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Hospitals

W.Va. Legislature Passes Merger Bill Setting Up Possible Fight With FTC

West Virginia's Legislature passed a law explicitly exempting from state and federal antitrust laws the actions of hospitals and health-care providers under the jurisdiction of the state's health-care authority.

The bill seeks to immunize a specific hospital merger from scrutiny, setting up a possible conflict with the Federal Trade Commission, which has already filed an administrative complaint challenging the merger as creating a monopoly for inpatient and outpatient care in Huntington, W.Va. (216 ATD 216, 11/9/15).

S. 597, which passed the West Virginia Legislature on the last day of its regular session, purports to put a state health-care authority in charge of cooperative agreements between certain hospitals. The goal is to pull those agreements, including mergers, out of the purview of state and federal antitrust law. The bill also would confer power to approve inpatient and outpatient treatment cost increases, as well as any reimbursement agreements with insurers, on the state attorney general and the health-care authority.

The trade-off in supervisory regime may come at a cost: Hospitals wishing to merge under the new procedures must file annual reports on their operations with the authority, pay a fee of up to \$75,000 to cover the costs of initial review of the proposed merger and pay a further fee annually to cover the costs of supervision.

Narrow Target. The bill came in response to the FTC's challenge of a proposed merger between Cabell Huntington Hospital and St. Mary's Medical Center, the only two hospitals in Huntington, W.Va.

The bill is targeted so narrowly that it only reaches cooperative agreements involving teaching hospitals attached to medical schools, of which there are only two in the state. It could therefore only apply to agreements

involving Cabell Huntington and West Virginia University School of Medicine's main campus hospital in Morgantown, W.Va.

Quick Timeline. While an administrative law judge is set to hear the FTC's challenge April 5, the law could well be in effect before that time. While laws in West Virginia generally take effect 90 days after passage, ones that receive at least a two-thirds vote in both houses—such as S. 597—become effective immediately.

Gov. Earl Ray Tomblin (D) has 15 days from passage to either sign or veto the bill. If he fails to act timely, the bill automatically becomes law. If he vetoes the bill, the Legislature won't have an opportunity at an override because it's no longer in session. Tomblin can, therefore, effectively kill the bill until next February despite its large margin of passage in both houses of the Legislature.

Even if the bill is signed, the merger faces other potential hurdles, as it has yet to receive a certificate of need (CON) from West Virginia's health authority. A CON is required by the bill before an entity can qualify for approval and monitoring. As a Catholic hospital, St. Mary's will also need permission from the Catholic Church for the deal, a fact that does not impact the legislative analysis.

The merger has, however, been cleared by the state attorney general, albeit with some agreed conditions.

State Action Immunity. The bill explicitly says that the state intends the health-care authority's actions in approving cooperative agreements to be immune from antitrust law.

State actions, including setting prices, creating regulated monopolies, and otherwise supplanting the competitive market within their territories in favor of other policy choices besides competition, are immune under the "state action doctrine."

In order for immunity to confer, a state needs to fulfill two steps. First, it must clearly articulate a state policy to displace competition and replace it with regulation, per the Supreme Court's holding in *FTC v.*

Phoebe Putney Health Sys. Inc., 133 S. Ct. 1003, 2013 BL 41069 (2013) .

The state must then actively supervise the market or enterprise, as recently clarified by the court in *N.C. State Bd. of Dental Exam'rs v. FTC*, 135 S. Ct. 1101, 2015 BL 48206 (2015) .

Exempt or Immune? Here, the language of the statute clearly articulates a state policy to displace antitrust law with state regulation in cooperative agreements among hospitals, Robert M. Langer, a partner in the Hartford, Conn., office of Wiggin and Dana LLP, told Bloomberg BNA.

But writing a law that explicitly replaces the antitrust law with a different state regulatory scheme is only one step in immunizing a market from antitrust regulation, and isn't sufficient by itself to confer immunity, Langer said.

"A state may be able to achieve immunity for its agencies, boards and commissions if the strictures of the state action immunity doctrine are met, but a state cannot perforce exempt its agencies, boards and commissions from the federal antitrust laws," he said.

"If that is what the West Virginia Legislature intends, an interesting challenge will follow from the FTC and/or DOJ," he added.

Active Supervision. One problem with attempting to protect the merger from antitrust scrutiny here is that both hospitals are private entities, Richard A. Feinstein, a partner with Boies Schiller & Flexner LLP in Washington and former director of the FTC's Bureau of Competition, told Bloomberg BNA.

"States that want to displace competition can do it—that's what the state action doctrine is all about," Feinstein said. But actively supervising the private entities involved in the cooperative agreements or mergers that the state law permits and regulates will be "where the rubber will meet the road."

Going forward, there could still be a question of whether the West Virginia health authority's supervision meets the test, he said.

That might be the key to the FTC's response, should Tomblin sign the bill, Feinstein added. The commission might reason that it should continue its challenge because the law sets up a mechanism for active supervi-

sion of hospitals in West Virginia, but there's no information yet as to how that supervision will actually play out.

FTC Response. In comments on the legislation requested by a West Virginia delegate issued before the final vote, the FTC made plain that it views supplanting competition regulation in the health-care arena as a bad idea and that the bill will do more harm than good.

If enacted, the law would "tend to decrease the quality of health care services in West Virginia," the FTC staff said. The law "is likely to foster mergers and conduct that are anticompetitive, inconsistent with federal antitrust law and policy, and liable to cause serious harm to West Virginia health care consumers."

The FTC's complaint against the merger also outlines the competitive harm that would result in the Huntington acute care market if the deal goes through as the bill intends. The FTC hasn't, however, sought a court order blocking the merger because of the additional regulatory approvals yet to be obtained.

Under the bill, the certificate of need is still a prerequisite to the health authority and attorney general taking over the merger investigation, clearance and regulation. As such, while Tomblin's signature is required for it to become a law, it won't presently make the Cabell/St. Mary's merger instantly qualified to apply for state regulation in place of antitrust regulation.

Next Steps. Tomblin must act within 15 days to veto the bill or it will become law. Upon the expiration of those 15 days, absent a veto, it will go into effect.

The health-care authority board has not made a final decision on Cabell Huntington's CON request. The authority held a hearing on the request in December 2015, and no timeline for the decision has been made public.

The authority's decision on the CON request is subject to requests for reconsideration and an appeal.

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The agreed bill is at <http://src.bna.com/dig>.