

FTC Challenges Proposed Hospital Transaction in West Virginia: Assurance of Voluntary Compliance with State's Attorney General Is Insufficient to Stop Challenge

By Patricia M. Wagner

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On November 5, 2015, the Federal Trade Commission ("FTC") issued an administrative complaint challenging the proposed acquisition of St. Mary's Medical Center ("St. Mary's") by Cabell Huntington Hospital ("Cabell").¹ The complaint alleges that the acquisition agreement between the two hospitals violates Section 5 of the FTC Act and that the acquisition, if consummated, would violate Section 5 of the FTC Act and Section 7 of the Clayton Act. Significantly, the FTC filed its complaint despite the fact that, in July 2015, the two hospitals had entered into an Assurance of Voluntary Compliance with the West Virginia Attorney General that was reported to have established conditions to protect competition and residents of the affected region.² This action by the FTC emphasizes both the FTC's disfavor for conduct remedies in the hospital merger context and the willingness of the agency to challenge a transaction that has the support of state regulatory officials.

Background

As described in the FTC's complaint, Pallottine Health Services, the parent of St. Mary's, began the process to sell St. Mary's in the spring of 2013. To that end, Pallottine started a request for proposal ("RFP") process. Potential acquirers responded to the RFP in May 2014.

¹ Complaint, *In the Matter of Cabell Huntington Hospital, Inc.*, Docket No. 9366 (FTC Nov. 5, 2015), available at <https://www.ftc.gov/system/files/documents/cases/151106cabellpart3cmpt.pdf> (hereinafter "FTC Complaint").

² Office of the WV Attorney General Patrick Morrissey, Press Release, "AG Patrick Morrissey Announces Antitrust Agreement in Cabell Huntington Hospital, St. Mary's Medical Center Acquisition (July 31, 2015), available at <http://www.ago.wv.gov/pressroom/2015/Pages/AG-Patrick-Morrissey-Announces-Antitrust-Agreement-in-Cabell-Huntington-Hospital,-St.-Mary's-Medical-Center-Aquisition.aspx> (hereinafter "AG Press Release").

In June 2014, Pallottine began discussions with Cabell. The parties signed a definitive agreement on November 7, 2014, under which Cabell would become the sole member and ultimate parent entity of St. Mary's. According to a press release issued by the parties, the parties filed notice of the transaction under the Hart-Scott-Rodino Act in December 2014.³ Since that time, the parties have indicated that they have been providing the FTC with information to support the transaction.

Assurance of Voluntary Compliance

The parties also had to address concerns about the acquisition raised by the West Virginia Attorney General. On July 30, 2015, the parties entered into an Assurance of Voluntary Compliance ("Assurance")⁴ with the West Virginia State Attorney General to address those concerns and, in doing so, gained the support of the Attorney General. "In order to assure that the Transaction does not result in noncompetitive rate or prices increases," the Assurance requires the two hospitals, for a period of seven years following the transaction, to:

- not oppose any certificate of need by any health care provider that would be offering competing services;
- release any provider and any employee from any obligation that the provider or employee has not to compete with the hospitals;
- maintain open medical staffs;
- not revoke privileges for non-employed physicians who obtain privileges at other hospitals or who join competing provider networks;
- not increase hospital rates beyond the benchmark rates established by the West Virginia Health Care Authority;
- agree that if the combined operating margins exceed an average of 4 percent during any three-year period, the hospitals will reduce rates by the amount of the excess;
- not terminate any existing payor contracts;
- not insist on, or bargain for, a most-favored nations clause;

³ Cabell, News Release, "FTC Challenges Plans to Acquire St. Mary's Medical Center" (Nov. 6, 2015), available at <http://cabellhuntington.org/news/wns/ftc-challenges-plans-to-acquire-st-mary-s-medical-center> (hereinafter "Cabell News Release").

⁴ Assurance of Voluntary Compliance (July 30, 2015), available at <http://www.ago.wv.gov/Documents/Cabell%20Huntington%20Hospital%20Civil%20Statement%20and%20Assurance.PDF>.

