Statements of Antitrust Enforcement Policy in Health Care

Statement 2: Enforcement Policy on Hospital Joint Ventures Involving High-technology or Other Expensive Health Care Equipment

Introduction

Most hospital joint ventures to purchase or otherwise share the ownership cost of, operate, and market high-technology or other expensive health care equipment and related services do not create antitrust problems. In most cases, these collaborative activities create procompetitive efficiencies that benefit consumers. These efficiencies include the provision of services at a lower cost or the provision of services that would not have been provided absent the joint venture. Sound antitrust enforcement policy distinguishes those joint ventures that on balance benefit the public from those that may increase prices without providing a countervailing benefit, and seeks to prevent only those that are harmful to consumers. The Agencies have never challenged a joint venture among hospitals to purchase or otherwise share the ownership cost of, operate and market high-technology or other expensive health care equipment and related services.

This statement of enforcement policy sets forth an antitrust safety zone that describes hospital high-technology or other expensive health care equipment joint ventures that will not be challenged, absent extraordinary circumstances, by the Agencies under the antitrust laws. It then describes the Agencies' antitrust analysis of hospital high-technology or other expensive health care equipment joint ventures that fall outside the antitrust safety zone. Finally, this statement includes examples of its application to hospital high-technology or other expensive health care equipment joint ventures.

A. Antitrust Safety Zone: Hospital High-technology Joint Ventures That Will Not Be Challenged, Absent Extraordinary Circumstances, By The Agencies

The Agencies will not challenge under the antitrust laws any joint venture among hospitals to purchase or otherwise share the ownership cost of, operate, and market the related services of, high-technology or other expensive health care equipment if the joint venture includes only the number of hospitals whose participation is needed to support the equipment, absent extraordinary circumstances.[2] This applies to joint ventures involving purchases of new equipment as well as to joint ventures involving existing equipment.[3] A joint venture that includes additional hospitals also will not be challenged if the additional hospitals could not support the equipment on their own or through the formation of a competing joint venture, absent extraordinary circumstances.

For example, if two hospitals are each unlikely to recover the cost of individually purchasing, operating, and marketing the services of a magnetic resonance imager (MRI) over its useful life, their joint venture with respect to the MRI would not be challenged by the Agencies. On the other hand, if the same two hospitals entered into a joint venture with a third hospital that independently could have purchased, operated, and marketed an MRI in a financially viable manner, the joint venture would not be in this antitrust safety zone. If, however, none of the three hospitals could have supported an MRI by itself, the Agencies would not challenge the joint venture.[4]

Information necessary to determine whether the costs of a piece of high-technology health care equipment could be recovered over its useful life is normally available to any hospital or group of hospitals considering such a purchase. This information may include the cost of the equipment, its expected useful life, the minimum number of procedures that must be done to meet a

machine's financial breakeven point, the expected number of procedures the equipment will be used for given the population served by the joint venture and the expected price to be charged for the use of the equipment. Expected prices and costs should be confirmed by objective evidence, such as experiences in similar markets for similar technologies.

B. The Agencies' Analysis Of Hospital High-technology Or Other Expensive Health Care Equipment Joint Ventures That Fall Outside The Antitrust Safety Zone

The Agencies recognize that joint ventures that fall outside the antitrust safety zone do not necessarily raise significant antitrust concerns. The Agencies will apply a rule of reason analysis in their antitrust review of such joint ventures.[5]

The objective of this analysis is to determine whether the joint venture may reduce competition substantially, and, if it might, whether it is likely to produce procompetitive efficiencies that outweigh its anticompetitive potential. This analysis is flexible and takes into account the nature and effect of the joint venture, the characteristics of the venture and of the hospital industry generally, and the reasons for, and purposes of, the venture. It also allows for consideration of efficiencies that will result from the venture. The steps involved in a rule of reason analysis are set forth below.[6]

STEP ONE: Define the relevant market. The rule of reason analysis first identifies what is produced through the joint venture. The relevant product and geographic markets are then properly defined. This process seeks to identify any other provider that could offer what patients or physicians generally would consider a good substitute for that provided by the joint venture. Thus, if a joint venture were to purchase and jointly operate and market the related services of an MRI, the relevant market would include all other MRIs in the area that are reasonable alternatives for the same patients, but would not include providers with only traditional X-ray equipment.

