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FTC Stands Down in Latest Head-to-Head Battle Between Federal and State Oversight of Healthcare Collaborations

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In what will undoubtedly be seen by all interested parties as a significant setback in the Federal Trade Commission's active opposition to potentially anticompetitive healthcare collaborations, the FTC voted unanimously on Wednesday to dismiss its challenge to Cabell Huntington Hospital's acquisition of St. Mary's Medical Center – two hospitals serving patients in the Huntington area of West Virginia. While the FTC continues to believe that the merger will result in significant anticompetitive harm, it chose to abandon the fight in light of the recent passage of West Virginia Senate Bill 597 (SB 597).

The FTC first challenged the Cabell-St. Mary's merger late last year. Although the proposed merger had already been approved by the West Virginia Attorney General after the two hospitals agreed to limit anticompetitive behavior, the FTC nevertheless challenged the acquisition. The FTC alleged that the two hospitals – the only two in Huntington, West Virginia – were each other's closest competitors with respect to general acute care inpatient hospital and outpatient surgical services, and that the acquisition would result in a dominant firm with greater than 75% market share. The FTC further alleged that the potential cost savings and purported quality improvements of the proposed acquisition were speculative, not merger-specific, and insufficient to outweigh the likely competitive harms of higher prices and lower quality of care.

In the midst of the FTC's challenge, West Virginia signed into law SB 597 in March of this year. SB 597 calls for the newly-constituted West Virginia Health Care Authority (the Authority) to be *the sole* decision-maker to approve or reject proposed "cooperative agreements" among healthcare providers, thus shielding them from federal (and state) antitrust scrutiny.

SB 597 represents West Virginia's implementation of the doctrine of state action immunity. State action immunity is typically an affirmative defense to an antitrust suit which requires its proponents to demonstrate both "clear articulation" of a state's desire to suspend competition and "active supervision" by the state of the conduct to be immunized such that any restraint on competition is a result of knowing, deliberate state intervention rather than simply an agreement among private parties. With respect to "active supervision" (which historically has been the more difficult

requirement to satisfy), SB 597 includes detailed provisions setting forth the Authority's supervisory role, including, at a minimum: (a) submission of annual reports by parties to a cooperative agreement to the Authority which include detailed information as to efficiencies achieved; price, cost, quality, and access to care; and reimbursement contracts with insurers; (b) a corrective action plan where average performance falls below national averages; (c) the Authority's ability to order rebates if price increases are significant and unjustified; (d) the Authority's ability to otherwise investigate compliance; and (e) the Authority's ability to take other appropriate action to ensure compliance.

The newly-minted state law also appears to be a direct response to the FTC's challenge of the Cabell-St. Mary's merger. State Senator Plymale (D) who introduced SB 597 (and represents the same county in which the two hospitals are located) argued that the decision of whether these hospitals should be allowed to merge should be decided in West Virginia, *not* Washington: "We better understand access, service, and regulation that affect the unique challenges of our citizens." Upon the bill's passage, the Authority predictably approved Cabell's cooperative agreement with St. Mary's, joining the West Virginia Attorney General's prior approval of the merger.

In a strongly-worded statement accompanying the FTC's dismissal of its challenge on Wednesday, the FTC declared that "[t]his case presents another example of healthcare providers attempting to use state legislation to shield potentially anticompetitive combinations from antitrust enforcement." The FTC argued that state cooperative agreement laws such as SB 597 undervalue the critical role that competition plays in the healthcare sector, and warned that such state laws are likely to harm healthcare consumers through higher prices and lower quality of care.

The FTC once again also refuted counterarguments that antitrust enforcement undermines the policy goals of the Affordable Care Act (ACA) to lower costs and improve care through greater coordination. The FTC reiterated that the ACA neither sets aside the antitrust laws nor encourages mergers that substantially lessen competition. Moreover, while the FTC has always recognized that mergers may often result in procompetitive efficiencies, any claimed benefits must be "merger-specific" (i.e., not achievable short of a merger) to be legally cognizable. And, as a general matter, many purported benefits of healthcare mergers – "including coordination of patient care, sharing information through electronic medical records, population health management, risk-based contracting, standardizing care, and joint purchasing" – often can be achieved through means short of mergers that do not harm competition.

The FTC ended its statement by reemphasizing its continued commitment to "vigorously" investigating and challenging anticompetitive healthcare mergers. It also warned that its decision to abandon the fight against the Cabell-St. Mary's merger "does not necessarily mean that we will do the same in other cases in which a cooperative agreement is sought or approved." Indeed, the FTC has in the past actively opposed efforts by states to extend antitrust immunity to certain healthcare collaborations under the cloak of state approval and supervision. The FTC has also enjoyed considerable success in narrowly confining the state action immunity doctrine, including its most recent Supreme Court victories in *North Carolina State Board of Dental Examiners v. FTC*, 135 S. Ct. 1101 (2015) and *FTC v. Phoebe Putney Health System, Inc.*, 133 S. Ct. 1013 (2013). Given this, the FTC's sudden change of heart with respect to SB 597 in particular may perhaps be surprising to the healthcare sector. It apparently constitutes tacit acknowledgement by the FTC that the regulatory regime established by SB 597 meets the requirements of state action immunity, including the requirement of active supervision.

The healthcare sector will surely monitor the situation closely to see if other states use West Virginia's statute as a blueprint for shielding their in-state healthcare providers from antitrust scrutiny,

and if so, whether the FTC will once again back down in the face of state action or be forced to draw a line in the sand against further erosion of its healthcare antitrust enforcement authority.

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