- not insist on, or bargain for, anti-tiering or anti-steering clauses in contracts with payors; and
- not insist on, or bargain for, restrictions that would prevent or impair vendors from doing business with competitors of the hospitals.⁵

In addition, in order to “enhance quality and improve access to health care,” the parties agreed to:

- develop quality and population health goals and provide such goals and a proposed timeline for implementation to the Attorney General,
- implement community wellness programs to reach the medically underserved,
- establish a fully integrated and interactive medical record system,
- give notice to the Attorney General of any proposed addition or deletion of a service line, and
- continue to accept Medicaid patients from Ohio and Kentucky at the payment rates established by those states for in-state providers.

In return, as stated in the Assurance, the Attorney General agreed not take action to enjoin the transaction, and to communicate to the FTC the Attorney General’s support for the transaction. In a press release issued by the Attorney General’s office, the Attorney General stated, “Unfortunately, with the recent increased federal regulation in the health care industry, the trend of hospital consolidation will likely increase over the coming years as hospitals struggle to deal with the increased costs of regulation However, I believe given the conditions negotiated in our agreement, the best interests of our citizens will be protected.”⁶

Challenge by the FTC

In spite of the Assurance and the support of the West Virginia Attorney General, on November 5, 2015, the FTC issued a complaint to block the proposed transaction. In its complaint, the FTC alleges that the transaction will be anticompetitive in two relevant product markets, general acute care inpatient hospital services and outpatient surgical services. The complaint states that in the alleged geographic market, the combined entities will have a general acute care inpatient hospital services market share of more than 75 percent. That market share, the complaint alleges, would eliminate price competition as well as quality and service competition. The complaint also rejects a suggestion that West Virginia’s rate review process would alleviate these concerns because, as the complaint alleges, the rate review process simply reviews and

⁵ See AG Press Release, *supra* note 2.

⁶ *Id.*

approves a hospital's charges rather than providing a review of the rates negotiated with payors.

The FTC's complaint also alleges that barriers to entry are high. In support of those allegations, the FTC references West Virginia's certificate of need law, as well as the fact that the relevant geographic market is "*an economically challenged region with flat population growth and high percentages of Medicare and Medicaid patients, making it unattractive for new hospital development.*"⁷ Interestingly, that allegation suggests that, in spite of the RFP process, St. Mary's may have had few options for potential buyers because interest in the area may have been limited. Potential buyers may have been concerned about the viability of a hospital that is in an economically challenged region with a predominantly Medicare and Medicaid payor mix, as those two payors generally have low reimbursement rates.

The complaint also attacks the suggestion that the Assurance would address the potential anticompetitive concerns. In that regard, the complaint alleges that the Assurance fails to restore competition to the area as it merely seeks "to limit the harm that results from the substantial lessening of competition."⁸ In addition, the complaint alleges that, because the Assurance is limited to seven years, at the end of the seven years, the hospitals "would be able to use its enhanced bargaining leverage to demand higher prices."⁹ In support of its position challenging a state agreement with the parties, the FTC references the settlement agreement rejected earlier this year by the Massachusetts court in the case of *Commonwealth v. Partners Healthcare System, Inc.*

Impact of the FTC's Challenge

This challenge is significant because the FTC was willing to oppose a transaction that has strong support from state regulators, in an area that (as acknowledged by the FTC) has a high percentage of Medicare and Medicaid patients. On November 6, 2015, the hospitals both reiterated their commitment to the transaction.¹⁰ As a result, the matter will continue to work its way through the FTC's administrative process.

It remains to be seen whether the FTC's challenge to the St. Mary's acquisition will have a chilling effect on the willingness of state attorneys general to try to address anti-competitive concerns of transactions through conduct remedies.

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*This Client Alert was authored by **Patricia M. Wagner**. For additional information about the issues discussed in this Client Alert, please contact the author or the Epstein Becker Green attorney who regularly handles your legal matters.*

⁷ FTC Complaint, *supra* note 1 at ¶ 97 (emphasis added).

⁸ *Id.* at ¶ 90.

⁹ *Id.* at ¶ 93.

¹⁰ See Cabell News Release, *supra* note 3.

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