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No Health Care Merger Too Small for the FTC to Take an Antitrust Look

By Carl W. Hittinger and Tyson Y. Herrold

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In our November and December 2016 articles, we discussed the Federal Trade Commission's proclivity to challenge health care mergers, even when the purported anticompetitive effects of the relatively economically limited merger would be confined to a local geographic region. For example, in 2014, the FTC, joined by the Idaho state attorney general, in *St. Alphonsus Medical Center Nampa v. St. Luke's Health System* successfully forced two small hospitals to unwind a consummated merger that affected only 81,557 people in the town of Nampa, Idaho. In 2016, the FTC blocked the merger of Penn State Hershey Medical Center and Pinnacle Health System, both of which mostly operate in a small, four-county area surrounding Harrisburg, Pennsylvania. In 2017, the FTC in In *re CentraCare Health* challenged and obtained a favorable settlement in a merger in St. Cloud, Minnesota involving a physician group that operated only four health clinics employing only 40 doctors. The merger was small enough to avoid triggering the Hart Scott Rodino Act's reporting rules.

Most recently, in December 2017, the FTC chalked up another win in a localized nonreportable health care merger when, in collaboration with the North Dakota state attorney general's office, it successfully blocked the merger of Bismarck, North Dakota health care providers Sanford Bismarck and Mid Dakota Clinic, P.C. (MCD) in *FTC v. Sanford Health*.

The Health Care Provider Market

In general, competition in the health care provider market can be divided into two "stages." In the first stage, providers compete with one another for access to insurance plans offered regionally by commercial health insurers. In the second stage, providers compete to attract patients to their facilities.

Competition in the first stage is mostly price centric—that is, providers compete by law only regionally with other providers on reimbursement rates they receive from insurers for medical services provided to patients. Competition in the second stage is mostly service centric—that is, providers compete with other regional providers on quality and cost of services provided, availability of procedures, hours of operation, convenience of facilities, innovative technology, and staffing needs and recruitment.

In *Sanford Health*, Magistrate Judge Alice Senechal of the U.S. District Court for the District of North Dakota, defined four relevant product markets: adult primary care services, pediatric services, obstetric/gynecologic services and general surgery services. None of the services provided in these four markets, she explained, is fungible with the services provided in any other market. In addition, Senechal defined the relevant geographic market as "the Bismarck- Mandan, North Dakota, Metropolitan Statistical Area." Comprising just four counties, the authors calculate the 2010 population of this geographic market at 115,000 people, according to information collected by the U.S. Census Bureau.

Anticompetitive Effects of the Merger

Using the hypothetical monopolist test, which assesses a company's ability to impose unilateral price increases on consumers, the district court found that, post-merger, Sanford/MDC would control 85.7 percent of the adult primary care market in Bismarck, 98.6 percent of the pediatric market in Bismarck, 84.6 percent of the OB/GYN market in Bismarck, and 100 percent of the general surgery market in Bismarck. In light of these figures, Judge Senechal agreed with the FTC and the North Dakota attorney general that the merger would be "presumptively unlawful in each of the four physician service lines."

Senechal also considered the "interfirm diversion ratio," which measures "the percentage of a provider's patients that, if their provider were no longer available, would switch to the other provider." Judge Senechal found that "patients view Sanford and MDC as substitutes for each other" and that "Sanford patients in the Bismarck-Mandan area regard MDC as their next best option." The upshot of Senechal's diversion analysis is that patients in the Bismarck-Mandan area would not have viable provider substitutes if Sanford and MDC were to merge, thereby incentivizing a combined Sanford/MDC to raise prices, decrease the quality of service and stem the pace of innovation.

Seeking to rebut the results of the hypothetical monopolist and diversion ratio tests, Sanford and MDC raised the "powerful buyer defense," arguing that any anticompetitive facets of the merger would be offset by the market power of Bismarck-Mandan's largest commercial health insurer, Blue Cross Blue Shield North Dakota. Controlling around 60 percent of the insurance market, Sanford and MDC argued, Blue Cross would be able to exercise its argued financial might to rebuff attempts by a combined Sanford/MDC to increase prices. Judge Senechal rejected this argument, finding that Blue Cross could not muster a viable insurance plan for the Bismarck-Mandan market without either Sanford or MDC and that the combination of those two providers would allow the merged company to adopt a take-it-or-leave-it bargaining position.

