



Insight

FTC Seeks to Intervene in COPA-blessed Merger

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Executive Summary

- The state of Louisiana issued a certificate of public advantage (COPA) to permit LCMC Health's \$150 million acquisition of three hospitals owned by HCA Healthcare in December of 2022.
- After the Federal Trade Commission (FTC) informed HCA Healthcare and LCMC Health of the merger's potential federal antitrust law violations, the two hospital systems respectively filed lawsuits against the FTC and the Department of Justice (DOJ), alleging the antitrust enforcement agencies are illegally trying to interfere with their recently completed merger; the FTC countersued, asserting that COPA did not exempt the hospital systems from Hart-Scott-Rodino (HSR) Act premerger notification and mandatory waiting period requirements.
- The scope of the lawsuits centers around a legal doctrine known as state action, which the hospital systems claim immunize the merger from federal antitrust law; a court ruling will further clarify the limits of the FTC's authority in matters of state action.

Introduction

On December 28, 2022, Louisiana's state attorney general issued a certificate of public advantage (COPA) to authorize LCMC Health's \$150 million acquisition of three hospitals owned by HCA Healthcare. The merger was completed in January 2023.

[COPA laws permit](#) hospitals in a concentrated market to merge if the state believes the likely benefits outweigh the potential harm from a loss of competition.

The Federal Trade Commission (FTC) informed both hospital systems that they are in a penalty period, which began on January 1, 2023, for failing to file a premerger notification report with the antitrust agencies, pay a filing fee, and observe the mandatory waiting. The penalty for closing a merger without preclearance is at least \$46,517 per day.

On April 19, 2023, both [LCMC Health](#) and [HCA Healthcare](#) respectively filed separate lawsuits against the Department of Justice (DOJ), the FTC, and the U.S. Attorney General "seeking a declaratory judgment that the Hart-Scott-Rodino Antitrust Improvements Act [HSR]...does not apply to transactions that are immune from federal antitrust law under the doctrine of state action immunity." They argue that state action immunity exempts them from having to file the premerger notification report, undergo the waiting period, or suffer any associated penalties mandated under the HSR Act. The hospital systems argue as their defense that state action, a legal doctrine that shields mergers from federal scrutiny if the permitted activity furthers a clearly articulated state policy and is actively supervised by the state, provides the basis for COPA laws.

In response, the [FTC countersued](#), alleging that a "state's grant of a COPA is not among the statutory

exemptions under HSR Act and has not been recognized by any court as a basis for refusing to comply with the Act.” A court ruling will further clarify the limits on the FTC’s authority in matters of state action.

On April 21, the [U.S. District Court for the District of Columbia](#) told LCMC Health “not to close or otherwise intentionally or negligently undermine the viability, competitiveness, and marketability” of the hospitals it acquired from HCA Healthcare while the legal battle with the FTC works through the court.

Hart-Scott-Rodino Act

The [HSR Act](#) “established the federal premerger notification program, which provides the FTC and the [DOJ] with information about large mergers and acquisitions before they occur.” Merging parties are required to file premerger notification documents with the agencies based on annually updated thresholds and other criteria. At the time of the merger, premerger notification was required if the transaction involved between \$101–\$403.9 million in voting securities or assets, and one of the parties had \$202 million in annual net sales or total assets and the other party had \$20.2 million in annual net sales or assets.

The merger between LCMC Health and HCA Healthcare exceeded both thresholds, yet the two hospital systems failed to file the premerger notification report, prompting the FTC’s lawsuit.

Furthermore, the HSR Act mandates a waiting period of 30 days to close the merger once premerger notification documents are filed. This waiting period affords the antitrust agencies time to review the transaction and determine whether further action is required. The FTC argued that because LCMC Health and HCA Healthcare did not file the premerger notification report that triggers the beginning of the waiting period, closing the merger also violated the HSR Act.

The Lawsuits

The [state action doctrine](#) originated in “response to efforts to apply antitrust rules to the activities of state governments, and is rooted in the notion that Congress passed the Sherman Act to protect competition, not to limit the sovereign regulatory power of the states.”

This legal doctrine is the centerpiece of the lawsuits filed by LCMC Health and HCA Healthcare against the FTC, DOJ, and the U.S. Attorney General. The two hospital systems are “seeking a declaratory judgement that the Hart-Scott-Rodino Antitrust Improvements Act...does not apply to transactions that are immune from federal antitrust laws under the doctrine of state action immunity.” In other words, state action immunizes the acquisition from the premerger notification report, the waiting period, and any associated penalties mandated under the HSR Act.

Shielding a merger from federal antitrust enforcement requires two conditions under state action: It furthers a clearly articulated state policy and is actively supervised by the state. LCMC Health and HCA Healthcare assert that “The State Legislature and Attorney General have expressly and unequivocally concluded that the acquisition furthers the State’s policy goals for the health and welfare of its citizens” and that the state and attorney general have “provided for active supervision by the Attorney General of the Acquisition’s implementation and subsequent operations of the merged entity.”

Louisiana’s COPA law ([La. R.S. §40:2254.1](#)) states that the “Louisiana Legislature has established a process for exempting certain health care acquisitions from enforcement of the antitrust laws in order to promote public

health.” The law “grant[s] the parties to the agreements, mergers, joint ventures, or consolidations state action immunity for actions that might otherwise be considered to be in violation of state antitrust laws, federal antitrust laws, or both.” In other words, the state’s COPA law is intended to immunize certain mergers approved and regulated by the state from federal antitrust scrutiny.

According to the lawsuits, the FTC informed both parties that they may be subject to penalties of at least \$46,517 per day.

In response, the [FTC countersued and asserted](#) that the state COPA law does not exempt the merging parties from the HSR Act’s premerger notification requirements and mandatory waiting period. The agency emphasized that such an “exemption appears nowhere in the text of the HSR Act and has never been recognized as an exemption...by any court in the HSR Act’s forty-seven year history.” The agency asked the court to order the hospital systems to comply with the HSR Act filing requirements and mandatory waiting period and keep assets separated.

Potential FTC Overreach

In a [statement announcing the countersuit](#), FTC Chair Lina Khan stated, “Businesses that believe they can flout the law should be on notice: we will use the full scope of our authority to combat obstruction and vindicate the FTC’s authority to investigate potentially illegal deals.”

Chair Khan’s assertion that the agency has the authority to investigate this deal is incompatible with a recently [published FTC policy paper](#) that concluded COPA laws “[limit] the FTC’s ability to challenge [mergers].”

The [State of Louisiana joined the litigation](#) and asked the court for a “declaratory judgement that the [HSR Act]...does not apply to transactions that are immune from federal antitrust laws under the doctrine of state action immunity.” The lawsuit argued that the FTC is engaging in a “blatant attack on Louisiana’s COPA law...and Louisiana’s state sovereignty.”

A court ruling will further clarify the limits on the FTC’s authority in matters of state action.