Antitrust Considerations for Health System-Physician Affiliation Models

Thursday, November 21, 2019 | 1:00 pm Eastern
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• Elizabeth Greene, Mirick, Worcester, MA

Vice Chairs:
• Tyler Cowart, UC San Diego Health, San Diego
• Chip Hutzler, Boca Raton, FL
• Thomas Hutchinson, Krieg DeVault LLP, Carmel, IN
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The Panel

• Moderator:
  • Tyler Cowart

• Panelists:
  • Erica Koscher
    • Asst. Attorney General, Washington State Attorney General’s Office
  • Matthew Hans
    • Partner, Polsinelli, St. Louis, MO
Agenda

• Single Entity?
• Per Se or Rule of Reason?
• Evidence of Integration?
• Failing or Flailing Firm?
• Healthcare Notice Laws
The Kitsap Transactions

Washington v.

CommonSpirit

TDC

WestSound Orthopaedics, PS

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The Kitsap Transactions

WSO transaction (July 1, 2016)
- FMG buys all assets
- FMG assumes lease
- Physicians employed by FMG
  - Paid wRVU basis per individual employment agreements with FMG
- WSO doctors join FMG contracts
- WSO clinic staff terminated; option to be employed directly by FMG

TDC transaction (Sept. 3, 2016)
- FMG buys ancillary assets
  - ASC, lab, imaging
- FMG assumes leases
- PSA: All patients seen by TDC doctors considered FMG patients
  - TDC doctors join FMG contracts
  - TDC as group on paid wRVU basis
- MSA: FMG hires TDC to manage it’s clinics
- TDC doctors and staff remain employed by TDC
- PSA terminable
The Investigation

- State received complaints and opened an investigation in early 2017
- Issued CID for possible Section 7, Section 1, and Section 2 violations
- Defendants produced thousands of documents
- State took depositions of defendants’ corporate representatives
- State filed complaint end of August 2017
  - Count 1: Section 1 of the Sherman Act (TDC Affiliation)
  - Count 2: Section 7 of the Clayton Act (WSO Transaction)
WHY DOES THE STRUCTURE OF A PHYSICIAN GROUP TRANSACTION MATTER?
2. … TDC and CHI Franciscan agreed that TDC would receive CHI Franciscan’s negotiated reimbursement rates with payers, and CHI Franciscan acquired certain ancillary services from TDC. Unlike the WestSound Acquisition … CHI Franciscan and TDC remain separate … . 
Whether there is an agreement “amongst ‘separate economic actors pursuing separate economic interests,’ … such that the agreement ‘deprives the marketplace of independent centers of decisionmaking,’ … and thus of actual or potential competition”
Did Franciscan and TDC Become a Single Entity?

- **Common ownership?**
  - Does lack of common ownership, standing alone, establish separate entity status?

- **Degree of control?**
  - How much control did TDC retain over its medical practice?
  - Over its physicians?

- **Separate economic decision making?**
  - Did the “profits wind up under the same mattress?”
  - Are TDC’s and FMG’s incentives aligned?

- **Ongoing competition?**
  - Do TDC and Franciscan continue to compete?
  - If the PSA terminates, will TDC and Franciscan compete?
DID FRANCISCAN GAIN CONTROL OF TDC?

**TDC**
- Ambulatory surgery center
- Lab business
- Imaging services
- Clinic leases
- Clinic property
- Revenues from payers
- Expenses
- Ability to choose patients
- Ability to choose new locations
- Ability to recruit new doctors
- Not subject to Franciscan policies

**Franciscan**
- Ambulatory surgery center
- Lab business
- Imaging services
- Clinic leases
- Clinic property
- Revenues from payers
- Expenses
- Ability to choose patients
- Ability to choose new locations
- Ability to recruit new doctors
- Subject to Franciscan policies
Rule of Decision

If not a single entity, does the *per se* rule or rule of reason apply?

**Claim against TDC**

<table>
<thead>
<tr>
<th>Per se illegal price fixing</th>
<th>Rule of Reason</th>
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<tbody>
<tr>
<td>Franciscan and TDC entered into agreement in <em>per se</em> violation of Section 1</td>
<td><strong>Markets</strong></td>
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<tr>
<td>• What agreement?</td>
<td>– Adult PCP orthopedics</td>
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<tr>
<td>• To fix the price of what?</td>
<td>– Kitsap Peninsula + Bainbridge Island</td>
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<tr>
<td>• What’s needed to make out a Section 1 violation?</td>
<td><strong>Market shares</strong></td>
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<td>– PCP: Franciscan + TDC</td>
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<td>– Orthopedic: Franciscan + TDC + WSO</td>
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<td><strong>Anticompetitive harm</strong></td>
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<td>– Higher prices</td>
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<td>– Reduced access to care</td>
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<td><strong>No cognizable efficiencies</strong></td>
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“The Supreme Court found that that doctor’s conduct did not create a new product like the ‘blanket license’ in BMI, but ‘merely permitted them to sell their services to certain customers at fixed prices’…Here, the Court finds that its final decision about the degree of economic integration and decision-making relationship between TDC and Franciscan will inform its determination of the similarly or difference between this case and others where the courts have applied the per se rule.”
“In Maricopa County, doctors agreed to set a maximum fee in order to create a competitive alternative to the area’s health insurance plans. The Supreme Court found that the doctor’s conduct did not create a new product … but ‘merely permitted them to sell their services to certain customers at fixed prices and arguably to affect the prevailing market price of medical care … [and] fit squarely into the horizontal price-fixing mold’ under *per se* analysis.”
“Plans for further integration that are not based upon contractual obligations seem to me to be irrelevant. Any steps taken during the discovery period to further integrate the two medical business entities might be irrelevant, but the Court questions how probative these might be if, again, not required by transaction agreements such that they could be terminated, apparently, at any time.”

MIL Hearing Transcript at 7.
What’s the Relevance of a Financially Distressed Physician Group?
Financial Condition May Matter

- Failing firm is absolute defense to Section 7 claim, but not a defense to a Section 1 claim
  - High evidentiary burden to satisfy defense
- Flailing firm is not a defense to a Section 1 per se claim
- But under a Section 1 rule of reason analysis, defendants may put forth flailing firm evidence “as part of their burden to show procompetitive effects justifying otherwise anticompetitive conduct.”
- Takeaways:
  - May suggest low chance of anticompetitive harm in a Section 7 or Section 1 rule of reason claim
  - Sparse case law on the applicability / relevance
Franciscan Consent Decree

Core provisions:
1. Retrospective Separate Insurer Contracting
2. Prospective Separate Insurer Contracting
3. Divestiture
4. AGO Pre-Acquisition/Affiliation Notification
5. Removal of Bar to Cost & Quality Incentive Compensation
6. Prohibition of Future Contracts
7. Patient Notification
8. Monetary Relief
Healthcare Notification Laws

- Washington: RCW 19.390
  - Requires advance reporting to the AGO **60 days** prior to the transaction of mergers, acquisitions, and affiliations among hospitals and provider groups with **7 or more providers**
- Massachusetts: M.G.L. c. 6D, § 13
- Connecticut: CT Gen Stat § 19a-486i
- Florida: HB 1243 (introduced 2019; did not pass)
Questions?

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