Physician Acquisitions and Mergers: Recent Developments in Light of Heightened Federal and State Governmental Enforcement

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As a result of various market conditions and reimbursement initiatives, the healthcare industry has witnessed increased activity in the area of physician consolidation. It is not uncommon for providers to attempt consolidation through the means of acquisitions, mergers, and other joint venture relationships. This activity may be based upon numerous reasons, such as meeting competition from larger independent physician groups or hospital-controlled physician practices or providing a broader geographic base for payor contracting purposes. Also, consolidation may be for the purpose of coordination of care, economies of scale, or being in a position to quickly and effectively address changes in the delivery of healthcare.

As recently noted, the "collision of old-world antitrust enforcement and new ideas of accountable care, bundled payments, value-based purchasing and patient-centered medical homes has ratcheted up the uncertainty over healthcare deals."[1] Proactive governmental investigations have followed these increased consolidation efforts. Such investigations have focused on consolidations that have been established under the guise of quality care or to increase efficiency but in actuality do not accomplish these purposes. This increased activity " . . . has been met with a corresponding dose of scrutiny from antitrust officials, who say they want to make sure hospitals aren't using the laudable goal of improving care as cover for corporate consolidations that jack up consumer healthcare prices."[2] As noted by the Federal Trade Commission (FTC), it will aggressively enforce those laws that will ensure that healthcare providers' consolidation do not increase healthcare costs.[3]

The primary enforcement tool used in governmental investigations of corporate consolidations is Section 7 of the Clayton Act.[4] This statute prohibits mergers and acquisitions where the end effect may be to " . . . substantially to lessen competition, or to tend to create a monopoly."[5] In reviewing the legality of a proposed consolidation, courts have focused not only on market share but any other factors that may determine whether the consolidation may allow the consolidated entity to exercise market power.

Enforcement initiatives may come from different governmental authorities and may focus on different arrangements. The federal government has vested the U.S. Attorney General (AG) and FTC with the power to ensure physician mergers and acquisitions will not be problematic to a given healthcare marketplace. State AGs also possess enforcement power and have increased state enforcement initiatives. In some instances, there has been a coordinated effort among the federal and state governmental authorities. No matter the governmental authority, the increased focus has been not only on physician-only transactions among competitors, but also those transactions where there is hospital involvement.

Recent Enforcement Actions Involving Physicians and Hospital Systems

Physician and hospital alignments have been on the enforcement radar for years but governmental investigations have been steadily rising. In many instances the primary focus has been on whether these consolidations will increase healthcare costs in the relevant geographic marketplace. From the healthcare provider standpoint, the argument is that coordinated care will provide better quality and more efficient services while not impacting the marketplace. Those questioning such affiliations tend to focus on the market impact and how a consolidated marketplace will affect cost.

Over the past two years, there have been several noteworthy attempts by hospital systems to acquire physician practices that have been met with resistance from the federal and state governmental authorities. The physician practices targeted by the hospital systems are generally specialty practices that control a significant amount of healthcare services in that specialty. In two prominent cases, the parties either declined to go forward with the proposed transaction or consented to changes in structure to gain governmental approval of the transaction.

In July 2010, Providence Health & Services (Providence) announced it intended to acquire two physician practices in the Spokane, WA area. The practices, Spokane Cardiology and Heart Clinics Northwest, are cardiology practices that were major providers in Spokane and the surrounding area. Providence intended to acquire the assets of the practices and enter into employment arrangements with virtually all of the two practices' physicians.[6] FTC, in cooperation with the Antitrust Division of the Washington AG's office, investigated the effect the transaction would have on competition and healthcare costs in the Spokane area. While recognizing some business arrangements of this type provide cost savings and quality benefits to the patients, FTC expressed its concerns on the economic impact of the transaction.[7] In light of this opposition, the parties abandoned the transaction. The two physician practices were subsequently acquired by two different health systems in separate transactions. Providence subsequently acquired Spokane Cardiology.[8] Heart Clinics Northwest was acquired by Kootenai Health, an Idaho-based health system.[9] The government did not intervene in these subsequent transactions.

