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ENFORCEMENT

A Watchful Antitrust Eye in Healthcare

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In President Obama's second term, antitrust enforcement in health care will continue to grab headlines as mergers and acquisitions increase.

The number of hospital and provider acquisitions is likely to rise, as providers attempt to gain greater bargaining leverage over dominant insurers and as the Patient Protection and Affordable Care Act (ACA), which offers providers incentives to combine in order to achieve cost-saving efficiencies, continues to be implemented. As the first Obama Administration demonstrated that health care combinations — on both the provider and insurer sides — will be met with significant scrutiny, and often times, litigation challenges, it is expected that the likely increased health care merger activity over the next four years will face substantial and important governmental hurdles.

The major issue confronting the Antitrust Division of the Department of Justice and Federal Trade Commission will not be whether litigation challenges to health care consolidation should be launched: rather, it will be identifying how their limited resources should be deployed to challenge only those transactions that most deeply offend the Clayton and Sherman Acts. If the expected increase in merger activity is greater than the antitrust agencies can handle, a number of mergers that may have been otherwise challenged may escape antitrust prosecution.

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Healthcare Antitrust Enforcement Will Continue To Be a Priority

Two key goals of the Obama Administration have been healthcare reform and aggressive antitrust enforcement. These goals, to the Administration, are complementary.

Thriving competition in the healthcare market is good for consumers as it results in lowered costs and innovation, as well as enhancing quality of care and consumer choice. Antitrust agencies have played an important role in ensuring that the market for healthcare is competitive by adopting and enforcing policies and guidelines, litigating against providers who engage in exclusionary conduct and — a hallmark of the Obama administration — by blocking anticompetitive mergers.

During President Obama's first term, the antitrust agencies were integral to advancing the Administration's healthcare reform goals along with its antitrust enforcement goals. In particular, the agencies have aggressively pursued antitrust enforcement in key healthcare areas, including challenging mergers and reviving its anti-monopoly arsenal by bringing a Sherman Act § 2 case against a health care monopolist.

FTC Chairman Jon Leibowitz recently said that challenging anticompetitive hospital mergers has been an important mechanism that the agency has used to control rising healthcare costs. The FTC's focus on hospital mergers has been clear through its enforcement activities. One notable hospital merger that has been blocked by enforcement in the first Obama term includes the acquisition of Palmyra Park Hospital (a Health Corporation of America property) by Phoebe Putney Health Systems, Inc. — a case that is now pending in the Su-

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preme Court.[1] The FTC argued, in that case, that the transaction would create a monopoly in Albany, Georgia, as the combined entity would control 85 percent of the market. The FTC lost at the appellate court on the grounds that the transaction was immunized from antitrust prosecution under the so-called ''state action'' doctrine: the proponents argued essentially that the state of Georgia had expressly sanctioned their monopolistic combination. However, in oral argument last Monday, it appeared that a number of the Supreme Court Justices felt that the FTC was right to challenge the deal and that appellate court ruling should be reversed.

In another case, the FTC ordered ProMedica Health System to divest St. Luke's Hospital in Ohio, ruling that the merger would lessen competition and likely result in higher prices.[2] The FTC calculated that the acquisition resulted in the combined entity having 58% of the market for inpatient hospital care and 81% of the market for obstetrical services. ProMedica has appealed the case to the Sixth Circuit, but the FTC is not backing down.

These are but two of a number of health care provider merger and acquisition challenges that have been spurred by the FTC in the last four years.

The Antitrust Division has also aggressively enforced the antitrust laws in the health care arena. It sued, for example, the United Regional Health Care system in Wichita Falls, Texas under § 2 of the Sherman Act (i.e., the statute precluding unlawful monopolization).[3] This was the first case in approximately a decade that was brought by the federal government under § 2. There, the Division alleged that United Regional used contracts that effectively excluded its competitors from being participating providers in health insurance networks to maintain a monopoly for hospital services. As a result of this conduct, so said the Division, consumers were forced to pay higher prices for healthcare insurance premiums, as commercial health insurers were charged up to 70 percent more than United Regional's closest competitor for the same inpatient hospital services (and as these charges were ultimately passed on to consumers). The settlement entered into by United Regional with the Division prohibits it from entering into or enforcing exclusionary contracts or from taking any retaliatory action.

In addition, in 2010, the Division sued a large insurer — Blue Cross Blue Shield of Michigan — arguing that BCBS' ''Most Favored Nation'' clauses are anticompetitive, as they raise prices and stifle competition.[4] That case is ongoing, demonstrating that health insurers will not escape Obama Administration antitrust scrutiny.

