

Calif. On Board As Health Care Antitrust Enforcer

Law360, New York (September 27, 2012, 2:13 PM ET) -- California's attorney general has recently launched a broad investigation into whether increasing consolidation among hospitals and physician groups may result in supracompetitive prices for medical care, according to several media sources. This investigation reflects increased scrutiny by antitrust regulators on a nationwide basis of rapid consolidation among the health care industry, which, in large part, has recently been motivated by the federal Affordable Care Act, an act that encourages efficiency and higher quality through coordination of care among different groups of providers.

The California attorney general has issued subpoenas to several large hospital systems in California, including Cottage Health System in Santa Barbara, Dignity Health in San Francisco, Sutter Health in Northern California, and Scripps Health and Sharp HealthCare in San Diego.

It has also issued subpoenas to large health insurers in the state, and the focus of the investigation appears to be whether the hospital systems' consolidations with physician groups are conferring on them enough market power to result in a lessening of competition and raising of prices, implicating antitrust concerns.

And, as mentioned, the attorney general is not alone in its close scrutiny of hospital's acquisitions of physician groups. In April 2011, the U.S. Federal Trade Commission, in conjunction with the Washington attorney general, made its first public announcement of an investigation into a proposed physician practice acquisition: one by Providence Health & Services to acquire two cardiology practices in Spokane, Wash (FTC File No. 101 0191).

Notably, these proposed acquisitions constituted nonreportable transactions below the Hart-Scott-Rodino Antitrust Improvements Act's threshold. The FTC nevertheless expressed serious concerns regarding possible anti-competitive effects of the acquisitions that could increase health care costs in the Spokane area in violation of Section 7 of the Clayton Antitrust Act.

While the parties ultimately abandoned the acquisitions, the FTC made clear that it was closely watching such physician acquisitions, which, although having the potential to generate cost savings and quality benefits for patients, could also "create highly concentrated markets that may harm consumers through higher prices or lower quality of care," and vowed that "the Commission will aggressively enforce the antitrust laws to ensure that consolidation among health care providers will not increase health care costs in local communities across the United States."

A more recent FTC action resolved just last month, in conjunction with the Nevada attorney general, challenging Renown Health's acquisition of two cardiology practices in Reno, Nev. (FTC File No. 111 0101), also demonstrates the unwillingness of antitrust agencies to overlook potentially anti-competitive acquisitions because of the relatively small size of the transaction, but more significantly, the agencies' recent inclination to analyze market effects using a very granular, specialty-by-specialty approach.

In that action, Renown had acquired one practice consisting of 15 cardiologists, and a second consisting of 16 cardiologists. The FTC alleged that this consolidation of two competing cardiology practices into one eliminated competition based on price, quality and other terms and led to increased bargaining power of Renown in relation to its payors, resulting in the potential to increase prices. The consent decrees ordered Renown to allow up to 10 cardiologists to terminate their employment with it and prohibited Renown from enforcing noncompete provisions in their employment agreements.

The FTC's analysis of effects on competition through a very granular, specialty-by-specialty basis is, as far as we can determine, as granular as the antitrust analysis has gotten since the beginning of reported actions in health care. And, it is likely no coincidence that the granular approach taken in Renown Health is the same specialty-by-specialty approach taken by the FTC and the Department of Justice when analyzing the likely competitive effects of recently-mandated accountable care organizations in their Statement of Antitrust Enforcement Policy Regarding Accountable Care Organizations, notwithstanding the agencies' disclaimer that the statement did not apply to mergers.

It is important to keep in mind, however, in the face of these recent regulatory challenges, the particular antitrust analysis, which governs most traditional hospital, physician group consolidations, i.e., nonhorizontal mergers. That is, while conventional merger analysis under Section 7 of the Clayton Antitrust Act (or Section 2 of the Sherman Antitrust Act) analyzes either the likely market power (or the actual market power) of the merged entity in the relevant market, nonhorizontal merger analysis like that required of hospital, physician group consolidations is much more difficult to quantify as there is no overlap in the respective products or services of the merging entities.

As such, antitrust enforcement agencies have more recently left largely unchallenged mergers with no product overlap. The increased regulatory interest in the recent rise in hospital, physician group consolidations, however, will require dusting off methods of nonhorizontal merger analysis not widely applied in quite some time. Such an analysis requires attempting to determine whether the new entity could preclude other hospitals or physician groups from competing effectively in the relevant geographic market.

Another important issue to keep in mind is that while hospitals may not continue to take for granted exclusivity provisions that restrict the ability of its physician employees to contract individually with payors or affiliate with other entities, determinations of the legality of exclusivity provisions, if challenged, will necessitate a full-blown, fact-dependent rule of reason analysis weighing the potential anti-competitive effects of exclusivity with its pro-competitive efficiencies.

This requires a case-by-case inquiry analyzing the market share of the participants in the relevant market, the terms of the exclusive arrangement at issue, the number of physicians required for the hospital provider and its competitors to compete effectively and the justifications proffered for the exclusivity. Furthermore, exclusivity can take on various forms, which, in turn, can impact the antitrust analysis: exclusivity in horizontal physician group consolidations generally raises more antitrust concerns than exclusivity within a nonhorizontal context.

That said, it would be unwise for hospitals and physician groups to take wholesale comfort in the currently somewhat novel, nonhorizontal merger analysis or the rule of reason standard governing exclusive agreements, given the costs and uncertainty associated with the burden of responding to investigations by antitrust enforcement agencies like the ones outlined above.

Moreover, in California, the attorney general has the broad, essentially unreviewable discretion, to bar any proposed transaction which sells, transfers or otherwise transfers control of a nonprofit hospital or its material assets to a for-profit entity, and the attorney general may consider any number of factors deemed relevant by the attorney general, including whether the proposed transaction is “fair and reasonable” and is in the “public interest” (Cal. Corp. Code §§ 5914).

Only time will tell if the new federal mandate for integration and coordination among different groups of providers will pave the way for more specific, concrete guidance from the various antitrust enforcement agencies as to how to legally structure hospital, physician group consolidations. In the meantime, interested parties will necessarily have to proceed carefully in order to minimize the risk of antitrust scrutiny and maximize the chances of successful outcomes.

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