

**Statement of the Federal Trade Commission  
In the Matter of Cabell Huntington Hospital, Inc., Docket No. 9366  
July 6, 2016**

In November 2015, the Commission issued an administrative complaint challenging Cabell Huntington Hospital's proposed acquisition of St. Mary's Medical Center, the only two hospitals in Huntington, West Virginia. The Commission had reason to believe that the acquisition would create a near-monopoly over general acute care inpatient hospital services and outpatient surgical services in the four-county region surrounding Huntington. As alleged in the complaint, this near-monopoly is likely to increase prices and degrade quality of care.

Although our concerns about this transaction remain, the Commission has determined to dismiss the administrative complaint without prejudice. We do so in light of the passage of West Virginia Senate Bill 597 ("SB 597") and the West Virginia Health Care Authority's decision to approve Cabell's cooperative agreement with St. Mary's, with which the West Virginia Attorney General concurred.

This case presents another example of healthcare providers attempting to use state legislation to shield potentially anticompetitive combinations from antitrust enforcement. The Commission believes that state cooperative agreement laws such as SB 597 are likely to harm communities through higher healthcare prices and lower healthcare quality.

Cooperative agreement laws, which seek to replace federal (and sometimes state) antitrust enforcement and judicial review under the antitrust laws with state regulation and supervision of healthcare provider combinations, undervalue the important role that competition plays in the healthcare sector. In general, vigorous competition benefits consumers through lower prices, higher quality goods and services, greater access to goods and services, and innovation. Empirical research demonstrates this holds true in healthcare provider markets as well. As a recently published economic review article notes, "the message from this literature is clear . . . , mergers between rival hospitals are likely to raise the price of inpatient care and these effects are larger in concentrated markets."<sup>1</sup> A recent economic working paper confirms this conclusion.<sup>2</sup> Further, these price increases are likely to be passed on to consumers through higher insurance premiums, deductibles, and copays; reduced coverage; or lower wages.<sup>3</sup> Finally, the weight of the existing evidence shows that competition improves clinical hospital quality and lowers mortality rates.<sup>4</sup>

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<sup>1</sup> Martin Gaynor et al., *The Industrial Organization of Health Care Markets*, 53 J. ECON. LIT. 235, 262 (2015); see also Martin Gaynor & Robert Town, *The Impact of Hospital Consolidation: Update*, Robert Wood Johnson Found. (June 2012), [http://www.rwjf.org/content/dam/farm/reports/issue\\_briefs/2012/rwjf73261](http://www.rwjf.org/content/dam/farm/reports/issue_briefs/2012/rwjf73261).

<sup>2</sup> Zack Cooper et al., *The Price Ain't Right? Hospital Prices and Health Spending on the Privately Insured* (Nat'l Bur. of Econ. Research, Working Paper No. 21815, 2015), <http://www.nber.org/papers/w21815.pdf>.

<sup>3</sup> For empirical evidence on the impact on premiums and wages, see, e.g., *id.*; Erin Trish & Bradley Herring, *How Do Health Insurer Market Concentration and Bargaining Power With Hospitals Affect Health Insurance Premiums?*, 42 J. HEALTH ECON. 104, 112 (2015); Katherine Baicker & Amitabh Chandra, *The Labor Market Effects of Rising Health Insurance Premiums*, 24 J. LABOR ECON. 609–34 (2006).

<sup>4</sup> See Gaynor et al., *supra* note 1, at 249 ("[T]he evidence indicates that increases in competition improve hospital quality."); see also Martin Gaynor et al., *Death by Market Power: Reform, Competition, and Patient Outcomes in*

Proponents of cooperative agreement laws claim that antitrust enforcement undermines the policy goals of the Affordable Care Act to improve quality and lower costs through greater coordination among healthcare providers. This is fundamentally incorrect. The ACA did not repeal the antitrust laws, and it certainly does not condone mergers that substantially lessen competition.<sup>5</sup> In many cases, healthcare providers can advance the goal of delivering clinically integrated care either on their own or through mergers or other collaborations that raise little or no antitrust concern. Indeed, the Federal Trade Commission and the Antitrust Division of the Department of Justice have issued extensive guidance to providers seeking to collaborate within the bounds of the antitrust laws.<sup>6</sup> In short, antitrust enforcement is consistent with – not an impediment to – the goals of the ACA.

Proponents of hospital mergers often argue, citing the policy goals of the ACA encouraging greater coordination of care, that a merger is necessary to improve quality and lower costs. Proponents claim those potential benefits as procompetitive efficiencies justifying mergers or collaborations that otherwise may raise antitrust concerns. We understand that coordination of care has the potential to further key goals of healthcare reform and consider those benefits when evaluating a provider merger. The FTC’s and the Department of Justice’s Horizontal Merger Guidelines expressly recognize that mergers may “result in lower prices, improved quality, enhanced service, or new products,” and that these possible benefits must be evaluated and weighed against potential anticompetitive harm.<sup>7</sup> Claimed benefits, however, are only cognizable if they are merger-specific. Many of the purported benefits of hospital mergers – including coordination of patient care, sharing information through electronic medical records, population health management, risk-based contracting, standardizing care, and joint purchasing – can often be achieved through alternative means that do not impair competition. Ultimately, the Commission challenges few hospital mergers and only does so after thorough investigation indicates, as alleged in this case, that the combination is likely to result in a loss of competition that is not outweighed by improvements in quality and cost efficiencies.

