

ANTITRUST & TRADE PRACTICES

Alert

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

2008 Antitrust Developments in Healthcare - The Year in Review

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Now that the holiday season is over and a Super Bowl champion has been crowned, it is a good time to take a moment to look back at how the antitrust laws were applied in the healthcare industry in 2008. The past year saw a number of continuing trends, including government intervention in hospital mergers and scrutiny of physician network activities. There were also new developments, most importantly the election of a president who promises to “reinvigorate antitrust enforcement” and “step up review of merger activity.”

Challenges to Hospital Mergers

The Federal Trade Commission (FTC) continued to be active in hospital merger enforcement. In August 2007, the FTC concluded that Evanston Northwestern Healthcare Corporation’s (Evanston) 2000 acquisition of a hospital to go along with the two hospitals it already owned in suburban Chicago violated Section 7 of the Clayton Act.¹ In April 2008, the FTC laid out the remedy for this violation. Instead of ordering a divestiture of the acquired hospital, the FTC placed a number of restrictions on Evanston’s business operations. Notably, the FTC required Evanston to establish separate teams to negotiate managed care contracts – one for the hospitals owned before the acquisition and one for the purchased hospital. The Evanston case demonstrates the FTC’s willingness to challenge mergers well after the fact – the merger was closed four years before it was challenged. Since the FTC announced its initial decision in 2007, Evanston has been hit with three class action antitrust lawsuits that it continues to fight.²

In June, Inova Health System Foundation (Inova) and Prince William Health System abandoned their proposed merger following an FTC challenge joined by Virginia’s Attorney General.³ Inova, which operates five hospitals in Northern Virginia, had proposed to acquire a single 180-bed hospital in the area.

These actions serve as a stark reminder that, in the hospital industry, even a merger that combines three or four hospitals can attract the attention of the FTC and private plaintiffs.

¹ *In the Matter of Evanston Northwestern Healthcare Corp.*, FTC Docket No. 9315 (Final Order April 24, 2008).

² *See In re Evanston Northwestern Healthcare*, No. 07-CV-4446 (N.D. Ill. May 29, 2008).

³ *In the Matter of Inova Health Sys. Found.*, FTC Docket No. 9326 (June 17, 2008).

Physician Joint Negotiation and Information Exchange

Two cases in 2008 showed, once again, that trying to “level the playing field” in negotiations with payors is fraught with danger. First, a federal appeals court found that an Independent Physician Association’s (IPA) conduct in setting minimum prices and messengering fee-for-service contracts on behalf of its member physicians amounted to an unlawful price fixing agreement.⁴ One part of the IPA’s program involved taking an annual poll of the minimum reimbursement levels members would accept from payors. The results of the poll were used to establish minimum reimbursement levels that the IPA demanded in negotiations. The member physicians also agreed to grant the IPA the right of first negotiation with payors.

In another matter, two IPAs were accused by the FTC of engaging in collective negotiations, telling members not to negotiate with payors on terms other than those approved by the entire group, and threatening payors with contract termination if they refused to negotiate with the doctors as a group. On December 24, the FTC announced a settlement with the IPAs that prohibits them from negotiating on behalf of member physicians and facilitating the exchange of information between member physicians about the prices and other contract terms they would be willing to accept from payors.⁵

These two cases highlight the fact that collective negotiation by physicians is extremely risky under the antitrust laws. The federal government has provided guidance on what conduct by physician networks is permissible, and it will closely scrutinize activity that deviates from this guidance.⁶

Bundled Discounts

A bundled discount is the combined sale of two or more goods or services that could be sold separately that are sold for a price lower than would be charged for the goods or services if purchased separately. Prior to 2008, only one case – *PeaceHealth* – comprehensively discussed the use of bundled discounts in the healthcare industry.⁷ In this civil case, PeaceHealth, which operated a number of hospitals in Oregon, was accused of engaging in anticompetitive conduct by offering bundled discounts to insurers of 35% to 40% on tertiary services if the insurers made PeaceHealth their sole preferred provider for primary, secondary, and tertiary services. *PeaceHealth* set forth the “discount attribution” and “marginal cost” standards for analyzing whether particular bundled discounts run afoul of the antitrust laws.

