Health Care
Our team of experts offers an unmatched combination of economic credentials, industry expertise, and testifying experience.
Introduction/Overview

The health care industry operates in a market landscape that is in constant flux. This is the era of innovation and reform, of provider repositioning and health plan consolidation, all in an effort to achieve that fine line between improving access to high-quality care and containing costs. Companies in the health care sector must navigate this evolving market, the uncertain regulatory environment, the demands of implementing the Affordable Care Act, and antitrust questions surrounding mergers at every level. Navigating these shifts requires continual analysis of strategic options and competitive responses.

For over half a century, NERA experts have been central to client success in some of the world’s highest-profile cases related to health care litigation, regulation, and business challenges. NERA’s Global Health Care Practice covers the full range of litigation, mergers, regulatory challenges, health care reform, public policy, and business strategy questions that arise in this complex industry. Our health economists have analyzed hundreds of mergers involving hospitals, health insurers, physicians, pharmaceuticals, and medical device companies. Many of these mergers have been reviewed by both US and European antitrust authorities. Our litigation experience covers antitrust issues such as monopolization, price fixing, RICO claims, unfair methods of competition, exclusive contracting, bundling, and other vertical restraints issues, such as those posed by integrated health care systems.
Focus Areas/Capabilities

NERA experts’ hands-on experience and deep understanding of health care markets span the range of industries and capabilities that are critical to our clients’ success. We are grounded in a set of core principles that have always guided our pioneering efforts: focus, independence, defensibility, and clarity. In the field of health care economics, our areas of focus include:

**Antitrust and Competition Policy**

NERA economists have been retained to analyze a variety of medical products and industries, such as home health care and ambulance services. We advise clients on issues related to market definition, entry conditions, pricing conduct, exclusionary behavior, predation, and profitability. We participate in all stages of pre-transaction counseling and analysis of antitrust risks. We advise companies and their attorneys, as well as governments and regulators, on monopoly and market dominance/abuse of market power investigations throughout the world. NERA advises on issues related to allegations of foreclosure, tying, monopoly and monopsony pricing, refusals to deal, essential facilities, and predatory pricing. We also work on cases involving alleged anti-competitive agreements, including issues raised by claims of vertical restraints and the economic impact of most-favored-nations clauses, bundling, exclusive agreements, and network exclusions. We consult with clients at all phases of the Hart-Scott Rodino notification process, including making presentations to lawyers and economists at the DOJ and FTC, as well as to state AGs and state Departments of Insurance.

**Health Care Mergers**

NERA’s health economists have been retained to evaluate the likely competitive effects of a variety of proposed mergers and acquisitions in the health care field, such as hospitals and health insurers. Over the past several years, NERA has analyzed more than 100 hospital mergers and provided strategic advice on choosing merger partners in many more. We have assessed the competitive effects of mergers of medical equipment manufacturers, pharmaceutical companies, home health care companies, physician practice management companies, manufacturers of clinical diagnostic tests, and ambulance services. In addition to these horizontal mergers, NERA has worked on mergers that raise concerns about vertical foreclosure. These include transactions involving insurers and hospitals, physician groups and hospitals, and mergers in the medical equipment industry.
Health Insurance Services
Besides a large number of hospital mergers, NERA has analyzed the competitive effects, both vertical and horizontal, for numerous health insurance mergers. We have also worked on litigations involving the use of UCR reimbursement to out-of-network providers, network exclusions of providers, and most-favored-nations clauses, and have provided analysis and testimony in subscriber and provider class actions against insurers.

Hospital Services
NERA’s health economists have been retained to evaluate the likely competitive effects of a variety of matters involving hospital services. For example, over the past several years, NERA has analyzed more than 100 hospital mergers and provided strategic advice on choosing merger partners in many more. In addition, NERA also has substantial expertise in evaluating allegations involving attempted monopolization, tying and bundling, exclusive contracts, and exclusive dealing cases by hospitals. Our experience spans a broad range, from analyses prepared for the US Federal Trade Commission and the Department of Justice, to studies and testimony presented in connection with Certificate of Public Advantage hearings, or litigation in connection with state Certificate of Need reviews.

