

Buyers And Sellers Beware – Federal And State Antitrust Authorities Heighten Scrutiny Of Healthcare Provider M&A

Article By:

Sills Cummis & Gross

The pace of consolidation and affiliations among healthcare providers has increased dramatically over the last year and is predicted to continue to increase in 2012. Whether the providers are attempting to increase their size and scope to combat Medicare and Medicaid reimbursement rate reductions, increase their bargaining power against large healthcare insurers or develop new sources of revenue, providers at every level of the healthcare industry – including hospitals and physician groups – are seeking transactions to bolster their financial viability.

At the same time the scrutiny of such transactions by both state and federal antitrust authorities has increased dramatically. While the agencies acknowledge the potential pro-competitive effects the transactions may provide for consumers – lower prices, increased service quality, greater innovation – the antitrust enforcers are also concerned that such consolidation can lead to the opposite – higher prices, reduced quality, less innovation. With a string of recent successes in challenging proposed transactions, both state and federal antitrust agencies are continuing their aggressive review of transactions, as well as demanding divestitures, imposing conditions on the transactions or seeking to stop transactions entirely.

Therefore, healthcare providers considering mergers, acquisitions or affiliations should assume from the outset of negotiations or discussions that any proposed transaction will be closely reviewed by state and/or federal antitrust authorities and that the transacting parties will need to provide the antitrust enforcers with credible and persuasive analyses that the transaction will not lead to anticompetitive effects. A brief review of the current transaction landscape and the antitrust challenges to recent transactions provides a useful perspective for healthcare providers to develop a strategy to prepare for the antitrust review of their proposed transactions.

Industry Consolidation

In March, articles in both the *New York Times* and the *Wall Street Journal* detailed the increasing consolidation in the healthcare industry, especially among hospitals, and the expectation that the rate of such consolidation will continue, if not increase, in 2012. The *New York Times* article was based on a Moody's report that concluded that the pace of smaller and nonprofit hospitals being acquired by larger entities, including for-profit companies such as private equity firms, would increase in 2012.^[1] Similarly, the *Wall Street Journal* article reported that “[a] 10-year high of 86 [hospital] deals,

valued at \$7.94 billion in total, were announced last year, according to research firm Irving Levin Associates Inc.”^[2] The article also discussed the growing tension between the hospital industry and the antitrust agencies, especially the Federal Trade Commission (“FTC”), which has been the most aggressive agency in challenging healthcare provider transactions. The industry believes that economic scale is necessary for providers to achieve the cost reductions and improved services envisioned by the nation’s healthcare reform law. In response, the agencies argue that they seek only to ensure that such hospital consolidation does not lead to the opposite – the reduction or elimination of meaningful price, quality of service or innovation competition.

The consolidation is not limited to hospital mergers and acquisitions. The transactions also involve hospitals acquiring physician practices, smaller physician practices merging with larger physician groups, and deals between long-term care pharmacy providers, psychiatric facility operators, dialysis clinic operators, pharmacy benefits managers and even companies that provide services to healthcare providers. Increasingly, the hospital transactions involve acquisitions by for-profit companies, including private equity firms.

The transacting parties envision several benefits from such consolidation – increased leverage in negotiating reimbursement rates with insurers; increased ability to cut costs to combat reduced government and private insurer reimbursement rates; and increased revenues from the addition of new services, improved service quality, redesigned delivery systems or expansion into nearby geographic areas.

Antitrust Scrutiny

Numerous proposed healthcare provider transactions over the last year have been challenged by either state or federal antitrust agencies. In many instances, these challenges have resulted in the abandonment of the proposed deal by the providers, the requirement of divestitures or the imposition of conduct restrictions. The antitrust agencies have not confined their activity to only hospital mergers and are aggressively pursuing transactions across the healthcare provider spectrum. In addition, the fact that the deal may have been small enough to avoid an HSR filing to the federal antitrust agencies has not meant that such transactions avoided scrutiny.

Psychiatric Facilities

- In late 2010, the FTC required Universal Health Services, Inc. to sell 15 psychiatric facilities in three markets – Delaware, Puerto Rico and Las Vegas – as a condition of the FTC’s approval of Universal’s \$3.1 billion acquisition of Psychiatric Solutions, Inc. The FTC argued that without the divestitures, the transaction would have combined the two largest competitors for acute inpatient psychiatric services in the three markets and thereby increased Universal’s ability to impose price increases and reduced its incentives to improve services.

Hospitals

- The FTC challenged Phoebe Putney Hospital Systems’ proposed acquisition of competitor Palmyra Park Hospital, both in Albany, GA, asserting that the acquisition was a merger to monopoly that would eliminate all price and non-price competition between the hospitals. The Hospital Authority of Albany-Dougherty County holds title to Phoebe Putney’s assets and approved the transaction. Both the district court and the Seventh Circuit have rejected the FTC’s challenge pursuant to the state action doctrine, and the FTC has filed for review by the

Supreme Court.

- The Pennsylvania Attorney General entered a consent decree imposing conduct restrictions upon two merging hospitals that competed in the Scranton, PA region – Geisinger Medical Center and Shamokin Area Community Hospital – to alleviate the AG’s concern that the merger would eliminate competition between the only two acute care competitors in the region.
- In November, the FTC challenged a hospital acquisition in Rockford, Illinois in which OSF Healthcare System sought to acquire competitor Rockford Health System. The FTC alleged that the combined entity would have only one much smaller competitor in the region.
- National hospital company Community Health Systems Inc. abandoned its proposed acquisition of Roswell Regional Hospital after the FTC expressed concerns that the acquisition would combine the only two competing hospitals in Roswell, NM, and that therefore, further review of the transaction was necessary.
- The FTC challenged ProMedica Health System Inc.’s proposed acquisition of smaller competitor St. Luke’s Hospital in Toledo, OH. The FTC alleged that the acquisition would reduce competition for general acute-care inpatient hospital services. In December, following an administrative trial, an ALJ issued an order and decision in favor of the FTC’s complaint.

