Antitrust Compliance in Hospital-Physician Mergers and Acquisitions
Assessing Anti-Competitiveness and Minimizing Risk of Agency Challenges

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1pm Eastern    |    12pm Central   |   11am Mountain    |    10am Pacific

Today’s faculty features:

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Hospital acquisition of physician practices: Background on the antitrust issues

Robert F. Leibenluft
Washington, DC

December 11, 2013
Presentation outline

• Merger review under the antitrust laws
• The FTC review of physician acquisitions
• Remedies
• St. Luke’s acquisition of the Saltzer Medical Group: background and key issues
• Questions?
Merger review under the antitrust laws

- Mergers or acquisitions that substantially lessen competition can be challenged under Clayton Act §7
- Cases can be brought by DOJ, FTC and state attorneys general, as well as private litigants with standing
- Challenges can be brought to transactions that are:
  - Horizontal (involving competitors)
  - Vertical (between firms at different levels of the “production process” or “distribution chain”
    - E.g. hospital/physicians or health plan/physicians
  - Conglomerate (e.g. geographic or product market extensions)
- Legal framework
  - Merger case law
  - 2010 DOJ/FTC  Horizontal Merger Guidelines
Threshold question: Has there been a merger or acquisition?

- In some situations there may be a question as to whether there has been a merger, even if physicians claim they have formed a new merged practice.
- FTC challenge to Surgical Specialists of Yakima:
  - 3 separate surgical groups formed LLC of 24 physicians.
  - FTC alleged no integration of practices, no central control or management, no sharing of revenues or costs.
- Such arrangements are subject to review under Sherman Act §1- and if there has been little or no integration, could be even challenged as *per se* illegal violations that do not require a showing of market power or anticompetitive effects.
- On the other hand, the employment of additional physicians, as opposed to the acquisition of their practices, generally should not raise antitrust issues.
Key issues in merger analysis

- Identify potential competitive concerns
- Define the relevant market
  - Product
  - Geographic
- Calculate market shares and change in market concentration for each relevant market
- Analyze anticompetitive effects
  - Unilateral
  - Coordinated
  - Power buyer
- Assess likelihood of entry
- Consider procompetitive efficiencies
- Consider failing firm defense
Identify possible potential concerns

• Horizontal mergers (e.g. hospital with employed physicians that acquires additional physicians in same specialty)
  – Primary concern – increased market power resulting in
    • Higher prices to health plans
    • Reduced quality, innovation

• Vertical transactions (e.g. hospital/physicians or health plan/physicians)
  – Primary concerns
    • Foreclosure of substantial share of the market, thereby raising rival’s costs
    • Raising barriers to entry
  – With hospital acquisitions of physician groups, consider impact on rival hospital’s admissions, ability to form ACOs

• Conglomerate transactions (e.g. product or geographic market extensions)
  – Primary concerns
    • Entities could be potential competitors
    • A controversial theory – even though market concentration has not increased, transaction enables acquirer to obtain higher rates
Defining the relevant market

- Key question: To whom else could customers turn in response to a price increase?
  - Who is the customer?
    - Patients
    - Health plans
  - Product dimension
    - With physicians, starting point is physician specialties
    - But in some cases, product could be more narrow than a single specialty, or encompass multiple specialties
  - Geographic dimension
    - How far will patients go for certain types of cares?
    - Will vary by type of service
Calculating shares and measuring concentration

• Practical questions
  – Data sources for the “denominator”
  – What is appropriate measure: head count, revenues, procedures, patients, visits?