Medical Device Industry
NERA’s experience in analyzing markets for medical devices and services spans a wide range of cases and issues. NERA economists have been retained by law firms and suppliers of medical devices to analyze the competitive issues that often arise in the context of mergers and acquisitions as well as other antitrust, contract dispute, licensing, and patent infringement matters. NERA staff members have testified and provided written analyses of pricing and innovation for a variety of medical technologies. We have extensive experience calculating patent damages, performing intellectual property valuations, and conducting transfer pricing studies.
NERA has provided economic analysis in testimony and written reports to many of the leading international research-based and generic pharmaceutical companies. We have performed competitive analyses of proposed acquisitions involving pharmaceutical companies as well as estimated damages or costs in contract, antitrust, patent, and regulatory matters. NERA economists have also successfully defended alleged “pay-for-delay” patent settlements challenged by the FTC. We also have expertise in providing companies with economically sound transfer pricing methodologies and strategic planning advice. Our work has encompassed both chemical-based and biotechnology products.

Physician Services
NERA economists frequently advise counsel on antitrust matters involving physician services, whether the issue is physician network development, physician group mergers, exclusive contracts, physician staff privileges, vertical integration with hospitals systems, or monopolization.

Public Policy and Health Care Sector Reform
In the health and pharmaceutical sectors, NERA economists have broad experience helping corporations and governments achieve “value for money” through the design of institutional and regulatory frameworks. From devising a new framework for health financing in the UK, to advising the Lebanese government on a vision for health policy, to assisting the Montana Attorney General on how to regulate hospital pricing, our consultants are experienced in applying knowledge of “what works” in different policy environments. In the same way, we also help hospitals, insurers, pharmaceutical companies, and industry associations understand the implications of changing policy environments and how best to respond to them. Most recently, our work recognizes the changes brought on by the Affordable Care Act and its encouragement of Accountable Care Organizations (ACOs) as a shared savings program between integrated providers and Medicare and other payers.
Case and Project Profiles

NERA economists bring to bear a passion for finding the right answer. The following case profiles illustrate the breadth of our experience in the area of health care economics.

Approval of Medco’s Acquisition by Express Scripts

In 2011, Express Scripts, Inc. announced plans to acquire Medco Health Solutions for $29 billion. The acquisition was a transaction between two of the three largest US pharmacy benefit managers (PBMs). After the acquisition was announced, the US Federal Trade Commission (FTC) opened an investigation to determine whether the acquisition would substantially reduce competition in violation of Section 7 of the Clayton Act.

NERA was retained on behalf of Medco to assist the company and its counsel in assessing the potential competitive effects of the proposed acquisition. NERA’s experts analyzed Medco’s historical sales and competitive bidding data. Analyses of these and other market data were particularly informative about the likely competitive effects of the transaction. As noted by the FTC, the bidding data produced by Medco, Express Scripts, and other third parties demonstrated that Medco and Express Scripts were not particularly close competitors and that other competitors have been successful in winning business away from the merging parties. These and other analyses were central to the FTC’s conclusion that the market for PBM services was competitive and that the transaction would not have an adverse effect on the competitive dynamics.

On 2 April 2012, the FTC announced that it had approved the acquisition. After an eight-month investigation, the Commission concluded that the transaction was unlikely to substantially lessen competition in the PBM industry. In its statement, the FTC said that its investigation revealed that Medco’s and Express Scripts’ high combined market shares did not accurately reflect the current competitive environment and were therefore an inaccurate indicator of the likely effects of the transaction on competition and consumers. The Commission said that the acquisition was unlikely to “cause unilateral anticompetitive effects, enhance the likelihood of successful coordination, or facilitate the exercise of monopsony power in any relevant market in which the merging parties participate.”
**FTC v. Laboratory Corporation of America, et al.**
LabCorp’s acquisition of Westcliff Medical Laboratories in 2010 was the first transaction in which the US Federal Trade Commission (FTC) went to court seeking a temporary restraining order and preliminary injunction since the 2010 Horizontal Merger Guidelines were issued.

LabCorp and Westcliff were clinical laboratories that provided laboratory testing services to physicians and physician groups. Both companies had laboratory facilities and patient service centers in Southern California. Both labs also had contracts with physician groups, including independent practice associations, in Southern California. Westcliff, however, was in the midst of bankruptcy proceedings. In May 2010, LabCorp entered into an asset purchase agreement to purchase substantially all of Westcliff’s assets. NERA was retained on behalf of LabCorp to consider and analyze a broad range of issues, including relevant market definition, market shares and concentration, the potential for the transaction to harm competition, the prospect that entry would maintain competitive pricing, and the likely efficiencies and cost savings of the transaction.

