



Trends in Hospital Merger Enforcement and Litigation

ACC Annual Meeting

October 24, 2011

Sara Y. Razi
Federal Trade Commission
Bureau of Competition

Note: The views I express are my own, and do not necessarily reflect those of the Federal Trade Commission or any Commissioner.

Overview of FTC Hospital Merger Enforcement

- FTC conducts federal antitrust review of proposed hospital mergers
 - HSR-reportable and non-reportable transactions
 - Consummated and unconsummated transactions
- Many will not result in competitive harm
 - Majority of reported hospital mergers are allowed to close in first 30 days
 - Likely improvements in quality of care and other efficiencies will be given substantial weight
- Staff issues Second Requests for full-phase investigations
- Files federal-court (§ 13(b)) and administrative complaints against transactions likely to substantially lessen competition

Overview of FTC Analytical Approach

- Substantive Issues (following case law and the 2010 FTC/DOJ *Merger Guidelines*)
 - Product Market
 - Geographic Market
 - Concentration (market share, HHI)
 - Competitive Effects
 - Entry and repositioning
 - Efficiencies
 - Failing/flailing firm

Government Hospital Merger Litigation History – Success and Failure



- Success in 1980s in administrative litigation (Part III)
 - *American Medical International* (1984)
 - *HCA* (1985) – affirmed by 7th Cir., cert. denied
- Success in federal court (Preliminary Injunctions)
 - *U.S. v. Rockford* (N.D. Ill. 1989), affirmed by 7th Cir., cert. denied
 - *FTC v. University Health* (11th Cir. 1991)
 - Non-profit hospitals subject to antitrust laws

Government Hospital Merger Litigation History – Success and Failure, cont.

- String of government losses from mid-1990s through 2001
 - Joplin, MO: *FTC v. Freeman Hospital* (8th Cir. 1995)
 - Grand Rapids, MI: *FTC v. Butterworth Health* (6th Cir. 1997)
 - Dubuque, IA: *US v. Mercy Health Servs.* (8th Cir. 1997)
 - Long Island, NY: *US v. Long Island Jewish Medical Center* (E.D.N.Y. 1997)
 - Poplar Bluff, MO: *FTC v. Tenet Healthcare* (8th Cir. 1999)
 - Berkeley, CA: *California v. Sutter Health System* (N.D. Cal. 2001)
- Stumbling blocks
 - Judicial acceptance of expansive geographic markets
 - Belief that non-profits don't exercise market power
 - Alleged improvements in quality of care

Agency Re-Evaluation and Response



- **2002: FTC Hospital Merger Retrospective Project**
 - To analyze the effects of consummated hospital mergers
 - Several completed transactions reviewed for actual effects on price and competition
 - Potential for FTC to seek to dissolve mergers found anticompetitive
- **2004: DOJ/FTC Health Care Report**
 - Analysis should not be affected by hospital's institutional status (non-profit vs. for-profit)
 - Affirms Merger Guidelines analysis (relevant markets, defenses)
 - Acknowledgement that hospital mergers raise unique issues
 - Types of evidence in all merger cases (e.g., strategic planning docs, customer [health plans/employers] testimony) should be used by fact finder to help delineate relevant markets

Recent Litigation Developments: The Tide Begins to Turn

- **Evanston/Highland Park (2007)**
 - Post-consummation FTC challenge, stemming from Hospital Merger Retrospective Project
 - Merged firm raised prices significantly to health plans
 - Efficiencies did not outweigh harm
 - ALJ finds Section 7 liability; Commission affirms but does not order divestiture
- **Inova/Prince William (2008)**
 - Pre-consummation challenge in both federal court and administrative litigation
 - Northern Virginia hospital system acquisition of an independent hospital competitor
 - Parties abandoned transaction in face of strong FTC case

Recent Litigation Developments: The Tide Begins to Turn, cont.

