

Client Alert

Antitrust Practice Group

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FTC Challenges North Dakota Healthcare Provider Merger

On Thursday, June 22, 2017, the Federal Trade Commission (“FTC”) and the North Dakota Attorney General filed a complaint challenging the merger of North Dakota providers, Sanford Health, Sanford Bismarck (together “Sanford”), and Mid Dakota Clinic, P.C. (“MDC”). The complaint, filed under seal in the U.S. District Court for District Court of North Dakota seeks a temporary restraining order and preliminary injunction to enjoin the merger.

Sanford is a vertically-integrated system, employing about 36 adult primary care physicians, 4 pediatricians, 8 OB/GYNs, and 4 general surgeons in addition to 100 advanced practice providers. It also operates the Sanford Bismarck Medical Center, a 217-bed general acute care hospital and Level II trauma center. MDC is a multispecialty practice with 23 adult primary care physicians, 6 pediatricians, 8 OB/GYNs, and 6 general surgeons. Together, the parties are the largest providers of certain healthcare services in the Bismarck and Mandan area.

The FTC’s administrative complaint alleges that the combination would substantially lessen competition in several healthcare markets, including adult primary care physician services, pediatrics, obstetrics and gynecology, and general surgery physician services. The complaint identifies a geographic market of the four-county Bismarck metropolitan statistical area. According to the FTC, the merger would create “by far the largest—and, in one case, the only—group of physicians offering these services” in the region. The two current FTC Commissioners (Acting Chairman Maureen Ohlhausen and Terrell McSweeney) voted unanimously to issue the complaint.

Analysis

The FTC alleges that the merged parties would have significant combined market shares in the overlapping service lines—ranging from 75% of the adult primary care physician services to 100% of the general surgery physician services. The complaint states that Sanford and MDC are each other’s closest competitors in those healthcare markets, citing the parties’ documents and alleging that the parties tracked and responded to each other’s marketing campaigns.

According to the FTC, the reduction in competition would create significant leverage with commercial payors. Specifically, the complaint states:

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“Without either of these physician groups, it would be very difficult for commercial payors to market a health plan provider network to employers with employees living in the Bismarck-Mandan area.” As a result, the merged parties would allegedly be able to negotiate higher reimbursement rates, and the increases would be passed on to consumers.

Takeaways

The FTC’s action is the second of two recent merger challenges by the agency in the Trump administration—the FTC recently challenged a merger of two fantasy sports sites, DraftKings and FanDuel—indicating that the antitrust agencies remain focused on antitrust enforcement. Earlier this year, the Department of Justice secured two impactful wins in challenging the health insurance mergers of Aetna/Humana and Anthem/Cigna in court. The DOJ also recently successfully blocked a merger of nuclear waste processors, EnergySolutions and Waste Control Specialists.

Finally, this action serves as a reminder that parties’ ordinary course documents are key drivers of review by the antitrust agencies. Here, the FTC complaint cites to Sanford and MDC’s own statements indicating significant head-to-head competition between them. Specifically, Sanford called MDC its “major competitor for primary care.” MDC also similarly described Sanford as “a demon to deal with competitively” and that the merger would “put us in the dominant health care system for quite a while.”

King & Spalding’s antitrust lawyers provide sophisticated, solution-oriented advice to healthcare companies on all aspects of antitrust law, from civil and criminal litigation and government investigations to antitrust counseling and government review of transactions. Please reach out to any members of our team should you have any questions.

Documents

The Federal Trade Commission’s press release is available at https://www.ftc.gov/news-events/press-releases/2017/06/ftc-state-attorney-general-challenge-physician-group-acquisition?utm_source=govdelivery.

The Federal Trade Commission’s administrative complaint in Sanford Health, Sanford Bismarck, and Mid Dakota Clinic, P.C. is available at <https://www.ftc.gov/enforcement/cases-proceedings/171-0019/sanford-healthsanford-bismarckmid-dakota-clinic>.

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