

State Control Of Hospital Merger Review May Be A Good Idea

Law360, New York (April 29, 2016, 11:41 AM ET) --

A state attorney general, the commissioner of the state Department of Health and a Federal Trade Commission attorney walk into a hospital merger review. It could be the start to a terrible lawyer joke. To the West Virginia Legislature, it is certainly a case of excessive federal antitrust enforcement intruding on state and local affairs.

Federal and state enforcers often come to the same conclusion following independent merger reviews.[1] In fact, of the FTC's currently pending hospital merger challenges, the state enforcers have joined two out of three times. But, in West Virginia, the FTC filed an administrative complaint to prevent the merger of two hospitals — just three months after the state attorney general announced his approval. Although West Virginia's subsequent legislative acrobatics to secure state-action-exemption protection for certain hospital mergers are novel, to hospitals and other states, West Virginia might be on to something.

The FTC has consistently raised two main concerns in the hospital merger context: (1) cost, and (2) quality of care. Perhaps state antitrust enforcers — such as the attorney general, the Department of Health and professional licensing boards — consider themselves to be equally or better able to address these concerns and to evaluate the uniquely local effects of a hospital merger. For the merging parties, state oversight in place of federal review provides greater certainty, as hospitals and other providers currently operate under state regulations protecting health care consumers.

West Virginia Senate Bill 597

On March 18, 2016, the governor of West Virginia signed into law Senate Bill 597, which effectively discharges federal antitrust authorities from reviewing hospital mergers in the state.[2] The law allows “cooperative agreements” — including consolidations by merger or some other combination of assets — between certain hospitals in the state. All cooperative agreements would be subject to approval by the state attorney general and the West Virginia Health Care Authority, an autonomous agency within the state government. In theory, review by the state authorities creates a state action that shields potentially anti-competitive mergers from federal review.

The law does not simply allow hospitals and providers to act anti-competitively without antitrust review. The West Virginia attorney general and the Health Care Authority must instead weigh the potential anti-



Emily Chow



Matthew Piehl

competitive effects of the cooperative agreement with the potential efficiencies and public benefits. By the law's own terms, even if a cooperative agreement "might be anticompetitive within the meaning and intent of state and federal antitrust laws the Legislature believes it is in the state's best interest to supplant such laws with regulatory approval and oversight by the Health Care Authority as set out" in the statute. The state authorities thus have the power to review and approve anti-competitive cooperative agreements if they are "beneficial to citizens of the state and to medical education."

The FTC called the law "unnecessary and likely harmful."^[3] The FTC recognized that competitor collaborations can be pro-competitive, but claimed that it balances anti-competitive harms with pro-competitive justifications, like merger-specific efficiencies that may result in lower prices, improved quality, enhanced service, or new products.

FTC Review of Hospital Mergers

Though the West Virginia law mandates that state authorities give "deference" to policy statements of the Federal Trade Commission, the law deliberately blocks federal antitrust review of certain hospital mergers. It is no coincidence that the law passed as the FTC juggles three separate hospital consolidation challenges, including one in West Virginia: (1) Cabell Huntington Hospital's acquisition of St. Mary's Medical Center in and around Huntington, West Virginia^[4]; (2) the merger of Penn State Hershey Medical Center and PinnacleHealth System in the Harrisburg, Pennsylvania area^[5]; and (3) the affiliation of Advocate Health Care Network, Advocate Health and Hospitals Corporation, and NorthShore University HealthSystem in the greater Chicagoland area.^[6]

In each case, the FTC's allegations follow a familiar formula. The copy-and-paste complaints are rooted in the principle that "hospital competition yields lower prices and higher quality."^[7] Cost and quality are the stalwarts of the FTC's objections. "First, hospitals compete for inclusion in commercial health plans' provider networks. Second, in-network hospitals compete to attract patients, including health plan members."

Step One: The Merger Will Raise Prices

As its first allegation in a hospital merger review complaint, the FTC alleges that the acquisition will eliminate price competition. For example, in the Cabell/St. Mary's transaction, the FTC states: "As a result of their proximity and service offerings, Cabell and St. Mary's are intense competitors and close substitutes for each other in the eyes of health plans and patients in the [geographic market]. ... The Acquisition would end the hospitals' significant and beneficial incentive to compete on price." For the other two ongoing FTC reviews, simply substitute the names, places, and HHI delta.

Though the allegation may be meritorious, states and hospitals would argue that nothing makes it unique for review by the federal agency. State enforcers may tell their federal counterparts that they are equally well positioned to review a transaction for potential price concerns, and are likely better situated to monitor anti-competitive price changes post-closing. The West Virginia attorney general, for instance, conditioned his approval of the Cabell-St. Mary's acquisition on an Assurance of Voluntary Compliance (AVC) agreement with the parties that neither hospital would increase its service rates beyond a benchmark rate established by the West Virginia Health Care Authority. Post-transaction, the Health Care Authority is already positioned to monitor price changes by the combined entity.

