NC Treasurer Backs FTC On Hospital Merger Challenge

Recent lawsuits focus on key competition issues

This spring, court cases are dealing with a variety of issues relevant to healthcare marketplace competition issues. These include a Federal Trade Commission's (FTC's) action to block a sale of hospitals in North Carolina, examining the fiduciary duties employer-sponsored health plans have in selecting drug plans, and looking at the acceptability of non-compete clauses in physician contracts.

FTC Files suit in North Carolina

In February, the FTC authorization of a suit to block Novant Health's proposed acquisition of two hospitals owned by Community Health Systems (CHS) in North Carolina. On March 25, the FTC acted on that authorization by filing a request for a preliminary injunction with the United States District Court for the Western District of North Carolina to block the sale. In its complaint, the FTC stated that the sale would "would irreversibly consolidate the market for hospital services in the Eastern Lake Norman Area in the northern suburbs of Charlotte." In the filing, the FTC argued for the injunction for two reasons: one, that the deal was unlawful "because it would result in a combined entity with an eye-popping 64% share of the market in the Eastern Lake Norman Area" where "The Supreme Court has held that mergers are presumptively unlawful if they result in a single entity

controlling a 30% market share." And two, that the deal "would immediately wipe out … competition" between Novant Huntersville and Lake Norman Regional "reducing defendants' incentives to invest in quality and leaving fewer options for patients." The Court has scheduled an evidentiary hearing for the case on April 29.

Class action suit filed over high employee drug costs

Also in February, a class action suit was filed in the United States District Court for New Jersey against Johnson & Johnson (J&J) in its capacity as the sponsor of employee group health and prescription drug plans, claiming breaches of fiduciary duties and other violations under the Employee Retirement Income Security Act (ERISA), which establishes a duty to prudently manage employee benefit plans. The suit claims that J&J violated its fiduciary duty to keep health plan drug prices reasonable, and that lack of oversight resulted in higher premiums, higher out-of-pocket costs and limits on employee wage growth, which harmed its beneficiaries (e.g. employees).

The suit gives specific examples of markup for costs of particular medications, and claims that an analysis shows that J&J agreed to a 498% markup for drugs when compared to pharmacy acquisition costs. The suit mentions J&J failure to use prudence in the selection of a Pharmacy Benefit Manager, a failure to negotiate better pricing terms, and a failure to use prudence in prescription drug plan design as failures to meet ERISA fiduciary obligations. The suit raises questions about an employer's duty in selecting and overseeing health plan vendors, which include PBMs. These relationships can be tricky for employers to manage, as they often aren't able to review the terms of contracts between PBMs and drug manufacturers, creating challenges for employers to be good stewards of benefit plans. Fiduciary duties under ERISA do not necessarily require using the lowest cost vendor – other factors can be considered including claims processing, drug

formulary selection, and network access – simply showing that the plan paid high rates for drugs would not be enough to establish a violation of a fiduciary duty. This case could potentially open the door for other lawsuits over excessive healthcare prices (beyond just pharmaceutical benefits) for self-funded employers.

Physician non-compete clauses coming under increased scrutiny

Non-compete clauses are terms, typically in an employment contract, stating that an employee (i.e. a physician) will not compete with his or her current employer (i.e. current practice group or hospital) within a geographic area for a limited amount of time. Physician non-compete clauses raise concern among antitrust enforcers and lawmakers, as they can stifle competition among health systems, allowing dominant systems to control the market for needed healthcare providers. They can also harm patients when their physician of choice is forced to leave a geographic area. Many states have passed laws either forbidding or limiting non-compete provisions, and there is an ongoing push to reconsider them. State courts are also grappling with this issue. Both the FTC and Congress have been considering federal action on this topic, and antitrust law can be used to pursue the issue.

In February of this year, two hospitals in the Trinity system (St. Joseph's Hospital in Syracuse, NY, and Holy Cross Hospital in Fort Lauderdale, FL) sued North American Partners in Anesthesia in Federal Court claiming that the anesthesia group's use of physician noncompete clauses violate antitrust laws and suppresses competition. According to the suits, the defendant's use of noncompete and non-solicitation clauses in contracts with providers prevented anesthesiologists and nurse anesthetists from working directly for the hospitals, allowing the defendant to "demand exorbitant payments for critical and understaffed patient services." The suits claim the Anesthesia group offered to waive the non-competes to allow the hospital to employ the providers directly, but "demanded

an exorbitant multi-million payment" to do so. The Trinity hospitals claim the suit is necessary for them to be able to offer employment to the anesthesia providers. In 2019, a Trinity hospital in Michigan filed a similar suit regarding noncompete clauses against Anesthesia Associates of Ann Arbor, which was ultimately settled out of court.

