



# Avoiding Antitrust Pitfalls in Hospital Acquisitions of Physician Practices

Lessons from Renown Health – FTC Settlement

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# Meet Today's Speakers

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# Webinar Housekeeping

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- *Slides* are located in the upper left hand corner.
- Type your *questions* into the question window at any time. We will answer them at the end of the program, or follow-up individually afterwards if you provide your email address.
- A brief *evaluation* will be emailed to you after this program.

# Today's Focus: Types of Affiliation and Parties

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- Poll: Do you primarily work for or represent a hospital or physicians?
  1. Hospital or health system
  2. Physician group
  3. Other

## Today's Focus: Types of Affiliation and Parties

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- Focus today is on hospital acquisition and employment of physicians
- But much of presentation applies equally to physician group mergers
- Focus is on full mergers resulting in hospital ownership of assets and employment of physicians (vs. less-than-fully integrated JVs)
- ACO Antitrust Policy Statement does not apply to fully-merged entities so do not address ACOs today
- Horizontal vs. vertical (or, here, both) mergers

# Increasing Trend in Hospital Acquisitions of Physician Groups

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Poll: Have you been involved in a hospital-physician affiliation of any kind?

1. Yes, in past two years
2. Yes, involved in ongoing affiliation currently
3. Not yet, but planning or contemplating an affiliation
4. No

# Increasing Trend in Hospital Acquisitions of Physician Groups

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- Hospital-physician mergers (like hospital mergers) increased in past two years
- Impetus for increase in mergers
  - Medicare reimbursement cuts
  - Meeting health care reform
    - Not only ACOs, but similar or other innovative quality and pricing mechanisms (e.g., ACE)
  - Access to capital and market changes

# Full Merger vs. Less Integrated Affiliation

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- Reasons hospitals acquire and employ physicians rather than less-integrated affiliation:
  - Greater control and ability to implement pricing and productivity – align interests
  - More straightforward than JV with myriad regulatory considerations (e.g., antitrust, Stark/AKB, etc.)
  - Not necessarily directly profitable, but ultimately hope to retain/increase/capture patients (inpatient, outpatient, other physician specialties)



# Resulting Increase in Agency Enforcement

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- Both FTC and state AGs have investigated and settled physician mergers in past 2 years
- None of these transactions were reportable under HSR thresholds, but still scrutinized
- All until Renown were either abandoned or resolved with conduct remedies
- Renown is first FTC settlement of a physician group acquisition, and only consent decree by any agency applying a “structural” remedy

# Physician Merger Challenges: Recent Enforcement

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- *Providence Health* cardiologists
  - FTC, hospital-physician, abandoned
- *Urology of Central Pennsylvania (UCPA)*
  - PA AG, physician group, conduct remedies
- *MaineHealth* cardiologists
  - Maine AG, hospital-physician, conduct remedies
- *Renown Health* cardiologists
  - FTC & NAG, hospital physician, divestiture

# Physician Merger Challenges: Recent Enforcement

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- Currently:
  - California AG investigating Dignity Health, Scripps Health, Sharp HealthCare, Sutter Health
  - FTC and Idaho AG investigating St. Luke's Health System
  - Multiple non-public FTC investigations

# Quick Overview of Applicable Law

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- Clayton Act Section 7: applies to both prospective and consummated mergers (and JVs) that *may* “substantially lessen competition”
  - FTC/DOJ Horizontal Merger Guidelines
  - Horizontal = Increased market power/coordination
  - Vertical = Foreclosure/exclusion of competitors
- Sherman Act Section 1: Prohibits agreements between *competitors* that *unreasonably* restrain competition
  - Can apply if parties not sufficiently integrated
  - Also applies to certain pre-closing activities

# Renown Merger Background

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- Renown Health is largest hospital system in Reno. Competitors include St.Mary's and NNMC in Reno, and Carson-Tahoe Hospital in Carson City
- Acquired two largest cardiology groups in Reno – SNCA and RHP, about 15 MDs each.
- Few remaining MDs, so 97% market share initially in Reno MSA
- St.Marys recruited 3 MDs (and likely more but for settlement), reducing Renown's share to 88%
- Employed MDs through contracts with noncompetes and other restrictions (typical in Reno, NV)
- Provisions in physician employment contracts to support any independent divested physicians (*e.g.*, back office functions, office, contracting, etc.)

