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Todd A. Zigrang, MBA, MHA, ASA, FACHE, Publisher • Jessica L. Bailey, Esq., Editor ©

Provider Concentration and Antitrust Implications

The first two parts of this Health Capital Topics series on concentration in the healthcare industry focused on the consolidation of health systems and hospital acquisition of insurers. This third and final installment will focus on healthcare provider concentration and associated antitrust implications. The consolidation of healthcare providers continues to be a growing trend since the passage of the *Patient Protection and Affordable Care Act* (ACA). Partly due to the ACA, which incentivizes quality healthcare, in contrast to the quantity of healthcare services provided, many hospitals are merging with other healthcare systems to create organizations capable of managing population health to better handle the operational needs and expenditures required to meet these goals.[1] In the 1990s, there was a similar surge of hospital mergers and acquisitions, and ultimately evidence indicated that the consolidation produced some cost savings.[2] However, classic market theory indicates that a concentration in providers could lead to higher prices for consumers.[3]

Prior to the *Great Recession* of 2005-2007, on average, 50 to 60 hospital mergers or acquisition deals occurred annually.[4] In contrast, in 2013 alone, 98 mergers or acquisition deals were made.[5] These acquisitions can affect the number of independent healthcare providers still practicing, which decreased from 57% of the marketplace in 2000 to 39% in 2013.[6] Physicians are increasingly seeking employment and abandoning their independence, with 87% of employed physicians citing costs and expenses as their primary reason for seeking employment.[7] A number of different approaches are available to assist policymakers in promoting integration across the spectrum of healthcare, which could assist in reducing healthcare costs, yet still allow the system to remain competitive, including:

(1) *"Antitrust enforcement;*
(2) *Promotion of greater transparency;*
(3) *Utilization of Physician Assistants (PAs) and Nurse Practitioners (NPs);*
(4) *Alternative Delivery Models;*
(5) *Payment Regulation;*
(6) *Tax Incentives; and,*
(7) *Utilization of the insurance rate review process."*[8]

Antitrust enforcement has become a common response in efforts to minimize anti-competitive consolidation activities in healthcare markets.[9] Typically, antitrust enforcement has been utilized to block large organizations from merging and to halt physician-hospital consolidations, especially where the arrangements may "*give providers sufficient market power to raise prices above competitive levels.*"[10] A prominent example of this occurred with the 1994 merger of Massachusetts General Hospital and Brigham and Women's Hospital, to become Partners HealthCare in the Boston region.[11]

The purpose of this merger was:

> "*to take away the ability of insurance companies to demand lower prices from one hospital with the threat that they could just send patients to the other. After the merger, insurers had to take both of them or neither.*"[12]

As a result of this merger, healthcare costs in the Boston area escalated as reimbursement costs, unrelated to the quality of care delivered, increased. In 2000, the Tufts Health Plan, a prominent private health plan in the local area, decided that Partners HealthCare was demanding unjustifiably high prices for healthcare services and refused to pay for services.[13] When Partners Healthcare subsequently announced they would not accept the Tufts Health Plan, Tufts quickly conceded and agreed to pay the premiums.[14] Recently, Partners Healthcare sought to acquire more physician groups south of Boston, and after review by the Health Policy Commission, it was determined that the acquisition could drive up prices in the area by $23-$26 million, and the matter was referred to the State Attorney General.[15] The Attorney General allowed the transaction to proceed, in exchange for "*temporary restrictions on raising [Partners Healthcare's] prices and no further expansion,*" which will last for 10 years.[16] The state investigators found no legal method to undo the original merger, and blocking this acquisition was deemed to not have a substantial effect on current market prices or the market power of Partners Healthcare.[17] Therefore, antitrust enforcement was not applied.

The hospital sector has been scrutinized by antitrust agencies more than any other sector of the U.S. economy.[18] A growing frustration among hospital

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executives is that there are two competing goals – a focus on integration and coordination of care, versus the enforcement against provider concentration by the *Federal Trade Commission* (FTC).[19] Even though healthcare reform encourages the integration of healthcare delivery systems, this fact alone cannot defend against antitrust litigation.[20] Other factors, in conjunction with the healthcare reform argument, such as quality and efficiency improvement, may assist hospitals, but ultimately the considerations will center on provider concentration and the lessening of competition.[21]

When either entity has more market power, their ability to drive prices increases and can lessen competition in a particular market, leading to antitrust concerns.[22] As physician organizations, hospitals, and health systems continue to consolidate, the balance of market power between insurers and hospitals may prove critical for the shaping of public policy.[23]

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Robert James Cimasi, MHA, ASA, FRICS, MCBA, CVA, CM&AA, serves as Chief Executive Officer of **HEALTH CAPITAL CONSULTANTS** (HCC), a nationally recognized healthcare financial and economic consulting firm headquartered in St. Louis, MO, serving clients in 49 states since 1993. Mr. Cimasi has over thirty years of experience in serving clients, with a professional focus on the financial and economic aspects of healthcare service sector entities including: valuation consulting and capital formation services; healthcare industry transactions including joint ventures, mergers, acquisitions, and divestitures; litigation support & expert testimony; and, certificate-of-need and other regulatory and policy planning consulting.

