

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.

an EHR can have. I think one of the reasons is that when there is an adverse event or near miss, rarely do we look back at the IT system to see how that might have contributed,” he says. “Many people don’t take that system perspective on how the error might have occurred. Instead, they focus on processes and look to blame the individual, when they could be looking for poorly designed technology that contributed to the error.”

Pediatric patients are especially vulnerable to dosing errors, and any EHR system that does not provide adequate safeguards against those errors is problematic, says **Robert Hanscom**, JD, vice president of business analytics with Coverys, a medical malpractice insurer based in Boston.

“Any time you have scenarios in which specific information is put in and then calculations made on that data, those are fraught with risk. Errors can occur with any patient population, but we have seen that the risk is greater with pediatrics whether you are using an EHR or not, and a poorly designed EHR only increases that risk,” he says.

“Back when these things were done manually, we had terrible errors with pediatric patients suffering great harm. EHRs have helped reduce those kinds of errors, but at the same time EHRs have not been designed to

cure all ills. Other vulnerabilities have emerged.”

Many EHRs are simply not designed with the pediatric patient in mind, particularly with regard to dosing, says **Ruben Nazario**, MD, clinical editor and strategist with Zynx Health, a company in Los Angeles that provides EHR support. He previously worked full-time as a pediatric ED physician, and still works part-time in that role.

“I see that almost every day with EHRs that are not optimized for pediatric patients. They may have some kind of basic safeguards with formularies that specify some medications are more appropriate for adults, and there may be some alerting to maximum dosing,” Nazario says. “But there are still a lot of issues with alerts in terms of usability and when in the work process they provide that information.”

Pediatric safety issues should be assessed and addressed when a hospital or health system is in the process of optimizing the system or changing the EHR product, he says.

“There is a great opportunity now that most providers are through the implementation phase and looking to optimize their EHR systems,” he says.

Hospital leaders are beginning to address the issue more directly and effectively, says **Sean Morris**, sales director with Digitech Systems, a

software company in Greenwood Village, CO.

“Five years ago, the picture was different, but we’ve seen in recent years that a lot of hospital leaders have become more techno-savvy. That may be because we have folks who are a little younger coming up into leadership roles, and it may be that people established in those roles are learning that they need to be better at staying on top of those issues,” Morris says. “We’re seeing a transition in those organizations where they are bringing in groups who understand what components need to work together and individuals who understand the need to address disparity of information across different resources.” ■

SOURCES

- **Robert Hanscom**, JD, Vice President of Business Analytics, Coverys, Boston. Phone: (800) 224-6168.
- **Sean Morris**, Sales Director, Digitech Systems, Greenwood Village, CO. Phone: (866) 374-3569. Email: seanm@digitechsystems.com.
- **Ruben Nazario**, MD, Clinical Editor and Strategist, Zynx Health, Los Angeles. Phone: (888) 996-9435.
- **Raj Ratwani**, PhD, Scientific Director and Senior Research Scientist, National Center for Human Factors in Healthcare, Medstar Institute for Innovation, Washington, DC. Phone: (877) 748-3567.

live & on-demand WEBINARS

- ✓ Instructor-led Webinars
- ✓ Live & On-Demand
- ✓ New Topics Added Weekly

CONTACT US TO LEARN MORE!

Visit us online at ReliasMedia.com/Webinars or call us at (800) 688-2421.