• What share level raise concerns?
  – DOJ/FTC: Presumption that merger will enhance market power if it increases HHI by > 200 points and results in market HHI >2500
  – Another possible rule of thumb: If merged entity will have < 30% share, unlikely to raise antitrust issues
  – Degree of concern will grow as share size increases, and also with confidence about market definition and extent of entry barriers
Entry

• DOJ/FTC Merger Guidelines: Agencies consider the “timeliness, likelihood and sufficiency” of entry

• In physician markets, consider
  – Regulatory barriers to entry
  – Whether new physicians will be able to obtain referrals
  – Whether hospitals or health plans might sponsor entry

• Recent examples of entry – whether successful or not successful - can be very probative
Efficiencies

• DOJ/FTC will only “credit” efficiencies that are
  – “Merger-specific” – i.e. likely to be accomplished with the merger and unlikely to be accomplished without it or another means with comparable anticompetitive effects
  – Verifiable
  – Cognizable i.e. do not arise from an anticompetitive reduction in output or service

• Efficiency claims are unlikely to “trump” very substantial adverse competitive effects
What will prompt an investigation/litigation?

• Most physician acquisitions will not require an HSR-filing because they won’t meet the $70.9 million size-of-transaction threshold
• But non-reportable transactions can still be reviewed either prospectively or retrospectively
• Review could be prompted by complaints from
  – Health plans
  – Competing hospitals or physician practices
  – Disgruntled physicians
FTC Perspective on Hospital Acquisitions of Physician Groups
TYPES OF TRANSACTIONS

- Hospital Structure
- Physician Structure
HOSPITAL STRUCTURE

- Direct Acquisition
- Acquisition through affiliated foundation
PHYSICIAN STRUCTURE

- Single entity
- Integrated IPA
- Non-integrated IPA
PRODUCT MARKET ANALYSIS

- Specialties as distinct product markets
- Provider-organized multi-specialty networks
- Payor-organized multi-specialty networks
GEOGRAPHIC MARKET ANALYSIS

- Data analysis
- Qualitative evidence
ANTICOMPETITIVE EFFECTS

- Horizontal Analysis
  - Market share calculation
  - Dominant firm behavior
  - Coordinated interaction
- Vertical Analysis
ENTRY

- Physician entry
  - Geographic extension
  - Hospital-sponsored entry
  - Payor-sponsored entry
  - Scale

- Hospital entry
  - Timeliness
  - Certificate-of-need
Remedies In Hospital Acquisitions of Physician Groups: Recent Cases and Practical Issues

William E. Berlin
December 11, 2013
Recent Increase in Agency Enforcement Resulting In Remedies

- Both FTC and state AGs have investigated, litigated some, and settled other physician mergers in past 3 years
- None of these transactions were reportable under HSR thresholds, but still scrutinized
- All until Renown were either abandoned or resolved with “conduct” remedies
- Renown Health is first FTC settlement of a physician group acquisition and only consent decree by any agency applying a “structural” remedy
- Multiple ongoing investigations and litigation by FTC and AGs - notably St. Luke’s/Saltzer
Conduct vs. Structural Remedies

- What is a conduct remedy?
- What is a structural remedy?
- Hybrid remedies
- Other options:
  - Block merger in entirety (structural?)
  - Allow anticompetitive merger to proceed with no remedy
Renown Merger Background

- Renown Health is largest hospital system in Reno. Competitors include St. Mary’s and NNMC in Reno, and Carson-Tahoe Hospital in Carson City
- Acquired two largest cardiology groups in Reno – SNCA and RHP, about 15 MDs each.
- Few remaining MDs, so 97% market share initially in Reno MSA
- St. Mary’s recruited 3 MDs (and likely more but for settlement), reducing Renown’s share to 88%
- Employed MDs through contracts with noncompetes and other restrictions (typical in Reno, NV)
- Provisions in physician employment contracts to support any independent divested physicians (e.g., back office functions, office, contracting, etc.)
Renown and St. Luke’s Risk Mitigation/Steps

- Impacted Temporary and Final Relief

- “Community commitment” to maintain pre-merger coverage and referral patterns

- Payor commitment to maintain current rates and other contract terms – no renegotiation, and discussions of joint innovative products (e.g., bundled pricing)

