Antitrust Health Care
Chronicle

March 2013
Vol. 26 / No. 3

A Publication of the Health Care and Pharmaceuticals Committee of the Antitrust Section of the American Bar Association

Co-Chairs:

Seth Silber
Wilson Sonsini
Washington, DC

Christi Braun
Mintz Levin
Washington, DC

Editors:

Jeff White
Weil Gotshal
Washington, DC

Gus Chiarello
Fed. Trade Comm'n
Washington, DC

Leigh Oliver
Hogan Lovells
Washington, DC

Promoting Competition
Protecting Consumers

Editor's Report

In this edition of the *Chronicle*, we are pleased to offer five articles covering a broad set of antitrust and consumer protection related issues involving the health care and pharmaceutical industries. In these articles:

- Lindsey Wilson of Dykema analyzes the FTC's recent enforcement action in the UHS/Ascend transaction and the use of crown jewel provisions and up-front buyers in merger remedies.
- Nicole Castle of McDermott, Will & Emery breaks down the issues and uncertainties arising from the FTC's recent enforcement action in Reading Health System's proposed acquisition of the Surgical Institute of Reading.
- Scott Perlman of Mayer Brown offers an analysis of potential conflicts between the FTC's merger enforcement activities and the policies underlying the Patient Protection and Affordable Care Act.
- Lauren Battaglia of Hogan Lovells analyzes antitrust risks associated with "Risk Mitigation Strategies."
- Jennifer Rangel of Locke Lord gives a primer on health care privacy law, including HIPAA and the new HIPAA "mega rule."

We are always interested in hearing from our committee members. If there is a topic that you would like to see covered in an article or a committee program, please contact Seth Silber (ssilber@wsgr.com) or Christi Braun (cjbraun@mintz.com). If you are interested in writing an article for the *Chronicle*, please contact Jeff White (jeff.white@weil.com), Gus Chiarello (gchiarello@ftc.gov), or Leigh Oliver (leigh.oliver@hoganlovells.com).

Jeff White, Weil Gotshal
Washington, D.C.

Leigh Oliver, Hogan Lovells
Washington, D.C.

Gus Chiarello, FTC
Washington, D.C.

What's Inside

The FTC's Universal Health Services Consent: Increased Flexibility with the Use of Crown Jewels and Up-Front Buyers....2

Recent Hospital Merger Antitrust Enforcement Action Highlights Conflicts and Uncertainties in Policies....8

A Policy Divided Against Itself? Health Care Reform and FTC Enforcement Policy....15

Risky Conduct with Risk Mitigation Strategies? The Potential Antitrust Issues Associated with REMS....26

HIPAA 101 and The New HIPAA Mega Rule....36

The FTC's Universal Health Services Consent: Increased Flexibility with the Use of Crown Jewels and Up-Front Buyers

By Lindsey Wilson[1]
Dykema

Crown jewel and up-front buyer provisions have played an evolving role in divestiture orders over time at both the Federal Trade Commission ("FTC") and Department of Justice ("DOJ"). In fact, until recently, the DOJ strongly disfavored the use of crown jewels, while the FTC has a long history of insisting upon them. The FTC's recent consent order in the proposed acquisition of Ascend Health by Universal Health Services demonstrates the agency's continued flexibility and willingness to entertain different combinations of these types of provisions, depending on the circumstances.

