DEPARTMENT OF JUSTICE

Recent Antitrust Division Enforcement Activities In Health Care

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INTRODUCTION

This is a time of great change and restructuring in the health care industry. As markets are re-defined and payers and providers adapt to competitive pressures and consumer concerns, antitrust enforcement and guidance play a critical role.

The Antitrust Division remains committed to preserving competition and protecting and maximizing the welfare of consumers in health care markets. At the same time, as health care markets evolve, the antitrust laws are flexible enough to adjust and respond accordingly -- promoting behavior that increases efficiencies and consumer benefits and discouraging behavior that impedes the development or availability of competitive alternatives. The Division will bring enforcement actions where necessary to prevent and deter conduct that harms consumers by raising prices, reducing quality, or limiting innovation.

Since 1996, the Division has completed **two hospital merger cases, one criminal price fixing case,** and **numerous civil non-merger health care cases.** We also issued **revised guidelines for the health care industry** and **numerous business review letters** to players in the health care industry.

MULTIPROVIDER NETWORKS

The most common types of multiprovider networks are physician hospital organizations ("PHOs"), which are usually comprised of one or more hospitals and numerous physicians with privileges at those hospitals. Statement 9 of the Statements of Antitrust Enforcement Policy in Health Care, issued by the U.S. Department of Justice and Federal Trade Commission in 1996, sets forth the analytical framework for evaluating PHOs and other multiprovider arrangements. Statement 9 also provides hypothetical examples of PHOs that would and would not present competitive concerns.

Competitive concern: If PHOs are able to achieve market power at either the hospital or physician level, they could use that power to raise prices or eliminate incentives to reduce prices, and thus restrict the choice of health plans available to consumers.

Cases

The Division in recent years challenged three anticompetitive PHOs. In all three cases, there was no financial or other substantial integration among the competing physicians; thus, their joint pricing activities were effectively challenged as *per se* violations. All three suits were settled with consent decrees.

Baton Rouge

In 1996, the Division alleged that the only women's hospital in Baton Rouge, Louisiana joined with 90% of the OB-GYNs in the area to both protect the hospital from the development of competing inpatient OB-GYN services and maintain or increase prices for both physician and hospital OB-GYN services above competitive levels. The parties entered into a consent decree whereby the defendants were enjoined from negotiating on behalf of competing physicians and from engaging in various other anticompetitive activities. *U.S. v. Women's Hospital Foundation and Women's Physician Health Organization*, 1996-2 Trade Cas. (CCH) ¶ 71,561 (M.D. La. 1996).

Danbury

In 1995, the Division and the State of Connecticut alleged violations of Sections 1 and 2 of the Sherman Act by the principal hospital and 98% of the physicians in Danbury, Connecticut. The complaint alleged that the defendants' joint activities were aimed at keeping lower-priced managed care plans out of the Danbury market. The resulting consent decree prohibits the defendants from negotiating on behalf of competing physicians, except under limited circumstances, and from engaging in various other anticompetitive activities. *U.S. and State of Connecticut v. Healthcare Partners, Inc., Danbury Area IPA, Inc., and Danbury Health Systems, Inc.*, 1996-1 Trade Cas. (CCH) ¶ 71,337 (D. Conn. 1996).

St. Joseph

Also in 1995, the Division filed suit against the only acute care hospital in Buchanan County, Missouri, and St. Joseph Physicians, Inc., a corporation comprising approximately 85% of the physicians working or residing in Buchanan County, along with their joint venture, Health Choice of Northwest Missouri, Inc., for conspiring to keep out lower-priced managed health care plans. The parties entered into a settlement agreement whereby they were enjoined from negotiating on behalf of competing physicians, except under limited circumstances. The hospital was further enjoined from acquiring additional primary care physicians and other physicians, except under certain circumstances, without first obtaining permission from the Antitrust Division. *U.S. v. Health Choice of Northwest Missouri, Heartland Health System, Inc., and St. Joseph Physicians, Inc.*, 1996-2 Trade Cas. (CCH) ¶ 71,605 (W.D. Mo. 1996).

Business Review Letters

In contrast, the Division has issued several favorable Business Review letters stating that proposed PHO arrangements were unlikely to have serious anticompetitive effects and had the potential for realizing significant efficiencies.

