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Documenting a Transaction Does Not Mean That It Will Come to Fruition: Update on Antitrust Challenges to Health Care Transactions

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The increase in merger activity in the health care sector over the last decade has been met with an increase in scrutiny by the Federal Trade Commission (FTC, or the Commission), with the Commission seeking injunctive relief to block proposed deals as anti-competitive under the Clayton Act. Indeed, the FTC has moved to block three hospital mergers in Illinois, West Virginia and Pennsylvania, in addition to the U.S. Department of Justice (DOJ) challenging the two proposed combinations among the five largest insurers. In each of these cases, the government was ultimately successful in court.

This increased scrutiny is part of a general increase in antitrust enforcement since the George W. Bush presidential administration. The government has engaged in increased scrutiny of transactions in healthcare and other industries, as reflected in extensive merger reviews and the increased number of court cases challenging particular transactions.

(Although overall antitrust enforcement has declined since the 1980s, the FTC and the DOJ have enjoyed recent success in blocking significant mergers and acquisitions or extracting concessions to permit transactions to proceed. Consider, for example, the government's success in blocking the mergers between the nation's largest office suppliers, Staples and Office Depot, and the proposed acquisition by Sysco of US Foods.)

But the government's attention has not been limited to the largest of deals. In October 2016, the FTC reached a settlement with two health care providers in St. Cloud, Minnesota, in connection with a proposed transaction that fell below the $78.2 million reporting threshold requiring Hart-Scott-Rodino notification. The FTC ultimately consented to the proposed merger in light of the precarious financial position of St. Cloud Medical Group, but required several measures designed to reduce the anticompetitive impact of the deal, including the suspension of physician non-competition agreements and the provision of six-figure payments to the first five physicians to depart to either start a new practice or join another provider.

A 2016 opinion by the federal appellate court in Chicago analyzed issues to be considered in determining whether a hospital combination can withstand antitrust scrutiny. In *FTC v. Advocate Health Network*, the primary issue involved how the marketplace for hospital services is defined. The

two combining hospitals defined the subject market area in broad geographic terms, including within their definition of the relevant market an “academic” or teaching hospital. The government and the U.S. Court of Appeals for the Seventh Circuit, however, rejected that proposed market definition, noting that “most patients prefer to receive hospital care close to home.”

The Seventh Circuit in that case reinforced that the relevant standard to be applied is the “hypothetical monopolist test,” which focuses on the question of what could happen if a single firm became the only seller in a geographic region. If that hypothetical monopolist could profitably raise prices above competitive levels, then that region defines the relevant geographic market.

In analyzing the market, the court noted three features of the market for hospital services. First, because most patients prefer to go to local hospitals, there are often few hospitals in a geographic market. Second, patients vary in their hospital preferences. As the court stated, “[g]etting an appendectomy is not like buying a beer; one Pabst Blue Ribbon or Hoegaarden may be as good as another, no matter where they are bought. For surgery patients, who their surgeon will be matters, the hospital’s reputation matters, and the hospital’s location matters.” Lastly, most of the costs associated with hospital care are borne by the insurers, rather than the consumers. As a result, in measuring whether a particular combination is anticompetitive, the analysis should focus on the likely response of insurers, and not patients.

The Seventh Circuit rejected the concept that no distinction exists between “destination hospitals” or academic medical centers and other hospitals, noting that patients will often travel significant distances for treatment at such facilities. The Seventh Circuit summed up the relevant analysis as follows: “The geographic market question asks in essence, how many hospitals can insurers convince most customers to drive past to save a few percent on their health insurance premiums? We should not be surprised if that number is very small.”

In considering future combinations, practitioners and others in the healthcare industry would be wise to take this question into account when assessing whether the combination is likely to withstand scrutiny.

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