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FTC Challenges Methodist-St. Francis and Hackensack Meridian Health-Englewood Mergers

Steve Vieux (Shook Hardy & Bacon LLP)

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The last few months of the Trump administration have brought two challenges to hospital mergers by the Federal Trade Commission (FTC). In November, the FTC filed a complaint seeking to block an acquisition in the Memphis metropolitan area. In December, the FTC filed another complaint challenging a hospital merger in Bergen County, NJ, the most populated county in the state and just across the river from New York City. The FTC followed both administrative filings with filings in respective federal district court jurisdictions to enjoin the transactions pending the completion of administrative proceedings.

Methodist Le Bonheur-St. Francis (Memphis, TN)

On November 13, 2020, the FTC filed an administrative complaint seeking to block Methodist Le Bonheur Healthcare's (Methodist) purchase of two Memphis, TN-area hospitals from Tenet Healthcare Corp., St. Francis Hospital-Memphis and St. Francis Hospital- Bartlett hospitals (collectively, St. Francis). The FTC alleges that the $350 million transaction would be anticompetitive and therefore illegal under Section 5 of the FTC Act and Section 7 of the Clayton Act. The FTC alleges the deal would create harm in the market for general acute care (GAC) inpatient hospital services sold to commercial insurers in the Memphis area.[1]

Methodist, described by the FTC as the largest health care provider in the Memphis area, is a not-for-profit, faith-based health system headquartered in Memphis. It operates five hospitals offering GAC inpatient hospital services and one children's hospital in the Memphis area. Methodist also operates 84 outpatient facilities and employs 280 physicians. In fiscal year 2018, it generated about $2 billion in revenue, and $81 million in operating income.[2] The St. Francis hospitals are both inpatient GAC hospitals in the Memphis area operated by Tenet Healthcare Corporation (Tenet), a national for-profit health system headquartered in Dallas, TX. The St. Francis hospitals, together, generated approximately $413.9 million in net patient revenue for fiscal year 2018.[3] The parties announced their transaction in Dec. 12, 2019.[4]

The FTC alleges that the transaction would reduce the number of competing hospital systems providing GAC inpatient hospital services in the Memphis area from four to three, with the combined entity controlling more than 50% of the GAC inpatient hospital services market and seven out of twelve GAC inpatient hospitals in the Memphis area.[5] The FTC asserts that after the combination, only one other health system, Baptist Memorial Health Care (Baptist), would meaningfully compete with the combined entity in providing GAC inpatient hospital services in the Memphis area.[6] Further, according to the FTC, the other GAC inpatient hospital system in the Memphis area, Regional One Health, only runs one hospital that provides a limited set of services primarily serving a patient community not covered by commercial private insurance.[7]

The FTC defines the relevant service market as “GAC inpatient hospital services sold and provided to commercial insurers and their insured members.”[8] Such services include several different inpatient hospital services ranging from emergency medicine to surgical procedures.[9] As with product market definition in past health care merger cases, the FTC’s analysis focused on the proposed combination’s effects across the full panoply, or “cluster,” of GAC inpatient hospital services as opposed to each individual service.[10] According to the FTC, outpatient services cannot be substituted for services included in the cluster defined as GAC inpatient hospital services and are not part of the product market.[11]

The FTC defines the relevant geographic market to be the Memphis Metropolitan Statistical Area.[12] This area includes the Tennessee counties of Fayette, Shelby, and Tipton; DeSoto, Marshall, Tate and Tunica counties in Mississippi; and Crittenden County in Arkansas.[13] The FTC argues that since Memphis-area residents prefer GAC inpatient hospital services close to where they live, a commercial insurer needs hospitals in the Memphis area to market its health plan in the Memphis area.[14] The FTC typically limits the relevant geographic market in such cases to the area in which a hypothetical monopolist could “profitably impose a small but significant and non-transitory increase in price (SSNIP).”[15] The FTC alleges that a hypothetical monopolist controlling all hospitals providing GAC inpatient hospital services in the Memphis area could impose a SSNIP, since insurers would not view hospitals outside of the area as reasonable substitutes.

As with its past challenges to hospital combinations and general antitrust advocacy in the health care industry, the FTC describes competition in the provision of health care services as occurring in two stages. The first stage deals with competition among health providers for inclusion in the health plan networks of commercial insurers.[16] Providers compete to become “in-network” providers in a commercial insurer’s network by offering insurers lower reimbursement rates and other favorable terms for inclusion.[17] Covered patients pay far less to access in-network providers; therefore, that provider will attract more patients from a health plan’s network than an out of network provider.[18] An Insurer attains its bargaining leverage from their ability to credibly threaten a provider with exclusion from its network. However, insurers want to increase the number of providers in their respective networks that they offer in a geographic area to make their health plans more attractive to current and prospective customers, typically local employers and their employees.[19]

The FTC employs an economic model based on bargaining theory—will the combination provide the providers more bargaining leverage to negotiate higher reimbursement rates relative to before the acquisition?[20] In addition to increasing costs for insurers, the FTC is concerned that insurers can then pass on the costs to their subscribers (patients) through higher premiums, deductibles, and co-pays.

