ANTITRUST ENFORCERS TALLY TWO MORE WINS IN PROVIDER CONSOLIDATION BATTLE

By this point, it is no secret that the federal and state antitrust enforcers are suspicious of providers' rationales for the provider consolidation wave hitting the health care industry. In their view, provider consolidation in highly concentrated markets leads to increased prices for hospital and physician services paid by commercial payers, which, in turn, are passed to patients via higher health insurance premiums. The antitrust enforcers have roundly rejected providers' efficiencies justifications that consolidation is necessary to achieve the goals of health care reform under the Affordable Care Act and that the quality benefits from such mergers are sufficient to outweigh the anticompetitive effects (or that a merger is even necessary to achieve those quality efficiencies). Over the last few years, the federal and state antitrust enforcers have successfully challenged a number of hospital mergers and physician practice acquisitions by hospitals and health systems. Two recent cases are further evidence that the state and federal antitrust enforcers continue to tally victories on this front.

HEALTH SYSTEM IN IDAHO LOSES AT THE NINTH CIRCUIT

On February 10, 2015, the Ninth Circuit affirmed the District Court's order that an Idaho health system ("Health System") divest a multispecialty physician group ("Physician Group"), which it acquired in 2012. The Ninth Circuit found that the District Court did not clearly err in finding that the acquisition of the Physician Group by the Health System violated the federal antitrust laws because of its anticompetitive effects on the market for adult primary care physicians ("PCPs") in Nampa, ID. The challenge was originally filed by the FTC and Idaho Attorney General in the District Court in 2013.

The Physician Group was the largest independent multispecialty physician practice in Idaho and had 16 PCPs providing care in Nampa, a city of 85,000 located 20 miles west of Boise. The Health System had 8 PCPs in Nampa and a competitor health system had 9. There were also several independent PCPs in solo or small practices.

The Health System vigorously disputed that Nampa was the relevant geographic market. But citing testimony from Nampa residents that they preferred access to local PCPs, the Ninth Circuit found the District Court was not erroneous in finding that commercial health plans needed to include Nampa PCPs in their networks to offer competitive products, and thus, Nampa was the correct geographic market.

More significantly, the Health System also argued that any anticompetitive harm was outweighed by the procompetitive efficiencies of the acquisition. Specifically, it argued that the acquisition allowed it to accomplish the goals of health care reform by integrating care and moving towards value-based contracting and thus improving quality of care. The Ninth Circuit noted that it was skeptical of any efficiencies defense and found the District Court was right in finding the efficiencies claimed by the Health System were insufficient and further, not merger-specific (i.e., could be otherwise achieved without merging). The Ninth Circuit stated that it was not enough to show that the acquisition would allow the Health System to better serve patients because the antitrust laws do not excuse acquisitions that improve operations but lessen competition.

HEALTH SYSTEM IN BOSTON HAS CONSENT DECREE REJECTED BY STATE COURT

In an interesting case that has had many unusual twists and turns, on January 29, 2015, a state court judge rejected a consent decree between a Boston Health System ("Health System") and the Massachusetts Attorney General ("AG") that would have allowed the Health System to acquire two competing health systems, subject to a variety of "conduct" restrictions on its post-merger operations.

The Health System is the largest health system in the state of Massachusetts, accounting for more than half of the commercial discharges in the state and receiving nearly one-third of all commercial payments to acute care hospitals. In December 2012, the Health System entered into an agreement to acquire a competitor health system in the South Shore region of the state. In January 2014, the Health System entered into an agreement to acquire a different competitor health system in the Boston and greater Metro-North area.

The Massachusetts AG had been investigating the Health System since 2009 for potential antitrust violations and had coordinated its investigation with a similar investigation by the DOJ. On June 24, 2014, the Massachusetts AG simultaneously filed a complaint and proposed consent decree in state court. The consent decree required the Health System to make certain concessions (i.e., a "conduct"

remedy or relief) over the course of 10 years in order to close the acquisitions, including agreeing to price caps, growth restrictions, component contracting (i.e., agreeing that commercial payers could contract with certain components instead of the entire health system) and a prohibition on joint contracting with independent physicians.

In determining whether to accept or reject the proposed consent decree, the court, with the parties' agreement, accepted comments from the public. Numerous comments were filed with many being sharply critical of the consent decree, including a comment from the statutorily created Massachusetts Health Policy Commission, which was created by the state to review proposed health care acquisitions.

In another twist, on January 26, 2015, the newly elected Massachusetts AG stated in a filing with the court that if the judge rejected the consent decree (which had been negotiated by the new AG's predecessor), the new AG would file suit to stop the acquisitions.

Set against this backdrop, the judge rejected the consent decree stating that it was not in the public interest because it would not adequately address the anticompetitive harm posed by the acquisitions. Further, the judge noted that there were serious concerns as to the enforceability of the consent decree's conduct relief provisions given the complicated issues related to health care pricing, the 10-year time frame and the rapid change in the health care industry. At this time, the merging parties' next steps are unclear.

PRACTICAL TAKEAWAYS

As provider consolidation continues, be aware that both state and federal antitrust enforcers are interested and active in looking at all potentially anticompetitive acquisitions. The following are simple points to keep in mind:

1. Be aware that the enforcers are very skeptical of any claims that a merger is necessary to advance the goals of health care reform, and any claimed efficiencies will be closely scrutinized and must be clearly demonstrated and merger-specific.
2. Know that the antitrust enforcers, particularly the federal agencies, tend to favor structural remedies (i.e., divestiture or abandonment) as opposed to conduct remedies (i.e., price caps and growth restrictions), and in light of the Boston Health System's outcome, even state enforcers may be becoming more reluctant to agree to conduct relief.
3. Be aware of acquisitions creating large market shares and plan for antitrust scrutiny.
4. Know that even small non-HSR reportable acquisitions are on the radar screens of antitrust enforcers.
5. Know that consummated acquisitions are fair game if anticompetitive conduct arises post-closing.
6. Be wary of post-closing price increases that are not tied to increased quality.

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