Sanford and MDC also argued that the merger would produce "synergies" and "efficiencies," a common defense in highly concentrated merger cases. Judge Senechal agreed with the FTC and the North Dakota attorney general and rejected this argument for two primary reasons. First, she concluded that the efficiencies were relatively small compared to the possible anticompetitive effects of the merger. Quoting the FTC's horizontal merger guidelines, Judge Senechal emphasized: "efficiencies almost never justify a merger to monopoly or near-monopoly." Second, many of the "claimed quality efficiencies [would not be] merger specific," meaning they could be realized by Sanford and MDC separately without the merger.

Finally, Sanford and MDC raised the "new entry" defense—i.e., that smaller health care providers in Bismarck would expand and open new practices and that new healthcare providers would enter the Bismarck-Mandan market to fill the competition gap. Judge Senechal again agreed with the FTC and North Dakota attorney general and rejected this defense. Pointing out the unique challenge of recruiting physicians to North Dakota and the substantial financial investment necessary to build a viable practice in the four relevant markets, she held that the threat of new entrants would be neither "timely, likely, nor sufficient to counter the anticompetitive effects of the proposed transaction."

The Future of Health Care Merger Enforcement

Sanford Health represents the FTC's most recent successful challenge to a local health care merger. Although Sanford and MDC have filed an appeal of Judge Senechal's decision to the U.S. Court of Appeals for the Eighth Circuit, the FTC has enjoyed a good record in similar appeals. Therefore, Sanford and MDC face an uphill battle.

It remains to be seen whether the FTC will continue to prioritize such even small local health care mergers during the Trump administration. Currently, the FTC is poised for a major leadership overhaul. On the heels of an announcement that Acting-FTC Chairwoman Maureen Olhausen would be nominated to the U.S. Court of Federal Claims, the White House last week nominated four new FTC commissioners: as new FTC chair, Joseph Simons; Paul Weiss partner and Bush-era FTC director of the Bureau of Competition; Noah Phillips, chief counsel for Texas Sen. John Cornyn; Democrat Rohit Chopra, senior fellow at the Consumer Federation of America and former assistant director of the Consumer Financial Protection Bureau; and, Christine Wilson, vice president of Delta Airlines. The only remaining commissioner,

Democrat Terrell McSweeney, was appointed during the Obama administration and is currently serving on a provisional basis since her term expired last fall. She may soon be replaced as well.

With four new commissioners in the works and a possible fifth to be nominated in short order, there is always a possibility that the brand new five- person commission will allocate resources to emphasize new priorities. But antitrust concerns in a politically charged climate over consolidation, and the attendant threats of higher prices, purported less innovation and often claimed fewer treatment choices for patients, make the health care provider industry an attractive target for the enforcement

agency. And the FTC's emboldening streak of victories will no doubt embolden the agency's enforcement efforts, no matter how small the merger or where in the heartland of America it will arise. Stay tuned.

Carl W. Hittinger is a senior partner in Baker & Hostetler's antitrust group and the litigation group coordinator for the firm's Philadelphia office. He concentrates his practice on complex commercial and civil rights trial and appellate litigation, with a particular emphasis on antitrust and unfair competition matters. He can be reached at 215-564-2898 or chittinger@bakerlaw.com.

Tyson Y. Herrold is an associate in the firm's Philadelphia office in its litigation group. His practice focuses on complex commercial and antitrust litigation matters. His experience also includes judicial clerkships for U.S. District Judge Malachy E. Mannion of the Middle District of Pennsylvania, Judge C. Darnell Jones II of the Eastern District of Pennsylvania and Judge Dolores K. Sloviter of the U.S. Court of Appeals for the Third Circuit. He can be reached at 215-568- 3439 or therrold@bakerlaw.com.