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Physician Practice Acquisitions Continue to Attract Antitrust Scrutiny

Healthcare reform continues to drive consolidation among healthcare providers attempting to leverage economies of scale, respond to calls for increased coordination of care and maintain margins in the face of declining reimbursement. In many instances, these provider consolidation efforts have attracted antitrust scrutiny from both federal and state enforcement agencies. Earlier this month, the Federal Trade Commission (FTC) and Nevada attorney general continued a recent string of successful enforcement actions against healthcare providers, announcing that they had entered into a proposed consent decree with Renown Health (Renown) relating to its acquisition of two cardiology physician groups.

According to the government's complaint, Renown acquired Sierra Nevada Cardiology Associates in November 2010 and hired its 15 cardiologists. Subsequently, in March 2011, Renown acquired Reno Heart Physicians and hired its approximately 16 cardiologists. Together, the 31 physicians represented 97 percent of the cardiologists in the Reno-Sparks Metropolitan Statistical Area at the time of the acquisitions, and 88 percent of the market at the time the complaint was filed. In addition, the physicians' employment agreements contained non-compete provisions that prohibited them from joining another medical practice within 50 miles of Renown for a period of two years following termination of their employment with Renown.

The FTC concluded that the acquisitions effectively eliminated competition in the market for cardiology services in the Reno-Sparks Area, thereby providing Renown with the incentive and ability to raise prices and/or reduce quality for the provision of those services. To remedy these anticompetitive effects, the proposed consent agreement requires Renown to suspend the non-compete provisions until a minimum of six of its cardiologists have terminated their employment agreements to go to work for one or more competitors in the Reno market.

The enforcement action against Renown acts as a reminder that physician practice acquisitions continue to be under the antitrust microscope, following successful challenges to proposed or consummated physician practice acquisitions in the states of Washington, Pennsylvania and Maine within the last 18 months. This trend is likely to continue in response to further consolidation in the industry.

Key takeaways:

- **"Out of Sight" Does Not Mean "Out of Mind."** Most physician practice acquisitions fall below the mandatory filing thresholds under the Hart-Scott-Rodino Act. Parties may therefore mistakenly believe that the transaction is not subject to antitrust review. The Renown case is the latest among many non-reportable transactions that have been investigated and challenged by antitrust enforcers, many of which are brought to the government's attention by third-party complainants such as commercial payers or competing providers.
- **There's No Such Thing as a Done Deal.** As the Renown case makes clear, consummated transactions are fair game for antitrust enforcers. Antitrust scrutiny is particularly likely where providers engage in post-acquisition price increases unrelated to quality improvements, or where providers engage in other conduct (through contractual provisions or otherwise) intended to limit or eliminate competition in the market.
- **Think Small (or Narrowly).** In Renown, as it has in other enforcement actions, the government defined the relevant market as a single service line (cardiology services) within a somewhat limited geographic area. Thus, even small acquisitions that consolidate in one provider all or

virtually all of the providers of a particular specialty can raise significant antitrust concerns. Single specialty groups (especially those with a significant market presence) should take particular care when considering the acquisition and/or hiring of competing providers.

- **Think Ahead.** Physician practice acquisitions that result in large market shares are those most likely to receive antitrust scrutiny. How large is too large for antitrust purposes depends on a number of factors and will vary from market to market. For example, in Renown, the loss of six cardiologists (as required by the proposed consent agreement) would presumably have left Renown with approximately 70 percent of the market, whereas in other cases the government has challenged provider acquisitions resulting in combined market shares lower than this amount. Given this variability, involving antitrust counsel early in the planning process of an acquisition to analyze the market can prove beneficial in identifying potential antitrust concerns raised by the transaction, as well as the steps parties can take to minimize those potential concerns and the possibility of a government investigation of the transaction.

For more information on the Renown consent decree and how to avoid antitrust scrutiny, contact one of the Squire Sanders antitrust lawyers listed below.

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