Mr. Cimasi holds a Masters in Health Administration from the University of Maryland, as well as several professional designations: Accredited Senior Appraiser (ASA – American Society of Appraisers); Fellow Royal Institution of Chartered Surveyors (FRICS – Royal Institute of Chartered Surveyors); Master Certified Business Appraiser (MCBA – Institute of Business Appraisers); Accredited Valuation Analyst (AVA – National Association of Certified Valuators and Analysts); and, Certified Merger & Acquisition Advisor (CM&AA – Alliance of Merger & Acquisition Advisors). He has served as an expert witness on cases in numerous courts, and has provided testimony before federal and state legislative committees. He is a nationally known speaker on healthcare industry topics, the author of several books, the latest of which include: "*Accountable Care Organizations: Value Metrics and Capital Formation*" [2013 - Taylor & Francis, a division of CRC Press], "*The Adviser's Guide to Healthcare*" – Vols. I, II & III [2010 – AICPA], and "*The U.S. Healthcare Certificate of Need Sourcebook*" [2005 - Beard Books]. His most recent book, entitled "*Healthcare Valuation: The Financial Appraisal of Enterprises, Assets, and Services*" was published by John Wiley & Sons in March 2014.

Mr. Cimasi is the author of numerous additional chapters in anthologies; books, and legal treatises; published articles in peer reviewed and industry trade journals; research papers and case studies; and, is often quoted by healthcare industry press. In 2006, Mr. Cimasi was honored with the prestigious "*Shannon Pratt Award in Business Valuation*" conferred by the Institute of Business Appraisers. Mr. Cimasi serves on the Editorial Board of the Business Appraisals Practice of the Institute of Business Appraisers, of which he is a member of the College of Fellows. In 2011, he was named a Fellow of the Royal Institution of Chartered Surveyors (RICS).

Todd A. Zigrang, MBA, MHA, ASA, FACHE, is the President of **HEALTH CAPITAL CONSULTANTS** (HCC), where he focuses on the areas valuation and financial analysis for hospitals and other healthcare enterprises. Mr. Zigrang has significant physician integration and financial analysis experience, and has participated in the development of a physician-owned multi-specialty MSO and networks involving a wide range of specialties; physician-owned hospitals, as well as several limited liability companies for the purpose of acquiring acute care and specialty hospitals, ASCs and other ancillary facilities; participated in the evaluation and negotiation of managed care contracts, performed and assisted in the valuation of various healthcare entities and related litigation support engagements; created pro-forma financials; written business plans; conducted a range of industry research; completed due diligence practice analysis; overseen the selection process for vendors, contractors, and architects; and, worked on the arrangement of financing.

Mr. Zigrang holds a Master of Science in Health Administration and a Masters in Business Administration from the University of Missouri at Columbia. He is a Fellow of the American College of Healthcare Executives, and serves as President of the St. Louis Chapter of the American Society of Appraisers (ASA). He has co-authored *"Research and Financial Benchmarking in the Healthcare Industry"* (STP Financial Management) and *"Healthcare Industry Research and its Application in Financial Consulting"* (Aspen Publishers). He has additionally taught before the Institute of Business Appraisers and CPA Leadership Institute, and has presented healthcare industry valuation related research papers before the Healthcare Financial Management Association; the National CPA Health Care Adviser's Association; Association for Corporate Growth; Infocast Executive Education Series; the St. Louis Business Valuation Roundtable; and, Physician Hospitals of America.

Matthew J. Wagner, MBA, CFA, is Senior Vice President of **HEALTH CAPITAL CONSULTANTS** (HCC), where he focuses on the areas of valuation and financial analysis. Mr. Wagner has provided valuation services regarding various healthcare related enterprises, assets and services, including but not limited to, physician practices, diagnostic imaging service lines, ambulatory surgery centers, physician-owned insurance plans, equity purchase options, physician clinical compensation, and healthcare equipment leases.

John R. Chwarzinski, MSF, MAE, is Vice President of **HEALTH CAPITAL CONSULTANTS** (HCC). Mr. Chwarzinski holds a Master's Degree in Economics from the University of Missouri – St. Louis, as well as, a Master's Degree in Finance from the John M. Olin School of Business at Washington University in St. Louis. Mr. Chwarzinski's areas of expertise include advanced statistical analysis, econometric modeling, and economic and financial analysis.

Jessica L. Bailey, Esq., is the Director of Research of **HEALTH CAPITAL CONSULTANTS** (HCC), where she conducts project management and consulting services related to the impact of both federal and state regulations on healthcare exempt organization transactions and provides research services necessary to support certified opinions of value related to the Fair Market Value and Commercial Reasonableness of transactions related to healthcare enterprises, assets, and services. Ms. Bailey is a member of the Missouri and Illinois Bars and holds a J.D. and Health Law Certificate from Saint Louis University School of Law, where she served as Fall Managing Editor for the Journal of Health Law and Policy.