Antitrust Implications of Hospital to Hospital Affiliations

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What Will Be Covered

• Review of Applicable Antitrust Laws
• Examples of Affiliation Options
• Recent antitrust enforcements regarding hospital affiliations
• Review of Steps to take to minimize antitrust risks
• Review of Applicable Antitrust Laws
Review of Applicable Antitrust Laws

Key Concepts

- Market allocation
- Price fixing
- Efforts to Monopolize
Review of Applicable Antitrust Laws

Key Laws

• Section 7 of the Clayton Act
  – prohibits all types of acquisitions that may substantially lessen competition

• Section 1 of the Sherman Act
  – prohibits agreements unreasonably restraining competition
Review of Applicable Antitrust Laws

Key Laws

• Section 2 of the Sherman Act
  – prohibits monopolization, attempted monopolization, and conspiracies to monopolize

• Section 5 of the Federal Trade Commission Act
  – prohibits unfair methods of competition

Central concern: does merger substantially lessen competition?

Product Market and Geographic Market
Review of Applicable Antitrust Laws

Safeguards

- Statements of Antitrust Enforcement Policy in Health Care
- Rule of reason
- 30% of market
Review of Applicable Antitrust Laws

COPA

• Certificate of Public Advantage
  – Issued by DHEC, can bar federal investigation
  – Purposes:
    • to foster improvements in the quality of health care,
    • moderate cost increases,
    • improve access to needed services in rural areas, and
    • enhance the likelihood that rural hospitals can remain open.
• Examples of Affiliation Options
Examples of Affiliation Options

- Spectrum:
  - Sale
  - Lease
  - Services Arrangement
  - Management
Examples of Affiliation Options

• Sale/Acquisition
  – Outright Sale of the Hospital’s assets
  – Complete transfer of Hospital operations
Examples of Affiliation Options

• Merger
  – Two or more hospitals combine to form new single entity
  – Each hospital contributes assets to new entity
  – New entity operates as a comprehensive system
Examples of Affiliation Options

• Joint Venture
  – Hospital contributes assets to new JV
  – Partner contributes cash to new JV
  – New JV operates Hospital
    • Options for ownership structure
    • Options for governance structure
Examples of Affiliation Options

- **Long Term Lease**
  - Hospital leases assets and operating rights to another hospital/system
  - Hospital Board continues to own assets and provide oversight of lease
  - Options for reimbursement; length of lease; control
Examples of Affiliation Options

• Management Agreement
  – Hospital engages another entity (hospital/system/management company) to manage hospital
  – Hospital usually retains ownership of assets, operating license, A/R
Examples of Affiliation Options

• Other contractual relationships
  – Group purchasing arrangements
  – Service line arrangements
  – Physician recruitment services
  – Billing/collection services
Examples of Affiliation Options

• Hart-Scott-Rodino Filings
  – Purpose
  – When required
  – Effect
• Recent antitrust enforcements regarding hospital affiliations
Recent Antitrust Enforcements Regarding Hospital Affiliations

• Evanston Northwestern Healthcare Corp. acquisition of Highland Park Hospital Hospital
  – FTC found that acquisitions substantially lessened competition in violation of Section 7 of the Clayton Act
  – Hospital immediately and substantially raised its prices for inpatient hospital services
Recent Antitrust Enforcements Regarding Hospital Affiliations

- ProMedica Health System acquisition of St. Luke Hospital
  - Rival hospitals
  - Concern over harm to competition of (1) general acute-care inpatient hospital services and (2) inpatient obstetrical services.
  - Acquisition resulted in 60% market share and reduced competitors from three to two
Recent Antitrust Enforcements Regarding Hospital Affiliations

- Phoebe Putney Health System
  - Attempted acquisition of Palmyra Park Hospital
  - Only two competing hospitals in Albany, Georgia area
  - Market share of 85%
• Review of Steps to take to minimize antitrust risks
Review of Steps to Take to Minimize Antitrust Risks

• Areas where antitrust issues may arise:
  – ACOs
  – Physician group acquisitions
  – Hospital affiliations
  – Partial integration
    • Insurance products
    • Global billing (technical and professional)
Review of Steps to Take to Minimize Antitrust Risks

• Analyze market share and competitive effect
• Avoid price increases post affiliation
• Meet Safeguards set forth by DOJ/FTC
• Apply for COPA
• State action immunity
Review of Steps to Take to Minimize Antitrust Risks

• Analyze the scope of the affiliation
  – Geographical footprint
  – Scope of services

• Know the rules; additional information available at www.ftc.gov
  – Advisory opinions
  – Industry guidance
  – Information on recent actions
Larkin Ellzey is an Associate with Nexsen Pruet's Health Care team. He regularly advises clients in all aspects of health care transactions, including physician/hospital relationships, mergers and acquisitions, joint ventures, entity formation, leasing and purchase of medical office space, and corporate governance. He works with clients to ensure compliance with federal and state laws and regulations in each of these components. He also assists businesses and health care entities in the drafting and review of various business agreements.

Tim Hewson, a healthcare attorney with Nexsen Pruet, counsels hospitals, long-term care facilities, multi-specialty physician practices and other health care entities. Issues he advises on range from managed care, mergers, acquisitions and reorganizations, hospital/physician joint ventures, Stark and Anti-Kickback advice, governmental investigations, physician recruiting and employment, and medical director agreements. He is a member of the American Health Lawyers Association and Health Care Financial Management Association.
Questions?