THE
NATIONAL LAW REVIEW

2016 Antitrust Case Law And FTC Action Highlight Agency's Approach To Hospital Mergers

Tuesday, December 27, 2016

In 2016, the ***Federal Trade Commission*** prevailed in litigation before the Third and Seventh Circuit Courts of Appeal related to two high-profile hospital mergers. In both cases, the courts of appeal overturned the federal district courts' decisions denying preliminary injunctions to stop the mergers. In another matter, the FTC dropped its complaint after the State of West Virginia enacted a statute that immunized certain hospital mergers from antitrust laws, and its hospital authority approved the hospital merger under the statute.

The decisions by the Third and Seventh Circuit Courts of Appeal and the FTC's abandonment of the FTC's challenge of the West Virginia merger provide guidance for healthcare providers about how courts and the enforcement agencies analyze mergers between hospitals under the antitrust laws. Key takeaways include:

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Antitrust & Trade Regulation
Health Law & Managed Care
All Federal
3rd Circuit (incl. bankruptcy)
7th Circuit (incl. bankruptcy)

1. When evaluating the relevant geographic market, courts and enforcement agencies will likely view specialized hospitals and academic institutions differently from local general acute care hospitals. The fact that some patients travel long distances for specialty care may not rebut the agencies' argument that "general acute care services are inherently local."
2. The decisions from the Third and Seventh Circuits confirm that the FTC continues to use the hypothetical monopolist test in evaluating the relevant market for healthcare transactions.
3. The agencies' and the courts' approaches to mergers differ from jurisdiction to jurisdiction, and parties to healthcare mergers and acquisitions should consult with antitrust counsel who can examine their transactions.
4. In addition to considering the impact of hospital mergers on consumers, hospitals looking to merge or enter into similar transactions need to consider the impact on insurers. If insurers oppose a merger and testify that they are unable to offer a network without at least one of the merging parties, the merging parties may have an uphill battle in getting the green light from the regulators and the courts.
5. Private arrangements between hospitals and insurers to curb price increases after a merger will typically not turn an anticompetitive merger or acquisition into a procompetitive one, but agreements between hospitals and state officials may be relevant in some jurisdictions, like West Virginia.
6. A merger's efficiencies need to be carefully considered by counsel and the parties. To help defend a merger, efficiencies need to be merger-specific, i.e., not available to the parties individually absent the merger, and parties to a merger may be required to show that cost savings or other benefits will be passed on to payors and patients.
7. Hospitals should evaluate whether their state statutes immunize their transactions, and consider the potential enforceability of such statutes if challenged by the FTC.

8. Merging parties should consult antitrust counsel with experience in healthcare transactions to assess antitrust risk and, if necessary, to prepare a defense to a regulatory challenge.

The two recent decisions by the Third and Seventh Circuit Courts of Appeal and the FTC's action in another hospital merger are summarized here.