Sierra CommCare

In August 1996, the Division issued a favorable letter to a proposed non-exclusive PHO among a small community hospital and 23 physicians in a rural area in California. The group

had proposed a properly structured "messenger" model to avoid any agreements on prices or other competitively sensitive terms among competing physicians. Thus, the Division concluded that, if carefully implemented, the PHO should not result in competitive harm, despite including virtually all physicians in the area. *Letter from Anne K. Bingaman to James W. Teevans, Esquire, counsel for Sierra CommCare, Inc.* (August 15, 1996).

Southern Health Corporation

In March 1996, the Division stated that it would not challenge a PHO among four commonly-owned hospitals and their affiliated physicians to provide services in a rural area of Georgia. While the PHO would include high percentages of the primary care doctors in the area, joint pricing among competing physicians would be avoided by use of a "messenger" model, and the group would be non-exclusive. *Letter from Anne K. Bingaman to Scott Withrow, Esquire, counsel for Southern Health Corporation* (March 5, 1996).

Santa Fe PHO

In February 1997, the Division issued a favorable business review letter to the sole general acute care hospital and 70-75 physicians in Santa Fe, New Mexico, who proposed to form a non-profit managed care organization to negotiate primarily risk-based contracts with payers. By subcontracting, the organization's physician panel could include virtually all remaining Santa Fe physicians. All physicians would provide services on a non-exclusive basis. For contracts not involving substantial risk sharing among its members, the PHO would act as a "messenger" to facilitate contracting between third-party payers and individual member and non-member participating physicians. PHO members would share in profits and losses, but subcontracting physicians would not. The proposal included other elements designed to create divergence of economic interests between member and non-member physicians, giving members incentives to bargain down the compensation paid to non-members. In general, member physicians together with any physician employees of the hospital would not exceed 30 percent of the physicians with offices in the City of Santa Fe in any physician specialty. Although this proposal created the potential for anticompetitive conduct that could result in harmful effects to consumers, it also had the potential for creating significant efficiencies by offering payers capitation and global fee arrangements that were not generally available in the Santa Fe area. Thus, the Division was unable to conclude that the plan would likely cause anticompetitive harm if it were implemented carefully as proposed. *Letter from Joel I. Klein to David Marx, Jr., Esquire, counsel for Santa Fe Managed Care Organization* (February 12, 1997).

MFN CLAUSES

A "Most Favored Nation" ("MFN") clause essentially requires a health care provider to charge a health care insurance company no more than the lowest prices the provider charges any other insurer (or in some cases, even individual patients). Some MFNs go even further and explicitly or implicitly ensure that the MFN payer gets a distinct advantage over its rivals by, for example, specifically requiring the provider to charge rival payers some percentage greater than

the rate the provider charges the MFN payer for the same services. This creates a price buffer between the products protected by the MFN and the products of competing plans.

Competitive concern: While not all MFNs violate the antitrust laws, under certain market conditions, they can discourage provider discounting, deter innovation, and reduce meaningful consumer choices in health plans, either by facilitating collusive pricing among competing providers or by discouraging providers from offering lower rates or more cost-effective care to rival plans.

Cases

The Division has successfully resolved three MFN cases since 1996.

Medical Mutual of Ohio

On September 23, 1998, the Division filed suit to prohibit Medical Mutual of Ohio (formerly Blue Cross & Blue Shield of Ohio), Ohio's largest health care insurer, from enforcing or reinstating MFN provisions in its contracts with hospitals in the Cleveland area. The complaint alleged that since at least l987, Medical Mutual required any hospital wishing to contract with it to agree to an MFN provision. Medical Mutual's various MFN provisions were the most far-reaching the Division has encountered, requiring that the hospitals charge Medical Mutual's competitors substantially more -- 15 to 30% more -- than they charged Medical Mutual. This buffer insulated Medical Mutual's health plans from competition, substantially increasing the cost of hospital services and health insurance for businesses and consumers while suppressing innovation in the Cleveland area. The complaint further alleged that Medical Mutual's MFN reduced hospital discounting and price competition among hospitals and health plans in the Cleveland area. While Medical Mutual had previously announced that it would cease enforcing its MFN clauses, the Division determined that this promise alone did not sufficiently protect consumers and that injunctive relief was needed. Under the settlement reached with the Division, Medical Mutual is enjoined from adopting or enforcing an MFN requirement and from engaging in various other activities that could lead to similar anticompetitive effects. *United States v. Medical Mutual of Ohio, Inc.*, 63 Fed. Reg. 52,764 (October 1, 1998).

