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A Special Master's Role In Hospital Merger Cases

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One of the most challenging aspects of antitrust cases in the health care field is the rich mixture of public interest considerations, pro-competitive benefits, anti-competitive concerns, the backdrop of the Affordable Care Act and the unknown about what will happen tomorrow. How will the courts rule in the context of the ongoing developments in change, consolidation and competition in health care? Will the challenged mergers and affiliations bring benefits to consumers? To the parties? To health care? How can counsel sort through the conflicting interests while also zealously advocating on behalf of their clients? Mergers, affiliations, patent licensing arrangements and purchasing and pricing arrangements between pharmaceutical companies, hospitals and insurers raise complex issues, and the results will have significant impacts on consumers and businesses in the health care field.

Three recent health care antitrust cases illustrate the point: Federal Trade Commission v. Advocate Health Care et al.; FTC, et al. v. Penn State Hershey Medical Center et al.; and ProMedica Health System Inc. v. FTC. These cases arose out of challenges by the FTC to hospital mergers in the metropolitan Chicago, Hershey, Pennsylvania, and Lucas County, Ohio, areas, respectively. In each case, the merging hospitals asserted that the merger would produce economic and health care benefits. In Advocate Health Care, the hospitals promised that the merger would create a new low-cost, high-performing network throughout the Chicago area, bringing benefits to consumers. In the Hershey case, the hospitals argued that their merger was in furtherance of finding innovative ways to best serve patients and the community by providing the “highest-quality and most cost-effective care possible.” ProMedica did not advance pro-competitive benefits as a justification for its merger, but rather the absence of anti-competitive impact. The FTC’s complaints, on the other hand, alleged that the mergers would create dominant providers of general acute care inpatient hospital services in the relevant markets and would likely lead to increased health care costs and reduced quality of care.

The focus of this analysis is not to argue the pros and cons of each party’s antitrust analysis and market definition position, but rather to analyze a more efficient way of approaching cases such as these in today’s “evolving landscape of health care” (to quote the court in Hershey), including the Affordable Care Act, changes in Medicare and Medicaid reimbursement and the transition to risk-based contracting, to name but a few.

The Advocate Health and Hershey cases are just at the beginning of their saga: The FTC’s motions for preliminary injunctions were denied and are on expedited appeal, with the prospect of the FTC administrative hearings still ahead. ProMedica is an example of what may lay ahead: The FTC just

approved ProMedica's divestiture of nearby St. Luke's Hospital, finally ending six years of litigation and uncertainty, following an FTC determination (and federal court decisions affirming the FTC) concluding that the transaction violated the antitrust laws.

These cases involve complex issues and interests, in the framework of an evolving and developing health care system. Predicting the potential outcomes of a merger is such a difficult task that it is unrealistic to expect the average judge to understand all the criticisms of an econometric study and all the nuances of provider-payor contracts and then assess what is likely to happen in the years following the merger. Yet in these examples, the cases were put before judges with little or no antitrust experience or health care expertise, presented by expert teams of advocates and teams of experts, in an extremely adversarial situation where time was of the essence, only to be followed, as ProMedica illustrates, by years of litigation and uncertainty.

Is there a more effective, studied and cost-efficient approach to weighing these interests and resolving the dispute to protect the public's interest in both competition and affordable, quality health care?

Courts have recognized that the appointment of a knowledgeable, neutral third party, or a special master, can streamline discovery, focus the parties on key evidence, settle discovery disputes and explore the pros and cons of settlement alternatives while keeping an eye on the various interests. Special masters, as discovery masters and settlement masters, serve as a knowledgeable neutral between the parties and a helpful buffer between the parties and court to manage discovery plans and assist in reaching a resolution.

Special masters are relatively commonplace in many cases in 2016, including government environmental cases, desegregation cases, water disputes between states, and prison condition cases. Special masters, as discovery masters and attorneys' fees referees, are also frequently used in antitrust cases. They do not appear to have been involved in any of the recent health care antitrust cases, ranging from challenges to mergers to disputes involving pharmaceutical companies' biosimilars and generic product-hopping. These cases are rich with issues that could have benefited from a discovery special master and/or a settlement special master.

What can a special master do?

1. A special master can focus discovery.

The use of discovery masters to manage and supervise complex cases is relatively commonplace. The discovery master can manage a discovery plan, issue orders resolving discovery disputes and make recommendations to the judge. A discovery master experienced in both discovery procedures and computer systems and software can cut through the arguments and objections to determine what information is readily accessible or recoverable and what really matters. How many trial lawyers have ever used more than a small subset of all discovery gathered when it came time to introduce exhibits at trial?

2. A special master can focus the issues for trial.

A special master can meet with each party, identify the respective interests and focus the trial on the issues where there are differences, saving trial days, while keeping in mind the need to preserve a record for appeal.

3. A special master can be a bridge between parties and develop interim measures.

A special master can explore alternatives with each side confidentially, such as allowing some form of integration or alliance on an interim basis to test the extent to which prices are impacted, costs reduced, savings passed to consumers and quality improved. Pharmaceutical companies battling over generic and biosimilars issues can feel safe exploring their issues with a special master, in confidence if the parties have agreed to mediation confidentiality, to see if there is some option that will keep them out of court while not running afoul of the regulators.

4. A special master can guide the parties toward settlement.

A settlement master can enable the parties to consider to what extent the competing interests of each party are reflective of some part of the public interest that could be preserved by careful structuring of the transaction or by modifying the transaction to something less than a merger. In an evolving market such as health care, with competing public interests, can anyone confidently predict the future and identify the public interest, in the black and white terms that advocates ask the court to find as a basis for allowing or preventing a merger?

The hospital mergers discussed above presented perfect settings for a neutral special master. For example, the parties might have agreed to focus discovery and analyze the following topics, which would have been critical to understanding the competitive impacts of a merger and could have shed more light on finding a solution: (1) market definition, including whether patients are likely to change their willingness to travel greater distances for health care as price information and quality of service information become more available, combined with incentives to use narrow networks; (2) the views of health insurers on the transaction; (3) an analysis of the rate agreements entered into by the two hospitals with their two largest insurers; (4) the status of recent contract negotiations between these hospitals and commercial health plans, and how they might be expected to change after the merger; (5) the proffered efficiencies; and (6), everyone's favorite, the extent to which antitrust enforcement is complementary to or in conflict with the goals of the Affordable Care Act. This approach may have led to a decision to prosecute, a decision to abandon the merger or a creative resolution that satisfied all parties that the public interest was being protected as best as anyone can understand at this point in time.

—By Barbara Reeves, JAMS

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