STEP TWO: Evaluate the competitive effects of the venture. This step begins with an analysis of the structure of the relevant market. If many providers would compete with the joint venture, competitive harm is unlikely and the analysis would continue with step four described below.

If the structural analysis of the relevant market showed that the joint venture would eliminate an existing or potentially viable competing provider and that there were few competing providers of that service, or that cooperation in the joint venture market may spill over into a market in which the parties to the joint venture are competitors, it then would be necessary to assess the extent of the potential anticompetitive effects of the joint venture. In addition to the number and size of competing providers, factors that could restrain the ability of the joint venture to raise prices either unilaterally or through collusive agreements with other providers would include: (1) characteristics of the market that make anticompetitive coordination unlikely; (2) the likelihood that other providers would enter the market; and (3) the effects of government regulation.

The extent to which the joint venture restricts competition among the hospitals participating in the venture is evaluated during this step. In some cases, a joint venture to purchase or otherwise share the cost of high-technology equipment may not substantially eliminate competition among the hospitals in providing the related service made possible by the equipment. For example, two hospitals might purchase a mobile MRI jointly, but operate and market MRI services separately. In such instances, the potential impact on competition of the joint venture would be substantially reduced.[7]

STEP THREE: Evaluate the impact of procompetitive efficiencies. This step requires an examination of the joint venture's potential to create procompetitive efficiencies, and the balancing of these efficiencies against any potential anticompetitive effects. The greater the

venture's likely anticompetitive effects, the greater must be the venture's likely efficiencies. In certain circumstances, efficiencies can be substantial because of the need to spread the cost of expensive equipment over a large number of patients and the potential for improvements in quality to occur as providers gain experience and skill from performing a larger number of procedures.

STEP FOUR: Evaluate collateral agreements. This step examines whether the joint venture includes collateral agreements or conditions that unreasonably restrict competition and are unlikely to contribute significantly to the legitimate purposes of the joint venture. The Agencies will examine whether the collateral agreements are reasonably necessary to achieve the efficiencies sought by the joint venture. For example, if the participants in a joint venture formed to purchase a mobile lithotripter also agreed on the daily room rate to be charged lithotripsy patients who required overnight hospitalization, this collateral agreement as to room rates would not be necessary to achieve the benefits of the lithotripter joint venture. Although the joint venture itself would be legal, the collateral agreement on hospital room rates would not be legal and would be subject to challenge.

C. Examples Of Hospital High-technology Joint Ventures

The following are examples of hospital joint ventures that are unlikely to raise significant antitrust concerns. Each is intended to demonstrate an aspect of the analysis that would be used to evaluate the venture.

1. New Equipment That Can Be Offered Only By A Joint Venture

All the hospitals in a relevant market agree that they jointly will purchase, operate and market a helicopter to provide emergency transportation for patients. The community's need for the helicopter is not great enough to justify having more than one helicopter operating in the area and studies of similarly sized communities indicate that a second helicopter service could not be supported. This joint venture falls within the antitrust safety zone. It would make available a service that would not otherwise be available, and for which duplication would be inefficient.

2. Joint Venture To Purchase Expensive Equipment

All five hospitals in a relevant market agree to jointly purchase a mobile health care device that provides a service for which consumers have no reasonable alternatives. The hospitals will share equally in the cost of maintaining the equipment, and the equipment will travel from one hospital to another and be available one day each week at each hospital. The hospitals' agreement contains no provisions for joint marketing of, and protects against exchanges of competitively sensitive information regarding, the equipment.[8] There are also no limitations on the prices that each hospital will charge for use of the equipment, on the number of procedures that each hospital can perform, or on each hospital's ability to purchase the equipment on its own. Although any combination of two of the hospitals could afford to purchase the equipment and recover their costs within the equipment's useful life, patient volume from all five hospitals is required to maximize the efficient use of the equipment and lead to significant cost savings. In addition, patient demand would be satisfied by provision of the equipment one day each week at each hospital. The joint venture would result in higher use of the equipment, thus lowering the cost per patient and potentially improving quality.