For the hospital, the removal of the FTC from the merger approval process should not alter the arguments presented in support of the merger. Specifically, the merging parties would likely continue to

present efficiencies arguments to demonstrate pro-competitive price effects. Additionally, the parties can focus on state policy initiatives that may outweigh potentially anti-competitive effects at a local or state level, such as greater access to care for a particularly vulnerable population.

Step Two: The Merger Will Reduce Quality

The FTC's second allegation typically states that the acquisition would eliminate quality and service competition. In the West Virginia case, the FTC argues, "Cabell and St. Mary's compete vigorously on non-price dimensions, particularly patient service and clinical quality ... Post-Acquisition, the hospitals would no longer be spurred by each other to improve the quality of their services, add service lines, obtain new technologies, recruit new physicians, and increase patient safety, comfort, and convenience." Dismissing the "temporary conduct remedies" set forth in the AVC with the state attorney general, the FTC alleges the proposed acquisition would "reduce the merging parties' incentives to maintain and improve quality of care," and criticizes West Virginia's regulation of health care facilities as being inadequate to prevent anti-competitive harm to consumers.

The FTC's challenge came just three months after the attorney general's office approved the merger, which it believed to benefit the citizens of West Virginia and to be "in the best interests of the State." And, while the FTC generally concludes in its complaint that "[a] merger of competing hospitals ... reduces their incentive to improve and maintain quality," West Virginia sought to enhance the quality of and access to health care through various conditions set forth in the AVC, which contemplate continuing involvement and oversight of the merged entity after closing. In the AVC, the parties agreed to develop quality and population health goals, implement community wellness programs targeted at medically underserved areas, establish a fully integrated and interactive records system, provide written notice of any proposed addition or deletion of any service line, and continue to accept Ohio and Kentucky Medicaid patients at in-state provider rates. Although these are not the structural remedies preferred by the federal antitrust agencies, they represent specific remedies to potential harms to consumers as identified by the state.

The FTC's action thus overrides the expressed desires of West Virginia to allow the merger to proceed under state oversight, and potentially ignores state interests in weighing competitive concerns with state and local health care initiatives. The United States Supreme Court recently reiterated that, "[i]f every duly enacted state law or policy were required to conform to the mandates of the Sherman Act, thus promoting competition at the expense of other values a State may deem fundamental, federal antitrust law would impose an impermissible burden on the States' power to regulate."^[8] States and health care providers may argue that this is particularly true when evaluating quality of care in hospital mergers. Multiple state authorities, including health departments and professional licensing boards, govern quality measures for hospitals and providers. Given the intensely local impact on quality and health care services, these state agencies may feel they are in a better position to assess the impact of a proposed transaction and to monitor the parties in a post-transaction market. To address one FTC concern by way of example, the state attorney general can mandate that a party's plans to introduce new service lines proceed, or, in the alternative, the state health department and the licensing boards can sanction and assist a new entrant.

Finally, state control of the process may provide greater certainty in the eyes of hospitals and providers. Health care entities interact frequently with state health authorities and so may be better able to predict the outcome of a state review or to structure the transaction to further state policy goals. With certainty in the process, the transaction may be able to achieve the cost efficiencies and quality goals the FTC promotes in its merger review process.

—By Emily Chow and Matthew Piehl, Faegre Baker Daniels LLP

Emily Chow and Matthew Piehl are associates in Faegre Baker Daniels' Minneapolis office.

The opinions expressed are those of the author(s) and do not necessarily reflect the views of the firm, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.

[1] For example, in December 2015, the FTC and the State of Illinois sought to block the merger of Advocate Health Care Network and NorthShore University HealthSystem in the northern Chicago suburbs.

[2] S.B. 597, 2016 Reg. Sess. (W. Va. 2016).

[3] FTC Staff Comment to the West Virginia House of Delegates Regarding SB 597 and the Competitive Implications of Provisions Regarding “Cooperative Agreements” Between – and Possible Exemptions From the Federal Antitrust Laws For – Health Care Providers (Mar. 9, 2016).

[4] Cabell Huntington Hospital/St. Mary’s Medical Center, Docket No. 9366.

[5] The Penn State Hershey Medical Center/PinnacleHealth System, Docket No. 9368.

[6] Advocate Health Care Network, Advocate Health and Hospitals Corporation, NorthShore University HealthSystem, Docket No. 9369.

[7] See, e.g., Cabell, Complaint by the Federal Trade Commission.

[8] N.C. State Bd. of Dental Examiners v. FTC, --- U.S. ----, 135 S. Ct. 1101, 1109 (2015) (citing Exxon Corp. v. Governor of Md., 437 U.S. 117, 113 (1978)).

All Content © 2003-2016, Portfolio Media, Inc.