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Health Law

Antitrust Alert

Federal Regulators Issue Joint Statement Opposing State Certificate Of Need Statutes

In September, the Federal Trade Commission and the Department of Justice Antitrust Division issued a joint statement expressing their strong opposition to state "certificate of need" laws, which typically prevent firms from entering health care markets unless the potential new entrant can demonstrate to state authorities that there is an unmet need for their services. The statement was sent to the Illinois Task Force on Health Planning Reform, which is currently studying whether to propose changes to the Illinois certificate of need law.

While the Federal Trade Commission and the DOJ (collectively "the agencies") have expressed their disapproval of certificate of need statutes in the past (for example, the FTC issued a statement recommending changes to the Florida certificate of need law in April), the joint statement constitutes their most complete and comprehensive expression of their views on the subject. The agencies declared that their "experience and expertise has taught that certificate of need laws impede the efficient performance of health care markets," and that "by their very nature, certificate of need laws create barriers to entry and expansion to the detriment of health care competition and consumers." The agencies further explained that certificate of need statutes "undercut consumer choice, stifle innovation and weaken markets' ability to contain health care costs."

The agencies also sought to refute many of the most common arguments typically advanced in support of certificate of need statutes. In response to the claim that health care is "different" from other markets, the agencies asserted that this argument is simply "not supported by the evidence or the law." In addition, the agencies also argued that the original reasons for which certificate of need statutes had been created are no longer valid. The statutes were enacted to ensure that the National Health Planning and Resources Development Act of 1974, which provided for the reimbursement of health care charges on a "cost-plus" basis, would not lead to unchecked over-development of health care facilities. As the Agencies noted, reimbursements are no longer made on a cost-plus basis, and the National Health Planning and Resources Development Act was repealed in 1986. Finally, the agencies also argued that certificate of need statutes have also failed to contain costs, which was another ostensible purpose for their enactment.

Finally, the agencies also noted that, in some instances, existing competitors have exploited certificate of need laws to thwart or delay new competitors from entering the market. Specifically, the agencies asserted that "incumbent providers may use the hearing and appeals process to cause substantial delays in the development of new health care services and facilities," and that much of this conduct may be shielded from federal antitrust scrutiny because it involves petitioning protected by the Noerr-Pennington Doctrine.

Thus, for all of these reasons, the agencies concluded their statement by urging the Illinois Task Force to "seriously consider whether Illinois' certificate of need law does more harm than good" for consumers.

Also in this edition:

Questions?

For more information on these and other health care-related antitrust matters, please contact the author, James M. Burns, at jmburns@williamsmullen.com or 202.327.5087.

FTC Seeks to Institutionalize the Procedures Taken in its Successful Inova Merger Challenge

Earlier this year, the FTC challenged the merger of Inova Health System, the largest hospital system in Northern Virginia, and Prince William Hospital System, a 180-bed facility in a contiguous Northern Virginia county. The high-profile challenge proved to be successful, as the parties ultimately agreed to abandon the deal. The FTC took several procedural steps in its Inova challenge that it had not previously utilized, and in doing so it reversed a long string of prior failures in litigated merger challenges. Thus, not surprisingly, on Sept. 25 the FTC announced plans to implement new rules that would formalize the procedures undertaken in its Inova challenge.

Critical to the FTC's success in the Inova challenge was its ability to persuade the U.S. District Court for the Eastern District of Virginia that the court's preliminary injunction hearing should be of limited scope, designed only to preserve the status quo until the FTC could conduct its own administrative hearing on the merger. Inova took a contrary position, arguing that this position constituted a fundamental change from prior FTC merger challenges, and that a full blown hearing by the court, with significant prehearing discovery and live witnesses, was both appropriate and required. However, the court disagreed, siding with the FTC; shortly thereafter, the parties abandoned their merger.

