FTC Provides Useful Update On Antitrust And Health Care

Law360, New York (July 02, 2014, 10:09 AM ET) -- The interplay between the Affordable Care Act, accountable care organizations and antitrust has been a matter of great moment for several years. It has been an issue in litigation such as the Federal Trade Commission’s St. Luke’s case.[1] Recently, in a conference, Deborah Feinstein, director of the FTC’s Bureau of Competition, had an opportunity in a policy speech to address arguments that the ACA’s goals of controlling costs and improving quality are at odds with antitrust enforcement.[2]

Recognizing the complexity of the antitrust issues in such a rapidly evolving environment, Feinstein also sought to articulate up-to-date antitrust guidance for health care providers. She focused on the FTC’s approach toward provider collaborations; discussed the types of collaborations necessitating FTC enforcement action; explained the details behind two common defenses — efficiencies and flailing/failing firm; and described the FTC’s preference for structural over conduct remedies. While not breaking new ground, her policy speech provided a very useful articulation of the FTC staff’s current thinking.

Accountable Care Organizations

The Affordable Care Act proposed the use of ACOs to control health care costs, and the FTC (along with the U.S. Department of Justice) thereafter articulated how they intended to apply antitrust enforcement policy towards ACOs.[3] Director Feinstein’s remarks focused on three points of the ACO policy statement: (1) analysis under the more lenient rule of reason standard for ACOs meeting certain criteria; (2) safety zones for ACOs that are unlikely to raise significant competitive concerns based on market share; and (3) identification of certain ACO structures or behavior that raise red flags for the agencies.

The ACO policy statement also provided for expedited, voluntary antitrust review for ACOs formed after March 2010. Director Feinstein noted that only two ACOs requested review under these provisions, and that the FTC has not yet opposed the formation of an ACO, nor has it taken enforcement action against any ACO.

Enforcement Actions Against Other Provider Collaborations

Director Feinstein summarized the FTC’s enforcement actions over the past seven years, including past litigated cases as well as examples of collaborations that were not
challenged by the FTC. She emphasized that the FTC has challenged less than 1 percent of
hospital deals — and only two challenges to physician combinations. Citing three hospital
mergers (Evanston, ProMedica and Rockford) and a physician acquisition challenged successfully, Feinstein noted that the FTC’s focus has primarily been on
markets with a small number of providers, particularly those where the number of
providers decreases from four to three, three to two, and particularly two to one.

Feinstein also articulated some provider collaborations that have not been challenged by
the FTC, but could be of potential concern. She observed that the commission has not yet
challenged a vertical merger involving a hospital and physician practice, but did not rule
them out. She also noted that if a hospital manages another hospital with which it
competes and a single entity negotiates prices with payors on behalf of both, the
management contracts could raise issues similar to those in a horizontal merger context.

Finally, Feinstein described two examples of collaborations that did not raise concerns,
making it clear that the FTC’s decision to pursue enforcement action is a fact-specific one,
and takes into account many factors, including the concerns of third parties, such as
payors, the community, and employers.

**Defenses**

Director Feinstein made clear that although the FTC will consider merger specific
efficiencies and flailing/failing firm defenses to balance concerns of market power, the
agencies take a more stringent approach to how these defenses outweigh competitive
harm. Feinstein noted that efficiencies under the horizontal merger guidelines must be
merger-specific, not vague or speculative, and cognizable. She also observed, however,
that in the transactions challenged by the FTC, all three of these factors has never been
achieved.

She also cited the Idaho district court’s opinion in St. Luke’s Hospital’s acquisition of
physician group Saltzer on moving toward more integrated care and the greater use of
electronic medical records: “St. Luke’s is to be applauded for its efforts to improve the
delivery of health care .... But there are other ways to achieve the same effect that do not
run afoul of the antitrust laws and do not run such a risk of increased costs.” Similarly,
with regard to flailing/failing firms, or hospitals that are struggling financially, Feinstein
noted that only in “limited circumstances” would the agencies consider a hospital so far
financially down as to be of limited competitive significance.

**Remedies**

The FTC has expressed a strong preference for structural remedies over conduct: that is,
the agency requires the parties to abandon the deal or if already consummated,
divestiture. Feinstein noted that the FTC believes that conduct remedies “do not restore
the competitive status quo and raise ... concerns,” such as the difficulty involved in
mandating market behavior. For example, if the providers enter a consent agreement
promising not to raise prices above a certain metric, determining the competitive price
absent the transaction is nearly impossible. Moreover, conduct remedies frequently only
focus on price and fail to take into account quality and incentives to innovate.

—By Bruce Sokler and Helen Kim, Mintz Levin Cohn Ferris Glovsky and Popeo PC

*Bruce Sokler is a member in Mintz Levin's Washington, D.C., office and chairman of the
firm's antitrust section. Helen Kim is an associate in the firm's Washington office.*

The opinions expressed are those of the author(s) and do not necessarily reflect the views
of the firm, its clients, or Portfolio Media Inc., or any of its or their respective affiliates.
This article is for general information purposes and is not intended to be and should not be
taken as legal advice.


[5] Bruce Sokler, Christi Braun, and Helen Kim, Rockford Returns — Part II: Court Grants FTC’s Preliminary Injunction Against Hospital Merger to Preserve Status Quo for Preliminary Hearing, April 9, 2012, Mintz Levin Antitrust Alert, view here; Bruce Sokler, Robert Kidwell, and Helen Kim, Rockford Rerun: The FTC on Hospital Mergers, Dec. 12, 2011, Law360, view here


All Content © 2003-2014, Portfolio Media, Inc.