

Health Care Mergers: Four Key Pieces of Evidence Used to Predict The Future

JULY 24, 2017

Associate Laura Greenspan authored an article titled “Healthcare Mergers: Four Key Pieces of Evidence Used to Predict the Future,” published by Competition Policy International (CPI) in the July issue of *Antitrust Chronicle*. The article concentrates on the types of evidence that have played a critical role in recent health care merger challenges: customer testimony; internal party documents; economic evidence; and third party testimonial or documentary evidence.

Merger challenges background

The federal government challenges proposed mergers through Section 7 of the Clayton Act, which prohibits any acquisition within the realm of commerce activity that substantially lessens competition or tends to create a monopoly. The Federal Trade Commission (FTC) and Department of Justice (DOJ) have authority to challenge such mergers.

In bringing Section 7 claims, the government must first establish a case that the merger will be anticompetitive. If such a case is established, the burden shifts to the merging parties to rebut it. If the merging parties successfully rebut, the burden of evidence production moves back to the government, joining with the burden of persuasion.

Pre-Litigation Sources of Evidence

Depending on the value of the transaction and the size of the parties, merging entities must make a filing in accordance with the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (HSR). If the HSR filing causes concerns that the transaction will have anticompetitive effects, the FTC or DOJ will serve a burdensome information request. The FTC can also take “Investigational Hearings” of merging party executives to gather additional information. While gathering evidence from the transaction parties, the government also seeks information from third parties, including customers and competitors. The FTC examines the evidence gathered during this period to make a recommendation on whether to challenge the proposed merger.

Litigation Sources of Evidence

If the government seeks a preliminary injunction (PI) and the parties intend to defend, a short and intense discovery process begins. Thousands of pages of documents and exhibits are produced, with scores of depositions taken in a handful of months. The FTC can file a complaint within its own body, which sets off an administrative litigation process, during which time all parties conduct even more discovery. A merits trial follows, which includes up to 210 hours of live testimony. The PI hearing can include economic evidence as well as evidence from the merging parties and customers in the relevant industry.

Types of Evidence

Customer testimony is considered one of the most common sources of reasonably available and reliable evidence. In hospital merger cases, the courts generally consider insurers (and not patients) to be “customers” of health care services. Payer testimony has also played a pivotal role in health plan merger litigation.

Internal party documents are among many sources used by the government to evaluate a proposed merger. Considered extremely informative in examining the effects of a merger, these documents are produced both in the normal course of business and reflect certain types of competitive effects; they can demonstrate that the parties intend to raise prices or take other potentially anticompetitive actions.

Economic evidence is used to evaluate whether a proposed merger creates market power, and includes market share, market concentration, ease of market entry, and market expansion. The hypothetical monopolist test looks to define the relevant product market and geographic market.

Other evidence considered includes third-party witness testimony, including evidence from competitor hospitals and local employers. Such evidence has been offered to prove or disprove the existence of a relevant geographic market. Non-economic experts, also known as “quality” or “efficiencies” experts, are increasingly utilized by both the government and merging parties.

The authors argue that the government has an advantage during the investigation process because of its ability to compel testimony and evidence. The merging parties should be cognizant of the types of evidence that courts will consider persuasive while understanding that there is no one piece or category of evidence that will determine the outcome.

3 Min Read

Related Locations

Chicago

Related Topics

Antitrust and Competition

Health Care

Related Capabilities

Antitrust/Competition

Litigation/Trials

Health Care

Related Regions

