firms, as well as (of particular note to health care) the view that technological innovation is blurring the traditional enforcement distinctions between competition, privacy, and consumer protection.[5] Indeed, FTC Commissioner Slaughter has suggested that the European

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[2]R. McCann, *Thinking Big: Market Power in Consolidating Health Care Markets*, in A. Gosfield, ed., HEALTH LAW HANDBOOK 2019 EDITION (Thomson Reuters 2019).

[3]Platform markets are those in which a firm brings together two or more sides who benefit from the existence of the platform marketplace. For example, credit card companies are platforms that bring together merchants and purchasers. Amazon, E-Bay, and Google are consumer sales platforms. Health information exchanges also are platforms, albeit of a somewhat different character.

[4]Federal Trade Comm'n Press Release, "FTC's Bureau of Competition Launches Task Force to Monitor Technology Markets," (Feb. 26, 2019).

[5]*See* J. Simons, Chairman, Federal Trade Commission, "Prepared Remarks of Chairman Joseph Simons, presented to Georgetown Law Global Antitrust Enforcement Symposium" (Sept. 25, 2018); *available at* https://www.ftc.gov/system/files/documents/public_statements/1409925/opening_remarks_of_joe_simons_hearings1georgetown_sept2018_0.pdf; R. Slaughter, Commissioner, Federal Trade Commission, "Prepared Closing

Commission's enforcement of its abuse-of-dominance standard presents "an opportunity to consider the benefits or risks of changing our statutory standards [in the United States]."[6]

Not every FTC Commissioner is enthusiastic about changing the legal standards applicable to dominant firms, however. Commissioner Wilson recently maintained, "I see little reason to create different antitrust laws for different entities," adding "we should stick to the same sound, economically-driven analysis that has served us well for many years."[7] Commissioner Wilson's comments are similar in nature to those of Assistant Attorney General Delrahim. who has argued that regulators must exercise care in applying the antitrust laws to large technology companies and big data platforms, and that new tools and a new approach to enforcement in these sectors is not necessary. In the context of data and market power, he has pointed to the fact that, in the United States, the antitrust laws have never compelled dominant firms to deal with their competitors.[8]

Keynote of Commissioner Rebecca Kelly Slaughter," presented to 6th Bill Kovacic Antitrust Salon: Where is Antitrust Policy Going? (Sept. 24, 2018), *available at* https://www.ftc.gov/public-statements/2018/09/prepared-closing-keynote-commissioner-rebecca-kelly-slaughter.

[6]Slaughter, note 5 supra. European competition authorities have aggressively pursued complaints against large technology companies, notably Google and Facebook, for a number of years. Since 2017, Google has been fined roughly €8.25 billion (about $9.22 billion) by the European Commission (EC) for various conduct deemed to be "abuse of dominance." In 2019, the EC published a report containing the recommendations of special advisors proposing updated theories of harm relating to the conduct of dominant technology companies. The European Union and EC also proposed regulations governing the manner in which online platforms deal with smaller companies who compete with and/or are reliant on those platforms. Although the EC's policies do not apply to domestic U.S. antitrust matters, they unquestionably are influential in the U.S. debate over Section 2 enforcement.

[7]C. Wilson, Commissioner, Federal Trade Commission, "Why We should All Play By the Same Antitrust Rules, from Big Tech to Small Business," address at the American Enterprise Institute (May 4, 2019), *available at* https://www.ftc.gov/system/files/documents/public_statements/1527497/wilson_remarks_aei_5-4-19.pdf.

[8]M. Delrahim, Assistant Attorney General, U.S. Dept. of Justice, "Don't Stop Believin': Antitrust Enforcement in the Digital Era," keynote address at the University of Chicago's Antitrust and Competition Confer-

A Legislative Proposal. Although most of the debate around monopolization reform has been just talk, a tangible proposal for change was introduced in Congress by Senators Amy Klobuchar and Richard Blumenthal. Rather than modify or enlarge the substantive legal standards for monopolization, the Monopolization Deterrence Act of 2019[9] would seek to deter monopolistic conduct by authorizing the DOJ and the FTC to seek civil monetary penalties for Section 2 violations.

As it presently exists, the Sherman Act is not without significant civil and criminal penalties. Consequences of a civil violation include treble damages, injunctive relief and related consent decrees, reasonable attorney fees and costs, along with debarment from government contracts. Criminal penalties are authorized under both Section 1 (for conspiratorial conduct) and Section 2 (for predatory unilateral conduct), with maximum fines of $100 million for a corporation and $1 million for an individual, along with prison terms of up to 10 years. (No court has ever imposed the maximum prison term in an antitrust case.) The maximum fine in a criminal case is subject to enlargement to twice the amount of the unlawful gain or twice the amount of the loss suffered by the affected party or parties.

However, the concern has been expressed that some corporations are so large that the prospect of treble damages and/or an injunction in a civil suit is not a significant deterrent to anticompetitive conduct.[10] And, criminal enforcement

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ence (Apr. 19, 2018), *available at* https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-keynote-address-university-chicagos; M. Delrahim, Assistant Attorney General, U.S. Dept. of Justice, " 'Start Me Up': Start-Up Nations, Innovation, and Antitrust Policy," remarks at the University of Haifa (Oct. 17, 2018), *available at* https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-university-haifa-israel.

[9]S. 2237, 116th Cong., 1st Sess. (July 23, 2019). Senator Klobuchar is the ranking Democrat on the Senate Judiciary Subcommittee on Antitrust, Competition Policy and Consumer Rights.

[10]*See, e.g.,* "Klobuchar Introduces Legislation to Crack Down on Monopolies that Violate Antitrust Law," press release from the office of Sen. Amy Klobuchar (Aug. 2, 2019) ("[T]he threat of an injunction isn't always enough to deter this unlawful conduct from happening in the first place. Dominant companies need to be put on notice that there will be

being rare outside of price-fixing violations, that remedy also is of questionable deterrent value.

To strengthen existing civil remedies, the Monopolization Deterrence Act would permit the FTC and DOJ to impose civil monetary penalties on a violator of up to 15 percent of its total U.S. revenue for the most recent year or 30 percent of its revenues over the period of time during which the unlawful conduct occurred—whichever is greater. The Act would also require DOJ and the FTC to jointly develop guidelines for imposition of the new civil monetary penalties, to include such factors as:

- The volume of commerce affected;
- The duration and severity of the unlawful conduct;
- Efforts by the unlawful actor(s) to conceal the unlawful conduct; and
- Whether the actor had previously engaged in the same or similar anticompetitive conduct.

The legislation is reported to have the support of national consumer welfare and antitrust policy organizations, specifically Consumer Reports, Public Knowledge, and American Antitrust Institute. The bill has been referred to the Senate Judiciary Committee, but no further action has been taken on the bill (or is expected) as of this writing. At this point, the bill is of note mainly as concrete evidence of intent to advance the debate over standards for challenging perceived anticompetitive exercises of market power.

As the debate continues (which it will, given the large number of progressive candidates vying for the 2020 Presidential nomination),[11] the health care sector must bear in mind that the ongoing quest for scale and integration in

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serious financial consequences for illegal monopolistic behavior."), *available at* https://www.klobuchar.senate.gov/public/index.cfm/2019/8/klobuchar-introduces-legislation-to-crack-down-on-monopolies-that-violate-antitrust-law.

[11] *See, e.g.,* "A Better Deal"—a position paper of the Democratic Party published in advance of the 2018 Congressional elections, with prominent support from 2020 candidates Elizabeth Warren and Bernie Sanders. https://www.democrats.senate.gov/imo/media/doc/2017/07/A-Better-Deal-on-Competition-and-Costs-1.pdf. Mr. Sanders has proposed extensive antitrust enforcement reforms as part of his platform, including revising standards for merger review to include considerations beyond consumer welfare (*e.g.*, effects on job security and the prior conduct of the parties) and giving the

health care, along with the implications of acquiring and amalgamating health care data, are likely to run head-on into any proposals to further regulate the FANG companies, whether directly as a result of broad changes in the law, or indirectly, in consequence of the osmosis of FANG-specific rules into competition rules for other sectors of the economy.

