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## Antitrust Focus On Health Care: Federal Antitrust Agencies Continue To Target Health Care Sector

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The Department of Justice (DOJ) and the Federal Trade Commission (FTC) have continued to target the health care sector, with a number of significant antitrust actions over the past few months. Specifically, the agencies have successfully challenged unlawful agreements among doctors and hospitals and successfully challenged health care mergers, both large and small, including consummated deals. In other market sectors, the FTC is using the broader reach of Section 5 of the FTC Act to attack conduct that may not be violative of the antitrust laws, such as invitations to collude and exclusionary conduct by dominant firms, and similar challenges could be brought in the health care sector. Finally, both agencies have stated they will pay special attention to antitrust issues involving accountable care organizations and health insurance exchanges. These recent significant antitrust actions are summarized below.

### I. AGENCIES CHALLENGE AGREEMENTS AMONG HEALTH CARE PROVIDERS - DOCTORS, HOSPITALS, DENTISTS

FTC Prohibits Hospitals and Doctors in Minnesota From Conspiring: A group of 25 hospitals and 70 doctors in southwestern Minnesota have agreed to a settlement with the FTC that prohibits anticompetitive tactics allegedly used to increase health insurance reimbursement rates. The tactics included agreements to fix prices, refusals to deal and use of coercive tactics during negotiations, such as threats to terminate contracts. *In the Matter of Minnesota Rural Health Care Cooperative*, FTC File No. 051 0199, June 18, 2010.

DOJ Halts Anticompetitive Practices By Idaho Orthopedics: The DOJ reached a settlement on May 28, 2010, with the Idaho Orthopaedic Society, an orthopedic practice group and five orthopedists that will prohibit them from conspiring with competing physicians in the Boise, Idaho area to deny medical care to injured workers covered by workers' compensation insurance and from engaging in group boycotts to obtain higher fees from health care plans. The DOJ complaint identifies two conspiracies, one involving a group boycott to obtain higher rates for treatment of injured workers, and the second involving threats to terminate contracts to force insurers to pay higher rates. The Idaho Attorney General joined in this action against the entities and the five individuals. *U.S. and State of Idaho v. Idaho Orthopaedic Society, et al.*, Civil Case No. 10-268-S, May 28, 2010.

FTC Challenges North Carolina State Dental Board Restrictions And Investigates Alabama Dental Association: The FTC initiated an action against the North Carolina state dental board alleging that it is harming competition by blocking non-dentists from providing teeth-whitening services in the state, thereby increasing the cost to consumers for such services. The FTC contends that there is no active supervision by a disinterested state authority qualifying for state action protection and the board's members are excluding competition from the marketplace. *In the Matter of The North Carolina Board of Dental Examiners*, FTC Docket No. 9343, June 17, 2010. In addition, it is reported that the FTC is conducting a non-public investigation into whether the Alabama Dental Association encouraged refusals to deal with low cost, non-profit, and public oral health care providers, including, among other things, communications with the University of Alabama School of Dentistry.

FTC Halts Practices By Physician IPA In Colorado: The FTC announced a consent order with Roaring Fork Valley Physicians IPA, Inc. (RFV), an independent physician association representing approximately 85 physicians, or almost 80 percent of the doctors in Garfield County, Colorado, which settled charges of price-fixing and other anticompetitive conduct by RFV. Although RFV was purporting to use a messenger model, the FTC alleged that RFV negotiated price-related terms on behalf of its members, who otherwise were competing small and solo practices. RFV increased rates by pressuring payors to include automatic cost-of-living adjustments and other terms in their provider contracts, and refusing, on behalf of its members, to messenger contracts with Medicare-based rates because of the potential of those rates to decline over time. The FTC also charged that, to enhance its bargaining power, RFV actively discouraged members from entering into individual contracts with insurers, while at the same time agreeing to contracts only if at least 80 percent of RFV's primary care physicians and 50 percent of its specialty doctors accepted the proposed contract's rates and terms. The FTC further found no efficiency enhancing or quality of care improvements based upon the collective behavior. *In the Matter of Roaring Fork Valley Physicians IPA, Inc.*, FTC File No. 061-0172, February 3, 2010.

