PUBLICATION

Anatomy of a Provider Antitrust Merger Challenge (Part 3) [Ober|Kaler]

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This is the third in a six-part series discussing the Federal Trade Commission's challenges to provider mergers. Following the initial Introduction and Background (Part 1), the series discusses The Need for Early Legal Advice (Part 2), The Investigatory Process (Part 3), Analyzing the Merger's Likely Effect on Competition (Part 4), and Rebutting the Prima Facie Case (Part 5), then offers a Conclusion (Part 6) to summate the factors that must be considered in an informed approach to provider mergers.

The series is based on Mr. Miles' presentation at the American Health Law Association Physicians and Hospitals Law Institute on February 2 and 3, 2015.

Part 3: The Investigatory Process

How does an antitrust investigation begin, proceed, and end?

The antitrust enforcement agencies learn about provider mergers in several ways. Under the Hart-Scott-Rodino (HSR) premerger notification provisions—Section 7A of the Clayton Act1—the merging parties must notify both the Antitrust Division of the U.S. Department of Justice and the Federal Trade Commission (FTC) of certain substantial transactions in terms of dollar value and size of the parties before the transaction may close.2 Through the agencies' "clearance process," they decide which, if either, will examine the transaction for possible antitrust concern. Because the agencies have a tacit market-allocation agreement by which the FTC typically handles antitrust issues involving providers and the Division handles those involving health plans, a hospital or physician merger will typically clear to the FTC.

The agencies discover some mergers through publications such as *Modern Healthcare* and other trade publications, as well as from local newspapers. And some investigations result from complaints, often from the merging providers' customers such as health plans, but sometimes from other sources, including politicians or community members objecting to the transaction. Or the state attorney general may discover the transaction and involve a federal agency in a joint investigation. And vice versa, the FTC may invite the state attorney general to join its investigation. Indeed, joint investigations and challenges appear to be more frequent today than in the past. For example, state attorneys general were plaintiffs in the FTC's most recent challenges to hospital and physician acquisitions. In some situations, the federal agency may ultimately defer to the state attorney general.3

It's not difficult to identify those transactions likely to generate some agency interest. Mergers between hospitals in the same town or city, between hospitals that are each the other's most direct competitor, that would result in large post-merger market shares, or that result in high levels of post-merger market concentration and significant increases in concentration likely will draw attention.

If the merger is reportable under the premerger notification requirements, the parties may not close the transaction for 30 days after filing the reporting forms. At the end of this period, the agency will either clear the transaction, permitting the parties to close, or issue each party a request for additional information, known as a "second-request letter—typically, a very long, detailed, and broad set of document requests. One of counsel's first jobs is to determine whether the request is overly broad and, if so, attempt to negotiate the scope of the

demand with FTC staff. The staff has no desire for parties to “trailer truck” it with a slew of irrelevant documents and thus is normally willing to discuss narrowing the letter's scope if this can be done without compromising the investigation.

Compliance with the second-request letter is typically quite expensive and time-consuming and takes substantial employee time from regular work. Much of the gathering and production of documents, usually accomplished on a “rolling” basis, is electronic, often requiring help from an outside document vendor—an additional significant expense. The compliance process is inherently disruptive to normal business operations. Compliance with second-request letters can take months, and the parties cannot close the transaction until 30 days after “substantial compliance” with the demands of the letter. At the end of this second 30-day waiting period, the agency will either (1) clear the transaction, permitting the parties to close, (2) request a “timing agreement” by which the parties voluntarily give the agency more time to examine the transaction, or (3) file suit in federal court for a preliminary injunction to block the transaction. At the same time, the FTC will normally file an administrative complaint challenging the transaction.

If the parties believe their HSR filings will trigger a second-request letter but believe they have a strong argument that the transaction would raise no antitrust problem (or only concern relating to a specific issue), they should consider meeting with the relevant agency prior to filing to present their case. This can have the effect of convincing the agency not to issue a second-request letter or limit it to certain determinative issues.