II. Merger Enforcement

A. Trends

Annually, the FTC and DOJ issue a report summarizing compliance activity under the Hart-Scott-Rodino Antitrust Improvements Act (HSR Act) during the prior fiscal year.[12] Although predicting trends is always risky, the 2019 report (covering the period of October 1, 2017 through September 30, 2018)[13] suggests that the agencies may be devoting more intensive attention to a narrower set of transactions.

In FY 2018, the total number of HSR filings increased by about 3%, to 2,111, compared to FY 2017. However, the number of transactions in which Second Requests were issued declined in absolute terms; thus, the percentage of transactions in which a Second Request was issued declined rather significantly, to 2.2% from 2.6%.[14] This represents the lowest percentage of transactions receiving Second Requests at any time in the past five years. However, the percentage of transactions receiving a Second Request that ultimately

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Federal Trade Commission authority to block and unwind mergers without judicial oversight. https://berniesanders.com/issues/corporate-accountability-and-democracy/.

[12]The Hart-Scott-Rodino Antitrust Improvements Act, 15 U.S.C. § 18a, requires parties to merger and acquisition transactions meeting certain size thresholds to report those transactions to the FTC and DOJ, and then wait 30 days before closing. The HSR Act is intended to provide the agencies with an opportunity to intervene in mergers that present competitive concerns before those mergers actually occur.

[13]Federal Trade Commission Bureau of Competition and U.S. Department of Justice Antitrust Division, HART-SCOTT-RODINO ANNUAL REPORT FISCAL YEAR 2018 (Sept., 2019).

[14]A "Second Request" is issued in cases in which the reviewing agency is unable to resolve its concerns about a merger within the 30-day HSR waiting period. A Second Request imposes (typically significant) additional reporting burdens on the merger parties and extends the waiting period until 30 days after the parties have complied with the Second Request.

were challenged by the FTC or DOJ rose in 2018 to 86.7% after a four-year low of 80.4% in 2017. In other words, even though the percentage of transactions receiving a Second Request declined in 2018, a higher percentage of Second Request-ed transactions were contested. These figures may suggest that the issuance of a Second Request is becoming a more meaningful indicator of a likely agency challenge, and some commenters have suggested as much.[15]

With respect to the health care industry specifically, across the three major categories (ambulatory health care services, hospitals, and nursing care facilities), there were 84 HSR-reported transactions in FY 2018,[16] of which 38 were "intra-industry" transactions, meaning that both the acquiring and acquired parties derived revenues from the same lines of business, and thus were potentially of competitive concern. Thirty-three of those transactions became the subject of a preliminary investigation (all by the FTC), and five Second Requests were issued.[17] In total, the health care industry represented 4.1% of the HSR filings and 6.7% of the intra-industry transactions, but accounted for 11.5% of the investigated transactions, and 11.1% of the Second Requests. These numbers reflect both the continuing intensive interest in the health care industry on the part of the FTC, as well as the fact that hospital markets (in particular) tend more toward concentration than other sectors of the economy.

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[15]However, it bears noting that the higher percentage of challenged transactions in FY 2018 (86.7%) nonetheless was in line with the percentages in 2016 (87.0%) and 2015 (89.4%).

[16]This figure is the number of transactions in which the *acquired* entity was in one of the three industry groups. It therefore does not reflect acquisitions by a health care firm of a non-health care entity.

[17]The reported statistics for Second Requests are based on the year in which the Second Request was issued. Thus, the FY 2018 total could include transactions for which an investigation began in FY 2017 and, concomitantly, a transaction investigated in FY 2018 for which a Second Request was issued in FY 2019 would not be reflected in the total.

B. Use of Arbitration in Federal Merger Review

The Administrative Dispute Resolution Act of 1996[18] permits all federal agencies to use alternative dispute resolution (ADR), including binding arbitration, as a means of resolving disputes. To do so, an agency must issue specific guidance for the process it will follow, and that guidance must take into account certain situations identified in the Act for which ADR may not be appropriate. These are situations in which (i) a definitive or authoritative resolution of the matter is required for precedential purposes and cannot be achieved through ADR; (ii) the matter in question involves or may bear on significant matters of governmental policy; (iii) there is a risk that an arbitration result may deviate from established policies, when the maintenance of those policies is deemed of special importance; (iv) the matter affects persons who would not be party to the ADR proceeding; (v) a full public record is required and cannot be provided through ADR; and (vi) ADR would interfere with the agency's authority to maintain jurisdiction over the matter post-decision.[19] Under the Act, both parties must agree to the use of ADR to resolve the dispute in question; an agency may not unilaterally require non-judicial resolution of a dispute.

To date, only a few agencies have issued guidance to implement the Administrative Dispute Resolution Act and, consequently, ADR has rarely been used to resolve disputes with the federal government. The DOJ issued guidelines in 1996 specifically authorizing the use of arbitration to settle merger reviews;[20] however, that authority was never exercised until very recently. The fact that antitrust disputes arguably touch on the categories for which ADR is disfavored under the Act no doubt explains (at least in part) this historical aversion. However, in September, 2019, the Antitrust Division of the DOJ, for the first time, agreed to the use of binding arbitration to resolve a merger challenge under Section 7 of the Clayton Act. Contemporaneous comments by

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[18]5 U.S.C. § 571, et. seq. The 1996 Act amended and made permanent the authority originally provided by the Alternative Dispute Resolution Act of 1990, Pub. L. 101-552, 104 Stat. 2736.

[19]5 U.S.C. § 572(b).

[20]61 Fed. Reg. 36896 (July 15, 1996).

the head of the Antitrust Division indicate that the Division currently is committed to more broadly exploring arbitration as a means to resolve challenges in appropriate cases.[21]

The specific case in question involved the acquisition by Novelis, a supplier of flat-rolled aluminum, of Aleris, a recent entrant into the same U.S. market. The DOJ complaint alleged that the acquisition would result in undue concentration in the market for aluminum auto body sheet (ABS) sold to North American automakers. The complaint alleged that the number of competitors in that market would be reduced from four to three, giving the merged firm a 60% share.[22]

In response, Novelis asserted, among other defenses, that the relevant market should be defined to also include suppliers of steel auto body sheet, as well as suppliers of aluminum ABS. Novelis asserted that steel sheet is used in over 90% of the auto body market; thus, inclusion of steel suppliers would result in a materially-reduced post-merger market concentration.[23] It is this question of market definition that Novelis and DOJ agreed to submit to arbitration. Their agreement is outlined in a "Term Sheet" filed with the court five days after the filing of DOJ's complaint.[24] The Term Sheet includes stipulations around discovery and other procedural items, as well as stipulations concerning negotia-

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[21]M. Delrahim, Assistant Attorney General, U.S. Dept. of Justice, *" 'Special, So Special': Specialist Decision-Makers in, and the Efficient Disposition of, Antitrust Cases,"* remarks delivered at the 7th Bill Kovacic Antitrust Salon (Sept. 9, 2019), *available at* https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-7th-bill-kovacic-antitrust.

[22]Complaint, *United States v. Novelis, Inc.*, No. 1:19-cv-02033-CAB (N.D. Ohio Sept. 9, 2019), *available at* https://www.justice.gov/atr/case-document/file/1199461/download.

[23]Press Release, "Novelis Reaffirms Commitment to Acquisition of Aleris," Aleris Sept. 4, 2019), *available at* http://investors.novelis.com/2019-09-04-Novelis-Reaffirms-Commitment-to-Acquisition-of-Aleris.

[24]Term Sheet, *United States v. Novelis, Inc.*, No. 1:19-cv-02033-CAB (N.D. Ohio Sept. 9, 2019), *available at* https://www.justice.gov/atr/case-document/file/1200806/download. In a related filing, the DOJ set forth for the court an explanation of the arbitration plan agreed to by the parties. Plaintiff United States' Explanation of Plan to Refer This Matter to Arbitration, United States v. Novelis, Inc., No. 1:19-cv-02033-CAB (N.D. Ohio Sept. 9, 2019), *available at* https://www.justice.gov/atr/case-document/file/1200821/download.

tion of a possible remedy. Arbitration would commence within 120 days after the defendants file their answer to the government's complaint. With respect to arbitration, however, the parties agree to instruct the arbiter(s) to:

> . . . determine whether aluminum automotive body sheet (ABS) constitutes a relevant product market as that term is used in the Horizontal Merger Guidelines, case law, and/or other applicable authorities, including *inter alia*, whether any competitive restraint from steel ABS, in conjunction with other constraints, is sufficient to prevent at least a small but significant on-transitory increase in price ("SSNIP") of one or more aluminum ABS products by a hypothetical monopolist of aluminum ABS.

