



DEPARTMENT OF JUSTICE
Antitrust Division

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April 16, 1997

Bob D. Tucker, Esquire
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Baton Rouge, Louisiana 70821-2997

Dear Mr. Tucker:

This letter responds to your request, pursuant to the Department of Justice's Business Review Procedure, 28 C.F.R. § 50.6, for a statement of the Department's enforcement intentions regarding a proposed merger of CVT Surgical Center ("CVT") and Vascular Surgery Associates of Baton Rouge ("VSA"). CVT employs six cardiovascular-thoracic surgeons. VSA employs three surgeons and contracts with a fourth, all of whom perform only peripheral vascular surgery. Based on the information provided and our own investigation, it does not appear that the merger of these two practices will create or enhance anticompetitive market power in the putative service and geographic markets in the greater Baton Rouge area. Therefore, the Department has no present intention to challenge the merger.

As we understand from the information you have provided, CVT and VSA are both Louisiana Professional Medical Corporations located in Baton Rouge, Louisiana. The six CVT surgeons operate at the three principal surgical hospitals in Baton Rouge as well as at North Oaks Medical Center in Hammond, Louisiana, which is approximately a one hour drive from Baton Rouge. VSA's surgeons operate in the Baton Rouge hospitals and have consulting privileges in other Baton Rouge health care facilities as well as at facilities in Gonzales, Zachary, Plaquemine and Denham Springs, Louisiana.

Merger Analysis

The Department and the courts examine the lawfulness under the antitrust laws of a merger of physician practices using the same antitrust standards that they apply to any other merger or combination of competing entities. The Clayton Act requires the delineation of the proper "line of commerce" and "area of the country" (*i.e.*, relevant product and geographic markets) and then the evaluation of the likely economic effect of the merger in that market (or markets). The merger is unlawful if it may tend substantially to lessen competition in any relevant market by creating, enhancing or facilitating the exercise of market power. *See* Department of Justice/Federal Trade Commission Horizontal Merger Guidelines, 4 Trade Reg. Rep. (CCH) ¶ 13,104 (April 2, 1992), § 2 ("Merger Guidelines"). "Market power" is generally defined as "the power to control prices [or restrict output] or exclude competition." United States v. E. I. du Pont de Nemours & Co., 351 U.S. 377, 391 (1956).

In defining the relevant product (or service) market for a particular merger, the Department determines what substitutes, as a practical matter, are reasonably available to consumers of each product of the merging firms if the price of the product were raised by a small but significant amount. *See* Merger Guidelines at §1.11. Services provided by a particular physician specialty may often be a relevant service market. *See* Statements of Antitrust Enforcement Policy in Health Care, Issued by the U.S. Department of Justice and the Federal Trade Commission, August 1996, at 76 ("Statements"). In this case, of the hundreds of types of surgical procedures within CVT's and VSA's recognized specialties, only approximately 60 procedures are performed in common by the two groups. During 1995, these "overlap" procedures accounted for approximately 12.5% of CVT revenue from surgical procedures and approximately 15% of the procedures performed by CVT. Thus, you contend, and we agree, that the relevant service market for analyzing this merger are those 60-odd "overlap" procedures.

Next, we determine the relevant geographic market by identifying where physicians who perform these procedures could practice in order to be good substitutes for any of the merging physicians if the prices for their services rose by a small but significant amount. The participants in the market would comprise all surgeons who either currently do perform the overlap procedures or would likely begin providing them in the relevant geographic market within a year and without incurring significant sunk costs. *See* Merger Guidelines at §1.3.

You have suggested that the geographic market relevant to this merger may be at least as large as the area within a one and one-half hour drive of Baton Rouge, including the cities of Hammond, New Orleans, Houma, Lafayette and Thibodaux. Your submission indicates that you believe the market to be at least that large, based on (among others) the facts that CVT has found it competitively necessary and economically justifiable to maintain continuous coverage of Hammond, approximately a one hour drive from Baton Rouge, and that the large New Orleans-based Ochsner Clinic has established a Baton Rouge office employing at least one vascular specialist, one cardiothoracic surgeon and three general surgeons. Further, Ochsner Clinic cardiovascular surgeons have provided services in Baton Rouge in response to short-term staffing demands of Ochsner's Baton Rouge office. Thus, you contend, the Ochsner Clinic faces no barriers to providing rapid supply in response to any attempted price increase in the putative geographic market for the overlap procedures. Major payers agree that they would have adequate substitutes to turn to should the merged entity raise prices unreasonably, including physicians from the Ochsner Clinic.