This joint venture does not fall within the antitrust safety zone because smaller groups of hospitals could afford to purchase and operate the equipment and recover their costs. Therefore, the joint venture would be analyzed under the rule of reason. The first step is to define the relevant market. In this example, the relevant market consists of the services provided by the equipment, and the five hospitals all potentially compete against each other for patients requiring this service.

The second step in the analysis is to determine the competitive effects of the joint venture. Because the joint venture is likely to reduce the number of these health care devices in the market, there is a potential restraint on competition. The restraint would not be substantial, however, for

several reasons. First, the joint venture is limited to the purchase of the equipment and would not eliminate competition among the hospitals in the provision of the services. The hospitals will market the services independently, and will not exchange competitively sensitive information. In addition, the venture does not preclude a hospital from purchasing another unit should the demand for these services increase.

Because the joint venture raises some competitive concerns, however, it is necessary to examine the potential efficiencies associated with the venture. As noted above, by sharing the equipment among the five hospitals significant cost savings can be achieved. The joint venture would produce substantial efficiencies while providing access to high quality care. Thus, this joint venture would on balance benefit consumers since it would not lessen competition substantially, and it would allow the hospitals to serve the community's need in a more efficient manner. Finally, in this example the joint venture does not involve any collateral agreements that raise competitive concerns. On these facts, the joint venture would not be challenged by the Agencies.

3. Joint Venture Of Existing Expensive Equipment Where One Of The Hospitals In The Venture Already Owns The Equipment

Metropolis has three hospitals and a population of 300,000. Mercy and University Hospitals each own and operate their own magnetic resonance imaging device ("MRI"). General Hospital does not. Three independent physician clinics also own and operate MRIs. All of the existing MRIs have similar capabilities. The acquisition of an MRI is not subject to review under a certificate of need law in the state in which Metropolis is located.

Managed care plans have told General Hospital that, unless it can provide MRI services, it will be a less attractive contracting partner than the other two hospitals in town. The five existing MRIs are slightly underutilized -- that is, the average cost per scan could be reduced if utilization of the machines increased. There is insufficient demand in Metropolis for six fully-utilized MRIs.

General has considered purchasing its own MRI so that it can compete on equal terms with Mercy and University Hospitals. However, it has decided based on its analysis of demand for MRI services and the cost of acquiring and operating the equipment that it would be better to share the equipment with another hospital. General proposes forming a joint venture in which it will purchase a 50 percent share in Mercy's MRI, and the two hospitals will work out an arrangement by which each hospital has equal access to the MRI. Each hospital in the joint venture will independently market and set prices for those MRI services, and the joint venture agreement protects against exchanges of competitively sensitive information among the hospitals. There is no restriction on the ability of each hospital to purchase its own equipment.

The proposed joint venture does not fall within the antitrust safety zone because General apparently could independently support the purchase and operation of its own MRI. Accordingly, the Agencies would analyze the joint venture under a rule of reason.

The first step of the rule of reason analysis is defining the relevant product and geographic markets. Assuming there are no good substitutes for MRI services, the relevant product market in this case is MRI services. Most patients currently receiving MRI services are unwilling to travel outside of Metropolis for those services, so the relevant geographic market is Metropolis. Mercy, University, and the three physician clinics are already offering MRI services in this market. Because General intends to offer MRI services within the next year, even if there is no joint venture, it is viewed as a market participant.

The second step is determining the competitive impact of the joint venture. Absent the joint venture, there would have been six independent MRIs in the market. This raises some competitive concerns with the joint venture. The fact that the joint venture will not entail joint price setting or marketing of MRI services to purchasers reduces the venture's potential anticompetitive effect. The competitive analysis would also consider the likelihood of additional entry in the market. If, for example, another physician clinic is likely to purchase an MRI in the event that the price

of MRI services were to increase, any anticompetitive effect from the joint venture becomes less likely. Entry may be more likely in Metropolis than other areas because new entrants are not required to obtain certificates of need.

