

***WOMBLE CARLYLE AND ECONOMISTS INCORPORATED
PRESENT A WEBINAR:***

**EMERGING ANTITRUST POLICY AND
PRACTICE IN HEALTH CARE MERGERS**

**December 16, 2009
12:00 – 1:30 p.m. (Eastern Time)**

*To enter the teleconference (audio) portion of the seminar:
Dial 1-888-732-6202 and when prompted, enter code 739293 followed by the # sign.*



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Presenters

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Webinar Overview

- Recent developments on the policy front
- Recent enforcement actions in the healthcare sector
- Some practice considerations: Hospital merger hypothetical
- Q & A Session



Recent Developments on the Policy Front

- Horizontal Merger Guidelines under review
- Speeches, papers, and remarks by Christine Varney signal renewed enforcement efforts
- DOJ's withdrawal of Section 2 report



Recent FTC Challenges

- Carilion Clinic
 - Dominant system acquires outpatient imaging and surgery center
 - After acquisition, Carilion faces competition for these services from only one other provider in Roanoke
 - \$20 MM transaction; not HSR reportable
 - FTC focused on prospective competitive effects
 - Resulted in divestiture



Recent FTC Challenges

- Thoratec/HeartWare
 - Merger of competing LVAD suppliers
 - Thoratec competing in the market; HeartWare seeking FDA approval
 - FTC proceeds on “potential competition” theory
 - Parties abandoned transaction



Recent FTC Challenges

- CSL Limited/Talecris
 - Merger of second- and third-largest suppliers of plasma-derivative protein therapies
 - Market configured as “tight oligopoly”
 - CSL’s post-acquisition market shares ranging from 42%-82%, depending on the relevant product market
 - Parties abandoned transaction



Hospital Merger Hypothetical

- Godzilla Medical Center's acquisition of Little Engine Hospital
 - Small hospital with limited access to capital
 - 3-to-2 merger
 - Non-HSR reportable
 - Godzilla to have a lock on certain physician services after acquisition
 - Post-acquisition rate increases at Little Engine; aggressive contracting tactics by Godzilla
 - FTC initiates investigation 2 years after consummation



Motivation for Transaction

- Small hospital, poor economy, competitive challenges
- Tight credit markets; capital infusion from Godzilla
 - Are the enforcement agencies more receptive to a failing/flailing firm defense in this economy?
- Elimination of certain redundancies in the market; capital avoidance for Little Engine
- Expansion of services at Godzilla



Market Dynamics

- What role will market demographics (small town v. large city, rural v. urban, etc.) play in the analysis?
 - Have the enforcement agencies targeted certain types of markets in recent challenges?
 - Carilion
 - Inova/Prince William



HSR Reportability

- If the transaction is not HSR reportable, what are some practical considerations for transaction counsel?
 - When should the parties retain an economist?
 - Should the parties voluntarily meet with the enforcement agencies?
 - What information will interest the agencies?



The Transaction's Effect on Competition

- Godzilla will have a lock on certain physician services
 - How do the enforcement agencies view physician concentration?
 - In general, how much weight is given to physicians' unilateral determination to affiliate with one facility over another?



Post-Acquisition Contracting

- 25% rate increase at Little Engine
 - How problematic is this in light of Evanston Northwestern?
 - Is there a procompetitive rationale to justify this rate increase?
- Godzilla is viewed as “must-have” due to its lock on certain services
- Godzilla is seeking exclusive managed care contracts
 - How do the agencies typically view exclusive contracts?
 - How will they be viewed under these circumstances?
- Any practical tips for engaging in managed care contracting after a transaction?



Complaints to FTC

- Complaints from area's largest payor
- Complaints from Sisyphus
- How much credibility will Sisyphus (competitor) have versus Orange Cross/Orange Shield (payor)?



Enforcement Issues

- Transaction challenged 2 years after the fact
 - What evidence is the FTC most likely to consider?
- Assuming post-acquisition pricing analysis is not favorable to Godzilla, how will the FTC likely view efficiencies?
- What is the most likely avenue of relief?
- Any practical tips for responding to FTC investigation?



Q & A



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