- Renown: FTC/NAG requested parties to hold separate, but Renown closed, so agency investigation was effectively retrospective
  - Impacted course of investigation and settlement

- St. Luke’s: Court denied motion for preliminary injunction (but no integration?)
Early/Pre-closing **Do’s** and **Don’ts** That Can Impact Remedy

- **Do** develop an efficiency/integration plan as the motivating force for the transaction, and then stick to it – late efficiency plan will appear pretextual.
- **Do** engage payors early in the process to reassure and involve them (i.e., in merger efficiencies) - obtain buy-in
- **Do** reassure competitors (to the extent possible) and the community at large
  - Public backlash can become political or agency opposition
- **Do** expedite the transactional process and close as soon as (and if) possible – but risk from closing over agency objection
- **Do** assess the antitrust risks (and retain an economist thru counsel) to anticipate and prepare for agency concerns
- **Don’t** assume small non-reportable transaction will not be noticed by the FTC or AG
Investigation Do’s and Don’ts That Can Impact Remedy

- **Do** cooperate and maintain rapport and transparency with the agencies
  - Be vigilant for openings to resolve agency concerns and thus the investigation

- **Don’t** neglect the AG
  - Many state statutes provide for additional remedies (e.g., civil penalties) plus attorneys fees and compliance programs

- **Do** continue to prepare your case on the substantive merits
  - Otherwise there is no “Plan B” and no settlement leverage, and the agencies can and will call your bluff

- **Do** identify and advocate defenses that apply in your case, e.g.: “entry” by new physicians recruited by rival hospital; switching by own employed physicians to rival making market share irrelevant
Renown Settlement/Remedy

- Complicated (and initially motivated) by dispute and litigation with first of acquired physician groups.
- Difficulty – determining how many physicians to divest and which ones (subspecialty, age, productivity)
- Noncompetes were complicating factor, but ultimate “solution” as mechanism for “testing the water”
Renown Settlement Provisions

- Suspend noncompetes for 60 days to allow MDs to negotiate employment (or independent support)
- Standard for “acceptable terminations”: MD’s intent practice in Reno/Sparks for at least one year (Renown not guarantor)
- Thresholds: as few as 6 (75% residual market share) and no more than 10 (66% market share)
- Renown not required to terminate any (if less than 6 volunteer, N/Cs remain suspended)
- But Renown may affirmatively terminate MDs
Renown Settlement Provisions

- Carve-outs permitting Renown to limit provider panels with payors or ACOs, excluding divested MDs from provider networks and paid positions or reading panels
- Support for divested physicians (independent) incorporated into consent decree
- Only *ongoing* requirements are compliance reporting and notice for new cardiology acquisitions
- Overall – flexible process with defined time period which allows Renown to resolve investigation, implement merger efficiencies going forward, and avoid operating under government oversight (limited)
- No more MDs divested than market can support
Conduct vs. Structural Remedies

- Conduct remedies potentially more restrictive than structural relief
  - *Urology of Central Pennsylvania* (UCPA) – curtails bargaining power with payors: arbitrate contracting impasses, refer outside of UCPA
  - *MaineHealth* – freezes premerger status quo: restricts pricing/contracting with payors, MD compensation, network composition
  - *Geisinger/Lewistown Health* – hybrid remedy? restricts pricing/contracting with payors and suspends non-competes to “self-divest” MDs) (*a la Renown*)
Factors Affecting Remedy

- Federal (FTC) vs. state AG enforcement
- Litigated judgment vs. consent decree settlement
- Consummated/retrospective review vs. prospective review
- Even if retrospective: consummate merger _before_ agency investigation vs. closed over agency objection/despite concern
- Fairness to physicians – not fungible assets
- Balancing (divestiture or conduct) remedy’s effectiveness in solving the competitive harm vs. impairing/impeding merger efficiencies
  - _E.g._, cost reduction and quality improvement goals of Health Care Reform
Settlement Do’s and Don’ts