The FTC's complaint also discusses and focuses on the proliferation of "narrow" network health plans.[21] Narrow networks are health plans that exclude some area hospitals in exchange for lower prices than broader health plan networks. To be included in narrow networks, hospitals may offer lower reimbursement rates or other more favorable terms to insurers. The availability, or lack thereof, of alternative hospitals in the area affects the leverage that hospital systems have in bargaining with insurers for inclusion in narrow networks.[22]

The FTC observes that narrow network health plans are prevalent in the Memphis area, with most commercial insurers offering a narrow network that includes one of the two largest hospital systems in the area—Methodist or Baptist—as well as St. Francis and/or Regional One.[23] The FTC argues that the combination could drastically increase Methodist's bargaining leverage by eliminating the ability of insurers to build narrow networks around Methodist.[24] According to the FTC, an insurer could presently build a narrow network with Baptist, St. Francis, and Regional One; after the transaction, however, an insurer desiring to build a network around Methodist could offer at most Baptist and Regional One.[25] The FTC's argument rests on the extent to which insurers can offer commercially viable narrow networks around Baptist. If Baptist, with or without Regional One, is sufficient, the merged entity may not have an ability to increase prices. The complaint references apparent evidence of Methodist offering price concessions to insurers to exclude St. Francis from narrow networks in the past.[26]

The complaint describes the second stage of competition in health care, competition between health systems over actual patients, as based on non-price attributes of competition such as quality, increasing access, and expanding service.[27] The FTC refers to internal documents from both parties identifying each other as direct and close competitors.[28] The complaint refers to instances of the parties tracking and monitoring each other's quality scores, advertising, and brand recognition.[29] This includes examples of St. Francis investing in technology, recruiting specialists, and other actions to improve quality and services to compete with Methodist.[30] The FTC is concerned that the transaction will eliminate this non-price competition between the systems.

The FTC also refers to its own diversion analysis in confirming that the parties are close competitors for GAC inpatient hospital services. According to the complaint, if St.

Francis hospitals were unavailable a majority of St. Francis patients would seek care at a Methodist hospital for GAC inpatient hospital services. The FTC also alleges that if Methodist hospitals were unavailable for GAC inpatient hospital services, a “significant fraction” of Methodist patients would go to St. Francis.[31]

The FTC notes that significant entry barriers, namely Tennessee’s Certificate of Need (CON) law and regulations, make new entry of GAC inpatient hospital services or significant expansion of the current GAC inpatient hospital services less likely.[32] The FTC describes the CON regulations as requiring an extensive application process to build or modify hospitals, or to increase beds in any specific category by more than 10% every three years.[33] Finally, as is customary in the FTC’s challenges to such transaction, the complaint alleges that the parties have not substantiated verifiable and merger-specific efficiencies to rebut the FTC’s theory and evidence of harm.[34]

The FTC’s administrative trial will begin on May 18, 2021.[35] On November 16, 2020, the FTC, together with the Tennessee Attorney General’s office, filed a preliminary injunction under seal in federal district court in Western Tennessee to enjoin the transaction until the conclusion of administrative proceedings.[36] The FTC’s full Commission unanimously voted out the complaint, with Commissioners Christine S. Wilson and Noah Joshua Phillips issuing a joint statement criticizing state CON regulations in Tennessee, as well as other states, for increasing barriers to entry and limiting competition among health care providers. State CON regulations have been a longtime target of the FTC’s competition advocacy. According to Wilson and Phillips, such policies slow down market reaction to competitive demand.[37]

Hackensack Meridian Health- Englewood Healthcare Foundation

Soon after filing the *Methodist/St. Francis* action, the FTC filed an administrative complaint to block Hackensack Meridian Health, Inc.’s (HMH’s) purchase of Englewood Healthcare Foundation (Englewood).[38] The FTC’s theory of harm is similar to what the FTC alleged in its complaint to block the *Methodist-St. Francis* transaction.

