Round Table on Hospitals and Health Care

Office of the Connecticut Attorney General

AAGs Michael Cole and Robert Clark

Health Care Mergers & Acquisitions

- The CT OAG has been reviewing health care transactions for quite some time
- Over the last several years we have reviewed:
  - Hartford/HOCC
  - Yale/HSR
  - Hartford/Backus
- Most reviews of proposed acquisitions are conducted jointly with federal agencies
- Health care has evolved and so have the transactions
  - Changing nature of transactions (horizontal and vertical)
  - Increasing number of transactions

How do we learn of these cases?

- Contacted by federal agencies
- Contacted by counsel for parties
- Contacted by stakeholders (competitors, payors, customers)
- News reports
- Going forward – Notice of Acquisition Statute

How do we conduct our reviews?

- **Ultimate Question** – will the transaction likely create or enhance **market power** or facilitate its exercise?
  - Analysis is predictive – likely that adverse competitive effects will arise in the future
  - MP =
    - ability of seller maintain prices above competitive levels, or
    - lessen competition such as quality, service, innovation
- The blueprint is the DOJ/FTC 2010 Horizontal Merger Guidelines
  - focus on **competitive effects** first
    - Market Share/Concentration (# of firms and market share)
    - Substantial Head-to-Head Competition
    - Disruptive Role of a Merging Party, e.g., a “maverick firm”

Initial Steps in the Review (Preliminary Inquiry)

- OHCA Publications, *i.e.*, Annual Reports on CT Hospitals

- ChimeData - collects and edits administrative discharge data from inpatient admissions, hospital-based outpatient surgery, and emergency department (ED) non-admissions.
- Parties "white papers"

- Other available sources

Transaction Appears to Raise Competitive Concerns (Investigation)

- Define the Relevant Market
  - <u>Product Market</u> – a cluster of general acute care inpatient services, *e.g.*, at least 24 hr stay (medical, surgical, other)
    - Usually <u>excludes</u> Outpatient Services – other alternatives
    - Core Services – no adequate substitute
    - Sometimes narrower market, i.e., primary care or obstetrics

Transaction Appears to Raise Competitive Concerns (Investigation)

- Define the Relevant Market
  - <u>Geographic Market</u> – the area within which competition takes place (patient's willingness to travel to find a substitute).
    - Response of health plan to a price increase
    - Response of patient to a price increase

Sources of Information on Competitive Effects of Merger

- Merging Parties
- Conduct interviews
  - Payers
  - Employers
  - Competitors
  - Physicians
  - Ancillary providers
- Review documents and any HSR submissions

What are we looking for?

- Substantial lessening of competition
  - Will the merger result in the entity obtaining market power?
  - Will health care prices to employers/patients go up?
  - Will merged entity be able to provider-based bill physicians and ancillaries?
  - Will merged entity reduce access to services?
  - Will merged entity exclude competitors or limit innovation?

Other Considerations

- **Likelihood of new entry** – counteract anticompetitive effects, i.e., offset a price increase
- **Proposed efficiencies**
  - ➢ Must be verifiable and merger specific (not achievable by other means)
    - ❖ lower prices
    - ❖ Improved quality
    - ❖ New products
  - ➢ Important to look at efficiencies early in the transaction
  - ➢ Important to explain how efficiencies benefit consumers, not just the parties
  - ➢ Not aware of any cases where efficiencies justify merger to monopoly

Other Considerations

- **Failing firm** – would either party in the merger likely fail in the absence of the merger, i.e., *the competitor is exiting the market regardless*.
  - Rigorous Test, all elements must be met:
    - FF unable to meet financial obligations in the near future
    - FF unable to reorganize under Chapter 11
    - FF has been unsuccessful in eliciting reasonable alternative offers that would pose “less severe” danger to competition
    - Absent the acquisition, the assets of the failing firm would exit the market.

Outcome of Investigation

- One of three things
  - No competitive problem so no action taken
  - Competitive problem, but can be resolved short of litigation through a consent decree
  - Competitive problem that cannot be resolved short of suing to block transaction

FTC/State of Idaho v. St. Luke’s

- Background:
  - ➢ St. Luke’s operates 7 hospitals and emergency clinics in Idaho
  - ➢ St. Luke’s employs approx. 450 M.D.s in the geographic market
  - ➢ Saltzer is one of the largest indep. multispeciality in ID, with approx. 44 M.D.s.
  - ➢ In the fall of 2012, St. Luke’s entered into an agreement to acquire the assests of Saltzer.

FTC/State of Idaho v. St. Luke’s

- Background (cont.)
  - The Saltzer acquisition was one of many M.D. practices St. Luke’s acquired over the last several years.
  - On November 12, 2012 two of St. Luke’s competitors filed suit seeking to enjoin the merger.
  - Plaintiffs’ alleged transaction would provide St. Luke’s with 80% of certain M.D. services in Nampa and Boise and reduce competition in these markets.

FTC/State of Idaho v. St. Luke's

- Background (cont.)
  - On December 31, 2012 St. Luke's acquired Saltzer
  - On March 26, 2013, the FTC and ID OAG filed a separate lawsuit claiming the transaction was anticompetitive and requesting it be unwound.
  - Trial commenced on September 22, 2013.
    - Bench trial – 4 weeks, dozens of witnesses, hundreds of exhibits.

The Decision

- The acquisition was one too many
- Acquisition would give St. Luke's 80% of the primary care M.D. market in Nampa (a "must have").
  - <u>Bargaining Leverage</u> - negotiate higher reimbursement rates from health plans that will be passed onto the consumer.
  - <u>Referrals to St. Luke's</u> - raise rates for ancillary services (x-rays, colonoscopies, lab, minor OP services) to the higher hospital-based billing rates.

The Decision

- Court acknowledged procompetitive aspects of the deal but
- Court found that the claimed efficiencies could be achieved without the acquisition.
    - ➢ Although the transaction was intended to improve patient outcomes, there are other ways of achieving this without the competitive risks.

The Decision

- Efficiencies could be achieved outside merger, e.*g.*,
  - The transition to integrated care and risk-based contracting could be obtained with the M.D.s St. Luke's already had
  - Efficiencies resulting from Epic (EHR system) do not require employment of M.D.s