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Health Care Antitrust Enforcement

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The DOJ's antitrust division dismantled its health care task force. The division will now refer most health care cases to the FTC.

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In recent months, the Federal Trade Commission (FTC) has embarked on several initiatives heralding a rejuvenated health care antitrust enforcement program. This new emphasis on federal health care antitrust enforcement has important implications for health care providers, payers and consumers.

Health care antitrust enforcement was a high priority at both the FTC and Department of Justice (DOJ) during the 1990s. Each agency had an office of about 20 attorneys dedicated exclusively to health care competition issues. The agencies brought a similar range of cases, concentrating on physician conduct that could be condemned as per se illegal price-fixing and on hospital mergers in markets that the agencies viewed as highly concentrated.

These activities reflected the health care environment of the times. Managed care was widely viewed as an important innovation for controlling growing health care costs. Accordingly, the enforcement agencies believed it was important to combat efforts by physicians to boycott or to raise fees collectively in negotiations with managed- care plans. The agencies achieved some initial successes in challenging hospital mergers, particularly involving for-profit chains.

By the late 1990s, however, the health care environment had changed in a number of important ways. Because of the managed care backlash, some courts appeared to be unsympathetic to health plan complaints about provider conduct or consolidation. Physicians began to form much more sophisticated ventures—involving various forms of "clinical" or financial integration—that defied simple characterization under the antitrust laws. And, perhaps most importantly, the FTC and DOJ failed in a string of six consecutive attempts to block hospital mergers. Judges, particularly when faced with transactions involving local nonprofit hospitals, seemed receptive to hospital arguments that mergers would make them more efficient, improve the range and quality of services and eliminate "wasteful competition."

Furthermore, health care competition generally seemed less important in the face of moderating health care cost increases. As a result, by the end of the Clinton Administration, "traditional" federal health care antitrust enforcement had slowed considerably. The FTC health care shop largely focused on anticompetitive practices of pharmaceutical companies. The DOJ health care shop concentrated primarily on a couple of matters that had been in litigation for several years. Neither agency had challenged a hospital merger since 1998.

Change of agency heads has had dramatic impact

After being appointed by President Bush, both Charles James, the new head of the DOJ's antitrust division, and Tim Muris, the new FTC chairman, emphasized continuity with immediate past antitrust policy. While this has been true in many areas, the change of agency heads has had a dramatic impact on health care antitrust enforcement.

James, who left the antitrust division in December, expressed little interest in prosecuting health care matters. Early in 2001, James announced that he was dismantling the antitrust division's health care task force, and that instead of sharing jurisdiction over health care matters with the FTC, as DOJ traditionally had done for decades, the antitrust division would generally refer health care cases involving physicians, hospitals or other providers, to the FTC. The only cases that DOJ would handle would be those involving health insurers.

In contrast, Muris repeatedly declared that health care antitrust enforcement would be one of his top priorities. The FTC soon initiated investigations of physicians in a number of markets, resulting in several consent decrees last year alleging per se illegal physician boycotts and price-fixing.

The FTC also announced a retrospective review of several hospital mergers. In part, this would be an academic exercise—to increase understanding about the actual effects of hospital mergers in concentrated markets, but it also might result in an enforcement action.

Finally, the FTC conducted a two-day workshop in September that examined competition issues involving hospitals, doctors, health plans, group purchasing organizations and the pharmaceutical industry. The FTC staff has announced an expanded set of hearings for 2003, totaling about 25 days, to address health care competition issues in greater depth.

While it is still too early to discern the ultimate impact of the above developments, they do suggest several implications for health care providers and plans.

The most immediate impact will be on physicians: It is now clear that the FTC is intent on vigorously prosecuting physician price-fixing and boycott cases. The FTC also is likely to oppose legislative changes to allow physicians to negotiate jointly

with health plans. Thus, for example, in March 2002, FTC staff testified strongly in opposition to a proposed Alaska state antitrust exemption for joint physician negotiations.

Prosecution of unintegrated physician groups who collectively negotiate with health plans follows a well-worn path and presents few novel issues. It remains to be seen, however, whether the FTC will examine the conduct or acquisitions of physician groups or networks that encompass a very high percentage of the available providers in a single specialty. In some instances, such groups can achieve significant efficiencies, offer a broader range of services and improve health care quality. Yet some efforts may produce few efficiencies, and the physicians may simply be amassing market power.

Under the antitrust laws, such ventures are examined under the rule of reason. This is a difficult task in any industry, but raises unique challenges in health care. The complexity of the undertaking was hinted at last year when the FTC staff issued an advisory opinion indicating that it had no current intention to challenge the MedSouth independent physical association in Denver, a "clinically integrated" network of more than 400 physicians that would involve no financial integration.

The FTC appears to be trying to reinvigorate hospital-merger enforcement through the back door—by focusing on consummated transactions. This approach offers the FTC two advantages. First, it may sidestep one of its biggest hurdles in hospital merger cases—defining the relevant geographic market and establishing that the proposed merger likely will have anti-competitive effects.

Second, challenging a consummated transaction allows the FTC to proceed on its home turf before an FTC administrative law judge rather than to seek a preliminary injunction before a local federal judge. This approach would give the FTC not only a greater chance at victory, but also the opportunity of establishing a favorable precedent (assuming the FTC decision is upheld on appeal) for future preliminary injunction challenges to hospital mergers.

The FTC will not lightly challenge a consummated hospital merger. A target will need to meet most or all of the following criteria:

- *High concentration in a plausible geographic market.* A challenge is most likely when the number of competing hospitals post-merger is three or fewer.

- *Demonstrable anti-competitive effects.* The FTC will look for evidence that post-merger hospital prices have increased, and that these increases are substantially greater than those that have taken place historically or at comparable hospitals.

- *Few merger-related efficiencies.* In the ideal case, from the FTC perspective, the hospitals would have achieved few efficiencies attributable to the merger.

- *Complaints from customers.* Key to a successful challenge would be complaints from those who pay for hospital services that the merger has resulted in higher prices and few efficiencies.

- *Practical remedy available.* The FTC is unlikely to mount a challenge if the hospitals' operations have been so scrambled that it is impossible to break them apart to restore the competitive landscape to premerger conditions.

- *Relatively recent transaction.* The more time that has elapsed, the more difficult it may be for the FTC to document anticompetitive effects and the less likely that a practicable remedy is available.

Not many consummated hospital mergers will meet the above criteria, but the FTC intends to try to find some.

Most health plan mergers lack major antitrust issues

There may also be heightened scrutiny of health plan mergers and conduct. Most health plans, however, do not raise significant antitrust issues. Health plan acquisitions typically have involved geographic extensions—acquisitions by companies that did not have a substantial presence in the acquired company's geographic market.

An additional challenge facing the FTC and DOJ will be coordinating enforcement efforts both within and between the agencies. As noted above, health care expertise has now been dissipated at DOJ. Moreover, while the FTC appears poised to take the lead on enforcement matters involving providers, because the FTC lacks jurisdiction over conduct involving certain nonprofits, such cases (as well as criminal matters) will need to be handled by DOJ, despite the disbanding of its health care shop.

The FTC will face very significant challenges as it seeks to expand health care antitrust enforcement—particularly if it seeks to attack conduct that cannot be easily condemned as per se illegal, such as joint ventures, mergers or unilateral conduct. Investigating such cases is a time consuming and factually intensive matter. Accordingly, it is likely that it will take a number of months before the fruit of the renewed FTC interest in health care is evident.