The third step of the analysis is assessing the likely efficiencies associated with the joint venture. The magnitude of any likely anticompetitive effects associated with the joint venture is important; the greater the venture's likely anticompetitive effects, the greater must be the venture's likely efficiencies. In this instance, the joint venture will avoid the costly duplication associated with General purchasing an MRI, and will allow Mercy to reduce the average cost of operating its MRI by increasing the number of procedures done. The competition between the Mercy/General venture and the other MRI providers in the market will provide some incentive for the joint venture to operate the MRI in as low-cost a manner as possible. Thus, there are efficiencies associated with the joint venture that could not be achieved in a less restrictive manner.

The final step of the analysis is determining whether the joint venture has any collateral agreements or conditions that reduce competition and are not reasonably necessary to achieve the efficiencies sought by the venture. For example, if the joint venture required managed care plans desiring MRI services to contract with both joint venture participants for those services, that condition would be viewed as anticompetitive and unnecessary to achieve the legitimate procompetitive goals of the joint venture. This example does not include any unnecessary collateral restraints.

On balance, when weighing the likelihood that the joint venture will significantly reduce competition for these services against its potential to result in efficiencies, the Agencies would view this joint venture favorably under a rule of reason analysis.

4. Joint Venture Of Existing Equipment Where Both Hospitals In The Venture Already Own The Equipment

Valley Town has a population of 30,000 and is located in a valley surrounded by mountains. The closest urbanized area is over 75 miles away. There are two hospitals in Valley Town: Valley Medical Center and St. Mary's. Valley Medical Center offers a full range of primary and secondary services. St. Mary's offers primary and some secondary services. Although both hospitals have a CT scanner, Valley Medical Center's scanner is more sophisticated. Because of its greater sophistication, Valley Medical Center's scanner is more expensive to operate, and can conduct fewer scans in a day. A physician clinic in Valley Town operates a third CT scanner that is comparable to St. Mary's scanner and is not fully utilized.

Valley Medical Center has found that many of the scans that it conducts do not require the sophisticated features of its scanner. Because scans on its machine take so long, and so many patients require scans, Valley Medical Center also is experiencing significant scheduling problems. St. Mary's scanner, on the other hand, is underutilized, partially because many individuals go to Valley Medical Center because they need the more sophisticated scans that only Valley Medical Center's scanner can provide. Despite the underutilization of St. Mary's scanner, and the higher costs of Valley Medical Center's scanner, neither hospital has any intention of discontinuing its CT services.

Valley Medical Center and St. Mary's are proposing a joint venture that would own and operate both hospitals' CT scanners. The two hospitals will then independently market and set the prices they charge for those services, and the joint venture agreement protects against exchanges of competitively sensitive information between the hospitals. There is no restriction on the ability of each hospital to purchase its own equipment.

The proposed joint venture does not qualify under the Agencies' safety zone because the participating hospitals can independently support their own equipment. Accordingly, the Agencies would analyze the joint venture under a rule of reason. The first step of the analysis is to determine the relevant product and geographic markets. As long as other diagnostic services such as

conventional X-rays or MRI scans are not viewed as a good substitute for CT scans, the relevant product market is CT scans. If patients currently receiving CT scans in Valley Town would be unlikely to switch to providers offering CT scans outside of Valley Town in the event that the price of CT scans in Valley Town increased by a small but significant amount, the relevant geographic market is Valley Town. There are three participants in this relevant market: Valley Medical Center, St. Mary's, and the physician clinic.

The second step of the analysis is determining the competitive effect of the joint venture. Because the joint venture does not entail joint pricing or marketing of CT services, the joint venture does not effectively reduce the number of market participants. This reduces the venture's potential anticompetitive effect. In fact, by increasing the scope of the CT services that each hospital can provide, the joint venture may increase competition between Valley Medical Center and St. Mary's since now both hospitals can provide sophisticated scans. Competitive concerns with this joint venture would be further ameliorated if other health care providers were likely to acquire CT scanners in response to a price increase following the formation of the joint venture.

The third step is assessing whether the efficiencies associated with the joint venture outweigh any anticompetitive effect associated with the joint venture. This joint venture will allow both hospitals to make either the sophisticated CT scanner or the less sophisticated, but less costly, CT scanner available to patients at those hospitals.

