

FTC Drops Challenge of West Virginia Hospital Merger

On July 6, 2016, the Federal Trade Commission ("FTC") decided to dismiss its administrative complaint challenging Cabell Huntington Hospital's ("Cabell Huntington") proposed acquisition of St. Mary's Medical Center ("St. Mary's") in Huntington, West Virginia. The [FTC's statement](#), makes clear that the FTC decided to drop its challenge after West Virginia passed Senate Bill 597, which allows for certain transactions between teaching hospitals, such as Cabell Huntington, and one or more hospitals. The general purpose of the legislation is to provide a framework under which a transaction would be blessed by the West Virginia Health Care Authority and potentially be sheltered from an FTC challenge because of the state action antitrust immunity.

Emboldened by a string of victories in recent years, the FTC has filed an increasing number of enforcement actions against mergers it perceives as anticompetitive. Some states, most notably West Virginia, have enacted or considered enacting Certificate of Public Advantage ("COPA") statutes. While it is unclear if state COPA statutes provide the requisite state supervision to ward off an FTC challenge, the FTC's decision to dismiss its administrative complaint is a positive step for hospitals considering similar transactions. Dismissal of the Cabell Huntington-St. Mary's challenge, combined with the FTC's recent losses in federal district courts in *FTC v. Penn State Hershey Medical Center* and *FTC v. Advocate Health Care Network*, indicates that more mergers may be feasible in the current regulatory environment.

The FTC has also challenged state Certificate of Need ("CON") laws by arguing that they restrict price and competition and suppress innovation in health care. COPA statutes differ from CON laws in that CON laws usually mandate that hospitals and other health care providers apply for and receive a CON before moving forward with particular projects; whereas, COPA statutes provide an option for hospitals and other health care providers that wish to obtain immunity against federal antitrust law.

Cabell Huntington-St. Mary's Merger

Cabell Huntington first announced its agreement with St. Mary's in November 2014. One year later, the FTC filed an administrative complaint to block the

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merger, alleging that the combined entity would have a near monopoly over general acute care inpatient hospital services and outpatient surgical services in the four-county region surrounding Huntington. Only a few months later, the West Virginia Legislature passed Senate Bill 597 in an effort to provide state immunity protection for the transaction. The FTC alleges the combined organizations would have a greater than 75% market share of general acute care inpatient hospital services.

COPA and State Action Immunity Basics

In general, COPA statutes authorize state bodies to approve cooperative transactions between competitors and potentially provide immunity from federal antitrust enforcement actions. Private parties wishing to merge or enter into other collaborative agreements apply to a legislatively created state body for a COPA. State COPA statutes nearly always mandate that deal documents be reviewed by a state body before making a determination of whether a transaction is more beneficial than harmful to competition. If the state body determines that the transaction meets the qualifications set forth in the relevant COPA statute and any applicable regulations or subregulatory guidance, a COPA may be issued. Obtaining a COPA may be beneficial for parties expecting a review by the FTC because state action immunity may provide additional protection should the FTC decide to file an administrative complaint. Even if certain COPA statutes may not survive judicial scrutiny, obtaining a COPA may serve as a deterrent to the FTC filing an administrative complaint.

State action immunity is grounded in a line of decisions from the United States Supreme Court exempting state action from federal antitrust statutes. State action immunity extends to nonstate actors carrying out a state's regulatory program. For state action immunity to extend to private parties, the parties must act pursuant to a "clearly articulated and affirmatively expressed" state policy and "be actively supervised by the State." *Cal. Retail Liquor Dealers Ass'n. v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980) (citations omitted).

The Supreme Court has recently narrowed the two prongs of state action immunity. First, a clearly articulated and affirmatively expressed state policy needs to be explicit in the statute. *FTC v. Phoebe Putney Health Sys., Inc.*, 133 S. Ct. 1003 (2013). Second, state supervision requires more than the state being in control of the program. For example, a North Carolina state board controlled by a majority of market participants did not have sufficient state supervision to receive state action immunity. *N.C. State Bd. of Dental Exam'rs v. FTC*, 135 S. Ct. 1101

(2015). In *North Carolina State Board of Dental Examiners*, six members of the eight member licensing board were licensed dentists. The Court, noting how market participants have economic incentives to constrain competition, found that a board controlled by market participants did not constitute state supervision. The Court did not articulate a clear test for active state supervision.

Discussion

It remains unclear whether state COPA statutes, including Wisconsin Statutes section 150.85, would withstand judicial scrutiny. If COPA statutes survive judicial scrutiny, hospitals, health systems and other health care providers would have one more option to strengthen their antitrust defenses in advance of a transaction; however, COPA statutes that have not been challenged in court can still serve as a deterrent to an FTC challenge.

The FTC continues to criticize state legislatures for enacting legislation intended to confer state action immunity to transactions between health care providers. The Horizontal Merger Guidelines recognize that mergers may produce lower prices, improved quality or new products. These benefits, which must be merger-specific, must be evaluated and weighed against potential anticompetitive harm. A transaction that produces merger-specific benefits that outweigh potential anticompetitive harm will not be challenged. Thus, the FTC reasons, state action immunity can only provide protection to anticompetitive transactions that would adversely impact competition.

In its decision to dismiss its administrative complaint, the FTC did not state its rationale for dismissing the complaint. However, the FTC temporarily withdrew the matter from adjudication on March 24, 2016 to "evaluate the impact, if any, of the state legislation." Presumably, the FTC concluded that Senate Bill 597 included sufficient state supervision to provide immunity from federal antitrust law.

Even though questions remain regarding the ability of COPA statutes to withstand judicial scrutiny, West Virginia's Senate Bill 597 may provide a roadmap for states that wish to provide state action immunity to certain transactions between health care providers. Additionally, the FTC's losing streak and apparent deference to state legislation in the Cabell Huntington-St. Mary's merger bodes well for hospitals around the United States considering similar transactions. As Deborah Feinstein, director of the FTC's Bureau of Competition, indicated at the 2016 American Bar Association's Antitrust in Healthcare conference, "[u]ltimately states



are sovereign entities and if they want to pass these laws that exempt the mergers from the antitrust laws with active state supervision, then that [is] the end of the discussion."

Additional Questions and Assistance

This may be one of the best times in recent history for hospitals and other health care providers to consider a merger or other transaction. It is critical that you consult with legal counsel early on to minimize the risk of an antitrust challenge from the FTC and to proactively develop defenses, one of which could involve attempting to obtain state action immunity. If you would like to discuss these developments or a contemplated transaction, please contact [Larri Broomfield](#) or your Reinhart attorney.

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