Round Table on Hospitals and Health Care

Office of the Connecticut Attorney General

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Health Care Mergers & Acquisitions

• The CT OAG has been reviewing health care transactions for quite some time
• Over the last several years we have reviewed:
  ➢ Hartford/HOCC
  ➢ Yale/HSR
  ➢ Hartford/Backus
• Most reviews of proposed acquisitions are conducted jointly with federal agencies
• Health care has evolved and so have the transactions
  ➢ Changing nature of transactions (horizontal and vertical)
  ➢ Increasing number of transactions
How do we learn of these cases?

- Contacted by federal agencies
- Contacted by counsel for parties
- Contacted by stakeholders (competitors, payors, customers)
- News reports
- Going forward – Notice of Acquisition Statute
How do we conduct our reviews?

- **Ultimate Question** – will the transaction likely create or enhance *market power* or facilitate its exercise?
  - Analysis is predictive – likely that adverse competitive effects will arise in the future
  - MP =
    - ability of seller maintain prices above competitive levels, or
    - lessen competition such as quality, service, innovation

- The **blueprint** is the DOJ/FTC 2010 Horizontal Merger Guidelines
  - focus on *competitive effects* first
    - Market Share/Concentration (# of firms and market share)
    - Substantial Head-to-Head Competition
    - Disruptive Role of a Merging Party, e.g., a “maverick firm”
Initial Steps in the Review (Preliminary Inquiry)

• OHCA Publications, *i.e.*, Annual Reports on CT Hospitals

• ChimeData - collects and edits administrative discharge data from inpatient admissions, hospital-based outpatient surgery, and emergency department (ED) non-admissions.

• Parties “white papers”

• Other available sources
Transaction Appears to Raise Competitive Concerns (Investigation)

• Define the Relevant Market
  ➢ Product Market – a cluster of general acute care inpatient services, *e.g.*, at least 24 hr stay (medical, surgical, other)

  ❖ Usually **excludes** Outpatient Services – other alternatives

  ❖ Core Services – no adequate substitute

  ❖ Sometimes narrower market, *i.e.*, primary care or obstetrics
Transaction Appears to Raise Competitive Concerns (Investigation)

- Define the Relevant Market

  - Geographic Market – the area within which competition takes place (patient’s willingness to travel to find a substitute).

    - Response of health plan to a price increase
    - Response of patient to a price increase
Sources of Information on Competitive Effects of Merger

• Merging Parties
• Conduct interviews
  – Payers
  – Employers
  – Competitors
  – Physicians
  – Ancillary providers
• Review documents and any HSR submissions
What are we looking for?

• **Substantial lessening of competition**
  – Will the merger result in the entity obtaining market power?
  – Will health care prices to employers/patients go up?
  – Will merged entity be able to provider-based bill physicians and ancillaries?
  – Will merged entity reduce access to services?
  – Will merged entity exclude competitors or limit innovation?
Other Considerations

- **Likelihood of new entry** – counteract anticompetitive effects, i.e., offset a price increase

- **Proposed efficiencies**
  - Must be verifiable and merger specific (not achievable by other means)
    - lower prices
    - Improved quality
    - New products
  - Important to look at efficiencies early in the transaction
  - Important to explain how efficiencies benefit consumers, not just the parties
  - Not aware of any cases where efficiencies justify merger to monopoly
Other Considerations

- **Failing firm** — would either party in the merger likely fail in the absence of the merger, i.e., *the competitor is exiting the market regardless.*
  
  - Rigorous Test, all elements must be met:
    
    - FF unable to meet financial obligations in the near future
    
    - FF unable to reorganize under Chapter 11
    
    - FF has been unsuccessful in eliciting reasonable alternative offers that would pose “less severe” danger to competition
    
    - Absent the acquisition, the assets of the failing firm would exit the market.
Outcome of Investigation

• One of three things
  - No competitive problem so no action taken
  - Competitive problem, but can be resolved short of litigation through a consent decree
  - Competitive problem that cannot be resolved short of suing to block transaction

• Background:
  ➢ St. Luke’s operates 7 hospitals and emergency clinics in Idaho
  ➢ St. Luke’s employs approx. 450 M.D.s in the geographic market
  ➢ Saltzer is one of the largest indep. multispeciality in ID, with approx. 44 M.D.s.
  ➢ In the fall of 2012, St. Luke’s entered into an agreement to acquire the assets of Saltzer.

• Background (cont.)
  - The Saltzer acquisition was one of many M.D. practices St. Luke’s acquired over the last several years.
  - On November 12, 2012 two of St. Luke’s competitors filed suit seeking to enjoin the merger.
  - Plaintiffs’ alleged transaction would provide St. Luke’s with 80% of certain M.D. services in Nampa and Boise and reduce competition in these markets.

• Background (cont.)
  ➢ On December 31, 2012 St. Luke’s acquired Saltzer
  ➢ On March 26, 2013, the FTC and ID OAG filed a separate lawsuit claiming the transaction was anticompetitive and requesting it be unwound.
  ➢ Trial commenced on September 22, 2013.
    ❖ Bench trial – 4 weeks, dozens of witnesses, hundreds of exhibits.
The Decision

• The acquisition was one too many
• Acquisition would give St. Luke’s 80% of the primary care M.D. market in Nampa (a “must have”).
  ➢ **Bargaining Leverage** - negotiate higher reimbursement rates from health plans that will be passed onto the consumer.
  ➢ **Referrals to St. Luke’s** - raise rates for ancillary services (x-rays, colonoscopies, lab, minor OP services) to the higher hospital-based billing rates.
The Decision

• Court acknowledged procompetitive aspects of the deal but

• Court found that the claimed efficiencies could be achieved without the acquisition.

  ➢ Although the transaction was intended to improve patient outcomes, there are other ways of achieving this without the competitive risks.
The Decision

• Efficiencies could be achieved outside merger, e.g.,
  
  ➢ The transition to integrated care and risk-based contracting could be obtained with the M.D.s St. Luke’s already had
  
  ➢ Efficiencies resulting from Epic (EHR system) do not require employment of M.D.s