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SPECIAL FOCUS: ANTITRUST

DOJ Steps Up Antitrust Enforcement Against Health-Plan/Provider Restraints on Competition

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Pursuant to an implicit, if not explicit, market-allocation agreement between the Federal Trade Commission and the Antitrust Division, the Division has primary responsibility for investigating and, where warranted, challenging alleged anticompetitive conduct by health plans. Some commentators heavily criticized the Division during the Bush administration for its seeming lack of effort in policing the anticompetitive activities of health plans, although the Division did challenge several health-plan mergers and investigated others. Prior to his election as president, then- Candidate Obama was particularly critical of the Antitrust Division's performance.

There seems to have been an uptick in health-plan antitrust enforcement under President Obama. For example, in March 2010, the Division issued a press release explaining that Blue Cross Blue Shield of Michigan and Physicians Health Plan of Mid-Michigan abandoned, in response to an Antitrust Division investigation, a health-plan merger that would have combined Blue Cross's 70 percent market share and Physician Health Plan's 20 percent share in the Lansing, Michigan area.

Perhaps more interesting is the emphasis the Division has recently placed on investigating and challenging exclusionary agreements between health plans and providers adversely affecting competition. In October 2010, the Division challenged Blue Cross Blue Shield of Michigan's use of most-favored-nations (MFN) provisions in its contracts with numerous Michigan hospitals. According to the Division's complaint, Blue Cross, the dominant health insurer in Michigan, entered

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into a number of “Equal-to MFNs” and “MFN-plus” contracts with Michigan hospitals. Under the former, the hospitals agreed with Blue Cross to charge other health plans at least as much as they charge Blue Cross for their hospital services. Under the latter, the hospitals agreed to charge other health plans more than they charge Blue Cross — allegedly as much as 40 percent more. The effect is to exclude other health plans from the market or at least make it much more difficult for them to compete effectively against Blue Cross, thus allegedly augmenting Blue Cross’s market power and ability to charge supracompetitive prices for its insurance. That case remains in litigation after the district court denied Blue Cross’s motion to dismiss for failure to state a claim.

Not all MFN provisions generate anticompetitive effects. The effect is most likely when implemented by a dominant insurer, which is thus a “must have” by hospitals because the plan generates a significant share of the hospitals’ revenues. Several reports indicate that the Division is investigating the use of MFNs by other dominant health insurers around the country.

In February this year, the Division filed suit against the United Regional Health System in Wichita Falls, Texas, for entering into a form of “bundled discount” exclusivity arrangement with health plans, which allegedly had the effect of preventing them from contracting with the other, much smaller, hospital in the city. United Regional’s market share of inpatient services was around 90 percent and its share in the outpatient market was about 75 percent. It discounted its prices 25 percent off charges if health plans excluded the smaller hospital from their networks and contracted only with it for all their services. If the smaller hospital were included in the networks, United Regional offered the health plans only a five percent discount off charges. As a result, and because United Regional was a “must have” hospital, several large payers refused to contract with the smaller hospital. United Regional thus was allegedly able to maintain its substantial market power, resulting in higher hospital prices that ultimtely translated into higher health insurance premiums for employers and consumers.

An interesting facet of the case is that the Division alleged that United Regional’s market power and conduct resulted in monopolization in violation of Section 2 of

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the Sherman Act. Antitrust Division monopolization challenges are few and far between. And because the restraint resulted from an agreement between United Regional and the health plans, the Division could have challenged the arrangements under Section 1, which requires a lower level of proof to sustain a violation. Thus, the Division seemed to be sending a signal that it intends to aggressively enforce Section 2 in the health-care sector, which several commentators accused it of not doing in the past. The case settled quickly with a consent decree.

Most recently, the Division challenged an unusual arrangement between a dominant health plan in Montana, Blue Cross of Montana; five hospitals; and a health-plan joint venture that the hospitals owned and operated. The hospital defendants, located in Billings, Bozeman, Missoula, Helena, and Havre, Montana, created and operated a health plan known as New West Health Services. Depending on the geographic area, Blue Cross's market share was between 43 and 75 percent. New West was the third largest health plan in the same areas, even though its market shares were only between seven and 12 percent, depending on the area.

Blue Cross and the hospitals intended to enter into an agreement with two allegedly anticompetitive features. First, Blue Cross would pay the hospitals a total of $26.3 million if the hospitals would agree that New West would cease providing health insurance to the hospital's employees and if they instead agreed to purchase their employees' insurance from Blue Cross. Second, if the hospitals agreed to exit the insurance business and not compete with Blue Cross, Blue Cross agreed to place two hospital representatives on its board of directors. The concern is that the agreements would result in New West's exiting the market, thus increasing Blue Cross's allegedly already-dominant position. This case also will terminate pursuant to a consent decree that, interestingly, requires the hospitals to divest New West to a new owner to ensure that it continues to compete with Blue Cross.

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Exclusionary contracts between providers and health plans can take an almost-infinite number of forms. Typically, however, they raise no significant antitrust concern unless one of the parties (or in some situations, both) has substantial market power and the provisions in question foreclose the competitors of that party from a significant share of the market, thus increasing its market power or permitting it to maintain that power.

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