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*the National Health Service*, 5 AM. ECON. J.: ECONOMIC POLICY 134 (2013); Zack Cooper et al., *Does Hospital Competition Save Lives? Evidence from the English NHS Patient Choice Reforms*, 121 ECON. J. 228 (2011); Nathan Wilson, *Market Structure as a Determinant of Patient Care Quality*, 2 AM. J. HEALTH ECON. 241 (2016).

<sup>5</sup> In fact, the ACA final program rules specifically recognize antitrust enforcement’s role in ensuring competition in provider markets. U.S. Dep’t of Health & Human Servs., Centers for Medicare & Medicaid Servs., Medicare Program, Medicare Shared Savings Program: Accountable Care Organizations, 42 C.F.R. § 425 (2011), 76 Fed. Reg. 67,826 (Nov. 2, 2011), <https://www.gpo.gov/fdsys/pkg/FR-2011-11-02/html/2011-27461.htm>.

<sup>6</sup> See, e.g., Fed. Trade Comm’n & U.S. Dep’t of Justice, Statement of Antitrust Enforcement Policy Regarding Accountable Care Organizations Participating in the Medicare Shared Savings Program, 76 Fed. Reg. 67,026 (Oct. 28, 2011), <https://www.gpo.gov/fdsys/pkg/FR-2011-10-28/pdf/2011-27944.pdf>; Fed. Trade Comm’n & U.S. Dep’t of Justice, ANTITRUST GUIDELINES FOR COLLABORATIONS AMONG COMPETITORS (2000), [https://www.ftc.gov/sites/default/files/documents/public\\_events/joint-venture-hearings-antitrust-guidelines-collaboration-among-competitors/ftcdojguidelines-2.pdf](https://www.ftc.gov/sites/default/files/documents/public_events/joint-venture-hearings-antitrust-guidelines-collaboration-among-competitors/ftcdojguidelines-2.pdf); U.S. Dep’t of Justice & Fed. Trade Comm’n, STATEMENTS OF ANTITRUST ENFORCEMENT POLICY IN HEALTH CARE (1996), <https://www.ftc.gov/sites/default/files/documents/reports/revise-federal-trade-commission-justice-department-policy-statements-health-care-antritrust/hlth3s.pdf>.

<sup>7</sup> U.S. Dep’t of Justice & Fed. Trade Comm’n, HORIZONTAL MERGER GUIDELINES 29–31 (2010), <https://www.ftc.gov/sites/default/files/attachments/merger-review/100819hmg.pdf>.

Cooperative agreements that replace antitrust enforcement with state regulatory regimes often protect likely anticompetitive transactions that impose harms far exceeding their benefits. These laws and any accompanying promises providers may make, no matter how well-intentioned or sophisticated, are unlikely to replicate the manifold benefits of competition. For this reason, the Commission has consistently recommended that states not implement such laws.<sup>8</sup>

Serious questions also remain about what happens if the parties to a cooperative agreement fail to achieve the level of benefits promised to state authorities and their local communities. Because healthcare provider mergers are difficult to unwind, there is no easy remedy if a cooperative agreement fails to deliver its promised benefits. In all likelihood, the benefits of competition will be lost, and patients, employers, and communities will suffer the consequences of higher-cost and lower-quality healthcare.

Finally, we emphasize that we will continue to vigorously investigate and, where appropriate, challenge anticompetitive mergers in the courts and, if necessary, through state cooperative agreement processes. Our decision to dismiss the complaint without prejudice does not necessarily mean that we will do the same in other cases in which a cooperative agreement is sought or approved.

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<sup>8</sup> See, e.g., Fed. Trade Comm'n Staff Comment Before the Ala. State Senate Re: House Bill 241 and Senate Bill 243 (May 2, 2016), [https://www.ftc.gov/system/files/documents/advocacy\\_documents/ftc-staff-comment-alabama-state-senate-regarding-alabama-house-bill-241-senate-bill-243/160504commentalabama.pdf](https://www.ftc.gov/system/files/documents/advocacy_documents/ftc-staff-comment-alabama-state-senate-regarding-alabama-house-bill-241-senate-bill-243/160504commentalabama.pdf); Fed. Trade Comm'n Staff Comment to W.Va. House of Delegates Re: Senate Bill 597 (Mar. 9, 2016), [https://www.ftc.gov/system/files/documents/advocacy\\_documents/ftc-staff-comment-west-virginia-house-delegates-regarding-sb-597-competitive-implications-provisions/160310westvirginia.pdf](https://www.ftc.gov/system/files/documents/advocacy_documents/ftc-staff-comment-west-virginia-house-delegates-regarding-sb-597-competitive-implications-provisions/160310westvirginia.pdf).