In the term sheet, the DOJ has agreed that if the arbiter(s) determine that the relevant market is broader that aluminum ABS, the complaint against Novelis and Aleris will be dismissed. If, however, the arbiter(s) determine that aluminum ABS in fact constitutes a relevant product market, Novelis will be required to make a divestiture of certain assets on terms acceptable to DOJ.

The use of arbitration in the Novelis matter can be seen as an encouraging development, given the time and expense of resolving merger cases in court. The incentive to "leave no stone unturned" in litigation typically results in protracted discovery and inordinate expense. In contrast, a negotiated ADR agreement presents an opportunity to focus in greater depth on dispositive issues. In recent remarks, the Assistant Attorney General identified three major considerations for the Antitrust Division in agreeing to arbitration:

> First, what are the efficiency gains relative to the alternatives? The Division would be more likely to arbitrate if doing so could save significant time or taxpayer money while ensuring that competition and consumers are protected. Second, is the question the arbitrator will be asked to resolve clear and easily can be agreed upon? If not, then arbitration may not be the best use of our or the parties' resources. Third, would arbitration result in a lost opportunity to create valuable legal precedent? This will depend on the facts of the particular case, but the effect could be mitigated depending on the transparency of the process and the arbitrator's decision.[25]

It is certainly true that many merger cases present

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[25]Delrahim, note 21, *supra*. Mr. Delrahim went on to identify "secondary" factors that would be relevant to the Antitrust Division's concurrence

multiple and arguably complex questions for resolution. However, it is also true that questions of market definition are dispositive in many such cases. Many, perhaps most, market definition disputes can be refined into a set of discrete questions that can be submitted to an independent arbiter. For example, in the recent Advocate merger litigation, a critical question was whether the FTC was correct in excluding certain geographically proximate hospitals, as well as certain academic medical centers, from the relevant market.[26] Although many arguments were propounded in those proceedings, the market definition question can be said to have been the dispositive issue in the case.

What About the FTC? Virtually all federal antitrust enforcement matters (particularly mergers) involving health care providers, by agreement with DOJ, fall within the jurisdiction of the FTC. The FTC, unlike the DOJ, adjudicates its own complaints. An FTC complaint is issued by vote of the Commissioners and tried before an Administrative Law Judge (ALJ) employed by the Commission. The first appeal from the ALJ's decision is before the Commission, *i.e.*, the same Commissioners who voted to issue the complaint in the first instance.[27] FTC merger review intersects with the federal court system primarily in the event of an action to

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in arbitration, specifically agreement to (i) the process to be followed, (ii) the identity of the arbitrator, (iii) the effect of the arbitration, and (iv) allocation of costs.

[26]*See* Federal Trade Comm'n v. Advocate Health Care Network, No. 15 C 11473, 2016 WL 3387163 (N.D. Ill. June 20, 2016), rev'd, 841 F.3d 460 (7th Cir. 2016), *on remand*, 2017 WL 1022015 (N.D. Ill. Mar. 16, 2017).

[27]It is a statistical fact that the Commission routinely affirms ALJ decisions upholding the FTC complaint and reverses those in favor of the respondent. The FTC's role as prosecutor, judge, and jury in its own cases is periodically a source of controversy. *See*, *So I Serve as Both a Prosecutor and a Judge—What's the Big Deal?*, Remarks of J. Thomas Rosch, Commissioner, Federal Trade Commission, before the American Bar Association Annual Meeting (Aug. 5, 2010), *available at* http://www.ftc.gov/speeches/rosch/100805abaspeech.pdf.

preliminarily enjoin the transaction pending trial before the ALJ.[28]

Although the FTC has been willing to embrace arbitration as a method of settling certain disputes arising under its issued orders,[29] it has not considered ADR as a means of resolving the substantive issues in merger challenges. Given that the FTC is a self-contained prosecutorial and adjudicatory system under which the FTC almost always prevails, it seems unlikely that the agency would embrace resolution by outside arbiters. Nonetheless, successful use of arbitration in appropriate cases by the DOJ could create a broader discussion on approaches to resolve merger challenges more efficiently.[30]

III. Challenges to Vertical Integration in Health Care

Consolidation of physician services by hospitals – and by insurers—continues to attract the attention of both federal

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[28]The federal appellate courts have jurisdiction to review the ultimate decisions of the Commission; however, that review occurs under the more deferential "substantial evidence" standard. See 15 U.S.C.A. § 45.

[29]The FTC has not used ADR as a means of settling disputes regarding alleged violations of the terms of an order itself; however, some FTC orders have included provisions requiring the respondent party to engage in arbitration to resolve related commercial disputes with third parties. *See, e.g.*, Final Order, *In the Matter of Evanston Northwestern Healthcare*, No. 9315 (FTC Apr. 24, 2008) at ¶ II.D. (under the order requiring the respondent to follow certain procedures in negotiating future contracts with third party payors, in the event of an impasse in any such negotiation, the payor is to be given the right to invoke both mediation and arbitration processes), *available at* https://www.ftc.gov/sites/default/files/documents/cases/2008/04/080424finalorder.pdf.

[30]Not all antitrust commenters are as enthusiastic about prospect of arbitration as the Assistant Attorney General. *See, e.g.*, S. Calkins "Binding Arbitration of Merger Challenges: First Do No Harm," (American Antitrust Institute Sept. 18, 2019), *available at* https://www.antitrustinstitute.org/work-product/binding-arbitration-of-merger-challenges-first-do-no-harm-stephen-calkins-comments-on-the-dojs-recent-announcement-in-novelis-aleris/. Professor Calkins argues that the DOJ negotiated away its usual advantages and accepted unfavorable legal standards in the *Novelis* matter, and that the "unusually talented lawyers" of the antitrust bar will besiege the DOJ and FTC with demands for "equally generous treatment" of their merger clients.

and state enforcement agencies. Three cases resolved in the past year have notable details.

A. United Healthcare and DaVita Medical Group

Much attention has been given to consolidation of physician practices by provider-based health systems; however, health insurers continue to pursue vertical integration into outpatient and physician services as well.[31] Prominently, the acquisition of Aetna by CVS, which operates more than 1,000 MinuteClinic sites in its stores and in some Target locations, was promoted as an opportunity to provide integrated opportunities for care management of Aetna insureds.[32] Similarly, Humana, which provides medical benefits to approximately 17 million members (over half of whom are in Medicare plans), operates more than 230 primary care clinics through ownership, joint venture, and alliance relationships.[33] This includes its management of Partners in Primary Care, a physician group practice focused on providing primary care services to members of Medicare Advantage plans that operates in five states.[34] In 2019, Humana and Walgreens announced an expansion of their joint venture under which Partners in Primary Care provides clinic ser-

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[31] *See, e.g.*, R. Abelson, "UnitedHealth Buys Large Doctors Group as Lines Blur in Health Care," *New York Times* (Dec. 6, 2017), *available at* https://www.nytimes.com/2017/12/06/health/unitedhealth-doctors-insurance.html.

[32] Press Statement, *CVS Health Completes Acquisition of Aetna, Marking the Start of Transforming the Consumer Health Experience* (CVS Nov. 28, 2018), *available at* https://cvshealth.com/newsroom/press-releases/cvs-health-completes-acquisition-of-aetna-marking-the-start-of-transforming-the-consumer-health-experience; *A New Path to Better Health* (CVS Nov. 28, 2018), *available at* https://cvshealth.com/aetna; J. Pinsker, "Why CVS Wants to Buy Aetna," *The Atlantic* (Dec. 4, 2017), *available at* https://www.theatlantic.com/business/archive/2017/12/cvs-aetna-merger-deal-why/547442/.

[33] Humana Inc., *2018 Annual Report*, *available at* http://www.annualreports.com/HostedData/AnnualReports/PDF/NYSE_HUM_2018.pdf.

