

SIZE MATTERS: ANTITRUST WARNING SIGNS IN ANESTHESIA GROUP AND PAIN GROUP MERGERS

Daniel B. Brown, Esq.
Neda Mirafzali, Esq.

The Health Law Partners, PC

The prospect of physician practice mergers can look clean and clear on the front end: perceived efficiencies, additional in-office revenues and additional power to negotiate attractive prices from commercial health insurance plans. But bigger doesn't always mean better. The back end of a merger can get ugly with the Federal Trade Commission (FTC), especially if the merged practice tries to bully its way to higher reimbursement. Compliance with antitrust rules is an important due diligence component of any health care combination.

Antitrust Rules. The federal Sherman Antitrust Act 1890 prohibits contracts, combinations and conspiracies in restraint of trade. Not all combinations violate the Act—only contracts that promote unreasonable restraints of trade are at risk.

Contracts retraining trade come in two judicial flavors. Some agreements—such as the agreement of local anesthesiologists to fix the price to charge hospitals for their services, or agreements to boycott certain hospitals—are so plainly anticompetitive that no examination of the arrangement's pro-competitive effects will save the conduct from antitrust penalties. In other words, these agreements, by themselves, trigger "*per se*" Sherman Act violations.

Alternatively, the suspect agreement may be less egregious. Antitrust penalties attach to these types of arrangements only if the anticompetitive effects of the



agreement outweigh the beneficial pro-competitive effects. Courts view these arrangements under the "Rule of Reason." This analysis requires an examination of the relevant service and geographic markets as well the overall competitive effects before a violation is found.

Antitrust violations are felonies with penalties of up to 10 years in jail and \$1,000,000 fine for individuals and \$100 million or more for corporations. Injured parties can bring private lawsuits against violators seeking treble damages and attorney fees.

You always want your arrangement to wind up in the Rule of Reason bucket.

Otherwise, it's "Game Over" if you find yourself with a *per se* anticompetitive agreement.

Hart-Scott Rodino Notices. The Hart Scott Rodino Act requires both acquiring and acquired parties in mergers, acquisitions, or certain other transactions to file pre-closing notifications with the FTC if the jurisdictional monetary thresholds apply. However, the notice applies only for large-dollar transactions whose total transaction consideration exceeds \$63.4 million in 2010. Persons engaging in transactions involving lesser amounts are not required to provide a pre-closing notice.

Continued on page 10

SIZE MATTERS: ANTITRUST WARNING SIGNS IN ANESTHESIA GROUP AND PAIN GROUP MERGERS

Continued from page 9

To Merge or Not To Merge? So what are the antitrust risks in merging anesthesia practices? Assuming there are no price fixing or other *per se* agreements, the arrangement will likely be viewed under the Rule of Reason analysis. Key to this analysis is whether the merged entity has dominant market power to suppress competition and whether the anticompetitive effects of the merger outweigh the pro-competitive effects.

For example, in 1982, the United States Supreme Court considered a case where a foundation originated a schedule of physician charges to be approved and used by its physician members in the local market. The members constituted 70% of all of the practicing physicians in the Phoenix, Arizona area. The Court deemed the physicians' agreement to use the fee schedule to be *per se* illegal price fixing under the antitrust laws. *Arizona v. Maricopa County Medical Society*, 457 U.S. 332 (1982).

Likewise, in 1996, the FTC issued a Business Review Letter describing why it would likely challenge the joint venture combination of five Orange County, California anesthesia practices under the antitrust laws. See, FTC Business Review Letter, Orange Los Angeles Medical Group, Inc. ("**ORLA**") (March 8, 1996.).

ORLA was to be comprised of five separate anesthesiology practices in Southern California. Each practice was the exclusive or dominant provider of anesthesia services at the local hospital served by the practice. Together, the local hospitals accounted for the lion's share of all managed care expenditures in Orange County.

ORLA's sole purpose was to contract with managed care customers for the individual practices' anesthesia services



at the hospitals. ORLA would negotiate a single payment covering all five groups. The managed care customer would pay ORLA for the anesthesia services provided by the group and ORLA would distribute the proceeds to the group that provided services.

ORLA argued that the combination created financial efficiencies for the anesthesia providers. Using a Rule of Reason approach, the Department of Justice defined the relevant service market to be managed anesthesia services and the relevant geographic market to be Orange County, California.