The FTC's UHS Consent Order

On October 5, 2012, the FTC accepted for public comment a proposed consent order to remedy the anticompetitive effects that would otherwise result from the merger of acute inpatient psychiatric services providers, Universal Health Services, Inc. ("UHS") and Ascend Health Corporation ("Ascend").[2] Under the terms of the order, UHS is required to divest its Peak Behavioral Health Services facility ("Peak") and assets in the local market encompassing El Paso, Texas and its suburb, Santa Teresa, New Mexico. Further, pursuant to a crown jewel provision, if Peak is not sold to an approved buyer within six months, the order requires the divestiture of a second facility, Mesilla Valley Hospital ("Mesilla Valley") in Las Cruces, New Mexico.[3]

According to the FTC, UHS is one of the largest hospital management companies in the U.S., owning or operating a number of general acute care hospitals and behavioral health facilities across the country.[4] Ascend also owns or operates behavioral health facilities in several states.[5] The FTC's investigation determined that the acquisition posed substantial antitrust concerns in the market for acute inpatient psychiatric services provided to commercially insured patients.[6] Specifically, the FTC found the deal would lead to a virtual monopoly in the provision of such services in the El Paso/Santa Teresa market, creating a strong presumption

[1] Lindsey Wilson is a senior attorney in the Business and Commercial Litigation Practice Group at Dykema in Bloomfield Hills, Michigan.

[2] *See* Alan B. Miller and Universal Health Services, Inc., FTC File No. 121-0157 (Oct. 5, 2012) (Analysis of Agreement Containing Consent Orders to Aid Public Comment) ("UHS Analysis"), http://www.ftc.gov/os/caselist/1210157/121005uhsascendanal.pdf; *see also* Press Release, Fed. Trade Comm'n, FTC Approves Final Order Settling Charges that Universal Health Services, Inc.'s Acquisition of Ascend Health Corp. Would Have Been Anticompetitive (Nov. 30, 2012), http://www.ftc.gov/opa/2012/11/uhs.shtm (announcing FTC approval of the final order).

[3] *See* UHS Analysis, *supra* note 2.

[4] *Id.* at 2.

[5] *Id.*

[6] *Id.*

that the acquisition would create or enhance market power.[7]

The consent order "wholly remedies" these alleged anticompetitive effects by requiring UHS to divest Peak within six months, and further provides that, if Peak is not sold to an approved acquirer within that timeframe, a divestiture trustee will be appointed and empowered to divest both Peak and Mesilla Valley. The FTC required this last provision—the crown jewel provision—"to address the uncertainty of whether Peak alone is sufficient to attract an acquirer that would compete as effectively as UHS competed prior to the merger."[8] Notably, the consent agreement provided that the potential acquirer of Peak would be subject to prior approval by the FTC, but did *not* require an up-front buyer prior to accepting the proposed order for public comment.

Recognition and Use of Crown Jewel Provisions at the FTC and DOJ

Certain types of provisions are nearly always included in merger-related divestiture orders, including the divestiture itself, trustee provisions, and certain reporting obligations.[9] Crown jewel provisions, in contrast, serve a more narrow purpose in only a subset of divestitures, and the FTC has a long history of utilizing them in consent orders.[10]

A crown jewel provision simply "requires divestiture of a different package of assets" relative to what the merging parties are originally required to divest.[11] Crown jewels are typically a "more marketable package" of assets for a trustee to sell if the parties are unable to find an acceptable buyer for the original package of assets.[12] They may consist of a package that includes more than the original package of assets, or may be a different package, such as the acquirer's assets instead of the acquired firm's assets (or vice versa).[13]

Crown jewel provisions are used "where there is a risk that, if the respondent fails to divest the original divestiture package on time (including to an up front buyer) or if the original divestiture falls through for some reason, a divestiture trustee may need an expanded or alternative package of assets to accomplish the divestiture remedy."[14] For instance, a buyer may require a larger or different package of assets to make the divestiture viable and competitive, or because it may be faster or

[7] *Id.* at 2-3.

[8] *Id.* at 3.

[9] "[M]ost orders relating to a horizontal merger will require a divestiture; the divestiture will have to be 'absolute'; the order will state the purpose of the divestiture; the Commission will be authorized to appoint a divestiture trustee if the assets aren't divested on time; the divestiture trustee may have authority to divest a larger package of assets; the assets to be divested will have to be maintained pending divestiture; the parties must represent that they can accomplish the remedy; certain reporting obligations will be imposed; and the staff's access to documents and employees will have to be assured." Fed. Trade Comm'n, Frequently Asked Questions About Merger Consent Order Provisions ("FTC FAQs"), at Q. 1, http://www.ftc.gov/bc/mergerfaq.shtm.

