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September 29, 2017

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State Regulators Take Antitrust Aim at Aggressive Health System Competition

The unfettered growth of hospital-centric medicine, usually touted as bringing “better care,” “enhanced safety,” and “more efficiency,” often brings less caring care, hospital acquired infections, and . . . control over the market with its “efficient” byproduct, higher prices.

The growth of hospital systems can be seen as a reaction to the fact that procedures are moving out of the hospital at a quickening pace.

But why grow when the future requires that they shrink? In a sense, it's the same reason that a government bureaucracy grows like a rhizome: self-protection. Stop the progress, stop the future, and stop the competition.

Consider the following: Hospitals attempt to prevent competition by (1) turning to regulators and legislators to ban or severely restrict competition (e.g., prohibitions on physician ownership of hospitals, certificates of need), (2) acquiring physician groups in order to bind the providers to the hospital, taking them “off the table” in a manner of speaking, and (3) acquiring competing freestanding facilities (e.g., ASCs) and either converting them into hospital outpatient department facilities receiving higher reimbursement, or simply closing them down.

On August 31st, Washington State's Attorney General filed an antitrust suit in federal court against Franciscan Health System d/b/a CHI Franciscan Health, Franciscan Medical Group (which I'll refer to collectively as “CHI Franciscan”), The Doctors Clinic (“TDC”), and WestSound Orthopedics (“WestSound”).

The lawsuit seeks to unwind the deals in which CHI Franciscan acquired WestSound, a seven physician orthopedic practice, and entered into an affiliation via a professional services agreement, a management services agreement, and other agreements (collectively, the “PSA”) with TDC, a 45-physician multi-specialty group. It also seeks disgorgement of profits plus civil penalties.

The State alleges that the deals violate a number of pro-competitive laws, including the Sherman and Clayton Acts (i.e., federal antitrust law), and counterpart Washington State law. In fact, the State alleges that the deal is so blatantly anti-competitive that it constitutes a *per se* antitrust violation.

The Deal

Prior to the deal, WestSound was a 7 physician orthopedic group in Silverdale, Washington.

In July 2016, CHI Franciscan acquired WestSound and folded the physicians into its captive group.

Then, in September 2016, CHI Franciscan entered into a set of agreements with TDC, also based in Silverdale. The deal with TDC was not structured as an acquisition of the medical practice itself. TDC remains a separate legal entity.

Instead, via the PSA, TDC and CHI Franciscan agreed that TDC would provide services exclusively for CHI Franciscan in exchange for CHI Franciscan's negotiated reimbursement rates with payers, and CHI Franciscan acquired TDC's ASC, imaging, and lab facilities. TDC agreed to provide management services back to CHI Franciscan.

The Allegations

The State argues that the acquisition of WestSound and the arrangement with TDC weren't simply deals entered into in order to improve care and provide better access for patients, but were instead anticompetitive schemes in connection with healthcare services on the Kitsap Peninsula, the area of the state that lies west from Seattle across the Puget Sound.

As to the deal with TDC, the State alleges that it's simply a price-fixing conspiracy between competitors via the PSA.

Under the PSA, the CHI Franciscan negotiates reimbursement rates both for itself and for TDC, but CHI Franciscan doesn't share any financial risk with TDC. As mentioned above, TDC remains an independent entity with its own governance, provides most of its own administrative functions, and has its own EHR system. CHI Franciscan and TDC are neither clinically nor financially integrated.

After the deal was inked, CHI Franciscan closed outpatient facilities that it acquired from TDC, allegedly shifting cases to CHI Franciscan's HOPDs in order to receive higher reimbursement.

According to the Complaint filed by the Washington State Attorney General, the impact of the arrangement between CHI Franciscan and TDC is higher prices, lower quality, and decreased patient choice.

The Attorney General's attack on CHI Franciscan's acquisition of WestSound is based on traditional anticompetitive merger grounds. The AG claims that the relevant market is the Kitsap Peninsula and that following the TDC and WestSound deals, CHI Franciscan controls 55% of orthopedic services and is monopolistic.

None of the defendants have yet filed a response to the Attorney General's Complaint.

The Takeaways For You

- Hospitals have had a rather free hand in acquiring physician groups, especially because many deals are too small to attract US Department of Justice or Federal Trade Commission attention. But there are other routes to challenge their metastasis, including, as in this case, action by the state government.
- Anti-competitive arrangements do not arise solely from true mergers and acquisitions. Ongoing deals between separate legal entities, as in the CHI Franciscan case, between a hospital system and a large medical group, can trigger antitrust investigations and lawsuits.
- The Complaint ([let me know if you'd like a copy](#)) demonstrates the the AG has detailed knowledge of internal CHI Franciscan communications. I'm not suggesting that anyone break the law and hide it, and the allegations in the CHI Franciscan case are of a civil, not criminal, nature. Rather, it's self-immolating to document unlawful intent. Emails don't just go away. Loose lips sink ships.
- As the future gets bleaker for hospitals, expect more to attempt to try to lock up physician referrals through questionable deals. Be ready.