- Don’t “settle” for conduct remedies, advocate for a structural fix, where one is feasible
  - Key to formulating a structural remedy is the presence of rival hospital(s) to employ and with capacity to support divested physicians

- Do negotiate forcefully, continuing to use substantive legal and economic arguments to support position
  - Each transaction presents unique problems, but also unique solutions

- Insist on consistency/uniformity between FTC and AG terms

- Follow the rules – the terms of the settlement – once you have agreed to them
  - Penalties for compliance violation are potentially very significant (e.g., fines, civil penalty, injunctive relief)
St. Luke’s acquisition of Saltzer Medical Group
St. Luke’s acquisition of Saltzer Medical Group:
The parties

- St. Luke’s is a multi-hospital system with 6 Idaho hospitals and >100 clinics throughout Idaho and eastern Oregon
  - 399-bed in Boise, Idaho
  - 22 physician practices with 200 employed physicians, including the Mercy Group in Nampa, ID with 7 family practitioners

- Saltzer Medical Group
  - 44 physician - multi-specialty group with principal office in Nampa, ID
  - Includes 11 FPs, 6 internists, and 11 pediatricians
  - More than ¾ of its patients come from Nampa

- St. Alphonsus Health System, includes
  - 381-bed hospital in Boise
  - 152-bed hospital in Nampa which relies heavily on SMG (which is across the street) for admissions

- Treasure Valley Hospital: 9-bed physician-owned short-term care hospital in Boise

- Federal Trade Commission
- Idaho Attorney General
St. Luke’s/Saltzer: The litigation (St. Al’s complaint)

- Alleged markets
  - Primary care and general pediatric physician services sold to commercial payers in a geographic market no broader than Nampa
  - General acute-care inpatient hospital services sold to commercial payers in a geographic market no broader than the Boise-Nampa MSA
  - Outpatient surgery services sold to commercial payers in a geographic area no broader than the Boise-Nampa area

- Alleged competitive effects
  - Horizontal theory – reduced competition in primary care and general pediatric physician services because of increased St. Luke’s share
  - Vertical theory – reduced competition for inpatient and outpatient services because of foreclosure of critical source of physician referrals
St. Luke’s/ Saltzer: The litigation (FTC>ID AG complaint)

- **Product market**
  - Adult primary care services sold to commercial health plans

- **Geographic market**
  - 5 zip codes that encompass Nampa and Caldwell and which account for 75% of visits to Nampa-area physicians

- Post-acquisition St. Luke’s would have a market share of 57% in adult PCP services based on visits
  - St. Al’s would have 16%, with all other entities less than 5% each

- **Competitive effects**
  - Increase in St. Luke’s dominance in contract negotiations
  - Increase in costs for ancillaries
  - Reduced non-price competition
  - Effects will occur even if physician and hospital negotiations are not tied
St. Luke’s / Saltzer: Key issues

- Product market
  - Are pediatric services also relevant market for this case?
- Geographic market
  - Nampa only? Also include rest of Canyon County? Meridian, Idaho? Entire Boise-Nampa MSA?
- If concerns are largely horizontal:
  - Is this a compelling case given that St. Luke’s has only 7 adult PCPs in Nampa?
- If concerns are largely vertical:
  - How serious is the foreclosure risk?
  - How does the court distinguish the harm to competition from harm to a competitor?
St. Luke’s / Saltzer: Key issues, cont’d

- **Efficiencies**
  - Could claimed efficiencies be achieved through contracting with the physicians rather than acquisition?
  - Does the ACA warrant greater willingness to accept consolidation to achieve more integrated care?

- **Entry**
  - Can St. Al’s bring in new physicians to displace referrals lost from Saltzer?
  - Or incentivize Saltzer physicians to switch to it?

