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FTC Scrutiny Results in Several Scrapped Hospital Deals

A series of Federal Trade Commission (FTC) challenges to hospital mergers and acquisitions in 2022 indicates heightened regulatory scrutiny of hospital deals. Perhaps emboldened by the July 2021 executive order that focused attention on antitrust enforcement of hospital consolidation,[1] the agency has voted to challenge a number of transactions, which has led hospitals to call off the deals rather than challenge the government. This Health Capital Topics article reviews three of the largest transactions called off this year, two of which were announced in June.

HCA's Cancelled Acquisition of Five Steward Hospitals

On June 16, 2022, Nashville-based HCA Healthcare announced that it was abandoning its proposed acquisition of five Utah hospitals from Dallas-based Steward Health Care System due to opposition from federal regulators.[2] Steward operates five hospitals in Salt Lake City while HCA operates eight hospitals, making it the second-largest system in the area.[3] The FTC voted unanimously to file suit to block the acquisition on June 2, 2022, alleging that the transaction "would eliminate the second [HCA] and fourth [Steward] largest healthcare systems in the Wasatch Front region, where approximately 80 percent of Utah's residents live… [and r]educe the number of healthcare systems offering inpatient general acute care hospital services," thereby decreasing competition and increasing costs.[4] The agency argued that this is especially important because HCA and Steward "compete for inclusion in insurer networks, and for health care quality, service lines, and nurse and physician recruitment."[5] However, if this deal were to close, the market concentration levels would increase significantly, as Steward would be eliminated as a low-cost competitor, enabling "HCA to command even higher reimbursement rates," which higher rates would likely be passed on by insurers to employers and beneficiaries through "increased premiums, deductibles, co-pays, and other out-of-pocket expenses."[6]

In a response to HCA and Steward's announcement, the FTC stated that this deal "should never have been proposed in the first place" and should be "a lesson learned to hospital systems all over the country."[7]

RWJBarnabas Health's Abandoned Acquisition of St. Peter's Healthcare System

The same week that HCA scrapped its acquisition plans, West Orange, New Jersey-based RWJBarnabas Health announced its decision to abandon its acquisition of St. Peter's Healthcare System in New Brunswick, NJ.[8] RWJBarnabas, a non-profit corporation, is one of the largest healthcare systems in New Jersey, operating 12 general acute care hospitals, numerous ambulatory surgery centers (ASCs), a pediatric rehabilitation hospital, and a freestanding behavioral health center.[9] St. Peter's University Hospital, also a non-profit system, is the only other hospital in New Brunswick, less than one mile from RWJBarnabas.[10] As a result, the systems "are direct competitors and both systems routinely identify the other as the most significant competitor when assessing competition and strategizing on providing general acute care services in Middlesex County."[11]

The parties originally announced their plans in September 2020,[12] and the FTC unanimously voted to file suit opposing the acquisition on June 2, 2022 (the same day that it voted to file suit in the HCA/Steward case), arguing that combined, this entity would have approximately 50% market share for general acute care services in Middlesex County, which is sufficient to result in a presumption of harm under federal antitrust laws.[13] The FTC alleged that "[t]here is overwhelming evidence that this acquisition would be bad for patients, because the parties would no longer have to compete to provide the lowest prices and the best quality and service."[14]

In announcing that RWJBarnabas would not move forward with the acquisition, CEO Barry H. Ostrowsky stated that the system is "disappointed in the termination of the proposed transaction, which we believe would have transformed quality, increased access and decreased the overall cost of care for the people of this State through the creation of a premier academic medical center… Despite the loss of this opportunity, RWJBarnabas Health remains resolute in its commitment to serve the people of New Jersey..."[15] Responding to the RWJBarnabas announcement, the FTC's Bureau of Competition Director stated, "I am glad that rival hospital systems RWJ and Saint Peter's have terminated an anticompetitive merger that would have harmed patients in Middlesex County… the transaction was presumptively unlawful and would have resulted in higher prices and lower quality of care for New Jersey residents."[16]

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Lifespan and Care New England Health System's Scrapped Merger Plans

Earlier in the year, Lifespan and Care New England Healthcare System (CNE) walked away from their plans to merge, as a result of federal and state opposition. Non-profits Lifespan and CNE are the two largest providers in Rhode Island.[17] Together, the systems would have controlled at least 70% of the general inpatient care, outpatient surgery, and inpatient behavioral healthcare in the state; even expanding the market to include surrounding Massachusetts towns, the entities would control 60% of the inpatient market and 50% of the inpatient behavioral market.[18] In issuing a decision denying the proposed merger, the Rhode Island Attorney General stated that "[i]f this extraordinary and unprecedented level of control and consolidation were allowed to go forward, nearly all Rhode Islanders would see their healthcare costs go up for healthcare that is lower in quality and harder to access, and Rhode Island's healthcare workers would be harmed."[19] Further, in its joint suit with the Rhode Island Attorney General blocking the merger, the FTC argued that "the merger would increase the combined firm's ability to raise hospital rates, and individuals would likely face higher premiums, co-pays, and deductibles. Similarly, if…consummated, the combined healthcare system will have reduced incentives to invest in vital non-price dimensions of competition, such as quality of care, access to services, and technology."[20]

Conclusion

This heightened antitrust scrutiny may result in a cooling period for hospital transactional activity. According to one antitrust attorney, "These (outcomes) have emboldened the FTC…Parties who were contemplating affiliations have to take into account the risk of an FTC challenge more than they had in the past. There is a deterrent effect that they are trying to cause."[21] The FTC's more aggressive stance seems to have had such an effect, with the hospital subsector seeing a decline in merger & acquisition activity over the past year.[22] As to how health systems will ultimately respond to these regulatory pressures, it is anticipated that more clinical affiliations and other informal partnerships will be pursued in lieu of full acquisitions.[23]

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