The complaint describes HMH as the largest health system in the state of New Jersey.[39] According to the complaint, HMH operates two GAC hospitals less than ten miles away from Englewood’s GAC hospital, Englewood Hospital and Medical Center, in Bergen County.[40] In Bergen County, HMH operates its flagship academic hospital, Hackensack University Medical Center (HUMC) and partially through a joint venture, operates Pascack Valley Medical Center (PVMC).[41] In nearby counties adjacent to Bergen County, HMH operates Palisades Medical Center and partially owns and operates through a joint venture, Mountainside Medical Center, both located within 15 miles of HUMC.[42] These hospitals and PVMC provide primary and secondary inpatient GAC hospital services and generally refer more complex services to HUMC.[43] In total, HMH operates 12 GAC hospitals, two children’s hospitals, two rehabilitation hospitals, and one behavioral health hospital across eight counties in Northern and Central New Jersey.[44] The FTC also notes that HMH reported $5.9 billion in revenue in 2019.[45]

Interestingly, the complaint describes how HMH became the largest system in the state through a series of recent acquisitions. HMH was formed through the merger of Hackensack University Health Network with Meridian Health in July 2016, giving the new system 11 GAC hospitals across seven counties.[46] In January 2018, HMH merged with the JFK Health System, expanding to 16 hospitals and over 450 patient care locations and physician offices. In January 2019, HMH acquired the Carrier Clinic, a behavioral health provider.[47] Although the FTC's challenge does not allege a violation regarding consolidation in a market for physician services, the complaint notes that HMH's physician network, the HMH Medical Group, is comprised of over 1,000 physicians and advanced providers, offering primary and specialty care at over 300 locations spanning eight counties in New Jersey.[48]

Englewood is composed of one GAC hospital in Bergen County and the Englewood Health Physician Network, which includes over 500 physicians in over 100 locations across six counties in New Jersey and New York.[49] Englewood also has minority interests in two joint venture outpatient surgical facilities and operates two outpatient imaging centers in Bergen County and one in n nearby Essex County.[50] According to the FTC, Englewood generated $786.9 million in revenue in 2019.[51]

The complaint comprehensively describes how the proposed transaction came about. The transaction was apparently initiated by Englewood's search for a larger health system to partner with beginning in mid-2018.[52] The FTC does not offer any details as to why Englewood was searching for a larger partner/acquirer. The search, led by an outside consultant, initially found five potential partners with Englewood deciding to continue discussions with HMH.[53] By February 2019, Englewood limited the pool of partners to HMH and one other health system. On September 13, 2009, Englewood selected HMH and they both entered into an affiliation agreement.[54]

Similar to the FTC's complaint against the *Methodist/St. Francis* transaction, the FTC defined the relevant product market as GAC inpatient hospital services.[55] Further, the FTC defines the geographic market as Bergen County, NJ.[56] The FTC argues that commercial insurers need hospitals in Bergen County to assemble viable networks for their commercial health plans in the county that meet regulatory geographic access requirements and patient requirements and preferences.[57] According to the FTC, the combined entity would control three out of the six GAC inpatient hospitals in Bergen County: HUMC, PVMC, and Englewood.[58] This consolidation would increase concentration to presumptively unlawful levels, according to the FTC.[59]

As in its *Methodist* complaint, the FTC expresses concern over the transaction's impact on two stages of health care competition. The FTC argues that the transaction would increase the bargaining leverage of an expanded HMH in negotiations with insurers over reimbursement rates.[60] The complaint describes HMH and Englewood as "important alternatives" for insurers seeking providers of inpatient GAC hospital services in Bergen County.[61]

The FTC complaint also addresses the transaction's potential elimination of the second stage of competition between these two health systems, the competition for actual patients.[62] Again, this competition is often over non-price terms such as quality and the expansion of access and service offerings. The complaint refers to evidence of the parties monitoring each other's "quality and brand recognition."[63]

Redactions to the public version of the complaint apparently reference statements in Englewood documents that reference the parties' close competition before the merger and the competitive impact of the merger.[64] The FTC's own diversion analysis allegedly confirms the parties' close competition in GAC inpatient hospital services. It shows that if HMH hospitals in Bergen County (HUMC and PVMC) were unavailable for inpatient GAC hospital services, "many" of HMH's patients would go to Englewood, and if Englewood were unavailable, a "significant fraction" of its patients would go to HMH hospitals.[65]

Here, the FTC also claims that there are significant entry barriers into the market for inpatient GAC hospital services in New Jersey that would make *de novo* entry or significant expansion unlikely to "counteract" anticompetitive effects of the proposed transaction. Among those barriers, are New Jersey's CON law and regulations.[66] The FTC finally claims that the parties have not substantiated verifiable and merger-specific efficiencies to rebut the presumption of harm.[67]

The FTC administrative trial will start on June 15, 2021, one month after the proposed administrative trial in *Methodist/St. Francis*. The Commission also unanimously authorized staff to file a preliminary injunction in federal district court in New Jersey to enjoin the transaction until conclusion of administrative proceeding.[68]

Steve Vieux is an Of Counsel at Shook Hardy & Bacon LLP. He provides business litigation and legal counseling services to clients, with a focus on antitrust and consumer protection. The views expressed here are solely those of the author and do not reflect those of Shook Hardy & Bacon LLP or its past or present clients.

