AMERICAN BAR ASSOCIATION

SECTION OF ANTITRUST LAW

REPORT ON S. 1022

RECOMMENDATION

The Section of Antitrust Law of the American Bar Association hereby presents its views on S. 1022. The Section of Administrative Law and Regulatory Practice concurs with these views. These views have not been approved by the House of Delegates or the Board of Governors of the American Bar Association, and should not be construed as representing the position of the ABA. The Section of Antitrust Law respectfully opposes S. 1022, and any other Congressional legislation, which uses the appropriations process to deny funding to the Federal Trade Commission ("FTC" or "Commission") for the continued adjudication of any particular law enforcement proceeding, including, but not limited to, the Butterworth-Blodgett merger case to which S. 1022 is apparently directed.

REPORT

Overview and Summary

The Proposed Legislation

On July 16, 1997, the Senate Committee on Appropriations of the 105th Congress (1st Session) reported S. 1022, a bill making appropriations for the Departments of Commerce, Justice, and State, the Judiciary, and related agencies for the fiscal year ending September 20, 1998, and for other purposes.[1] This legislation contains the following proviso:

> That, for a period of one year, none of the funds made available to the Federal Trade Commission shall be spent on an administrative proceeding concerning the merger of two hospitals where the Commission has already sought injunctive relief under 15 U.S.C. 53(b), and prior to July 9, 1997, a Court of Appeals has affirmed the denial of the injunctive relief requested by the Commission unless

[1] S. 1022, 105th Congress, 1st Session (July 16, 1997) (hereinafter "S. 1022"); Report 105-48 of Senate Committee on Appropriations accompanying S. 1022, (7/16/97) (hereinafter "Senate Appropriations Committee Report" or "Committee Report").

further review overturns the decision by the court of appeals.

There is a single piece of pending litigation which fits the description in this proviso: In the Matter of Butterworth Health Corporation and Blodgett Memorial Medical Center, FTC Docket No. 9283. In this case, the Federal Trade Commission is challenging the merger of the two largest hospitals in Grand Rapids, Michigan. The FTC's motion to enjoin this hospital merger preliminarily, pending a full adjudication, was denied by the federal district court. Recognizing the potential for the FTC to institute administrative proceedings to analyze the merger on its merits, the Sixth Circuit Court of Appeals affirmed this decision on July 8, 1997. Pursuant to Section 11 of the Clayton Act, 15 U.S.C. § 21, the FTC also has filed an administrative complaint challenging the transaction. The respondents have moved to dismiss the administrative proceeding and, at this time, the Commission has not decided whether it will pursue the administrative litigation.

S. 1022 would use the appropriations process to intervene in a pending adjudication, divest the FTC of its statutory authority to pursue the merits of that litigation, and potentially affect the natural evolution of substantive antitrust policy in the agencies and courts. The Section of Antitrust Law opposes S. 1022 for the reasons set forth below.

The Background of the Case at Issue

In January, 1996, the FTC filed an action to enjoin the proposed merger of two nonprofit hospitals in Grand Rapids, Michigan - Butterworth Health Corporation ("Butterworth") and Blodgett Memorial Medical Center ("Blodgett"). The FTC sought a preliminary injunction under Section 13(b) of the FTC Act, 15 U.S.C. § 53(b). The district court held a five-day hearing in April, 1996. After hearing the evidence, the court determined "the FTC had established its prima facie case that the proposed merger would violate Section 7 of the Clayton Act" by increasing concentration in the relevant hospital markets to presumptively illegal levels.[2]

Although the district court acknowledged that the FTC had a strong case as measured by the usual antitrust benchmarks, it nonetheless concluded that consumers would be better off if the merger were allowed to proceed. In reaching that conclusion, the district court accepted the position advocated by the hospital's expert that nonprofit hospitals behaved differently and, specifically, that increased market concentration

[2] FTC v. Butterworth Health Corp., 946 F. Supp. 1285, 1294 (W.D. Mich. 1996), aff'd, 1997-2 Trade Cas. (CCH) ¶ 71,863 (6th Cir. 1997). In so finding, the court found that the FTC had established its definition of the relevant markets within which to assess the competitive impact of the merger. The court further found that the merger would increase concentration to presumptively illegal levels in the relevant service markets within the geographic markets the FTC alleged, and that the exercise of market power by the merged entity would not be deterred by either new entry or by any existing hospitals in the market.

among nonprofit hospitals in this case did not necessarily mean higher prices to consumers of health care services.[3] In addition to relying on testimony of the parties to this effect, the court also noted the hospitals' Community Commitment to freeze prices and limit profit margins, and the efficiencies of more than $100 million predicted to result from the merger. Therefore, the court concluded that the hospitals would be unlikely to exercise their market power in a manner detrimental to consumers and denied the request for a preliminary injunction, thereby allowing the merger to proceed.[4]

