WINSTON & STRAWN LLP

BLOG

Landmark Ruling Paves the Way for Streamlined Health Care Transactions

OCTOBER 2, 2023

On September 27, 2023, a Louisiana federal court issued a landmark ruling addressing the intersection of the Hart-Scott-Rodino (HSR) Act and the Certificate of Public Advantage (COPA) regimes adopted by various states. The court held that Louisiana Children's Medical Center's proposed acquisition of three hospitals from HCA Healthcare (HCA) was exempt from the federal antitrust laws, including the reporting requirements of the HSR Act, because the parties had been granted a COPA under the Louisiana regime.[1] This precedent, if upheld on appeal, would eliminate the prolonged delays and significant costs of lengthy Federal Trade Commission (FTC) reviews for parties to health care transactions that are granted a COPA exempting the transaction from federal antitrust laws under the state action doctrine.[2]

BACKGROUND ON COPA AND STATE ACTION IMMUNITY

COPA is a regulatory framework implemented by some states, including Louisiana, that imposes increased state supervision and control over transactions between health care facilities in exchange for state action immunity from federal antitrust laws. The state action doctrine immunizes state authorities from federal antitrust requirements and liability for actions taken pursuant to a clearly expressed state policy that had foreseeable anticompetitive effects when legislated. The immunity also extends to private actors acting under a clearly articulated and affirmatively expressed state policy to displace competition when the conduct is actively supervised by the state. The Louisiana statute at issue provides that it was "the intent of the legislature that supervision and control over [such transactions] . . . have the effect of granting the parties to [such transactions] state action immunity for actions that might otherwise be considered to be in violation of state antitrust laws, federal antitrust laws, or both."[3]

For more on COPA laws and the FTC's previous efforts to restrict them, see our prior Competition Corner post here.

THE CLASH OF HSR AND COPA

The HSR Act is a federal law that requires parties to certain mergers and acquisitions to notify the FTC and the Department of Justice (DOJ) before proceeding with their transactions. This notification process requires parties to observe a thirty-day waiting period before they can close the transaction. If an agency issues a "Second Request," the waiting period does not expire until 30 days after both parties have substantially complied with the request. This process can require submitting extensive information and incurring substantial costs.

The tension between COPA and HSR regimes at the center of the Louisiana case arose from the FTC's position that even a transaction that has been granted a COPA is still subject to the reporting requirements of the HSR Act. In the FTC's view, it should first vet a transaction for anticompetitive effects pursuant to the HSR Act and, if it concludes there are such effects, the parties could raise the state action doctrine as a defense. The FTC or a court would then determine whether the COPA applies to the identified anticompetitive effects and exempts them from violating Section 7 of the Clayton Act. Here, the parties took the position that the COPA also exempted the proposed transaction from the HSR Act entirely, such that no premerger filing was required. Notably, the Louisiana Attorney General intervened in the suit, defending the state's COPA regime and supporting the hospitals' position against the FTC.

This decision provided much-needed clarity on the interplay of the HSR Act and the Louisiana COPA statute. After finding that the state action doctrine applied to the COPA statute, the court found that the HSR Act did not provide the required clear statement of Congressional intent to override the state action doctrine.[4] Further, the court found that allowing the HSR Act to apply to transactions subject to COPA would have subjected the transactions to delays and review that were the "precise 'antitrust scrutiny' the Attorney General intended to avoid by issuing the COPA."[5]

TAKEAWAYS

The *Louisiana Children's Medical Center v. FTC* decision marks a watershed change in the antitrust risks for health care transactions subject to a COPA. If the decision is upheld on appeal, health care providers pursuing transactions who have state action immunity under COPA will be able to do so without the burdensome process of HSR notification. This exemption eliminates the delays and costs associated with federal review, allowing health care entities to expedite their collaborations and mergers. Indeed, it is likely that this decision will lead to an increase in parties seeking to exempt their provider transactions through a COPA.

Parties considering health care transactions should also consider seeking a COPA in states where it is available or where the legislature is considering such laws. Winston & Strawn attorneys can assist in understanding the state of the law and whether seeking a COPA to exempt the transaction from federal antitrust scrutiny is a viable option. Readers should stay tuned for further updates concerning potential appeals to this matter.

---

[1] *La. Child.'s Med. Ctr. v. FTC*, 2:23-cv-01305-LMA-MBN at *28 (Sept. 27, 2023).

[2] The state action doctrine exempts from the federal antitrust laws conduct by private entities acting pursuant to a "clearly and affirmatively expressed" state policy with "active supervision by the state." *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980) (internal quotation marks omitted). Whether COPA regimes in other states also would be found to exempt transactions granted a COPA would depend, in part, on whether the COPA regime in any such state meets these requirements.

[3] *La. Child.'s Med. Ctr.*, at *3 (quoting La. Stat. Ann. § 40:2254.1) (alteration in original).

[4] *Id.* at *20-27.

[5] *Id.* at *27-28.

4 Min Read

Authors

Richard Falek

Kevin B. Goldstein

Conor Reidy

Nathan Garg

Related Topics

Antitrust Intelligence | FTC | Health Care Antitrust | M&A | State Antitrust Laws

Related Capabilities

Antitrust/Competition | Antitrust Transactions | Mergers & Acquisitions | Health Care

Related Professionals

Richard Falek

Kevin B. Goldstein

Conor Reidy

Nathan Garg

This entry has been created for information and planning purposes. It is not intended to be, nor should it be substituted for, legal advice, which turns on specific facts.

© 2024 Winston & Strawn LLP.