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Health Care Mergers In 2014: The Enforcers Strike Back

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Law360, New York (January 20, 2015, 10:09 AM ET) -- Antitrust enforcement continues to play a crucial role in health care, and rightly so because of the ever-increasing need to control costs. The focus of enforcement is on consolidation, but the role of consolidation is crucial in bringing about a more efficient, integrated health care system with the ability to bend the cost curve and improve health care quality. Indeed, the Affordable Care Act encourages many forms of increased consolidation.

Nevertheless, some see consolidation as an anathema, leading to increases in market power and higher prices. Needless to say, there are warring studies and commentary on the subject.

The Federal Trade Commission and state attorneys general have ramped up enforcement but the results seem far from consistent. With the FTC, there has been increased scrutiny placed upon not only mergers between hospitals, but also a newfound energy in challenging physician practice acquisitions that had previously gone uncontested.[1] As FTC Chairwoman Edith Ramirez remarked, provider consolidation is a “priority” for the commission.[2]

In 2014, the FTC settled two health care provider merger cases requiring certain asset divestitures in both.[3] In the fall, the FTC, after considering a consent proposal in the ongoing Phoebe Putney merger case, withdrew acceptance of the proposed consent agreement and restarted litigation.[4] Lastly, in 2014, the FTC won two provider consolidation cases in federal court[5] (we will discuss the St. Luke’s case below).[6]

In contrast to the FTC, several state attorneys general have been more willing to permit

consolidation to occur with some type of regulatory decree to attempt to prevent anti-competitive conduct. For example, in New York, the attorney general allowed the two largest acute care hospitals in Utica "to combine in order to survive a challenging economic environment."[7] However, the AG required a consent decree to regulate their conduct going forward including rate protections, requiring physician access to either hospital, and requiring the merged entity achieve certain efficiencies post-merger.[8] A similar approach was used in provider acquisitions and mergers in Pennsylvania involving the Geisinger Health System.[9] And as described below, in 2014's most hotly contested matter, the Massachusetts attorney general permitted Partners Healthcare, the dominant hospital system in eastern Massachusetts, to acquire three rival hospitals and physician practices under a complicated heavily regulated consent decree.

One cannot suggest consistency in the different approaches taken by the federal government and by the states. To clarify the challenges facing provider consolidation matters, this article will focus on the two most important such matters of 2014: St. Luke's and Partners. Both of these pending decisions could dramatically change health care provider consolidation litigation.

St. Luke's Litigation

As described above, the FTC has ramped up enforcement against mergers of health care providers. Hospital merger enforcement is a well-trod territory, but hospital-physician alliances have not been challenged until the FTC's case against Boise, Idaho-based St. Luke's Health System's vertical acquisition of Saltzer Medical group and its physicians in the town of Nampa, Idaho.[10] A district court ordered a divestiture, and the case is currently on appeal to the Ninth Circuit. The case was argued on Nov. 19, 2014 with a decision anticipated in early 2015.

Until now, the agencies had been reluctant to challenge hospital-physician alliances and probably for good reason. How do you define a physician services geographic market? Are entry barriers ever significant in physician service markets? Are there fairly clear-cut efficiencies from hospital-physician alliances (after all, the ACA is a clarion call for more, not less, integration)? On appeal, the panel will address many of these issues, but for the purposes of this article, we will focus on the analysis of pro-competitive merger efficiencies.

In its lengthy findings, the district court recognized the tremendous need to consolidate to

improve health care quality and create a system to better control costs, away from volume-centric medicine towards high-quality, efficient care. The court outright “applauded [St. Luke’s] for its efforts to improve the delivery of healthcare.” Moreover, the court stated that the transaction, if permitted, would “improve the quality of medical care” in Nampa. The court further noted that Saltzer had previously “made attempts to coordinate care ... under less-formal affiliations,” but “none of [those] projects” have come to fruition. Still, the court found that vertical acquisition of just 16 of the Saltzer physicians violated Section 7 of the Clayton Act.

