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If You Can’t Beat Them and You Can’t Join Them: Geisinger and Evangelical’s Settlement with DOJ Limits the Scope of Their Partial Acquisition and Collaboration

This Featured Article is contributed by AHLA's Antitrust Practice Group.

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On March 3, 2021, the Antitrust Division of the Department of Justice (DOJ) announced a settlement with Geisinger Health (Geisinger) and Evangelical Community Hospital (Evangelical) that resolves DOJ’s challenge to Geisinger’s partial acquisition of Evangelical. DOJ alleged that several features of the partial-acquisition agreement, combined with a history of close competition and cooperation between the parties, would violate Section 7 of the Clayton Act and Section 1 of the Sherman Act.

The settlement—subject to judicial review under the Tunney Act—will prevent Geisinger from controlling or influencing Evangelical, according to DOJ. In a move to restore competition between Geisinger and Evangelical, the settlement (1) caps Geisinger's ownership interest in Evangelical at 7.5%, (2) eliminates additional entanglements, (3) prohibits most information sharing, (4) sets rules for future cooperation between the parties, and (5) requires antitrust compliance programs and firewalls.

The Investigation and Complaint

On February 1, 2019, Geisinger and Evangelical executed a "Collaboration Agreement." As part of this proposed agreement, Geisinger agreed to acquire a 30% interest in Evangelical in exchange for $100 million towards intellectual property licensing and investment projects. The agreement also provides additional rights to Geisinger, including certain approvals over Evangelical's strategic decisions.

DOJ opened an investigation into the agreement shortly after it was executed, and the hospitals agreed to a hold-separate to maintain the status quo. DOJ filed a complaint on August 5, 2020, to block the partial acquisition.

Most antitrust-related transaction investigations—and particularly investigations that lead to actions to block such transactions—involve a merger or acquisition that results in a change of control. DOJ's enforcement power, however, is not limited to transactions in which a buyer gains control of a target. Section 7 of the Clayton Act specifically prohibits acquisitions of "the whole or any part" of an entity if "the effect of such acquisition may be substantially to lessen competition."[1] Antitrust enforcers can and do investigate partial acquisitions in a similar manner to merger investigations when the transaction in question gives effective control of the target to the buyer, involves substantially all of the relevant assets of the target, or otherwise provides the incentive for the parties to reduce competition between themselves or coordinate their competitive behavior as a result of the partial acquisition.

Here, at only 30% proposed ownership, DOJ did not affirmatively allege in its complaint that Geisinger will "control" Evangelical. From the hospitals' perspective, a sympathetic review of the facts suggests that the hospitals are left to face the might of a DOJ lawsuit for attempting to inject capital into a community's health care system. The hospitals frame the "unique partnership" as an effort to "make healthcare delivery in our region more efficient, cost-effective, and simply better for the patients we serve."[2]

DOJ's complaint, however, contends that the transaction would fundamentally alter the relationship between Geisinger and Evangelical and will consequently harm patients and other health care payers through diminished competition. DOJ's investigation found that the hospitals are close competitors attempting to fully integrate. The closeness of competition became clear to DOJ through the parties' market shares and unhelpful documents from Geisinger and Evangelical. The investigation prompted DOJ to pursue not only a Clayton Act Section 7 case alleging that the partial acquisition substantially lessens competition, but also a Sherman Act Section 1 case alleging that the agreement unreasonably restrains trade.[3] Further, the complaint alleges that the parties understood they could not fully merge, so they structured the agreement to integrate in a manner so as to avoid facing antitrust scrutiny. DOJ then analyzed the agreement in light of the parties' past practices and found a history of problematic collaboration, including a "no poach" agreement, that would only further harm competition through the entanglements created by the partial acquisition agreement.

For a more detailed summary and analysis of DOJ's complaint, please *see* our previous article, available on the AHLA website.

The Settlement

DOJ announced the settlement on March 3, 2021, making the original partial acquisition agreement null and void and replacing it with an Amended and Restated Collaboration Agreement. The result of the settlement and the new collaboration agreement can be described in three categories: prohibitions, permissions, and requirements. First, the parties are prohibited from increasing Geisinger's interest in Evangelical, controlling or influencing each other, and sharing competitively sensitive information. Second, Evangelical is permitted to use Geisinger's $20.3 million investment for specified projects that will benefit the community, and the parties can collaborate on some information technology and software systems. Third, the parties are required to institute antitrust compliance programs and maintain firewalls.

Prohibited Conduct Under the Settlement Agreement

Geisinger is prohibited from: (a) acquiring an interest in Evangelical over 7.5%; (b) exerting control or influence over Evangelical; and (c) sharing competitively sensitive information with, or receiving similar information from, Evangelical. The specific rules surrounding these prohibitions are laid out in detail in the Proposed Final Judgement.