[34] *Id.*; Press Release, *Humana Received 5-Star Quality Ratings for Two Medicare Contracts Reflecting the Company's Focus on Quality in both Member Experience and Clinical Outcomes*, (Humana Oct. 10, 2018).

vices in Walgreens store locations.[35] Walgreens offers retail clinic services in about 400 of its stores.[36]

Among insurers, however, United Healthcare has moved most directly into the physician services market. Through its OptumHealth and OptumCare subsidiaries, United has employment or affiliation relationships with some 50,000 physicians covering 40 markets in six states, along with its MedExpress urgent care centers and more than 200 surgery centers acquired in the 2017 purchase of Surgical Care Affiliates.[37]

Given United's position, it was not unexpected that its $4 billion acquisition of DaVita Medical Group, operating 300 medical clinics in six states and overlapping with Optum in multiple markets, would prompt investigations and, ultimately, enforcement actions at both the federal and state levels.

FTC Challenge. The FTC challenged the proposed acquisition specifically with respect to its potential effects in a two-county Las Vegas, Nevada, market. Within that geography, the FTC alleged, United's OptumCare and DaVita Medical Group's HealthCare Partners of Nevada (HCPNV) served 80 percent of Medicare Advantage (MA) plan members.[38] The FTC alleged, in addition, that United insured 50% of the MA lives in a market defined as Medicare Advantage plans sold to individuals, and that the individual

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[35]Press Release, *Humana and Walgreens to Open Additional In-store Partners in Primary Care Centers* (Walgreens July 30, 2019), *available at* https://news.walgreens.com/press-releases/humana-and-walgreens-to-open-additional-in-store-partners-in-primary-care-centers.htm.

[36]*Id.*

[37]L. Dyrda, "Optum has 50,000 employed, affiliated physicians and a vision for the future," *Becker's ASC Review* (Sept. 17, 2019), *available at* https://www.beckersasc.com/asc-transactions-and-valuation-issues/optum-has-50-000-employed-affiliated-physicians-and-a-vision-for-the-future.html; B. Japsen, "UnitedHealth: DaVita Medical Deal 'Progressing' On Path To Close," *Forbes* (Apr. 17, 2019), *available at* https://www.forbes.com/sites/brucejapsen/2019/04/17/unitedhealth-davita-medical-deal-progressing-on-path-to-close/#58352cba629f; "UnitedHealth to buy DaVita primary care unit for $4.9 billion," Reuters Business News (Dec, 6, 2017), *available at* https://www.reuters.com/article/us-davita-m-a-unitedhealth/unitedhealth-to-buy-davita-primary-care-unit-for-4-9-billion-idUSKBN1E01HJ.

[38]Complaint, *In the Matter of United Health Group Incorporated, et al.*, No. C-4677 (FTC June 19, 2019) at ¶ V, *available at* https://www.ftc.go

market was highly concentrated (with non-party Humana covering approximately 35% of the MA lives).[39] In June, 2019, United and DaVita settled the FTC's complaint pursuant to a consent order requiring United to sell the operations of HCPNV to a third party, Intermountain Healthcare.[40]

The FTC's complaint in this matter is notable in two respects. First, the FTC confined its allegations of anticompetitive effects to markets for Medicare Advantage plans. It has been far more common for FTC challenges of provider transactions to be based on alleged competitive effects in commercial insurance markets.[41] One can reasonably posit that the historical lack of attention to Medicare Advantage markets reflects the fact that price competition among providers has been absent from those markets in many parts of the country. Most MA plans pay providers at or slightly

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v/system/files/documents/cases/181_0057_c4677_united_davita_complaint.pdf (hereinafter, "United Complaint").

[39] *Id.*

[40] Decision and Order, *In the Matter of United Health Group Incorporated, et al.*, No. C-4677 (FTC June 19, 2019), *available at* https://www.ftc.gov/system/files/documents/cases/181_0057_c4677_united_davita_order.pdf; Agreement Containing Consent Orders, *In the Matter of United Health Group Incorporated, et al.*, No. 181-0057 (FTC June 19, 2019), *available at* https://www.ftc.gov/system/files/documents/cases/181_0057_united_davita_acco_6-19-19.pdf.

[41] Indeed, none of the four most recent hospital merger challenges raised concerns beyond potential effects in the commercial insurance market. *See* Complaint for Temporary Restraining Order and Preliminary Injunction, *Federal Trade Comm'n v. Penn State Hershey Medical Center*, No. 1:15-cv-02362-JEJ (M.D. Pa. Apr. 8, 2016) at ¶ 4 (alleging harm in the "market for GAC [general acute care] services sold to commercial health plans"); Complaint for Temporary Restraining Order and Preliminary Injunction, *Federal Trade Comm'n v. Advocate Health Care Network*, No. 1:15-cv-11473 N.D. Ill. Dec. 22, 2015) at ¶ 4 (alleging harm in the "market for GAC [general acute care] inpatient hospital services sold and provided to commercial health plans and their insured members"); Complaint for Temporary Restraining Order and Preliminary Injunction, *Federal Trade Comm'n v. OSF Healthcare System*, No. 3:11-cv-50344 (N.D. Ill. Nov. 18, 2011) at ¶ 33(alleging harm in the "market for general acute care inpatient services sold to commercial health plans"); Complaint for Temporary Restraining Order and Preliminary Injunction, *Federal Trade Comm'n v. ProMedica Health System, Inc.*, No. 3:11CV0047 (N.D. Ohio Jan. 7, 2011) at ¶¶ 19, 21 (alleging harm in two relevant service markets, "general acute care inpatient hospital services sold to commercial health plans" and "inpatient obstetrical services").

above standard fee-for-service Medicare rates, and narrow network products (in which providers would compete to participate) comprise only about 16 percent of MA plans.[42] MA plans typically have derived savings from utilization management and not from negotiating unit-price discounts with providers.[43] Recent research suggests, however, that Medicare's star-rating system, which grades MA plans in part on clinician performance and provides financial incentives to high-performing plans, is impelling more MA plans toward narrow networks. This, of course, represents an alternative dimension of provider competition, and suggests that antitrust regulators may more routinely scrutinize this segment in reviewing provider mergers and acquisitions.

The United complaint is also notable for its explicit identification of potential vertical effects from the acquisition. Specifically, the complaint alleged that the integration of United Health Group and HCPNV would give United, as a Medicare Advantage Organization, control of a competitively significant input (physician services) required by its competitors in the MA marketplace. United, the complaint alleged, would be able to disadvantage its rivals by raising rates for the services of HCPNV physicians, restrict participation by HCPNV in care coordination and quality initiatives of rival plans, or even refusing HCPNV contracts to rival plans altogether.[44]

These vertical foreclosure issues are present in most acquisitions of physician organizations by health systems, but generally those claims have not been pursued in enforcement actions. To some degree, this result reflects the fact that these transactions also have horizontal dimensions (*i.e.*, the acquiring system typically is also a significant employer of physicians in the same specialties) and, in such cases, it is often a simpler matter to demonstrate the likelihood of adverse horizontal effects in the physician services market than the vertical effects in the hospital services market.

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[42]L. Skopec, R. Berenson, and J. Feder, *Why Do Medicare Advantage Plans Have Narrow Networks?* (Urban Institute Nov., 2018), *available at* https://www.urban.org/sites/default/files/publication/99414/why_do_medicare_advantage_plans_have_narrow_networks.pdf.

[43]*Id.*

[44]Complaint, *In the Matter of UnitedHealth Group Incorporated*, No. C-4677 (FTC June 19, 2019) at ¶¶ 18–20.

Moreover, many antitrust authorities hold that vertical integration is presumptively efficiency-enhancing, and the Supreme Court has declined to recognize the once-popular monopoly leveraging theory of liability under Section 2 of the Sherman Act.[45] Although neither factor forecloses the ability to make a vertical Section 7 case based on foreclosure, they are argumentative hurdles that do not exist in a horizontal case.

Indeed, vertical merger enforcement cases remain rare. The Justice Department's challenge to the AT&T-Time Warner merger (which the government ultimately lost) was the first litigated vertical combination case in 40 years.[46] But the FTC complaint in the United/DaVita transactions indicates that the agency is well aware of the potential for vertical effects in health care mergers and acquisitions.

