DOJ Antitrust Division Pledges to Step Up Antitrust Enforcement in the Health Insurance Industry

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On December 1, the House Judiciary Committee?s Subcommittee on Courts and Competition Policy held a hearing to examine the state of antitrust enforcement in the health care industry. The witnesses at the hearing included Sharis Pozen, who serves as the DOJ Antitrust Division?s Chief of Staff. Pozen provided an overview of the Antitrust Division?s health care enforcement activities over the last year and its enforcement objectives for the future. Over the course of her testimony, Pozen left little doubt that the health insurance industry will be the focus of considerable Antitrust Division attention in the coming year.

Pozen began her testimony by stating that antitrust enforcement must play an important role in shaping the future of national health care policy, a sentiment that has been advanced repeatedly by Assistant Attorney General Christine Varney, who leads the Antitrust Division. Specifically, Pozen stated that ?the success of [health care reform] will depend as much upon healthy competitive markets free from undue concentration and anticompetitive behavior as it will upon regulatory change,? and that ?vigorous but responsible antitrust enforcement has long been, and will continue to be, crucial to the health care industry.?

Pozen then embarked on a review of the Antitrust Division?s enforcement actions in the health care industry over the last year. She identified the Antitrust Division?s recently filed action against Blue Cross of Michigan, which challenges Blue Cross of Michigan?s use of ?most favored nation? clauses in provider contracts. Pozen also highlighted the Antitrust Division?s derailment of a proposed health insurer merger earlier this year (which also, coincidentally, involved Blue Cross of Michigan) and touted that action as evidence of the Division?s vigilance in the merger area as well. House Judiciary Committee Chairman John Conyers, however, was unimpressed, telling Pozen, ?You keep citing three lousy cases as proof that you?re on the job,? while there have been ?hundreds of health care mergers in the last ten years.?

Undeterred by Chairman Conyers?s criticism, Pozen closed her testimony with a summary of the Antitrust Division?s plans for the future. She pledged that the Division will ?carefully review mergers in the health insurance industry and continue to challenge those mergers that are likely to substantially

lessen competition,? and that the Division will view ?with skepticism? any claims that new entry into insurance markets will protect against potential anticompetitive effects (a frequent response by merging insurers seeking to head off potential merger challenges). Pozen also stated that the Division will ?carefully scrutinize and continue to challenge exclusionary practices by dominant firms -- whether for profit or non-profit -- that substantially increase the cost of entry or expansion.? This statement undoubtedly suggests that further challenges to most favored nation clauses, for example, may be on the way. Pozen made this prospect more certain when she stated that the Antitrust Division is ?working closely with state attorneys general, in particular , to determine whether there are most-favored-nation clauses, exclusionary contracts, or similar arrangements between insurers and significant providers that reduce the ability or incentive of providers to negotiate discounts with aggressive insurance entrants.?

Given Pozen?s statements -- and the strong support for greater enforcement urged by Chairman Conyers and others -- it certainly appears that the health insurance industry will continue to be a focus for Antitrust Division enforcement activity in 2011. Stay tuned.

New York Attorney General Discontinues Effort Seeking Reinstatement of Antitrust Convictions Against Former Marsh Executives

Two former Marsh executives received good news in December, as the New York Attorney General?s office announced that it was withdrawing its appeal of a lower court?s decision to vacate their convictions for violating the Donnelly Act (New York?s antitrust law).

The Attorney General?s office had filed the appeal in July, shortly after State Supreme Court Judge James Yates unexpectedly vacated his earlier convictions of the executives. At the time, Judge Yates stated that he no longer had confidence that his initial decision to convict the executives -- William Gilman and Edward McNenney - - was appropriate, stating that his decision had been ?undermined? by the discovery of new, contradictory evidence. (The new evidence came to light during the trials of other Marsh executives whose cases were prosecuted after Gilman?s and McNenney?s cases, all of which ended in acquittals.) After Judge Yates vacated Gilman?s and McNenney?s convictions, the State appealed the decision to the New York Appellate Division.

The Attorney General?s withdrawal of its appeal finally brings to a close its six year investigation intobid rigging in the insurance industry, which was commenced under former New York Attorney General Eliot Spitzer and continued (some might say with a degree of ambivalence) by current New York Attorney General -- and soon to be New York Governor ? Andrew Cuomo. While New York collected hundreds of millions of dollars in civil fines and settlements from insurers and brokers, including an $850 million settlement from Marsh and a similarly-sized settlement from AIG, the investigation ultimately failed to result in criminal convictions of any of the individuals charged in the matter. The civil proceeding arising from the same facts (*In re Insurance Antitrust Brokerage Litigation*) remains pending in the New Jersey District Court, having recently been reinstated by the Third Circuit Court of Appeals.

