

Healthcare Merger Challenges: Q2 2021 Update

In this mid-year issue of Litigation and Enforcement Highlights, we provide updates on several pending healthcare transactions. As much of the country recovers from COVID-19, healthcare entities continue to actively pursue proposed mergers and affiliations that could further change the landscape of the healthcare market.

In the [last update](#), federal enforcement agencies saw a mixed bag of results to their enforcement efforts, with an FTC loss against Jefferson-Albert Einstein, a DOJ settlement with Geisinger-Evangelical, and several proposed mergers that buckled under antitrust scrutiny (see case reference table below). Since then, we have seen additional litigation in New Jersey and California, as well as more proposed deals that fell through in the face of resistance from enforcement agencies.

Hackensack Meridian-Englewood Awaits Preliminary Injunction Decision

The Source is closely tracking the proposed merger of Hackensack Meridian Health and Englewood Healthcare in New Jersey. The deal hit a roadblock at the end of 2020, when the FTC filed a lawsuit in New Jersey district court seeking a preliminary injunction against the merger (see coverage on the [Source Blog](#)). While the proposed transaction was approved by the New Jersey attorney general and New Jersey Department of Health, the FTC continued to pursue the challenge.

After a string of discovery disputes, hearings on the preliminary injunction began in May and concluded this month. The FTC argued the merger would allow Hackensack Meridian, the largest health system in New Jersey, to control three of the six inpatient general acute care hospitals in Bergen County. As the two entities are rivals that “vigorously compete against each other” for inpatient general acute care services, the merger would give Hackensack great bargaining leverage to demand higher prices from insurers and decrease the quality of care and access for patients.^[1] On the other hand, the hospitals argued that the deal would enable a

\$400 million investment in Englewood that would have pro-competitive benefits. However, U.S. District Judge John Michael Vazquez seemed unconvinced that the merged entity would pass the potential cost savings onto insurers given the lack of history showing such a result.[\[2\]](#)

While a full FTC administrative trial has been scheduled for July 15, as in the Jefferson-Albert Einstein merger challenge, the outcome of the preliminary injunction in district court will likely determine the fate of the deal. As such, there may be more on the line for the FTC than just the outcome of this particular transaction, as a repeat of the loss against Jefferson-Albert Einstein earlier this year would be a serious blow to its enforcement efforts.

Huntington and Cedars-Sinai Sue California AG for Conditions Imposed on Affiliation

Another enforcement case we are closely watching is the proposed affiliation of Huntington Memorial Hospital and Cedars-Sinai Medical Center in California, which announced their intended affiliation shortly before the onset of the COVID-19 pandemic. In December 2020, then California Attorney General Xavier Becerra reviewed the proposal as required for proposed transactions of nonprofit hospitals in the state,[\[3\]](#) and [conditionally approved](#) the affiliation. In March 2021, however, the hospitals filed suit against the AG's office and the state Department of Justice in Los Angeles Superior Court to challenge the conditions imposed, calling them "unprecedented" and alleging that they would place Huntington at a disadvantage competitively.

While the affiliation did not trigger antitrust scrutiny or challenge from the FTC given the lack of significant overlap in the service areas of the providers, the AG was concerned about potential anticompetitive effects of this "cross-market" merger, based on empirical evidence and theoretical foundations that have been increasingly raised and studied by many antitrust experts.[\[4\]](#) According to the state's [competition impact analysis report](#), the providers have substantial market power and their affiliation could increase healthcare prices at Huntington by as much as 32 percent. As such, the AG imposed several ["competitive impact" conditions](#) to address

competition concerns from the affiliation, including price caps on Huntington's rates to insurers for a period of at least ten years and separate firewalled teams for insurer negotiations.

In the lawsuit, the [healthcare entities allege](#) that the price cap conditions primarily benefit the insurance companies, as the cost savings are not required to be passed on to consumers. Additionally, they protest that no other hospital in California is required to agree to "winner-take-all" arbitration in contract negotiations with insurance companies as imposed by the conditions to the affiliation. As of this writing, the AG has filed an answer denying the allegations and the lawsuit is pending in court. More importantly, the outcome of this case may determine the ability of the AG to challenge and impose similar conditions on future cross-market healthcare transactions.