Delta Dental of Rhode Island

In 1996, the Division sued to stop Delta Dental of Rhode Island ("Delta") and unnamed co-conspirators from engaging in unlawful agreements that discouraged dentists from offering to patients covered by other insurance companies and to uninsured patients fees lower than those paid by Delta patients. Delta was the largest dental insurer in Rhode Island and had contracts with approximately 90% of the dentists in the State. Work for Delta enrollees represented a significant portion of most dentists' income. Almost all of the Delta dentists agreed to comply with the MFN clause and refused to contract at prices below Delta's with limited-panel dental insurance plans that were trying to enter the Rhode Island market. The case was settled with a consent decree after the District Court had denied the defendant's motion to dismiss and issued a very significant opinion on the application of the antitrust laws to MFN clauses. In denying

Delta's motion to dismiss the case, the Court rejected Delta's argument that most MFN clauses are *per se* legal and agreed with the Division that, under certain conditions, MFNs may have substantial anticompetitive effects and are properly analyzed under the rule of reason. *U.S. v. Delta Dental of Rhode Island*, 943 F. Supp. 172 (D.R.I. 1996); consent decree, 1997-2 Trade Cas. (CCH) ¶71,860 (D.R.I. July 2, 1997).

Vision Services Plan

In December 1994, the Division filed suit to stop Vision Services Plan ("VSP"), the largest national vision care insurer, from enforcing MFN clauses in contracts with its member optometrists. The complaint alleged that the MFN clause had restricted the willingness of VSP's members to provide discounted fees for vision care services to non-VSP patients, and that prices for vision care and vision care insurance were thus higher than they might otherwise have been. The parties entered into a settlement agreement whereby VSP was enjoined from continuing to use MFNs in its contracts with member optometrists and from engaging in various other anticompetitive activities. *U.S. v. Vision Service Plan*, 1996-1 Trade Cas. (CCH) ¶ 71,404 (D.D.C. 1996).

See also U.S. v. Oregon Dental Service, 1995-2 Trade Cas. (CCH) ¶ 71,062 (N.D. Ca. 1995); *U.S. v. Delta Dental Plan of Arizona, Inc.*, 1995-1 Trade Cas. (CCH) ¶ 71, 048 (D. Ariz. 1995).

HOSPITAL MERGERS

A complex, yet important, area of antitrust enforcement is hospital mergers. Dramatic changes in health care markets over the past decade have prompted an enormous wave of mergers and other consolidations among health care providers, particularly hospitals.

Competitive concern: Most hospital mergers are either competitively neutral or, on balance, beneficial to competition and consumers. However, where the evidence demonstrates that a merger is likely to lead to higher prices, reduced quality, or other consumer harm, the Division stands ready to challenge it.

Antitrust Division Cases

Long Island

In 1997, the Division challenged the proposed combination of Long Island Jewish Medical Center ("LIJ"), a large academic hospital, and the North Shore Health System, whose flagship hospital, North Shore University Hospital, is also a large academic hospital. The complaint alleged that North Shore's acquisition of LIJ would likely lead to higher hospital prices for health care consumers in the Long Island, New York area since it would eliminate competition between the only two "flagship" or "anchor" hospitals in Nassau and Queens Counties, Long Island. After a trial on the merits, the District Court granted judgment in favor of the defendants and dismissed the complaint on October 23, 1997. Among other things, the

Court concluded that the evidence did not support an "anchor hospital" product market and thus concluded that there were other nearby hospitals that would constrain the merging hospitals' prices. *U.S. v. Long Island Jewish Medical Center*, 983 F. Supp. 121 (E.D.N.Y. 1997).

Dubuque

On June 10, 1994, the Division filed suit to stop the creation of a hospital monopoly in the Dubuque, Iowa area. The complaint alleged that the combination of Mercy Health Services and Finley Tri-States Health Group, Inc., the only two general acute inpatient facilities in the Dubuque area, would eliminate competition and result in higher prices and lower quality for hospital services for health care consumers. The District Court ruled against the Division at trial, finding that the geographic market was more extensive than we had alleged, although excluding from the market the several rural hospitals in the area as unrealistic alternatives. The Division appealed the ruling to the 8th Circuit Court of Appeals; however, since the parties abandoned the proposed merger while the case was on appeal, the Court deemed the case moot. *U.S. v. Mercy Health Services*, 902 F. Supp. 968 (N.D. Iowa 1995), *vacated*, 107 F. 3rd 632 (8th Cir. 1997).