Geisinger Can Only Acquire 7.5% of Evangelical

Geisinger's interest in Evangelical is limited to a passive investment of 7.5%, down from the 30% agreed to between the parties in the attempted potential acquisition.[4] This ownership stake was calculated using the approximately $20.3 million already paid by Geisinger to Evangelical.[5] These funds can be spent only on two projects: (1) improving Evangelical's patient rooms and (2) sponsoring a local center for recreation and wellness.[6]

By limiting the financial entanglement between the competing hospitals, DOJ believes Geisinger will be sufficiently incentivized to compete against Evangelical.[7] The limited ownership stake weakens any potential financial incentive Geisinger may have to not compete. The smaller financial interest reduces the profits Geisinger would recapture from patients switching to Evangelical, reducing its willingness to lose customers to Evangelical, and consequently weakening Geisinger's leverage over insurers.

Geisinger Cannot Take Certain Actions to Influence or Control Evangelical

DOJ alleged that the original Collaboration Agreement contained numerous provisions giving Geisinger the ability to influence and control Evangelical. In order to prevent Geisinger from exerting influence or control of Evangelical, the settlement prohibits Geisinger from:

- appointing directors to Evangelical's board (and vice versa);[8]
- obtaining any management or leadership position with Evangelical that would give Geisinger influence over strategic or competitive decisions;[9]
- consulting with Evangelical on executive-level employment decisions;[10]
- having a right of first offer/refusal over any proposal or offer to Evangelical;[11]
- controlling Evangelical's expenditures or providing a loan or guaranty over losses;[12]
- licensing information technology systems to Evangelical without DOJ consent;[13] and
- entering into a joint venture with Evangelical without DOJ consent.[14]

These provisions serve several purposes, according to DOJ.[15] First, the settlement maintains the independence of the competing hospitals by limiting the involvement in each other's governance, management, or strategic decision making. Second, it prevents Geisinger from interfering in transactions and collaborations between Evangelical and other entities. Third, it ensures financial independence between the parties. Fourth, it allows Evangelical to improve its operations and patient care to become a more effective competitor. And finally, it maintains the parties' competitive independence.

The Parties Cannot Share Competitively Sensitive Information

DOJ was concerned that the original Collaboration Agreement provided for increased information sharing that would encourage greater competitive coordination between the parties. The settlement eliminates these aspects of the original Collaboration Agreement by prohibiting the parties from sharing any non-public information or accessing each other's financial records,[16] and eliminating Geisinger's right of first refusal, which would in effect require the sharing of competitively sensitive information.[17]

Some Investment and Collaboration is Permitted Between Geisinger and Evangelical to Benefit the Community

DOJ acknowledges that Geisinger already provided Evangelical with certain investment from the Collaboration Agreement and already has the power to provide certain services to Evangelical that would benefit patients. The settlement specifically allows Evangelical to: (1) keep Geisinger's $20.3 million investment for specified projects; (2) receive certain information technology systems and support from Geisinger at a discounted rate; and (3) access back-office software systems from Geisinger at commercially reasonable rates.

The original Collaboration Agreement contemplated Geisinger investing $100 million in Evangelical. The settlement agreement prohibits this degree of investment, but allows Evangelical to retain the $20.3 million Geisinger already invested.[18] The funds can only be used, per the settlement, on a specified patient room improvement project and to sponsor a recreation and wellness center.[19]

Second, under the settlement agreement, Geisinger can provide certain information technology systems and support to Evangelical.[20] The services and support will be provided at a discounted rate to enable Evangelical to upgrade its electronic health records systems.[21]

Third, Evangelical can access various back-office software systems from Geisinger at commercially reasonable rates.[22] Evangelical has failed to accomplish such upgrades to date because it is a small independent community hospital and allowing this collaboration will promote the adoption of health information technology to improve the delivery of care to patients.[23]

The Parties Must Implement an Antitrust Compliance Program and Maintain a Firewall

Each party must create an antitrust compliance program to ensure compliance with the settlement and the antitrust laws. This includes appointing a compliance officer, providing copies of and explaining the settlement to certain employees, conducting annual trainings, filing written reports and certifications of compliance, and reporting any violations.[24] As discussed above, the parties are permitted to collaborate regarding some information technology and back-office software systems; however, the parties are required to maintain a firewall to prevent the sharing of competitively sensitive information when collaborating.[25]

Conclusion

DOJ's complaint in *Geisinger-Evangelical* provides a stern warning for competing health care providers that try to subvert or avoid the antitrust laws through partial acquisitions or other devices. Here, DOJ discovered evidence not only that Geisinger and Evangelical were close competitors, but also that the parties were such close competitors they knew that they would not be able to merge or complete a full acquisition. By scrutinizing the parties' agreement and their past practices coordinating their competitive behavior with each other, it is unsurprising that DOJ took action to stop this proposal to tie two competitors together in a way that would lessen competition for patients and health care payers in central Pennsylvania.

The settlement rewrites Geisinger's partial acquisition, effectively freezing it at a 7.5% interest in Evangelical. DOJ's acceptance of the current state without requiring a complete divestiture of its ownership interests allows Evangelical to go forward with specified investments aimed at helping its patients and community. With the exception of some collaboration on information technology support and back office software, the settlement still largely prevents other ongoing entanglements between the parties and mandates protections to prevent antitrust violations going forward.

