COPA – Certificates of Public Advantage

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NAAG 2018 Southern Region Meeting
April 11, 2018

Contains personal views, not necessarily those of Crowell & Moring or FTC
Hospital Merger Enforcement in Context

Hospital Mergers and Enforcement Actions Since 2000

*Figure 1*. Hospital and Health System M&A Activity, 2000-2017

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Policy View

FTC’s Policy Reasons for Opposing COPAs

• Contrary to free-market principles
• Antitrust law already allows procompetitive mergers
  • *Merger Guidelines* account for, weigh efficiencies
  • Thus, COPAs immunize anticompetitive mergers
• COPA conditions –
  • Seek to contain harm, but do not remedy it
  • Difficult to implement, monitor, and enforce
  • Expire
• If COPA doesn’t work, difficult or impossible to unwind merger
Merger Concerns

FTC Concerns With the MSHA/Wellmont Merger

- MSHA and Wellmont –
  - Closest competitors; little other competition
  - Dominant providers with high market shares
  - Constrained each other’s prices
  - Spurred each other to improve quality, innovate

- Merger would eliminate or lessen –
  - Price competition
  - Incentive to maintain, improve quality

- There were alternatives to the merger
**COPA Conditions**

**Key FTC Concerns With the Proposed Commitments**

- Rate caps flawed, had gaps
- Did not apply to all payers
- Did not clearly apply to risk-based contracts
- Rural hospitals not actually preserved
- Investments dependent on speculative savings
- Certain “benefits” already planned or achievable without merger
- Terms intended to expire without separation
- Plan of separation inchoate, unlikely to work

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**FEDERAL TRADE COMMISSION STAFF COMMENTS ON THE MOUNTAIN STATES MELLON COPA COMMITMENTS (AS AMENDED FOR THE SOUTHWEST VIRGINIA HEALTH AUTHORITY)**

<table>
<thead>
<tr>
<th>Commitment</th>
<th>Reduction of Fixed Rate Increase</th>
<th>FTC Staff Comment</th>
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<tbody>
<tr>
<td>1. <strong>Price commitments are unlikely to duplicate the benefits of competition or what pricing would have achieved in the absence of the merger.</strong></td>
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<td>2. <strong>Price commitments are difficult to construct, monitor, and enforce.</strong></td>
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<td>3. <strong>Pricing commitments do not remedy the harms to non-price competition—such as competition to improve quality, access, and invest in healthcare services, facilities, and equipment.</strong></td>
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FTC Challenges

Limitations in FTC COPA Advocacy

• Limited to submitting public information
  • Cannot submit confidential information received without waiver → limits ability to use usual evidence (declarations, depositions, documents, data)

• Participation affected by forces outside its control
  • Extent to which COPA law, regs, process permit public’s comments, participation
  • Willingness of Department of Health and AG’s Office to discuss directly

• Certain COPA factors may be beyond traditional antitrust analysis

• Little empirical evidence on effect of COPAs
FTC Calls for Empirical Research and Public Comments

- Requests academic, industry research on COPAs
  - Study COPA impact on prices, quality, access, and innovation

- Seeks public comment on benefits and harms that have resulted from COPAs or other state regs
  - Invites state officials, providers, payers, consumers, policy experts, academics, economists, and others to comment

- Plans public workshop on COPAs in Fall 2018

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Alexis J. Gilman is a partner in the Antitrust Group in Crowell & Moring’s Washington, D.C. office. His practice focuses primarily on advising and representing companies on a broad range of civil antitrust matters, including merger reviews, government investigations, litigation, and counseling regarding various business practices.

From 2014 until 2017, Alexis served as the Assistant Director of the Mergers IV Division in the Bureau of Competition of the Federal Trade Commission where he had leading roles in and oversaw investigations and litigations in various industries, including hospitals and other healthcare providers, distribution services, supermarkets, funeral homes, casinos and online gaming, retail, and consumer goods. Prior to this position, Alexis served as a Deputy Assistant Director of the Mergers IV Division from 2012-2014, working on and supervising investigations and litigations in the Division. While at the FTC, Alexis worked on several high-profile merger investigations and litigations, including Sysco/US Foods, Staples/Office Depot, DraftKings/FanDuel, ProMedica/St. Luke’s, Dollar Tree/Family Dollar, Albertsons/Safeway, Phoebe Putney/Palmyra, Advocate/NorthShore, Cabell/St. Mary’s, Mountain States/Wellmont Health System, CHS/HMA, Office Depot/OfficeMax, and Pinnacle/Ameristar.

Prior to joining the FTC, Alexis was an associate in the Antitrust Group of a large U.S.-based law firm, where he represented Fortune 500 companies in high-profile U.S. and foreign merger investigations and other civil antitrust matters. He represented pharmaceutical, publishing, retail, chemical, energy, and private equity clients, among others.

Alexis received his J.D. with honors from The George Washington University Law School where he was a member of the George Washington International Law Review. He received his B.A. from Williams College.
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