[10] *See* William J. Baer, Dir., Bureau of Competition, Fed. Trade Comm'n, Reflections on 20 Years of Merger Enforcement Under the Hart-Scott-Rodino Act, Prepared Remarks Before the Conf. Bd. and the 35th Ann. Corp. Counsel Init. (Oct. 29, 1996) ("Baer Remarks"), http://www.ftc.gov/speeches/other/hsrspeec.shtm (noting that crown jewel provisions are "difficult to negotiate, but we will insist on them where appropriate").

[11] *See* FTC FAQs, *supra* note 9, at Q. 24 ("What is a 'crown jewel' provision?").

[12] *Id.*

[13] *Id.*

[14] *Id.* at Q. 26.

easier for the trustee to sell a larger, more complete package of assets.[15]

Crown jewel provisions are not designed to serve as a "penalty clause," or as punishment for failure to comply with a consent order.[16] Rather, the FTC uses crown jewels where, for instance, the merging parties argue that the agency should accept "surgically defined divestiture packages," as opposed to stand-alone businesses.[17] In particular, crown jewel provisions may be useful "when there are some uncertainties about the salability or viability of the divestiture package, or where the respondent may be able to frustrate the viability of a divestiture—for example, by not transferring all the necessary technology or know-how."[18]

The DOJ actually strongly disfavored (at least in its policy guidelines)[19] the use of crown jewel provisions up until June 2011, stating "they represent acceptance of either less than effective relief at the outset or more than is necessary to remedy the competitive problem."[20] Citing the tension between "requiring a somewhat smaller, less valuable package of divestiture assets and accepting greater risk that the remedy will prove inadequate, or demanding a more substantial divestiture in order to be highly confident that postmerger competition will be fully preserved," the DOJ's preference had been "to demand at the outset a remedy that provides this confidence—rather than one that may turn out later to require the addition of more assets, e.g., a crown jewel."[21] Indeed, DOJ's prior policy guidance emphasized a number of concerns over the use of crown jewel provisions, at the time viewing their use as punitive, and even as a means to allow "purchaser manipulation," stating that "[i]f there are only a few potential purchasers and they are aware of the crown jewel provision in the decree, they may intentionally delay negotiating for the agreed-upon divestiture assets so that they may later purchase the crown jewels at an attractive price."[22]

However, in June 2011, the DOJ officially revised its position and more forcefully embraced the use of crown jewel provisions, in particular in two circumstances.[23] First, where the merging parties dispute which assets are necessary for a divestiture, the DOJ may agree

---

[15] *Id.*

[16] *Id.* at Q. 24.

[17] George S. Cary, Sr. Deputy Director, Bureau of Competition, Fed. Trade Comm'n, Merger Remedies, Prepared Remarks Before the Am. Bar. Assoc. (Apr. 10, 1997), http://www.ftc.gov/speeches/other/aba397.shtm.

[18] *See* Baer Remarks, *supra* note 10.

[19] *See* U.S. Dept. of Just., Antitrust Division Policy Guide to Merger Remedies (Oct. 2004) ("2004 DOJ Guidelines"), at § IV.H ("Crown Jewel Provisions Are Strongly Disfavored"), http://www.justice.gov/atr/public/guidelines/205108.htm (archived and updated in June 2011). While disfavoring their use, the DOJ had nonetheless incorporated crown jewel provisions in connection with divestiture packages. *See, e.g.,* Final Judgment, U.S. v. Monsanto Co. and Delta and Pine Land Co., No. 07-00992 (D.D.C. Nov. 6, 2008) (requiring the divestiture of additional assets in the event other assets were not divested by the end of the time period permitted by the Final Judgment); Press Release, U.S. Dept. of Just., Justice Department Requires Divestiture in Mittal Steel's Acquisition of Arcelor (Aug. 1, 2006), http://www.justice.gov/opa/pr/2006/August/06_at_483.html (requiring best efforts to sell one set of assets, but allowing the DOJ to select either of two alternative sets of assets to divest in the event the acquirer could not sell the original divestiture assets).