Thus, the joint venture should increase quality of care by allowing for better utilization and scheduling of the equipment, while also reducing the cost of providing that care, thereby benefitting the community. The joint venture may also increase quality of care by making more capacity available to Valley Medical Center; while Valley Medical Center faced capacity constraints prior to the joint venture, it can now take advantage of St. Mary's underutilized CT scanner. The joint venture will also improve access by allowing patients requiring routine scans to be moved from the sophisticated scanner at Valley Medical Center to St. Mary's scanner where the scans can be performed more quickly.

The last step of the analysis is to determine whether there are any collateral agreements or conditions associated with the joint venture that reduce competition and are not reasonably necessary to achieve the efficiencies sought by the joint venture. Assuming there are no such agreements or conditions, the Agencies would view this joint venture favorably under a rule of reason analysis.

As noted in the previous example, excluding price setting and marketing from the scope of the joint venture reduces the probability and magnitude of any anticompetitive effect of the joint venture, and thus reduces the likelihood that the Agencies will find the joint venture to be anticompetitive. If joint price setting and marketing were, however, a part of that joint venture, the Agencies would have to determine whether the cost savings and quality improvements associated with the joint venture offset the loss of competition between the two hospitals. Also, if neither of the hospitals in Valley Town had a CT scanner, and they proposed a similar joint venture for the purchase of two CT scanners, one sophisticated and one less sophisticated, the Agencies would be unlikely to view that joint venture as anticompetitive, even though each hospital could independently support the purchase of its own CT scanner. This conclusion would be based upon a rule of reason analysis that was virtually identical to the one described above.

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Hospitals that are considering high-technology or other expensive equipment joint ventures and are unsure of the legality of their conduct under the antitrust laws can take advantage of the Department's expedited business review procedure for joint ventures and information exchanges announced on December 1, 1992 (58 Fed. Reg. 6132 (1993)) or the Federal Trade Commission's advisory opinion procedure contained at 16 C.F.R. §§ 1.1-1.4 (1993). The Agencies will respond to a business review or advisory opinion request on behalf of hospitals that are considering a high-technology joint venture within 90 days after all necessary information is submitted. The Department's December 1, 1992 announcement contains specific guidance as to the information that should be submitted.

FOOTNOTES:

2. A hospital or group of hospitals will be considered able to support high-technology or other expensive health care equipment for purposes of this antitrust safety zone if it could recover the costs of owning, operating, and marketing the equipment over its useful life. If the joint venture is limited to ownership, only the ownership costs are relevant. If the joint venture is limited to owning and operating, only the owning and operating costs are relevant.

3. Consequently, the safety zone would apply in a situation in which one hospital had already purchased the health care equipment, but was not recovering the costs of the equipment and sought a joint venture with one or more hospitals in order to recover the costs of the equipment.

4. The antitrust safety zone described in this statement applies only to the joint venture and agreements reasonably necessary to the venture. The safety zone does not apply to or protect agreements made by participants in a joint venture that are related to a service not provided by the venture. For example, the antitrust safety zone that would apply to the MRI joint venture would not apply to protect an agreement among the hospitals with respect to charges for an overnight stay.

5. This statement assumes that the joint venture arrangement is not one that uses the joint venture label but is likely merely to restrict competition and decrease output. For example, two hospitals that independently operate profitable MRI services could not avoid charges of price fixing by labeling as a joint venture their plan to obtain higher prices through joint marketing of their existing MRI services.

6. Many joint ventures that could provide substantial efficiencies also may present little likelihood of competitive harm. Where it is clear initially that any joint venture presents little likelihood of competitive harm, the step-by-step analysis described in the text below will not be necessary. For example, when two hospitals propose to merge existing expensive health care equipment into a joint venture in a properly defined market in which many other hospitals or other health care facilities operate the same equipment, such that the market will be unconcentrated, then the combination is unlikely to be anticompetitive and further analysis ordinarily would not be required. *See* Department of Justice/Federal Trade Commission 1992 *Horizontal Merger Guidelines.*

7. If steps one and two reveal no competitive concerns with the joint venture, step three is unnecessary, and the analysis continues with step four described below.

8. Examples of such information include prices and marketing plans.