

FTC Complaint Evidences

Increasing Government Focus on Antitrust Abuses in the Healthcare Arena

BY: MICHEL MARCOUX

The Federal Trade Commission issued an administrative complaint on July 24, 2009, challenging Carilion Clinic's acquisition of two outpatient clinics in Roanoke, Virginia in August 2008.

FTC alleges that Carilion's acquisition of the two outpatient clinics – an advanced outpatient imaging services center called the Center for Advanced Imaging (CAI) and an outpatient surgery center called the Center for Surgical Excellence (CSE) – eliminated vital competition in violation of federal antitrust laws. The complaint further alleges that the acquisition will lead to higher health care costs and reduced incentives to maintain service and quality of care for patients in the Roanoke area. The agency seeks divestiture of these clinics and related assets necessary to restore the competition eliminated by the acquisition.

Obama's Antitrust Promise Becoming Reality

During his campaign, President Barack Obama promised to reinvigorate antitrust enforcement by stepping up review of "merger activity" and taking "effective action to stop or restructure those mergers that are likely to harm consumer welfare." The new Administration has explicitly identified several types of healthcare entities, such as hospitals in certain highly concentrated markets, insurance companies and group purchasing organizations, as being ripe for antitrust and consumer protection enforcement.

In early 2009, the President appointed veteran antitrust enforcement attorneys Christine Varney and Jon Leibowitz to lead the Department of Justice's antitrust division and FTC, respectively, and to ensure that his new policies reached fruition. Breaking with the relatively laissez faire antitrust policy under President Bush, both officials have hinted that dominant firms in given geographic and product markets that engage in improper business practices to stifle competitors will be likely targets of antitrust enforcement in the future. FTC's complaint against Carilion illustrates that this future may have arrived for hospitals in concentrated markets seeking to merge with or acquire competing providers of healthcare services in those markets.

The agency describes Carilion as the dominant hospital system in Southwest Virginia controlling approximately 80 percent of the hospital beds in the Roanoke area. Following the purchase of CAI and CSE, only HCA Inc.'s Lewis-Gale Medical Center remains in the Roanoke area to rival Carilion for the

provision advanced outpatient imaging and outpatient surgery services. FTC claims that higher healthcare costs for these services are inevitable with only two competitors in the region.

Lessons from FTC's Carilion Complaint

Federal antitrust regulators are taking the stance that monopolistic activity poses major problems in certain healthcare markets leading to higher costs and lower quality care for patients. Hospitals, thus, would be wise to carefully scrutinize any antitrust considerations as early as possible when pursuing mergers or acquisitions.

In the current regulatory environment, a disgruntled physician or another opponent to a given transaction has a high likelihood of finding a receptive ear at DOJ or FTC should he decide to report antitrust concerns to the government. For example, Carilion's purchase of the two outpatient clinics for \$20 million was too small a transaction to trigger automatic antitrust review by FTC. Still, FTC informed Carilion that the purchase was being investigated just two days after it closed, according to the Roanoke Times. It is likely that an opponent of Carilion brought the case to FTC's attention.

Making a decision not to pursue

a transaction based on an antitrust analysis conducted at the early stages of the negotiation process will be less painful from an economic and employee morale perspective than being forced post-closing by FTC to divest a recently acquired clinic and related assets.

Separately, in States like Alabama and Georgia with certificate of need (CON) laws, hospitals should consider possible antitrust ramifications that may occur down the road when deciding how to best oppose a competing entity that is seeking a CON.

CSE sought and received a Certificate of Public Need (Virginia's

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Heal the Claims Process, *continued from page 24*

The National Health Insurer Report Card was developed to encourage these goals by setting up an objective and reliable source of information on claims processing systems used by the nation's largest health insurers – Aetna, Anthem/BlueCross BlueShield, CIGNA, Coventry, Humana, UnitedHealthcare and Medicare. The broad performance measures fell under the six focus areas of payment timeliness, accuracy of remittance advice, transparency of fees and payment policies, code edit sources, denial rates and transparency, and workflow improvements.

Mark Rieger, CEO of the National Healthcare Exchange Services (NHXS), said the report card analysis was primarily based on electronic data interchange files totaling 2.5 million services billed on 1.6 million claims between February 1 and March 31, 2009 from providers in 29 states representing 62 specialties.

Rieger said among the lessons learned about payment timeliness, prompt payment laws do seem to have been effective in encouraging insurers to respond quickly. "Median days to the first remittance showed some improvement," he noted. Of continuing concern is that health insurers are not required to report the date a claim was received, but that information is crucial to physicians in order to track compliance with state prompt pay laws.

As for accuracy, Rieger reported, "Health insurers clearly made progress on the accuracy metrics. The match between the payers' reported and the physicians' expected contracted fee schedule rate increased significantly when compared to 2008." In 2009, private health insurers correctly reported the expected contracted rate to physicians 72-93 percent of the time as compared with 62-87 percent of the time in 2008. To continue the momentum, the AMA would like to see payers provide

on demand a complete, downloadable, product-specific contracted fee schedule; clearly identify a patient's plan type on each remittance; and then correctly apply the proper contracted fee schedule to each claim.

As with accuracy, payers have made gains in their efforts to improve transparency. Health insurers' Web sites have assisted payers in disclosing important policies and information to physicians through provider portals. However, work still needs to be done when it comes to a lack of transparency in terms of undisclosed claim edits, which adds substantially to the cost of claims reconciliation for physicians.

Denials, which were defined as "an allowed amount of billed charges and a paid amount of zero," improved over the past year for most payers. Only Coventry saw a rise in claims denials from 2008 to 2009 (from 2.88 percent to 3.99 percent). Leading the way in improvement, Aetna's percentage of claim lines denied dropped from 6.8 percent in 2008 to 1.81 percent in 2009. However, the AMA believes the variation between denial rates among payers clearly illustrates the lack of industry standardization.

"In spite of the notable improvements from 2008 to 2009," Rieger summed up, "there continues to be inconsistency and confusion that results from each insurer using different rules for processing and paying medical claims. This translates into physicians having to maintain payer-specific rule sets, which only increase their cost of doing business."

Both Rieger and Dolan agreed that everyone has a part to play in continuing the improvements seen over the past 12 months – certainly payers and providers, but also employers and patients.

For the complete 2009 report card findings, go to www.ama-assn.org/go/reportcard.

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equivalent to a CON) from the Commonwealth of Virginia's State Health Commissioner prior to Carilion's decision to purchase the facility. During this time, Carilion staunchly opposed CSE's COPN application noting, among other arguments, that CSE would offer "the very same services offered at Carilion." Now, FTC is using some of Carilion's language and arguments from its opposition to CSE's COPN application against Carilion to show that antitrust laws have been violated by the acquisition.

An Administrative Law Judge is slated to hold an evidentiary hearing concerning the Carilion case on March 23, 2010. As that date nears, hospitals should expect to see more antitrust complaints filed by FTC and DOJ lawyers making similar allegations to those made against Carilion.



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