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Health Law

Antitrust Alert

Fifth Circuit Affirms FTC Ruling in Precedential "Messenger Model" Antitrust Case

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On May 14, the U.S. Court of Appeals for the Fifth Circuit issued a significant decision regarding the application of the antitrust laws to physician contracting practices. The ruling, in *North Texas Specialty Physicians v. FTC*, affirms the Federal Trade Commission's 2005 ruling that North Texas Specialty Physicians ("NTSP"), a physician-controlled independent practice association, misused the "messenger model" and thus engaged in horizontal price-fixing. The decision is the first time that an appellate court has considered the limits to which the "messenger model" can permissibly be used, and thus constitutes a significant decision in this area. The court's analysis also provides useful guidance regarding how best to steer clear of potential violations.

Background

In 1996, the Department of Justice Antitrust Division and the Federal Trade Commission issued Joint Statements of Antitrust Enforcement Policy in Health Care (1996) (the "Guidelines"). The Guidelines outline, among other things, the extent and circumstances in which health care providers can engage in collective contractual negotiations with payors without violating the antitrust laws. The Guidelines also introduced the concept of a "messenger model," whereby a group of providers designates an agent to shuttle fee information between physicians and the payor so that providers that are not clinically integrated can still obtain some of the efficiencies of joint contracting without offending the antitrust laws. Since that time, the FTC and the DOJ have commenced numerous enforcement actions against provider groups that exceeded the permissible boundaries of the messenger model, but in each instance, until *North Texas Specialty Physicians v. FTC*, the providers agreed to a consent decree to resolve regulator concerns.

However, in 2003, the FTC brought an administrative action against NTSP, contending that it had misused the messenger model and engaged in horizontal price fixing. Specifically, the FTC challenged the following conduct by NTSP: (1) polling providers on the minimum fees they would accept from payors and then disclosing the results, in the form of mean, median, and mode fee minimums, to all physician members before contracting had begun; (2) utilizing these "contract minimums" in negotiations with payors, and refusing to pass on payor offers that did not meet or exceed these minimums; and (3) obtaining the agreement of providers not to contract individually with the payor while NTSP was engaged in joint negotiations. In 2004 an Administrative Law Judge ruled

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Questions?

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for the FTC, and that decision was affirmed in 2005 by the Commission in a decision that the FTC described as "not really a close case." The Commission concluded that NTSP had engaged in "not only negotiation activity in aid of a collective agreement on a minimum fee schedule, but also specific enforcement mechanisms — such as powers of attorney and collective withdrawal from payor networks — in order to coerce agreement from payors." Thus, when viewed as a whole, NTSP's conduct left "no doubt that the overriding purpose behind it was to fix prices." NTSP subsequently appealed the decision to the Fifth Circuit Court of Appeals.

The Fifth Circuit Decision

Before the Fifth Circuit, NTSP argued that the FTC decision was erroneous because (1) NTSP was a single actor, and thus there was no evidence of concerted action (the FTC proceeding had not individually charged its physician members); and (2) that the FTC had impermissibly failed to engage in a full rule of reason analysis of NTSP's conduct, instead finding it "inherently suspect" and thereby ignoring NTSP's evidence of procompetitive justifications for its conduct. However, siding with the FTC in all respects, the Fifth Circuit affirmed the FTC's decision.

Specifically, with respect to the issue of concerted action, NTSP argued that it was a "memberless, non-profit corporation" and that its actions were not the actions of any individual physicians. However, the Fifth Circuit held that "NTSP is controlled by competing physicians, and therefore is not a sole actor for purposes of the antitrust laws." In addition, responding to NTSP's contention that many of its board members did not compete with one another (given that they engaged in separate medical specialties), the court held "the correct analysis is not whether the board members compete directly with one another but whether the organization is controlled by members with substantially similar economic interests." Finally, addressing NTSP's argument that there was no evidence of direct agreement between any NTSP members, the court agreed with the FTC that "it is enough that participating physicians individually authorized NTSP to take certain actions on their behalf, knowing that others were doing the same thing" and that "the fact that physicians could reject offers negotiated by NTSP does not establish that there was no agreement on price."

