



STATE OF NEW YORK
OFFICE OF THE ATTORNEY GENERAL

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May 15, 2015

The Honorable Michael H. Ranzenhofer
Room 609 LOB
Albany, NY 12247

The Honorable Terrence P. Murphy
Room 817 LOB
Albany, NY 12247

The Honorable Crystal D. Peoples-Stokes
Room 625 LOB
Albany, NY 12248

The Honorable Thomas Abinanti
Room 839 LOB
Albany, NY 12248

RE: S.2647/A.5254, S.4417/A.2888

Dear Senators Ranzenhofer & Murphy and Assemblymembers Peoples Stokes & Abinanti,

The Office of the Attorney General writes to express its opposition to the above-referenced bills (the "Bills"), which are currently moving through both houses of the Legislature. The Bills seek to fully immunize from federal and state antitrust laws all activities undertaken by, respectively, the Erie County Medical Center Corporation ("ECMCC") and the Westchester Health Care Corporation ("WHCC") (together, the "Corporations") in collaboration with their competitors. These Bills are not in the interest of New Yorkers because they grant the Corporations virtually unlimited discretion to work together with their competitors to raise the prices of health care services that they provide to patients in New York. Further, the Bills are unnecessary because collaborations among health care providers that truly benefit patients are already lawful and need no exemption from the antitrust laws.

Efforts by health care providers in New York to obtain special exceptions to the antitrust laws are unfortunately not a new phenomenon. In 2013, nearly identical legislation immunizing potentially anticompetitive conduct by another public benefit corporation, the Nassau Health Care Corporation, passed into law. The Office of the Attorney General vigorously opposed that legislation, stating, as it does here, that the bill was unnecessary, overbroad, and against the interests of patients in New York. The Office of the Attorney General additionally expressed concern that the bill would create a dangerous precedent, as it threatens to replace careful and professional antitrust analysis by expert state and federal enforcement agencies with a rush to the legislature. Unfortunately, it appears that this concern was well-founded.

The New York legislative grant of special exceptions to the antitrust laws for market participants has also attracted concern from federal authorities. Three weeks ago, the Federal Trade Commission submitted a letter to the New York State Department of Health expressing concerns about applications by private parties for antitrust immunity pending before NYS DOH. The FTC cautioned that “antitrust exemptions threaten broad consumer harm while benefitting only certain market participants” and noted that “[t]here is no reason to treat the health care industry differently with regard to the application of the antitrust laws.”¹

Whether a particular collaboration violates the antitrust laws is a matter that should be decided on a case by case basis, and not predetermined through legislation. Accordingly, the Office of the Attorney General urges you to protect the best interests of New Yorkers by opposing these Bills.

Description of the Bills

The Bills amend the Public Authorities Law as it would apply to ECMCC and WHCC. ECMCC operates Erie County Medical Center (Buffalo) and certain affiliated health care facilities; WHCC operates Westchester Medical Center (Valhalla), MidHudson Regional Hospital (Poughkeepsie), and certain affiliated health care facilities. The Bills, which contain identical language, outline apparent benefits the Corporations would achieve through collaborations with other health care entities, including “preserving and expanding needed health care services,” “consolidating unneeded or duplicative health care services,” “enhancing the quality of, and expanding access to, health care delivered to medically underserved populations,” “lowering costs,” improving “efficiency,” and “achieving improved reimbursement from non-governmental payors.” The Bills affirmatively support a state policy to allow the Corporations “to engage in collaborative activities” even though they would have an anti-competitive effect. Moreover, the Bills expressly provide that the Corporations ***and all entities with which they collaborate*** “shall be immunized from liability under the federal and state antitrust laws.” Should these Bills become law, the Attorney General, as well as private parties, would be barred from using New York State’s antitrust law, the Donnelly Act, to challenge collaborations that harm the public.

¹ Letter from Deborah Feinstein, Director, Bureau of Competition, Federal Trade Commission, et al., to New York State Department of Health 4-5 (April 22, 2015) (available at https://www.ftc.gov/system/files/documents/advocacy_documents/ftc-staff-comment-center-health-care-policy-resource-development-office-primary-care-health-systems/150422newyorkhealth.pdf).

