Antitrust Action: New Enforcement Moves in the Health Care Arena

Recent Government Enforcement Actions
and
Private Antitrust Litigation

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Recent Government Enforcement Actions

United States v. UnitedHealth Group, Case No. 1:08-CV-322-ESH.

In Re Inova Health System, FTC Docket No. 9326.

North Texas Specialty Physicians v. Fed'l Trade Comm'n, 528 F.3d 346 (5th Cir. 2008).

Health Plan Mergers: UnitedHealth/Sierra

- Key Facts:
  - United was the largest health insurer in the United States providing health insurance to more than 70 million people worldwide, with revenues of approximately $75 billion.
    - United also provided health insurance to approximately 27,800 Medicare Advantage enrollees in the Las Vegas area.
  - Sierra Health Services was the largest health insurer in Nevada providing health insurance and other services to more than 655,000 people, with revenues of $1.9 billion.
    - Sierra provided health insurance to approximately 49,500 Medicare Advantage enrollees in the Las Vegas area.
  - On March 11, 2007, United and Sierra entered into an agreement by which United would acquire all outstanding shares of Sierra.

The UnitedHealth/Sierra Merger (cont.)

- Key Allegations (according to DOJ complaint):
  - Parties had a combined 94% market share for all Medicare Advantage plans and a 99% share for Medicare Advantage coordinated-care plans.
  - Merger would substantially lessen competition in the market for Medicare Advantage plans in Las Vegas area.
  - Deal would eliminate head-to-head competition.
  - Competition from existing competitors with small market shares would be unlikely to prevent anticompetitive effects.

The UnitedHealth/Sierra Merger (cont.)

- The Process:
  - Parties file HSR notification, receive Second Request.
  - DOJ simultaneously issues Complaint and Order
    - Permits merger subject to divestiture of United's individual M.A. business in Las Vegas.
    - Tunney Act notice and comment period in which parties expressed opinions on the prospective transaction.
  - Nevada A.G. also imposes remedial measures.
    - United must refrain from unlawful exclusive provider contracts and contracts with "MFN" clauses, for two years.
    - United must make $15 million "donation" to charitable activities specified by the A.G.

Hospitals Mergers: INOVA/Prince William

- Key Facts:
  - INOVA operates 5 hospitals in Northern VA.
    - Significant growth through recent acquisitions including Loudon Hospital in 1997 and Alexandria Hospital in 2005.
    - Approximately 1,892 licensed beds.
    - Approximately $1.8 billion total net operating revenue.
  - Prince William Hospital operates a hospital in Manassas, VA.
    - 180 licensed beds.
    - Total net revenue of $170.5 million in 2006.
  - On August 1, 2006, the parties signed an agreement by which Prince William Hospital would merge into INOVA.

Hospitals Mergers: INOVA/Prince William

- Key Allegations:
  - Post-merger, INOVA would control approx. 73% of licensed beds.
  - Lack of competitive alternatives in Northern VA would lead to:
    - Significant price increases at Prince William Hospital
    - Incremental price increases at INOVA.

The INOVA/Prince William Merger (cont.)

- The Process:
  - FTC issues administrative complaint and requests preliminary injunction in May 2008.
  - FTC appoints own Commissioner to serve as the Administrative Law Judge, commits to “expedited” schedule
    - Parties’ Motion to Recuse Commissioner Rosch is denied.
    - According to the Commissioner, “a reasonable person would not find any reasonable basis for doubting [his] impartiality.”
  - Merger is abandoned in June 2008.

Physician Networks: North Texas Specialty Physicians

- Key Facts:
  - NTSP was an organization of 500 independent physicians and physician groups.
  - Represented 26 medical specialties and some PCPs.
  - NTSP mainly negotiated “non-risk” (fee-for-service) contracts.
  - NTSP polled physicians to calculate the mean, median and mode of the minimum acceptable fees.

North Texas Specialty Physicians (cont.)

- Key Allegations:
  - Many participating physicians competed against each other.
  - Exchanges of prospective price information reduced competition, facilitated higher prices, and violated Section 5 of the FTC Act.
  - Payors forced to accept higher fees to contract through NTSP.
  - NTSP discouraged direct contracting with payors.
  - NTSP engaged in no significant efficiency enhancing activities.

North Texas Specialty Physicians (cont.)

- Procedural History:
  - FTC files administrative complaint on Sept. 17, 2003.
  - ALJ issues order requiring NTSP to "cease and desist" on Nov. 8, 2004.
  - Federal Trade Commission affirms ALJ decision on Dec. 1, 2005.
  - Fifth Circuit affirms Federal Trade Commission on May 14, 2008.
    - NTSP's conduct "inherently suspect," with "no procompetitive justification."
    - FTC Order overbroad because it required NTSP "to cease and desist from dealing, refusing to deal or threatening to refuse to deal with any payor."
    - NTSP's for rehearing *en banc* was denied on July 18, 2008.
  - NTSP's right to appeal expires on October 16, 2008.

