Health Care Antitrust Update

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Recent Government Successes In Health Antitrust Enforcement

- Evanston
- Inova
- Promedica
- OSF
- St. Luke's
- Renown
- Providence
- Reading

Recent Antitrust Challenges To Physician Transactions

- Renown:
  - Government challenged hospital's cardiologist acquisitions in Reno resulting in a dominant market share.
  - FTC argued for a local market, based on the many cardiology cases that involved emergencies or chronic care, therefore requiring local access.
  - Transaction was not unwound, but noncompete clauses were dissolved. 12 cardiologists left the hospital's employment.

Recent Antitrust Challenges To Physician Transactions

- Urology of Central Pennsylvania:
  - Allegedly all the urologists in metropolitan Harrisburg.
  - 13 of 22 in alleged relevant market.
- Consent order permitted group to continue operating with some regulatory constraints.

Recent Antitrust Challenges To Physician Transactions

- *Saint Alphonsus v. St. Luke's*:
  - Hospital acquired dominant local primary care practice.
  - 80% share of primary care in local community.
  - Court ordered divestiture.

Recent Antitrust Challenges To Surgery Center Acquisitions: *FTC v. Reading Health System/Surgical Institute of Reading* Complaint

- "RHS already is the dominant healthcare provider in the Reading area due to its market share and its ownership of the largest hospital, several outpatient facilities, two large physician groups, and a local provider network."
- "SIR entered the market in 2007 as a small but potent challenger to RHS's dominance. SIR offers substantially lower rates to health plans for its services than RHS and also offers a convenient, high-quality alternative for patients."

Recent Antitrust Challenges To Surgery Center Acquisitions: *FTC v. Reading Health System/Surgical Institute of Reading* Complaint

- "An analysis conducted by a third party, based on information provided by SIR, describes RHS as SIR's '[p]rimary competitor.'"
- Transaction abandoned.

Lessons From The Precedents: Market Share Is Important

- The *St. Luke's* court found the merger would result in an 80% share of primary care in the relevant market.
- The court relied in part on the presumption of anticompetitive effects at an HHI of 2,500.
- A combined share of 50% triggers the presumption.

The Size Of The Geographic Market

- More than 60 miles (*Morgenstern v. Wilson* – Cardiac Surgery).
- 120 miles (*Patel v. Verde Valley Medical Center* – Cardiology).
- 36 miles (*Quorum Health* – Primary Care).
- One town (*St. Luke's*).

The Importance Of Payors' Views

- "BCI considers 'primary care services in the direct community that the member resides' to be a 'threshold' consideration for an employer evaluating a potential health plan."[1]
- " After the Acquisition, if St. Luke's were to bill for these ancillary services at the higher 'hospital-based' rates, BCI estimates that costs under its commercial contracts would increase by 30 to 35 percent."[2]

1. *Saint Alphonsus v. St. Luke's* Findings of Fact at ¶ 61.
2. *Id.* at ¶ 125.

"Smoking Gun" Evidence on Price

- **Evanston Opinion:** "There is no dispute that ENH substantially raised its prices shortly after the merging parties consummated the transaction." "[W]e find that the merger enabled ENH to exercise market power, and that ENH used this market power to increase its average net prices to MCOs for acute inpatient hospital services by a substantial amount. . ."

- **Inova Complaint:** "[T]he respondents do not dispute that health care prices will increase as a result of the merger."

- **ProMedica Opinion:** A "ProMedica . . . affiliation could still stick it to employers, that is, to continue forcing high rates on employers and insurance companies." (hospital document)

Is Entry Easy?

- Has entry occurred?
- Is there a shortage of providers?
- Recruitment patterns?

St. Luke's: Judge Winmill's Findings On The "Quality Defense"

- "Independent physician groups are using risk-based contracting successfully."[1]
- "[T]he efficiencies of a shared electronic record can be achieved without the Acquisition . . ."[2]
- "The same efficiencies [sought to be achieved with employment] have been demonstrated with groups of independent physicians."[3]
- "Because a committed team can be assembled without employing physicians, a committed team is not a merger-specific efficiency of the acquisition."[4]

1. Findings of Fact at ¶ 183.
2. Conclusions of Law at ¶ 48.
3. *Id.* at ¶ 46.
4. Findings of Fact at ¶ 185.

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Unique Features of Primary Care

- Need for local, convenient care.
- Strongest patient loyalty.
- Strongest influence on choice of other health care providers.
- Most important to network selection.