The Bills are silent as to the identity of potential ECMCC and WHCC collaborators. Unless amended, the Bills would allow *any* collaboration by the Corporations, with *any* type of health care organization (e.g., physician practice organization, hospital, health insurer) to completely evade antitrust scrutiny in perpetuity. If any future collaboration between one of the Corporations and a private health care organization is in the public interest, such an exemption is unnecessary to achieve the proposed collaboration.

The Bills are Overbroad

The proposed Bills authorize, in perpetuity, a broad swath of potentially anticompetitive conduct that is unlikely to benefit patients.

For example, the Bills authorize the joint negotiation of hospital and physician rates by the Corporations and any other health care provider without tethering these activities to the accomplishment (or even the planned accomplishment) of quality or efficiency gains. Such joint negotiations are likely to increase health care costs for patients and payors without any positive contribution to the health care system. These rate increases may initially be borne by insurers, but ultimately they will be passed on to employers (including the State) and patients in the form of increased premiums and copays. In the face of increased rates, insurers may also reduce the benefits offered to patients in their insurance plans, or may limit the networks of hospitals and other providers in their plans, thereby diminishing patient access to affordable health care.

In addition, the Bills provide the Corporations with sweeping authorization in perpetuity to engage in collaborations with private sector partners, with virtually no limitations. For example, the Bills purport to allow ECMCC and a private sector competitor to jointly negotiate reimbursement rates and raise prices for services at either or both facilities. The Bills would also permit the Corporations and private sector providers to accumulate market power and exclude others from competing in the provision of health care services.

In short, the Bills offer a vast array of possibilities for increasing health care prices—including through coercive concerted price-fixing practices—and reducing health care quality, innovation, and access, without yielding countervailing consumer benefits.

Antitrust Law is an Effective and Efficient Tool for Evaluating Health Care Transactions So Legislation is Not Needed

These Bills are not necessary to promote patient welfare. State and federal antitrust laws create no barrier to health care collaborations that benefit patients.² Indeed, antitrust law *promotes* such arrangements while preventing those that may harm patients. Vigorous competition among health care providers in an open marketplace gives patients the benefits of lower prices, higher quality care, greater access to care, and innovation.

Antitrust laws do not stand in the way of collaborations that have no anticompetitive effect. Moreover, even if collaboration may result in less competition and/or higher prices, the

² For example, the Attorney General has investigated many of the numerous hospital consolidations in New York State over the past ten years but has not sued to block a single transaction on antitrust grounds.

collaboration will still be lawful if the anticompetitive effects (*e.g.*, higher prices) do not outweigh the benefits of the collaboration (*e.g.*, improved access to care or enhanced quality of care). In short, antitrust law is no obstacle to health care collaborations that benefit patients.

An antitrust analysis of a health care collaboration of the type described in the Bills would require consideration of factors such as the availability of other suitable health care services in the geographic market, the relationships between other hospitals and health care professionals in the market, and the financial condition of the parties. Whether increased efficiencies, lower costs, better quality of care, expanded access to care, or more innovation would result from the proposed collaboration is critical to an evaluation of the collaboration under antitrust law. Assuming such benefits are present, they may be more significant than, for example, a possible price increase that could result from a reduction in competition.

If the Corporations want to enter into collaborations that involve clinical integration to enhance quality, reduce cost, increase access or otherwise make health care services more efficient, those would be considered pro-competitive benefits. And if joint negotiations on reimbursement rates between ECMCC or WHCC and their partners on the one side, and payors on the other, were necessary to achieve those benefits, antitrust law would not interfere. The proposed legislation is not necessary to achieve the result that the Corporations appear to seek, as long as their proposed collaborations, overall, are in the best interests of patients. The Bills would allow the Corporations to enter into anticompetitive collaborations, whether or not the collaborations are in the best interests of patients.

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For all of the reasons stated above, the Office of the Attorney General respectfully urges you not to move these bills in your respective houses. If collaboration between one of the Corporations and a private partner is in the public interest, then these Bills are entirely unnecessary, and the Bills unwisely provide a blanket exemption from antitrust law for future transactions that may harm the public.

Sincerely,



Eric J. Stock
Bureau Chief, Antitrust Bureau
Office of the New York State Attorney General