axinn

Survival vs. Antitrust: Inside the FTC's Strict Standards for "Failing" Hospital Acquisitions

6 MIN READ

September 16, 2026, 2:43 PM
By: Lisl J. Dunlop

Financial pressures on rural and critical access hospitals are well documented. Losses due to low reimbursements by private insurers, significant volumes of Medicare, Medicaid and uninsured patients, as well as the end of pandemic-related federal payments, have led to service cuts and closures of facilities. A July 21, 2026, analysis by the Center for Healthcare Quality and Payment Reform noted over 700 hospitals at risk of closing, 264 of which are at immediate risk of closure, with most states having more than 25% of rural hospitals at risk and 11 states having 50% or more at risk. And with an anticipated $1 trillion in Medicaid and CHIP cuts on the horizon, as well as tightening eligibility requirements, financial pressures will become even more acute.

Against this backdrop, financially pressured hospitals are looking to larger systems to help maintain services and make ongoing investments. But what happens when the best option for such a partner is also a significant competitor? The Federal Trade Commission's recent Statement regarding Fairfield Medical's acquisition by Adena Health and the accompanying Statement of Chairman Andrew N. Ferguson Joined by Commissioner Mark R. Meador shed light on the requirements of the "failing firm defense" when seeking to defend such a transaction. Chairman Ferguson's statement in particular demonstrates a strong focus on the adequacy of a struggling hospital's search for an alternative buyer.

What is the "failing firm defense"?

The FTC, which reviews most hospital transactions reported to the federal antitrust agencies (and some that are not reported), has historically been somewhat skeptical of arguments that a hospital is in such dire financial straits that it needs to merge to survive. The FTC has regularly challenged transactions where such arguments have been made (for example, Novant's 2024 proposed acquisition of Lake Norman Regional Hospital). Since 1982, the federal antitrust agencies' Merger Guidelines have set out a stringent standard for the so-called "failing firm defense," which, if successful, would allow an otherwise anticompetitive merger to go ahead. According to Section 3.1 of the 2023 Merger Guidelines, the failing firm defense has three requirements:

1. That the firm faces the "grave possibility of a business failure," meaning that the allegedly failing firm would be unable to meet its obligations in the near future;

2. That the failing firm would be unable to reorganize successfully under Chapter 11; and

3. That the acquiring firm is the only available purchaser and the failing firm has made unsuccessful good-faith efforts to elicit alternative offers that would keep the assets in the relevant market and pose less severe danger to competition than the proposed merger.

FTC guidance on the failing firm defense

Over the years, and under leadership from both political parties, the FTC has put out several statements about when the failing firm defense may be applicable.

In 2020, then Director of the FTC's Bureau of Competition, Ian Conner, responding to a "surprising number of failing firm claims by merging parties" in the COVID-induced economic downturn, issued a blog post: *On "Failing" Firms—and Miraculous Recoveries*. The post noted that the standard for claiming a firm is failing is high: "failing is equated with reducing the acquired firm to nothing—not only does the business no longer exist, but the productive assets are also dismantled or redeployed for use outside the relevant market." Conner made clear the FTC's skepticism about claims of imminent failure, observing that "it has been striking to see firms that were condemned as failing rise like a phoenix from the ashes once the proposed transaction was abandoned in light of our competition concerns" and admonishing that counsel should think twice before making such claims. Having said that, Conner noted that the FTC "will accept solid evidence that a firm is failing, and step aside when justified by the full evidence."

But a hospital need not already be in jeopardy of shutting down to benefit from the defense. In a 2014 speech, then Director of the FTC's Bureau of Competition Debbie Feinstein noted that the FTC has closed investigations of acquisitions of financially distressed hospitals even when the facts would not support a strict failing firm defense. While a struggling hospital may have sufficient cash reserves to fund operations and its revenues cover expenses in the short term, the evidence may show that the hospital lacks sufficient reserves to make identified capital improvements, resulting in declines in its competitive significance. In these cases, arguments that a hospital is "flailing," rather than about to fold, have been accepted.