Setting aside the question of competitive harm in such a modest transaction (which is hotly debated on appeal), the most interesting issue is whether St. Luke’s intent and the likely efficiencies from the transaction outweigh the potential competitive harm. St. Luke’s introduced considerable evidence that the merger would allow the parties to offer a high level of coordinated, patient-centered care. According to St. Luke’s, the evidence showed that the acquisition would assist in a transition from volume-based to value-based delivery of care. Moreover, St. Luke’s showed that the parties planned on implementing population health management and increased outreach to underserved patients. Further, it demonstrated that the transaction had already expanded services to uninsured and underserved patients in Nampa — a point later stressed by public interest groups as amici in the court of appeals.[11]

However, the district court ultimately rejected these stated efficiencies on the basis that they were not “merger-specific.” The district court found that the efficiencies were not merger-specific because there were less restrictive, alternative models that the parties could have utilized to achieve the same goals. However, as I have discussed elsewhere, this analysis overlooks the complexity of provider contractual arrangements in which parties face structural and coordination hurdles and must comply with federal laws such as the Anti-Kickback Statute and Stark Law.[12] Moreover, the court’s analysis and FTC’s approach reinforces the asymmetric burdens of proof in merger cases where plaintiffs need only predict anti-competitive effects and merging parties must prove pro-competitive efficiencies to outweigh any harm.[13] FTC Commissioner Joshua Wright has been particularly critical of the use of asymmetric burdens in merger litigation.[14]

From a legal perspective, there is an additional important issue raised — who bears the burden of demonstrating there is no less restrictive alternative? Under the Sherman Act, the plaintiff bears that burden. The FTC claims the burden under the Clayton Act is on the

defendant. The law is unclear, but to place the burden on the defendant might not further sound competition policy.

If the Ninth Circuit upholds the court's analysis and the FTC's approach to efficiencies, it may likely dampen the ability of providers in similar situations to demonstrate pro-competitive efficiencies since there are few limits to suggesting an alternative model, regardless of its applicability to the pending matter. Raising barriers to collaboration would create an even stronger disincentive to coordinate and improve care.[15] On the other hand, a Ninth Circuit reversal could provide prudent guidance for efficiency analysis that would promote collaboration.

Partners Proposed Settlement

Like the agencies, states are increasingly analyzing potential anti-competitive outcomes from provider mergers and acquisitions. However, the states, unlike the federal government,[16] are more likely to consider remedial settlements rather than preventing the acquisition outright.

Is this regulatory approach appropriate? Years of antitrust jurisprudence in other markets says no, but health care is not like any other market. Few markets are as regulated, and Massachusetts has been in the forefront of trying to regulate and manage the increase in health care costs.

In 2014, this issue came to a head involving a proposed settlement by the commonwealth of Massachusetts of an acquisition by Partners Healthcare System of three hospitals and over 450 physicians. Partners originated in 1994 with the merger of Boston's Massachusetts General Hospital and Brigham and Women's Hospital and dominates the eastern Massachusetts market. In 2014, Partners looked to merge with both the South Shore and Hallmark hospital systems in suburban Boston communities. The Massachusetts Health Policy Commission, a newly formed organization tasked with monitoring health spending within the state, found that the two mergers would increase annual total medical spending by up to $26 million and $23 million respectively.[17] Instead of seeking to block the transaction, Massachusetts Attorney General Martha Coakley decided to implement a novel conduct-oriented remedy. (The U.S. Department of joined the investigation but took no enforcement action so far).

The proposed settlement allows Partners to complete both acquisitions of South Shore and Hallmark under the condition of certain remedies that the attorney general believes will prevent competitive harm. In particular, the attorney general proposed price caps that will seek to ensure Partners cannot increase prices above general inflation through the year 2020. Second, the consent limits Partners' physician and hospital growth for the next seven years. Finally, the attorney general proposed the implementation of component contracting for payers allowing third parties to negotiate separately for four different categories of Partners' providers. To ensure compliance, an independent party chosen by the attorney general and paid for by Partners would monitor the settlement for a 10-year period.[18]