If the transaction is not reportable under the HSR requirements, the parties' first inkling of an investigation might be receipt of a letter from FTC or Department staff asking them to produce certain information voluntarily. The letter will request much of the same information that an HSR notification would provide. Its scope, too, can be negotiated with the staff. At the same time, the staff may have begun reviewing relevant public information and interviewing others knowledgeable about the potential effect of the transaction, particularly customers of the parties, e.g., health plans in the case of a provider merger. Depending on the conclusion the staff draws from this information, the matter may go nowhere or the staff may request authority from the Commission to issue compulsory process in the form of subpoenas or civil investigative demands. These will request extensive documentary information comparable to a second-request letter, include interrogatories, and ultimately depositions. The staff likely will issue compulsory process to third parties as well and begin conducting interviews. During this period, counsel for the parties should take every opportunity to meet or talk with the staff, attempting to discover its specific concerns with the transaction and the particular antitrust questions or issues leading to those concerns. Often, there may be a determinative issue, e.g., scope of the relevant product or geographic market, and thus what would otherwise be an extremely broad and expensive investigation can be narrowed substantially or the parties can convince the staff that its concern is unwarranted.

When the staff's investigation is complete, it formulates a written recommendation that goes to the Bureau of Competition Assistant Director in charge of the investigating section or “shop” (typically, the FTC's Mergers IV division if a hospital merger) looking into the transaction. Prior to this, the staff normally will have informed the parties whether it is recommending a challenge, and the parties will usually have had several opportunities to discuss the transaction with staff to argue against a recommendation to challenge. Some staffs are more forthcoming with information than others. From Assistant Director, the recommendation goes to the Director of the Bureau of Competition; if the recommendation is to challenge the merger, the parties usually have the opportunity to meet with the director and his or her advisors to argue against a challenge. If the director agrees with the staff, the recommendation goes to the offices of the five Commissioners, and the parties may meet with each Commissioner and his or her advisors individually, again to explain why no challenge is appropriate. These meetings are important but seldom successful.

Careful consideration should be given to the individuals who will take part in meetings with the staff and its superiors. At the outset, the parties' economists should be included in any meeting of substance; the agency will normally have its own economists present. Depending on the issues the meeting is to cover, other experts may be needed, e.g., those who aided with integration plans and efficiencies estimates or those who examined failing company or weakened competitor arguments. All else equal, it's wise to include business representatives as well if they are well-prepared and would be impressive. The staff is especially in hearing about fact issues from business representatives rather than from counsel and, frankly, the client business representatives probably have more credibility since the staff expects that counsel is more likely to know the "right" answers to their questions.

Ultimately, the five Commissioners vote whether to challenge the transaction; a simple majority vote prevails. If the parties haven't consummated the transaction, the FTC typically files suit for a preliminary injunction in federal court to enjoin the parties from closing and, usually, an administrative complaint before an FTC administrative law judge. If the transaction has been consummated, the staff would likely request a hold-separate order to prevent further integration of the parties' operations. If the parties refuse, the staff likely would file suit in federal court for an injunction to force the parties to hold the assets of the merging parties separate and to prevent further integration until the Commission can determine the merger's lawfulness through its administrative process.4

Much to the chagrin of many defendants, transaction challenge procedures differ between the Antitrust Division and FTC. The FTC's approach is to seek a preliminary injunction to prohibit the parties from closing and thus "scrambling the eggs," prior to a trial on the merits before an FTC administrative law judge (ALJ) and review by the Commission. Thus, parties whose transaction is challenged by the FTC may face (1) litigation in federal court seeking a preliminary injunction, (2) then an administrative trial before an FTC ALJ, (3) then an appeal to the full Commission, and (4) then an appeal to a federal circuit court of appeals.