In February 2011, The Honorable Andrew J. Guilford of the United States District Court for the Central District of California issued an order denying the FTC’s request for a preliminary injunction. In his decision, Judge Guilford cited extensively NERA’s testimony and the declaration filed by NERA’s experts.

**Daiichi Pharmaceutical Co., Ltd., et al. v. Apotex, Inc. et al.**
United States Patent No. 5,401,741 discloses a method of treating certain ear infections with Ofloxacin Otic Solution, 0.3%, sold by Daiichi under the brand name FLOXIN® Otic. Apotex contended that the patent was invalid due to obviousness and other reasons and announced its intention to introduce a generic equivalent before the ‘741 patent expired.

Retained by Daiichi, NERA analyzed FLOXIN® Otic’s performance in the marketplace and concluded that the invention described in the patent had been a commercial success. In November 2005, NERA Senior Vice President Dr. Phillip Beutel testified on Daiichi’s behalf and explained NERA’s research and analysis to the court.

On 2 August 2006, Senior District Judge William Bassler of the US District Court for the District of New Jersey ruled that the ‘741 patent is not invalid, that FLOXIN® Otic was a commercial success, and that Apotex would infringe the patent if it introduced a generic version of FLOXIN® Otic prior to the patent’s expiration. Citing NERA’s analyses, Judge Bassler wrote: “Secondary considerations further support the Court’s finding that the ‘741 patent is non-obvious....The evidence shows that Daiichi’s FLOXIN® Otic product was commercially successful.”
Federal Trade Commission v. Lundbeck, Inc.

Ovation Pharmaceuticals purchased a bundle of five drugs from Merck & Co. Indocin IV, one of the drugs in the bundle, is used to treat a life-threatening heart condition in extremely premature infants called patent ductus arteriosus (PDA). Ovation then acquired the marketing rights to NeoProfen, another drug used to treat PDA, from Abbott Laboratories. At the time of this acquisition, NeoProfen was still waiting for its FDA approval. Immediately after acquiring the rights to NeoProfen, Ovation raised the price of Indocin IV by almost 1,300 percent.

The US Federal Trade Commission (FTC) and the state of Minnesota sued Ovation, claiming that the acquisition of the rights to NeoProfen was anticompetitive, and was a violation of the Clayton and FTC Acts. The FTC asked the court to order Ovation to divest one of the two drugs, and to disgorge profits obtained because of its alleged monopoly. The Danish firm H. Lundbeck A/S later acquired Ovation, and its US subsidiary, Lundbeck, Inc., inherited the lawsuit.

Lundbeck retained NERA to examine whether Ovation’s acquisition of NeoProfen resulted in any anticompetitive harm. NERA’s expert, Senior Vice President Dr. Thomas McCarthy, opined that, despite being functional substitutes, Indocin and NeoProfen are not economic substitutes and, hence, they are not in the same antitrust market. The key evidence behind this conclusion came from the testimony of the neonatologists in charge of treating these premature babies. The physicians each had strong clinical preferences for one drug or the other. Dr. McCarthy further opined that the record showed that Lundbeck planned to raise the price of Indocin long before it learned about the existence of NeoProfen. Finally, based on the economic literature on pharmaceutical pricing, Dr. McCarthy concluded that an independent manufacturer of NeoProfen would have priced NeoProfen at or above the price that Ovation chose.

On 31 August 2010, Judge Ericksen ruled in favor of Lundbeck. The ruling unequivocally stated that the FTC and Minnesota failed to demonstrate that NeoProfen and Indocin IV are in the same product market, that Lundbeck possessed monopoly power, or that the acquisition of the rights to NeoProfen substantially lessened competition.
About NERA

NERA Economic Consulting (www.nera.com) is a global firm of experts dedicated to applying economic, finance, and quantitative principles to complex business and legal challenges. For over half a century, NERA’s economists have been creating strategies, studies, reports, expert testimony, and policy recommendations for government authorities and the world’s leading law firms and corporations. We bring academic rigor, objectivity, and real world industry experience to bear on issues arising from competition, regulation, public policy, strategy, finance, and litigation.

NERA’s clients value our ability to apply and communicate state-of-the-art approaches clearly and convincingly, our commitment to deliver unbiased findings, and our reputation for quality and independence. Our clients rely on the integrity and skills of our unparalleled team of economists and other experts backed by the resources and reliability of one of the world’s largest economic consultancies. With its main office in New York City, NERA serves clients from more than 25 offices across North America, Europe, and Asia Pacific.

For more information about our capabilities and services in health care, please visit www.nera.com/healthcare.