FTC Investigations Could Bring Unwanted Scrutiny to Hospitals

Hospitals may face scrutiny from the Federal Trade Commission (FTC) as it investigates anti-competitive behavior in healthcare and should assess their level of risk.

U.S. Senator Chuck Grassley recently asked the FTC to investigate hospital contracts and determine whether they violate antitrust laws by secretly prohibiting insurers from working with smaller, less expensive competitors. An FTC investigation into such anti-competitive behavior could lead to antitrust lawsuits, so it is important for hospitals to assess and fully understand their exposure before government inspectors come knocking, says **Robert H. Iseman**, JD, partner with the Rivkin Radler law firm in Albany, NY.

Hospitals and health systems that are regarded as "must-have" participants in health insurance plans face substantial antitrust risk, Iseman says. "Must-have" status means that, within the particular market, there is no reasonable substitute for the healthcare services they offer and insurers must have the hospital or health system in order to market a financially viable health insurance product, he explains.

The term "must-have" is sometimes used synonymously with the term "market power," and any health system that possesses market power is at heightened risk for antitrust enforcement depending on the nature of their actions and business decisions in the marketplace, Iseman says.

"Hospitals or health systems that use their must-have status to coerce insurers into accepting contract provisions that damage competition and increase costs face significant antitrust risk and liability," Iseman says. "This is especially so because of Senator Grassley's request that the FTC investigate anti-steering provisions, thus bringing such matters into sharp focus for public debate and attention by regulatory enforcement agencies."

Anti-Steering Provisions Cited

Iseman notes that there is heightened focus on anti-steering provisions because of two pending cases. On Nov. 15, 2018, it was announced that the Justice Department's prosecution of the Atrium case in North Carolina is in the process of being settled based on Atrium's agreement to discontinue the anti-steering provisions in its payor contracts. A similar case is pending in California against the Sutter Health System. The Justice Department alleged that anti-steering provisions prevented payers from directing patients to different plans or lower-cost providers.

"This public activity says to me that must-have providers who have negotiated anti-steering provisions in their contracts with third-party payers through market coercion need to buckle their seatbelts," Iseman says.

The risk could be high for health systems that are the product of recent mergers, he says. Since the passage of the Affordable Care Act, there has been substantial merger activity in healthcare — and the result, in some markets, has been the creation of new must-have systems. In some cases, the newly merged entity is virtually the only acute care provider in the market.

"There is already substantial skepticism about whether hospital mergers are in the public interest, and many believe that the mergers have increased prices. A recently merged entity that has used its must-have status to require third-party payers to include anti-steering provisions is at risk of not only having the anti-steering provisions attacked, but also having its merger reviewed and reconsidered by antitrust enforcement agencies."

Factors to Consider

To assess how much a hospital or health system is at risk, Iseman says the risk manager should take these three steps:

EXECUTIVE SUMMARY

The Federal Trade Commission is investigating whether hospitals and health systems violated antitrust laws through contracts with payors. Assess your risk before the government investigates.

- The hospital or health system's "must-have" status in the region is key.
- Email and other communications could indicate intent and knowledge of the effect on other hospitals.
- Smaller healthcare providers could sue if a government investigation finds anti-competitive behavior.

• Assess whether the organization is a must-have provider based on whether competitors provide a reasonable substitute for their services and whether a financially viable health insurance plan can be marketed without them.

• Determine whether anti-steering provisions or other potentially anticompetitive terms have been added to the hospital's contracts with third-party payers and, if so, whether they have a business rationale for why such contract terms are necessary to protect legitimate interests and are not anticompetitive.

• Consider relationships with third-party payers in their area, as well as with major employers and others who may be aggrieved by the hospital's conduct.

But here is an important point: Iseman says any such assessment should be conducted under the guidance of counsel and made subject to the attorney-client privilege.

"At-risk hospitals and healthcare systems should be carefully monitoring the settlement of the Atrium case and the progress of the Sutter case and reviewing and strengthening their rationale for why the anti-steering provisions are reasonable and necessary from a business perspective and not violations of the antitrust laws," Iseman says.

"It is possible that all of the interest and publicity surrounding this topic will result in payers approaching must-have providers with requests for contract amendments. Obviously, that would be an extremely sensitive and important event, and any contact from payers should immediately be referred to hospital counsel."

