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In this Issue...

HORIZONTAL MERGER GUIDELINES REVISED

The Department of Justice and the Federal Trade Commission (the Agencies) recently revised their Horizontal Merger Guidelines (the New Guidelines). In the first major revision since 1992, the New Guidelines provide clarity and emphasize fact-specific antitrust analysis by the two regulating Agencies. The New Guidelines are available by clicking here.

The Agencies first adopted guidelines on horizontal mergers in 1968 to summarize the main techniques and practices they used when evaluating mergers of competing firms in similar markets. Such guidelines were published for the benefit of the business community as an attempt to convey the Agencies' framework of horizontal merger analysis and enforcement.

The New Guidelines emphasize the use of numerous additional factors and tools to analyze anticompetitive conduct, whereas the previous version primarily focused on market analyses to evaluate such conduct. Most notably, the New Guidelines de-emphasize the exclusive use of a rigid five-step market analysis by adding a nonexhaustive list of evidentiary considerations the Agencies use in their evaluation of horizontal mergers. Other significant changes made to the New Guidelines are listed below.

Evidentiary Changes

The evidentiary section added to the New Guidelines lists the types and sources of evidence that the Agencies rely on in horizontal merger investigations. The New Guidelines expressly state that the Agencies consider any reasonably available and reliable evidence to analyze mergers, including, without limitation, any observed effects, comparisons, market shares and concentrations in the relevant market, loss of head-to-head competition, and any disruptions that

the merger creates. Such evidence may come from customers, other industry participants, industry observers, and the merging parties themselves. By listing these new evidentiary factors, the New Guidelines provide a more comprehensive picture of the Agencies' considerations.

Market Definition

The New Guidelines retain the same definition of the market as the previous version of the guidelines but emphasize that the market measurement is not the decisive factor in horizontal merger analysis. The New Guidelines also identify the two roles that market definition can have in identifying competitive concerns in a horizontal merger. The first role is helping identify the relevant markets, based on the line of commerce and section of the country where the concern arises. The second role is identifying the market participants and their relative market shares and concentrations. The New Guidelines explain that although the market definition is necessary to every analysis to aid in establishing likely competitive effects, it is not necessarily the Agencies' analytical starting point.

Hypothetical Monopolist Test

The New Guidelines better describe and explain the use of the hypothetical monopolist test. The test is used to help identify the product market (a group of products that can be substituted for each other), which, in turn, helps define the market. The test determines how much a hypothetical monopolist can increase the price of its product before consumers switch to another seller. The New Guidelines identify a five percent increase as the benchmark increase but note that higher and lower values can be applied based on the nature of the industry and the position of the merging firms. A comprehensive list of factors used in the hypothetical monopoly test is set forth in the New Guidelines. This section also adds three examples of applying the test, one of which highlights the Agencies' willingness to examine lower thresholds of price increases.

Concentration Thresholds

The New Guidelines increase the levels of market concentration and market concentration changes allowed for different levels of agency review. They address the use of the Herfindahl-Hirschman Index (the HHI) to calculate the market concentration as measured by the number of significant competitors in the market. They also increase the HHI thresholds that define unconcentrated, moderately concentrated, and highly concentrated markets as well as double the level of concentration change for which no agency analysis is suggested. These revisions consequently allow for greater market concentration increases.

Unilateral Competitive Effects

Unilateral effects are those produced solely from the merged entity's own conduct rather than from the market as a whole. The New Guidelines provide a more thorough description of unilateral effects and also focus more on the types of unilateral conduct rather than the factors used in evaluating such conduct. They provide new information on certain types of unilateral conduct, including those on the merged firm's innovation, changes in bargaining negotiations with buyers and sellers, and the merged firm's changes in capacity and output of products. In addition, they highlight when certain effects could produce anticompetitive conduct and lead to Agency review, and offer examples of such unilateral effects.

