

Healthcare Merger Challenges: Q1 2021 Update

In this month's Litigation and Enforcement Highlights, we provide the latest updates on several proposed provider mergers, many of which were fueled by the continued pandemic. With the increased consolidation came increased antitrust scrutiny. So far this year, we've seen a mixed bag of wins and losses for federal and state enforcement agencies that seek to block the mergers.

FTC Concedes in Failed Challenge of Jefferson-Albert Einstein Merger

In its first major loss in a healthcare merger challenge in recent years, the Federal Trade Commission (FTC) officially dropped its case against the proposed merger of Jefferson Health and Albert Einstein Healthcare Network in Philadelphia. The Pennsylvania attorney general had [withdrawn from the challenge](#) more than a month before the FTC announcement to do the same. The joint federal and state enforcement effort suffered a defeat in federal court, when the Eastern District of Pennsylvania denied a preliminary injunction against the merger (see coverage on the [Source Blog](#)). Subsequently, the 3rd Circuit Court of Appeals denied the emergency motion for an injunction pending outcome of the appeals process, essentially allowing the merger to proceed. Given the general consensus among enforcement agencies that it would be too late to "unscramble the egg" once the merger is consummated, the consecutive withdrawals by the Pennsylvania AG and FTC did not come as a surprise as the courts refused to halt proceedings. The question that now remains is how this setback, in particular the federal court rationale in rejecting the preliminary injunction, could impact future court challenges to hospital mergers.

DOJ Limits Competitive Harm in Settlement with Geisinger and Evangelical

The Department of Justice (DOJ) also saw resolution of one of its merger challenges

in Pennsylvania, albeit with a more compromising result. Geisinger Health System had proposed, in a partial ownership agreement challenged by the DOJ, to acquire 30% ownership of Evangelical Community Hospital (see coverage on the [Source Blog](#)). In a [preliminary settlement agreement](#) reached this month, Geisinger agreed to reduce and limit any future ownership interest of Evangelical to a cap of 7.5%. Additionally, among other settlement terms, Geisinger is restricted from making any loan or line of credit associated with Evangelical, and from being involved in any decision-making in management or leadership positions at Evangelical. Finally, the parties also agreed to implement an antitrust compliance program. The [DOJ stated](#) the settlement “would resolve the competitive harm alleged in the complaint... [and] prevent Geisinger from exercising any form of control or influence over Evangelical to restore the defendants’ incentives to compete with each other on both quality and price.” The proposed settlement is now filed and pending final approval from the District Court for the Middle District of Pennsylvania. The outcome of this case indicates not only that partial ownership interest acquisitions can come under antitrust scrutiny, but also that such challenges can be fruitful in reducing anticompetitive concerns.

Handful of Proposed Mergers Abandoned Due to Antitrust Challenge

A handful of other challenged proposed mergers saw favorable outcomes for enforcement agencies over the past few months. In [January](#), we reported that in Tennessee, Methodist Le Bonheur and Tenet abandoned their plans to merge following a [lawsuit for preliminary injunction](#) filed by the FTC and Tennessee attorney general.

Following that announcement, Massachusetts General Hospital also gave up its efforts to acquire Exeter Health Resources, a hospital in New Hampshire. This decision was the result of continued scrutiny and objection from state regulators as well as pending federal regulatory review. New Hampshire attorney general Gordon MacDonald [cited concerns](#) that the proposed merger would decrease competition and lead to increased healthcare costs. Such opposition ultimately “led to [the parties’] view that there was no pathway to secure New Hampshire regulatory

approval.”[\[1\]](#)

Lastly, the proposed partnership of Atrium Health Navicent and Houston Healthcare, two of the largest hospital systems in central Georgia, also fell through last month. Navicent recently merged with North Carolina-based Atrium Health (previously Carolinas Healthcare System) in 2019. While the entities stated the decision resulted from the impact of the COVID-19 pandemic, the deal had also been under active investigation by the FTC. [According to the FTC](#), the deal “threatened to increase healthcare costs for employers and patients in the region and would have substantially lessened competition” and the agency was prepared to challenge the merger in court. Following the announcement, the FTC closed its investigation.

Pending Merger Challenge Entangled in Discovery Dispute

As some proposed deals buckled under scrutiny, the pending merger of Hackensack Meridian Health and Englewood Healthcare in New Jersey is causing a ruckus. At the end of 2020, the FTC filed a lawsuit in New Jersey district court for a preliminary injunction against the merger (see coverage on the [Source Blog](#)). The case is currently in the discovery phase, where the parties have reached an impasse. First, Hospital for Special Surgery (HSS), a non-party New York hospital, objected to Englewood’s subpoena for records that sought to show HSS as a competitor in an attempt to boost its merger case.[\[2\]](#) Then, the FTC refused to be deposed by the defendants and requested the court to issue a protective order. The Commission argued such discovery constitutes deposition of opposing counsel and is impermissible because of undue burden and invasion of attorney work product. These discovery disputes may push back the court trial date, while an FTC administrative trial set for June 2021. Stayed tuned to the Source Blog to find out the fate of this merger.

Case Reference Table

Entities	State	Enforcement Agency	Case Filings and Info	Outcome/ Decision
<p>Jefferson Health; Albert Einstein</p>	<p>Pennsylvania</p>	<p>FTC (see administrative case page); Pennsylvania AG</p>	<p>FTC administrative complaint (filed 2/27/20); District Court complaint (filed 2/27/20); Plaintiffs' Post-trial Brief re Proposed Findings of Fact and Conclusions of Law; Defendants' Post-trial Brief re Proposed Findings of Fact and Conclusions of Law</p>	<p>Failed challenge - see District Court opinion (12/8/20)</p>
<p>Geisinger; Evangelical</p>	<p>Pennsylvania</p>	<p>DOJ (see DOJ case page)</p>	<p>District Court complaint (filed 8/5/20); Competitive Impact Statement (3/3/21)</p>	<p>Settlement agreement (3/3/21)</p>

Methodist Le Bonheur; Tenet	Tennessee	FTC (see administrative case page); Tennessee AG	FTC administrative complaint (filed 11/12/20); District Court complaint (filed 11/16/20)	Abandoned
Massachusetts General Hospital; Exeter Health Resources	New Hampshire	New Hampshire AG	Report of the Attorney General's Charitable Trusts Unit	Abandoned
Atrium Health Navicent; Houston Healthcare System	Georgia	FTC	FTC investigation	Abandoned
Hackensack Meridian; Englewood	New Jersey	FTC (see administrative case page)	FTC administrative complaint (filed 12/3/20); District Court complaint (filed 12/8/20)	Pending

[1] Chris Villani, *Mass. General Scraps NH Merger Plan Amid Antitrust Probe*, Law360 (January 14, 2021).

[2] Sierra Jackson, *NY Hospital Fights Subpoena In Health System Merger Row*, Law360 (March 3, 2021).