The FTC's burden in obtaining a preliminary injunction is, frankly, very lenient today. As do private parties seeking a preliminary injunction, the agency must show a likelihood of success on the merits, but it meets that burden by showing merely that the case "raises questions going to the merits so serious, substantial, difficult, and doubtful as to make them fair ground for thorough investigation, study, deliberation and determination by the Commission in the first instance and ultimately by the Court of Appeals,"5 and recent courts have applied that standard very much to the FTC's advantage.6

When the case is brought by the Antitrust Division, the parties often agree to consolidate the motion for preliminary injunction and trial on the merits7 before a federal-court judge, whom some believe might be more objective than an FTC administrative judge and the Commissioners. This process can save much time and expense. There is an effort in Congress at present to unify the processes and the preliminary injunction standards,8 but all else equal, most merging parties would much prefer investigation and enforcement by the Antitrust Division than the FTC. Of course, they have no opportunity to choose between the agencies.

In some cases, the parties can obviate antitrust concern by agreeing, under a consent order or decree, to divest certain assets, permitting the remainder of the transaction to proceed and close. For example, where a hospital system acquires hospitals in different geographic areas, it may be possible for the acquiring system to divest a hospital in an area in which it already owns a competing facility.9

The vast majority of merger challenges are to unconsummated transactions, where the agency seeks an injunction to prevent the merger. In the case of consummated transactions, the agency will almost always seek a structural remedy—divestiture. The federal agencies uniformly reject so-called "conduct" remedies, which permit the transaction to close under a consent order restricting various aspects of the merged firm's competitive behavior, such as setting caps on reimbursement.10 The FTC did accept a conduct remedy in one

hospital-merger order where the parties had significantly integrated and divestiture would have undone significant quality improvements at the acquired facilities. But it pointed to the unusual circumstances of the case—that the merger had occurred seven years before the finding of a violation—and it found that "certain improvements" from the merger "would not survive the divestiture" and that it "would take [the acquired hospital] a significant amount of time to implement [those improvements] on its own."11 The FTC also accepted a conduct remedy where a hospital acquired two competing cardiology practices because it believed that a number of the acquired cardiologists would leave the hospital's employment and compete against the hospital's cardiologists.12 But in the FTC's most recent litigated case, the Ninth Circuit affirmed a district court order requiring the defendant hospital to divest a physician group it had acquired, rejecting the hospital's argument that a conduct remedy would restore competition.13 And although state attorneys general have accepted conduct remedies in some hospital-merger challenges,14 a Massachusetts state court recently rejected a proposed conduct remedy in a proposed Boston hospital merger.15

The attorney should always represent his or client zealously before the agency, but credibility with and respect towards the staff are crucially important.16 Always important to remember is that because of their pre-complaint discovery powers, particularly as those powers are applied to third parties, the agencies usually know more facts than the parties. Misrepresenting or exaggerating the facts, hiding the ball, treating the staff rudely or in a condescending manner, and making stupid legal or factual arguments that any antitrust attorney would understand lack merit are big mistakes. Underestimating the staff's competence or zeal to conduct a full investigation can lead to very bad results. And once an attorney loses credibility with the staff, it's very difficult, if not impossible, to regain it. The client suffers and so does the attorney—not only with that client but with clients the attorney might represent before the agency in the future. The parties' attorneys should work against the staff, but also with it.

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1 5 U.S.C. § 18a.

2 Very generally, under the HSR premerger notification requirements, the transaction is not reportable if its value is less than $76.3 million but is reportable if more than $305.2 million. Between these values, the size of the parties is determinative. The transaction is reportable if one party has sales or assets of $152.5 million or more and the other has sales or assets of $15.3 million or more. *See* 80 Fed. Reg. 2934 (Jan. 21, 2015). These thresholds change from year to year based on changes in U.S. Gross National Product.