Effects of Coordinated Conduct

Mergers can diminish competition by enabling or encouraging post-merger coordinated interaction among firms in the relevant market. Coordinated conduct involves conduct by multiple firms that is profitable for each of them only as a result of the accommodating reactions of the others. The New Guidelines provide a more comprehensive discussion on the effects of coordinated conduct. Specifically, they illustrate how the Agencies identify coordinated conduct,

their analysis of how a merger might trigger coordinated conduct, and the different types of evidence that demonstrate a market is vulnerable to coordinated conduct. The New Guidelines also provide a new analytical directive to firms on when to expect Agency review. The Agencies state they will likely challenge mergers implicating potential anticompetitive coordinated effects if all the following conditions are met: (1) The merger significantly increased concentration, leading to a moderately or highly concentrated market; (2) There are signs of vulnerability to coordinated conduct in the market; and (3) There is a credible basis on which the Agencies can conclude that the merger might enhance such vulnerability.

Powerful Buyers, Competing Buyers, Partial Acquisitions

New sections on powerful buyers, competing buyers, and partial acquisitions were added to the New Guidelines. First, the New Guidelines explain the influence of powerful buyers as a check on anticompetitive conduct. Second, they include the Agencies' analytical framework on the anticompetitive effects of merging buyers. Lastly, they explain how partial acquisitions may have the potential to decrease competition at the same level as a traditional horizontal merger and may be analyzed as such.

The Agencies' shift from a well-defined, methodical approach to a more sweeping, fact-specific inquiry of horizontal mergers better reflects the true analytical practices of the Agencies while also presenting a more complex, wide-ranging approach to horizontal merger scrutiny. If you have any questions on the New Guidelines or on antitrust or horizontal mergers, please contact a member of Robinson & Cole's Health Law Group.

MASSACHUSETTS SUPREME JUDICIAL COURT RULES AGAINST PUBLIC POLICY EXCEPTION TO PSYCHOTHERAPIST/PATIENT PRIVILEGE

The Supreme Judicial Court of Massachusetts (the Court), in a September 2, 2010, ruling, declined to create a public interest exception to the psychotherapist/patient statutory privilege (M.G.L 233, § 20B) (the Psychotherapist/Patient Privilege) to allow the Board of Registration in Medicine (the Board) to obtain patient records in the course of an investigation into potential medical misconduct of a psychiatrist. The Psychotherapist/Patient Privilege protects the disclosure of communications between patients and their psychotherapists in any court, administrative, or legislative proceeding, with certain exceptions. Communications, for purposes of the Psychotherapist/Patient Privilege, includes conversations, actions, and occurrences relating to the diagnosis or treatment of the patient's mental or emotional condition, and any records, memoranda, or notes of the foregoing. A psychotherapist is defined in the statute as a person licensed to practice medicine who devotes a substantial portion of time to the practice of psychiatry. In this case, the Board, the state's medical licensing agency responsible for physician oversight, filed suit against a board-certified psychiatrist (the Doctor)[1] to enforce a subpoena to turn over the records of 24 patients in connection with a Board investigation into the Doctor's prescribing practices in pain management.

The facts of the case as laid out in the decision are as follows: The Doctor, who specialized in psychiatry and pain management, was reported to the Board after he was called by a physician (the Reporting Physician) seeking to confirm the medications and diagnosis of one of the Doctor's patients (Patient A), who had contacted the Reporting Physician to obtain narcotics detoxification treatment. When the Reporting Physician could not get verification of the diagnosis or prescriptions of Patient A from the Doctor, the Reporting Physician suspected the Doctor was impaired. The Reporting Physician notified the Board of his concerns regarding the Doctor. A Board investigator then reviewed the pharmacy records of the Doctor. The pharmacy records indicated that of the 205 patients whose prescription records were reviewed, the Doctor had prescribed oxycodone to 81 percent of them, Valium to 78 percent them, and both drugs to 77 percent of them. The pharmacy records also indicated that the Doctor may have prescribed

Schedule II drugs to members of his household, a potential violation of the Board's regulations. Thereafter, the Board's investigator requested the medical records of Patient A and 23 additional patients. The Doctor voluntarily disclosed the records of Patient A to the Board investigator, stating that he believed he could disclose Patient A's records because Patient A had violated a pain management agreement with the Doctor, but he refused to turn over any other patient records, stating that the records were protected by the Psychotherapist/Patient Privilege.

