

# ANTITRUST AND TRADE PRACTICES ALERT

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

## **Recent Healthcare Antitrust Matters – Hospital System Survives Antitrust Attack From Physician-Owned Hospital Competitor**

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### **Key Points:**

- Hospital systems that attempt to prevent payors from contracting with a competitor continue to face antitrust challenges in the form of expensive and protracted private litigation and/or interventions by state and federal enforcement authorities. A recent Texas case continues this trend.
- This excluded competitor's case may be the first to make it all the way to a trial on the merits but the jury verdict rejecting the claim demonstrates how excluded competitors face an uphill battle in challenging these alleged anticompetitive contracting practices.

### **Jury Rejects Claims That Hospital Conspired With Payors To Put Physician-Owned Hospital Competitor Out Of Business**

A Texas state jury recently found that a physician-owned hospital failed to demonstrate that the region's dominant hospital system conspired with payors to exclude it from the payors' networks. This case represents the latest in what has become a growing trend of physician-owned hospitals asserting similar claims.<sup>1</sup>

Houston Town & Country, a hospital owned by a partnership of over 100 physicians, failed after a year of business, and subsequently filed a state antitrust action against Memorial Hermann Healthcare Systems, the region's largest hospital system with a 20 percent market share, for causing the hospital's demise.<sup>2</sup> Town & Country alleged that Memorial Hermann told the major insurance payors in the region that it would either stop doing business with them or seek rate increases in their contracts if the payors contracted to provide network coverage with Town & Country Hospital. Town & Country alleged those actions violated the antitrust laws and tortiously interfered with Town & Country's contracts and prospective relationships.

Memorial Hermann acknowledged that it did indeed tell private payors that it would alter its rates if the payors contracted with Town & Country. Yet, the hospital system claimed that its behavior was a fair response to a legitimate competitive threat to its business. The hospital system attributed Town & Country's downfall to its own undercapitalization, poor business plan, and poor management.

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<sup>1</sup> See Bass, Berry & Sims PLC February 19, 2010 Antitrust & Trade Practices Alert, *Recent Healthcare Antitrust Matters – Competition with Full Service Hospitals; Messenger Model Contracting Networks*, [available here](#).

<sup>2</sup> Miguel Franco v. Memorial Hermann Health Care System, Case No. 2006-79945, Harris County Court, Texas.

After a two-month trial, the Houston jury found that Town & Country failed to prove that a conspiracy existed between Memorial Hermann and the payors, despite finding that threats to increase rates might have occurred.

### Hospital System's Actions Did Not Come Without Consequences

Although Memorial Hermann successfully defended the civil lawsuit, it did not emerge from the antitrust challenge unscathed.

First, on the eve of trial, Memorial Hermann settled, for an undisclosed amount, with Stealth LP, a partnership made up of over 100 physicians that had invested in Town & Country. Stealth's attorney described the last-minute settlement as "very favorable to the doctors."

Second, the Texas Attorney General had also initiated its own investigation bringing charges against Memorial Hermann related to its alleged anti-competitive behavior vis-à-vis Town & Country. Memorial Hermann settled those claims by agreeing to pay a \$700,000 fine to the State and agreeing to a five-year injunction barring the hospital from "certain contracting practices" including threatening to terminate, refusing to contract with, or increasing rates for, health plans that contracted with competitors.

### What's Next?

This case is the latest episode in the escalating competitive struggle between full-service and physician-owned hospitals for access to payors and patients. Although private actions such as the Memorial Hermann case remain difficult to win on the merits, civil litigation will continue on this front along with governmental scrutiny and potential action.

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