Although ORLA's members accounted for only 30% of the total anesthesiologists in Orange County, the DOJ drew the relevant market around these five practices and six hospitals. In this market definition, ORLA would reduce the number of group anesthesia competitors able to serve Orange County hospitals from six to two. Therefore, the DOJ concluded that the anticompetitive effects posed by ORLA's operation outweighed the alleged pro-competitive efficiencies claimed by ORLA.

FTC Guidance for Physician Joint Ventures. Recognizing that health care providers can generate legitimate price and cost efficiencies through combinations, the FTC published in 1996 its Statements of Antitrust Enforcement Policy in Health Care. The Statements provide guidance to mitigate antitrust risks in physician joint ventures.

An over-riding policy in the Statements is the belief that the clinical or financial integration of individual physicians or physician groups will promote health care delivery efficiencies sufficient to validate the combination. Alternatively, combinations that do not entail clinical or financial integration among its constituent members—like the ORLA situation discussed above—are likely to be found lacking under a Rule of Reason approach.

Christine Varney, the Assistant to the Attorney General of the Antitrust Division of the DOJ, stated that "the touchstone of clinical integration analysis is the adoption of a comprehensive, coordinated program of care management designed, and likely, to improve quality and cost-effective care. Only that kind of program—with its emphasis on realizing benefits for consumers—justifies rule-of-reason treatment for price setting or other agreements that might otherwise be *per se* illegal."

The goal, then, of any combination of anesthesia or pain care practices is to avoid a *per se* claim by including legitimate clinical or financial protocols to which all members fully adhere. The common protocols must be developed to streamline health care delivery in the market and promote cost savings or other pro-competitive effects. Members should invest sufficient



human and financial capital in protocol development and monitoring to realize the claimed efficiencies. Members who fail to adhere to the common protocols are to be disciplined or excluded from the combination. According to the Statements, a physician network developed to collectively bargain for rates but that involves little or no integration among its physician participants is per se illegal.

Abusive Exercise of Market Power. Even if operations are integrated, a dominant market player will be seen to engage in anti-competitive behavior by bullying others with market power tactics. Thus, in April of 2010, the FTC settled an enforcement action against Boulder Valley Individual Practice Association (BVIPA), a multi-specialty IPA of approximately 365 physician members in Boulder County, Colorado. The FTC alleged that BVIPA threatened to terminate contracts with payors facing rate increases if they refused to negotiate with the physicians through the IPA, or to otherwise respond to the IPA's demands.

In addition, BVIPA actively discouraged members from contracting with payors.

Similarly, on July 10, 2009, the FTC settled an enforcement action against Alta Bates Medical Group, Inc. (ABMG), an IPA consisting of about 600 physicians in Berkeley and Oakland, California. The FTC alleged, in part, that ABMG fixed prices and other contract terms with payors and forced ABMG members to refrain from negotiating individually with payors or contracting with payors on terms not approved by ABMG.

Exclusive Contracts for Anesthesia Services. A compelling reason to merge practices may be your merger partner's exclusive arrangement to provide anesthesia services at one or more local hospitals. Do these exclusive dealing arrangements present antitrust risk?

The answer is that exclusive service contracts are not likely to be troublesome under antitrust law. Courts generally have upheld exclusive hospital services contracts because of the practical efficiencies offered by single-source service vendors. The beneficial effects

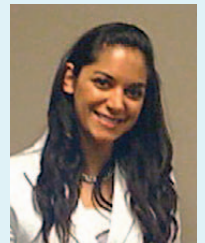
of exclusive services agreements include: (i) shared responsibility for effective administration, supervision and coverage of services, (ii) development of working relationships between the provider and hospital personnel and departments, (iii) assures full-time availability of services, and (v) lowers costs through standardization of procedures and centralized administration of the hospital departments.

CONCLUSION

Keeping antitrust issues in mind in the due diligence stage can help avoid FTC problems after closing. If the merged entity attains market dominance, it is a good idea to adopt policies to track antitrust compliance after closing. That way you may be able to obtain the most benefit in negotiating reimbursement rates for your larger anesthesia practice. ▲



Daniel B. Brown



Neda Mirafzali

Daniel B. Brown, Esq., is the managing shareholder of the Atlanta, Georgia office of The Health Law Partners. He can be reached at (770) 804-6475 or at Dbrown@thehlp.com.

Neda Mirafzali, Esq., is an associate attorney with the Health Law Partners, PC and practices in all areas of health care law, assisting clients with transactional and corporate matters; representing providers and suppliers in health care litigation matters; providing counsel regarding compliance and reimbursement matters; and representing providers and suppliers in third party payor audit appeals. She can be reached at (248) 996-8510 or at nmirafzali@thehlp.com.