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[1] *In the Matter of Methodist Le Bonheur Healthcare and Tenet Healthcare Corporation,* Complaint, Docket No. 9396 (Nov. 13, 2020).
[2] *Id.* at ¶ 10.
[3] *Id.* at ¶ 12.

[4] *FTC and Tennessee v. Methodist Le Bonheur Healthcare and Tenet Healthcare Corporation,* Joint Motion for Entry of Stipulated Temporary Restraining Order and Memorandum in Support (W.D. Tenn. Nov. 16, 2020).
[5] Complaint, *supra* note 1 at ¶¶ 2 and 23.
[6] *Id.* at ¶ 3.
[7] *Id.*
[8] *Id.* at ¶ 14.
[9] *Id.*
[10] *Id.* at ¶ 15.
[11] *Id.* at ¶ 15-16. The GAC inpatient hospital services does not include psychiatric care, substance abuse, rehabilitation services, or services provided to minors; such services are offered by different types of providers under differing competitive conditions in the Memphis area and are not substitutes for GAC inpatient hospital services. *Id.* at ¶ 17.
[12] *Id.* at ¶ 18.
[13] *Id.*
[14] *Id.* at ¶ 20.
[15] *Id.*
[16] *Id.* at ¶ 27.
[17] *Id.* at ¶¶ 27-28.
[18] *Id.* at ¶ 28.
[19] *Id.* at ¶ 29.
[20] *See Id.* at ¶ 30.
[21] *Id.* at ¶ 31, 39.
[22] *Id.*
[23] *Id.* at ¶ 40.
[24] *Id.* at ¶ 42.
[25] *Id.* at ¶ 42.
[26] *Id.* at ¶ 41.
[27] *Id.* at ¶ 4.
[28] *Id.* at ¶ 35.
[29] *Id.* at ¶ 44.
[30] *Id.*
[31] *Id.* at ¶ 36.
[32] *Id.* at ¶ 47.
[33] *Id.* at ¶ 48. It is noteworthy that the FTC pointed to Methodist's and St. Francis's opposition to the other party's past respective CON applications as further evidence of their direct competition before the transaction. *Id.* at ¶ 35.
[34] *Id.* at ¶ 50.
[35] *Id.*
[36] *FTC and Tennessee v. Methodist Le Bonheur Healthcare and Tenet Healthcare Corp.,* Plaintiff's Motion to File Complaint Under Seal (W.D. Tenn. Nov. 16, 2020).
[37] *In the Matter of Methodist Le Bonheur Healthcare and Tenet Healthcare Corporation,* Statement of Commissioner Christine S. Wilson Joined by Commissioner Noah Joshua Phillips, File No. 191-0189 (Nov. 13, 2020).
[38] *In the Matter of Hackensack Meridian Health, Inc., and Englewood Healthcare Foundation,* Complaint, Docket No. 9399 (Dec. 3, 2020).
[39] *Id.* at ¶ 1.
[40] *Id.*
[41] *Id.* at ¶ 17.
[42] *Id.*
[43] *Id.*
[44] *Id.*

[45] *Id.* at ¶ 15.
[46] *Id.* at ¶ 16.
[47] *Id.*
[48] *Id.* at ¶ 18.
[49] *Id.* at ¶¶ 19-21.
[50] *Id.* at ¶ 21.
[51] *Id.* at ¶ 19.
[52] *Id.* at ¶ 22.
[53] *Id.*
[54] *Id.* at ¶ 23.
[55] *Id.* at ¶¶ 25, 29.
[56] *Id.* at ¶¶ 30-35.
[57] *Id.* at ¶ 34.
[58] *Id.* at ¶¶ 35, 50.
[59] *Id.* at ¶¶ 36-38.
[60] *Id.* at ¶ 45.
[61] *Id.* at ¶ 50.
[62] *Id.* at ¶ 46.
[63] *Id.* at ¶ 52.
[64] *Id.* at ¶ 47.
[65] *Id*.
[66] *Id.* at ¶ 55.
[67] *Id.* at ¶ 56.
[68] *FTC v. Hackensack Meridian Health, Inc. and Englewood Healthcare Foundation,* Complaint for Temporary Restraining Order and Preliminary Injunction (D.NJ. Dec. 3, 2020).