When the Doctor refused to supply the records of his patients, the Board served the Doctor with a subpoena demanding the production of the records. When the Doctor refused to comply with the subpoena, the Board filed an action in the Superior Court to enforce it. In Superior Court, the Doctor requested an evidentiary hearing to challenge the findings of the Board's investigator but was denied such a hearing. The Superior Court judge ruled that the Doctor did not quality as a psychologist as defined in the statute because he did not satisfy the "substantial portion" requirement of M.G.L 233, § 20B. The Supreme Judicial Court described this determination as implicitly assuming a finding that pain management, as practiced by the Doctor, is not a subspecialty of psychiatry. Based on this determination, the judge ordered the production of the records. The Doctor appealed the ruling and the Supreme Judicial Court took the matter on its own motion. In his appeal, the Doctor argued he was a psychotherapist as defined under the statute and thus the privilege applied to the patient records. The Board argued that the Doctor did not qualify as a psychotherapist under the statute and, even if he did, that a public policy exception should be created to allow the disclosure of the records for the Board's investigatory purposes.

Because the Board conceded at oral argument that pain management is a subspecialty of psychiatry, the Court concluded that the Doctor satisfied both conditions set forth in the statute and thus qualified as a psychotherapist. (The Court did not address the issue of whether all board-certified psychiatrists automatically qualify as psychotherapists, as the Doctor had requested, because it found that the Doctor himself was a psychotherapist.)

The Court then addressed the Board's public policy argument — that the records must be produced because the Board's compelling need to examine the records in furtherance of its mission to protect the public safety outweighs the confidentiality interests protected by the Psychotherapist/Patient Privilege. The Court ruled that it was not empowered to extend the exceptions to the Psychotherapist/Patient Privilege beyond what the Legislature enacted, noting that while the statute includes certain specified exceptions,[2] the Legislature declined to enact a statutory exception to the Privilege for Board investigations into physician misconduct, notwithstanding a strong public interest in disclosure.

Lastly, because it determined that the patient records were protected by the Psychotherapist/Patient Privilege, the Court declined to reach the issue of whether Massachusetts privacy law, as it has been developed in other cases, prohibits such disclosures.

The Psychotherapist/Patient Privilege plays a significant role in fostering strong therapeutic relationships between patients and caregivers, and this ruling reaffirms the importance of this Privilege to the confidential relationship between patients and psychotherapists.

For additional information on patient privacy matters or doctor/patient privileges, please contact a member of Robinson & Cole LLP's Health Law Group.

PHARMACEUTICALS DISPOSAL BEST PRACTICES

The U.S. Environmental Protection Agency has announced the availability of a draft guidance entitled *Best Management Practices for Disposal of Pharmaceuticals at Health Care Facilities*. Click here for a link to the document. The guidance was drafted in response to the detection of

pharmaceuticals in the nation's waters at very low concentrations. EPA recognizes that there are many sources of these pharmaceuticals; however, the agency has been studying unused pharmaceutical disposal practices at health care facilities, prompted by a concern that health care facilities, with their large amounts of unused pharmaceuticals, were flushing them or disposing of them down the drain, where they ultimately end up in rivers, streams, and coastal waters. The final study can be viewed by clicking here. The guidance document describes the following:

- Techniques for reducing or avoiding pharmaceutical waste
- Practices for identifying and managing types of unused pharmaceuticals
- Applicable disposal regulations

Public comments on the guidance document are being accepted until November 8, 2010, and may be submitted via e-mail to unusedpharms@epa.gov, or to the following contact person:

Meghan Hessenauer
Engineering and Analysis Division (4303T)
US EPA, 1200 Pennsylvania Ave., N.W.
Washington, D.C. 20460

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[1] The Court redacted the name of the psychiatrist in its opinion.

[2] M.G.L 233, § 20B specifies six exceptions to the Psychotherapist/Patient Privilege. For example, the Privilege does not apply to child custody or adoption proceedings if a judge finds that the psychotherapist has evidence bearing on the patient's ability to provide suitable care or custody, and it is more important to the welfare of the child that the communication be disclosed than to preserve the confidential patient/psychotherapist relationship.

If you have any questions regarding these changes, please contact any member of Robinson & Cole's Health Law Group.

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