See also U.S. v. Morton Plant Health System, Inc., 1994-2 Trade Cas. (CCH) ¶ 70,759 (M.D. Fla. 1994); *U.S. v. Rockford Memorial Corp.*, 717 F. Supp. 1251 (N.D. Ill. 1989), *aff'd.*, 898 F. 2d 1278 (7th Cir.), *cert. denied*, 498 U.S. 920 (1990).

Federal Trade Commission Cases

Poplar Bluff

A recent hospital merger case prosecuted by the Federal Trade Commission is worth noting here. On April 16, 1998, the FTC sought a preliminary injunction to block the proposed merger of the only two acute-care hospitals in Poplar Bluff, Missouri. The FTC alleged that the geographic market was a 50-mile radius from Poplar Bluff, which contains five smaller rural hospitals and the two merging entities. The merged group would have controlled 78% of the market for acute care, inpatient hospital services in that area. While defendants argued for a much larger geographic market, reaching as far as 95 driving miles from Poplar Bluff, the Court on July 30, 1998 accepted the FTC's geographic market and agreed that the merger would likely have the effect of substantially lessening competition in the relevant market. *FTC v. Tenet Healthcare Corporation*, 1998-2 Trade Cas. (CCH) ¶ 72,227 (E.D. Mo.1998).

See also FTC v. Butterworth Health Corp., 946 F. Supp. 1285 (W.D. Mich. 1996), *aff'd.*, 121 F. 3rd 708 (6th Cir. 1997).

PHYSICIAN UNIONS

The antitrust laws have long exempted from scrutiny the collective bargaining activities of employees with employers. This labor exemption from the antitrust laws, however, applies only to employees, not to independent economic actors such as self-employed physicians in

independent practice. Recently, an increasing number of physicians have been joining unions and other organizations hoping to increase their bargaining leverage with health plans.

Competitive concern: Unions can provide various useful services that are valuable to their members, and may collectively bargain for employed physicians. However, antitrust issues arise when a union (or any other organization) attempts to negotiate on behalf of otherwise competing, non-employee physicians.

Delaware Case

On August 12, 1998, the Division filed a civil case in U.S. District Court in Wilmington, Delaware against the Federation of Physicians and Dentists, a physician union, for orchestrating a boycott to extract artificially high fees for independent competing orthopedic surgeons in Delaware. The complaint alleges that in 1996 and 1997 nearly all of the orthopedic surgeons in Delaware joined the Federation, and thereafter acted in concert through the Federation to resist the efforts of Blue Cross of Delaware to reduce the fees Blue Cross paid to them. By the end of 1997, nearly all of the members of the Federation rejected a Blue Cross fee proposal and terminated their contracts with Blue Cross.

The Federation purported to be operating as a third-party messenger. If properly implemented, with adequate safeguards against collusion, a third-party messenger system should not lead to a messenger negotiating on behalf of competing independent physicians or enhancing the bargaining leverage of such physicians. When properly implemented, third-party messenger arrangements may facilitate the contracting process, reduce transaction costs, and thus, ultimately benefit consumers.

Here, however, the Federation's messenger system facilitated, rather than safeguarded against, collusion. The Federation encouraged the physicians to refuse to negotiate with Blue Cross except through the Federation, and ultimately nearly all of the physicians terminated their contracts with Blue Cross. *U.S. v. Federation of Physicians and Dentists, Inc.*, 98-475 (D.Del. 8/12/98).

HEALTH CARE BUSINESS REVIEWS

Since the September 15, 1993 issuance of the first edition of the joint DOJ/FTC health care policy statements, the Division has issued 54 health care business review letters. 26 of these were issued since 1996. A summary of these letters is available at http://www.usdoj.gov or by writing or calling:

Antitrust Documents Group
Antitrust Division
U.S. Department of Justice
Suite 215, 325 7th St., NW
Washington, D.C. 20530
(202) 514-2481

The frequency of requests, and letters issued, has declined dramatically in the last year or so: in FY 1996, 17 letters were issued; in FY 1997, 11 letters were issued; and thus far in FY 1998, which ends September 30, 1998, only three letters have been issued.

