

## Antitrust Advisory

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### FTC Uses Creative Remedy to Halt Cardiology Practice Merger: Requires Suspension of Employed Physicians' Non-Compete Contracts

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The Federal Trade Commission (FTC) is leaving no stone unturned in its scrutiny of physician acquisitions, as indicated by its recent enforcement action regarding the acquisition of a small cardiology group in Reno, Nevada.

The FTC alleged that Renown Health (Renown), an integrated health network based in Reno, had gained control of the market for cardiology services by acquiring the only two major cardiology groups in the area. To settle the matter, Renown entered into a consent decree under which it would release up to ten of its staff cardiologists from their post-employment, non-compete contract provisions. *In the Matter of Renown Health, a corporation*, FTC File No. 111 0101, <http://www.ftc.gov/os/caselist/1110101/index.shtm>.

In November 2010, Renown acquired Reno medical group Sierra Nevada Cardiology Associates (SNCA) and hired its 15 cardiologists, becoming a direct competitor of the only other cardiology practice in the Reno area, Reno Heart Physicians (RHP). Renown had not previously employed any cardiologists. Renown then doubled its cardiology practice in March 2011 when it acquired RHP and hired the approximately 16 cardiologists in that practice. All 31 physicians signed employment agreements containing non-compete provisions that forbade them from joining medical practices within 50 miles of Renown upon leaving Renown's employ, for a period of two years.

The two acquisitions represented 97% of the cardiologists in the Reno/Sparks Metropolitan Statistical Area. By August 3, 2012, however, as a result of changes in the market due to physician entry and exit, Renown's market share declined to 88%. The FTC alleged that despite this new entry, the transaction "effectively eliminated" competition and would therefore likely lead to higher prices as a result of its increased bargaining leverage with health plans and reduced quality for the provision of cardiology services. In arriving at its conclusion that the 2-to-1 merger reduced competition, the FTC focused heavily on the Hershman-Herfindahl Index, the post-employment, non-compete covenants in the cardiologists' employment contracts, and insurers' lack of alternative entities with which to contract.

The proposed order settling the FTC's charges is designed to remedy the anticompetitive effects of Renown's acquisitions and to restore competition for cardiology services in the Reno area. Renown has agreed to an order suspending the non-compete provisions currently in place with its cardiologists for at least 30 days while the FTC considers public comments. During this time, former SNCA and RHP cardiologists may contact other employers about leaving Renown, and will notify the FTC-appointed special monitor to ensure that they are included in a group of up to 10 cardiologists that will be allowed to join competing groups.

After the FTC finalizes the consent order, another 30-day release period will begin, during which other cardiologists may leave Renown, provided certain conditions are met, including the requirement that they intend to continue to practice in the Reno area for at least one year.

At any time during this period, Renown can ask the FTC to end the release order if ten of its cardiologists have left

for competing practices. If fewer than six cardiologists have decided to leave Renown at the end of this release period, Renown will continue to suspend the non-compete provisions until at least six cardiologists have accepted offers with competing practices in the Reno area.

The Nevada Attorney General, who worked with the FTC on this matter, has also filed a similar complaint; its similar proposed settlement is pending court approval.

Non-competes are frequently used in many industries, including the health care industry, and are usually acceptable under the antitrust laws when reasonable in scope and duration. The FTC's challenge here is not based upon its disagreement with either the scope or duration of the non-competes at issue, but with the barriers to successful entry of new competition when virtually all cardiologists already established in the market are prevented from becoming the foundation of new competitive forces.

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