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# Health Law

## Antitrust Alert



### Federal Trade Commission Announces Public Workshops on Health Care Competition Issues

On Aug. 27, the Federal Trade Commission announced that it will hold two public workshops this fall on health care competition issues. The workshops will address (1) competition issues arising from the regulatory approval process for prescription drugs; and (2) competition among health care providers based on "quality information." The specific dates for the workshops will be announced soon by the FTC.

In advance of the workshops, the FTC has requested comments from the public on these issues. Moreover, the FTC has requested that the comments address the following questions: (1) the competitive effect of the approval and entry of follow-on drugs into the market; (2) the impact of a follow-on drug being designated "interchangeable" with a referenced drug; (3) how the prospect of competition from follow-on drugs influences research and development for new drugs, and the timing of them; and (4) how the method used by Medicare for reimbursement of drugs affect pricing and competition. With regard to the competitive issues raised by provider quality information, the FTC's questions include: (1) can health care quality be measured such that it is of value to purchasers in their decision making; (2) what quality information is considered most significant by consumers; (3) how broad a range of differences among health care providers and services is needed to motivate purchasers to switch service providers; and (4) what are the tradeoffs between quality-based competition and the availability of health care?

Public comments in response to the FTC's questions must be submitted before Sept. 30. In the Spring of 2009, the FTC will release a report on the results of the hearing.

#### Also in this edition:

■ *Pennsylvania Health Insurance Merger Faces Further Scrutiny*

■ *Closely Watched Illinois Attorney General Antitrust Case Against Downstate Hospitals to Proceed*

### Pennsylvania Health Insurance Merger Faces Further Scrutiny

On July 31, the Senate Judiciary Committee's Subcommittee on Antitrust, Competition Policy and Consumer Rights held a hearing to consider the proposed merger of Independence Blue Cross and Highmark Blue Shield, Pennsylvania's two largest health insurers. The transaction was announced over a year ago, but has been mired in regulatory review since that time while the Pennsylvania Insurance Department determines whether to approve the deal. The transaction would create one of the largest health insurers in the country (based on total premiums), but has already been approved by the DOJ Antitrust Division, principally because the insurers are not viewed as direct competitors (Independence operates predominantly in the Philadelphia area while Highmark is based in Pittsburgh). Now, with the parties still awaiting approval from the Pennsylvania Insurance Department, additional questions about the deal are being raised by, among others, Pennsylvania Senator and Senate Judiciary Committee member Arlen Specter.

Specifically, at the July 31 hearing, Senator Specter challenged the insurers' chief executive officers, Joseph Frick and Dr. Kenneth Melani, to provide further details

#### Questions?

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

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on the efficiencies the parties claim would be achieved by the deal. In response, Melani stated that the largest insurers in the country have many millions more subscribers than do Independence and Highmark, separately or combined, and consequently those insurers can better spread their operating costs over more members.

Melani also maintained that these larger insurers can leverage their large subscriber base to obtain better pricing from national suppliers of laboratory services, durable medical equipment, radiology services and pharmaceuticals, which neither Independence nor Highmark can currently do to any great degree. Accordingly, Melani asserted, the transaction would permit the parties to achieve these savings, which the parties value at approximately \$1 billion over six years. Moreover, both executives noted that the insurers have committed to direct \$650 million of this anticipated savings to expand health coverage for the uninsured in Pennsylvania.

The American Medical Association has opposed the transaction since its announcement, and took a leading

role at the hearing in denouncing it. After first criticizing the Antitrust Division generally for challenging only three of the more than 400 mergers involving health insurers and managed care companies over the last 12 years, the AMA turned its attention to the merits of the specific transaction under review. The AMA asserted that the transaction would create a “merger to monopoly,” and that national insurers have been largely incapable of penetrating the Pennsylvania market, despite significant market gains in many other regions of the country. Accordingly, the AMA told the subcommittee that the Antitrust Division’s clearance of the deal “greatly concerns” the AMA, and called upon the subcommittee to urge DOJ to reconsider its position on the deal.

Given that the DOJ Antitrust Division has twice reviewed and cleared the deal (the initial approval lapsed after twelve months), a change in position by the DOJ is unlikely. However, all of the parties, both for and against the transaction, continue anxiously to await a ruling by the Pennsylvania Department of Insurance on the deal, and should the Department approve the deal, a court challenge to the decision similar to the challenge raised earlier this year in the United/Sierra merger, is certainly possible.

## Closely Watched Illinois Attorney General Antitrust Case Against Downstate Hospitals to Proceed

Last summer, to great fanfare, Illinois Attorney General Lisa Madigan announced the filing of an antitrust action, *State of Illinois v. Carle Clinic Association*, against two southern Illinois hospitals, accusing them of conspiring to turn away Medicaid patients in an attempt to compel the state to increase reimbursements rates. After over a year of legal wrangling, Champaign County Illinois Circuit Court Judge Richard Klaus has rejected most aspects of defendants’ motions to dismiss the complaint, clearing the way for the case to proceed.

The action centers upon the state’s claim that Carle Clinic and co-defendant Christie Clinic, two large downstate clinics, agreed to set identical policies regarding Medicaid services at their facilities, forcing patients to seek out more costly emergency rooms for such care. The policies were implemented, according to the complaint, to force the state to raise reimbursement rates for the clinic’s physicians.

In a decision announced on Sept. 3, Judge Klaus ruled that the state had pled a viable antitrust claim, stating “The Attorney General alleges a ‘horizontal’ agreement between competitors for the purpose of controlling and limiting the sale and or supply of a service. The Attorney General further contends that the alleged agreement occurred for the purpose of fixing or controlling the fee charged or paid for services performed.” Accordingly,

Judge Klaus concluded, “The Illinois Attorney General sufficiently pleads a *per se* violation of the [Illinois] Act.”

Despite denying defendants’ motion, the court noted that it was “skeptical about the Attorney General’s damages claims,” stating that “it is difficult, at best, for the Court to envision the Attorney General proving that the alleged agreement caused antitrust injury and damages to the state.” As the court further explained, “The State controls the Medicaid reimbursement system, and it is an understatement to say that the system is under a severe stress which has absolutely nothing to do with Carle and Christie.” Finally, as to the state’s claim for damages on behalf of the citizens of Illinois (a so-called *parens patriae* claim), the defendants fared much better, succeeding in having that claim dismissed. In reaching that conclusion, Judge Klaus held that a “plain reading of the [Illinois Antitrust] Act illustrates quite clearly that the Illinois Attorney General lacks standing to assert a *parens patriae* claim.”

The case now proceeds into discovery, with the next hearing in the matter scheduled by Judge Klaus for Nov. 5. Stay tuned.

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