The attorney general's proposed settlement has received intense scrutiny and criticism from a number of entities. The American Antitrust Institute argues that the settlement is not in the public interest because the settlement does not limit Partners increased market power, it is limited in scope with component contracting unlikely to succeed in lower prices, and that the price caps only limit price increases and do not lower Partners already high prices.[19] Moreover, a coalition of Massachusetts hospitals and physician groups also weighed in opposing the Partners acquisitions. In particular, the coalition noted that the proposed remedy only served to "temporarily" restrain Partners' market power and would offer "no lasting change to the market structures and incentives that underlie the operation of Partners' already substantial bargaining leverage."[20]

Other parties, including the Pennsylvania Attorney General's Office, support Massachusetts proposed settlement.[21] The state court is currently considering the proposed settlement with an expected judgment from Judge Janet Sanders in early 2015.

Regardless of the outcome of the Partners matter, the proposed settlement issued by the commonwealth of Massachusetts sends a clear message to health care providers that states continue to be interested in acquisitions and mergers. However, unlike their federal counterparts, the states continue to be willing to test conduct remedies. Given the states increased interest in provider consolidation, parties may be more likely to deal directly with attorneys general coming to amicable solutions and forgoing divestiture.

Conclusion

2014 was a tumultuous time for health care provider mergers and acquisitions. And while there is no anticipated decrease in similar scrutiny from state and federal enforcers in 2015,

this year will bring the resolution of these two controversial cases. Both rulings should provide health care providers and antitrust practitioners a clearer indication of how health care antitrust issues are to be assessed by both state and federal enforcers and the courts.

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Disclosure: The Law Offices of David Balto signed the comment from the American Antitrust Institute in the Partners matter.

[1] Robert Pear, FTC Wary of Mergers by Hospitals, N.Y. Times, Sept. 17, 2014, http://www.nytimes.com/2014 /09/18/business/ftc-wary-of-mergers-by-hospitals-.html

[2] Ronan P. Harty, Interview with Chairwoman Edith Ramirez, 14 The Threshold Newsletter of The Mergers & Acquisitions Comm. at 3 (2014), available at http://www.ftc.gov/system/files/documents/public_statements /294181/140326thresholdspringissue_0.pdf.

[3] In the Matter of Community Health Sys., Docket No. C-4427 (F.T.C. Apr. 11, 2014), available at http://www.ftc.gov/system/files/documents/cases/140415chshmado.pdf; In the Matter of H.I.G. Bayside Debt & LBO Fund II, L.P., Docket No. C-4494 (F.T.C. Oct. 31, 2014) (settlement is pending public comments).

[4] Order Returning Matter to Adjudication, In the Matter of Phoebe Putney Health Sys. Inc., Docket No. 9348 (F.T.C. Sept. 4, 2014), available at http://www.ftc.gov/system/files/documents/cases/140905phoebeputneyorder.pdf.

[5] ProMedica Health Sys. Inc. v. FTC, 749 F.3d 559 (6th Cir. 2014) (finding that a horizontal merger between ProMedica Health Systems and St. Luke's Community Hospital in Lucas County, Ohio would substantially lessen competition). On Dec. 22, 2014, ProMedica filed with the United States Supreme Court a petition for writ of certiorari. Petition for cert. filed, (U.S. Dec. 22, 2014) (No. 14-762).

[6] FTC v. St. Luke's Health System Ltd., No. 12-0560 (D. Idaho Jan. 24, 2014), appeal dktd., No. 14-35173 (9th Cir. filed March 7, 2014).

[7] Press Release, Attorney General Eric Schneiderman, A.G. Schneiderman Announces Settlement with Utica Hospitals to Address Competitive Concerns (Dec. 11, 2013), available at http://www.ag.ny.gov/press-release/ag-schneiderman-announces-settlement-utica-hospitals-address-competitive-concerns.

[8] Id.

[9] From 2011 through 2013, the state of Pennsylvania entered into three settlements with Geisinger Health System Foundation for three separate Geisinger provider acquisitions. Each settlement contained a number of conduct remedies designed to allow the transaction moved forward, but also to protect competition within the market.

