CLIENT ALERT

Two New FTC Hospital Merger Enforcement Actions: The FTC Seeks to Block Hospital Merger in Northern Virginia and Issues Order Requiring Merged Hospital in Illinois to Create Independent Negotiating Teams

May.22.2008

During the last several weeks, the Federal Trade Commission ("Commission" or "FTC") has taken two significant antitrust enforcement actions affecting hospitals: (1) The initiation of a merger challenge seeking to block Inova Health System Foundation's ("Inova") acquisition of Prince William Health System, Inc., ("Prince William") and (2) The issuance of a final decision and order relating to Evanston Northwestern Healthcare Corporation's ("ENH") acquisition of Highland Park Hospital ("Highland Park"). These actions indicate that the FTC's hospital merger enforcement program is alive and well.

The FTC Seeks to Block Inova's Acquisition of Prince William

On May 9, 2008, the Federal Trade Commission unanimously voted to issue an administrative complaint challenging Inova's proposed merger with Prince William as a violation of Section 7 of the Clayton Act. The complaint alleges that Inova would control of over 73% of the licensed beds in Northern Virginia as a result of the proposed consolidation. Post-merger, Inova would compete with only four independent hospitals. According to the FTC's administrative complaint, Inova has grown significantly by acquiring competing hospitals, with two other local hospital acquisitions in the past 10 years. The FTC's administrative complaint alleges that the transaction would significantly reduce competition and lead to higher prices for general acute care inpatient hospital services in Northern Virginia. Notably, one of the FTC's own Commissioners, Commissioner J. Thomas Rosch, will preside over the administrative hearing rather than a professional administrative law judge. The opinion issued after the conclusion of the administrative hearing will be subject to appeal to the full Commission (i.e., proceedings from which Commissioner Rosch will be excused, just as he excused himself from voting on issuance of the complaint).

Another notable aspect of the Inova hospital merger challenge is that the Attorney General of the Commonwealth of Virginia (the "Virginia AG") is joining the FTC in opposition to the transaction. On May 12, 2008, the FTC and the Virginia AG jointly filed a motion for a preliminary injunction in the Eastern District of Virginia to enjoin the merger pending the outcome of the administrative hearing. This is the first hospital merger challenge in many years in which an attorney general has joined with the FTC to seek injunctive relief.

For FTC documents relating to this case please see: Press Release on Motion for Preliminary Injunction http://www.ftc.gov/opa/2008/05/inovapi.shtm.

The FTC Orders Separate Contracting Teams for ENH and Highland Park

On April 24, 2008, the Commission issued a final decision and order in the ENH/Highland Park transaction. Previously, on August 6, 2007, the FTC issued an order finding that the parties' merger, consummated in January 2000, violated Section 7 of the Clayton Act. Despite its finding of liability, the FTC declined to order a hospital divestiture due to concerns that separating Highland Park from ENH after many years of operation as a single entity would result in an unusually great "risk of unforeseen
costs and failure." Instead, the government concluded that "this is the highly unusual case in which a conduct remedy, rather than divestiture, is appropriate." The parties were ordered to submit a proposal to the FTC for establishing independent negotiating business teams that would permit third party payors to negotiate separately with each hospital and effectively "re-inject competition" between the two hospitals.

The FTC’s April 2008 final opinion and order reaffirms its earlier liability decision and sets forth a detailed framework for the establishment of separate negotiating teams. Under the order, ENH and Highland Park are required to engage (or refrain from engaging) in the following conduct:

- ENH and Highland Park must establish separate and discrete business teams that will independently negotiate all in-patient and out-patient hospital services, unless a payor elects to jointly negotiate for both hospitals;
- ENH may not enter into any contract for hospital services that is contingent on the payor entering into a contract with Highland Park for hospital services, or vice versa;
- ENH may not make the availability of contract prices or terms contingent on the payor entering into a contract with Highland Park for hospital services, or vice-versa;
- ENH must submit—at the request of the payor—any price or term disputes arising out of independent negotiations to mediation, and then if unresolved, to binding final arbitration;
- ENH must maintain separate and confidential contracting information from Highland Park with protections such as firewalls, separate contract management systems and confidentiality agreements; and
- ENH must notify all payors with pre-existing contracts of its new rights under the order, and offer those payors the option to re-negotiate their contract under the terms in the order.

In addition, the parties are required to adhere to certain other obligations, including compliance obligations such as the periodic submission of written reports and the provision of advance written notice of any proposed acquisition of a nearby hospital. The order terminates in 20 years.

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