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"Shop" Until You Drop: FTC Chairman Signals Tougher Scrutiny of "Shop" Processes When Evaluating the "Failing Firm" Defense

By Stephen Wu and Payton T. Thornton*

In this article, the authors discuss the implications of a recent statement by Federal Trade Commission Chairman Andrew Ferguson addressing the "failing firm" defense in the context of a hospital merger.

Federal Trade Commission (FTC) Chairman Andrew Ferguson (joined by Commissioner Mark Meador) recently issued a statement addressing the "failing firm" defense in the context of a hospital merger and emphasized the significance of comprehensive "shop" processes when merging parties argue that an acquisition is necessary because the target firm is in financial distress. While focused on the hospital industry, Chairman Ferguson's statement applies with equal force to transactions in any industry that involve a financially distressed party where the parties may be considering asserting a failing firm defense to obtain antitrust clearance. Financially distressed firms considering transactions should consider the chairman's statement and engage in comprehensive shop processes before selecting a close competitor as their partner. Doing so may prevent significant delays and expenses during a later antitrust review of the transaction, when time (and money) may already be of the essence.

PROPOSED ACQUISITION

OhioHealth, a 16-hospital system in central Ohio, proposed acquiring Fairfield Medical Center (FMC), an independent hospital located in nearby Lancaster, Ohio. FTC staff and the Ohio attorney general's office raised competitive concerns with the proposed transaction, and FMC ultimately abandoned the proposed transaction in favor of one with Adena Health, which does not currently operate a hospital in Fairfield County or the surrounding area. The FTC prompted FMC to search for and identify an alternative transaction partner through a robust sale process and heralded the alternate transaction as a win, underscoring the Commission's commitment to rigorous enforcement of the antitrust laws and to preserving competition for US healthcare.

Of note, the Antitrust Division of the U.S. Department of Justice (DOJ) settled a civil antitrust lawsuit earlier this summer against OhioHealth

* The authors, attorneys with McDermott Will & Schulte, may be contacted at swu@mcdermottlaw.com and pthornton@mcdermottlaw.com, respectively.

challenging alleged anticompetitive contract restrictions and prohibited OhioHealth from "imposing terms in its contracts with commercial health insurers that deter budget-conscious healthcare plans that would lower costs for Ohio consumers and employers," among other things. This antitrust prologue[1] may have spurred the FTC to push harder for an alternative buyer in the FMC case.

Upon the announcement of the Adena-FMC transaction's closing, the FTC's Bureau of Competition Director, Daniel Guarnera, said in a statement:[2]

> The Commission remains vigilant in preserving healthcare competition, especially when reviewing deals involving hospitals that serve rural communities. Today's announcement should serve as a reminder that we will stop bad hospital deals. This matter should also serve as a reminder to firms, including hospitals, that might wish to make a failing firm argument. The standard is demanding, and if you have not searched broadly for a buyer, we will work expeditiously with firms to investigate whether there is a better buyer and, if the Commission deems it necessary, go to court to block a bad deal. I'm pleased that [our] staff's dedicated work resulted in a better deal for the people of Ohio without the need to resort to litigation. This is a win for the Commission, for FMC, and, most importantly for FMC's patients and employees.

CHAIRMAN FERGUSON'S STATEMENT REGARDING COMPREHENSIVE AND ROBUST SHOP PROCESSES

In addition to Director Guarnera's statement, Chairman Ferguson used the occasion to issue his own statement[3] describing – in more granular terms than prior FTC guidance – exactly what the FTC looks for when a party invokes the failing firm defense to justify what the FTC views as an otherwise anticompetitive transaction. Citing *Citizen Publishing Co. v. United States*[4] and Section 3.1 of the 2023 Merger Guidelines,[5] Chairman Ferguson reiterated the three-part test for a party to successfully avail itself of a failing firm defense: (1) that the target has a "grave probability of business failure," (2) that the prospects

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[1] https://www.justice.gov/opa/pr/justice-department-requires-ohiohealth-stop-using-anticompetitive-healthcare-contract-terms.

[2] https://www.ftc.gov/news-events/news/press-releases/2026/09/statement-regarding-fairfield-medical-centers-sale-adena-health.

[3] https://www.ftc.gov/system/files/ftc_gov/pdf/ferguson-meador-adena-fmc-statement.pdf.

[4] Citizen Publishing Co. v. United States, 394 U.S. 131 (1969).

[5] https://www.ftc.gov/system/files/ftc_gov/pdf/2023_merger_guidelines_final_12.18.2023.pdf.

of reorganization in bankruptcy are "dim or nonexistent," and (3) that after a good faith effort to obtain other offers, the acquirer is the "only available purchaser."

