

FTC has strong cases against hospital mergers, attorneys say

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- Cases fit within a sophisticated approach FTC developed after a string of losses
- Agency action does not put a damper on industry deals – former AHIP general counsel
- Arguments about insurance consolidation unlikely to succeed in hospital mergers to monopoly

The Federal Trade Commission (FTC) has a good shot at winning three recent challenges to hospital mergers because the agency has sharpened its legal strategies in recent years, several antitrust attorneys said.

After the FTC lost multiple hospital merger cases in the 1990s, the commission undertook a retrospective study and subsequently developed a more sophisticated approach to industry deals. Since then, the FTC has effectively prevailed in every hospital merger challenge.

That streak is likely to continue with the three pending matters, according to an attorney with healthcare antitrust experience. “They’re all the right things to do,” he said, arguing that the hospital mergers could hurt consumers.

First in the series of challenges was the FTC’s action in November 2015 to block **Cabell Huntington Hospital’s** proposed acquisition of **St. Mary’s Medical Center** in West Virginia.

Then, in December 2015, the FTC challenged the merger between **Penn State Hershey Medical Center** and **PinnacleHealth System** in Pennsylvania, as well as the combination of **Advocate** and **NorthShore** in Illinois.

Commission staff is seeking preliminary injunctions for all three hospital deals, arguing that the mergers give too much power to the combined hospitals to control prices.

The merging parties have offered procompetitive justifications, such as cost savings for consumers.

During a recent scheduling conference, David Dahlquist, a partner at Winston & Strawn who represents NorthShore, accused the FTC of being on a ‘no’ campaign against healthcare consolidation.

There are more than 100 hospitals in the Chicago area that would act as a counterweight to the NorthShore/Advocate deal, he told the FTC’s administrative law judge.

On the whole, nothing in the FTC’s challenges is “theoretically exotic or anything out of the ordinary,” according to Joseph Miller, a partner at Crowell & Moring. Miller previously worked at both US antitrust agencies and is the former general counsel of AHIP, the health insurance trade group, which has opposed hospital mergers in the past.

Still, the FTC’s flurry of activity does not necessarily put a damper on hospital mergers, Miller said.

The commission has a long-standing interest in hospital transactions, and healthcare executives would not undertake a significant deal without understanding the antitrust risks, he added.

According to the attorney with healthcare antitrust experience, attempts to justify a hospital deal based on broader developments, such as health insurance consolidation, are unlikely to succeed.

“Ultimately, if you’re a monopoly – I don’t care how big the customer is – you’re going to charge whatever you want to charge,” the attorney said, “and that’s the issue.”

There are also case-specific arguments expected to face scrutiny in court. For example, in the Pinnacle case, the merging parties have argued that academic medical centers are a relevant market separate from that of other types of hospitals.

In order for that argument to succeed, Pinnacle and Hershey will need to explain why being an academic medical center has a tangible effect on patients and competition, a DC-based antitrust attorney said.

Separately, in the NorthShore/Advocate deal, the parties have criticized the FTC for defining a geographic market that is seemingly inconsistent with a previous FTC case against Evanston Northwestern.

Whether the FTC wins or loses the Advocate case, the agency would not allege a market without the support of economic data, the attorney said.

Further, the criticism of FTC inconsistency is unlikely to carry much weight, because the agency’s definition of a product market or a geographic market may evolve over time. “I think that’s a red herring,” he said.

by Ryan Lynch and Madeline O’Leary in New York

- Companies

- [NorthShore University HealthSystem](#)
- [Advocate Health Care Network](#)
- [PinnacleHealth Hospitals](#)
- [Penn State Milton S. Hershey Medical Center](#)

Agencies

- [US Federal Trade Commission \(FTC\)](#)