FTC Restricts IPA Executive Director From Engaging In Anticompetitive Conduct: By a majority of 3-1, the FTC settled charges that the executive director of another Colorado independent physicians association attempted to circumvent the terms of an earlier settlement between the physicians association and the Commission. This matter is significant because it targets an individual and because of the strong dissent of one commissioner. The FTC's 2008 decision and order against Boulder Valley Individual Practice Association (BVIPA) in Boulder, Colorado prohibited BVIPA from facilitating certain physician negotiations, threatening to refuse to deal with payors based upon price terms, or otherwise facilitating improper collective activity among its members. The FTC alleged that M. Catherine Higgins, BVIPA's executive director, sought to circumvent the FTC order by maintaining that because she was not named personally in the previous proceedings, she was free to negotiate personally contractual agreements on behalf of BVIPA's members. The settlement with Ms. Higgins contains broad limitations and notification requirements restricting her activities as an agent or representative for BVIPA's members. Commissioner Rosch dissented, complaining that the order was unnecessarily punitive, punishing Ms. Higgins for publicly criticizing the FTC order concerning BVIPA; overly broad, in that it prohibited Ms. Higgins from negotiating non-price terms with payors; and, contrary to what he believed to be the FTC's earlier agreement not to pursue Ms. Higgins individually, a shift he suggested might have been influenced by Anthem Blue Cross. According to Commissioner Rosch: "Today's events represent a sad conclusion to an unnecessarily sordid tale." *In the Matter of M. Catherine Higgins*, FTC File No. 051-0252, February 5, 2010.

DOJ Reportedly Investigating Large Hospital-Physician Network in Boston: It is reported that DOJ is conducting a civil investigation into possible anticompetitive practices by Partners HealthCare System, a large hospital-physician network in the Boston area. Civil investigative demands have been sent to Partners and three large health insurers regarding Partners' contracting and other practices.

## II. AGENCIES CHALLENGE MERGERS, INCLUDING SMALL CONSUMMATED DEALS

Michigan Health Insurers Drop Merger Plans Due To DOJ Challenge: In March 2010, the DOJ moved to challenge the planned merger of Blue Cross Blue Shield of Michigan and its closest competitor, alleging the merged entity would have had a 90 percent share in a market where entry is limited. The DOJ contended the proposed deal would lead to higher prices, fewer choices and a reduction in the quality of commercial health insurance plans and would give the new entity the ability to control physician reimbursement rates in a manner harmful to consumers. The parties abandoned the merger in the face of this opposition. The DOJ announcement stated it worked closely with the Michigan Attorney General's office.

FTC Investigating and Challenging Small Consummated Health Care Mergers: The FTC continues to investigate and challenge small consummated mergers in health care markets.

-- In response to an FTC challenge, late last year Carilion Clinic agreed to divest two competing outpatient clinics in the Roanoke area which it had acquired for \$20 million in August 2008. In *the Matter of Carilion Clinic*, FTC File No. 081-0259, November 23, 2009. The FTC recently approved the sale of one of the clinics and is currently reviewing the proposed sale of the other clinic.

-- In late 2009, the FTC closed an investigation of a hospital acquisition in Bell County, Texas after concluding that the acquisition qualified for the failing firm defense. The FTC was prepared to challenge the acquisition but the acquiring hospital agreed with the FTC to allow an alternative purchaser to acquire the hospital at agreed upon terms. However, the alternative purchaser declined due to the financial condition of the acquired hospital. In *the Matter of Scott & White Healthcare*, FTC File No. 091-0084, December 23, 2009.

### III. FTC BARS MONOPOLY PRACTICES AND USES SECTION 5 TO ATTACK INVITATIONS TO COLLUDE AND DOMINANT MARKET POSITION

FTC Bars Monopoly Practices By Transitions Optical: The FTC reached a settlement with Transitions Optical, the nation's leading manufacturer of photochromic treatments that darken eyeglass lenses, prohibiting it from using anticompetitive practices to maintain its monopoly position and to increase prices. According to the FTC, Transitions had more than 80 percent of this market and allegedly maintained its monopoly by exclusive dealing, refusals to deal with sellers of competing lenses and bundling. The proposed settlement is designed to end the exclusive dealing and restore competition, and many of the provisions will be in effect for 20 years. In *the Matter of Transitions Optical, Inc.*, FTC File No. 091-0062, March 3, 2010.