The search for alternative buyers and the Fairfield Medical acquisition

Several FTC statements have focused on the third element of the defense: the need to search for alternative buyers. In 2015, Director Feinstein and her Deputy Director, Alexis Gilman, published a blog post discussing several cases in which parties had failed to take sufficient steps to find a less problematic acquirer: *Power Shopping for an Alternative Buyer*. Feinstein and Gilman stressed that the failing firm defense is limited to situations where "the acquiring company is the *only* available purchaser," meaning the struggling hospital must have performed more than a perfunctory search for alternative buyers. They identified hospital mergers in which the FTC's investigation uncovered other potentially interested buyers who had not initially been approached. In response, in one case, the hospital abandoned the original transaction and sold to the alternative buyer, and in another, the hospital delayed the transaction until a potential alternative buyer had more time to kick the tires (although that buyer decided not to proceed with the acquisition).

The search for an alternative buyer was also the focus of the FTC's most recent statements concerning the acquisition of Fairfield Medical Center (FMC), a hospital system in southeastern Ohio. The FTC initially investigated a proposed acquisition of FMC by OhioHealth, a large system with facilities in Fairfield County, and raised competitive concerns about that acquisition. The FTC staff encouraged FMC to consider alternative buyers. FMC did so and found a different hospital acquirer without a facility in Fairfield County. The FTC did not challenge the new acquisition.

In his statement on the acquisition, Chairman Ferguson stressed that the FTC would look closely at the *process* that a financially distressed hospital followed to identify potential buyers. Although recognizing that the adequacy of a search would be determined by case-specific facts, he identified the following best practices:

- The search must solicit interest from the full set of potential buyers
- The seller must engage with all interested potential buyers in good faith
- Potential buyers must receive sufficient and equal access to necessary information and be given sufficient time to evaluate a potential transaction
- The seller must appropriately consider offers from buyers that do not present competitive concerns
- The entire process should be documented so that it can be reviewed and assessed by the FTC staff

Chair Ferguson noted that such a search process could generate a higher offer price than a less fulsome process, but he further emphasized that, "if that search process yields an offer that would preserve competition, rather than substantially lessen it, the seller may not accept the anticompetitive offer even if it is more lucrative to do so." And if the process itself is determined to be insufficient, the staff may demand that the selling firm re-shop itself appropriately, which would likely cause delays.

These considerations will become increasingly important with the increasing financial pressures on rural and safety-net hospitals and agency focus on hospital transactions. Sale processes may take longer. Dealmakers should also take into account potential impacts on

deal dynamics from the FTC's most recent guidance, expressly pushing hospitals to combine with acquirers that may offer less if they pose fewer antitrust concerns.

Related People

Lisl J. Dunlop

Related Services

Antitrust

To subscribe to our publications, click here.

News & Insights

- Consero Healthcare General Counsel Forum 2026
  SPONSORSHIP **ANTITRUST**
- Energizing Tomorrow: The Future of Energy, Antitrust & International Business Law
  SPONSORSHIP **ANTITRUST**
- IBA Annual Conference 2026
  SPONSORSHIP **ANTITRUST**
- CCWC 22nd Annual Career Strategies Conference
  SPONSORSHIP
- Fordham Competition Law Institute's 53rd Annual Conference on International Antitrust Law and Policy, and Antitrust Economics Workshop
  SPONSORSHIP **ANTITRUST**
- Women, Influence, & Power in Law Conference 2026
  SPONSORSHIP **ANTITRUST**
- IP Litigation North America Summit 2026
  SPONSORSHIP **INTELLECTUAL PROPERTY**
- Axinn Partners Named to Lawdragon's 2027 500 "Leading Litigators in America" Guide
  AWARDS & RECOGNITIONS **ANTITRUST**
- HNBA/VIA Annual Convention 2026
  SPONSORSHIP **ANTITRUST**
- The DOJ's Antitrust Whistleblower Rewards Program
  WEBINAR **ANTITRUST**