FOR COMPETITIVE HEALTH CARE:
A Review of Recent Antitrust Developments
September 29, 2014

MODERATOR:
Mark Jacobson, Partner, Lindquist & Vennum LLP

PANELISTS:
Richard Duncan, Partner, Faegre Baker Daniels LLP
Mike Lenz, Vice President of Strategic Initiatives at Medica
Representative Paul Thissen, Speaker of the House, Minnesota House of Representatives

Co-sponsored by the MSBA Antitrust Law and Health Law Sections
Four Recent Cases Illuminating Important Issues in Health Care Antitrust Law

Richard Duncan, Partner
Faegre Baker Daniels LLP
Supreme Court decision dealing with the state action doctrine

Georgia’s Hospital Authorities Law authorizes counties and municipalities to create public entities called hospital authorities, which have the power to acquire and operate projects

Hospital Authority of Albany-Dougherty County, which already controlled one hospital in the county, sought to acquire a different hospital—the only other hospital in the county

• Issue before the Supreme Court: Was the Hospital Authority immune from federal antitrust law, when Georgia statutory law authorized hospital authorities to acquire and operate projects?

• Holding: Georgia’s Hospital Authorities Law does not authorize hospital authorities to use their powers anticompetitively; thus, state action immunity doesn’t apply
• FTC enforcement action dealing with small-market mergers of traditional hospitals and physician-owned hospitals or ambulatory surgical centers

• Complaint alleged that Reading Health System’s proposed acquisition of the Surgical Institute of Reading would violate the FTC Act and the Clayton Act by substantially lessening competition for surgical services in the Reading, Pennsylvania area
In re Reading Health System, Docket No. 9353, 2012 WL 5879404 (F.T.C.) (Nov. 16, 2012)

- RHS and SIR previously engaged in head-to-head competition, which produced benefits for employers (offering health care plans to employees) and for patients
- Concern that the acquisition would subject healthcare plan members to higher rates and would burden employers with higher employee health care costs, potentially forcing them to cut benefits
- FTC dismissed complaint after RHS and SIR abandoned the proposed acquisition

• Multidistrict litigation involving coordination among insurance carriers
• Allegations by two separate putative classes seeking to represent Blue Cross/Blue Shield providers and subscribers
• Putative classes filed complaints against Blue Cross/Blue Shield plans, each of which is an independent company, as well as the Blue Cross/Blue Shield Association

- Plaintiffs claimed that defendants engaged in a conspiracy to horizontally allocate geographic markets by agreeing with each other to carve the U.S. into “service areas” in which only one designated Blue plan was permitted to sell health insurance to subscribers and to contract with providers.

- Court denied defendants’ motion to dismiss plaintiffs’ Sherman Act Section 1 claim, finding that plaintiffs alleged a viable market allocation scheme, despite defendants’ argument that the alleged allocation agreements were not illegal because they merely recognized preexisting trademarks.

- Wage information sharing case in the Eastern District of Michigan
- Putative class action brought by registered nurses against hospitals, alleging that the hospital violated Section 1 of the Sherman Act by exchanging compensation-related information with other hospitals with the effect of depressing wages for RNs (rule of reason claim)
- The court granted class certification for a class including over 20,000 RNs employed by eight defendant hospitals
The court reinstated its opinion on the plaintiffs’ motion for class certification after the Sixth Circuit vacated the court’s 2013 ruling and directed the court to reconsider its class certification decision in light of Comcast Corp. v. Behrend, 133 S. Ct. 1426 (2013)

New Collaboration Concerns in the Name of Health Care Reform

Mike Lenz, VP of Strategic Initiatives
Medica
Six System Wisconsin Network

- Aurora (Eastern WI)
- ThedaCare (Appleton)
- Aspirus (Wausau)
- Bellin Health (Green Bay)
- Gunderson Health System (LaCrosse)
- UW Health (Madison)

- $9 billion in annual revenue
Improve or lessen competition?

- The idea is for the six health systems to share their best practices for improving quality and eliminating waste. For example, the health systems could share clinical guidelines rather than have each system develop its own.
- The systems eventually hope to negotiate contracts jointly with all health insurers, said Greg Devine, a senior vice president of ThedaCare, who will be the president and chief executive of the partnership. That could increase their bargaining power in contract negotiations with insurers.
Anthem Blue Cross Vivity (CA)

- 7 health systems
  - UCLA Health System
  - Cedars-Sinai
  - Good Samaritan Hospital
  - Huntington Memorial Hospital
  - MemorialCare Health System
  - PIH Health
  - Torrance Memorial Medical Center
Other Areas to Watch

• ACOs
  – Accountable Care Organizations, or
  – Accelerated Cost Opportunity

• Exchanges