The FTC issued an administrative complaint on November 18, 1996 alleging that the proposed merger of Blodgett and Butterworth violates Section 7 of the Clayton Act. In addition, the FTC filed an appeal of the district court's denial of preliminary injunctive relief to the Sixth Circuit Court of Appeals. In an unpublished per curiam opinion issued on July 8, 1997, the Sixth Circuit concluded that the district court did not abuse its discretion in declining to grant a preliminary injunction. In reaching its decision, the Sixth Circuit recognized that administrative proceedings were currently pending to determine the legality of the proposed merger on the merits. Since it relied on this fact, the Sixth Circuit may have evaluated the lower court decision differently if the administrative proceedings were barred and it was dealing with a final ruling on the merits.[5]

The hospitals filed a Motion to Dismiss the administrative proceeding before the Commission on the grounds that adjudication of the administrative proceeding would be contrary to the public interest. The FTC Staff has opposed the Motion to Dismiss the administrative proceeding on the grounds that the merger of the two hospitals in the Grand Rapids area presents important issues that merit thorough examination by the Commission on a full evidentiary record.

If the pending Motion to Dismiss the administrative proceeding is denied, the effect of S. 1022 would be to preclude the FTC from pursuing its administrative complaint and litigating the merits of its challenge to the Butterworth-Blodgett merger before an administrative law judge.

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[3] Id. at 1297. The court also found it relevant that the hospitals' board members are local business and community leaders and found that the hospitals' respective board chairmen had "both testified convincingly that the proposed merger is motivated by a common desire to lower health care costs and improve the quality of care." Id. However, there is a dispute between the parties as to whether this issue was fully litigated in the district court.

[4] This finding runs contrary to a number of cases which have held that nonprofit hospitals should not be treated differently under the antitrust laws. FTC v. University Health, Inc., 938 F.2d 1206, 1218, 1221-2 (8th Cir. 1991); U.S. v. Rockford Memorial Corp., 898 F.2d 1278, 1285 (7th Cir. 1990); U.S. v. Mercy Health Services, 902 F. Supp. 968, 989 (N.D. Iowa 1995).

[5] 1997-2 Trade Cas. (CCH) ¶ 71,863 at 80,064 (6th Cir. 1997). Citing the different standard of review applicable to denials of preliminary relief, the court stated that it was "not disposed to disturb the district court's factual findings" challenged in the appeal.

Discussion

The Appropriations Process Should Not Be Used to Intervene in a Pending Adjudication and to Preclude the FTC's Exercise of its Statutory Authority to Adjudicate It

Intervention in a Specific Pending Case

In denying funding to the Commission to pursue a specific ongoing case, S. 1022 would intervene with the normal process of adjudication of the merits of the case. In *Butterworth-Blodgett*, the district court decided the request for an injunction and, correspondingly, some of the key legal and policy issues raised by that case regarding hospital mergers, *preliminarily* -- pending an expected Commission decision on whether to pursue administrative proceedings.

The Section opposes use of the appropriations process as the vehicle by which to essentially halt a specific ongoing case in midstream. There are several reasons why such intervention is unsound. Congressional attempts to influence the outcome of a single case are subject to the charge that they constitute special-interest legislation (whether or not they are). Action through the appropriations process is particularly vulnerable to this charge. In an appropriations committee context, action is usually fast and, unlike legislation that goes through the committees with substantive jurisdiction, is not usually taken on the basis of hearings and policy input from affected and interested parties. Therefore, the grounds for action tend to remain unarticulated -- as in this case -- and the public can have no confidence that those grounds were proper. Thus, action on a single piece of litigation through the appropriations process tends to undermine public confidence in the integrity of the legislative process.

For related reasons, action of this nature also tends to undermine public confidence in law enforcement and the adjudicative process. If parties to litigation can affect the outcome of their particular matters by seeking quick, favorable action in Congress, independent of the merits of their position, it appears that those with significant influence in Congress can avoid the consequences of general laws and regulatory statutes ordinarily enforced though agencies and courts. Congressional action to affect the outcome of a specific case through quick appropriations legislation may subvert the natural evolution of important policy issues through the courts.

In addition, use of the appropriations process to intervene in a specific case is, at best, unorthodox, and at worst, a potential threat to the independence of the judicial process. By analogy, S. 1022 is tantamount to using the appropriations process to deny funding to a federal district court to adjudicate the merits of a case after the court denied a motion for a preliminary injunction, but before the matter is fully heard at trial.

Intervention in the Statutory Discretion of the FTC to Pursue Specific Cases

Under the Federal Trade Commission Act passed by Congress in 1914, the FTC has had the legal authority to seek a preliminary injunction in federal district court to enjoin a proposed merger or acquisition. If a preliminary injunction is denied, the FTC has the statutory right and authority to file an administrative complaint against the merging parties if it believes that the merger will violate Section 7 of the Clayton Act.[6] The FTC was vested with this authority in connection with its creation as an independent agency with the expertise to make determinations on competition policy in merger cases.