Chairman Ferguson emphasized the third element: the adequacy of the financially struggling target's shop process. He then identified five factors that FTC staff will scrutinize when evaluating the adequacy of a robust and comprehensive shop process:

- Whether the search solicited interest from the full set of potential buyers;
- Whether interested buyers were given sufficient time to evaluate a transaction;
- Whether buyers received sufficient and equal access to diligence information necessary to evaluate the transaction;
- Whether the seller engaged with interested buyers in good faith; and
- Whether the seller appropriately considered offers from buyers that presented fewer competitive concerns.

Chairman Ferguson also noted that a close competitor's willingness to buy a distressed hospital is not sufficient to justify an otherwise unlawful risk of harm to patients and healthcare workers (*i.e.*, competition).

This is not a new theory (or practice) for the FTC. In 2009, the FTC's Bureau of Competition confronted a similar fact pattern involving a healthcare system's acquisition of a financially distressed hospital, as detailed in a 2009 statement.[6] Even though the hospital was financially deteriorating and the FTC acknowledged as much, FTC staff were troubled that a seriously interested alternative purchaser, the Seton Family of Hospitals, had its due diligence unnecessarily cut short by the agreement between the merged parties.

Rather than litigate to unwind the transaction, the FTC convinced the acquiring healthcare system to give the alternative purchaser a second opportunity to acquire the hospital. The alternative purchaser ultimately declined to proceed and said its decision was based, in part, on the hospital's financial and operational deterioration, including the loss of key personnel. The FTC, however, was "satisfied that the agreement was fairly implemented" and said it would "continue to consider a wide range of approaches to protect competition going forward" in other transactions involving financially distressed parties.

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[6] https://www.ftc.gov/sites/default/files/documents/public_statements/ftcs-closure-its-investigation-consummated-hospital-merger-temple-texas/091223scottwhitestmt.pdf.

Chairman Ferguson's statement makes explicit what the 2009 example illustrated: An inadequate shop process can unwind a deal or force a party to re-shop itself, even well after signing, and financially distressed sellers seeking to assert a failing firm defense (or buyers seeking to transact with the same) should conduct a robust shop process prior to selecting a close competitor as their partner in a transaction that may raise competition issues.

TIPS FOR "SHOPPING"

- Solicit interest broadly and evenhandedly. Send evaluation materials to a diverse and substantial buyer pool, rather than a narrow or pre-selected list. For hospital systems, for example, this may include religious and/or secular systems, for-profit and/or not-for-profit acquirers, and private equity-backed platforms (regardless of any preconceived reservations about those transaction partners).
- Retain an investment banker or strategic advisor early in the process to facilitate a competitive bid process. An independent, professionally run process is strong evidence of good faith and is much more difficult for the FTC, DOJ, or a state attorney general to second-guess.
- Give all prospective buyers robust and complete evaluation materials (including what was provided to other strategic buyers within the bounds of the antitrust laws). Compressed timelines and unequal access to due diligence materials are precisely the deficiencies the FTC, DOJ, or a state attorney general will flag, as the FTC did in the 2009 investigation.
- Document the process contemporaneously. Records of outreach, timelines, and specific buyer responses will allow antitrust enforcement agency staff to "expeditiously review" the shop process.
- Adopt a proactive posture. Consult antitrust counsel early and often to identify when a transaction is likely to raise competitive concerns with the FTC, DOJ, or a state attorney general. If a failing firm defense is anticipated on a deal that has antitrust concerns, initiate a thorough shop process before selecting a close competitor as a transaction partner – not after filing the Hart-Scott-Rodino premerger notification or presenting advocacy on the deal's competitive merits to the agencies. Transacting parties should keep in mind that being required by the agencies to conduct a robust and comprehensive shop process during a merger review can be costly in terms of time, leverage, and deal certainty.

Importantly, neither U.S. antitrust agency endorses the position that a firm qualifies for the failing firm defense simply because it is in bankruptcy

proceedings.[7] In other words, being involved in bankruptcy proceedings does not shield a transaction from scrutiny by the FTC and DOJ. Instead, to qualify for and successfully assert the failing firm defense, the firm must not be capable of reorganizing in bankruptcy, among other elements.

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[7] See, e.g., FTC Reaches Agreement with Winn-Dixie Regarding its Planned Purchase of 68 Stores from Bankrupt Jitney-Jungle Chain, Press Release (Jan. 9, 2001) (FTC sued proposed acquirer of supermarkets from seller in bankruptcy, argued that the proposed acquisition would substantially lessen competition in several markets through the elimination of direct competition, and secured relief via consent order that contained a carveout of four supermarkets and prior approval requirements among other behavioral commitments), available at https://www.ftc.gov/news-events/news/press-releases/2001/01/ftc-reaches-agreement-winn-dixie-regarding-its-planned-purchase-68-stores-bankrupt-jitney-jungle; see also United States v. SunGard Data Systems, Inc. et al., 172 F.Supp.2d 172 (D.D.C. 2001) (DOJ unsuccessfully challenged the acquisition of assets in a bankruptcy auction).