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Top Antitrust Lawmaker Takes Aim at Health-Care Consolidation

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- Focus on allowing FTC to recoup company gains from anticompetitive behavior
- Could let FTC review anticompetitive behavior from hospitals outside mergers

An influential House lawmaker intends to start crafting legislation allowing the Federal Trade Commission to more easily punish anticompetitive behavior in the health-care industry.

Rep. David Cicilline (D-R.I.), the chairman of the House Judiciary antitrust subcommittee, said in an interview that he is going to start working on legislation based on recommendations from economics professors and researchers at a recent hearing.

Courts typically push back on what the FTC considers anticompetitive practices because the law is unclear, Fiona Scott Morton, an economics professor at the Yale School of Management, said at the March 7 hearing. With more guidance, the FTC could more easily go after those violations, she said.

Cicilline said his top priority is allowing the FTC to recoup through a process known as disgorgement the money that companies have obtained through their anticompetitive behavior, “to really be sure the penalties are felt by the bad actors,” he said.

Health-care consolidation is the subject of growing attention from regulators, lawmakers, and the industry. Hospital and health system merger and acquisition activity has jumped over the past 15 years, from 38 transactions in 2003 to 115 in 2017, according to an analysis by management consulting and software firm Kaufman Hall.

Court Conflicts

Lawmakers should modify the FTC Act to clarify that the FTC can recoup money from anticompetitive behavior, Michael Kades, director of markets and competition policy at the Washington Center for Equitable Growth, said at the hearing. Kades is a former FTC attorney.

Changing the law would allow the FTC stop any antitrust violations and to extract any illegal profits that companies earned after the fact, rather than having to catch it before or during the violations, Kades said. Such a change would deter profitable but anticompetitive conduct, he added.

Lawmakers also should change FTC laws to allow a presumption of anticompetitive harm, Martin Gaynor, a professor of economics and health policy at Carnegie Mellon University, said at the hearing.

This presumption would say that certain types of mergers are presumed to be illegal, rather than having antitrust regulators conduct an analysis of each merger to determine whether it would harm competition.

If the FTC gets authorization to go after more anticompetitive behavior, the agency will need more resources to do so, including funding and hiring of more staff, Gaynor said.

Hospital Behavior

Cicilline also said he wanted to give the FTC the authority to investigate not-for-profit hospitals and their anticompetitive behavior, including enforcement measures.

The FTC is unable to pursue the anticompetitive conduct of nonprofit hospitals under current laws—it can only examine mergers—but a 1999 report put out by the agency pointed to those types of mergers as an area of anticompetitive concern.

Over 1,600 hospital mergers have occurred from 1998 to 2017, according to the American Hospital Association. Nearly 31,000 physician practices were acquired by hospitals from 2008 to 2012, according to a study by Shruthi Venkatesh at Carnegie Mellon University. The two largest health insurers have 70 percent of the market, according to a 2017 American Medical Association report.

Congress should allow the FTC to study anticompetitive behavior in the insurance industry and track physician practice mergers and hospital acquisitions of physician practices, Gaynor said.

These smaller transactions are not within the FTC's purview, according to Hart-Scott-Rodino, which sets the threshold for the size of a transaction to get FTC review, reporting requirements, and are where consolidation primarily occurs.

Senate Finance Committee Chairman Charles Grassley (R-Iowa) is also looking into how nonprofit hospitals are earning their tax-exempt status and how the Internal Revenue Service is enforcing those standards. Cicilline said he planned to discuss working together on the issue with Grassley.

Already Existing Legislation

Meanwhile, House Judiciary Committee Chairman Jerry Nadler (D-N.Y.) said he plans to introduce legislation that would stop pay-for-delay tactics where brand-name companies pay generic drugmakers not to make low-cost copies of their products. Nadler didn't say if his bill will be similar to one that Grassley is cosponsoring in the Senate (S. 64).

Congress should create a presumption by law that pay-for-delay practices are harmful and that companies need to prove they're not, rather than requiring the FTC to prove they're harmful, Kades said. The FTC needs a really strong penalty provision for pay-for-delay practices, he said.

Both chambers of Congress also plan to take up the CREATES Act (S. 340) again, which would make it easier for generic companies to sue brand-name companies for blocking access to the samples needed to create copies of existing drugs. Lawmakers reached a compromise on the legislation in the last Congress, but it never came to a floor vote.

Cicilline said he doesn't plan to make any big changes to the CREATES Act and that the House Judiciary antitrust subcommittee will take up the bill again soon.

Grassley told reporters that he intends to move ahead with the CREATES Act "the way it is right now."

To contact the reporter on this story: Shira Stein in Washington at sstein@bloomberglaw.com

To contact the editors responsible for this story: Fawn Johnson at fjohnson@bloomberglaw.com; Brent Bierman at bbierman@bloomberglaw.com