Although most business review letters address various provider networks or joint ventures, in FY 1997, four letters specifically addressed physician practice mergers. In general, the proposed transactions did not pose anticompetitive problems. However, one proposal -- a request by 12 of the 14 gastroenterologists in the Allentown/Bethlehem, Pennsylvania area to merge into a single group practice -- drew a negative response.

Allentown Gastroenterologists

In the Allentown matter, three groups of four physicians each proposed to merge. The Division concluded that the proper service market was board-certified gastroenterologists, and that the proper geographic market was chiefly Allentown, and at most, Allentown and Bethlehem. In these areas, the merged firm would have represented from 86 to 92% of the relevant market.

The Division did not agree with the parties' argument that other specialties that performed some similar procedures were adequate substitutes for the services of board-certified gastroenterologists. Similarly, the Division found the evidence did not support their contention of a very broad geographic market merely because these physicians traveled far into surrounding counties to treat patients. Rather, payers in the area had consistent and firm views that the large elderly population in the Allentown area required the services of gastroenterologists and could not be expected to travel much beyond Allentown to receive such services.

In the relevant market area, the merged firms would have had considerable market power and would also have had the ability to control entry of gastroenterologists by virtue of their leadership positions on the staffs of the two most prestigious hospitals in the area. No demonstrable efficiencies were put forward to counteract the potential harm.

The Division concluded that the merged group would likely be able to exercise power over the prices of gastroenterology services, or to restrict the availability of such services, to the detriment of consumers in the area. Consequently, the Division refused to provide assurance that it would not take enforcement action if the merger were consummated. *Letter from Joel I. Klein to Donald H. Lipson, Esquire, counsel for Gastroenterology Associates, Ltd., GI Associates, P.C., and Valley Gastroenterologists* (July 7, 1997).

OTHER ENFORCEMENT ACTIONS

The Division continues to investigate and prosecute attempts by professional or trade associations, including those in the health care area, to facilitate agreements among their members that eliminate or limit competition. Professional associations must resist the impulse to use their collective power to restrict competition among their members. In recent years, the Division has filed five antitrust suits involving anticompetitive trade association activity. The

most recent case was filed in May 1996, against the Association of Family Practice Residency Directors ("AFPRD"), a national organization of hospital residency program directors.

AFPRD

The AFPRD is a Kansas City, Missouri-based association that represents over 90 percent of all U.S. family practice residency program directors. Beginning as early as June 1992, the AFPRD published and enforced "ethical" guidelines governing resident recruiting by family practice residency programs. These guidelines prohibited the use of certain competitive recruiting practices, such as actively soliciting current residents from other residency programs and offering individualized economic inducements to attract prospective residents. On May 28, 1996, the Division filed a complaint and proposed final judgment in the U.S. District Court for the Western District of Missouri charging the AFPRD with restraining competition among family practice residency programs to employ family practice residents. The judgment, entered on August 15, 1996, eliminates the anticompetitive restraint among family practice residency programs by enjoining the AFPRD from establishing, or maintaining any guidelines, code of ethics, or other rules stating that these competitive recruiting practices are unethical.

Lake Country Optometric Society

In the first criminal antitrust case filed in the health care area since the Division's cases against pharmaceutical companies, *U.S. v. Bolar Pharmaceutical*, in 1992, and Tucson dentists, *U.S. v. Alston*, in 1990, a Texas trade association of optometrists was charged by information with fixing prices for eye examinations in central Texas on December 15, 1995. The Lake Country Optometric Society was charged with participating in a conspiracy between November 1992 and February 1994, to suppress and eliminate competition in the provision of optometric services to patients in central Texas. The information charged that the defendant and unnamed co-conspirators met to discuss the prices being charged for eye exams, agreed to raise the prices charged and to adhere to the new prices, and then monitored and enforced compliance with the price agreement. The Society pled guilty on March 6, 1996, and was fined $75,000. *U.S. v. Lake Country Optometric Society*, 6 Trade Reg. Rep. (CCH) ¶ 45,095 at 44,781 (W.D. Tex., Dec. 15, 1995).

You can direct questions and concerns about antitrust and health care issues to:

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You may contact the Antitrust Division regarding public documents by writing or calling:

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