State Challenge. Although the FTC declined to pursue any action with respect to the potential effects of the DaVita Medical Group-Optum combination in the State of Colorado, the Colorado Attorney General sought relief from the perceived impact of the transaction in the market for Medicare Advantage plans in the Colorado Springs area. In contrast to the FTC's Nevada complaint, in this matter the Attorney General focused solely on vertical effects, alleging that "[t]he combination of Optum and DaVita Medical Group would create significant market power with the ability and incentive to raise DaVita Medical Group's price to other insurance companies that serve Medicare Advantage patients in the Colorado Springs Area."[47] This matter likewise was settled through a consent order, under which United agreed

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[45]*See, e.g.*, H. Hovenkamp, *Robert Bork and Vertical Integration: Leverage, Foreclosure, and Efficiency*, 79 ANTITRUST L. J. 983, 996 (2014) ("Indeed, today most vertical integration is viewed as economically beneficial and competitively benign."); Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 415 n.4 (2004). ("The Court of Appeals also thought that respondent's complaint might state a claim under a 'monopoly leveraging' theory. . . We disagree. To the extent that the Court of Appeals dispensed with a requirement that there be a 'dangerous probability of success' in monopolizing a second market, it erred." This statement by the Court indicates it did not recognize a monopoly leveraging theory distinct from an attempted monopolization claim.).

[46]United States v. AT&T, Inc., 918 F.3d 1029 (D.C. Cir. 2019).

[47]Press Release, Office of the Attorney General of Colorado, "Antitrust Challenge and Settlement to the UnitedHealth Group and DaVita Merger

(1) not to enforce the exclusivity provisions of its agreement with Centura Health, a large health system that includes two hospitals in Colorado Springs, under which the Centura hospitals were precluded from participating in the network of any non-United MA plan; and (2) refrain from giving notice of non-renewal of any contract between the Colorado Springs physician groups acquired from DaVita and any non-United MA plan prior to the end of the 2019 (or in certain cases 2020) plan year.

Typical of many state enforcement remedies, the Colorado consent order is conduct-oriented (as opposed to requiring structural relief, *e.g.*, divestiture) and in a major respect, of very limited duration. Nonetheless, this action, as well as the action of the Washington Attorney General, discussed below, evidences the continuing and growing interest of state attorneys general in health care antitrust matters.[48]

B. Sanford Health and Mid-Dakota Clinic

On appeal of a case first filed in 2017, the Eighth Circuit Court of Appeals upheld a preliminary injunction in favor of the Federal Trade Commission against the intended acquisition of Mid-Dakota Clinic in Bismarck, ND, by a subsidiary of Sanford Health.[49] On a purely structural basis, the result can be described as unremarkable. However, several aspects of the case are noteworthy with respect to future challenges to health care provider consolidations.

Mid-Dakota Clinic is a multi-specialty physician group practice that includes adult and pediatric primary care physicians, OB/GYNs, and general surgeons (which specialties comprised the relevant market in this case), as well as a number of specialists in other disciplines. Sanford is a large regional health care system that operates one of two

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Will Safeguard Competition, Cost, and Quality of Healthcare for Seniors in the Colorado Springs Area," (June 19, 2019), *available at* https://coag.gov/press-releases/06-19-19/; an unfiled version of the complaint is *available at* https://coag.gov/app/uploads/2019/06/2019-06-19-08-00-13-United-DaVita-Complaint-final.pdf.

[48] *See also*, state enforcement actions discussed in R. McCann and K. Vorassi, *Antitrust Treatment of Physician-Hospital Integration Post-FTC v. St. Luke's*, 28 ANTITRUST 75 (2014).

[49] Federal Trade Comm'n v. Sanford Health, 926 F.3d 959 (8th Cir. 2019).

hospitals in Bismarck. Sanford also operates physician clinics in the Bismarck area and likewise is a large employer of physicians, including physicians practicing adult and pediatric primary care, OB/GYN, and general surgery. After unsuccessfully pursuing an acquisition by Sanford's hospital competitor (CHI St. Alexius Health), Mid-Dakota entered into a stock purchase agreement with Sanford. The deal was opposed by the FTC and the North Dakota Attorney General, and a preliminary injunction was granted by the federal district court[50] and affirmed by the Court of Appeals. Among other findings, the court concluded that the merged firm would have market shares in the relevant physician specialty markets ranging from 85 percent to 99 percent

The large post-merger market shares *per se* were not an apparent point of contention in the case.[51] Rather, Sanford's defense was based principally on two arguments relating to the nature of competition. First, Sanford argued that the trial court's use of the "hypothetical monopolist test" to define the relevant market was flawed because it failed to account for dominant market position of the North Dakota Blue Cross plan. The hypothetical monopolist test, which is adopted in the federal *Merger Guidelines*,[52] defines a market by an iterative process that asks whether—within a proposed market—a hypothetical monopoly seller could profitably impose a "small but significant and non-transitory" price increase. If not, *i.e.*, if purchasers would have alternatives outside of the proposed market, the proposed market is too narrow and must be expanded. Sanford asserted that Blue Cross' ability to defeat a post-merger price increase made the calculus of the hypothetical monopolist test inaccurate. The trial court rejected this reasoning, stating that any argument concerning Blue Cross' leverage would be relevant only in rebuttal of the government's *prima facie* case and not in

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[50]Order Granting Plaintiffs' Motion for a Preliminary Injunction, *Federal Trade Comm'n v. Sanford Health*, No. 1:17-cv-133 (D.N.D. Dec. 13, 2017), *available at* https://www.ftc.gov/system/files/documents/cases/sanford_order.pdf.

[51]Indeed, the FTC's complaint asserted a fairly broad geographic market which, although not surprising for a sparsely populated area, likely pre-empted debate on market shares.

[52]U.S. Department of Justice and Federal Trade Commission, *Horizontal Merger Guidelines* (2010) (hereinafter "*Merger Guidelines*") at § 4.

defining the relevant market.[53] The Eighth Circuit agreed, explaining that the hypothetical monopolist test is concerned solely with the ability of a purchaser to avoid a price increase by substituting away from the merging parties, not with the ability of the purchaser to avoid a price increase by other means.[54]

Thus, Sanford advanced the same premise as a rebuttal of the *prima facie* case built on market shares, *i.e.*, that a presumption of competitive harm should not arise from the high market shares because Blue Cross, with an approximate two-thirds share of the insurance market and near-100 percent participation by North Dakota physicians, was positioned to thwart any post-merger exercise of market power by Sanford in the relevant physician markets. In support, Sanford pointed to Blue Cross' use of a statewide fee schedule for physician services. Although this "power-buyer" line of argument has some support in older decisions in other industries,[55] it has been singularly unsuccessful in health care antitrust cases (and ultimately was unsuccessful here).

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[53]Sanford Memorandum of Decision at ¶ 19.

[54]926 F.3d at 965.

[55]*See, e.g.*, United States v. Baker Hughes Co., 908 F.2d 981 (D.C. Cir. 1990); United States v. Country Lake Foods, Inc., 754 F. Supp. 669 (D. Minn. 1990); United States v. Syufy Enterprises, 903 F.2d 659 (9th Cir. 1990). In *Baker Hughes*, the D.C. Circuit rejected a federal challenge to a merger vesting the defendants with a 75 percent market share, observing, among other things, that the likelihood of competitive harm was mitigated by the fact that the affected purchasers were generally large and highly sophisticated firms. 908 F.2d at 986–87. Notably, the court also found that barriers to entry in the affected market were low. In *Country Lake Foods*, the court declined to grant a preliminary injunction against a merger of the second and third largest milk producers in the relevant market, finding that post-merger competition would be ensured by the fact that three buyers controlled 90% of that market. 754 F. Supp. at 674. It bears noting, however, that the court did not rely exclusively on that fact in reaching its decision and cited several other reasons why it believed DOJ would not be successful on the merits of the case. In *Syufy*, a case in which the *defendant* was an alleged power buyer, the Ninth Circuit rejected a § 2 monopolization claim against an owner of movie theaters where the evidence showed that large movie distributors were successful in defeating any exercise of monopsony power by the defendant. For a broader discussion of power buyer (monopsony) issues in health care, *see* R. McCann, "Field of Dreams: Dominant Health Plans and the Search for a 'Level Playing Field,' " in A. Gosfield, ed., 2007 HEALTH LAW HANDBOOK (Thomson West 2007).

