CPI COMPETITION POLICY INTERNATIONAL

CPI Antitrust Chronicle
Sep 2014 (2)

Integrating to Enhance Value and Quality vs. Preserving Competition to Maintain Lower Prices

J. Mark Waxman
Foley & Lardner LLP

Competition Policy International, Inc. 2014© Copying, reprinting, or distributing this article is forbidden by anyone other than the publisher or author.

Integrating to Enhance Value and Quality vs. Preserving Competition to Maintain Lower Prices

J. Mark Waxman[1]

I. INTRODUCTION

The Affordable Care Act ("ACA"), the Triple Aim (targeting enhanced quality and patient satisfaction, engaging in population health, and reducing per capita costs), and the need for capital and infrastructure to change from a fee-based system of care to a value- and results-based system are all driving providers to consider merging and consolidating health care systems, as never before. Those merging believe that only by engaging consumers across a larger and financially integrated platform, and eliminating the inefficiencies of fragmentation, can the necessary efficiencies and quality enhancement really occur in a sustained way.

On the other hand, concerns exist that consolidation to achieve these goals is not necessary, and may well come at the expense of the consumers or those who arrange for their care—the employer and health plan community. Forefront in this concern is the Federal Trade Commission ("FTC"), recently described as "a lonely but powerful voice" suggesting that "consumers may be victimized."[2]

Unfortunately, there is no bright line to indicate where the balance lies between the desire for efficiency and population health management and the need to retain a competitive environment as a check on pricing decisions. Instead, this debate often plays through the application of the provisions of the Clayton Act,[3] which on a market-by-market basis looks to whether the effect of the proposed acquisition will "substantially" lessen competition or "tend" to create a monopoly. Unfortunately, while in many instances it is unnecessary, all too often the answer to this question plays out through the expensive and often frustrating prism of litigation. This Article explores two high profile transactions where the balance is being examined and, in both cases, the examination is taking case through the courts.

II. NAMPA, IDAHO AND THE ST. LUKE'S HEALTH SYSTEM

In Nampa, Idaho, a community initially homesteaded in 1885 and currently with a population under 90,000, has three hospitals in the area, although only one actually within the city. There are also a number of physician groups, although one group (the Saltzer Medical Group) includes 80 percent of the critical primary care physicians in Nampa. One of the hospital systems in the area (St. Luke's Health System) acquired Saltzer as a part of its approach to assemble a team "committed to practicing integrated medicine in a system where compensation depended on patient outcomes," which in turn was found to make it the dominant provider in the area for primary care, thereby giving it "significant bargaining leverage" over the health

[1] J. Mark Waxman is Partner at Foley and Lardner LLP where he is former chair of the Health Care Industry Team, and a member of the Government Enforcement, Compliance & White Collar Defense and Antitrust Practices.

[2] Robert Pear, *F.T.C Wary of Mergers by Hospitals*, NEW YORK TIMES (Sept. 17, 2014).

[3] Clayton Act , Section 7 [15 USC 18]).

plans.[4] This set of facts led the FTC (as well as a number of competitors) to attack the acquisition and seek a divestiture, claiming that the acquisition ran afoul of the Clayton Act by substantially lessening competition.

Following a bench trial early this year, the Court determined that a divestiture was required. The Court's decision reflects the challenge in the market place. First, the Court found that the purposes of the acquisition were to improve patient care, access to quality, and enhance services—not to reduce competition or create a path to a monopoly. The physicians and the hospital involved did not believe a looser affiliation would lead to the necessary level of integration to achieve the desired goals. Yet, it was also true that they recognized the benefits of increased leverage.

Second, the Court found that the resulting market share would create a dominant bargaining position, and although the merging entities were "to be applauded" for their efforts to improve patient care delivery, the Court believed there were other ways to achieve the same effect that did not run the same degree of risk that there would be increased costs as a result. Because the Court found that the transaction would have anticompetitive effects, the transaction would need to be unwound.

The matter is now on appeal, where the argument with respect to the balance between efficiencies and the benefits of integrated delivery against the challenge of a potential for lessening competition will again play out.

III. BOSTON, MASSACHUSETTS AND THE PARTNERS HEALTH CARE SYSTEM

The Partners Health Care System is the largest hospital system in the greater Boston area. Anchored by two of the highest quality institutions in the United States, and formed in response to managed care pressures in the 1990's, it has been a national leader in many health care endeavors, and is one of the largest employers in the State. Over time, it has been growing, and most recently sought to acquire three suburban hospital systems (inclusive of a number of groups of affiliated physicians) with which it has had clinical relationships for many years.

Recognizing that such a large transaction was bound to be heavily scrutinized, Partners worked hard to approach the transaction from the standpoint of the benefits it was bringing: (i) enhanced quality, (ii) the need to move to population health, and (iii) the overall health care benefits it could bring to the delivery system in the areas served by the enhanced system and, in particular, the local communities involved.

Concerned about rising costs, Massachusetts had created the Health Policy Commission ("HPC") to provide public information and analysis with respect to material health care transactions. The work informs and supplements the overall enforcement and oversight authority of the Attorney General in State-based matters. Both the Attorney General and the HPC carefully reviewed the proposed acquisitions and concluded that it was possible that the transactions would lead to higher prices, and it would be necessary and appropriate to address the potentially adverse competitive impacts.

[4] Memorandum Decision and Order, Saint Alphonsus Medical Center et al. v. St. Lukes Health System Ltd. , Case No. 1:13-CV-00116-BLW, Dist. Idaho, January 24, 2014.

In this case, however, rather than address the transaction as one requiring divestiture (a "structural" remedy), the approach taken was to pursue a resolution through controls on future behavior (a "behavioral" remedy), couched in terms of a settlement agreement and consent decree to a complaint. The proposed future constraints seek to address concerns over future growth with respect to hospitals or physicians within the Partners system, pricing restraints, contracting restraints, and other limitations. This resolution is currently being reviewed through the pending approval of the settlement court proceedings, where the determination will be based on whether the settlement is "fair, just and equitable."

As might be expected, the settlement proposal has attracted a great deal of commentary across the affected area, with comments adverse to the resolution filed by insurance carriers as well as competitors. In addition, economists and others with an interest in antitrust issues in health care have weighed in, focusing on whether behavioral as opposed to structural restraints can really be effective. A final resolution awaits further judicial proceedings. They may result in a modification of the settlement terms, approval, rejection, or even potentially formal court hearings at which evidence may be taken prior to a final resolution.

IV. LOOKING FORWARD

Resolving access, quality, efficiency and population health goals of consolidation, as they must be balanced against the benefits of competition and as played out through the judicial system through the application of the Clayton Act (or like State legislation), is clearly a long and expensive process. The alternative, however, is a return to or rebirth of a more regulatory approach, with either pricing and M&A controls applied administratively through something akin to a certificate of need or a public utility model. At the moment, while there is some activity by states in allowing "cooperative activity" subject to active State oversight[5] neither approach finds uniform support across the various States and the Federal governments. As a result, the uncertainly in just where the lines and the balance may be struck will continue to be a burden on the system.

[5] For example in New York, as the result of the enactment of Art. 29-F of the Public Health Law is pursuing this through Certificates of Public Advantage