FTC Uses Section 5 To Attack Invitation To Collude And Dominant Market Position: Those involved in health care markets should also be aware of the FTC's increased use of Section 5 of the FTC Act to challenge conduct that does not violate the antitrust laws, as demonstrated by the FTC's recent actions against U-Haul and Intel.

-- The FTC recently charged that U-Haul invited its competitor to collude on prices for truck rentals by privately and publicly communicating with Avis/Budget in violation of Section 5 of the FTC Act, which prohibits unfair methods of competition. The FTC made clear that this invitation to collude conduct did not violate the antitrust laws. The FTC's settlement with U-Haul prohibits colluding or invitations to collude, contains monitoring and compliance provisions and is in effect for 20 years. In *the Matter of U-Haul International, Inc.*, FTC File No. 081-0157, June 9, 2010.

-- The FTC has also charged that Intel Corp. violated Section 5 by unlawfully maintaining its dominant position. The FTC also emphasized in this case that Section 5 is broader than the antitrust laws. In *the Matter of Intel Corp.*, FTC Docket No. 9341, December 16, 2009.

### IV. AGENCIES EMPHASIZE FOCUS ON HEALTH CARE MERGERS AND ACOs

DOJ Stresses Antitrust Enforcement in Health Care: In a May 24, 2010 speech, the head of DOJ's Antitrust Division, Christine Varney, emphasized the following enforcement priorities:

- DOJ will continue its close scrutiny of mergers in the health care area, especially of insurance companies, hospitals and other providers.
- With respect to insurance company mergers, DOJ believes that in most cases new entry is difficult and will give little credit to arguments based on the possibility of entry.
- DOJ is particularly concerned about barriers to entry and expansion in health insurance markets in light of the enactment of the Affordable Care Act and competition provided by state-based health insurance marketplaces or exchanges. Ms. Varney expressed concerns about most favored nations

clauses and exclusive contracts between insurers and significant providers that reduce the ability or incentive of providers to negotiate discounts with insurance entrants.

- DOJ intends to collaborate with other agencies to provide antitrust guidance on how providers can properly structure Accountable Care Organizations (ACOs) under the Affordable Care Act without running afoul of the antitrust laws. She stated at the outset that the success of health insurance exchanges and ACOs will depend in large part on effective competition among health care insurers and providers. A June 25, 2010 speech by the Antitrust Division Chief of Staff also emphasized the importance of ensuring competition in the operation of health insurance exchanges and ACOs.
- DOJ will continue its competition advocacy, including opposing Certificate of Need legislation that can provide state action protection.

FTC To Hold Public Workshop On Health Care, Including ACOs: In a June 14, 2010 speech, the chairman of the FTC announced that the FTC will hold a public workshop this fall on health care competition policy, payment reform and new models for delivering health care that seek to incentivize high-quality, cost-effective care. According to the chairman, the FTC will focus on how ACOs could affect competition among commercial payers and provide consumers with access to affordable care services.

## V. AGENCIES REVIEW INFORMATION EXCHANGES AND CONTINUE CHALLENGE TO REVERSE PAYMENTS

DOJ OKs Hospital Information Exchange by Purchasers. On April 26, 2010, the DOJ stated that it has no present intention to challenge the formation or operation of an information exchange program sponsored by private and public group purchasers of health care services (purchasing health care for over 7 million people) to collect, analyze and distribute aggregate comparative data on the level of reimbursement received and resources used by 300 California hospitals in providing inpatient and outpatient services. According to the sponsors, information collected would allow purchasers to make more informed purchasing decisions and spur competition among hospitals to operate more efficiently and to provide better quality services at lower costs. The DOJ decision not to challenge was based on the use of a third party to collect and aggregate the data, the age of the data and the fact that the data would not reveal any hospital's actual service fees.

FTC Maintains Strong Opposition to "Pay For Delay" Settlements: The FTC continues its strong opposition to reverse payments (or "pay for delay" agreements) involving payments by brand-name drug manufacturers to potential generic competitors to delay entry into the market in order to resolve patent infringement disputes. Most recently, the FTC filed an amicus brief in the Second Circuit seeking en banc review of a recent Second Circuit decision in which the court invited the plaintiffs to seek full review due to the "exceptional importance" of the antitrust implications of reverse settlements.

If you have questions about any of these or other FTC and DOJ actions, please contact any of Baker Donelson's Health Care Government Investigations or Antitrust attorneys.