These examples demonstrate that anticompetitive conduct in healthcare markets will be met with scrutiny and, potentially, resistance by the Obama Administration. Now that President Obama has won his bid for reelection, we expect to see a continued vigor in healthcare antitrust enforcement.

[1] *See F.T.C. v. Phoebe Putney Health Sys., Inc.*, 663 F.3d 1369 (11th Cir. 2011), *cert. granted*, 133 S. Ct. 28 (U.S. 2012).

[2] *See F.T.C. v. ProMedica Health Sys., Inc.*, 3:11 CV 47, 2011 BL 97190 (N.D. Ohio Mar. 29, 2011).

[3] *See United States v. United Regional Healthcare System*, No. 7:11-cv-00030-O (N.D. Tex., Feb. 25, 2011).

[4] *See United States v. Blue Cross Blue Shield of Michigan,* 809 F. Supp. 2d 665 (E.D. Mich. 2011).

Healthcare Antitrust Reviews Will Continue to Rise

We also expect that healthcare merger and other antitrust reviews will continue to rise during President Obama's second term.

Our conclusion is simply based on the fact that we expect that health care providers will consolidate and collaborate with greater frequency in the coming years. This consolidation and collaboration will be spurred by health care provider attempts to (1) level the playing field against dominant insurers and (2) take advantage of the financial benefits offered by the ACA to providers that collaborate to reduce Medicare expenditures. For example, one of the important ways that the continued implementation of the ACA will impact antitrust review is that it encourages providers to form Accountable Care Organizations (ACOs). ACOs are essentially a network of doctors and hospitals that share the responsibility of providing care to a population of Medicare patients in order to save Medicare costs and, in turn, share in those savings.

It is important to note that many of the ACOs that have been created as a result of the ACA's financial ''carrots'' are legitimate and important to our national effort to reduce inflated health care costs. We expect that some of these future collaborations and combinations, however, may raise antitrust issues as they may create entities that wield market power (i.e., power over price). It will be up to antitrust enforcers to scrutinize these deals in order to separate procompetitive, efficient ventures from anticompetitive, cost-raising ones.

Under the agencies' jointly issued *Statement of Antitrust Enforcement Policy Regarding Accountable Care Organizations Participating in the Medicare Shared Savings Program* (ACO Policy Statement), providers are permitted to obtain from the Division or the FTC an expedited review of their proposed ACO formation to ensure that they are in compliance with antitrust maxims, so long as they are not yet participating in the Medicare Shared Savings Program. Given the fact that more and more providers are forming ACOs, we expect that the request for expedited reviews will correspondingly increase.

Current DOJ and FTC Policies Will Remain In Place, But Resources Will Be Stretched

Those thinking that current Division and FTC antitrust policies and guidelines may be altered during the next term will likely have a rude awakening: we see no evidence of that, particularly as their current guidelines are in substantial conformity with the governing antitrust caselaw on mergers and collaborations. To the contrary, we expect that these policies and guidelines will remain in full force and effect over the remainder of Obama's second term.

We also believe that it is unlikely that there will be additional or revised policies or guidelines from these agencies, given that they revised their Horizontal Merger Guidelines in 2010 (to allow for certain mergers taking place in less concentrated markets to escape an antitrust challenge) and issued their ACO Policy Statement in October 2011. Both the Horizontal Merger Guidelines and the ACO Policy Statement provide clear

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guidance to providers seeking to enter into various healthcare combinations. The agencies have the tools they need to enforce the antitrust laws.

Indeed, the pertinent ''question'' regarding the antitrust agencies is not whether they have the proper tools, guidelines or policies in place to distinguish anticompetitive mergers from pro-consumer transactions. Rather, it is whether the antitrust agencies can handle the expected volume of review that we anticipate in the next four years. Whether the government will have adequate resources to give serious analysis to many mergers and combinations that we believe will be posed remains to be seen, particularly in light of the broad fiscal challenges and substantial budget deficit that our federal government faces. We believe that the resource allocation issues faced by these agencies will resemble those that were faced in President Clinton's second term — when there was a flurry of merger activity in numerous industries and when a number of large combinations went unchallenged in the name of conserving resources.

Conclusion

We anticipate that the antitrust agencies will be very active in the healthcare segment during President Obama's second term, as his Administration has made reducing health care costs and expanding output of health care services a priority.

Providers and insurance companies should take heed of these laws before engaging in particular transformative transactions.