

Will FTC's winning record end planned Philadelphia-area hospital merger?

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The FTC and State of Pennsylvania on February 28 moved to block the proposed merger of Jefferson Health and Albert Einstein Healthcare Network, two leading providers of inpatient general acute care hospital services and inpatient acute rehabilitation services in the Philadelphia area. The FTC issued an administrative complaint alleging that the proposed merger would reduce competition in both Philadelphia and nearby Montgomery County and authorized staff to file a complaint, along with the state, seeking a temporary restraining order and a preliminary injunction to prevent the parties from consummating the merger and to maintain the status quo pending the administrative trial.

The challenge comes four years after FTC and state successfully blocked the combination of Penn State Hershey Medical Center and Pinnacle Health System in the Harrisburg area. The FTC also has seen an improved track record in blocking hospital mergers in recent years. As a result, the enforcement effort raises a significant hurdle for a combined Jefferson and Einstein.

In response to the challenge, the parties to the planned merger have said that they "will take some time to review the challenge to better understand both their position and how to best move forward." The hospital operators went on to say: "we have presented a strong and comprehensive case as to how the merger would

benefit the patients we serve and advance our academic mission without reducing competition for healthcare services.”

The Third Circuit precedent and other recent FTC successes, however, could embolden the agency in its effort to block the pending Jefferson/Einstein deal.

In September 2018, Einstein and Jefferson announced that they had entered into a binding definitive agreement to integrate into a single healthcare system. Talks of a combination reportedly began in 2017.

Thomas Jefferson University Hospitals has 908 licensed acute care beds, with services provided at five primary locations. Einstein Healthcare Network is also the largest independent academic medical center in the Philadelphia region. It provides services through Einstein Medical Center Elkins Park, Einstein Medical Center Philadelphia, Einstein Medical Center Montgomery, MossRehab, and Willowcrest outpatient facilities throughout the region.

According to the FTC, the proposed merger would eliminate the robust competition between Jefferson and Einstein for inclusion in health insurance companies’ hospital networks to the detriment of patients. As a result of the merger, the parties would control at least 60% of the inpatient general acute care (GAC) hospital services market in and around North Philadelphia, and at least 45% of the GAC market in and around Montgomery County, the agency contends.

Further, the merged parties would control at least 70% of the inpatient acute rehabilitation services market in the Philadelphia area, according to the FTC. Inpatient rehabilitation facilities (IRFs) provide intensive multi-disciplinary rehabilitation services to patients previously treated at GAC hospitals who are recovering from serious, acute conditions such as a stroke, traumatic brain injury or spinal cord injury. Collectively, Jefferson and Einstein operate six of the eight IRFs in the Philadelphia area in and around Einstein’s flagship Moss at Elkins Park facility.

An administrative trial would begin as early as September 2020. The request for preliminary relief will be filed in the federal district court in Philadelphia.

Earlier Third Circuit merger win for FTC and state. An appeal of a federal district court decision as to the preliminary injunctive relief in this latest case would be decided by the U.S. Court of Appeals in Philadelphia. Just four years ago,

the Third Circuit sided with the FTC and the State of Pennsylvania when they challenged the merger of Penn State Hershey Medical Center and Pinnacle Health System in the Harrisburg area.

In that case, the federal district court in Harrisburg denied the FTC's request for a preliminary injunction, finding that the agency failed to meet its burden to properly define the relevant geographic market. On appeal, a Third Circuit panel held that the lower court erred in finding that the FTC too narrowly defined the geographic market. Further, the appellate court concluded that the FTC had demonstrated that the proposed transaction would be presumptively anticompetitive and that the hospitals failed to rebut that presumption. Thus, the district court's order was reversed, and the lower court was directed to enter the preliminary injunction. Penn State Hershey Medical Center and Pinnacle Health ultimately abandoned the deal.

Other recent FTC merger challenges. The Third Circuit victory is just one of the successes for the FTC in challenging hospital mergers in recent years. Last year, Sanford Health abandoned its proposed acquisition of Mid Dakota Clinic in the face of FTC and State of North Dakota allegations that the deal would harm competition in the Bismarck-Mandan region of North Dakota. The U.S. Court of Appeals in St. Louis upheld a lower court, which temporarily enjoined the deal on the ground that FTC was likely to succeed in proving that the merger would substantially lessen competition in four types of physician services in the Bismarck-Mandan area.

In 2017, Advocate Health Care Network and NorthShore University HealthSystem abandoned their proposed merger in Chicago's north suburbs after the FTC and State of Illinois sued to block the transaction. A federal district court in Chicago found that the FTC was likely to succeed on the merits of its claims that the merger violated Section 7 of the Clayton Act.