

ANTITRUST AND TRADE PRACTICES ALERT

NEWS FOR THE CLIENTS AND FRIENDS OF BASS, BERRY & SIMS PLC

Recent Healthcare Antitrust Matters - Competition with Full Service Hospitals; Messenger Model Contracting Networks

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Key Points:

- Single specialty hospitals (SSHs)/ambulatory surgery centers (ASCs) that believe they have been denied market access by full service hospitals continue to bring antitrust actions. Full service hospitals need to consider antitrust implications before implementing competitive strategies and entering into potentially exclusive contracts with payors. Both SSH/ASCs and hospitals need to understand relevant antitrust issues well in advance of litigation.
- Contracting between physicians and payors using the messenger model can be difficult to implement and maintain without running afoul of antitrust laws. The messenger model continues to be a topic of interest for the enforcement agencies.

Recent Federal Decisions Highlight the Antitrust Implications of Competing SSH/ASCs and Full-Service Hospitals

The ongoing competitive struggles between SSH/ASCs and full-service hospitals over access to payor networks continues. Two recent decisions show that the ability to allege and prove effects on competition within a properly defined market is critical to the outcome of any antitrust action.

The Eighth Circuit Court of Appeals recently dismissed antitrust claims against Baptist Health, a full service hospital in Little Rock, Arkansas, for allegedly conspiring with Blue Cross Blue Shield of Arkansas to exclude a group of cardiologists from the market.¹ In 1997, the cardiologists opened Arkansas Heart Hospital, a competitor to Baptist, and soon thereafter Blue Cross terminated its network provider agreement with the cardiologists. In 2003, Baptist instituted credentialing policies that foreclosed staff privileges to any doctor who held an interest in a competing hospital. Although the SSH was not itself a plaintiff, it is illustrative of the antitrust issues in this competitive environment. The trial court found that the cardiologists failed to plead a plausible relevant market and dismissed their claim. The cardiologists argued that the market for their services was "cardiology procedures obtained in hospitals by patients covered by private insurance" in Little Rock. The Eighth Circuit disagreed, finding both the geographic area too limited and the patient market improperly restricted to those with private insurance, rather than to all patients capable of paying for their medical bills.

¹ Opinion available at : <http://www.bassberry.com/files/upload/EighthCircuitNos.08-315809-1786.pdf>

In contrast, an Illinois federal district court recently denied summary judgment in favor of St. Francis Medical Center, the largest hospital in Peoria, Illinois, allowing an ASC, Peoria Day Surgery Center ("PDSC"), to pursue its antitrust claims.² In the 1990's, a predecessor of PDSC contracted with Caterpillar, the largest employer in Peoria, to treat its health plan beneficiaries. Later, St. Francis informed Caterpillar that it wanted to cover the services offered by PDSC. In 2001, Caterpillar agreed to make St. Francis its exclusive provider of ambulatory surgical services if St. Francis could meet Caterpillar's needs. When St. Francis later opened several ASCs, Caterpillar informed PDSC that it was no longer considered in-network for urological surgical facility charges. Without reaching the merits, the Court found that PDSC's expert provided evidence that raised genuine issues of material fact as to whether the exclusive agreement between Caterpillar and St. Francis prevented other ASCs from entering the market, improperly limited patient choices and quality of care, and raised prices. Absent settlement, the case appears headed to a trial.

Messenger Model Contracting Arrangements Continue to Bedevil Physicians (and their Contract Negotiating Staff)

Two recent FTC consent decrees highlight the government's continued interest in, and the perils associated with the use of, messenger models.

On February 3, 2010, the FTC announced a consent decree with Roaring Fork Valley Physicians, a multispecialty IPA, settling charges that Roaring Fork orchestrated agreements among its physicians to set higher prices and to refuse to deal with payors that did not agree to higher rates.³ The FTC alleged that Roaring Fork's doctors – 80 percent of the physicians in Garfield County, Colorado – used the agreements to demand a cost of living adjustment that increased reimbursement rates yearly, to ban contract provisions linking reimbursement rates to Medicare rates, to discourage physicians from contracting directly with payors, and to accept contracts only if at least 80 percent of its primary care physicians and 50 percent of its specialty doctors approved the proposed contracts. The FTC settlement bars Roaring Fork from engaging in collective price negotiations and collectively refusing to deal with insurers, requires the IPA to terminate any contracts obtained through price-fixing tactics, and requires the IPA to notify and obtain approval from the FTC before acting as "messenger" in any further collaborative arrangements.

While most messenger model matters involve the contracting entity, another recent consent decree demonstrates the potential legal perils for individuals – especially those attempting to duck the FTC's consent decree prohibitions. In December 2008, the FTC settled allegations that Boulder Valley, a multispecialty IPA, was engaged in illegal price fixing as the result of an improper messenger model. The 2008 consent decree did not name any individuals. On February 5, 2010, the FTC announced that it settled charges stemming from allegations that the executive director of Boulder Valley tried to evade the terms of the 2008 Order by telling insurers that because she was not named individually in the 2008 Order, she could simply negotiate on behalf of competing physicians "not with my [association] hat, but as an individual."⁴ The FTC alleged that the executive director improperly screened out offers she believed too low, threatened payors with termination of their contracts if they refused to negotiate or meet her demands, and told doctors not to contract directly with payors. The new consent decree specifically limits the executive director's behavior in ways very similar to the consent decree in Roaring Fork Valley IPA.

² Opinion available at :

<http://www.bassberry.com/files/upload/USDistrictCourtCentralDistrictIllinoisCaseNo06-1236.pdf>

³ The press release and related materials may be found at

<http://www.ftc.gov/opa/2010/02/roaringfork.shtm>

⁴ The press release and related materials may be found at <http://ftc.gov/opa/2010/02/bouldervlly.shtm>.

What's Next?

ASCs and full service hospitals will undoubtedly continue to compete for patients and payor contracts, resulting in more lawsuits. The litigants' ability to convince a court that there have been anticompetitive effects in a properly defined market may be the difference between dismissal and a trial on the merits.

Efforts by providers to "level the playing field" with payors is fraught with danger. The enforcement agencies already closely scrutinize provider contracting activity. Given the challenges of implementing a messenger model that complies with antitrust laws, expect that 2010 will continue the trend of additional enforcement litigation and consent decrees regarding failed messenger model programs.

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