[20] 2004 DOJ Guidelines, *supra* note 19, at § IV.H.

[21] *Id.*

[22] *Id.*

[23] *See* U.S. Dept. of Just., Antitrust Division Policy Guide to Merger Remedies (June 2011) ("2011 DOJ Guidelines"), http://www.justice.gov/atr/public/guidelines/272350.pdf.

to the parties' proposed package on the condition of a crown jewel provision.[24] Second, the DOJ will consider requiring a crown jewel where the parties offer a "creative solution" to alleviate any anticompetitive concerns, but which may not ultimately result in a successful divestiture.[25]

Despite the apparent increasing recognition and routine use of crown jewels by both agencies, such provisions are rarely in fact triggered.[26] This is likely due to the incentive they provide to the merging parties to complete the original divestiture.[27]

No Up-Front Buyer

One noteworthy aspect of the UHS consent is that the FTC did not require an up-front buyer—that is, the parties were not required to find an acceptable buyer for the assets it proposed to divest, and execute an acceptable agreement with that buyer, before the FTC's accepting the proposed order for public comment.[28] Like crown jewel provisions, up-front buyers are not required in all FTC divestitures, but may be required where there is concern about the adequacy of the asset package or the possible lack of an acceptable buyer, or where the parties have urged the divestiture of only selected assets.[29]

Interestingly, these are the same types of concerns the FTC specifically cited in its analysis of the UHS consent agreement (i.e., uncertainty over whether Peak alone would be sufficient to attract an acquirer that would compete as effectively as UHS competed prior to the merger).[30] Despite the concern, it appears the FTC felt confident enough in its crown jewel provision—alone—not to require an up-front buyer.

The FTC determines whether to require a crown jewel provision or an up-front buyer— or both—on a case by case basis.[31] From the FTC's perspective, an up-front buyer does not necessarily obviate the need for a crown jewel provision, since agreements with up-front buyers occasionally fall through, in which case the original asset package may be unattractive to other buyers and there may be a need to alter or expand the original divestiture package to preserve competition.[32]

The DOJ's stated policy is largely similar, citing benefits to both sides. For the merging parties,

---

[24] *Id.* at § IV(A)(2)(b).

[25] *Id.*

[26] *See, e.g.,* Letter from the Comm'n, Aventis S.A., FTC File No. 991-0071 (Sept. 26, 2001), http://www.ftc.gov/os/2001/09/010926aventisletter.htm (approving the divestiture of crown jewel assets); Press Release, U.S. Dept. of Just., Justice Department Requires Mittal Steel to Divest Sparrows Point Steel Mill (Feb. 20, 2007), http://www.justice.gov/atr/public/press_releases/2007/221503.htm (requiring divestiture of alternative assets where acquirer was unable to sell the original divestiture assets).

[27] *See, e.g.,* Baer Remarks, *supra* note 10 (noting that the fact that crown jewel provisions are rarely triggered "probably attests to the incentive value of such provisions" and "also suggests that if a respondent is adamantly opposed to such a provision, there may be serious questions about the viability of the proposed settlement").

[28] "When the Commission requires a 'buyer up front' (or up front buyer), it requires that the respondent find an acceptable buyer for the package of assets it proposes to divest and that it execute an acceptable agreement – and all necessary ancillary agreements – with the buyer (and third parties, if required) before the Commission accepts the proposed consent order for public comment." FTC FAQs, *supra* note 9, at Q. 7.

