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SPECIAL FOCUS: ANTITRUST

Renown Health-FTC Antitrust Agreement: Guidance for Hospitals Acquiring and Employing Physicians

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Renown was represented in the agencies' investigation and the ensuing settlement negotiations by Ober|Kaler principal Bill Berlin, a member of the firm's Antitrust and Competition Group.

On August 6, 2012, Renown Health entered into consent decrees with the Federal Trade Commission (FTC) and the state of Nevada Attorney General (NAG) settling the antitrust investigation of its consummated cardiology group acquisitions. It is the first FTC settlement of an investigation into a physician group acquisition, and the only antitrust consent decree by any federal or state agency applying a "structural" remedy to a physician merger – here, allowing partial divestiture of physicians – rather than "conduct" relief as state Attorneys General (AG) have imposed in several recent physician merger settlements. Such conduct remedies can impose more restrictive limitations than divestiture on the hospital system's activities. As a result, the Renown Health consent decree provides rare guidance to hospitals and physicians considering such mergers with both horizontal and vertical aspects.

In January 2011, Renown Health, the largest hospital system in Reno, Nevada, acquired Sierra Nevada Cardiology Associates, with 15 cardiologists. Three months later, Renown acquired Reno Heart Physicians, the other major cardiology group in the region with 17 cardiologists. The employment agreements between Renown and the cardiologists include noncompete covenants restricting any physician who leaves Renown from providing competing services, as well as other constraints. In their investigation and the subsequent antitrust complaints they filed,

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the FTC and the Nevada Attorney General's office claimed that the resulting market consolidation, combined with the barrier created by the noncompete agreements, potentially reduced competition for adult cardiology services in the region.

Under the settlement, Renown agreed to suspend the noncompete provisions for at least 60 days, allowing as few as six but no more than ten cardiologists to seek employment with other hospitals or to practice independently as long as they remain in the Reno area for one year. Alternatively, even if fewer than six cardiologists request to terminate employment, Renown is not required to take any action other than to continue suspending the noncompete provisions. Other provisions call for advance notification to the government of any future acquisitions of cardiology groups in Reno during the next five years, and creation of an antitrust compliance program for Renown. There are no provisions restricting Renown's ability to contract with health plans, limit provider panels, recruit new cardiologists, or otherwise limiting Renown's ability to create ACOs or other innovative services to meet the demands of health care reform.

Recent years have seen a wave of mergers between hospitals and specialty physician groups resulting in hospital employment of physicians, largely in response to reimbursement changes as well as to position those hospitals and physicians to comply with the Affordable Care Act. These hospital-physician group mergers can provide mechanisms to improve quality of care, reduce costs, and achieve other efficiencies. At the same time, these transactions can raise significant antitrust issues, and as a result there has been an increase in FTC and AG investigation and enforcement activity, which, in the eyes of many providers, creates a tension between conflicting government priorities. Prior FTC and state investigations of hospital-physician mergers have resulted in substantial restrictions on the hospital system's ability to manage its newly employed physicians or to negotiate with payors, or, where the merger was not already consummated, have resulted in its outright abandonment.

The Renown settlement was a creative solution to address an already-consummated merger, providing a blueprint for managing physician acquisitions

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and resolving any ensuing government investigation in a way that does not hamstring the future operations of the resulting hospital-physician organization, here a heart institute. The settlement provides a number of factors, arguments and affirmative steps that merging parties and their counsel should consider during each stage of the merger and during any agency investigation to maximize the likelihood of the agency permitting the transaction to proceed and preserve the integrity and benefits of the transaction even if it is challenged, including:

- There are several actions that merging parties can take at the outset of merger planning to minimize antitrust exposure – payor communications regarding merger efficiencies, renegotiating contracts and price increases, community commitments to maintain practice patterns, and determining how to respond to agency requests to postpone closing the transaction until the agency has completed its review;
- Market dynamics are changing nationwide, and consequently the continuing utility of traditional agency enforcement tools is questionable. In particular, using market shares and concentration may no longer be a reliable indicator of likely anticompetitive effects in physician services mergers. Historical and often incomplete patient data does not reflect where patients may go in the future, and even where mergers result in high market shares, rival hospitals can readily expand by employing their own physicians, including by hiring away some of the merged physicians (particularly if there are no noncompete provisions). Such “entry” and switching will be sufficient to defeat any exercise of market power by the merged parties.

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- Even in the event the agencies investigate and indicate their concern that a merger may lessen competition, there are remedies that can minimize the need for ongoing government regulatory oversight by allowing market dynamics to resolve the perceived competitive issues. In *Renown*, applying a flexible standard for divestiture by suspending noncompete provisions allows physicians to “test the waters” and ultimately ensures that only those physicians with viable competing employment or independent practice alternatives to *Renown* will switch to a rival hospital or, less likely in today’s physician markets, return to independent practice. In turn, this ensures that no more physicians will be divested than the market (i.e., competing hospitals) can support.

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