Iseman notes that must-have providers tend to be large, sophisticated business organizations with access to knowledgeable antitrust counsel. Because the behavior of must-have providers in third-party payer negotiations always is a matter of concern, he suspects that many health systems had the anti-steering provisions reviewed by their antitrust counsel and perhaps have attorney-client privileged opinion letters on the point.

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"They should be reviewing any such letters and advice to assess whether they have followed the guidance of counsel and, if not, how their behavior in the marketplace should change," Iseman says.

Look for Intent in Communications

Reviewing the contracts themselves may not be enough, says **John Kihlberg**, senior director for engagement and client management with H5, a data management consulting company in San Francisco. The bigger question is the hospital's policy and strategy at the time it negotiated those contracts, he says.

"There will be a question of what the company's intent was. For that, you need to turn to the email communications that were happening at the time of the negotiations," Kihlberg says. "The communications in question would involve those people who have approval over the contracts and probably people in various regions that are actually out on the front lines making the deals."

In the Atrium case, for instance, the investigation revealed communications in which health system leaders bragged about having more than 50% of the market share in the region. Investigators also will be looking at deals with payers that did not go through, seeking evidence that they were shut out by another provider with a larger market share.

"If there was intent and knowledge on your part that it had the effect of restraining competition, that becomes a problem. Other smaller hospital chains, not just the government, can file suit," Kihlberg says. "There could be additional litigation that's spurred by the government investigation. Any company that might be the target of that litigation should asses their risk now."

States Also May Investigate

Grassley's call for an FTC investigation is only one avenue by which government enforcers and private plaintiffs are attacking the contracting practices of large integrated healthcare delivery networks, notes **Robert G. Kidwell**, JD, an attorney with the Mintz law firm in Washington, DC.

"Hospitals and provider networks with high market shares in local payer markets face a real possibility that their contracting practices will face enhanced scrutiny — less likely by the federal government save for the biggest players nationwide but more likely by state attorneys general and by their smaller competitors as private antitrust plaintiffs," Kidwell says. "If nothing else, payers may begin to push back on some of these types of provisions during contract negotiations using antitrust concerns as an excuse."

The providers most at risk are those with both high market shares and few competitive alternatives for payors and contract terms that tend to steer patients toward more costly care rather than toward lower-cost care, he says.

There is a danger in assuming that investigators will not find fault with a hospital's contracts just because they have not been questioned in the past, Kidwell says.

"Providers tend to be conservative. Many providers will stick with what works for them today until it stops working for them," Kidwell says. "But the tide is clearly flowing toward steering care to appropriate lower-cost care rather than to higher-cost care. Most hospitals know that they are eventually going to need to address cost of care in a serious way. Many have already embraced change and begun to innovate; many others have not." ■

SOURCES

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Pediatric Safety Still Threatened by Electronic Health Records

Years after the widespread adoption of electronic health records (EHRs), pediatric patients still are at risk from software systems that do not properly account for the needs of younger patients.

One of the most recent reports came from **Raj Ratwani**, PhD, scientific director and senior research scientist with the National Center for Human Factors in Healthcare at the Medstar Institute for Innovation in Washington, DC. He and his colleagues studied the effect of EHRs on pediatric safety, analyzing 9,000 patient safety reports.

They found the most common usability challenges were associated with system feedback and the visual display, and the most common medication error was improper dosing. Of the 9,000 reports, 36% had a usability issue that contributed to the medication event and 18.8% of those incidents might have resulted in patient harm. *(An abstract of the report is available online at: https://bit.ly/2zL28o6.)*

"There's an association between the usability of electronic health records and patient harm events. We focused exclusively on pediatric populations and found that where there were EHR-related medication errors, those can reach the patient," Ratwani says. "There is building evidence that we have to be aware of EHR usability challenges and how they can affect the patient. In pediatric patients, that is particularly alarming given that they are not as resilient as adults to overcome some of these challenges."

EXECUTIVE SUMMARY

Pediatric patients are at risk from electronic health records (EHRs) that do not adequately factor in their needs. Medication dosing is the biggest threat.

- The usability of an EHR affects patient safety.
- Frontline staff may realize the risk more than administrators.
- Efforts to optimize an EHR present an opportunity to address the risk.

Don't Underestimate Impact

Frontline EHR users are aware that the systems pose risks to pediatric patients, he says. Their vigilance and the redundant safety checks built into the healthcare delivery system prevent many instances of potential harm from reaching the patient, Ratwani says.

"From a risk management perspective, there may not be an awareness of how much impact