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Antitrust Alert

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FTC Wins Preliminary Injunction, Stopping Second Hospital Merger in a Week

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In a second hospital merger victory in a week for the Bureau of Competition at the Federal Trade Commission (FTC), Federal District Court Judge Kapala in the Northern District of Illinois granted the FTC's motion for a preliminary injunction (PI) last week, stopping a merger between two hospital systems in Rockford, Illinois. The decision kept the parties' assets separate pending an administrative litigation before an FTC administrative judge, which was to begin on April 17, 2012. The hospitals withdrew their merger filing on April 12, ending that case.

The case illustrates the continuing value of a strong structural case for enforcement agencies in federal court; in this instance, the merger reduced the number of competitors from three to two. It also demonstrates the limitations of efficiency arguments at the PI stage, especially when the deal is not motivated by the efficiencies. An unusual aspect of the case is that the administrative litigation proceeded along with the PI litigation in federal court. As a result, the administrative hearing was scheduled to occur less than three weeks after the decision to grant the preliminary injunction. The district court judge seemed cognizant of the impending administrative case, noting repeatedly that the FTC, and not the court, is authorized to determine whether the transaction violates antitrust laws.

Background

The parties, OSF Healthcare System (OSF) and Rockford Health System (RHS), entered into an agreement in January 2011 under which OSF would acquire all of the operating assets of RHS. After an investigation of the transaction, the FTC initiated an administrative litigation against the transaction in November 2011 and filed for the preliminary injunction in district court a day later. The three-day evidentiary hearing on the FTC's preliminary injunction motion was held in February 2012 after expedited discovery.

The Litigation and the Court's Decision

Neither market definition nor market shares were contested by the parties. As a result, the FTC was able to show that the deal reduced the market for general acute care inpatient services sold to commercial health plans in the Rockford area from three competitors to two with the merging parties controlling approximately 60% of the market. The FTC argued that the increased concentration from the deal was likely to raise prices as a result of coordinated effects after the merger, showing that there was a history of collusion in the market. Under a coordinated effects theory, a merger might be anticompetitive if it allows all the firms in the market to raise prices.

As in ***ProMedica*** a few weeks ago, the merging parties rebutted the structural case, this time arguing that: there remained a strong competitor in the market after the transaction, SwedishAmerican; the buyers are sophisticated and powerful insurance companies; and the structural case was "eviscerate[d]" by the parties' proposed stipulation (explained below). The parties also argued that the deal was procompetitive given the efficiencies it creates.

Competition from SwedishAmerican

The court first addressed the parties' argument that continued competition from SwedishAmerican, the acknowledged pre-merger leader in the market, could limit the anticompetitive effect of the transaction. It isn't clear from the decision whether the parties were able to produce any evidence that SwedishAmerican was a pricing maverick, such that its continued existence in the market drove competition. In the end, the court quickly disposed of the argument, finding that it was unable to find "any authority which holds that the FTC is required to show that all competition will be eliminated as the result of a merger in order to obtain an injunction pending the administrative trial on the merits."

Sophisticated Buyers

The parties argued that the payers would still be able to put together a network of providers to satisfy their customers' needs after the deal that did not include the merged entity. The court evaluated the evidence as to the competitive value of a payer's network without the merging parties' hospitals. After reviewing the competitive history of one-hospital payer networks in the Rockford area, the court concluded that any payer that only used SwedishAmerican would be at a disadvantage against payers that used the merging parties' hospitals, giving the merging hospitals significant "bargaining leverage" over the payers after the merger.

Proposed Stipulation

The merged parties offered to stipulate that they would not engage in certain sorts of conduct if the merger were allowed to close. Oddly, given the case against the deal, the stipulation did not address the possibility of price increases after the merger closed. The court dismissed the argument on this basis. A question remains whether the court would have accepted a promise not to raise prices for some period of time as an argument in favor of allowing the deal to close prior to an administrative hearing. Presumably the FTC would have rejected such an offer prior to its decision to challenge the deal.

Efficiencies

In evaluating the efficiencies, the court noted its own "limited role in these proceedings and expresse[d] no opinion on the ultimate merits of the proposed merger." The court again noted the importance of the strong structural case by the FTC and concluded that the conflicting evidence on the efficiencies of the transaction actually "demonstrated the need for further substantive review by the FTC at the trial on the merits."

One of the problems that the parties had in demonstrating the efficiencies of the transaction was that they had not made final plans as to how they would integrate the hospitals after the deal. Thus, the parties often had to concede either that they were not sure if they were in fact going to make the indicated investments after the deal closed, that they might make the investments regardless of whether the deal closed, or both. Other efficiencies claimed by the parties, including claims for improved quality or other community benefits, were dismissed as not being merger-specific.

If you have any other questions regarding this or other antitrust concerns, please contact one of the attorneys in our **Antitrust Practice Group**.