

## The FTC Picks a Fight Against the COPA Hospital Merger System

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While regulators are signaling their goals to revise and strengthen merger enforcement, they are picking a fight against a particular obstacle to achieving their vision in health care. Specifically, the Federal Trade Commission (FTC) is currently pushing states to restrict their use of Certificates of Public Advantage (COPAs).

COPAs are state statutes that provide state regulatory oversight over health systems mergers and collaborations that immunize them from antitrust scrutiny under the state action doctrine exemption. The general purpose of a COPA is to allow mergers that otherwise may not pass antitrust scrutiny because the merger benefits the public. As of today, 18 states (including Texas, Florida and New York) maintain COPA regimes. Five states that previously maintained COPA regimes have repealed them (NC, CO, MT, ND and MN), with some COPA systems having been in operation for many years.<sup>[1]</sup> The COPA concept was initially developed to facilitate availability of care in rural counties. While the systems vary slightly across state jurisdictions, they are generally described as regulatory oversight programs that exempt approved transactions from the ire of federal antitrust enforcers. The state's approval of the merger and subsequent regulatory oversight of the merged system (often including annual reporting) excuses the transaction from federal antitrust scrutiny.<sup>[2]</sup> However, sometimes the process of state approval is done informally, and may favor granting approval without a thorough analytical probe.<sup>[3]</sup>

This summer, the FTC put the COPA system in its crosshairs by voting 5-0 to release an FTC staff policy paper attacking COPA regimes. The FTC policy paper criticized COPAs as “intended to displace competition” in such a manner that can result in higher prices for patients without improvements in quality of care, reduced patient access to healthcare services, and lower wages for hospital employees who face fewer employment options. FTC staff performed investigation and analysis that they claim revealed numerous anticompetitive outcomes. According to the FTC staff:

- “In each of the last four hospital mergers, the FTC investigated that received a COPA, and in our experience more broadly, hospitals seeking COPAs have had adequate financial resources to continue operating independently and to maintain quality and access to healthcare services without requiring a merger – contrary to the claims often made by the hospitals.”
- “Recent empirical research suggests that consolidation among healthcare providers has not facilitated the increased use of value-based payment models.”

- “Related research suggests that health systems with increased scale are not more likely to engage in or be more successful at value-based contracting.”
- “Many hospital mergers do not result in significant cost savings, and some studies have found that hospital competition leads to improved patient health outcomes with more effective resource utilization, as compared to highly concentrated markets with less competition.”

The FTC further cited difficulties in monitoring compliance and various case studies revealing price increases in COPA-approved circumstances in its critique, although often *after* the COPA regulatory oversight expired.

Ultimately, the FTC is seeking to restrict the use of COPAs at the state level. As of now, it appears that the FTC’s stance against COPAs is largely precatory, as its regulatory authority does not currently extend to commandeer such state policy. To that end, in a “[fact sheet](#)” accompanying the study, “FTC staff urges states to avoid using COPAs.” However, the FTC’s stated perspectives regularly evolve into litigation or proposed legislation in Congress. The FTC’s policy paper has raised questions about the applicability of state action to certain COPA processes in circumstances where the involvement of the state is remote and may not equate to actual “action” on its behalf, noting “there are important and meaningful limitations to using COPAs to shield hospital mergers from antitrust scrutiny.” In light of historic levels of antitrust litigation from government regulators,<sup>[4]</sup> hospital systems operating under COPAs should have their approvals reviewed by counsel, to ensure their validity and protective strength.

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<sup>[1]</sup> Randall R. Bovbjerg & Robert A. Berenson, Certification of Public Advantage: Can They Address Provider Market Power, Urban Institute (Feb. 2015) available at: <https://www.urban.org/sites/default/files/publication/42226/2000111-Certificates-of-Public-Advantage.pdf>.

<sup>[2]</sup> The state action doctrine is often referred to as Parker Immunity. *Parker v. Brown*, 317 U.S. 341 (1943).

<sup>[3]</sup> For example, Wisconsin’s COPA statute specifies that approval is granted as long as a denial is not issued. See Wis. Stat. Ann. § 150.85 (“Unless the department issues a denial of the certificate of public advantage, the application is approved.”).

<sup>[4]</sup> “We [the DOJ Antitrust Division] are litigating more [merger cases] than we have in decades. Since I [Assistant Attorney General Jonathan Kanter] was confirmed in November, the Division has challenged or obtained merger abandonments in six cases. Several other transactions were abandoned after parties were informed they would receive second requests. We currently have pending six civil antitrust lawsuits, the largest number of civil cases in litigation in the last 20 years. We will litigate more merger trials this year than in any fiscal year on record. Notably, this litigation occurs against the backdrop of nearly 3,000 notified transactions in FY 2022—which follows FY 2021 as the largest number of filings any year since the reporting thresholds were adjusted in 2000. We have also indicted 20 criminal cases since November, more than any time since the 1980s. We ended FY 2021 with 146 pending grand jury investigations, the most in 30 years.” Assistant Attorney General Jonathan Kanter Delivers Keynote Speech at Georgetown Antitrust Law Symposium, Department of Justice (Sep. 13, 2022), available at: <https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-delivers-keynote-speech-georgetown-antitrust>.

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