[10] Findings of Fact and Conclusions of Law, FTC v. St. Luke's Health System, Ltd., No. 13-cv-00116 (D. Idaho, Jan. 24, 2014); see also David Balto, Swimming Against the Tide: The FTC's Misguided Antagonism to Health Care Integration, Truth on the Market (Aug. 26, 2014, 12:00 AM), http://truthonthemarket.com/2014/08/26/swimming-against-the-tide-the-ftcs-misguided-antagonism-to-health-care-integration/.

[11] Brief for Amicus Curiae Medicaid Defense Fund in Support of Motion for A Stay, at 6, FTC v. St. Luke's Health System, Ltd., No. 14-35173 (9th Cir., June 27, 2014).

[12] David Balto, 9th Circ. Must Apply Dynamic Analysis to St. Luke's, Law360.com (Nov. 13, 2014, 4:29PM), http://www.law360.com/articles/596089/9th-circ-must-apply-dynamic-analysis-to-st-luke-s.

[13] See David Balto, Antitrust Enforcement in Reverse: Getting Efficiencies Backwards, Truth on the Market (Sept. 11, 2014, 12:00 AM),

http://truthonthemarket.com/2014/09/11/antitrust-enforcement-in-reverse-getting-efficiencies-backwards/.

[14] Dissenting Statement of Commissioner Joshua D. Wright, In the Matter of Ardagh Goup S.A., and Saint-Gobain Containers, Inc., and Compagnie de Saint-Gobain, File No. 131-0087 (April 11, 2014), available at http://www.ftc.gov/system/files/documents/cases/140411ardaghstmt.pdf.

[15] See David Balto, An Open Letter to the FTC on Hospital and Providers, The Health Care Blog (Oct. 8, 2014, 12:00 AM), http://thehealthcareblog.com/blog/2014/10/08/an-open-letter-to-the-ftc-on-hospitals-and-providers/#comments.

[16] Deborah L. Feinstein, Director, Fed. Trade Comm'n Bureau of Competition, Antitrust Enforcement in Health Care: Proscription, not Prescription, Remarks at Fifth National Accountable Care Organization Summit at 15 (June 19, 2014), available at http://www.ftc.gov/system/files/documents/public_statements/409481/140619_aco_speech.pdf (stating the "Commission generally rejects" conduct remedies).

[17] Public Comment by the Mass. Health Policy Comm'n, In Re Comm. of Mass. v. Partners Health Sys. Inc., South Shore Health and Ed. Corp., and Hallmark Health Corp., Civil Action No. 14-2033-BLS (Mass. Superior Ct. July 17, 2014), available at http://www.mass.gov/ago/docs/partners/hpc.pdf.

[18] Press Release, Massachusetts Attorney General Martha Coakley, AG Final Resolution with Partners Would Alter Provider's Negotiating Power, Restrict Growth and Health Costs (June 24, 2014), available at http://www.mass.gov/ago/news-and-updates/press-releases/2014/2014-06-24-partners-settlement.html.

[19] Public Comment by the Am. Antitrust Inst., In Re Comm. of Mass. v. Partners Health Sys., Inc., South Shore Health and Ed. Corp., and Hallmark Health Corp., Civil Action No. 14-2033-BLS (Mass. Superior Ct. Sept. 11, 2014), available at http://www.mass.gov/ago/docs/partners/aai.pdf.

[20] Public Comment by the Physician/Hospital Coalition, In Re Comm. of Mass. v. Partners Health Sys., Inc., South Shore Health and Ed. Corp., and Hallmark Health Corp., Civil Action No. 14-2033-BLS (Mass. Superior Ct. Oct. 21, 2014), available at

http://www.mass.gov/ago/docs/partners/health-systems-medical-centers-2.pdf.

[21] Public Comment by James A. Donahue, Executive Deputy Attorney General for Penn., In Re Comm. of Mass. v. Partners Health Sys., Inc., South Shore Health and Ed. Corp., and Hallmark Health Corp., Civil Action No. 14-2033-BLS (Mass. Superior Ct. Aug. 28, 2014), available at http://www.mass.gov/ago/docs/partners/pa-ago.pdf.