For example, the defendants in *FTC v. St. Luke's Health System*, in which the FTC challenged the acquisition of a large medical group (the Salzer Clinic) by a hospital-based health system, argued that the dominant position of Blue Cross of Idaho as a purchaser of health care provider services would prevent them from charging supra-competitive prices following the transaction. St. Luke's contended that it could not walk away from a Blue Cross contract without incurring the substantial economic loss that would ensue from significant migration of its patient volume to competitors.[56] The trial court, however, credited testimony from Blue Cross that St. Luke's, pre-acquisition, had negotiated significantly higher rates from Blue Cross than other hospitals, and that Blue Cross' position in the market would be "unsustainable" without a St. Luke's contract.[57] The Court further found that St. Luke's and Salzer Clinic were each other's closest substitutes and that their merger would increase the bargaining leverage of both organizations at the expense of Blue Cross.[58]

In *Sanford*, the trial court similarly concluded that the defendants' arguments were insufficient to overcome the testimony of Blue Cross that it would be forced to agree to increased reimbursement with Sanford post-merger, along with evidence that Blue Cross had modified its contract terms in the past based on negotiations with Sanford.[59] The trial court also cited the federal *Merger Guidelines*, which take the position that the presence of a powerful buyer alone will not necessarily constrain the ability of merging firms to raise prices, and that the existence of a powerful buyer may

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[56]Defendants' Corrected Proposed Findings of Fact and Conclusions of Law at ¶¶ 265–274, Federal Trade Comm'n v. St. Luke's Health System, Ltd., No. 13-cv-116 (D. Idaho Jan. 7, 2014), *available at* https://www.ftc.gov/system/files/documents/cases/131104stlukefof.pdf.

[57]Findings of Fact & Conclusions of Law at ¶¶ 88–89, Federal Trade Comm'n v. St. Luke's Health System, Ltd., No. 13-cv-116 (D. Idaho Jan. 24, 2014), *available at* https://www.ftc.gov/system/files/documents/cases/140124stlukesfindings.pdf.

[58]*Id.* at ¶¶ 109–111.

[59]Memorandum of Decision, Findings of Fact, Conclusions of Law, and Order at ¶¶ 39–41; 103–122, Federal Trade Comm'n v. Sanford Health, No. 1:17-cv-133 (D.N.D. Dec, 15, 2017) (hereinafter "Sanford Memorandum of Decision").

not prevent an exercise of market power against other, smaller buyers.[60] The court of appeals agreed that the trial court's reliance on the Blue Cross testimony and the *Merger Guidelines* was not clearly erroneous.[61]

Perhaps the more interesting observations from the *Sanford* litigation concern the strategy of the case from the enforcement perspective. First, this action reflects a continuing interest on the part of the FTC in the consolidation of physician markets—particularly in primary care and basic specialties such as cardiology and general surgery. Although, historically, physician consolidation transactions typically have been too small to attract enforcement interest, the continuing consolidation of physician markets by health systems and insurers is leading to greater scrutiny.[62] Unquestionably, reviews of hospital and health system mergers have come to include a focus on potential effects in physician services markets, beyond the traditional focus on general acute care inpatient hospital markets.

Also notable is that, as in the *St. Luke's* matter, the FTC pursued the case solely as a horizontal merger in the physician services markets, notwithstanding that the acquisition of Mid-Dakota Clinic by Sanford had clear competitive

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[60] Id. at ¶ 38, citing *Merger Guidelines* at § 8. Although the issue has never been squarely before it, more than 25 years ago the Supreme Court cautioned that a few "power buyers" cannot be expected to protect other (*i.e.*, smaller) buyers in the market from the effects of a monopolistic seller. Eastman Kodak Co. v. Image Technical Services, Inc., 504 U.S. 451, 475–76. (1992). Indeed, there are cases holding that a merger may properly be enjoined even if the product has only one customer. Federal Trade Comm'n v. PPG Industries, Inc., 798 F.2d 1500 (D.C. Cir. 1986); Grumman Corp. v. LTV Corp., 665 F.2d 10 (2d Cir. 1981); Federal Trade Comm'n v. Alliant Techsystems, Inc., 808 F. Supp. 9 (D.D.C. 1992); Federal Trade Comm'n v. Imo Industries, 1992-2 Trade Cas. ¶ 69,943 (D.D.C. 1989). All of those cases involved defense industry products that were purchased solely by the United States, so one could speculate that national interest considerations alone were sufficient to influence those decisions.

[61] 926 F.3d at 964–65.

[62] *See*, *e.g.*, H. Meyer "Medical Group Deals Face Growing Antitrust Scrutiny," *Modern Healthcare* (July 6, 2019), *available at* https://www.modernhealthcare.com/legal/medical-group-deals-face-growing-antitrust-scrutiny; C. Capps, D. Dranove, and C. Ody, *Physician Practice Consolidation Driven by Small Acquisitions, So Antitrust Agencies Have Few Tools to Intervene*, 36 Health Affairs 9 (Sept. 2017); McCann and Vorrasi, note 48, *supra*.

implications for competition between Sanford and CHI St. Alexius Health, the only other hospital in Bismarck. Those implications were considered only obliquely, in regard to the question of whether St. Alexius would be capable of expanding in a manner that would provide timely constraints on Sanford following the acquisition of Mid-Dakota Clinic. In considering that question, the trial court acknowledged the likely competitive impact in the hospital services market, but did not rely on that theory of harm to reach its decision.[63] As noted in the preceding section, focusing on physician service markets is a simpler, less speculative case in terms of demonstrating likely competitive effects, and in this matter that focus was sufficient.

C. CHI Franciscan Health System and WestSound/The Doctors Clinic

Challenges to consummated mergers and affiliations remain relatively rare in health care. However, in 2017, the Attorney General of the State of Washington brought suit against Tacoma-based CHI Franciscan Health System (Franciscan), alleging, first, that Franciscan's 2016 acquisition of an orthopedic practice (WestSound) in Kitsap County, Washington constituted an unlawful acquisition under Section 7 of the Clayton Act. The complaint further challenged a series of integration transactions occurring in 2016 between Franciscan and The Doctors Clinic (TDC), a 54-member multispecialty group practice also located in Kitsap County, alleging those actions constituted unlawful joint agreements under Section 1 of the Sherman Act.[64] Franciscan operates all of the non-federal hospitals in Kitsap County.

The WestSound transaction comprised Franciscan's

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[63]Sanford Memorandum of Decision at ¶ 149 ("Post-merger, physicians currently practicing at [Mid-Dakota Clinic] would likely refer more patients to Sanford rather than to CHI St. Alexius. The anticipated decline in referrals to CHI St. Alexius would indeed incentivize and motivate CHI to add physicians in the four service areas. But, hearing evidence did not establish that the Bismarck-Mandan area's population is sufficient to support a significant increase in total numbers of physicians in each of the four service lines.").

[64]Complaint for Permanent Injunction and Other Relief, *State of Washington v. Franciscan Health System*, No. 3:17-cv-05690 (W.D. Wash. Aug. 31, 2017) (hereinafter, "Franciscan Complaint").

acquisition of the WestSound assets, assumption of its leases, and the employment of the WestSound physicians. The state's complaint alleged that an analysis of the substitutability of orthopedic providers in the relevant market (*i.e.*, a diversion analysis) would establish that orthopedic physicians employed by Franciscan and those formerly employed by WestSound were each other's closest substitutes, and that the loss of competition between them had resulted in higher prices and a loss of non-price (quality) competition.[65] However, this argument was rejected by the federal district court on Franciscan's motion for summary judgment on the Section 7 claim. The state had based its competitive allegations, *inter alia*, on the aggregation of WestSound's orthopedic surgeons with the orthopedic surgeons employed by TDC, who became contracted to Franciscan subsequent to the WestSound acquisition. However, because Franciscan actually employed only one orthopedic surgeon *at the time of the WestSound transaction*, the court ruled that the WestSound transaction itself did not result in a material reduction of competition for orthopedic physician services, and thus could not be the basis of a Section 7 claim.[66]

Franciscan's transaction with TDC was structured as a professional services agreement (PSA) and a series of related agreements under which Franciscan acquired certain ancillary assets of TDC—an ambulatory surgery center, along with lab and imaging facilities—and assumed the associated leases. The TDC physicians remained employees of TDC but were held out as Franciscan providers and paid pursuant to Franciscan's payor contracts. The state's Section 1 claim against the TDC transaction was based on the premise that Franciscan and TDC were not in fact fully integrated, but rather remained separate economic entities. Accordingly, the state asserted that the parties were engaged in a *per se* unlawful price-fixing conspiracy with respect to their joint payor contracting or, alternatively, that their joint contract-

[65]Franciscan Complaint at ¶¶ 84–91.