Physician Groups

- Providence Health & Services, a not-for-profit health system operating in Alaska, Washington, Montana, Oregon and California, abandoned its plan to acquire Spokane Cardiology and Heart Clinics Northwest after the FTC concluded that the acquisition was likely to have anticompetitive effects in Spokane, WA. Although the acquisition was not reportable under the HSR Act, the FTC conducted an investigation that led to its concerns.
- The Pennsylvania Attorney General entered into a consent decree with a urology group in the Harrisburg, PA area that had been formed in 2005 by the merger of five independent urology practices in the area. Based on concerns regarding the group’s post-merger conduct, the AG imposed conduct restrictions intended to alleviate the group’s market power.
- The Maine Attorney General entered into a consent decree imposing conduct restrictions regarding Maine Medical Center’s acquisition of two cardiologist practices. The AG sought to eliminate the potential reduction in competition for general, interventional and electrophysiological cardiovascular services in southern Maine.
- Boise, ID-based St. Luke’s Health System recently announced that it was cooperating with an investigation by the Idaho Attorney General and the FTC regarding St. Luke’s acquisitions of medical practices. The acquisitions have made St. Luke’s one of the state’s largest employers.

Healthcare Services

- API Healthcare Corp. abandoned a merger with Kronos Inc. after the Department of Justice’s (“DOJ’s”) Antitrust Division expressed concerns that the merger would combine the two largest competitors for healthcare time and attendance solutions.
- The FTC agreed to allow IMS Health, Inc., a provider of market research to pharmaceutical companies, to acquire competitor SDI Health LLC on the condition that IMS divest two of SDI’s competing products to a third party.

Dialysis Clinics

-
- In February this year, the FTC required Fresenius Medical Care AG & Co. KGaA to sell 60 outpatient dialysis clinics in 43 local markets as a condition of the FTC's approval of Fresenius' \$2.1 billion acquisition of Liberty Dialysis Holdings, Inc. The parties are among the top three largest providers of outpatient dialysis services in the nation, and the FTC argued that the combination would lead to higher prices and reduced quality services in the markets by significantly reducing competition in each (from two competitors to one or three competitors to two in 41 of the 43 markets).
 - For similar reasons, the FTC also required DaVita, Inc. to sell 29 outpatient dialysis clinics in 22 local markets as a condition of approval of DaVita's \$689 million acquisition of CDSI I Holding Company, a smaller competing dialysis services provider.

Long-Term Care Pharmacy Providers

- Also this past February, after the FTC issued a complaint to stop Omnicare, Inc.'s hostile acquisition of its long-term care pharmacy provider rival PharMerica Corp., Omnicare abandoned the proposed acquisition. The acquisition would have combined the nation's two largest long-term care pharmacies.

Pharmacy Benefits Managers

- The attorneys general of numerous states, as well as the FTC, are currently investigating Express Scripts' proposed \$29.1 billion acquisition of Medco Health Solutions Inc., which would result in the combined entity being the nation's largest pharmacy benefit manager. In March, it was reported that at least five states – New York, Pennsylvania, Ohio, Texas and California – are considering a suit to stop the deal depending upon what the FTC does.

Antitrust Strategy For Healthcare Providers Considering A Transaction

The enforcement actions by state and federal antitrust agencies against healthcare provider transactions suggest several necessary strategies that providers should implement as they consider potential transactions:

1. Assume that any proposed transaction will be reviewed by state and/or federal antitrust authorities.
2. Engage antitrust counsel as soon as possible to analyze the potential antitrust concerns and prior enforcement actions.
3. Develop theories and evidence of the likely pro-competitive benefits of the proposed transaction from the outset of negotiations.
4. To the extent possible, tailor such theories and evidence to arguments that have been successful previously to obtain antitrust approval.
5. Incorporate discussion of such pro-competitive benefits in any documents discussing the proposed transaction.
6. Be prepared to proactively engage the antitrust authorities to discuss the benefits and potential concerns regarding the transaction.
7. During transaction negotiations, develop potential "fixes" for any significant potential anticompetitive effects, which the parties can subsequently offer to the antitrust authorities, if the need arises.

While these “best practices” may not ultimately help the transaction avoid challenge by the antitrust authorities, employing them will help the transacting parties have the best chance of successfully navigating the currently roiling waters of antitrust review of healthcare provider transactions.

[1] Reed Abelson, “Hospital Groups Will Get Bigger, Moody’s Predicts,” *The New York Times*, March 8, 2012.

[2] Brent Kendall, “Regulators Seek to Cool Hospital-Deal Fever,” March 18, 2012.

This article appeared in the April 2012 issue of The Management Corporate Counsel.

The views and opinions expressed in this article are those of the author and do not necessarily reflect those of Sills Cummis & Gross P.C.

© Copyright 2025 Sills Cummis & Gross P.C.

National Law Review, Volume II, Number 138

Source URL: <https://natlawreview.com/article/buyers-and-sellers-beware-federal-and-state-antitrust-authorities-heighten-scrutiny>