

Small Providers Beware: Antitrust Enforcement Applies Regardless of Size

Despite the Federal Trade Commission's (the "FTC") recent focus on challenging large health system mergers across the country, it is important for smaller health care providers to remember that they, too, are subject to antitrust challenge. A recent FTC challenge to the merger of 19 physicians in Pennsylvania demonstrates this point and the importance of proper antitrust planning from the beginning of a transaction. The merger, which the FTC claimed substantially lessened competition in the market, was resolved through a consent agreement putting in place significant restraints on the physicians' operations for the foreseeable future. This challenge follows a line of similar challenges to small health care provider mergers over the past five years.^[1]

Background

In 2011, six independent orthopedist groups combined their practices to form Keystone Orthopaedic Specialists ("Keystone"). The merger combined 19 out of 25, or 76%, of the orthopedists practicing in Berks County, Pennsylvania. Three years after the merger, in 2014, six orthopedists left Keystone and resumed doing business as an independent group ("Orthopaedic Associates"). In October 2015, the FTC issued a complaint challenging the merger (the "Complaint"). Both Keystone and Orthopaedic Associates were named parties in the Complaint. The FTC felt that, given Orthopaedic Associates' access to competitively sensitive information during the three years before it separated from Keystone, and the potential that Orthopaedic Associates could merge with Keystone again in the future, it was necessary to include Orthopaedic Associates in the Complaint.

Anticompetitive Effects

In the Complaint, the FTC alleged that the merger substantially lessened competition and created a monopoly in the relevant market (orthopedic physician services in Berks County) in violation of Section 7 of the Clayton Act^[2] and Section 5 of the FTC Act.^[3] Specifically, the FTC alleged that the merger increased the ability of the merged entity to unilaterally raise prices for orthopedic physician services, reduced incentives to maintain or improve service and quality in the relevant market, and eliminated competition between the orthopedists within the

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merged practice.

Bargaining Power. As the FTC explained, health care providers compete in multiple ways. One way includes the process health plans use for selecting in network providers. To gain in network status, a provider engages in negotiations with each health plan, including negotiating reimbursement rates, and then enters into a contract with that plan. In the typical process, providers benefit by gaining access to the health plans' members as patients and health plans benefit by negotiating discounted prices. When providers merge, including in this case where they formed a near monopoly, a health plan's choice of providers, and thus bargaining power, is significantly reduced and can lead to higher prices and reduced incentive to maintain or improve quality.

After the merger, Keystone negotiated prices with health plans on behalf of all of the previously competing practices. Because of Keystone's near monopoly, health plans could not offer commercially marketable networks without contracting with Keystone. Thus, Keystone gained substantial market power, which it used to raise prices with most health plans with coverage in Berks County, including a Medicaid managed care plan.

Direct Competition. Another way health care providers compete is by competing with other in network physicians to attract patients. Health plans typically offer multiple in network providers with similar out of pocket costs, and those physicians compete primarily on nonprice dimensions to attract patients including service, amenities, convenience and quality of care. The FTC found that patients in Berks County generally do not leave the county to obtain orthopedic physician services. Therefore, by combining a majority of the orthopedists in the county, the merger also eliminated competition with respect to service, amenities, convenience and quality of care.

Efficiencies and Barriers to Entry. The FTC alleged that neither merger efficiencies nor the entry of new orthopedists to the market reduced the anticompetitive harm. The FTC alleged that the merger did not produce merger specific efficiencies sufficient to offset the actual anticompetitive harm from the merger.

Settlement

In October 2015, the FTC entered into a consent agreement with Keystone and Orthopaedic Associates resolving the matter. In December 2015, following public notice of the consent agreement, the FTC entered a final decision and order

outlining the terms and conditions of the consent agreement (the "Order"). The Order was designed to maintain competition in the relevant market by, among other things, preserving Keystone and Orthopaedic Associates' separation, and by allowing health plans to avail themselves of current market conditions (*i.e.*, Keystone and Orthopaedic Associates as separate entities) by renegotiating existing Keystone contracts. The Order did not require structural changes to Keystone. The FTC explained that had Keystone and Orthopaedic Associates not separated prior to the FTC's investigation, the FTC likely would have sought divestiture. However, in light of the separation, provisions preventing recombination were a sufficient remedy.

Among other requirements, the Order contained the following restrictions:

- Keystone and Orthopaedic Associates must obtain prior approval from the FTC before:
 - acquiring any interest in each other;
 - acquiring another orthopedic practice located in Berks County; or
 - entering into any employment, membership or other agreement of affiliation with an orthopedist who, during the prior year, provided services in Berks County.
- Keystone and Orthopaedic Associates orthopedists may not engage in a variety of other joint activities, including jointly negotiating with payors, refusing to deal with or threatening any payor, discussing any term or condition of any payor agreement, or agreeing not to independently deal with a payor.
- Keystone and Orthopaedic Associates may not exchange or facilitate the exchange of any information concerning any orthopedist's willingness to deal with a payor or any terms and conditions on which the provider is willing to deal.
- Keystone and Orthopaedic Associates must terminate any existing contracts with payors at the written request from a payor, or the earliest termination or renewal date under the contract.

Key Takeaways

- Seek legal counsel up front to avoid surprise later. Although many mergers and

other types of collaborations are procompetitive and acceptable, legal counsel should analyze potential anticompetitive effects of a proposed merger or acquisition as part of the pretransaction planning, regardless of the type or size of health care providers involved. Being below the Hart Scott Rodino Act premerger notification thresholds does not prevent an antitrust challenge. The FTC likely will pursue mergers or acquisitions that it suspects are anticompetitive, irrespective of size.

- Any time a provider merger creates significant anticompetitive harm, especially by creating a near monopoly, there is substantial risk that it could result in a state, federal or private party antitrust challenge.
- The purpose of a health care provider merger or acquisition should focus on creating cognizable efficiencies for patients, such as higher quality and care integration, and never on leveraging market share to gain increased reimbursement rates. Ask yourself: Is the merger necessary to achieve these efficiencies?
- Although not at issue in this case, health care providers should also take precautions with respect to communicating and engaging in joint activity with competitors even when a transaction is not involved. Sharing competitively sensitive information or engaging in joint activity affecting competition can violate state and federal antitrust laws.

Additional Questions and Assistance

If your health care organization is considering an acquisition, merger or other affiliation, the professionals at Reinhart Boerner Van Deuren s.c. are available to assist you in reviewing your options and developing an antitrust strategy. Please feel free to contact [Larri Broomfield](#) or your Reinhart attorney, to discuss any questions or concerns related to your health care organization.

[1] *Pennsylvania v. Urology of Central Pennsylvania et al.* (M.D. Pa. Case No. 11-01625) (involving the merger of five urology practices that was challenged by the Pennsylvania Attorney General); see also Order of the Commission, *In re Renown Health*, Docket No. C-4366 (Dec. 4, 2012) available at <http://www.ftc.gov/sites/default/files/documents/cases/2012/12/121204renownhealthdo.pdf> (involving the acquisition of two cardiology groups by Renown Health,



which also operated general acute care hospitals and health plans).

[2] 15 U.S.C. § 18.

[3] 15 U.S.C. § 45.

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