Hogan Lovells

Antitrust and Health Care Consolidation

CWAG 2017 Summit

March 15, 2017

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Overview

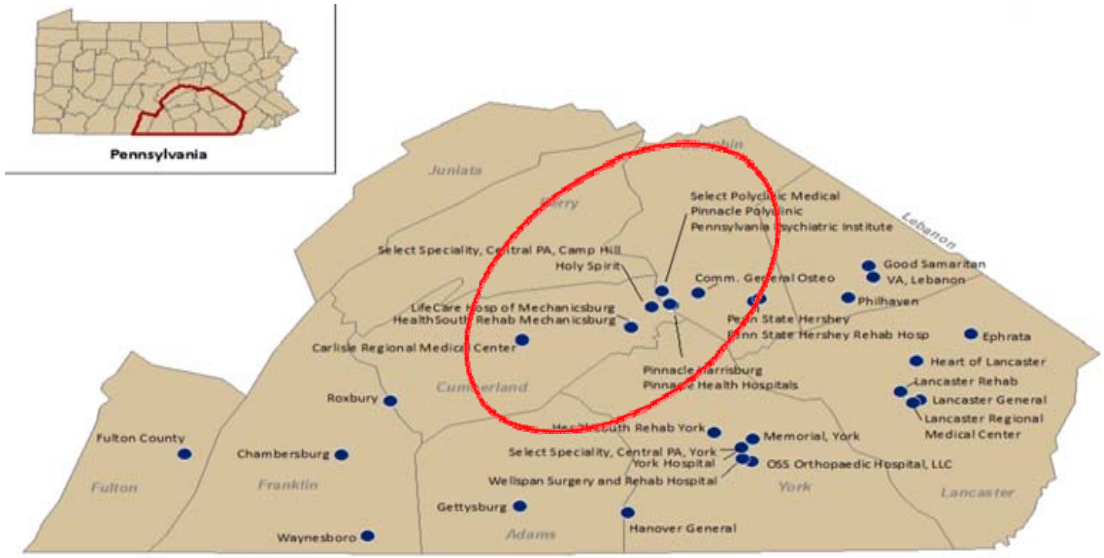
- Provider consolidation
  - Hospitals
  - Physicians
  - Hospitals/Physicians
  - “Clinically-integrated” networks
- Certificates of Public Advantage (COPAs)
- Health plan mergers
- Questions

Reasons for provider mergers and transactions

- Reduce costs (supply chain savings, IT costs, back office services)
- Capital access and avoidance
- Clinical standardization to reduce costs and improve quality
- Participate in risk-bearing arrangements
  - Obtain greater reimbursement under MACRA (for physicians)
- Fear of being without a “dance partner”
- Greater leverage with payers

All of these likely will continue no matter what happens to the ACA

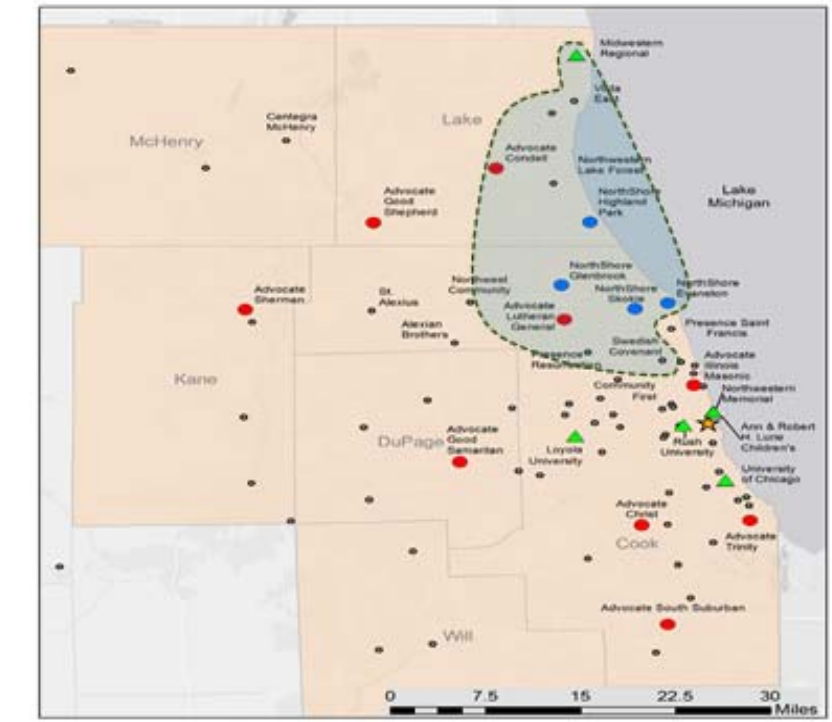
FTC/PA AG vs. Pinnacle/PennState-Hershey (3rd Cir. 2016)



