Hospital Looking to Buy Your Practice? Beware of the Antitrust Angle.

If you have been operating your medical practice for a period of time, you may have been contacted by your local hospital with an expression of interest in acquiring your medical practice or entering into another arrangement where your practice and its revenues will be more closely affiliated with the hospital or a hospital affiliate. Hospitals are seeking to more closely align with physicians as a result of market pressures and the implementation of efficiencies and evidence-based medicine protocols required by the Affordable Care Act. In some instances, the hospital will request that the physician or physician group enter into a professional services agreement ('PSA'). Under a PSA, the physician group will provide services to the hospital while maintaining its existing medical practice. Typically, the hospital will request that the physician or physician group assign their right to bill and collect for professional medical services to the hospital or hospital affiliate, with the physician or physician group paid for its professional services out of the revenues collected for their professional services. In other circumstances, the hospital is interested in acquiring the assets of the practice and directly employing the physicians in either a captive professional corporation or directly by the licensed hospital.

In most instances involving the alignment with, or acquisition of, a physician practice by a hospital or a hospital affiliate, both the physician and the hospital are focused on the financial and operational terms of the deal. An issue that can often be overlooked is whether or not the potential alignment or acquisition of the physician practice creates any issues under the federal antitrust laws. In a recent federal court case decided in Idaho, the court found that the acquisition of a primary care practice by a hospital would have an anticompetitive effect upon both the prices charged to third party payors and the ability of a competitor hospital to obtain referrals. As a result, the court found that the acquisition violated the antitrust laws, and the acquisition of the physician group now has to be undone (absent a reversal of the lower court decision on appeal). Saint Alphonsus Medical Center ñ Nampa, Inc. v. St. Lukeís Health System, 214 U.S. Dist. LEXIS 9264 (D. Idaho 2014). ('St. Luke's'). Clearly, the expense of being involved as a party to costly antitrust litigation and the unwinding of a PSA arrangement or practice acquisition are both items that a practice will want to avoid.

The facts of the St. Luke's case involved the acquisition by St. Luke's of the furniture, fixtures and equipment of the Salzer Medical Group, a 40 physician medical practice located in Nampa, Idaho. Of the 40 physicians employed by the group practice, 16 provided adult primary care services and 8 provided pediatric services. The hospital and the medical practice entered into a PSA. Under the PSA, the physicians would provide medical services in Nampa on behalf of St. Luke's. Most of the services were to be provided in clinics operated by St. Luke's. In return, St. Luke's agreed to compensate the medical group and its physicians for performing medical services on behalf of the hospital pursuant to the PSA. St. Luke's would conduct all managed care contracting and billing for the physician group, and also hired all of the nonphysician employees who had previously worked for the physician group.

Following the affiliation, it was estimated that St. Luke's and Salzer Medical Group would control 80% of the primary care physician market in Nampa, Idaho. This caused concern for both the nearby competitor hospitals (Saint Alphonsus and Treasure Valley) and for third party payors. They were concerned that the concentrated market power which would be held by the hospital and the physician group following the acquisition would lead St. Luke's to negotiate higher fees with health insurers, leading to both higher health insurance premiums and claims payments. The competitor hospitals were also concerned that if the acquisition took place, St. Luke's would put pressure on the group practice physicians to steer patients away from the competitor hospitals for procedures such as CT scans and MRIs and would send them to St. Luke's instead, which would result in both a drop in referrals of patients to the competitor hospitals and the potential layoff of a significant number of staff members. As a result of these concerns, the competitors of St. Luke's which operated hospitals in Nampa filed a lawsuit seeking to enjoin the acquisition from taking place. The Federal Trade Commission and the State of Idaho were also parties to the litigation.

St. Luke's relied heavily on its goal of advancing the objectives of the Affordable Care Act in its defense of the lawsuit (the 'ACA defense).' At first, the federal district court denied the motion for a preliminary injunction and allowed the acquisition to proceed while the matter went to trial. However, at the conclusion of the trial, the court held that the acquisition was, in fact, anticompetitive and ordered divestiture of the affiliation between St. Luke's and the physician practice. While the court praised St. Luke's for its efforts in implementing the goals of the Affordable Care Act, it ultimately concluded that the ACA defense advanced by St. Luke's did not serve as a justification for the antitrust violations alleged by the plaintiffs.

The court found that that the acquisition was intended by St. Luke's and the physician practice to improve patient outcomes, and the court was convinced that it would have that effect if left intact. As is the case here in New Jersey, the court noted that the quality of patient care in Idaho is outstanding, but that the cost of such care is substantially above the national average. The court also found that St. Luke's had exhibited 'foresight and vision' in purchasing independent physician groups to assemble a team committed to practicing integrated medicine in a system where compensation depends on patient outcomes. However, the court ultimately concluded that the acquisition resulted in an anticompetitive effect. The court found that lit appears highly likely that health care costs will rise as a combined entity obtains a dominant market position that will enable it to (1) negotiate higher reimbursement rates from health insurance plans that will be passed onto the consumer, and (2) raise rates for ancillary services (like x-rays) to the higher hospital billing rate, since the acquired physicians would be encouraged to shift their referrals for such services to the hospital. 'The court concluded that even though St. Luke's was to be applauded for its efforts to improve the delivery of health care in the Treasure Valley, 'there are other ways to achieve the same effect that do not run afoul of the antitrust laws and do not run such a risk of increased costs.'

Generally, most physician practice affiliations or acquisitions do not require review and approval by the Federal Trade Commission prior to the transaction being consummated. While New Jersey has its own antitrust laws, New Jersey normally follows federal antitrust law interpretation and analysis in reviewing antitrust questions. Therefore, it is likely that any New Jersey lawsuit alleging antitrust claims would be initiated in federal court. However, if a federal court (or state court) in New Jersey were to review a similar set of facts as those considered by the Idaho federal court in the St. Luke's case, it is likely that a similar antitrust analysis and result would be reached.

If you are approached by a hospital or hospital affiliate which has expressed an interest in acquiring your practice or in entering into a professional services agreement with your practice, you should ask the hospital if they have conducted an analysis of the proposed transaction under the federal antitrust laws to ensure that the proposed acquisition or affiliation would not have an anticompetitive effect. Whether or not the transaction would be viewed as anticompetitive may be based on a number of factors, such as the physician or physician group's medical specialty or specialties; the size of the relevant geographic market; the percentage of market share that the affiliating hospital and physician group will control in the relevant market and specialty or specialties following the affiliation or acquisition; the number of competing physicians in the relevant specialty or specialties who will remain either as independent practitioners in the community or in affiliations with competitor hospitals following the acquisition; payor mix; the population density of the relevant market, and other factors such as ease of transportation to alternate providers. By asking the right questions, you can hopefully avoid the unfortunate circumstances that the Idaho physicians and St. Luke's found themselves in when they were ordered by the court to undo their transaction.

By Beth Christian of Giordano, Halleran and Ciesla, 732-741-3900