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Insurance Antitrust LEGALNEWS

FTC COMMISSIONER CRITICIZES PROPOSED LEGISLATION THAT WOULD PERMIT HEALTH PROVIDERS TO NEGOTIATE JOINTLY WITH HEALTH INSURERS

by James M. Burns

In a February 26 speech before the Connecticut Bar Association, Federal Trade Commissioner Maureen Olhausen expressed strong opposition to proposed legislation that would create an antitrust exemption for collective negotiations with health insurers by otherwise competing health care providers. Describing such proposals, which have been introduced at both the federal and state levels, as "particularly troublesome," Commissioner Olhausen noted that the FTC has "long advocated against such exemptions for the simple reason that they tend to raise prices and harm consumers."

In further explaining the basis for her concern about such proposals, Commissioner Olhausen stated that while collaborations among physicians and other health care professionals can benefit consumers, her opposition is rooted in the following three principles: (1) the antitrust laws, as currently constructed, do *not* stand in the way of health care providers forming collaborative arrangements that are likely to reduce costs and benefit consumers through increased efficiency and improved coordination of care. She noted that the FTC has authored guidance on this very issue, explaining how an accountable care organization can ensure that the prospect of antitrust liability does not impede the formation of *beneficial* ACOs; (2) that, in Commissioner Olhausen's view, the central purpose of such legislation often appears to be to permit physicians to extract higher reimbursement rates from health plans, not to integrate their practices to reduce costs or better coordinate care for their patients; and (3) that because *procompetitive* health care collaborations are already permissible under the antitrust laws, the proposed legislation's main effect would be to foster precisely those types of collaborative negotiations that would not generate efficiencies and thus otherwise pass muster under the antitrust laws, an unwelcome result.

Turning her attention to the oft-heard contention that such legislation is needed to "level the playing field" between providers and payors, Commissioner Olhausen responded that "reducing competition on one side of a market is not the answer to a perceived lack of competition on the other side of the market." For this reason, Commissioner Olhausen closed with a prediction that she "expects [the FTC] will continue to oppose these attempts to authorize departures from competition."

In the last twelve months, there have been several state bills that would permit providers to collectively bargain with payors (including

Connecticut H.B. 6431, which was the principal focus of Commissioner Olhausen's remarks). At the federal level, Congressman John Conyers of Michigan introduced legislation of this nature on February 25 as the "Quality Health Care Coalition Act of 2014." Stay tuned.

PROPERTY & CASUALTY INSURERS HIT WITH ANTITRUST SUIT BY AUTO BODY SHOPS

by James M. Burns

On February 24, a group of Florida auto body shops filed an antitrust action against over forty property & casualty insurers in the United States District Court for the Middle District of Florida.

In the case, styled *A&E Auto Body v. 21st Century Centennial Insurance Co., d/b/a Farmers Insurance Group et al.*, the plaintiffs allege that State Farm's vendor agreement requires shops desiring to participate in tis preferred provider program to accept the "market rate" for such services, and that State Farm calculates those rates in an improper manner that keeps them artificially low and not representative of the true "market" for such services. The plaintiffs also alleges that the remaining insurer defendants in the state have advised plaintiffs that they will pay no more than State Farm pays for labor at their shops, thus resulting in a stabilizing of rates at these allegedly low levels.

In addition to a number of common law counts, plaintiffs assert that defendants' conduct constitutes price fixing under Section 1 of the Sherman Act. In search of evidence of "agreement" amongst the defendants (a necessary element of a Section 1 claim), plaintiffs allege that the insurers agreed to control and suppress automobile damage repair costs at meetings "amongst themselves" that they "refused to allow members of the auto collision repair industry to attend." Plaintiffs also contend that defendants' allege conduct constitutes unlawful "boycott" activity. In support of that assertion, plaintiffs maintain that defendants' alleged acts of "steering customers away from plaintiffs, through allegations and intimidations of poor work quality" places defendants' conduct beyond the limited antitrust exemption that the insurance industry enjoys under the McCarran Ferguson Act.

The action is only in its very earliest stages, and the insurers have not yet responded to plaintiffs' allegations. However, given the number of insurer defendants, and the nature of the issues, the case is clearly "one to watch" going forward into 2014.

