

Antitrust Advisory: Latest Chapter in Evanston Hospital Antitrust Saga: Class Certification Denied in Private Antitrust Case

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Evanston Northwestern Healthcare Corporation (ENH) was the target of the Federal Trade Commission (FTC)'s signature retrospective challenge to a consummated hospital merger. The FTC successfully challenged the January 2000 merger between ENH and Highland Park Hospital. The FTC staff had sought divestiture as a remedy, but the FTC ultimately chose to impose conduct remedies, requiring the merged hospitals to each contract separately with payors. Now, the Evanston saga continues to spawn notable antitrust jurisprudence as, in a follow-on private antitrust suit challenging the merger, the United States District Court for the Northern District of Illinois has recently denied class certification in the case.

The class certification landscape is one that has been evolving over the past few years at an increasingly rapid pace, particularly with regard to potential antitrust class actions. Thus, in addition to its prominent pedigree, this case is important for every business as it highlights the critical role that reliable expert testimony plays in class certification and the strategies that some purported class experts use to avoid rigorous analysis. The case also demonstrates the evolving level of judicial scrutiny of class certification motions in antitrust cases.

Background

This case follows a previous FTC proceeding in 2004 in which the FTC alleged that the merger between ENH and Highland Park Hospital substantially lessened competition and enabled ENH to raise its prices for inpatient services to private payors above the prices that the hospitals would charge absent the merger, thus violating § 7 of the Clayton Act. The FTC ordered ENH to divest the acquired assets of Highland Park Hospital. On appeal, the full Commission, in August 2007, upheld the conclusion that the merger violated the Clayton Act, but reversed the divestiture, instead ordering conduct remedies that required ENH to establish two separate and independent teams for negotiating contracts with payors (one team for Evanston Hospital and Glenbrook Hospital and a separate team for Highland Park Hospital).¹

In the recent Northern District of Illinois case, the plaintiffs (four different direct purchasers of health care services from ENH) alleged that, through the January 2000 merger, ENH acquired monopoly power over health care services in the relevant geographic market and abused, and continues to abuse, its monopoly power to maintain market dominance by unreasonably restraining trade, and thus artificially and anticompetitively raising the price of health care services to plaintiffs and members of the putative class. At issue were:

1. the plaintiffs' motion to certify a broad class of plaintiffs that would include all persons or entities in the United States and Puerto Rico, except those who solely paid fixed amount co-pays, uninsureds who did not pay their bills, Medicaid and Medicare patients, government entities, the defendant, and other providers of healthcare services; and
2. plaintiffs' and defendant's motions to exclude the other party's expert testimony and reports.

The Court denied all motions.

Class Certification

Under the Federal Rules of Civil Procedure, a party seeking class certification has the burden to prove 1) numerosity; 2) commonality; 3) typicality; and 4) adequacy of representation. In addition, a plaintiff seeking class certification under Federal Rule of Civil Procedure 23(b) must prove that:

1. questions of law or fact common to the class members predominate over questions affecting only individual members; and
2. a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

In many cases, the first four elements are easily proved, and the majority of the "battle" is fought (and usually won or lost) over whether common issues predominate over individualized ones; the same was true in this case. The parties did not dispute the numerosity and commonality elements. And the Court, with minimal discussion, determined that the other elements were satisfied because:

1. the named plaintiffs' claims all arose out of the same conduct (the merger) (typicality); and
2. plaintiffs produced sufficient evidence to show that the interests of the putative class members who received services of increased quality after the merger would not conflict with the interests of the individuals who paid higher prices for services of pre-merger quality, and ENH did not proffer evidence to dispute the FTC's finding that the increases in quality of services at ENH were not a consequence of the merger (adequacy).

To determine whether predominate proof will dominate over individualized proof in an antitrust case, plaintiffs must be able to prove with common evidence each element of their antitrust claims: 1) a violation of antitrust law; 2) injury caused by the violation (impact); and 3) measurable damages. This case focused on the first two elements.

1. Proving a Violation of Antitrust Law

ENH argued that individualized issues would predominate over common issues with respect to 1) alternative dispute provisions contained in the individual contracts of some Managed Care Organization (MCO) putative class members; and 2) the statute of limitations defense. In essence, ENH argued that because only some putative class members had contracts with

alternative dispute resolution provisions in their contracts with ENH, individualized proof would be required as to those plaintiffs. The Court disagreed and relied partly on the fact that ENH, in its motion to compel arbitration for all MCOs, did not make individualized arguments, and instead stated that the terms of each contract all contemplated arbitration. ENH also argued that the evaluation of its statute of limitations defense required individualized analysis. The Court disagreed, finding that the applicability of the statute of limitations would turn on the resolution of five common issues:

1. whether the statute of limitations was triggered by knowledge of the merger or at some other time;
2. whether ENH engaged in continuing violation of antitrust law;
3. whether the letters sent from ENH to various entities put them on notice of the merger;
4. whether such letters provide evidence of fraudulent concealment; and
5. whether the knowledge of a MCO, self-insured entity, or fully-insured entity can be imputed to insured individuals under the principles of agency law,

and would not likely be affected by individualized evidence.

2. Proving Antitrust Impact and Damages

In order to prevail on the merits, every class member must prove at least some antitrust impact resulting from the alleged antitrust violation. At the class certification stage, plaintiffs need not prove the element of antitrust impact, but they must “demonstrate that that element is capable of common proof at trial through evidence that is common to the class rather than individual to its members.” It is at this stage that parties rely on testimony and reports from experts, and at which the court is often called on to determine the winner in a duel of those experts. In this case, both parties presented reports and oral testimony from their respective experts as to how antitrust impact could be proven at trial. Both parties also moved to strike the other’s expert reports. The Court discussed those methods in length and denied both motions to strike, stating that the Court was aware of the shortcomings in each report and could assess the credibility of each on its own.

Ultimately, the Court found that the plaintiffs could not prove antitrust impact through common proof, but would instead require individualized proof at trial. The linchpin of that decision was that the plaintiffs’ expert relied on assumptions, and “plaintiffs [did] not put forth credible evidence to validate these assumptions.” The plaintiffs’ expert presented a method for adjusting his analysis to accommodate variable price increases. The method was a two-step approach: “1) calculate the average percentage increase (or decrease) across all variably priced services and 2) calculate how much of a service’s new price (if any) was the result of this average increase.” The expert acknowledged that the two step-approach rested on the assumption that any price due to the merger was distributed evenly across services, which came out of a further assumption that ENH increased prices at uniform rates across services. And without evidence to prove that assumption, the Court held that plaintiffs did not meet their burden to show that common proof would predominate over individualized proof as to antitrust impact and damages at trial. Thus, the Court denied class certification.

Conclusion

This holding is in line with other recent antitrust class certification holdings that, particularly in antitrust cases, assumptions are not adequate proof that common issues of law and fact will predominate over individualized ones, particularly with regard to proving antitrust impact. This is perhaps the main weapon in the arsenal for companies defending potential class action antitrust suits. This case also demonstrates the importance of expert reports and testimony at the class certification stage, especially in light of courts' increasing willingness to determine a winner in a duel of the experts at the certification stage. While some courts still continue to defer such assessments to trial, the recent trend is to turn class certification motions into mini-merits hearings. And here, even with a FTC finding of liability to backstop plaintiffs, the Court was willing to rigorously apply the requirements of antitrust impact and reject class status.

Endnotes

¹ Please see our August 2007 Advisory, [FTC Rules Evanston Northwestern Merger Violated Antitrust Law](#)

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