# Renown Merger Background

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- “Community commitment” to maintain pre-merger coverage and referral patterns
- Payor commitment to maintain current rates and other contract terms – no renegotiation, and discussions of joint innovative products (e.g., bundled pricing)
- FTC/NAG requested parties to hold separate, but Renown closed, so agency investigation was effectively retrospective
  - Impacted course of investigation and settlement

# Early/Pre-closing Do's and Don'ts

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- Do develop an efficiency/integration plan as the motivating force for the transaction, and then stick to it.
- Do engage payors early in the process to reassure and involve them (i.e., in merger efficiencies) - obtain buy-in
- Do reassure competitors (to the extent possible) and the community at large
  - Public backlash can become political or agency opposition
- Do expedite the transactional process and close as soon as (and if) possible
- Do assess the antitrust risks (and retain an economist thru counsel) to anticipate and prepare for agency concerns

# Early/Pre-closing Do's and Don'ts

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- Don't assume small non-reportable transaction will not be noticed by the FTC or AG
- Don't create documents stating “bad intent” (e.g., to gain leverage, negotiating power) or referring to markets or competitions.
- Don't wait until the transaction is well underway to generate an efficiency/integration plan – will appear pretextual
- Don't “gun-jump” or share competitive information before the closing (e.g., during due diligence, integration planning)



# Renown FTC/NAG Investigation

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- Clear that agencies would have serious concerns based simply on resulting market share in Reno, so investigation likely
- Defenses:
  - Scope of geographic market includes Carson City
  - Entry is easy, likely and sufficient via competing hospitals recruiting new cardiologists, had already begun
  - Merger was “justified” by resulting efficiencies
  - Regardless, no actual anticompetitive effects because of community and payor commitments

# Renown FTC/NAG Investigation

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- Defenses (cont.)
  - New and evolving market paradigm: vertically integrated hospital-physician health systems
    - Intent: Trend away from independent practice to hospital employment nationwide
    - Impact: Traditional enforcement tools too static, not useful/relevant in evolving hospital-physician integrated markets (e.g., market definition, concentration)
- FTC and NAG nonetheless indicated they would challenge
  - Despite actual entry by St. Mary's, no price effect

# Investigation Do's and Don'ts

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- Do cooperate and maintain rapport and transparency with the agencies
  - Be vigilant for openings to resolve agency concerns and thus the investigation
- Don't neglect the AG
- Do continue to prepare your case on the substantive merits
  - Otherwise there is no “Plan B” and no settlement leverage, and the agencies can and will call your bluff
- Key defense: identify rival hospital who can and will sponsor “entry” by recruiting new physicians
  - Or if no noncompetes or other restrictions, even employed physicians can freely switch to rival so market share irrelevant

# Renown Settlement

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- Complicated (and initially motivated) by dispute and litigation with first of acquired physician groups.
- Difficulty – determining how many physicians to divest and which ones (subspecialty, age, productivity)
- Noncompetes were complicating factor, but ultimate “solution” as mechanism for “testing the water”

# Renown Settlement Provisions

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- Suspend noncompetes for 60 days to allow MDs to negotiate employment (or independent support)
- Standard for “acceptable terminations”: MD’s intent practice in Reno/Sparks for at least one year (Renown not guarantor)
- Thresholds: as few as 6 (75% residual market share) and no more than 10 (66% market share)
- Renown not required to terminate any (if less than 6 volunteer, N/Cs remain suspended)
- But Renown may affirmatively terminate MDs

# Renown Settlement Provisions

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- Carve-outs permitting Renown to limit provider panels with payors or ACOs, excluding divested MDs from provider networks and paid positions or reading panels
- Support for divested physicians (independent) incorporated into consent decree
- Only *ongoing* requirements are compliance reporting and notice for new cardiology acquisitions
- Overall – flexible process with defined time period which allows Renown to resolve investigation, implement merger efficiencies going forward, and avoid operating under government oversight (limited)
- No more MDs divested than market can support

# Conduct vs. Structural Remedies

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- What is a conduct remedy?
- What is a structural remedy?
- Conduct remedies potentially more restrictive than structural relief
  - *Urology of Central Pennsylvania* (UCPA) – curtails bargaining power with payors: arbitrate contracting impasses, refer outside of UCPA
  - *MaineHealth* – freezes premerger status quo: restricts pricing/contracting with payors, MD compensation, network composition

# Settlement Do's and Don'ts

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- Don't "settle" for conduct remedies, advocate for a structural fix, where one is feasible
  - Key to formulating a structural remedy is the presence of rival hospital(s) to employ and with capacity to absorb divested physicians
- Do negotiate forcefully, continuing to use substantive legal and economic arguments to support position
  - Each transaction presents unique problems, but also unique solutions
- Insist on consistency/uniformity between FTC and AG terms
- Do follow the rules – the terms of the settlement – once you have agreed to them
  - Penalties for compliance violation are potentially very significant (e.g., fines, civil penalty, injunctive relief)
- Don't break the rules...



# Bottom Line

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- It *is* possible to resolve an agency investigation/challenge and still preserve the merger's integrity and benefits
- Requires perseverance
- Not for the risk averse
- In the end, must weigh the benefits against the costs (perhaps literally in \$\$)

# Questions? Contact us.

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