- **Remedy**
  - Is there a viable remedy short of divestiture?
  - Have St. Luke’s and Saltzer substantially integrated yet?
Robert F. Leibenluft's practice is devoted entirely to health and antitrust matters, including counseling and litigation regarding antitrust issues in the health, medical device, and pharmaceutical industries.

Upon completing law school, Bob worked as an attorney advisor in the Federal Trade Commission (FTC)'s Office of Policy Planning, concentrating on health and antitrust matters. In 1981, he joined Hogan & Hartson and became a partner in the firm in 1989. He practiced health law at Hogan & Hartson until January 1996 when he rejoined the FTC as Assistant Director for Health Care in the FTC's Bureau of Competition. As head of the Health Care Division, Bob supervised a 25-30 person staff engaged in the review of mergers, acquisitions, and joint ventures involving hospitals, physicians, and other healthcare providers, as well as conduct in the healthcare and pharmaceutical industries. While at the FTC, Bob supervised the 1996 revisions of the FTC and DOJ Statements of Antitrust Enforcement Policy in Health Care in which the Agencies first addressed clinical integration. He rejoined Hogan & Hartson in September 1998.

Bob is an inaugural fellow of the American Health Lawyers Association, where he previously served as a Vice-President and member of the Board of Directors. He is a former Chair of the ABA Antitrust Section Joint Conduct Committee, Health and Pharmaceuticals Committee and State Enforcement Committee. He is Chair of the Board of Directors of HCI3, the parent company of Prometheus Payment Inc. and Bridges to Excellence.

EDUCATION
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John P. Wiegand is an attorney in the San Francisco office of the Federal Trade Commission. He practices antitrust law, primarily in the health care and telecommunications industries. He has been involved in several health care matters that have resulted in litigation, including hospital merger and physician price fixing cases. He was part of the Commission’s trial team in *North Texas Specialty Physicians*.

Mr. Wiegand has addressed policy issues relating to the application of the antitrust laws to the health care and telecommunications industries in both published articles and speeches. He has co-authored six Commission-authorized public comments on competition issues in the telecommunications industry. In the 2003 Federal Trade Commission/Department of Justice Hearings on Health Care and Competition Law and Policy, he served as both a moderator and a presenter.

He has received the FTC’s Paul Rand Dixon Award for Legal and Economic Analysis. He earned his J.D. in 1985 from the University of Illinois, and his A.B. in 1982 in economics from the University of Chicago. He is admitted to the bar of Illinois, and he is a member of the Federalist Society’s Practice Group for Corporations, Securities and Antitrust.

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William E. Berlin is a principal and member of Ober|Kaler’s Antitrust and Competition, Litigation and Health Law Groups. Based in the firm’s Washington, D.C., office, he devotes his practice to antitrust litigation and counseling, representing hospitals, health systems, health insurance plans, physicians, and other health care entities.

Bill’s practice focuses primarily on representing clients in private treble-damage litigation, as well as in U.S. Department of Justice Antitrust Division, Federal Trade Commission and state antitrust enforcement agency investigations and actions, involving mergers and acquisitions, including federal (Hart-Scott-Rodino) and state clearance proceedings, exclusionary conduct by dominant firms, and contracting provisions or other collaborative activity between hospitals, physicians and health plans. Bill’s private and government agency litigation frequently requires managing complex procedural issues, including large-scale electronic document discovery. Bill also serves as a monitor arbitrator or mediator in antitrust and other disputes between health care entities.

Formerly a trial attorney with the Health Care Task Force and later the Litigation 1 Section of the DOJ’s Antitrust Division, Bill has extensive experience leading investigations and litigation of both merger and non-merger civil antitrust cases in healthcare and other market sectors, including the Antitrust Division’s successful five-year litigation and trial in U.S. v. Dentsply International, Inc. He also managed the Joint DOJ/FTC Hearings on Health Care and Competition Law and Policy in 2003 on behalf of the DOJ and moderated several sessions during the hearings.