NTSP was no more successful on its second issue. First, while the Fifth Circuit held that the "quick look" analysis applied by the FTC is appropriate "only when the likelihood of anticompetitive effects is obvious," it concluded that the net anticompetitive effects of certain of NTSP's practices were, in fact, "obvious." Specifically, regarding NTSP's polling on fees, the court held that "the FTC reasonably concluded that the physicians anticipated that any individual response would help to raise or lower the average fee for the group - an average that NTSP would then use in negotiating with payors." Thus, "if NTSP was successful in obtaining a contract with a payor . . . the fees to which NTSP agreed would be higher than the minimum fees that many of its participating physicians were willing to accept and had indicated in their polling responses they were willing to accept." In addition, the court agreed with the FTC's conclusion that NTSP "actively encouraged physicians to reject offers below the minimum fees indicated in the polls." As such, "Even though NTSP could not bind physicians to particular contracts, its practices interfered with payors seeking lower fees."

The Aftermath

On July 3, NTSP filed a motion requesting that the Fifth Circuit reconsider its decision *en banc*, arguing, among other things, that the Fifth Circuit Panel failed to consider the market effects of the alleged conduct (which NTSP contends are nonexistent). In support of its argument, NTSP asserts that "physicians rejected offers messengered through NTSP more than two-thirds or the time," that "physicians did not receive higher rates through NTSP than those that physicians and other physician groups were already receiving" elsewhere, and that "the contracts to which NTSP was a party were no more than 8 percent of the contracts in any county" in which it operated. Stay tuned.

Northern Virginia Hospital Merger Abandoned After FTC Challenge

On June 6, Inova Health System and Prince William Health System, two Northern Virginia hospital systems, announced that they were abandoning their plans to merge. The decision came less than a month after the Federal Trade Commission filed an action in the U.S. District Court for the Eastern District of Virginia requesting that the court issue a preliminary injunction blocking the deal.

The parties' decision to abandon the transaction followed a preliminary hearing before the District Court at which the FTC laid out the evidence it proposed to present in the case, but before the court had issued a ruling in the matter. In response to the parties' announcement, the FTC asserted that it had "marshaled the evidence necessary to prove the transaction would have violated the antitrust laws" and that "stopping this proposed deal is a major victory for Northern Virginia consumers." The parties, however, had a decidedly different perspective on these events. Pointing to the FTC's decision to

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appoint FTC Commissioner Thomas Rosch to hear the FTC's contemporaneously-filed administrative complaint, a decision that suggested the FTC would continue its challenge to the merger even if the District Court failed to enjoin the transaction, the parties claimed that the FTC's challenge included "unusual process changes ... that threatened to prolong completion of the merger by as much as two years."

The FTC's challenge to the Inova/Prince William merger was its first hospital merger challenge in federal court since 1998, and followed a long prior string of district court loses in such matters. However, the challenge was the first in which it signaled that a loss in federal court would not trigger a decision on its part to dismiss its administrative complaint. Accordingly, the manner in which the FTC handled this matter may reflect a new approach by the FTC to merger challenges, and one that may make it more difficult to defeat FTC challenges in contested merger proceedings.

Private Damages Action Following FTC Evanston Hospital Decision Not Time Barred

On May 29, a federal district court in Illinois rejected Evanston Hospital's attempt to have a number of private class action antitrust proceedings against it, filed in the aftermath of the FTC's successful challenge to its 2000 merger with Highland Park hospital, dismissed as untimely. The actions, consolidated as *In re Evanston Northwestern Healthcare*, were filed in 2007, seven years after the merger had closed. Accordingly, with the statute of limitations for federal antitrust claims typically four years, Evanston argued that plaintiffs' claims were clearly time-barred and sought to have the claims dismissed.

However, despite the seven-year delay in bringing the suits, District Judge Joan Lefkow refused Evanston's efforts to have the claims dismissed. In reaching this conclusion, Judge Lefkow noted that under the "discovery rule," a claim accrues not when the defendant's anticompetitive conduct began, nor when a plaintiff was first injured by that conduct, but when the plaintiff discovers (or reasonably should have discovered) that he has been injured and who caused the injury. Thus, despite the fact that plaintiffs' complaints were filed more than four years after the merger closed, this did not preclude the possibility that plaintiffs did not learn of their injury until some time after January 2000. Moreover, Judge Lefkow also held that plaintiffs' claims were tolled for the period of time during which the FTC administrative complaint was pending. Because that action was commenced in February 2004, Judge Lefkow ruled that for plaintiffs' actions to be timely filed the critical issue was whether plaintiffs knew, or should have known, that they had suffered injury from the merger between January 2000 and February 2000. Because this issue was one that could not be determined from the pleadings, and would instead require discovery, Judge Lefkow refused to dismiss plaintiffs' complaints. The action now moves into discovery, causing further trouble for Evanston on a transaction that it long ago believed had been successfully consummated.

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