Health Care Antitrust Advisory: Assistant Attorney General Varney's Healthcare Antitrust Speech Emphasizes Health Insurance Industry Enforcement and Offers Supportive Remarks on Clinical Integration

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At the American Bar Association's *Antitrust in Healthcare Conference* on May 24, 2010, Department of Justice Antitrust Division head Christine Varney gave her first detailed thinking on health care antitrust enforcement priorities. Her remarks focused on two key areas. First, "the importance of measured, responsible antitrust enforcement in preserving open and vigorous competition in health insurance markets," and second, "the importance of encouraging innovation and efficiency in health care delivery and the ways in which coordination and integration among health care providers can help achieve these goals while still preserving competitive markets."

Varney began by noting the substantial role that the Antitrust Division will play in ensuring that reform is achieved under the Patient Protection and Affordable Care Act, enacted by Congress on March 21st, which relies, in part, "on the belief that robust competition and expanded choice will expand coverage while containing cost." She asserted that health care reform, and specifically the success of the Exchanges and Accountable Care Organizations (ACOs) called for by the Act "will depend, in large part, on effective competition, both among health care insurers and providers."

Turning to enforcement issues, Varney stated that "responsible antitrust enforcement has long been, and will continue to be, crucial to the health care industry. This includes health insurance plans, providers, and others in the industry." She then put a spotlight on health insurers, highlighting the proposed Blue Cross Blue Shield of Michigan and Physicians Health Plan of Mid-Michigan merger that was abandoned in March after the Department of Justice (DOJ) indicated that they would challenge it. More generally, she claimed that DOJ is very vigilant in examining health insurance mergers, and said that DOJ is "committed to vigorously, but responsibly, scrutinizing mergers in the health care industry that appear to present a competitive concern."

Varney concluded her enforcement discussion with an acknowledgement that "anticompetitive conduct and the exercise of market power by health care providers also can harm consumers and violate the antitrust laws. Accordingly while most hospital mergers and acquisitions do not present competitive concerns," DOJ and the Federal Trade Commission (FTC) "[do] investigate hospital mergers and will act to prevent those mergers that are likely to reduce competition. In that effort, we use the same analytical framework that we use for other mergers."

Also with respect to the health insurance market, Varney described the agency's "Entry Project," an initiative to gather expert experience and insight about the significance and nature of entry and expansion in the health insurance industry. As a result of the project, DOJ reached several conclusions. First, the greatest obstacle to an insurer's entry or expansion in the small- or mid-sized employer market is scale. Second, it may be easier to enter less-concentrated markets, with competition between several large, but relatively equal-sized, insurers than it is to enter a market with one or two dominant plans. Third, new entrants or niche players are more likely to receive provider discounts comparable to their competitors' in less concentrated markets than they are in markets dominated by one or two plans.

Varney suggested that the initiative suggests three important takeaways for the health insurance industry. First, DOJ will carefully review mergers in the industry. Second, entry defenses will be generally viewed with skepticism. Third, DOJ will carefully scrutinize and continue to challenge exclusionary practices by dominant firms—such as most-favored nations clauses and exclusive contracts that reduce the ability or incentive of providers to negotiate discounts with aggressive insurance entrants.

Varney also devoted a large portion of her speech to clinical integration, of which she spoke in supportive and favorable terms. As Varney indicated, "[t]here does not seem to be serious dispute that clinical integration and coordinated care have the potential to decrease costs and improve quality. The key is whether we can gain those benefits without sacrificing meaningful competition."

Varney reviewed the development of clinical integration guidelines under her tenure as an FTC Commissioner. She referred to several FTC advisory opinions in the space. She also referenced financial integration and asserted that "it is incumbent upon the group to share financial risk in such a way that each member has an economic incentive to ensure that the group as a whole produces material efficiencies that will benefit consumers."

As to clinical integration, Varney stated"[w]hile there is no particular formula that can cover all types of legitimate clinical integration, the key is that there must be sufficient clinical integration to motivate the kinds of changes that can achieve real cost-containment or other performance benchmarks. For example, indicia of clinical integration may include: adequate infrastructure; an adequate number of meaningful protocols for diagnoses and treatment of diseases; enforceable performance standards; and proof of physician commitment to the program. However, where purported efforts to integrate are principally a vehicle for obtaining and exploiting market power or simply a subterfuge for price fixing, then antitrust is there, as it should be, to protect competition and consumers." Notably, Varney did not focus upon the requirement that the joint contracting be reasonably necessary to the clinical integration program.

Looking forward, Varney suggested that ACOs may be a "good example of how providers might work together to deliver more efficient, high quality care without inhibiting competition, so long as their collaborations are properly constructed."

To close her discussion of clinical integration, Varney indicated that DOJ and the FTC are talking about "two important topics with respect to clinical integration." First, the agencies want

to find additional ways "to reach out to clinical-integration stakeholders and convey the important message that antitrust is not an impediment to legitimate clinical integration." Second, the agencies want to see if they "can improve, streamline, and make more transparent [their] review of integrated provider networks."

As a side note, Varney reviewed the agency's business review procedure available for competition advocacy. As an illustration, she highlighted the business review letter issued in April indicating that DOJ would "not challenge a proposal to establish an information exchange program providing data on the relative costs and resource efficiencies of more than 300 hospitals in California."

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The complete text of the speech is available at http://www.justice.gov/atr/public/speeches/258898.pdf.

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