Avoiding Antitrust Enforcement In Health Care Joint Ventures

By **Brian Browder, Bill Katz and Alexander Dudley** (June 13, 2023)

Brian Browder

Bill Katz

Alexander Dudley

The Federal Trade Commission has been active in challenging hospital combinations.

After one of those combinations was abandoned, FTC Bureau of Competition Director Holly Vedova said, "This should be a lesson learned to hospital systems all over the country and their counsel: the FTC will not hesitate to take action in enforcing the antitrust laws to protect healthcare consumers who are faced with unlawful hospital consolidation."[1]

In addition to filing formal complaints to challenge proposed transactions, the FTC has also taken a dim view of certificates of public advantage, "which purport to shield hospital mergers from antitrust laws in favor of state oversight."[2]

Within the current enforcement climate, health care providers are trying to achieve the pro-competitive benefits of traditional mergers or other combinations, all while managing the antitrust risks associated with more aggressive government enforcement.

To help manage these risks and achieve various benefits for patients, many health care providers are pursuing joint ventures through which resources and experience may be combined or shared, whether through service-line expansion or other combinations.

Although health care joint ventures frequently involve competitors working together to achieve a common goal, they can ultimately provide numerous benefits to patients — including lower costs, expanded services in existing markets, new services in new markets and the delivery of higher-quality health care to patients.

Importantly, absent a joint venture, these pro-competitive benefits often would not even be possible to achieve. Nonetheless, joint ventures implicate a number of antitrust considerations such as information exchanges, market carveouts, noncompete provisions and interlocking directorates.

This article addresses some of these considerations and discusses strategies to mitigate potential antitrust risks arising from joint ventures.

Mitigating Potential Antitrust Risks

In evaluating potential antitrust concerns, joint ventures should first understand how the Sherman Act and the FTC Act may affect them and their owners.

For example, Section 1 of the Sherman Act prohibits contracts, combinations and conspiracies that unreasonably restrain trade pursuant to either the per se rule or the rule of reason.

Unless the joint venture engages in per se illegal activities such as price-fixing, market allocation or group boycotts, the joint venture's antitrust impact will likely be analyzed using the rule of reason, in which the joint venture's pro-competitive benefits are weighed against any anti-competitive effects.

The joint venture's conduct typically does not violate the rule of reason unless the anti-competitive effects outweigh the joint venture's pro-competitive benefits. Joint ventures should also be cognizant of Section 2 of the Sherman Act, which prohibits monopolies and attempts to monopolize. Although size alone will not necessarily violate Section 2, additional conduct that harms competition could create antitrust risk under Section 2.

Lastly, Section 5 of the FTC Act broadly prohibits unfair methods of competition. Although Section 5 had historically been interpreted similar to Section 1 of the Sherman Act, that is no longer the FTC's current approach, and there is a fair amount of uncertainty about how the FTC will apply Section 5 in the future.

With this legal framework in mind, joint ventures should be aware of certain antitrust pitfalls, so they can avoid or minimize the risks associated with them.

The Exchange of Competitively Sensitive Information

A joint venture's collaborative nature requires the owners to exchange various types of information, which runs the risk that competitively sensitive information is shared.

For example, if two hospitals wish to form a joint venture to create a new facility — whether a specialty hospital, ambulatory surgery center or otherwise — each will conduct a due diligence investigation to ensure that it has the facts necessary to make an informed business decision about whether to proceed with the joint venture.

As part of that process, the hospitals may exchange information about a variety of issues, including the pay scale for the joint venture's employees. Although there are valid business reasons for exchanging information in connection with a joint venture, government enforcers may argue that the exchange of competitively sensitive information such as salaries or even benefits is anti-competitive.

An antitrust challenge to this information exchange should be analyzed under the rule of reason to determine whether the pro-competitive benefits — such as expanding into a new market, enhanced services and cost reductions for patients — outweigh anti-competitive outcomes such as potentially increased control by the hospitals of the relevant market.

Before Feb. 3 — when the Antitrust Division of the U.S. Department of Justice withdrew them — the joint venture and its owners could also rely on the "Statements of Antitrust Enforcement Policy in Health Care," published on Aug. 1, 1996.

These policy statements provided guidance for analyzing provider collaborations, joint ventures and similar arrangements that potentially implicate antitrust concerns.

With respect to information exchanges, the policy statements established a safety zone pursuant to which an information exchange would not be challenged by the DOJ or FTC, if:

- The exchange was managed by a third party such as an accounting or consulting firm;

- The information was more than three months old; and

- At least five participants provided the data underlying each statistic shared, no single participant's data contributed more than a quarter of the amount of any statistic shared and the shared statistics were sufficiently aggregated in a manner where no participant could discern the data of any other participant.

The conditions to qualify for an antitrust safety zone were intended to ensure that an exchange of competitively sensitive information — such as prices, costs, wages and salaries — was not used by competing providers for collusive purposes resulting in potential or actual anti-competitive effects.