Recent Private Litigation

Cascade Health Solutions v. PeaceHealth, 515 F.3d 883 (9th Cir. 2008)

Heartland Surgical Specialty Hosp., v. Midwest Div'n, 527 F. Supp.2d 1257 (D. Kan. 2007)

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Cascade Health Solutions v. PeaceHealth

- Key Facts:
  - PeaceHealth and McKenzie are only hospitals in the county.
  - McKenzie
    - Operates a single, 114 bed hospital.
    - Offered primary and secondary care.
  - PeaceHealth
    - Operates 3 hospitals, with a total of 464 beds.
    - Offers primary, secondary and tertiary care services.
    - Offers a rate of 85% of charges to payors that contract exclusively.
    - Offers a rate of 90% of charges to all others.

The *PeaceHealth* Litigation (cont.)

- Key Allegations
  - Monopolization, attempted monopolization, conspiracy to monopolize, tying, exclusive dealing and state claims.
- The Process
  - Complaint filed on Jan. 28, 2002.
  - Tying claims dismissed on Aug. 15, 2003.
  - Jury verdict issued on Oct. 31, 2003.
    - <u>For defendant</u> on exclusive dealing, monopolization and conspiracy to monopolize.
    - <u>For plaintiff</u> on attempt to monopolize.

PeaceHealth – Jury Verdict

7. Did plaintiff suffer an antitrust injury arising out of the attempt to monopolize?

Yes ✓

No ____

If your answer to question 7 is no, then you should skip question 8 and go to question 9.

8. What amount of damages, if any, were suffered by plaintiff?

$ 5.4 million ($5,400,000 $\underline{00}$)

The *PeaceHealth* Litigation (cont.)

- The Process:
  - Ninth Circuit issues request for amici briefing on Mar. 20, 2007.
  - Ninth Circuit issues ruling on Feb. 1, 2008.
  - The parties announce settlement on August 26, 2008.

The *PeaceHealth* Litigation (cont.)

- Substantive Issues:
  - Jury instruction allows liability for bundled discounts that exclude firms selling fewer products.
  - "Bundled pricing occurs when price discounts are offered for purchasing an entire line of services from one supplier. [This] may be anticompetitive if…offered by a monopolist and substantially foreclose[s]…a competitor who does not provide an equally diverse group of services…"
  - Instruction is based on *LePage's Inc. v. 3M*, 324 F.3d 141 (3rd Cir. 2003).

The *PeaceHealth* Litigation (cont.)

– The Ninth Circuit adopts “discount attribution” standard.

- Bundling can be efficient, but can be used to “exclud[e] less diversified but more efficient producers.”
- Bundling is presumptively lawful unless it has “the potential to exclude a hypothetical equally efficient producer of the competitive product.”
- Full amount of bundled discounts is allocated to competitive product. If resulting price is below seller’s average variable cost of competitive product, bundled discount may be exclusionary under Section 2.
- Rejects *LePage’s,* adopts “discount attribution” standard.

Discount Allocation Example

- Firm A produces

  Shampoo at a cost of $1.50……………….sells for $3.00

  Conditioner at a cost of $2.50 …………….sells for $5.00

  Bundled sale with discount ………………..sells for $5.25

  * Competitors produce shampoo only.

- Under allocative discount standard,

  Firm A's $2.75 discount must be allocated to the competitive product, yielding a price for shampoo of $0.25, well-below A's incremental cost (although bundle sells at profit).

The *PeaceHealth* Litigation (cont.)

– <u>Also</u>, Ninth Circuit reverses district court's defense summary judgment ruling on tying claim.
  - Permits plaintiff to try to prove coercive "tie" via pressure of differential pricing from bundling.

– Monopoly claim challenges "below cost" character of bundled prices, via impact on competition from less comprehensive competitor.

– Tie-in analysis focuses on flip-side—i.e., use of market power in tying product to force purchase of other products, often at above market prices.

Heartland Surgical Specialty Hosp. v. Midwest Div'n

- Key Facts:
  - Heartland is a physician-owned specialty hospital.
    - 48 licensed beds.
    - Orthopedic, neurological, plastic, pain management and general surgical services.
  - Defendants include 11 MCOs and hospitals operating in the Kansas City area.
    - Defendant MCOs' combined share of local managed care enrollment is 90%.
    - Defendant hospitals' combined share of local net patient revenues is 74%.

Heartland Litigation (cont.)

- Key Allegations (according to complaint):
  - Defendants engaged in boycott to exclude it from MCO contracts.
    - MCOs agreed with each other to exclude Heartland (i.e., so none suffer a competitive disadvantage from the exclusion).
- The Process:
  - Complaint filed on Apr. 26, 2005.
  - District Court of Kansas denies defendants' Motion for Summary Judgment on Oct. 1, 2007.
  - Parties announce settlement in August 2008.

Heartland Litigation (cont.)

- Substantive Issues:
  - Heartland alleged a Sherman Act Section 1 violation
    - Prohibits "[e]very contract, combination…or conspiracy, in restraint of trade or commerce among the several states…"
    - Unilateral action not a violation – must prove, through direct or circumstantial evidence, concerted action between separate entities.
    - Heartland asserted direct, circumstantial and economic evidence of conspiracy.

Heartland Litigation (cont.)

- Circumstantial evidence and economic motives supported conspiracy allegations.
  - Economic Motive:
    - Shared incentive to conspire to exclude Heartland i.e., to protect their market shares and profitability.
  - Circumstantial Evidence
    - Heartland was a new, attractive facility.
    - Hospital defendants perceived that new competition could threaten profits.
    - MCO defendants communicated with one another about their strategies at various healthcare events.