

Preparing for the Next Time: Health Care Consolidation and Antitrust Strategies After the Pandemic

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By all accounts, the consolidation that has dominated the health care provider industry will continue—if not accelerate—after the pandemic subsides. At its 2021 Health Care and Life Sciences Summit, Winston & Strawn hosted a panel discussion to examine both the forces driving consolidation and the antitrust implications as the industry looks to the future. The panel was moderated by a partner at Winston & Strawn and Co-Chair of the firm's Health Care and Life Sciences Practice, who was joined by Shivani Bautista, General Counsel of NorthShore University HealthSystem, and Jason Cole, Vice President and General Counsel, Catholic Medical Center, GraniteOne Health. Highlights of the conversation included the following:

CRISIS PUTS CONSOLIDATION'S BENEFITS IN HIGH RELIEF

The pandemic has wreaked havoc on everything from staffing projections to balance sheets and challenged the operating capabilities of even the most established health care systems. With the bar raised in scenario planning, consolidation becomes not just a matter of competitive advantage, but existential necessity.

PLAN FOR COLLABORATION AHEAD OF TIME

PPE shortages, capacity overflows, and vaccination challenges have underscored the importance of collaboration among institutions and between institutions and regulators in the face of large-scale public health challenges. All parties should build on lessons learned to provide stronger collaboration frameworks so that valuable time is not lost in the early days of the next crisis.

LOOK UP AND DOWN, NOT JUST TO THE SIDE

Historically, most health care consolidation has been horizontal. But policy trends, the desire for greater efficiencies and dissolving boundaries between health care sectors all serve to increase the drive for vertical integration. Along these lines, there is likely to be an increase in supply chain partnerships and other alliances that provide the benefits of scale and cooperation without combination.

HAVE AN ANTITRUST PLAYBOOK

The probability of winning approval from antitrust regulators is greatly increased by thorough preparation and early communication. For example, ensure that best practices are being followed from the start, such as compiling documentation needed for HSR notification as you go along rather than all at once at the end. Be prepared to reach out to regulators to present your case—backed by solid and objective market impact studies—immediately following notification.

PAST IS NOT PROLOGUE

If a deal is blocked for antitrust reasons, turn the page and move on—and you can expect regulators to do the same. Not only is each proposed deal different, but patient populations and the competitive landscape change over time.

PRICING IS NOT A PANACEA

The new HHS hospital pricing regulations are a well-intentioned step toward improving transparency, but they are likely to have little effect on competition without increased standardization, given the differences between hospitals regarding data sources, term definitions, and even in what constitutes a “consumer friendly” format. Just as importantly, there are other components that factor into consumer decision-making—not least of which is the existence of other viable options.

SIZE CAN BE A FORCE FOR EQUITY

Benefit to the community has always been an integral part of a merger’s rationale. This argument becomes even more powerful when tied to the current focus on increasing health care access and equity among underserved groups.

CYBERSECURITY NEEDS TO BE A BOARD-LEVEL CONCERN

While the growing digitalization of health care brings many benefits, it also increases the vulnerability of institutions to cybersecurity threats, as the recent wave of ransomware attacks illustrates. Hospitals are even a higher-value target than usual during a public health crisis, placing cybersecurity high on the senior leadership agenda.

BE PREPARED FOR GREATER SCRUTINY

While it is too early to know the specifics of how the Biden administration’s antitrust policy will unfold, there is a clear impetus for greater scrutiny, as can be seen in proposed legislation by Senator Amy Klobuchar that would both increase funding for antitrust enforcement and significantly lower the threshold for raising red flags on proposed mergers. General counsel should be prepared for a highly dynamic antitrust environment going forward.

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