

Pennsylvania Loss Ends FTC's Winning Streak on Hospital Mergers

A federal judge rejected efforts to block the Penn State Hershey-PinnacleHealth merger after taking a different approach, raising questions about the fate of a tie-up in Chicago.

May 10, 2016

An unusual loss for The Federal Trade Commission (FTC) following a ruling by a federal judge in Pennsylvania likely has antitrust regulators troubled about the future of hospital mergers.

Judge John Jones III of the U.S. District Court for the Middle District of Pennsylvania late Monday denied the FTC's and Pennsylvania Attorney General's (AG) request for an injunction to thwart the The Penn State Hershey Medical Center's proposed merger with PinnacleHealth System in Harrisburg, Pa. The ruling comes after the FTC and AG Kathleen Kane in December filed an antitrust suit that argued the union would substantially harm competition, weakening quality and leading to higher health care costs in the area.

"We are disappointed in the ruling and will be considering our options," an FTC spokeswoman wrote in a Tuesday email.

How the FTC and AG choose to proceed remains uncertain, but regulators may opt to withdraw their legal challenge or choose to appeal the judge's decision. Either way, regulators surely won't be taking the decision lightly.

"From an enforcement perspective, it's very important to keep the winning streak alive," Thomas Greaney, former assistant chief in charge of health care antitrust enforcement at the Justice Department, said in a Tuesday phone interview.

In matters that ended up in trial, the FTC has proven victorious in a string of cases against hospital tie-ups in recent years, while many are stopped before even making it to trial. Monday's decision is a step back for the FTC, Greaney said, explaining that should the final outcome favor the hospitals, it may lead to more attempts by entities to merge.

The crux behind the Monday decision was largely the judge's analysis around the relevant market, which, unlike previous cases, was based on patient flow argument. While regulators argued that the systems' market should encompass health systems located throughout the Pennsylvania counties of Dauphin, Cumberland, Perry and Lebanon, the hospitals asserted that because a large percentage of their patients come from outside of these counties, additional competitors should be considered.

"It's not the methodology that has been used in recent hospital merger cases or in other industries," said Jeff Miles, who as counsel in the Washington office for Ober, Kaler, Grimes & Shriver PC is a nationally known expert on antitrust law, particularly within the health care sector.

Jones also gave credence to the health systems' agreements with major insurers, which essentially included a promise of a freeze on pricing for some time. The judge's comments on the Affordable Care Act having encouraged the integration and merging of the entities was also inconsistent with previous cases.

Greaney, who is now co-director for the Center for Health Law Studies at St. Louis University School of Law, said he agrees with the FTC that the ruling is based on questionable arguments.

But, according to Gregory Hagood, who as the head of the healthcare practice at SOLIC Capital LLC, recently advised the Board of Trustees to Jackson, Mich., health system Allegiance Health on its merger with Detroit's Henry Ford Health System, this is "the best news for hospital mergers in a while".

"If more judges took this approach, requiring rate agreements as a condition, [it] would result in [the] creation of many more value-creating mergers and health systems," Hagood said.

While the analysis used in the Pennsylvania case likely isn't sufficient enough to set a precedent for other health system cases, it could potentially impact the fate of two Chicago health systems currently fighting against the FTC, noted Miles.

On the heels of its challenge against the Penn State Hershey-PinnacleHealth deal, the FTC in December took action to stop Advocate Health Care Network's proposed merger with NorthShore University Health System in the North Shore area of Chicago. In the latter case, the healthcare systems are also arguing that the FTC is inaccurately identifying their market.

A third outstanding hospital challenge is the FTC's antitrust suit against Cabell Huntington Hospital's acquisition of St. Mary's Medical Center in the Huntington, W. Va., area.

With help from state officials, the two West Virginia hospitals may be able to eliminate regulatory hurdles. Gov. Earl Tomblin signed a bill into law March 18 that exempts Cabell Huntington from federal antitrust laws.

While the Chicago situation remains uncertain, Miles said he suspects the FTC will walk away from its suit in West Virginia.

Assuming the Penn State Hershey-PinnacleHealth transaction is successfully completed, the newly combined health system will be led by Dr. A. Craig Hillemeier, the current CEO of Penn State Health, dean of Penn State College of Medicine and Penn State's senior vice president for health affairs.

The entity will be governed by a 17-member board of directors consisting of directors from both hospital systems' current boards.

The three outstanding hospital battles come after perhaps the most high-profile win for the FTC last year. The victory for regulators followed a five-year battle against ProMedica Health System's August 2010 acquisition of St. Luke's Hospital in Toledo, Ohio. The Sixth Circuit, in May 2015, affirmed the FTC's initial 2011 ruling that ProMedica's proposed merger with St. Luke's violated Section 7 of the Clayton Act, requiring that the latter be divested.

"There's a lot of balls flying in the air right now for the FTC and Department of Justice," Greaney said. "It's a pretty challenging time."

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