Antitrust Structure Issues

- Acquisition: Go
- True Corporate Structure: Go
- Joint Operating Agreement: Go
- “Loose Affiliation”: Stop

Due Diligence: Antitrust Issues

- Charges: Stop
- Managed Care Planning: Stop
- Wages: Stop
- Analysis of Costs and Efficiencies: Qualified Go

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FTC Actions Against Hospital-Physician Networks

- Averaged a couple annually for the last 20 years or more.
- Cases generally involved multiple antitrust problems.
  - Absence of significant clinical or financial integration.
  - Dominant share of physicians in area participated in network.
  - Often evidence of increased reimbursement.

The Antitrust Standards

Activity	*Legal Standard for Analysis*
Price fixing	*Per se illegal*
Joint negotiation through integrated joint venture	Rule of reason

The Standard For Clinical Integration

- The physician organizations must "(b) implement an active and ongoing program to evaluate and modify practice patterns. . .”[1]

[1] *In the Matter of Urological Stone Surgeons, Inc.* (emphasis added).

FTC: Networks Not Sufficiently Clinically Integrated

- Clinical integration was found insufficient where:
  - IPA did "not: engage in case management; provide feedback to physicians concerning patient care; require adherence to its clinical guidelines and protocols; operate or refer patients to any disease management programs or patient registries; or engage in meaningful education." [1]
  - IPA did "not monitor practice patterns and quality of care, or enforce utilization standards regarding services provided by its PPO network." Its physicians were "required to abide by the utilization management guidelines established by payors, not by the guidelines in [the IPA's] risk-sharing contracts."[2]
  - Network provided "practice management programs (including two quality improvement projects, clinic inspections, and quarterly quality council meetings)" but "[t]hese activities . . . [did] not involve collaboration to monitor and modify clinical practice patterns to control costs and ensure quality or otherwise integrate their delivery of care to patients.[3]

[1] *N. Tex. Specialty Physicians*, Dkt. No. 9312 (FTC Nov. 16, 2004) (initial decision).
[2] *Cal Pac. Med. Group*, 137 F.T.C. 411 (2004) (consent order).
[3] *Minn. Rural Health Coop.*, Dkt. No. 0510199 (FTC Dec. 28, 2010) (consent order).

Elements Of Clinical Integration

- Care maps, guidelines, and/or toolkits for disease management.
- Patient and physician education programs and materials.
- Utilization review (e.g., ER utilization, increase generic drug use).
- Review of medical records.
- Review of office procedures.
- Electronic medical records system and electronic patient registries.
- Data analysis and physician feedback/monitoring.

Elements Of Clinical Integration

- Pharmacy usage review.
- Preventive health management.
- Electronic prescribing.
- Surgical infection prevention.
- Surgery process improvements.
- Sharing of physician and hospital savings from re-engineering.

Other Clinical Integration Issues

- Dedicated staff.
- Scope of programs.
  - What specialties are clinically integrated?
  - What specialties' rates are negotiated?
- Timing versus negotiation.
  - Integration by 2016?
  - Negotiation by _____?

Other Clinical Integration Issues

- Marketing to managed care.
  - Do the payors use your clinical programs?
  - Are the clinical programs in the contract?
  - Are they in your communications?
- The “reasonably necessary” standard.
  - Why do you need to negotiate rates?
- Spillover effects.

The Rule Of Reason Factors

- Market definition.
- Market share by specialty.
- Entry.
- Exclusivity?

Network “Exclusivity”

- Contract language.
- How else do the providers contract?
- What happens if there is no deal with the payor?
- Communications with providers.

When Is There A Potential Practical Antitrust Issue With ACOs

- Dominant local share among hospitals or major specialty areas
- Exclusive or preferred relationship with providers
- "Crowding out" other ACOs

Other “High Share” Network Conduct Of Concern

- Preventing steering.
- Tying.
- Impeding information flow to consumers.

Wage Information

- *Cason-Merendo*:
  - $50 million plus in settlement
  - Vanguard
- *U.S. v. Adobe, et al*