

FTC Closed Out 2015 Focusing on Provider Mergers with Mighty Market Shares

The FTC closed out 2015 with a number of actions aimed at anticompetitive provider combinations. Hospital mergers were the primary focus, with three hospital merger challenges filed in the last two months of 2015, but they were not the only providers subject to challenge, as the FTC also settled over an allegedly anticompetitive merger with two specialty physicians practices in late December. The challenged hospital mergers involved providers in the Huntington, West Virginia, Chicago, Illinois, and Harrisburg, Pennsylvania areas. Pennsylvania was also where the FTC challenged the merger of orthopedics practices.

The three hospital merger challenges involve allegations of resulting market share over acute care inpatient and other services of at least 50 percent. The challenge to the merger of Chicago's Advocate Health Care Network and NorthShore University HealthSystem contains the lowest estimate of resulting market share at 50 percent, and The [FTC alleges](#) that the combination "create the largest hospital system in the North Shore area." The Pennsylvania proposed merger of Penn State Hershey Medical Center's (Hershey) with Pinnacle Health System is [alleged](#) to be even more anticompetitive, with an alleged resulting market share of 64 percent, and the creation of a "dominant provider." Tipping the anticompetitive scales is the proposed merger of Huntington, West Virginia's Cabell Huntington Hospital with St. Mary's Medical Center, which the FTC [argues](#) would create "a dominant firm with a near monopoly" over the hospital services at issue. The challenge involving Berks County, Pennsylvania orthopedists likewise involved a high resulting market share of 76 percent of those specialists in the area. None of these challenges appears, from the

allegations, to be a huge risk for the Commission, which is likely to embolden critics who claim the FTC prefers to go after low-hanging fruit (only horizontal mergers with high resulting market shares) when it comes to healthcare combinations. Nonetheless, we certainly anticipate fervent defenses from the hospitals that have, unlike the orthopedists, not already settled with the FTC.

These actions have also added to the debate among stakeholders as to whether the ACA encourages, or even mandates, provider combinations that may be in conflict with the FTC's trust-busting mission. As the New York Times [reported](#) last month, some providers and their lawyers have taken the position that government agencies are sending mixed signals, simultaneously encouraging coordination to promote efficiencies, primarily through the ACA's accountable care organization (ACO) model, and challenging their attempts to merge through the FTC. The FTC, however, has said that the antitrust laws are not inconsistent with the ACA, which does not mandate the merging of providers, but rather encourages their coordination. The resolution of this debate is still to come, and providers appear to still be merging, if, as [some argue](#), under less merger-frenzied conditions than before.