- Geographic market is the "Harrisburg Area," consisting of Dauphin, Cumberland, Perry, and Lebanon Counties in PA
  - Even though 43.5% of PSH's patients came from outside the area
- Reject efficiency claim based on capital avoidance

FTC/IL AG v. Advocate Health Care (7th Cir. 2016)

Figure 1: Advocate and NorthShore Hospitals in the Chicago Area



Source: AHA Hospital Data

Geographic market:

- Government: the "North Shore Area"—an area bounded by 6 hospitals north of downtown Chicago
- Parties claim: this market arbitrarily excludes hospitals other than those included in the market, e.g. Northwestern Memorial, Rush University

Hospitals claimed merger was needed for them to offer risk-based product throughout Chicagoland

Hospital mergers – key issues

- Geographic market
  - How well do the new economic models and *Merger Guidelines* "hypothetical monopolist" test work – especially in "non-obvious" markets?
- Product market
  - Role of outpatient care
  - What if hospitals are just an element of a "population health strategy"?
- Efficiencies
  - How to analyze them, and how much credit to give them?
  - How rigorous to be re merger-specificity, cognizable, and verifiable requirements
  - How to weigh alleged effect on quality?

Physician practice mergers

- Increasingly common as single-specialty groups consolidate
  - Can bring important efficiencies and scale
  - But can create “must have” practices
- Raise difficult issues
  - Often not HSR-reportable
  - Product market definition
  - Geographic market
  - How high are entry barriers?
  - What remedies?
- State AGs can play particularly important role

Hospital acquisition of physicians

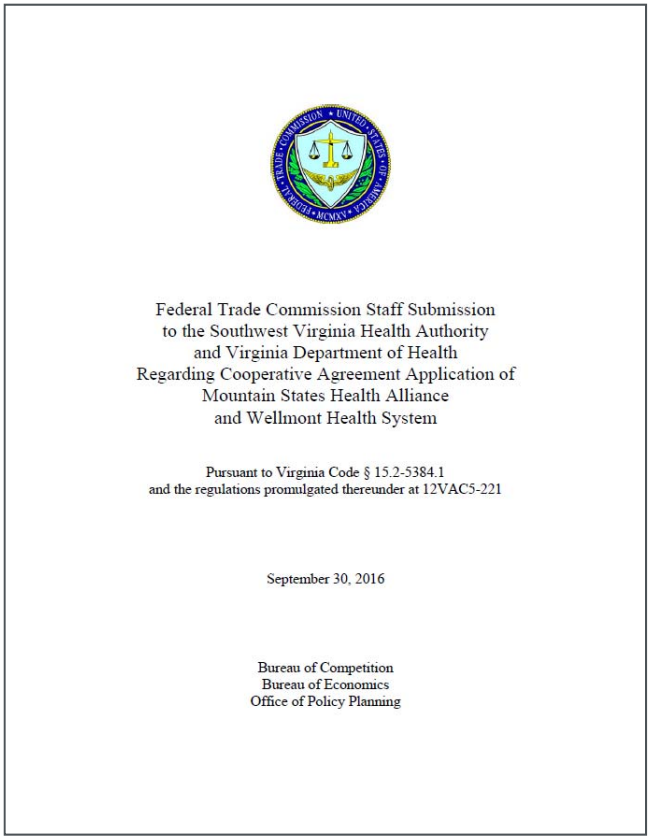
- New wave of hospital acquisitions
  - Assures hospitals of referral base
  - Facilitates clinical integration
- But can create tough antitrust issues
  - Horizontal overlap
  - Vertical foreclosure
  - Could increase hospital market power concerns
- Example: FTC/ID AG challenge in St. Luke's/Salzer Clinic transaction in Nampa, Idaho

Clinically integrated networks

- Providers coordinate care short of fully integrating
  - But typically will jointly negotiate rates and may coordinate competitive strategy
- Non-exclusivity and ability to terminate may lessen antitrust concerns
  - But can also reduce potential for efficiencies
- Antitrust issues
  - Traditionally – is there enough integration for network to be more than just price-fixing?
  - Now – market power and competitive effects

Certificates of Public Advantage (COPAs)

- Confer antitrust immunity *if*
  - State legislature has clearly articulated and affirmatively expressed the intent to displace competition
  - Conduct is subject to active ongoing supervision by the state
- An alternative to competition in rural markets?
- FTC has a long history of opposing antitrust exemptions, including COPAs
  - More recently it is weighing-in on merits of specific COPA applications
- State AGs play an especially important role
  - Addressing antitrust issues, but also advising on health care issues
- Extent of ongoing supervision can be a real challenge