[66]Order on Motion for Partial Summary Judgment, *State of Washington v. Franciscan Health System*, No. 3:17-cv-05690 (W.D. Wash. Mar. 1, 2019).

ing was not a necessary adjunct to their PSA arrangement and thus unlawful under the rule of reason.[67]

On the verge of trial, the case settled by consent order.[68] In exchange for dismissal of the all claims, and without admission of liability, Franciscan and TDC agreed, *inter alia*, to: (1) pay the state $2 million, to be used to promote access to health services for the residents of the Kitsap area; (2) divest the ambulatory surgery center acquired from TDC; (3) establish separate (Franciscan and TDC), firewalled payor contract negotiating teams and offer payors the opportunity to negotiate and contract separately with TDC, including the opportunity to re-open existing contracts; (4) refrain from future joint contracting, except in the case of a legitimate clinical integration or risk sharing arrangement, which may only occur upon prior notice to the state; (5) provide advance notice to the state of any physician group acquisition involving seven or more physicians unless the transaction otherwise is reportable under the HSR Act; and (6) advise imaging patients in writing of alternative imaging providers that are not affiliated with Franciscan or TDC.

As with the Colorado Attorney General's settlement with United and DaVita, the relief sought by the State of Washington in this matter was principally conduct-based, and arguably not very onerous. But this matter again demonstrates the high degree of state-level interest in health care acquisitions and affiliations. It also calls attention to the question of whether and when a PSA may constitute sufficient integration to support an argument that a "unity of interest" has been created, thereby avoiding Section 1 scrutiny of joint contracting and strategic planning. The parties claimed that their particular structure evinced common decision-making and common goals and that those factors were enough. The state focused on the lack of mutual ownership and the absence of economic integration, including the absence of risk sharing under payor contracts. Defining the factors that create sufficient "integration" is not a new issue in health care. Outside of a true control relationship, the requisite unity of interest may be defined (if it can be defined

[67]Franciscan Complaint at ¶¶ 68–74.

[68]Consent Decree, *State of Washington v. Franciscan Health System*, No. 3:17-cv-05690 (W.D. Wash. June 28, 2019).

at all) by reference to a multiplicity of factors,[69] but the Franciscan case is a reminder that enforcement authorities are prone to a conservative view when it comes to joint contracting by sellers of health care services.

IV. Non-Compete Covenants in Acquisitions

It is not uncommon for parties to an acquisition to agree to some form of non-compete covenant, whereby (usually) the seller agrees to refrain from competing against the buyer within a defined geographic area for a period of time. Similar covenants are common in joint ventures, limiting competition by the venture partners against the joint enterprise. Such agreements, of course, are literally anticompetitive, constituting market allocations that ordinarily would be *per se* unlawful. But courts have long recognized that such covenants should be judged by their net effects on competition, *i.e.*, treated as rule of reason questions, provided that they are ancillary to the main business purpose of a lawful contract, and limited in scope as necessary to reasonably protect the covenantee's legitimate property interests.[70] Most litigation over non-competes concerns the reasonableness of the scope and duration of the restraint.

A recent FTC action to block the implementation of a non-compete agreement exposed a potential ideological gap among the Commissioners on the question of how these covenants should be regarded as a future matter.[71] The case itself was factually straightforward. Nexus Gas Transmission, LLC (a joint venture of two energy companies), proposed to acquire Generation Pipeline, LLC, which owned and operated an intrastate natural gas transmission pipeline in the Toledo, Ohio, area. Generation Pipeline's owners included North Coast Gas Transmission LLC (NCGT), the primary asset of which was a large natural gas transmission

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[69]For a broader discussion of this question, *see* R. McCann and F. Zanzi, *"In Necessary Things, Unity"—Conspiracies,* Copperweld*, and Health Care Joint Ventures*, in A. Gosfield, ed., 2008 HEALTH LAW HANDBOOK (Thomson Reuters/West 2008).

[70]National Society of Professional Engineers, 435 U.S. 679, 688–89; (1978); Lektro-Vend Corp. v. Vendo Co., 660 F. 2d 255, 264–66 (1981); United States v. Addyston Pipe & Steel Co., 85 F. 271, 282–283 (6th Cir. 1898).

[71]In the Matter of DTE Energy Co., No, 191-0068 (FTC 2019).

pipeline spanning thirteen Ohio counties, including the three counties comprising the Toledo metropolitan area. The agreement by which Nexus would acquire Generation Pipeline contained a covenant forbidding NCGT from competing in the three-county Toledo area for a period of three years after closing. The FTC challenged the reasonableness of the non-compete, alleging: (1) the non-compete did not protect any intellectual property, goodwill, or customer relationships necessary to safeguard the value of Nexus' investment in Generation Pipeline—a mere desire to be free of competition not being a sufficient business justification; (2) the geographic scope of the non-compete was broader than necessary because it would prevent NCGT from competing for opportunities in the three-county area that were not foreseen at the time of the transaction; and (3) barriers to entry of new competitors are high in the natural gas transmission market.[72] The complaint was settled by consent order, under which the parties agreed to amend the purchase agreement to remove the non-compete. Further, the respondents (Nexus and its owners) are required, for a period of ten years, to notify the FTC in advance of any further acquisition of gas pipeline assets in the three-county Toledo area.[73]

The Commission vote to issue the complaint and enter into the consent order was unanimous. Three Commissioners filed concurring statements. Commissioner Wilson, while agreeing that the non-compete in this particular matter was over-broad, stressed that non-compete covenants often serve valid purposes that have long been recognized by the law, and expressed the view that many such agreements "are—and will continue to be—lawful."[74] Commissioners Chopra and Slaughter expressed a less sanguine viewpoint, stating that, "Too many firms impose non-compete clauses to avoid

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[72]Complaint, *In the Matter of DTE Energy Co.*, No, 191-0068 (FTC Sept. 13, 2019) at ¶¶ 13, 15 *available at* https://www.ftc.gov/system/files/documents/cases/06_dte-enbridge_complaint_redacted.pdf.

[73]Decision and Order, *In the Matter of DTE Energy Co.*, No, 191-0068 (FTC Sept. 13, 2019) at ¶¶ II.A., III.A, *available at* https://www.ftc.gov/system/files/documents/cases/05_dte-enbridge_decision_and_order.pdf.

[74]Concurring Statement of Christine S. Wilson, *In the Matter of DTE Energy Co.,* No. 191-0068 (Sept. 12, 2019), *available at* https://www.ftc.gov/system/files/documents/public_statements/1544152/wilson_concurring_statement_dte_9-13-19.pdf.

the discipline and functioning of the marketplace. . . . The Commission should continue to closely scrutinize contract terms that impede free and fair markets."[75] In this exchange one can see not just a divergence of traditional political viewpoints (Chopra and Slaughter are Democratic appointees; Wilson is a Republican), but also shades of the debate over proposals to shift enforcement viewpoints and standards in a more populist direction. The FTC's action here may signal greater scrutiny of non-compete agreements in future matters, particularly if the political balance of the Commission shifts left.

V. Private Antitrust Enforcement

The question of who is a proper plaintiff to bring a private antitrust challenge has always been a debatable (and, to some degree, controversial) question and it is one that is not getting easier as traditional markets and distribution channels blur and move online. For more than 30 years, federal law in this area has been controlled primarily by the Supreme Court's decision in *Illinois Brick*, along with its earlier, "corollary" decision in *Hanover Shoe*.[76] In May, 2019, the Supreme Court ruled in *Apple, Inc. v. Pepper*, a decision that pared back *Illinois Brick* in a manner that may have colorable implications for health care antitrust litigation.[77] *Pepper* also highlighted an ideological divide within the High Court that may influence future antitrust cases.