In 2008, a federal district court found an exception to these standards when it refused to dismiss the Meijer supermarket chain’s bundling claim against a manufacturer of stand-alone protease inhibitors.⁸ While the court acknowledged the *PeaceHealth* standards, it concluded that, based

⁴ *North Texas Specialty Physicians v. FTC*, 528 F.3d 346 (5th Cir. 2008).

⁵ *In the Matter of Boulder Valley Individual Practice Association and Independent Physician Associates Medical Group, Inc.*, FTC File No. 051-0252 (Agreement Containing Consent Order to Cease and Desist Dec. 24, 2008).

⁶ See Department of Justice and the Federal Trade Commission Statements of Antitrust Enforcement Policy in Health Care (1996).

⁷ *Cascade Health Solutions v. PeaceHealth*, 502 F.3d 895 (9th Cir. 2007), superseded and amended by 515 F.3d 883 (9th Cir. 2008).

⁸ *Meijer, Inc. v. Abbott Laboratories, Inc.*, 544 F. Supp. 2d 995 (N.D. Cal. 2008).

on the unique facts of the case before it, the proper test to evaluate bundling requires a showing that the bundled prices are below the seller's incremental costs.

As these cases suggest, the antitrust laws presently do not provide clear lines for companies considering or engaging in bundled discounts.

Network Joint Ventures

At least one case in 2008 demonstrated the courts' continued skepticism about claims of providers who are excluded from network joint ventures.⁹ In that case, a federal court of appeals affirmed the trial court's determination that a group of diagnostic imaging centers failed to show that an integrated health system, health plan, and preferred provider organization (Providence) had attempted to monopolize the market for diagnostic imaging services in the Portland metropolitan area. The court found that the imaging centers showed neither that they would incur costs that incumbent providers would not nor that Providence could earn monopoly profits by controlling patients and physician referrals through its insurance products. This case is the latest in a long line of unsuccessful antitrust suits brought by physicians and other healthcare providers excluded from a network.

Federal Antitrust Enforcement Agency Guidance

On September 15, 2008, the FTC and the DOJ issued a joint statement to the Illinois Task Force on Health Planning Reform urging Illinois to repeal or rework its certificate of need (CON) laws. The FTC and DOJ argued that CON laws impede the efficient performance of healthcare markets and that the benefits of those laws do not justify the detriment they cause to consumers.

A lawsuit filed in Illinois in July illustrates this concern. ProCure Treatment Centers, Inc. (ProCure) claimed that Northern Illinois University (NIU) attempted to monopolize proton beam therapy initiatives in Illinois by gaming the CON process. ProCure proposed to build a new proton center in West Chicago and applied for a CON. NIU then proposed to build a similar center just six miles away and applied for the state's less-demanding Certificate of Exemption in order to get its center approved first. ProCure subsequently withdrew the lawsuit when the Illinois Health Facilities Planning Board approved ProCure's plan to build its facility.

On May 29, the FTC also submitted comments to the Illinois legislature on a proposal to regulate retail health facilities in the state. The proposal included (i) restrictions on advertising; (ii) a requirement that insurers not discriminate between retail clinics and other healthcare providers; and (iii) a general restriction as to how the retail clinics operate. The FTC believes the bill could put retail clinics at a competitive disadvantage against other healthcare facilities.

What is Next?

In a statement to the American Antitrust Institute during the campaign, President Obama promised to reinvigorate antitrust enforcement, specifically in the healthcare and pharmaceutical industries. President Obama specifically mentioned the need for greater scrutiny of mergers, citing the sheer number of healthcare mergers consummated over the last 10 years and "the

⁹ *East Portland Imaging Center, P.C. v. Providence Health System-Oregon*, No. 06-35394 (9th Cir. May 20, 2008).

consequences of lax enforcement for consumers.” So while the healthcare industry garnered significant interest from the FTC and the DOJ in 2008, there is every reason to believe there is more to come in 2009.

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