In a similar transaction, Maine Medical Center's proposed acquisition of two cardiology practices in southern Maine met with similar opposition. The Maine AG challenged the acquisition of Maine Cardiology Associates and Cardiovascular Consultants of Maine due to concerns that the transaction would concentrate cardiology services.[10] While the parties attempted to restruc-

ture the transaction, the Maine AG continued to raise regulatory issues, and FTC launched an investigation and initiated legal action due to similar concerns. Ultimately, the matter was resolved when all parties, except for FTC, entered into a consent decree imposing significant conduct remedies pertaining to cardiology-related services. These restrictions included the establishment of limitations on charges and reimbursement for cardiology-related services, restriction on the place of delivery for related diagnostic testing, limitations on the compensation to cardiologists, and a requirement that the cardiologists would not be hindered in their ability to compete or participate in physician networks.[11]

Recent Enforcement Actions Involving Physician Actions

Federal and state authorities have also focused on the consolidation of physicians that did not include hospital involvement. The proactive investigations prevalent with physician-only consolidations are similar to those witnessed in hospital-physician transactions. Ultimately, the different types of investigations and their end results demonstrate the wide array of enforcement tools the government may utilize.

In 2011, the Pennsylvania AG's office performed a retrospective review of the consolidation of urology practices that had occurred back in 2005. This retrospective review resulted in a consent decree by the parties.[12] The government asserted the urology services market as it related to pricing and the delivery of prostate cancer treatments was impacted by the merger of these practices into one entity, Urology of Central Pennsylvania.[13] The consent decree provided that the medical group would negotiate in good faith with health plans, and if it did not, then binding arbitration may be used by the health plans to establish rates. Additionally, the consent decree required the group when referring patients to its radiation oncology center to provide such patients the names of other local providers of those services.[14]

The latest, high-profile enforcement action involving a consolidation of physician practices, with a twist on the remedies involved, pertains to the proposed Renown Health's (Renown's) acquisition of Sierra Nevada Cardiology Associates and Reno Heart Physicians. FTC and the Nevada AG's office initiated the enforcement action due to Renown's acquisition of the two medical practices.[15] Renown is based in Reno, NV, and the two medical practices provided essentially all of the cardiology services in the Reno area.[16] When Renown acquired the practices, the physicians' employment agreements contained a non-compete for a two-year period after termination of the agreement. The acquisition of the practices and the physician employment agreement effectively eliminated competition in the marketplace for cardiology services.

In a novel approach to eliminate the antitrust concerns, the parties entered into a consent order whereby the noncompete provisions would be suspended for a period of time to allow up to ten cardiologists to leave Renown and move to competing medical practices in the Reno area.[17] By doing so, this allowed for the transaction to remain intact, but allowed for physicians to leave and revitalize competition within the Reno marketplace.

So What about Consolidations for the Purpose of Creating or Participating in ACOs?

The Patient Protection and Affordable Care Act and the Health Care and Education Reconciliation Act of 2010, (collectively, the Affordable Care Act), were passed to increase quality in the delivery of healthcare while at the same time decreasing the costs of its delivery.[18] One mechanism in achieving this goal is the Medicare Shared Savings Program offered through accountable care organizations (ACOs).[19] These organizations are based on interactions between healthcare providers to provide a network for the delivery of healthcare within a geographic area.

With the impetus on enforcement, how may those healthcare providers who formed a "collaboration" participate in an ACO without running afoul of the issues faced by the other providers noted herein?[20] In light of their recognition that " . . . ACOs may generate opportunities for healthcare providers to innovate in both the Medicare and commercial markets and achieve for many consumers the benefits Congress intended for Medicare beneficiaries through the Shared Savings Program," FTC and the Antitrust Division of the U.S. Department of Justice collectively established the Statement of Antitrust Enforcement Policy Regarding Accountable Care Organizations Participating in the Medicare Shared Savings Program (Policy Statement).[21] The Policy Statement provides guidance so that the ACOs and their participants may determine whether the proposed arrangement is likely to create competitive concerns.

