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DOJ Antitrust Chief Promises Careful Monitoring of Health Insurance Market While Encouraging Innovation and Efficiency in Health Care Delivery

By Robert Magielnicki

In a May 24, 2010 speech to the Antitrust in Healthcare Conference, Christine A. Varney, the Chief of DOJ's Antitrust Division, emphasized the importance of antitrust enforcement in preserving vigorous competition in health insurance markets, and of encouraging innovation and efficiency in health care delivery while preserving competitive markets.

She began her remarks by noting that the recently-enacted Patient Protection and Affordable Care Act relies in part on the belief that robust competition and expanded choice will expand coverage while containing cost. In addition, the repeal of the antitrust exemption in the McCarren-Ferguson Act for the health insurance industry would give American families and businesses more control over their health care choices by promoting greater competition and outlawing anticompetitive practices like price fixing, bid rigging, and market allocation.

With regard to the health insurance market, the Antitrust Division recently conducted a review to gather further insight about the significance and nature of entry and expansion in that industry. That review yielded several important conclusions. First, the biggest obstacle to an insurer's entry or expansion in small-or mid-sized- employer markets is scale. New insurers cannot compete with incumbents for enrollees without provider discounts, but they cannot negotiate for discounts without a large number of enrollees. Second, it maybe easier to enter less concentrated markets, with several large but relatively equal-sized insurers, than a market with one or two dominate plans.

Third, new entrants are more likely to receive comparable provider discounts in less concentrated markets than in those dominated by one or two plans. This is because no one plan provides such a large number of enrollees that it can demand disproportionately larger provider discounts than its competitors. Finally, brokers typically are reluctant to sell new health insurance plans, even if

they have substantially reduced premiums, unless the plan has strong brand recognition or a good reputation in the geographic area.

As these conclusions reinforced the Antitrust Division's concern about strong barriers to entry in health insurance markets, Ms. Varney announced "three important takeaways for the health insurance industry." First, DOJ will carefully review mergers in the industry and will continue to challenge those that are likely to substantially lessen competition. "Second, entry defenses in the health insurance industry generally will be viewed with skepticism and will almost never justify an otherwise anticompetitive merger." Third, DOJ will carefully scrutinize and challenge exclusionary practices by dominant firms, particularly most-favored-nations clauses and exclusive contracts between insurers and significant providers.

Turning to health care delivery, Ms. Varney stated that there are many ways for providers to form joint ventures to control costs and improve quality without unduly inhibiting competition. "They can financially integrate, or they can clinically integrate, or, indeed, they can do both." She added that the antitrust agencies "should be receptive to new and innovative forms of provider arrangements that do not necessarily involve financial risk sharing."

According to Ms. Varney, the 1996 joint "Statements of Antitrust Enforcement Policy in Health Care" and a number of Federal Trade Commission ("FTC")advisory opinions provide guidance as to what constitutes sufficient clinical integration, as well as sufficient financial integration. She added:

> The economic integration that justifies application of the rule of reason to joint price negotiations with payers requires the sharing of some form of financial risk, such as an agreement by providers to accept a capitated rate, a predetermined percentage of revenue from a health plan, or sufficient clinical integration to induce the group's members to improve the quality and efficiency of the care they provide. While there is no particular formula that can cover all types of legitimate clinical integration, the key is that there must be sufficient clinical integration to motivate the kinds of changes that can achieve real cost-containment or other performance benchmarks.

Ms. Varney concluded by advising that the Antitrust Division and the FTC recently have started a dialogue, the goal of which is to ensure that health care providers "have the necessary guidance to form innovative, integrated health care delivery systems without unduly confining providers to any particular delivery model."

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