

FTC Challenges Antitrust Immunity Under Louisiana COPA

The healthcare market is seeing intense antitrust scrutiny in recent years at both the federal and state level. As the Federal Trade Commission (FTC) and Department of Justice (DOJ) step up their enforcement efforts, some states are exploring avenues to allow healthcare entities to pursue consolidating transactions the state deems beneficial and avoid antitrust challenge. One of them is the use of certificate of public advantages (COPA). A recent slew of antitrust immunity disputes coming out of a healthcare merger in Louisiana brought the use of COPA and state action immunity into the spotlight.

What are COPAs

A certificate of public advantage (COPA) is enabled by legislation in some states in the form of a written approval or certificate issued by the state government. Specifically, a COPA allows a state to regulate and exercise direct supervision and control over the implementation of a cooperative agreement or consolidating transaction among two or more healthcare providers. Importantly, along with the state supervision, the COPA also affords the transaction immunity from any state or federal antitrust enforcement under the state action doctrine, when the state determines that the interests of the public in the region are served by the transaction. For a transaction that would otherwise constitute an antitrust violation to qualify for state action immunity, the state-issued COPA must 1) clearly articulate and explicitly state that it is meant to block antitrust enforcement and 2) provide that the state actively supervise and monitor the entities on an ongoing basis to ensure

the state's interests.

For example, [Louisiana's COPA statute](#) was enacted in 1997 and provides that health care facilities may apply to the state Department of Justice for a COPA to enter into cooperative agreements, merger or acquisitions, joint ventures, or consolidate with one or more health care facilities if the state finds that the agreement is likely to result in lower health care costs or improved access to health care or higher quality of health care without any undue increase in cost.

While some states have repealed their statutes enabling COPAs (such as North Carolina and Minnesota), more than a dozen states still have existing COPA laws that allow for cooperative transactions that could receive antitrust immunity through state regulation. Notably, some states are reintroducing legislation to enable COPAs in the 2023 legislative session, including Colorado and North Carolina.

FTC Opposition to COPA

The FTC has been outspoken in its distaste for COPAs. In August 2022, the FTC released a [policy paper](#) that discouraged the use of COPAs. According to the paper, even though hospitals claim that COPAs can help improve health outcomes and lower costs, research shows that hospital mergers granted by COPAs have resulted in higher prices and reduced quality of care, despite state regulatory oversight to reduce anticompetitive effects. As a result, COPAs encourage mergers and significantly increase hospital concentration in the market.

Mostly recently, in October 2022, the FTC submitted a [public comment](#) urging the New York Department of Health to not grant a COPA application for the merger of SUNY Upstate Medical

University and Crouse Health System. The healthcare entities subsequently abandoned the merger in February this year.

LCMC/HCA Healthcare COPA

The FTC then turned its attention to the use of a COPA in Louisiana, specifically the Louisiana Children's Medical Center (LCMC)'s acquisition of three hospitals from HCA Healthcare without federal oversight. LCMC is a nonprofit hospital system that operates six hospitals in the New Orleans area. In December 2022, LCMC obtained a COPA from the Louisiana attorney to acquire Tulane University Medical Center, Lakeview Regional Medical Center, and Tulane Lakeside Hospital from HCA Healthcare. Without prior notice or review by the FTC, the acquisitions proceeded under the COPA and were completed in early 2023.

In April, the FTC stepped in and objected to the transaction, ordering LCMC to halt its acquisition of the three hospitals while the agency reviews and investigates the deal for potential antitrust violations. What ensued was a string of lawsuits filed by both sides in federal district courts, seeking injunction and declaratory relief over the contested issue of whether the COPA issued by the state of Louisiana preempted federal merger review of the LCMC acquisitions.

- *FTC Lawsuit*: FTC v. LCMC and HCA Healthcare (No. 1:23-cv-01103-ABJ)

As part of its enforcement efforts, on April 20, the FTC [filed a court action](#) against LCMC and HCA Healthcare in the District of Columbia District Court. The FTC complaint asserts that even though the entities obtained a COPA from the state, they are still required to comply with the FTC's [Hart-Scott-Rodino \(HSR\)](#)

[Act](#). The federal law requires transactions meeting certain thresholds to file advanced notice to the FTC and submit to a waiting period of at least 30 days before consummating the deal to allow the FTC to investigate the proposed transaction, which the entities have failed to do.

According to the FTC complaint, the text of the HSR Act does not expressly exempt a transaction that was granted a COPA from the pre-merger notification requirements or from an FTC investigation. Moreover, no court or agency policy has ever recognized any such exemption based on COPA. As such, the entities were required by law to comply with pre-transaction notice filing and the requisite waiting period. The complaint further indicated that based on preliminary information, the FTC is concerned that combining LCMC's six existing hospitals in the region with the three hospitals it is acquiring from HCA Healthcare would lessen competition. Accordingly, the FTC is requesting a preliminary injunction against the acquisition to further investigate the potential effects of the transaction. Once the FTC gathers all requisite information, only then could the agency evaluate the potential anticompetitive effects and the parameters of the COPA to determine whether the acquisition is in fact shielded or immune from antitrust liability under Section 7 of the Clayton Act, the federal antitrust law.

- LCMC/HCA Healthcare and Louisiana AG Lawsuits: LCMC v. Garland et al. (No. 2:23-cv-01305); HCA Healthcare v. Garland et al. (No. 2:23-cv-01311)

In response to the FTC challenge, both LCMC and HCA Healthcare filed actions in the District Court of the Eastern District of Louisiana against the federal government. They assert that the state-issued COPA effectively preempts federal merger review and exempts their acquisition from the HSR Act. Their complaints emphasize that the COPA is a process for the state to exempt

applicable health care acquisitions from antitrust scrutiny in order to promote public health. They argue that they had obtained the COPA through required procedures including a public notice and comment period as well as public hearing pursuant to Louisiana state law. Additionally, the AG is committed to supervising the implementation of the COPA with terms and conditions that include restrictions on rate increases, capital investments, charity care, medical research, and reporting.

Joining the dispute in support of the hospitals, the state of Louisiana filed for court approval early this month to intervene in the LCMC and HCA lawsuits as Plaintiff-Intervenor. The state AG defended its COPA issuance and argued for upholding the state action immunity doctrine, asserting that the COPA had complied with the required elements of “clear articulation” and “active supervision”. Given the multiple cases in the two district courts, the cases may be transferred to be consolidated, while the parties have agreed to maintain the status quo pending the litigation.

As healthcare consolidation continues across the country, some states such as California and Oregon are expanding their review and oversight of healthcare entity transactions. At the other extreme, some states are exploring the implementation of COPAs that would take the matters of antitrust enforcement out of federal purview by exempting consolidating transactions in favor of state regulation and supervision. The tension between state oversight and federal antitrust enforcement may boil over as the dispute is headed to the federal courts. Stay tuned to the Source Litigation and Enforcement Highlights to find out the outcome of the litigation and its impact on the use of COPAs and healthcare consolidation.