Antitrust Law Blog

March 11, 2011 by Sheppard Mullin

First Section 2 Monopolization Case Of the Obama Administration Targets Dominant Texas Health Care Provider

In the first challenge against anticompetitive unilateral conduct since 1999, the Department of Justice reached a proposed settlement with a Texas hospital to enjoin it from entering into exclusionary contracts that effectively prevented commercial health insurers from also contracting with the hospital's rivals.

In *U.S. v. United Regional Healthcare System*, case number 7:11-cv-00030, filed in the U.S. District Court for the Northern District of Texas on February 25, 2011, the DOJ (in conjunction with the Texas Attorney General) alleges that United Regional's maintenance of its monopoly over hospital services in the Wichita Falls area violated Section 2 of the Sherman Act.

Specifically, the complaint alleges that United Regional has approximately 90% of the market for inpatient hospital services, and a greater than 65% share of the market for outpatient surgical services, sold to commercial insurers in the relevant geographical market. By far the largest hospital in the region and the only provider of some essential services, United Regional is considered by insurers a "must have" hospital for inclusion in their networks.

In response to the entry of another hospital to the Wichita Falls area in 1999, United Regional began systematically imposing a discount pricing structure which makes it prohibitively expensive for commercial insurers to also contract with any other facility in the area. Specifically, the DOJ alleges, United Regional imposes a 13 to 27% price penalty on insurers who also contract with other providers in Wichita Falls by providing a much higher discount off billed charges (25% for example) if United Regional is the only provider in the network, as opposed to a much smaller discount (5% for example) if other providers are included in the network. As a result of this pricing structure, although insurers technically have a choice between exclusivity or non-exclusivity, not a single insurer has opted for the non-exclusive discount structure in the more than twelve years that United Regional has engaged in this practice. This despite the fact that, according to the DOJ, every commercial insurer that deals exclusively with United Regional prefers an open network which includes competing providers. The DOJ alleges that by 2010, United Regional had successfully entered into exclusionary contracts with all but the biggest commercial insurer in the Wichita Falls area.

The DOJ alleges that United Regional's exclusionary contracts have effectively barred its rivals from contracting with commercial networks -- networks which are the most profitable and thus critical for effective competition. United Regional's conduct is alleged to have several anticompetitive effects: (1) delayed expansion and entry of United Regional's competitors, likely leading to higher healthcare costs and insurance premiums; (2) limited price competition for those patients who select a hospital based on price, also likely leading to higher costs and insurance premiums; and (3) reduced competition between United Regional and other providers based on quality of care and service. Indeed, commercial insurers have had to pay as much as 50 to 70% more for services in Wichita Falls than in other comparable cities in Texas, which in turn, the DOJ alleges, has led to higher insurance premiums for consumers. The DOJ also noted that insurance premiums in Wichita Falls are among the highest in Texas.

According to the DOJ, United Regional has reaped substantial benefits from its anticompetitive conduct. By restricting competition from other providers, United Regional has been able to charge as much as 70% more than its primary competitor in the area for the same services. While commercial insurers dealing exclusively with United Regional comprised only about 8% of United Regional's total patient volume, they accounted for approximately 30 to 35% of United Regional's total profits.

The complaint also alleged the absence of any valid procompetitive justification for the exclusionary contracts: United Regional did not use them to achieve any economies of scale or other efficiencies as a result of any additional patient volume obtained from the contracts. The DOJ also noted that while certain discounts conditioned on exclusivity may be procompetitive if they result from "competition on the merits" (in which rivals compete on price so that the most efficient firm will win additional consumers), the discounts provided by United Regional, when analyzed under an appropriate "price-cost test," were anticompetitive in that they prevented equally or more efficient rivals from attracting additional consumers.

The DOJ's proposed settlement with United Regional is designed to restore competition among healthcare providers in the relevant area by enjoining United Regional from: (1) conditioning prices or discounts offered to commercial insurers based on whether those insurers also contracts with competing providers; (2) prohibiting insurers from entering into agreements with competing providers; and (3) taking any retaliatory measures against an insurer that enters into an agreement with a rival. United Regional is also required (for up to 270 days) to provide services to each commercial insurer at the greater discount rate previously conditioned on exclusivity until the contract is renegotiated or terminated, even if the insurer enters into agreements with competing providers. United Regional is required to comply with the prohibitions in the proposed settlement for seven years.

Christine Varney, head of the DOJ's Antitrust Division, explained that "[u]nfettered competition among hospitals is vital to ensuring that patients receive high-quality, low-cost healthcare," and that "[t]oday's settlement prevents a dominant hospital from using its market power to harm consumers by undermining its competitors' ability to compete in the marketplace."

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