Federal Trade Commission Staff Submission
to the Southwest Virginia Health Authority
and Virginia Department of Health
Regarding Cooperative Agreement Application of
Mountain States Health Alliance
and Wellmont Health System

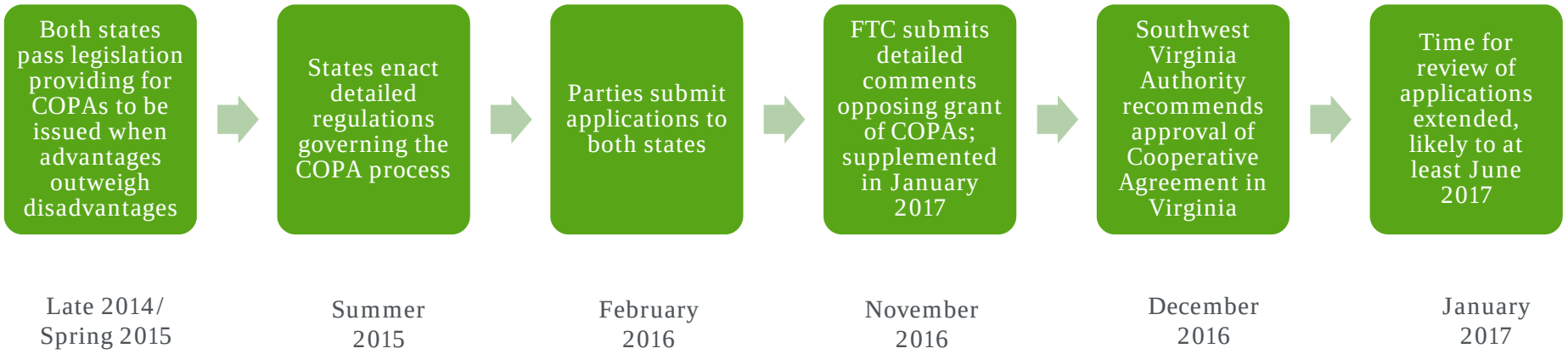
Pursuant to Virginia Code § 15.2-5384.1
and the regulations promulgated thereunder at 12VAC5-221

September 30, 2016

Bureau of Competition
Bureau of Economics
Office of Policy Planning

Wellmont/Mountain States Health Alliance seek COPA

Two systems with facilities covering two counties in southwestern Virginia and northeastern Tennessee



DOJ/State AGs challenges to health plan combinations

Key Issues

Anthem-Cigna (on appeal)

- Product market
  - Commercial insurance for national accounts and large employer groups
- Efficiencies were rejected
  - Medical cost savings were insufficient to overcome potential competitive harm
  - Insufficient evidence they would be passed on to consumers

Aetna-Humana

- Product market
  - Medicare advantage separate product from traditional Medicare
  - Overlap in exchange products in certain states
- Insufficient remedy proposal
  - Parties proposed to divest certain MA business to Molina, but court rejected remedy

Questions/Discussion?

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Bob Leibenluft's antitrust practice is unusual in that it focuses on only one industry — healthcare and life sciences — yet it spans all industry sectors, including providers, payers, and drug and device manufacturers. He brings over 35 years of experience, including heading the FTC Healthcare Division, to his representation of clients in counseling, investigations, transactions, and litigation matters.

Starting at the firm in 1981 as a health regulatory lawyer, Bob became a nationally recognized lawyer on Medicare issues. His deep understanding of the industry was a reason he was asked to lead the FTC Healthcare Division in the mid-1990s, where he supervised drafting of the FTC/DOJ Health Policy Statements, which first addressed clinical integration, and led investigations of hospital mergers and physician networks.

On a pro bono basis, Bob has led a 10-year review of the D.C. government's response to HIV/AIDs, advised the Government of Liberia on a new public health law, and provided antitrust advice to the CEO Roundtable on Cancer.

Chambers USA describes Bob as "renowned for his expertise in healthcare antitrust and is singled out by a source as someone who really knows how the system works" and who is hailed by peers as a "terrific healthcare antitrust lawyer."

Bob is an inaugural fellow and former vice president of the American Health Lawyers Association. He is a former Chair of the ABA Antitrust Section's Health and Pharmaceuticals Committee, Joint Conduct Committee, and State Enforcement Committee. Bob also has served as Chair of the Board of Directors of HC13, the parent of Prometheus Payment, and Bridges-to-Excellence. He teaches a course on Antitrust in the Healthcare Sector at George Washington School of Law, where he is an adjunct professor.

Areas of Focus

Regulatory
Antitrust and Competition
Life Sciences and Healthcare

Education

J.D., Order of the Coif, University of California, Berkeley Boalt Hall School of Law

B.A., magna cum laude, Yale University

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