

HEALTH CARE

MERGERS: KEEPING CARE COMPETITIVE



The U.S. government has made it a top priority to make sure that any consolidation in the health care industry doesn't hurt competition, and it has been aggressive in trying to block mergers that it believes will hurt consumers.

That campaign has resulted in several key litigation victories for the government that show what types of transactions raise concerns with the federal government, providing valuable information for merger-minded health care companies preparing to navigate the antitrust waters.

The Department of Justice and the Federal Trade Commission represent a powerful combination in the federal government's efforts to keep health care competitive, with DOJ reviewing mergers involving insurance plans and the FTC reviewing mergers involving hospitals and physician groups.

DOJ won two big cases in 2017 when a federal judge blocked Aetna's \$37 billion takeover of fellow insurer Humana just a few weeks before another federal judge stopped Anthem's \$54 billion merger with Cigna. In both cases, DOJ argued that the marriage of two rivals would hurt competition.

That came in the wake of major wins for the FTC in late 2016, when separate appellate court decisions reversed lower-court decisions to side with the agency's efforts to block two hospital system mergers: the combination of Chicago's Advocate Health Care Network and Northshore University Healthcare System, and the tie-up of Penn State Hershey Medical Center and PinnacleHealth System in the Harrisburg, Pennsylvania, area. The FTC said both of those transactions would harm competition in local geographic areas.

Those victories were part of a revitalized antitrust campaign that the government launched in the early 2000s focused on hospital mergers that has gained traction in the courts.

Although the court decisions stopped these mergers, they still provide helpful intelligence for what kinds of acquisitions and mergers companies can pursue in the rapidly changing health care landscape, says [Joseph Miller](#), a partner at Crowell & Moring and a member of its [Antitrust](#) and [Health Care](#) groups.

Health insurers and hospitals are both working in an uncertain atmosphere in terms of how health care reform and shrinking Medicare and Medicaid payments will affect them. "One way they think about dealing with those systemic changes is bulking up through acquisitions," Miller says. "Now there is more legal clarity that can affect the way they think as they go forward in their business strategy."

The most important takeaway is that "horizontal" combinations of head-to-head competitors, as all the blocked cases were, may face significantly greater antitrust hurdles than "vertical" mergers, in which the merging companies have complementary businesses and don't compete.

WHEN THE FEDS AND STATES PART WAYS

Health care is one of the FTC's primary focus areas. In the four-year period between 2013 through 2016, 50 percent of FTC enforcement actions involved health care, pharmaceuticals, and medical device companies, FTC statistics show. "Using enforcement as its primary tool, the commission works to prevent anticompetitive mergers and conduct that might diminish competition in health care markets," the FTC says in its mission statement.

That mission has produced results for the agency. "For about the past decade, the FTC has been on a winning streak in hospital and health care provider merger enforcement," says [Alexis Gilman](#), a partner at Crowell & Moring and a member of its Antitrust Group. But the health care providers that have been on the losing side argue the FTC doesn't fully appreciate the challenges they face or fully account for the benefits of mergers.



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“Health care providers generally try to explain that they are doing these mergers to gain efficiencies, lower prices, improve quality, and really tackle health care challenges in their local communities,” Gilman says. “Their view has been that federal antitrust law has gotten in the way or doesn’t understand those challenges.”

While that argument hasn’t been persuasive at the federal level, some states are more sympathetic. When health care providers think the FTC has a good chance of successfully suing to block their merger on federal antitrust grounds, some are turning to their state legislatures for something known as “state action immunity.” Recently, certain state legislatures have passed laws creating a state system of active regulatory oversight displacing federal antitrust laws, and giving the merging health care providers immunity from federal (and sometimes state) antitrust liability.

That is what happened in West Virginia in 2015. The FTC sued to block Cabell Huntington Hospital’s purchase of St. Mary’s Medical Hospital on antitrust grounds even though West Virginia’s attorney general had already approved the deal. To save the merger, the West Virginia legislature created a new system for the state to approve or reject health care providers’ so-called cooperative agreements. Soon afterward, the merging parties’ cooperative agreement was approved by the state health care authority, and the FTC dropped its opposition.

NEIGHBORING STATES TAKE NOTICE

The success of that deal, despite FTC opposition, could prompt similar attempts by other health care companies whose planned merger is headed for federal antitrust trouble, Gilman says.

A case in point is Mountain States Health Alliance and Wellmont Health System. Following in West Virginia’s footsteps, Tennessee and Virginia recently passed “Certificate of Public Advantage” (or COPA) and cooperative agreement laws, respectively. Mountain States and Wellmont sought approval of their merger, and state action immunity, under these laws. Recently, both states approved the merging hospitals’ applications, subject to certain conditions. The FTC hasn’t signaled any interest in trying to block the merger following the states’ approvals. Gilman says, “If West Virginia is any indication, it will probably not challenge the transaction.”

Now that three states have adopted this tactic to circumvent the FTC and federal antitrust law, there is precedent. “So if you are a hospital and you want to get your deal

GETTING STATE SUPPORT

When the federal government steps in to block a health care merger, it likes to have a state’s attorney general standing by its side in filing a complaint.

“For the FTC, having state support is particularly important in health care cases, where the markets are very local,” says Crowell & Moring’s Alexis Gilman. “The agency is sensitive to the perception that it is the big, bad government coming in to tell the state or local community how to run health care.”

State AGs are also known to intercede and file suit on their own even when the federal government doesn’t. “Health care antitrust cases are almost by definition local because that is the way health care is delivered,” says Crowell & Moring’s Joseph Miller.

One thing to watch in health care antitrust enforcement is whether the state attorneys general end up playing a bigger role in policing antitrust violations in the health care industry under the Trump administration. “If for whatever reason the health care antitrust enforcement were to slow down during this current administration, you’d still have the states out there as enforcers of antitrust,” says Gilman.

through and you think the FTC is going to challenge you, this is another path forward,” says Miller.

But the U.S. government isn’t likely to sit back and watch if too many more hospital systems that it would have otherwise blocked from merging decide to seek state help. “If you see a continuing trend toward hospitals seeking immunity to get deals done, you can anticipate a counterreaction from the federal government,” says Miller.

Miller and Gilman both predict that DOJ and the FTC will continue to aggressively challenge health care mergers. Adds Gilman, “If health care providers are looking for a transaction to add scale or generate efficiencies, it is less risky from an antitrust perspective to look for merger partners in adjacent markets as opposed to partners in your local geographic area.”