- ProMedica/St. Luke's (2011)
 - FTC alleges dominant, three-hospital system eliminates key competition by acquiring independent community hospital
 - 4 → 3 in GAC; 3 → 2 in OB
 - Clear pre-acquisition rivalry between ProMedica and St. Luke's
 - Documents show St. Luke's aim to increase negotiating leverage and obtain higher rates through deal; concern about community
 - U.S. District Judge Katz (N.D. Ohio) finds FTC likely to succeed at trial and orders preliminary injunction
 - 115-page opinion finding for FTC on every substantive issue

Recent Litigation Developments: The Tide Begins to Turn, cont.

- ProMedica/St. Luke's, cont.
 - Administrative trial on the merits
 - FTC Chief ALJ Chappell presides
 - Nearly 200 hours of live testimony
 - 29 fact witnesses (hospitals, health plans, physicians, employers)
 - 5 experts
 - Briefing; proposed divestiture order; oral arguments
 - Initial Decision expected by mid-December
 - Subject to *de novo* review by Commission, 6th Cir.

Recent Litigation Developments: The Tide Begins to Turn, cont.

- Phoebe Putney/Palmyra (2011)
 - Acquisition of Palmyra by Phoebe Putney (nominally the county Hospital Authority)
 - FTC filed federal-court and administrative complaints alleging monopoly in Albany, Georgia
 - In federal-court P.I. proceedings, parties concede anticompetitive effects but defend on state-action grounds
 - U.S. District Judge Sands grants T.R.O. but denies P.I.; 11th Cir. grants injunction pending appeal; oral arguments on Oct. 5

Definition of Relevant Product Market for Hospital Mergers

- General Acute Care Inpatient Hospital Services for Commercially Insured Patients
 - Cluster market
 - Widely recognized by courts
 - Outpatient, tertiary not included

Geographic Market

- Defining the correct (or defensible) parameters of geographic market
 - An historical area of weakness for the agencies
 - Testimony/documents from health plans, parties, other hospitals, and employers
 - Inflow/Outflow analysis (not Elzinga-Hogarty)
 - Econometric work

Theories of Competitive Harm

- First- and second-stage competition: are merging hospitals competing for inclusion in health-plan networks, and to attract patients?
- Traditional Unilateral Effects
 - Are they closest substitutes based on draw/patient data?
- Will merger strengthen combined hospitals' bargaining strength against health plans?
- Will merger eliminate quality incentives?

Competitive Effects Evidence

- Documents of merging firms and other market participants
- Health-plan testimony
- Third-party hospital testimony
- Expert testimony
- Econometric work

Story of Competitive Harm

- Why does competition matter in hospital markets?
- How does hospital competition impact health-plan rates and consequently rates paid by employers, employees, and out-of-pocket expenses?
 - Self-insured employers
 - Fully-insured employers
- Do non-profit hospitals really exercise market power? **YES**

Quality-of-Care Claims

- Acquired hospital will obtain acquiring hospital's expertise
 - A-side is higher quality to begin with
 - This is due to superior knowledge and/or practices
 - After the merger, these practices will be brought to B-side
- A-side would invest substantially in B-side
 - The money would not be invested without the merger
 - The money will be spent on things that will improve quality (e.g., bed tower with private rooms, state-of-the-art cath labs)

Other Possible Efficiencies

- New services
- Centers of excellence
- Better amenities
- Cost savings/avoidance of duplicative spending
- Merger will save a failing or flailing hospital

Implications of Health-Care Reform and ACOs

- Affordable Care Act's laudable aim is to make health care less expensive and more efficient
 - Provides incentives for providers to create accountable care organizations (ACOs) to care for dedicated populations of Medicare beneficiaries
 - ACOs want to participate in commercial markets also
 - Notably, no requirement of merger or singular economic control

Implications of health-care reform and ACOs

- Parties increasingly attempt to defend mergers to FTC on grounds of healthcare reform
 - Bottom line: FTC's fundamental approach to hospital merger analysis unchanged
 - Will continue to give substantial weight to cost savings, quality-of-care improvements if substantiated and merger-specific
 - Will continue to challenge mergers that substantially lessen competition and thus increase bargaining leverage of hospitals, leading to higher rates
- Process for FTC/DOJ antitrust review of ACOs still under development