Basking in its success, the FTC now intends to formalize the procedures taken in the Inova challenge. Because the speed with which the FTC could advance a merger challenge to an administrative hearing was a critical issue for the district court, the FTC's proposed new procedures would ensure that administrative challenges were resolved more quickly. Chief among these changes is the decision to have FTC administrative proceedings, and discovery, proceed concurrently with any district court proceedings. This is a fundamental change in approach; in the past, the FTC typically stayed its proceedings until after the district court had ruled (which delayed the FTC proceedings and often granted the district court a more prominent role in determining the merits of the merger). In addition, the administrative trial would be limited to no more than 210 hours (30 seven-day hearing days), split equally between the FTC and the merging parties and the full FTC would also be authorized to rule in the first instance on dispositive motions in the case.

Finally, demonstrating the importance with which the FTC attaches to these changes, on Nov. 4 it rejected a request that the deadline for comments on the proposed new rules be extended. The new procedures are now likely to be implemented early next year.

Pharmacy Benefit Managers Group Attacks Independent Pharmacy Collective Bargaining Bill

In late September, the Pharmaceutical Care Management Association ("PCMA"), a trade association of pharmacy benefit managers, issued a statement strongly opposing H.R. 971, the Community Pharmacy Fairness Act. The legislation, introduced back in 2007, would permit independent pharmacies to negotiate collectively with health plans and other payors over payment rates and other contract terms for prescription drugs.

The PCMA's announcement was timed to follow a September Congressional Budget Office ("CBO") report on the legislation. The CBO report concluded that the legislation "would increase costs for Medicare Part D, Medicaid, and the Federal Employees Health Benefits Program" as a vehicle for reviving the debate on this legislation. The PCMA, seizing on this announcement, declared that H.R. 971 would also "give independent pharmacies a license to collude to raise prescription drug prices, without adding value to consumers or payors." The PCMA further noted that the FTC expressed its strong opposition to the legislation during testimony before the House Judiciary Committee Antitrust Task Force earlier this year, stating that "Giving health care providers ... a license to engage in price fixing and boycotts in order to extract higher payments from third-party payors would be a costly step backward, not forward, on the path to a better health care system."

No further action is expected on the legislation this year, with Congress expected to limit its activities in the upcoming "lame duck" session to those arising from the financial crisis. Thus, the PCMA statement appears to be an attempt to dissuade legislators from reintroducing the legislation early next year when the new Congress is convened.

Battle Rages on in Pennsylvania Blues Merger

Pennsylvania's review of the proposed merger between Highmark Blue Cross and Blue Shield and Independence Blue Cross continued in October, showing no clear sign that it will soon come to an end, despite the fact that the merger has now been pending for over 18 months and was approved by federal antitrust regulators well over a year ago.

Instead, on Oct. 7, the Pennsylvania Senate Banking and Insurance Committee held another hearing in the matter, soliciting additional public comments on whether the committee should recommend to the Pennsylvania Insurance Department that it approve the merger. At the hearing, the committee heard once again from the chief executives of both insurers, who again urged the committee to recommend approval of the merger. The CEOs maintained that both experts engaged by the Pennsylvania Insurance Department to examine the merger had confirmed that the merger would provide significant benefits for the citizens of Pennsylvania, and therefore further delay was unjustified.

However, opponents of the merger took a decidedly different stance on the experts' reports. Jonathan Stein, testifying on behalf of several organizations opposing the merger, claimed that the Blackstone Group report acknowledged some benefits of the merger, but claimed that the benefits to consumers "may need to be discounted" because of the difficulty in assessing what the parties would do independently absent the merger. Accordingly, Stein urged the Senate Committee not to recommend approval of the merger. Finally, perhaps sensing that-at this point-approval of the merger may be a question of when, not if, Stein recommends that the insurers should be required to increase the commitment to charitable care that they have previously announced to gain approval of the deal.

A final decision on the merger could issue from the Pennsylvania Insurance Department any day, bringing to a close one of the longest merger reviews ever undertaken.

For more information on these topics, please contact, James M. Burns, Antitrust Team Chair, at 202.327.5087 or jmburns@williamsmullen.com.

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