Antitrust Action: New Enforcement Moves in the Health Care Arena

Recent Government Enforcement Actions and Private Antitrust Litigation

Arthur N. Lerner
Christine L. White

HOOPS2008
Crowell & Moring LLP
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:
  – ALJ issues order requiring NTSP to “cease and desist” on Nov. 8, 2004.
    • 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)

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.
    • For defendant on exclusive dealing, monopolization and conspiracy to monopolize.
    • For plaintiff on attempt to monopolize.
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?
   $5.4\text{ million} \left( \frac{5,400,000}{80} \right)$
The PeaceHealth Litigation (cont.)

• The Process:
  – 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.)

- Also, 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.
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.