There has been pressure for states to ban non-compete clauses for some time, and states currently take a wide variety of approaches. In 2023, Indiana enacted Senate Bill 7 to add restrictions on physician noncompete agreements and Minnesota passed legislation preventing new non-compete agreements for all workers, although the ban was not retroactive. Also in 2023, the FTC proposed a rule to ban the imposition of non-compete clauses. Furthermore, the American Medical Association voted in 2023 to oppose non-compete contracts for physicians. While parties are open to contest individual noncompete clauses, there is pressure to ban them entirely, but as is so often the case, approaches will vary from state to state unless the Federal government chooses to step in.

North Carolina county seeks damages in HCA Mission lawsuit

Novant’s proposed purchase of CHS hospitals ‘irreversibly’ harms competition, FTC says

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Hospitals Say Constitutional Defenses Valid In FTC Merger Row

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FTC Attacks Constitutional Defenses In Hospital Merger Fight

Novant Health, Inc. and Community Health Systems,

Inc., In the Matter of

On January 25th, 2024, the Federal Trade Commission (FTC) announced that it had authorized a suit to block Novant Health's proposed acquisition of two hospitals owned by Community Health Systems (CHS) in North Carolina. Nearly a year ago, in February of 2023, Novant Health and Community Health Systems (CHS) signed an Asset Purchase Agreement for Novant to pay $320 million to acquire two North Carolina hospitals from CHS. According to the FTC's administrative complaint, the deal would give Novant close to 65% of the local inpatient general acute care services market, which "would likely increase annual healthcare costs by several million dollars", according to the FTC's press release.

FTC Files Suit to Block Sale of North Carolina Hospitals to Novant

On January 25th, 2024, the Federal Trade Commission (FTC) announced that it had authorized a suit to block Novant Health's proposed acquisition of two hospitals owned by Community Health Systems (CHS) in North Carolina. Nearly a year ago, in February of 2023, Novant Health and Community Health Systems (CHS) signed an Asset Purchase Agreement for Novant to pay $320 million to acquire two North Carolina hospitals from CHS.

Novant is currently one of the largest hospital systems in the southeastern United States, and already owns a local hospital

that serves more patients than any other local hospital. CHS is a for profit healthcare system operating over 70 hospitals and many other care sites in 15 states, but has reportedly been experiencing financial difficulties in recent years.

According to the FTC's administrative complaint, the deal would give Novant close to 65% of the local inpatient general acute care services market, which "would likely increase annual healthcare costs by several million dollars", according to the FTC's press release. The complaint asserts many claims that are typical of horizontal mergers between hospitals in the same geographic market. Specifically, the FTC alleges that because there are few alternatives for inpatient care in the area, the merger will result in millions of dollars in increased healthcare costs by eliminating the price competition that currently exists between CHS and Novant. The FTC also states that the merger would reduce Novant's incentive to compete to attract patients by improving its facilities, service offerings, and quality of care and would likely lead to worse outcomes for nurses and doctors, and "life or death consequences for patients."

A transaction that significantly increases concentration in a highly concentrated market is presumptively illegal under Guideline 1 of the 2023 Merger Guidelines that were issued by the FTC and DOJ in December 2023. In the complaint, the FTC alleges that this transaction would increase the Herfindahl-Hirschman Index (HHI, a measure of market concentration calculated by summing the squares of the individual firm's market shares) would increase by more than 1000 points, leading to a post-acquisition HHI significantly about 3500. The 2023 Merge Guidelines include a structural presumption of illegality of a market HHI greater than 1800 and a change in HHI of more than 100 from a transaction. While the presumption of illegality can be rebutted or disproved, if the FTC's market definitions are accurate, this transaction would greatly exceed those thresholds and would likely harm

competition in the area. According to the FTC, the complaint will be filed in the U.S. District Court for the Western District of North Carolina to halt the transaction pending an administrative proceeding.

North Carolina Hospitals Can’t Exit Monopoly Claims

HCA files response to North Carolina’s lawsuit

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