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FTC's Pa. Merger Loss Puts Obamacare Defense On The Table

By **Jeff Zalesin**

Law360, New York (May 10, 2016, 10:02 PM ET) -- The Federal Trade Commission's Monday failure to halt a Pennsylvania hospital merger could help health care providers in future merger cases because in a novel move, the judge described the Affordable Care Act as a factor that could help justify industry consolidation, experts say.

The so-called Obamacare defense was not the decisive factor in U.S. District Judge John E. Jones III's decision **denying a preliminary injunction** to stop the merger of Penn State Hershey Medical Center and PinnacleHealth System. But in passages that are sure to be cited elsewhere, the judge embraced the view that the ACA and other changes in health care have changed competitive dynamics and created good reasons for some mergers.

"I think antitrust practitioners recognize a bit of a conflict between the ACA's goals and the FTC's antitrust enforcement," said Matthew Piehl, an attorney at Faegre Baker Daniels. "The FTC has said it's not a conflict, and you can comply with both, but this judge is blowing the doors open and saying, 'There is a conflict. The FTC can't keep going down this road if we also want to accomplish the goals of the Affordable Care Act.'"

One goal of the 2010 federal health care law was to encourage a shift toward payment models in which providers are paid based on the value, not just the volume, of their care, according to Dionne Lomax, an antitrust member of Mintz Levin Cohn Ferris Glovsky and Popeo PC.

Reimbursement increasingly depends on the ability to achieve positive patient outcomes while using resources efficiently, so providers need to compete on quality and price, Lomax said. To manage the risk built into new models, providers may need to operate on a larger scale than before, she said.

"Quality and other things are becoming huge factors, and as the antitrust bar, we need to figure out a way to factor that in," Lomax said. "That's the reality that providers are dealing with, and that's what's driving some of these mergers that you see in the marketplace."

Some potential hospital mergers, however, never make it past the negotiation stage because of concern that they would be blocked by antitrust enforcers. Michael W. King, a shareholder at Brownstein Hyatt Farber Schreck LLP who advises on transactions in health and other industries, said that the FTC has a "hard-line" position against relaxing antitrust standards to reflect the ACA, and that stance has likely chilled some consolidation.

"Assuming an Obamacare defense to mergers becomes increasingly recognized, I think that could result in an uptick in activity," King said.

Before Monday, hospitals had made little headway in convincing courts to recognize the

ACA as a factor justifying mergers.

In an FTC enforcement action over St. Luke's Health System Ltd.'s acquisition of Saltzer Medical Group in Idaho, St. Luke's Health argued in part that the deal would help it comply with ACA provisions pushing hospitals toward value-based payment systems. But U.S. District Judge B. Lynn Winmill sided with the FTC in 2014, saying that the deal was an attempt to provide better care but was **still an antitrust violation**.

The FTC also successfully challenged ProMedica Health System Inc.'s acquisition of St. Luke's Hospital in Toledo, Ohio. In a petition for U.S. Supreme Court review of the case, ProMedica said its transaction took place partially because St. Luke's Hospital had been struggling to survive under the ACA, but the Supreme Court **declined to hear** the case last year.

On Monday, Judge Jones' opinion broke both the FTC's winning streak in hospital merger cases and the pattern of setbacks for ACA-based defenses.

The judge said that the motion for a preliminary injunction, filed by the FTC together with Pennsylvania Attorney General Kathleen Kane, was doomed because the enforcers had defined the relevant geographic market too narrowly, leaving out hospitals that offered realistic alternatives to patients in the Harrisburg, Pennsylvania, area. That finding alone would have made the opinion remarkable, since the courts in recent years have consistently accepted the FTC's proposed geographic market definitions in hospital merger cases, according to Piehl.

But Judge Jones went further, saying the merger could be a boon to patients in light of current health care industry conditions. For one thing, the judge said he was persuaded by the testimony of Penn State Hershey CEO A. Craig Hillemeier, who had said that the merger would help Hershey adapt to risk-based contracting by spreading certain costs of population care over a larger system.

More broadly, the judge pointed to "an evolving landscape of health care," changed by factors including the ACA and fluctuations in reimbursement from Medicare and Medicaid.

"We find it no small irony that the same federal government under which the FTC operates has created a climate that virtually compels institutions to seek alliances such as the hospitals intend here," he said. "Like the corner store, the community medical center is a charming but increasingly antiquated concept. It is better for the people they treat that such hospitals unite and survive rather than remain divided and wither."

Such statements from Judge Jones are likely to be widely quoted by hospital merger defendants, according to Piehl. The FTC will likely argue that the statements are mere dicta that set no precedent, but hospitals will insist that they have persuasive value, he said.

"I think hospitals and health systems will point to that and say, 'We're not the only ones saying that the Affordable Care Act and the antitrust laws conflict. Here's a federal court that agrees with us,'" he said.

Indeed, the fact that one judge has signaled support for an ACA-rooted defense could make other judges more likely to take the argument seriously, said Jeff Miles, an antitrust lawyer at Ober Kaler.

"It's not the legal holding of the case, but it's potentially influential in other cases that come down the road," he said. "Other judges may feel the same way."

One case in which Judge Jones' opinion could be cited is the FTC's pending challenge to the merger of Chicago-area health care providers Advocate Health Care and NorthShore

University HealthSystem, which is scheduled for closing argument later this month. Miles and Piehl said the hospitals in that case are likely to work the Pennsylvania decision into their post-trial briefs.

Denial of a preliminary injunction in the Advocate case — whether based on its geographic market definition or because of broader factors and trends in health care — would be a significant blow to an FTC that is hardly accustomed to losing hospital merger challenges, let alone two in a row, attorneys agreed.

Meanwhile, the FTC is in danger of losing or having to abandon a challenge to a West Virginia hospital merger because of a new state law shielding certain transactions from antitrust scrutiny, Miles pointed out.

But the Pennsylvania case alone doesn't necessarily show that the FTC's health care antitrust enforcement agenda is in trouble or even that the ACA will become a powerful antitrust shield, Piehl said.

"I think the usefulness of this opinion to other defendants will hinge on whether other courts start taking this route or if this is just an anomaly in the FTC's enforcement in this area," he said.

The FTC is represented by staff counsel Gerald A. Stein, GERALYN Trujillo, Jared P. Nagley, Jonathan Platt, Nancy Turnblacer, Ryan Harsch, Theodore Zang and William Efron.

Kane is represented by Aaron Schwartz, Tracy Wertz and Jennifer Thomson of the Pennsylvania Office of the Attorney General.

Penn State Hershey and PinnacleHealth are represented by Adrian Wager-Zito, Julie E. McEvoy, Geoffrey D. Oliver, Toby G. Singer, Kenneth W. Field, Christopher N. Thatch and William D. Coglianese of Jones Day and James P. DeAngelo of McNees Wallace & Nurick LLC.

The case is Federal Trade Commission et al. v. Penn State Hershey Medical Center et al., case number 1:15-cv-02362, in the U.S. District Court for the Middle District of Pennsylvania.

--Editing by Christine Chun and Kat Laskowski.

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