

Year in Review: 2020 Sees A Flurry of Federal Healthcare Antitrust Challenges

As the COVID-19 pandemic continues to ravage the nation, it has put economic stress on smaller healthcare providers, giving larger health systems the opportunity to gain market power through more rampant merger and acquisition activity. In response, the Federal Trade Commission and the Department of Justice also stepped up their antitrust enforcement efforts. In this year-end Litigation and Enforcement Highlights issue, we round up federal enforcement challenges of provider mergers in 2020 and look at the latest status of these actions.

Jefferson Health/Albert Einstein (Pennsylvania)

The Federal Trade Commission (FTC) and the Pennsylvania attorney general filed a lawsuit in the Eastern District of Pennsylvania to block the nearly \$600 million merger deal between Jefferson Health and Albert Einstein Healthcare Network, the two leading providers in Philadelphia and Montgomery counties. According to the complaint, the merger would result in the entities controlling 45-60% of the inpatient general acute care services market and 70% of the rehabilitation services market in those regions. However, the enforcement effort was shot down last week, when the court denied the preliminary injunction. The judge questioned the government's claim that the merger would drive up prices for insurers. While two of the four major insurers in the region claimed the potential merger would raise their rates, the court noted that Aetna, the second largest insurer in the market, expressed no concerns about the merger driving up its prices. The Source Distinguished Fellow and Advisory Board

Member Tim Greaney worried that if other courts follow this ruling, it could make it difficult for the government to challenge mergers in the future, particularly as hospitals struggle financially due to the pandemic. The government may appeal the district court decision, while an FTC administrative trial on the merits is scheduled for March 2021.

Hackensack Meridian/Englewood (New Jersey)

Also last week, the FTC began proceedings to challenge Hackensack Meridian Health's proposed acquisition of Englewood Healthcare Foundation. Hackensack Meridian is the largest healthcare system in New Jersey, covering eight counties across the state. The complaint alleges the proposed acquisition of Englewood, located in northern New Jersey, would reduce competition for inpatient general acute care services in Bergen County and lead to higher insurance premiums and out-of-pocket costs. The Commission has filed for a preliminary injunction in New Jersey district court, with the administrative trial set to begin in June 2021.

Methodist Le Bonheur/Tenet (Tennessee)

The FTC is challenging Methodist Le Bonheur's proposed \$350 million acquisition of two hospitals known as Saint Francis, located in Memphis and owned by Tenet Healthcare Corporation. Joined by the Tennessee attorney general, the FTC filed in federal court for a preliminary injunction to block the transaction, pending an administrative trial scheduled for May 2021. The complaint alleges that Methodist and Saint Francis are direct competitors, and the proposed acquisition would substantially lessen competition for inpatient general acute care services in the Memphis area, giving Methodist control of nearly 60% of the acute-care market. It would also reduce the

number of health systems in the region from four to three and allow Methodist to demand higher rates from insurers, which would be passed on to patients as higher premiums and out-of-pocket costs. The hearing for preliminary injunction is tentatively set for April 12, 2021, with briefs from both parties due in March.

Hendrick/Abilene (CHS); Shannon/San Angelo (CHS) (Texas)

In another setback for the FTC this year, state regulators in Texas greenlighted a pair of mergers over the objection of the federal agency. In September, the FTC issued a strong warning to the Texas Health and Human Services Commission (HHSC) regarding two transactions both involving purchases from the for-profit Community Health Systems (CHS). The first transaction involves Hendrick Health System's purchase of Abilene Regional Medical Center and Brownwood Regional Medical Center, while the second transaction is Shannon Health System's purchase of San Angelo Community Medical Center. Because a Certificate of Public Advantage (COPA) law passed in 2019 shields healthcare transactions in Texas from federal antitrust oversight, the FTC has no enforcement authority. Instead, the federal agency sent a 70-page comment letter to the Texas HHSC and AG, urging the state to deny the proposed transactions as they would create a monopoly in the markets and result in higher prices to consumers. According to the FTC, the combination of Hendrick and Abilene Regional would give the combined entity an 85% market share of inpatient services in the Abilene region and the combination of Shannon and San Angelo would control a 62.3% market share of inpatient hospital services in the San Angelo region.

Despite the strong opposition, the HHSC, in consultation with the Texas AG, ultimately approved both deals, as it determined the benefits of the proposed deals outweighed any disadvantages. The COPA approvals are contingent on a list of

conditions, including a rate review process that requires prior approval of rate changes and quarterly reports that must contain information on quality, costs, access and competition. However, antitrust experts are concerned that they may not have teeth. The Source Advisory Board Member, Bob Berenson, said that the parties could opt out of regulation as termination is allowed under Texas' COPA law with a 30-day notice.

Geisinger/Evangelical (Pennsylvania)

Another Pennsylvania provider merger faced antitrust enforcement challenge this year, this time from the Department of Justice (DOJ). In August, the DOJ filed suit in the district court of Pennsylvania, challenging agreements that include Geisinger Health System's bid to acquire 30% ownership of Evangelical Community Hospital (ostensibly to avoid antitrust scrutiny) and other potentially anticompetitive conduct involving "significant entanglements" between the two parties. The DOJ took the lead over FTC in this case as it brought the suit under both Section 7 of the Clayton Act and Section 1 of the Sherman Act. The complaint alleges that the two entities are close competitors for inpatient general acute care services in a six-county region in central Pennsylvania, and the transaction is likely to substantially lessen competition as the two entities would account for 71% of the relevant market. In addition to the partial ownership stake, the complaint alleges the agreement between the parties gives Geisinger the right of first offer and first refusal for certain transactions and joint ventures of Evangelical, which "fundamentally alters the relationship between the parties, raising the likelihood of coordination and reducing Defendants' incentives to compete aggressively against each other." The defendants have until January 18, 2021 to file an Answer to the complaint.

In the face of the coronavirus pandemic and an uptick in healthcare merger and acquisition activities, federal agencies have pledged to afford more scrutiny of anticompetitive transactions. In March, the FTC said in a press release that “its scrutiny of anticompetitive transactions and practices will not be relaxed, notwithstanding the difficult circumstances caused by the coronavirus pandemic.” While the FTC faced two setbacks so far this year, continued and heightened enforcement efforts are more important than ever. Stay tuned for the latest developments on these cases and more to come in 2021.

Case Reference Table

Entities	State	Enforcement Agency	Case Filings	Outcome/ Decision
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Jefferson Health; Albert Einstein	Pennsylvania	FTC (see administrative case page); Pennsylvania AG	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	District Court opinion (12/8/20)
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

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)	Pending (see District Court case schedule)
Hendrick; Shannon; CHS (Abilene, San Angelo)	Texas	FTC (see Comment letter 9/11/20); Texas HHSC (see COPA info page)	Hendrick COPA application ; Shannon COPA application	Hendrick Determination of Findings; Terms and Conditions ; Shannon Determination of Findings; Terms and Conditions
Geisinger; Evangelical	Pennsylvania	DOJ (see DOJ case page)	District Court complaint (filed 8/5/20)	Pending