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Health Care Alert: Seventh Circuit Reverses Lower Court Denial of Preliminary Injunction in Chicago Area Hospital Merger

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On Monday, the U.S. Court of Appeals for the Seventh Circuit overturned a district court order denying a request by the Federal Trade Commission (FTC) and the state of Illinois (collectively, the government) to preliminarily enjoin a merger between two Chicago-area health systems, Advocate Health Care Network (Advocate) and NorthShore University HealthSystem (NorthShore) (collectively, the hospitals). This is the second time in as many months that a federal appellate court has reversed a district court's denial of a preliminary injunction in a hospital merger case.

Echoing last month's Third Circuit decision, the Seventh Circuit's ruling focused on the district court's rejection of the government's proposed geographic market. To determine the geographic market, the government relied on the hypothetical monopolist test, which seeks to determine the area within which a single firm "could profitably raise prices above competitive levels." The focus of the parties' arguments was a proposed geographic market that included eleven Chicago-area hospitals—six party hospitals and five nearby hospitals—but excluded "destination hospitals," such as academic medical centers (the NorthShore area). Within this area, the Herfindahl-Hirschman Index calculation showed that the merger would result in a presumptively anticompetitive level of market concentration.

In rejecting the district court's conclusions relating to the relevant geographic market, the Seventh Circuit highlighted three notable features about the health care industry that must frame the economic analysis:

1. Patients tend to seek health care services close to their homes and workplaces—a characteristic that generally supports a smaller relevant geographic market.
2. Health care consumers "vary in their hospital preferences." Unlike consumers in the general market where "one Pabst Blue Ribbon . . . may be as good as another, no matter where they are bought," patients differ in how much they value a hospital's reputation and location. Attempting to account for these distinctions often results

in an oversized market because it assumes that, if some patients will travel for care before a merger, more will do so to avoid a price increase. In fact, the evidence showed that a “silent majority” of patients will not travel,” which in turn enables anticompetitive price increases.

3. In today’s health care market “consumers do not directly pay the full cost of hospital care” because insurance companies cover most of these costs. Thus, while an antitrust analysis must consider the effect on patients, the relevant geographic market is “most directly about ‘the likely response of insurers.’” Moreover, hospital competition can be divided into “two stages: one in which hospitals compete to be included in insurers’ networks, and a second in which hospitals compete to attract patients.” Thus, insurers must “respond to both prices and patient preferences,” whereas patients exhibit little price sensitivity.

Because of these general market characteristics, the Seventh Circuit rejected the district court’s overreliance on patient-focused data, such as patients’ willingness to travel outside of the NorthShore area for hospital care, and focused instead on the evidence supporting the hospitals’ likely market power within the NorthShore area. Such evidence included, for example, the fact that “[n]o health insurance product has been successfully marketed to employers in Chicago without offering access to either NorthShore hospitals or Advocate hospitals.” Evidence also showed that the “destination hospitals” to which some patients traveled offered a higher level of care than the community hospitals included in the geographic market; therefore, such hospitals were appropriately excluded from the geographic market. Finally, the court observed that, although some patients are willing to travel, the vast majority prefer to receive care locally. As a result, insurers must offer products that provide patients with options for receiving local care in order to ensure that employers will offer their plans and that employees will sign up for them. All of these evidentiary points supported the government’s proposed relevant geographic market.

In short, the Seventh Circuit explained that the essence of the geographic market question is “how many hospitals can insurers convince most customers to drive past to save a few percent on their health insurance premiums?” Because the government made a “strong case” that the number in the NorthShore area is quite small, the Seventh Circuit enjoined the merger and remanded the case to the district court for reconsideration of the preliminary injunction motion.