The Policy Statement sets forth an antitrust safety zone for ACOs meeting certain eligibility criteria established by the Centers for Medicare & Medicaid Services.[22] For those that do not fall within the antitrust safety zone, the federal government shall apply a rule-of-reason analysis to those ACOs that meet certain conditions as set forth in the Policy Statement.[23] Even with this guidance, one should still be cognizant of the antitrust laws and the past interpretations and actions related to those laws. If an ACO does not fall within a safety zone, it may still demonstrate its legality by possessing precompetitive aspects and compliance with antitrust laws.[24] The Policy Statement does not provide relief on those actions that traditionally rise to the level of "per se" violations.

What to Do if Faced with this Type of Transaction

With the availability of reconsolidation and retrospective review, there is a significant shelf life to the questioning of a transaction and the effect it may have on competition. The parties must be prepared to demonstrate to governmental investigators that such concerns were reviewed prior to, during, and after the transaction. Even if it is a small transaction, it may impact competition within a marketplace. As part of due diligence, these issues should be discussed with the parties to anticipate where the problems may arise. If this does not occur, the monetary and

nonmonetary effects of restoring competition may be felt by all parties involved in the transaction.

1 Carlson, J. (2012, Dec. 15). Pulled in two directions. Providers pursuing coordinated care confused by antitrust actions. ModernHealthcare.com, *available at* www.modernhealthcare.com/article/20121215/MAGAZINE/312159986.
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3 FTC (2011). FTC Bureau of Competition Director Issues Statement on Providence Health & Services' Abandonment of Its Plan to Acquire Spokane Cardiology and Heart Clinics Northwest. *Available at* www.ftc.gov/opa/2011/04/providence.shtm.
4 15 U.S.C. § 18.
5 *Id.*
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9 Selvam, A. (2011, September 22). Kootenai to buy cardio practice. ModernPhysician.com, *available at* www.modernphysician.com/article/20110922/MODERNPHYSICIAN/309229960.
10 *State of Maine v. MaineHealth, Maine Medical Center, Maine Cardiology Associates, P.A. and Cardiovascular Associates of Maine, P.A* (Maine Sup. Court 2011).
11 Docket No. BCD-CV-11-08; State of Maine, Business and Consumer Docket; Consent Decree, *available at* www.maine.gov/tools/whatsnew/attach.php?id=310574&an=1.
12 Pennsylvania Attorney General's Office, (2011). Payment and injunction resolve attorney general urological services monopoly claims. *Available at* www.attorneygeneral.gov/press.aspx?id=6244.
13 *Id.*
14 *Id.*
15 FTC (2012). FTC order will restore competition for adult cardiology services in Reno, Nevada. *Available at* www.ftc.gov/opa/2012/08/renownhealth.shtm.
16 *Id.*
17 *Id.*
18 The Patient Protection and Affordable Care Act, Pub. L. No. 111-48 (2010); the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-52 (2010).
19 The Patient Protection and Affordable Care Act, Pub. L. No. 111-48 § 3022 (2010).
20 A "collaboration" is defined as an agreement or set of agreements among otherwise independent entities jointly to engage in economic activity, and the resulting economic activity. It does not refer to a merger of those entities. U.S. Dep't of Justice & Fed. Trade Comm'n, Antitrust Guidelines for Collaborations Among Competitors 1.1 (2000), *available at* www.ftc.gov/os/2000/04/ftcdojguidelines.pdf.
21 Statement of Antitrust Enforcement Policy Regarding Accountable Care Organizations Participating in the Medicare Shared Savings Program, 76 Fed. Reg. 67026-67032 (28 October 2011).
22 *Id.* The Policy Statement specifically references the criteria include: (1) a legal structure that allow for it to receive and distribute the payments for shared savings; (2) management structure that includes clinical and administrative processes; (3) the promotion of evidence-based medicine and patient engagement through established processes; (4) reporting quality and cost measures; and (5) coordinated care for beneficiaries.
23 *Id.* at 67027.
24 *Id.* at 67028.

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