3rd Circuit Reinstates Provider Antitrust Action against Insurer and Rival Provider

On November 29, the 3rd Circuit Court of Appeals reinstated a closely watched antitrust case brought by West Penn Allegheny Health System against University of Pittsburgh Medical Center (?UPMC?) and health insurer Highmark. The case, *West Penn Allegheny Health System v. UPMC*, focuses on claims

by West Penn that UPMC and Highmark agreed to take several steps designed to impair West Penn?s ability to compete with UPMC. The most interesting of the claims involves West Penn?s assertion that the defendants agreed to have Highmark reimburse West Penn for its services at significantly lower rates than those provided to UPMC so that West Penn would be ?hobbled? in its ability to compete with UPMC.

The 3rd Circuit began its analysis of West Penn?s claims by acknowledging that Highmark?s decisionto negotiate aggressively with West Penn for lower reimbursement rates, by itself, was not necessarily unlawful, and that Highmark?s use of such tactics could ultimately benefit consumers by providing Highmark the ability to reduce premiums. This was so even though West Penn alleged that Highmark had market power, because, as the Court noted, even ?A firm that has substantial power on the buy side of the market (*i.e.,* monopsony power) is generally free to bargain aggressively when negotiating the prices it will pay for goods and services.? The Court also acknowledged, however, that ?when a firm exercises monopsony power pursuant to a conspiracy, its conduct is subject to more rigorous scrutiny and will be condemned if it imposes an unreasonable restraint of trade.?

Turning back to West Penn?s allegations, the Court noted that ?the complaint alleges that Highmark paid West Penn depressed reimbursement rates, not as a result of independent decision making, but pursuant to a conspiracy with UPMC, under which UPMC insulated Highmark from competition in return for Highmark?s taking steps to hobble West Penn.? Accordingly, the Court concluded, ?it is certainly plausible that paying West Penn depressed reimbursement rates unreasonably restrained trade.? In addition, the Court rejected defendants? contention that Highmark?s actions had benefitted consumers, because (1) the complaint alleged that Highmark did not pass the savings on to consumers (which the Court accepted as true at this stage of the proceeding) and (2) even if Highmark did pass on cost savings to consumers, the Court opined that the quality and availability of hospital services would likely be diminished by defendants? conduct. Accordingly, having determined that Highmark?s payment of artificially depressed reimbursement rates, if proven, would constitute antitrust injury to West Penn, the court required that the complaint be reinstated.

The case now returns to the district court (the Western District of Pennsylvania) for further proceedings before Judge Arthur Schwab, and will likely be watched closely by both health care providers and insurers going forward.

DOJ Antitrust Division Announces Fiscal Year 2010 Criminal Enforcement Statistics ? Another Year of Vigorous Enforcement

In late November, Deputy Assistant Attorney General for Economics Carl Shapiro, the Antitrust Division?s lead economist, provided year-end statistics for the Antitrust Division?s criminal enforcement activity during the Division?s most recent fiscal year (October 1, 2009 ? September 30, 2010). The statistics demonstrate that the risks for those that engage in anticompetitive conduct continue to be quite significant.

All told, the Antitrust Division filed 60 criminal antitrust cases in fiscal year 2010, and collected inexcess of $550 million in fines. The Division charged 84 corporate and individual defendants with antitrust violations, and 76% of all individuals charged ultimately were sentenced to serve jail time. The average

sentence imposed was 30 months, and total jail time for all defendants was approximately 26,000 days. In virtually all categories these are the second highest totals in recent memory (exceeded only by fiscal year 2009), and the total jail time figure obtained in 2010 is the highest on record.

Not surprisingly, Deputy Assistant Attorney General Shapiro concluded his remarks with the following advice: ?We encourage firms to establish comprehensive and thorough compliance and educational programs as a means both to deter violations of the antitrust laws and to detect the same.? Wise counsel, for sure.

Blue Cross of Georgia and Georgia Insurance Commissioner Spar Over the Use of MFN Clauses

While the DOJ Antitrust Division?s action against Blue Cross of Michigan has received considerably more attention, another Blue -- Blue Cross of Georgia -- is also engaged in litigation with regulators concerning its use of ?most favored nation? clauses in its provider contracts.

Specifically, Blue Cross of Georgia has filed an action in the Fulton County Superior Court (*Blue Cross and Blue Shield of Georgia v. John W. Oxendine, Commissioner of Insurance*, Case no. 2010cv189416) seeking a judicial declaration that its use of such clauses is lawful. The action follows statements by Georgia Insurance Commissioner John Oxendine indicating that the use of such clauses violates the Georgia unfair trade practices act, and his direction that all insurers in the state discontinue their use of such clauses in their provider contracts. Blue Cross instead filed suit (seeking a declaration that the clauses are not unlawful). In support of its case, Blue Cross maintains that its use of the clauses leads to lower prices for consumers and that there is no evidence that they have restricted competition in Georgia.

An initial status conference in the matter was held in late December and, unless resolved by settlement, will now likely proceed into discovery. Insurance Commissioner Oxendine has already announced that, should the court not rule in his favor, the Georgia legislature should enact legislation banning the use of most favored nation clauses in all Georgia health care contracts. (Over the last five or so years, approximately 15 states have enacted legislation that either limits or prohibits the use of such clauses in certain circumstances.)

For more information about this topic, please contact the author or any member of the Williams Mullen Antitrust - Insurance Team.

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