Proposed Mergers in the Carolinas Abandoned Amidst Antitrust Scrutiny and Legal Challenges

Sentara-Cone Health (North Carolina)

Earlier this month, nonprofit systems Sentara Healthcare of Virginia and North Carolina-based Cone Health [called off](#) their proposed cross-market merger. While the parties denied that potential antitrust enforcement played a role in the termination of the deal, North Carolina Attorney General Josh Stein and the state Department of Justice were in fact in the middle of an investigation and review of the proposed merger. Stein's office had collected [public comments](#) regarding the deal, which found opposition and concerns that it would drive up prices. Following announcement of the abandoned merger, the AG's office [released a statement](#) that criticized and expressed concerns over the potential impact of the healthcare consolidation trend in North Carolina.

Prisma Health-LifePoint Health (South Carolina)

Across the border in South Carolina, another proposed merger announced just before the pandemic called it quits due to antitrust concerns. Nonprofit health

system Prisma Health had planned to acquire three South Carolina hospitals and a free-standing emergency room owned by LifePoint Health, a for-profit system based in Tennessee. The proposed merger sought to use and expand an existing certificate of public advantage (COPA) issued by the South Carolina Department of Health and Environmental Control (DHEC) in 1997, since the entities being acquired operate in the same market covered by the COPA. The deal would have made Prisma Health the only provider of hospital-based acute care services in four counties and was quickly challenged in administrative court by competing provider Lexington Medical Center and Lexington County officials.^[5] In November 2020, the South Carolina Administrative Law Court denied the use of the COPA and subsequent appeals to the South Carolina Court of Appeals were also unfruitful, leading to termination of the merger in April 2021. In its announcement, Prisma Health further [acknowledged](#) that potential regulatory hurdles from the FTC and state agencies contributed to the decision to abandon the deal.

Stayed tuned to the Source Blog to find out the fate of the pending mergers and litigation.

Case Reference Table

Entities	State	Enforcement Agency	Case Filings and Info	Outcome/ Decision
Hackensack Meridian; Englewood	New Jersey	FTC (see administrative case page)	FTC administrative complaint (filed 12/3/20); District Court complaint (filed 12/8/20)	Preliminary Injunction decision pending

<p>Huntington; Cedars-Sinai</p>	<p>California</p>	<p>California AG</p>	<p>Conditional approval (12/10/20); Competition Impact Report (9/28/20)</p>	<p>Conditionally approved; lawsuit challenging conditions pending</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>
<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>

Sentara; Cone Health	North Carolina	North Carolina AG; North Carolina Department of Insurance	Public comments on proposed merger	Abandoned
Prisma Health; LifePoint Health	South Carolina	Lexington County; private provider; DHEC (COPA); South Carolina AG; FTC	<i>Lexington County Health Services District, Inc. v. S.C. Dept. of Health and Env'tl. Control, et al., No. 20-ALJ-07-0108-cc, (S.C. Admin. Law J. Div.)</i>	COPA denied in administrative court (11/2/20); Abandoned
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

[1] Jeannie O’Sullivan, *FTC Wants NJ Hospital Merger On Ice During Antitrust Row*, Law360 (May 10, 2021).

[2] Bryan Koenig, *NJ Hospitals Merger Met With ‘Jaundiced Eyes’ In FTC Suit*, Law360 (June 2, 2021).

[3] California Corporations Code §§ 5914-5920 et seq.

[4] See Jaime S. King & Erin Fuse Brown, *The Anti-Competitive Potential of Cross-Market Mergers in Health Care*, 11 ST. LOUIS U. J. HEALTH L. & POL’Y 43 (2018).

[5] Dave Muoio, *Prisma Health, LifePoint Health call off sale of 3 South Carolina hospitals*, Fierce Healthcare (April 13, 2021).