3 E.g., *Pa. v. Urology of Cent. Pa.*, No. 1:11-cv-01625-JEJ (M.D. Pa. Aug. 2011).

4 For an example, see *FTC v. ProMedica Health Sys.*, 2011-1 Trade Cas.(CCH) ¶ 77,395 (N.D. Ohio 2011).

5 E.g., *FTC v. Univ. Health, Inc.*, 938 F.2d 1206, 1218 (11th Cir. 1991).

6 *See*, e.g., *FTC v. Whole Foods Mkt., Inc.*, 548 F.3d 1028, 1034–36 (D.C. Cir. 2008); *FTC v. OSF Healthcare Sys.*, 852 F. Supp. 2d 2069, 1073–74 (noting that, at the preliminary injunction stage, the FTC need not present detailed evidence of anticompetitive effects but only raise substantial doubts about the transaction; also noting that the FTC need not show irreparable harm, that private equities cannot overcome the FTC showing of likelihood of success, and that there is a presumption that the FTC is entitled to preliminary relief).

7 E.g., *United States v. H&R Block, Inc.*, 833 F. Supp. 2d 36 (D.D.C. 2011).

8 *See* H.R. 5402, 113th Cong., 2d Sess. (introduced Sept. 8, 2014), the Standard Merger and Acquisition Reviews Through Equal Rules Act of 2014), called "SMARTER." For discussions, *see* Joshua D. Wright, Commissioner, FTC, "Judging Antitrust," Prepared Remarks Before the Global Antitrust Institutional Moot Curt

Competition (Feb. 21, 2015); Brent Kendall, *A Challenge to FTC Methods: Republicans Want the Agency's Antitrust Process to Be Like Justice Department*, Wash. Post, Nov. 17, 2014.

9 *See*, e.g., *Cmty. Health Sys., Inc.*, Dkt. No. C-4427 (FTC Apr. 11, 2014) (consent order) (requiring CHS to divest hospital facilities in Florence, South Carolina, and Gadsden, Alabama, as a condition of its acquisition of Health Management Associates).

10 *See generally* Deborah L. Feinstein, *Conduct Remedies: Tried But Not Tested*, Antitrust, Fall 2011 at 6 ("Divestitures continue to be the remedy of choice—and with rare exceptions, the only remedy for horizontal mergers at both the FTC and DOJ."). Ms. Feinstein made the same point subsequently after becoming Director of the FTC's Bureau of Competition. See Deborah L. Feinstein, Director, Bureau of Competition, FTC, "Antitrust Enforcement in Health Care: Proscription, Not Prescription," Prepared Remarks Before the Fifth National Accountable Care Organization Summit (June 19, 2014) ("While parties in provider transactions often urge adoption of conduct remedies, the Commission generally rejects such requests. Conduct remedies do not restore the competitive status quo and raise several concerns.").

11 *Evanston Nw. Healthcare Corp*., 2007-2 Trade Cas. (CCH) ¶ 75,814 at 108,602 (FTC 2007).

12 *Renown Health*, Dkt. Dkt. No. C-4366 (FTC Nov. 30, 2012) (consent order).

13 *St. Alphonsus Med. Ctr. v. St. Luke's Health Sys.*, 2014-1 Trade Cas. (CCH) ¶ 78,668 (D. Idaho 2014), aff'd, ___ F.3d ___, 2015 WL 525540 (9th Cir. Feb. 10, 2015).

14 E.g., *Pa. v. Geisinger Health Sys.*, 2012 WL 9085171 (M.D. Pa. June 26, 2012) (Final Judgment) (consent order relating to both hospital services and physician services markets)

15 *Mass. v. Ptrs. Healthcare Sys.*, 2015-1 Trade Cas. (CCH) ¶ 79,052 (Sup. Ct. Mass. 2015).

16 For helpful guidance on dealing with the FTC, *see* Maureen Ohlhausen, Commissioner, FTC, "Tips for Agency Practitioners (An Interview with Maureen Ohlhausen)," Federal Civil Enforcement Newsletter at 2 (ABA Section of Antitrust Law, Oct. 2014).