In cases where a federal district court denies the FTC's request for a preliminary injunction, the determination whether to continue the merger challenge in an administrative litigation proceeding is not automatic. Rather, the FTC decides on a case-by-case basis whether to proceed with administrative litigation after the denial of a preliminary injunction. Essentially, this decision is based on whether further administrative proceedings would be in the public interest.[7] In some cases following the denial of a preliminary injunction the FTC has proceeded with a full administrative proceeding, while in other cases the FTC has decided that further proceedings would not be in the public interest.[8] The Butterworth-Blodgett case is not unique simply because it involves issues regarding the competitive effects of nonprofit hospital mergers and the propriety of certain merger remedies.

For some time, there have been reasonable differences of opinion as to the appropriateness of the FTC's pursuit of administrative litigation following the denial of a preliminary injunction. The FTC's decision to pursue administrative litigation in the Butterworth-Blodgett case has brought this public policy issue to the surface. For the purpose of this report, the Section of Antitrust Law takes no position on either the merits of further FTC action in Butterworth-Blodgett or, more broadly, the merits of the current statutory policy permitting the FTC to bring administrative litigation following the denial of a preliminary injunction.

The Section of Antitrust Law submits, however, that to the extent S. 1022 addresses these important policy issues, Congressional action through a limitations rider to appropriations legislation is far less conducive to consideration of such issues than thorough consideration by the substantive Congressional committees established to

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[6] 15 U.S.C. § 21; Hospital Corp. of America v. FTC, 807 F.2d 1381, 1386 (7th Cir. 1986), cert. denied, 481 U.S. 1038 (1987).

[7] Statement of Federal Trade Commission Policy Regarding Administrative Merger Litigation Following the Denial of a Preliminary Injunction, 1995 Trade Cas. (CCH) ¶ 13,242 (June, 1995).

[8] Compare R.R. Donnelly & Son, Inc., Dkt. 9243 (1995), with Lee County, Dkt. 9265, and Freeman Hospital, Dkt. 9273.

consider such issues and to build consensus on them. If the rider to S. 1022 is based on policy questions related either to hospital mergers (discussed below) or the FTC's authority and procedures, many members of the public and a variety of government agencies at local, state and federal levels should be given the opportunity to express their views on such important policy questions. Congressional and public debate, particularly through the substantive committees which entertain such debate, is important to a successful and thorough resolution of those issues.

Federal Antitrust Policy Should Not Be Determined Through the Appropriations Process

To the extent S. 1022 is designed to impact the development of hospital merger policy under the antitrust laws and the competition policy of the United States, it would be only the latest in a series of appropriations bills that have attempted to use FTC funding to impact antitrust policy. The ABA's Board of Governors, and representatives of the ABA, previously have adopted and expressed the position that the appropriations process should not be used for antitrust policymaking.[9]

Appropriations-based policymaking -- whether on the role of the FTC in hospital merger cases or on the development of antitrust and hospital merger policy -- is an inappropriate substitute for enacting substantive legislation, for the same reasons as those cited above. Policymaking through the appropriations process diverts evaluation and review of the issue away from the committees with subject matter expertise and places it in the hands of a committee which is concerned primarily with funding considerations. This committee is unlikely to commit the same time or resources to study relevant policy issues and, therefore, may neither understand nor appreciate the long-term effects of legislation that undermines the agency's statutory authority.[10]

In addition, as the Section has previously commented, since the Senate Appropriations Committee adopted S. 1022 without any hearings or public debate on this limitation rider, it may reflect the policy preferences of only a small group of

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[9] These ABA positions have opposed reliance on the appropriations process as a mechanism to fund the Commission, and have urged Congress to reauthorize the Commission. Reauthorization of the Federal Trade Commission: Hearings Before the Subcomm. on Transportation and Hazardous Materials, H. Rep. Comm. on Energy and Commerce, 103rd Cong., 1st Sess. (May 26, 1993) (Statement of Michael L. Denger, Chair of Antitrust Law Section, American Bar Association); Report to Board of Governors by J. Thomas Rosch, Chair of Antitrust Law Section of American Bar Association (May 20, 1991).

[10] Devins, *Regulation of Government Agencies Through Limitation Riders*, 1987 Duke L.J. 456, 464-65; Bloch, *Orphaned Rules in the Administrative State: The Fairness Doctrine and Other Orphaned Progeny of Interactive Deregulation*, 76 Geo. L.J. 59, 112-14 (1987). *See* Standing Rules of Senate, Rule XVI Appropriations and Amendments to General Appropriations Bills, Section 2(c), S. Doc. 104-1, 104th Cong., 1st Sess. (1995).

Members rather than a true consensus of Congress.[11] The rider deserves a more complete examination of its public policy implications, and its long-term effect on FTC policy or practice in merger investigations, than the Appropriations Committee has been able to devote.

Finally, S. 1022 creates unnecessary confusion as to the availability of administrative litigation in future merger cases and may encourage others to use the appropriations process to interfere with FTC investigations and enforcement actions.

For the reasons stated above, the Section of Antitrust Law strongly opposes the enactment of the limitation rider contained in S. 1022.

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[11] *See* n. 9, above; Bloch, supra note 11, at 112.