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Having fallen for the fallacy that there's profit in market share, hospitals have gorged on acquisitions and on employment and alignment of physicians. Many physician

Is your present now the same future as you envisioned in years past?



All Things Personal

I stood in line to order. No problem. I expected it. But when I finally got to the counter at the BBQ joint (consistently on "top" lists) the young woman taking orders looked as happy as an ice cube in a hot oven.

"I'll have the brisket and the turkey, please, and for the sides, I'd like . . ."

"Stop!" she said.

"Double coleslaw."

"No," she said.

"What, you don't have coleslaw?"

"I need to know whether you want the brisket chopped or sliced before you can tell me what you want as sides."

The food was great, but I left with a bad taste my mouth. Ms. Upside-Down-Smile irked the shit out of me.

Does the owner know the true value of a customer? The lifetime value of a customer, that is?

It's easy for the owner to picture the \$4.27 in profit the restaurant made on my lunch. It's a lot more difficult to conceptualize the notion of the lifetime value of the customer -- how much in profit the average customer will bring over his or her lifetime of patronage. But, it's essential, because it tells you what you can spend, both in money and in effort, to get, and to keep, a customer.

The same concept can be used in the context of the lifetime value of a patient, of the lifetime value of a referral source, of the lifetime value of a relationship with a facility, of the lifetime value of . . . any number of things essential to your business.

Over the past few years, I've driven by that BBQ joint at least 16 times around lunchtime. Since having the un-pleasure of meeting Ms. Have-a-Bad Day, I've just kept driving.

Am I being petty?

Have I cut off their brisket to spite my mouth?

Maybe, but am I any more petty than your customers, clients, patients, and referral sources? I think not.

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I've spoken at dozens of medical group events, healthcare organization events, large corporate events, university-sponsored events, and private, invitation-only events on topics such as The Impending Death of Hospitals, the strategic use of OIG Advisory Opinions,

have been willing participants through practice sales and the belief that there's safety in hospital employment. But it becoming evident that physician employment leads to loss and that integrated care delivers neither better care nor lower costs. And now, technology is about to moot many of the reasons for a hospital's existence. How can your practice survive and even thrive in the post-hospital world?

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Hospital-Based Medical Group Mergers, Acquisitions & Alternatives



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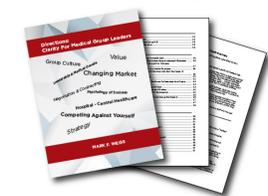
Some days, it seems as if everyone, from anesthesia gro to vascular surgery practices, is talking about selling their practice to a larger group, to private equity investors, or to a hospital.

The reality is that some practices can be sold, some can never be sold, and some have nothing to sell. The reality also is that there are a number of strategic alternatives to practice sale.

A perfect storm of factors is accelerating the market for hospital-based medical group mergers and acquisitions.

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Directions: Clarity For Medical Group Leaders

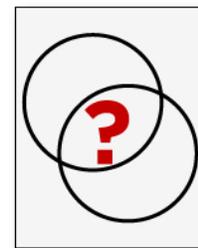


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The healthcare market is changing rapidly, bringing new sets of problems. How can you find a solution, how can you engage in the right development of strategy, and how can you to plan your, or your group's, future without tools to help clarify your thinking?

Directions is a collection of thoughts as thinking tools, each intended to instruct, inform, and even more so, cause you to give pause to instruct and inform yourself.

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SANTA BARBARA OFFICE:
1227 De La Vina Street
Santa Barbara, CA 93101
Tel: 805 695 8107

LOS ANGELES OFFICE:
10940 Wilshire Boulevard
16th Floor
Los Angeles, CA 90024
Tel: 310 843 2800

DALLAS OFFICE:
1717 McKinney Avenue
Suite 700
Dallas, TX 75202
Tel: 972 392 9200

Fax (all locations): 877 883 0099

www.advisorylawgroup.com

markweiss@advisorylawgroup.com

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Mark was quoted in the article [ASC Regulatory Areas T Developers Need To Pay Attention To](#) published on No 2016 in The Ambulatory M&A Advisor. Read or download [here](#).

Mark's article [OIG Advisory Opinion Secrets and Strategies](#) was published in the Summer 2016 volume of [Communicue](#). Read or download [here](#).

Finders keepers, losers weepers. Except in connection with overpayments from Medicare, then it's a violation of the federal False Claims Act leading to significant liability—th is, unless you repay the overpaid sum within 60 days. Re [CMS Resets the Clock for Return Of Medicare Overpayments](#) published on [AnesthesiologyNews.com](#) i May 2016. Read or download [here](#).

Mark's article [A New Strategy To Profit From Interventional Radiology](#), co-authored with Cecilia Kronawitter, was published on [AuntMinne.com](#) on May 2016. Read or download [here](#).

Three of Mark's blog posts were republished as a column entitled [Practice Challenges](#) in the Spring 2016 issue of Pennsylvania Society of Anesthesiologists Newsletter, th [Sentinel](#). Read or download [here](#).

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