DOJ's agreement to settle reflects a recognition that some of the efforts between Geisinger and Evangelical are procompetitive and should be allowed to move forward for the benefit of patients and the community. As discussed in our prior article, DOJ may have faced difficulties in proving that Geisinger's economic incentives to compete were diminished through a 30% ownership interest in Evangelical. This uncertainty may have encouraged DOJ to settle the case. Nonetheless, through the settlement, DOJ is allowing some degree of financial entanglement and cooperation between the parties to go forward, explicitly stating that some of the collaborations and investments from the partial acquisition are necessary to achieve procompetitive improvements for patients.[26]

Notably, however, the settlement is silent regarding the no-poach allegations contained in the complaint. As we explained in our prior article, the complaint uses these allegations as evidence of closeness between the competitors. These allegations are potentially more serious because of DOJ's recent criminal enforcement activity in no-poach actions.[27] Since the settlement does not address the no-poach allegations, the parties may still face antitrust enforcement action regarding these allegations in the near future, and will also be defending several class actions brought by nurses and other health care professionals challenging these alleged no-poach agreements.[28]

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[1] 15 U.S.C. § 18.

[2] *Evangelical and Geisinger Agreement Finalized* (Feb. 4, 2019), https://www.geisinger.org/about-geisinger/news-and-media/news-releases/2019/02/04/13/51/evangelical-and-geisinger-agreement-finalized.

[3] The Federal Trade Commission (FTC) normally reviews transactions between health care providers, including hospitals and hospital systems. It is somewhat unusual that this transaction between an integrated hospital system and a single hospital was reviewed by DOJ. It is likely that one of reasons DOJ conducted this investigation instead of the FTC is that DOJ can bring cases under the Sherman Act as well as the Clayton Act, while FTC cannot bring cases under the Sherman Act (although it can bring Sherman Act-type claims under Section 5 of the Federal Trade Commission Act). Because this case was brought by DOJ under both the Sherman and Clayton Acts (i.e., challenging the partial acquisition as well as the parties' other coordinated conduct) instead of just the Clayton Act (i.e., challenging just the partial

acquisition), it suggests that, at least at the beginning of the investigation, FTC and DOJ did not feel confident that a 30% acquisition would lead to a strong Clayton Act Section 7 case.

[4] Competitive Impact Statement at § III., *United States v. Geisinger Health and Evangelical Community Hospital*, No. 4:20-cv-01383 (M.D. Pa. March 3, 2021), https://www.justice.gov/opa/press-release/file/1373356/download.

[5] *Id.*

[6] Proposed Final Judgment at ¶¶ V.A.1-2, *United States v. Geisinger Health and Evangelical Community Hospital*, No. 4:20-cv-01383 (M.D. Pa. March 3, 2021), https://www.justice.gov/opa/press-release/file/1373366/download.

[7] Competitive Impact Statement, *supra* note 4, at § III.A.

[8] Proposed Final Judgment, *supra* note 6, at ¶¶ IV.B.1 and IV.C.

[9] *Id.* at ¶ IV.B.4. (exceptions included for pre-existing joint ventures).

[10] *Id.* at ¶ IV.D. (exceptions included for verification of employment and checking references for new hires).

[11] *Id.* at ¶ IV.B.5.

[12] *Id.* at ¶ IV.B.3 & 6.

[13] *Id.* at ¶ IV.B.7.

[14] *Id.* at ¶ IV.E.

[15] Competitive Impact Statement, *supra* note 4, at § III.B.

[16] Proposed Final Judgment, *supra* note 6, at ¶ IV.G (including an exception for sharing of information necessary to treat patients).

[17] *Id.* at ¶ IV.B.5.

[18] Competitive Impact Statement, *supra* note 4, at § III.E.

[19] Proposed Final Judgment, *supra* note 6, at ¶¶ V.A.1-2.

[20] *Id.* at ¶¶ V.B.1-2.

[21] Proposed Final Judgment, *supra* note 6, at ¶¶ V.B.1-2.

[22] *Id.* at ¶ V.B.3.

[23] Competitive Impact Statement, *supra* note 4, at § III.E.

[24] Proposed Final Judgment, *supra* note 6, at ¶¶ VI.A-E.

[25] *Id.* at ¶ VII.A.

[26] *See, e.g.*, Competitive Impact Statement, *supra* note 4, at § III.E. ("Evangelical has been unable to accomplish such upgrades on its own because of its status as a small independent community hospital. Permitting Evangelical to obtain this electronic medical records upgrade and related support from Geisinger at a discount will benefit patients in central Pennsylvania and promote the adoption of health information technology to improve the delivery of care to patients.").

[27] *See, e.g.*, Indictment, *United States v. Surgical Care Affiliates, LLC*, No. 3-21-cr-0011-L (N.D. Tex. Jan. 5, 2021) (indicting a health care company and an affiliate for agreeing with competitors not to solicit senior-level employees), https://www.justice.gov/opa/press-release/file/1373876/download.

[28] Complaint, *Sauer v. Geisinger Health and Evangelical Community Hospital*, No. 4:21-cv-00263 (M.D. Penn Feb. 12, 2021); Complaint, *Leib v. Geisinger Health and Evangelical Community Hospital*, No. 4:21-cv-00196 (M.D. Penn. Jan. 3, 2021).