BLUE CROSS OF RHODE ISLAND IS UNSUCCESSFUL IN BOUNCING HOSPITAL SYSTEM'S ANTITRUST CLAIM

by James M. Burns

In June of 2013, Steward Health System, a Massachusetts-based provider, commenced an antitrust lawsuit against Blue Cross Blue Shield of Rhode Island in the federal district court in Rhode Island. Steward contended that, for anticompetitive reasons, BCBS-RI derailed Steward's proposed acquisition of Landmark Medical Center, a Rhode Island hospital that was in financial distress and looking to be acquired. Specifically, Steward alleged that because it has a reputation in Massachusetts for partnering with low-cost insurers offering limited network products, BCBS-RI feared Steward's entry into Rhode Island would jeopardize BCBS-RI's alleged market dominance. In support of its claim, Steward alleged that, among other things, BCBS-RI (1) refused to negotiate an extension of "in network" status for Landmark at "reasonable" rates, knowing that this would ensure that Steward would pull back from its offer to acquire Landmark; and (2) terminating BCBS-RI's in-network contract with a different Steward hospital that is located near the Rhode Island/Massachusetts border, despite Steward's offer to continue the relationship on terms "advantageous" to BCBS-RI.

BCBS-RI filed a motion seeking to have Steward's claims dismissed, contending that, for numerous reasons, the allegations failed to state an antitrust claim. However, on February 19, District Court Judge William Smith denied BCBS-RI's motion, holding that Steward's claims passed muster under the antitrust laws.

Turning first to BCBS-RI's argument that, even as an alleged monopolist, it had no duty to deal with Steward, Judge Smith found that argument unpersuasive, at least at this stage of the proceeding. After acknowledging that, in most cases, a party is free to choose with whom it will deal, Judge Smith noted that right is not unqualified. Citing the Supreme Court's decision in *Verizon Communications v. Trinko*, he observed that "under certain circumstances, a refusal to cooperate with rivals can constitute anticompetitive conduct and violate Section 2 of the Sherman Act." And, while the existence of a valid business justification for a monopolist to refuse to deal may preclude Section 2 liability, Judge Smith held that "the existence of a business justification is not properly determined on a motion to dismiss." Moreover, Judge Smith noted that the complaint included "sufficient factual allegations suggesting that [BCBS-RI's] conduct was contrary to its short-term financial interests," and thus held that "it is sufficient for Steward to have pled facts suggesting that Blue Cross rejected proposed reimbursement rates significantly lower than the statewide average that Blue Cross accepted at other hospitals."

Second, Judge Smith considered BCBS-RI's contention that Steward lacked standing to assert its claims. Rejecting this argument as well, the Court held that where a plaintiff demonstrates the "intent and preparedness" to enter the relevant market, that satisfies antitrust standing. While observing that "Steward may ultimately be called upon to demonstrate that its successful acquisition of Landmark would have permitted Steward to develop its community hospital model in Rhode Island, Steward need not do so at the initial pleading stage."

Finally, addressing BCBS-RI's contention that Steward had failed adequately to allege the relevant product and geographic markets, the Court rejected this argument as well. While BCBS-RI contended that the proper product market should include both services offered to commercial and government payors (i.e., Medicare and Medicaid), Steward contended that the proper relevant market was commercial payors only, a contention with which the court agreed. And, as to the geographic market, the Court accepted Steward's contention that the geographic market need not be alleged with precision, and that

the fact that a small number of Rhode Island residents cross over into Massachusetts for health care services did not make Steward's allegation that the geographic market was Rhode Island unreasonable.

Having denied BCBS-RI's motion, the case now proceeds into discovery. And, given the somewhat unique set of facts presented in *Steward v. Blue Cross Blue Shield of Rhode Island*, the case is likely to garner significant interest going forward.

PENNSYLVANIA BLUES ANNOUNCE PROPOSED MERGER

by James M. Burns

On February 19, two Pennsylvania Blues – Blue Cross of Northeastern Pennsylvania and western-Pennsylvania based Highmark – announced plans to merge. Under an agreement submitted to the Pennsylvania Insurance Department for approval, Highmark, which currently serves approximately 4.5 million Pennsylvania residents, would add over 500,000 new Blue Cross of NEPA members to its insured ranks. The transaction would reduce the number of Blues in Pennsylvania from four to three, which is still a larger number than in other states (only five states have more than one Blue entity in their state).

The transaction requires both Insurance Department and federal and state antitrust approval before it can be completed, and is notable because it is Highmark's first merger attempt in Pennsylvania since its failed attempt to combine with Philadelphia-based Independence Blue Cross in 2009. That transaction was approved by federal antitrust regulators, but the parties ultimately gave up on the deal in response to a very lengthy investigation by state regulators. Whether this transaction will face similar obstacles, at either the federal or state level, remains to be seen. Stay tuned.