Pepper was a case brought by consumers who purchased iPhone applications (apps) from Apple's App Store. The App Store is the only channel through which iPhone owners can purchase apps that work on Apple devices. Developers are charged a modest annual fee ($99) to sell their products in the App Store. Apple does not dictate the price at which any app may be sold, but does charge its app developers a 30%

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[75]Statement of Commissioners Rohit Chopra and Rebecca Kelly Slaughter, *In the Matter of DTE Energy Co.,* No. 191-0068 (Sept. 12, 2019), *available at* https://www.ftc.gov/system/files/documents/public_statements/1544138/joint_statement_of_chopra_and_slaughter_dte_energy-generation_pipeline_9-13-19.pdf.

[76]Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977); Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481 (1968).

[77]Apple Inc. v. Pepper, 139 S. Ct. 1514 (2019).

commission on every sale.[78] The *Pepper* plaintiffs asserted that this commission structure represented an abuse of Apple's monopoly power that resulted in higher prices charged to app purchasers, *i.e.*, because developers pass through their commission costs to purchasers.

Apple asserted that the purchasers' claims were barred for lack of standing under *Illinois Brick*. In *Illinois Brick*, the Court addressed the question of whether a purchaser could maintain a damages action against an antitrust malefactor if that purchaser was not in fact the direct purchaser of the good or service in question, but rather bought from a middleman (*e.g.*, a broker or wholesaler) who simply passed along to the ultimate purchaser any supra-competitive pricing imposed by the original seller. The Court said "no" – a plaintiff may not rely on a "pass-on" theory of damages to maintain an antitrust action. Rather, only the direct purchaser of the good or service in question has standing to maintain that case.[79] The Court's ruling was based on concerns that a "pass-on" damages case would require uncertain and possibly conflicting (throughout the distribution chain) assessments of the degree to which the monopoly rents (*i.e.*, above-market pricing) extracted by the original seller were borne by parties other than the original purchaser.[80]

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[78] *Id.* at 1519. However, Apple does require that all app prices end in ".99" and thus the majority of apps for which a price is charged are priced at $0.99. However, this pricing rule was not challenged in *Pepper*.

[79] *Illinois Brick*, 431 U.S. at 728–29. *Illinois Brick* did not divest indirect purchasers of standing to seek injunctive relief, however.

[80] *Id.* at 737–745. The Court's ruling in *Illinois Brick* did not arise in a vacuum. A decade earlier, in *Hanover Shoe*, the Court had ruled on the same issue from the opposite perspective, holding that an antitrust *defendant* could not *avoid* liability to a purchaser-plaintiff by using a "pass-on" defense. *Hanover Shoe*, 392 U.S. at 494. That is, a defendant would not be permitted to argue that the plaintiff was not, in fact, damaged because the plaintiff had passed on any overcharges to its customers. The Court expressed concern regarding the difficulties of determining damages in this situation parallel to those later expressed in *Illinois Brick*. *Id.* at 492–94.

Illinois Brick has never been popular with the plaintiffs' bar or with consumer advocates.[81] It is viewed as a get-out-of-jail-free card that protects antitrust violators in cases where direct-purchaser "victims" are able to pass through overcharges—and thereby have little or no incentive to challenge the anticompetitive conduct that creates the overcharges. In the aftermath of *Illinois Brick*, many states passed "repealer" laws that sanctioned indirect purchaser lawsuits under state law.

Pepper presented an unusual twist of facts on the *Illinois Brick* scenario. Although the prices charged for apps are set by the developers (allegedly under the influence of the 30% commission), the actual sale transaction occurs between the customer and Apple, not between the customer and the developer. Thus, the question was presented whether the plaintiff app users are really direct purchasers, not indirect purchasers. The Court concluded they are direct purchasers.[82] The Court did not view the App Store arrangement as a traditional multi-tier distribution chain. Rather, it viewed the transactions in question simply as direct purchases between Apple and the customer and concluded that the absence of an intermediary was dispositive. Apple contended that because the developer, not Apple, set the price of an app, the arrangement could not be viewed so simply. The Court observed that Apple's argument basically would allow antitrust violators to avoid liability simply by adopting a commission pricing structure instead of using traditional multi-tier mark-up pricing.[83]

The Court also concluded that allowing the app purchasers to proceed in this case would not pose the risks that motivated the *Illinois Brick* decision. In particular, the Court rejected the idea that damage calculations in this matter would be complicated and hard to determine. The Court said, in so many words, that damage calculations in modern antitrust cases are always complicated, and it viewed this

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[81] In *Pepper*, thirty states and the District of Columbia filed an *amicus* brief urging the Court to overrule Illinois Brick. On the other side of the coin, the U.S. Solicitor General filed a brief in support of Apple's position.

[82] *Pepper*, 139 S. Ct. at 1520–21.

[83] *Id.* at 1522–24.

case to present no greater complications than a direct purchaser case.[84] The Court further observed that the risks of duplicative recovery (i.e., by the developers and the app purchasers) against Apple did not exist because the developers' lost profits and the overcharges paid by consumers are not the same, *i.e.*, they are not sourced from a "common fund."[85]

Four Justices joined in a vigorous dissent, arguing that the majority "replaces a rule of proximate cause and economic reality with an easily manipulated and formalistic rule of contractual privity."[86] The dissent argued that the direct injury, if there is one, falls on the developers, and that the plaintiffs are injured only to the extent the developers are able and choose to pass on the overcharges in the form of higher prices. In contrast to the majority, the dissent concluded that the questions of apportionment and causation would in fact make this case, and others like it, unacceptably complex.[87] According to the dissent, the majority's requirement that an intermediary stand in the chain in order to invoke *Illinois Brick* places the form of the transaction over the substance, substituting privity of contract for proximate cause.[88]

The upshot of the Court's decision is that the case against Apple was permitted to move forward. It did not resolve the substance of the claims raised by the plaintiffs. However, the majority's ruling may have removed actual or perceived limitations on private lawsuits in cases involving non-traditional "distribution" arrangements. Consider commercial health care markets, for example. Consumers (and health plan sponsors on their behalf) pay health insurance premiums in lieu of directly paying hospitals and physicians. Direct payments by consumers generally are limited to cost sharing requirements and charges for non-covered services. The

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[84] *Id.* at 1524.

[85] *Id.* at 1525.

[86] *Pepper*, 139 S. Ct. at 1526 (Gorsuch, J., dissenting).

[87] *Id.* at 1528. As an illustration, the dissent observed that Apple's requirement that all app prices end in ".99" makes any pass-on damages calculation in this instance that much more complex, given that a developers pricing options are limited to $0.99, $1.99, $2.99, etc.

[88] *Id.* at 1529–30.

impact of any anticompetitive practices among providers falls on health insurers in the first instance, in the form of higher negotiated prices under participation agreements, which may (or may not) be passed on to consumers in the form of higher premiums. This is arguably a classic distribution chain in which, under *Illinois Brick*, antitrust damages due to higher prices charged by providers would be recoverable, if at all, by the insurers. But insurers do not buy health services and re-sell them to patients. Patients "purchase" services directly from providers, and unquestionably are in privity of contract with those providers. *Pepper* would seem to say that commercially insured patients would have standing to bring an antitrust damages action directly against providers perceived to have engaged in anticompetitive practices, even if the immediate impact of those practices was visited only on insurers. Granted, a health insurance market does not look exactly like the facts of *Pepper*, but neither does it look like the facts of *Illinois Brick*. To the extent *Pepper* represents a move to a contractual privity approach to standing and away from a proximate cause approach, private enforcement of the antitrust laws—generally and in health care—is likely to expand.

VI. What to Make of All This

Emerging policy debates in public forums and within the courts and regulatory agencies are likely to keep the health care sector (and corporations generally) somewhat off balance with respect to the legal standards by which combinations and consolidations will be reviewed. The 2020 elections have the potential to push enforcement in directions not seen since the 1960's. Concerns about "big data" and digital markets will remain in the forefront of the competition debate and ultimately will sweep in health insurers and health care systems. Also, because the incentives to achieve scale and integration remain strong for health care systems, it is reasonable to believe that any action resulting from antitrust reform debates will affect health care enforcement directly. And, beyond continued federal scrutiny, state attorneys general now occupy a larger role in health care antitrust enforcement, regardless of action or inaction by the federal agencies. This fact requires parties to health care mergers, acquisitions, and affiliations to embrace an additional, broader perspective that includes political and

behavioral issues that historically have had little bearing on federal reviews.