With the DOJ's withdrawal of the policy statements, however, joint ventures are currently navigating uncharted waters on whether adherence to the safety zones protects against antitrust liability.

Joint ventures should be mindful of the types of information exchanged and the manner in which the information is exchanged to ensure that only information that is reasonably necessary to effectuate the venture is shared with the appropriate persons. That will help ensure that the rule of reason applies to the joint venture's conduct.

The joint venture's owners should thus have legitimate, pro-competitive justifications for any exchange of competitively sensitive information, and the exchange should be done in an appropriate manner involving the correct personnel.

Geographic Exclusivity Provisions in Joint Venture Governing Documents

Unlike other antitrust markets that may be broader in geographic scope, the relevant geographic market for the health care industry is often relatively local, based on the distance patients travel to receive care.

Thus, competitors in a health care joint venture should carefully consider the venture's effect on carving out geographic markets. For example, should the joint venture's owners be allowed to provide services that would otherwise compete with the joint venture?

Assume that the joint venture's purpose is to provide imaging services within a certain area. Should the joint venture's owners be allowed to provide those same services within the same area? Exclusivity provisions that potentially limit patients' health care options typically require closer scrutiny to avoid anti-competitive consequences.

Noncompete Provisions in Joint Venture Governing Documents

Joint ventures should carefully consider and tailor any noncompete provisions in their governing documents. Joint ventures are often contractually prohibited from competing against their owners, which may extend to prohibitions on joint venture employees working for any joint venture owner.

In the health care industry, noncompete or nonsolicitation provisions may have unintended consequences such as impeding patient care, increasing health care costs and suppressing wages. In drafting any noncompete or nonsolicitation provision, the joint venture should ensure that it is no broader than the scope of the joint venture's business, which must be clearly defined in the governing documents.

Further, the entities and persons bound by the noncompete or nonsolicitation provisions must be clearly defined and reasonably limited. Given the ever-expanding array of multientity structures, binding a joint venture owner's affiliated entities to a noncompete or nonsolicitation provision because of overbroad drafting may result in unintended antitrust risk.

Further, given the FTC's recent announcement of a proposed rule that would effectively ban noncompetes and similar arrangements, there is quite a bit of uncertainty about the continuing validity and use of noncompetes.

The DOJ has also been actively pursuing criminal convictions for no-poach agreements — in which competitors agree not to hire one another's employees — although it has thus far secured only one guilty plea from a health care staffing company that admitted to violating Section 1 of the Sherman Act.[3]

Regardless of the outcome of the FTC's rulemaking process and the DOJ's ongoing efforts to prosecute no-poach agreements criminally, joint ventures should be careful in how they draft and enforce any noncompete or nonsolicitation provision.

Interlocking Directorates

Section 8 of the Clayton Antitrust Act prohibits any person from simultaneously serving as an officer or director of two competing companies.

Violations of Section 8 are per se antitrust violations, meaning that liability attaches irrespective of a lack of competitive injury. In the joint venture context, officers and directors are sometimes shared between the joint venture and its owners.

For example, the commingling of officers and directors between a platform investment by a private equity company and its joint venture holdings is not uncommon. Although this may appear reasonable on its face, it can nevertheless create antitrust concerns given the DOJ's recent emphasis on Section 8 enforcement.

As a best practice, joint ventures should avoid sharing any officers and directors with their owners, even if sharing would have a legitimate, pro-competitive basis.

Key Takeaways

Health care joint ventures provide substantial benefits to patients and the marketplace through consistent innovation and purposeful integration. Although every venture should be analyzed independently for antitrust concerns based on the specific surrounding facts and circumstances, certain takeaways apply universally.

In forming a joint venture, the owners should ensure that information is shared in an appropriate manner and that the joint venture's formation documents are specific and narrowly drafted to describe the venture's key activities and functions.

Additionally, exclusivity, and noncompete and nonsolicitation provisions, should be thoughtfully crafted to avoid creating any unnecessary antitrust risk.

Antitrust risk is also lower if the joint venture owners are financially or clinically integrated in a manner that will likely produce quality improvements, meaningful cost savings or other identifiable efficiencies. This helps prevent the joint venture from being used to achieve anti-competitive goals.

Finally, the joint venture's core functions should, on balance, provide more pro-competitive benefits than anti-competitive harms to patients and the marketplace.

Brian R. Browder and Bill Katz are partners, and Alexander M. Dudley is an associate, at Holland & Knight LLP.

[1] https://www.ftc.gov/news-events/news/press-releases/2022/06/statement-bureau-competition-director-holly-vedova-regarding-decision-utah-healthcare-competitors.

[2] https://www.ftc.gov/news-events/news/press-releases/2022/08/ftc-policy-paper-warns-about-pitfalls-copa-agreements-patient-care-healthcare-workers.