It has been our experience that, in general, and especially in urban and semi-urban areas, health care geographic markets are localized. Although this is somewhat less the case for health care specialist markets than it is for primary care markets, it is prudent to consider the effects of this merger under a range of assumptions about the relevant market size.

The large geographic market that you have suggested would be appropriate if payers could and would defeat a small hypothetical price increase in Baton Rouge by sending patients to New Orleans and the other towns you have identified. In this market, 82 surgeons claim vascular surgery as a specialty in Yellow Pages advertising. This would result in the merged entity representing significantly less than 20 percent of the total number of surgeons available to perform the relevant procedures, making it highly likely that market competition would prevent the merged entity from raising prices anticompetitively.

It is possible, however, that the relevant geographic market is no larger than Baton Rouge. From information you have provided, it appears that the merging groups will account for approximately 50 percent of the vascular surgeons who advertize in the Baton Rouge Yellow Pages. There are, however, several attributes of this market that would mitigate any competitive concern we might otherwise have about this merger. First, this percentage may not fully include competing physicians, such as those in New Orleans' Ochsner Clinic, that already practice in Baton Rouge or would begin to

practice there in response to a small but significant price increase. Neither does it include cardiologists and other specialists that you contend are available to perform many of the overlap procedures. Second, there is some evidence that payers may need to include very few peripheral vascular surgeons (perhaps only one) in a managed care network, so the independent vascular surgeons in Baton Rouge that are not part of the merging group offer payers sufficient contracting alternatives to prevent the merged group from exercising market power. Third, given that payers require few vascular specialists on a panel, it appears that sponsored entry or expansion by an incumbent group would likely defeat an attempt by current providers to raise price. Lastly, our investigation has confirmed that payers in Baton Rouge are generally confident that the merged group is not likely to acquire market power.

Given these considerations, we conclude that, in any reasonably defined geographic market, the merged entity should face effective competitive constraints on its ability to exercise market power in the provision of peripheral vascular procedures, and thus that the merger would not be likely to lessen competition substantially.

Since the proposed merger does not raise concern about any significant potential adverse competitive effects based on an analysis of market characteristics, we do not need to scrutinize any other factors, such as any efficiencies that are likely to result from the merger. We nevertheless note that CVT and VSA anticipate that their merger will produce significant efficiencies and benefits for consumers and payers in the market area. For example, they believe the larger patient base will result in improved patient care by allowing further specialization with volume sufficient to maintain high standards of proficiency in individual procedures. You also state that the larger volume should also support the addition of state-of-the-art equipment and technology that neither firm could support alone, such as the acquisition of costly color duplex ultrasound vascular testing equipment. You contend that the merger will allow consolidation of thousands of dollars in duplicative and underutilized diagnostic and testing equipment currently owned by each firm, as well as savings on administrative costs. Finally, you state that the larger patient base will support formalized utilization review and case management procedures and may allow the merged entity to take on risk-based contracts for large managed-care populations.

Conclusion

It appears from the foregoing analysis that the proposed merger is not likely to have any significant adverse competitive effects and may, in fact, result in substantial

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efficiencies for the benefit of consumers and payers. Therefore, the Department has no present intention of challenging the proposed merger because it is not likely substantially to lessen competition. In accordance with our normal practice, however, the Department remains free to bring an enforcement action in the future should the operation of the merged group prove anticompetitive in purpose or effect.

This statement is made in accordance with the Department's Business Review Procedure, 28 C.F.R. § 50.6, a copy of which is enclosed. Pursuant to its terms, your business review request and this letter will be made available to the public immediately. In addition, any supporting documents that you do not identify to be confidential business information under Paragraph 10(c) of the Business Review Procedure within 30 days of the date of this letter will also be made publicly available.

Sincerely,

Joel I. Klein