[29] *Id.* at Q. 8 (noting that "[b]uyers up front also reduce the risk of interim harm to competition by speeding up accomplishment of the remedy").

[30] UHS Analysis, *supra* note 2, at 3.

[31] FTC FAQs, *supra* note 9, at Q. 27.

[32] *Id.*

"an upfront buyer can shorten the divestiture process, provide more certainty about the transaction than if they (or a selling trustee) must seek a buyer for a package of assets post-consummation, and avoid the possibility of a sale dictated by the Division in which the parties might have to give up a larger package of assets."[33] At the same time, the DOJ "benefits from avoiding the costs that might be incurred in a longer investigation and post-consummation sale process and gains certainty that the divestiture will be effective in preserving competition."[34] However, even with an up-front buyer, the DOJ will normally *insist* that the consent decree also include a crown jewel provision—"an alternative relief proposal, in the event that the pre-approved buyer decides to back out of the arrangement" and reflecting the fact that "different assets may appeal to different purchasers."[35]

Increased Flexibility at the FTC

The U.S. agencies' recognition and use of crown jewel provisions has evolved over time, with the FTC having a history of routinely requiring them, and the DOJ only recently standing behind them as a matter of policy. Today, both agencies view them as a viable means of alleviating concerns over whether a particular divestiture package is sufficient to attract a competitive acquirer. Reading between the lines, and given its stated guidance, it appears the DOJ may prefer up-front buyers (backstopped by crown jewel provisions) over standalone crown jewels,[36] whereas the UHS consent may demonstrate that the FTC is more amenable to employing a crown jewel provision—without an up-front buyer—at least in certain circumstances. Thus, on paper and in practice, the FTC seems more flexible with respect to the use of up-front buyers and crown jewels.[37]

In UHS, closing quickly may have been an especially critical factor to the merging parties (leaving them without sufficient time to reach an agreement with an up-front buyer), in which case they were compelled to risk the divestiture of an additional, presumably important, asset. From all appearances, this was a fast-moving deal, from signing on June 3, 2012, to entrance of a proposed consent order on Oct. 5, 2012—a period of just four months. Assuming the parties' need for speed, it appears the FTC was open to accommodating the parties by requiring a precautionary crown jewel provision.

Speculation aside, the lesson from UHS is likely that the FTC is becoming increasingly flexible concerning divestiture remedies, and that a crown jewel alone may be a useful means for the FTC and merging parties to address antitrust and asset attractiveness concerns. As a result, and depending on timing and other circumstances, merging parties may be able to negotiate either an up-front buyer divestiture backed-up with a crown jewel provision,[38] or a

[33] 2011 DOJ Guidelines, *supra* note 23, at § IV(A)(2)(a) (Upfront Buyers).

[34] *Id.*

[35] *Id.*

[36] *See id.* ("The Division typically will seek to ensure that there will be at least one acceptable potential purchaser for the specified asset package. In the absence of an upfront buyer, the Division must be satisfied that the package will be sufficient to attract a purchaser in whose hands the assets will effectively preserve competition.").

[37] *Compare* 2011 DOJ Guidelines, *supra* note 23, at § IV(A)(2)(a) ("An upfront buyer consent decree also *must* include an alternative relief proposal, in the event that the pre-approved buyer decides to back out of the arrangement.") *with* FTC FAQs, *supra* note 9, at Q. 27 ("An up front buyer does not necessarily eliminate the need for a crown jewel provision.") (emphasis added).

[38] *See, e.g.,* Quest Diagnostics, Inc., FTC File No. 021-0140 (Apr. 3, 2003) (Decision and Order), http://www.ftc.gov/os/2003/04/questdo.pdf (requiring

stand-alone crown jewel provision without an up-front buyer, as was the case in UHS, in order to close their deals.

divestiture to up-front buyer, along with crown jewel provision requiring divestiture of a more extensive package of assets to another acquirer if transaction with up-front buyer is not consummated within a certain period of time).