

# Client Alert

Antitrust &amp; Litigation Practice Group

April 9, 2012

## FTC Granted Preliminary Injunction Against OSF Healthcare System/Rockford Health System

The U.S. District Court for the Northern District of Illinois granted the request for a preliminary injunction by the Federal Trade Commission (FTC), pending a full administrative trial before an FTC Administrative Law Judge (ALJ) on the merits of OSF Healthcare System's proposed acquisition of Rockford Health System on April 5, 2012. The decision marks the second FTC preliminary injunction granted by a U.S. District Court against parties in a hospital merger in a year (the first being the FTC's action against ProMedica and St. Luke's Hospital). In the last year, the FTC also lost its attempt to enjoin the transaction between Phoebe Putney Health System and Palmyra Park Hospital; it is currently seeking cert from the Supreme Court to overturn the lower court's actions to stop the FTC based on a finding of State Action immunity. Rich Feinstein, the Director of the FTC's Bureau of Competition, stated, "The Court's ruling today temporarily blocking OSF's proposed acquisition of Rockford Health System is a victory for both competition and consumers. We continue to believe in the merits of our case, and that if this deal is ultimately allowed to proceed, the result will be less competition and higher health care prices in the Rockford area. We look forward to presenting our case before the Administrative Law Judge later this month." The FTC press release regarding the preliminary injunction is available at <http://www.ftc.gov/opa/2012/04/rockford.shtm> and the court's decision is available at <http://www.ftc.gov/os/caselist/1110102/120505rockfordmemo.pdf>.

For more information, contact:

**Jeffrey S. Spigel**  
+1 202 626 2626  
jspigel@kslaw.com

**John D. Carroll**  
+1 202 626 2993  
jdc Carroll@kslaw.com

**King & Spalding**  
**Washington, D.C.**  
1700 Pennsylvania Avenue, NW  
Washington, D.C. 20006-4706  
Tel: +1 202 737 0500  
Fax: +1 202 626 3737

[www.kslaw.com](http://www.kslaw.com)

On November 18, 2011, FTC announced that it was challenging OSF's Healthcare System's acquisition of Rockford Health System. According to the FTC's complaint, OSF's proposed acquisition of Rockford Health System would violate federal antitrust laws by reducing competition in two markets in the Rockford, Illinois area: (1) general acute-care (GAC) inpatient services, and (2) primary care physician (PCP) services. The FTC alleges that, post-acquisition, OSF would control 64 percent of general acute-care inpatient services in the Rockford area post-acquisition, and face only one competitor, SwedishAmerican Health System. The two remaining hospitals together would control more than 99 percent of the market for general acute-care services in the Rockford area. The FTC also alleges there are only three significant primary care physician groups in the Rockford area, and that, post-acquisition, OSF and SwedishAmerican together would control almost 60 percent of all primary care physician services.

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U.S. District Court Judge Frederick Kapala wrote in the court's Memorandum Opinion and Order that "a district court must not require the FTC to prove the merits" and that the "adjudicatory function" to determine whether the antitrust laws have been violated "is vested in FTC in the first instance." Thus, in deciding whether to issue a preliminary injunction, the District Court only has to (1) determine the likelihood that the FTC will ultimately succeed on the merits and (2) balance the equities. Notably, the standard the FTC must meet for a preliminary injunction is considered by many to be lower than the standard the Department of Justice must meet for a preliminary injunction, which has caused considerable controversy given that the two agencies share enforcement of the antitrust laws. The court held that the FTC met their burden by establishing that the transaction would result in a highly concentrated GAC market and that a combined OSF/Rockford's pricing would not be sufficiently constrained by other hospitals. The court also rejected OSF/Rockford's efficiencies defense, noting "defendants have failed to present sufficient proof of the type of 'extraordinary efficiencies' that would be necessary to rebut the FTC's strong prima facie case." The court also indicated that the FTC's case regarding PCP is weaker, because the lower combined market shares and because "the market is not subject to the same prohibitive barriers to entry that exist in the GAC market, and the bargaining leverage held by large insurance companies with respect to physician contracting is different than what would exist in contracting for GAC services if the merger were to take place."

Interestingly, a similar transaction by Rockford and SwedishAmerican had been successfully litigated by the government and upheld on appeal in 1989, which was noted by the court in OSF/Rockford. The court acknowledged, however, that the combined shares of the merging parties in the current transaction would be lower than the combination would have been in that transaction. In addition, in 1997 the government declined to challenge OSF's proposed acquisition of SwedishAmerican, but that deal never materialized for non-antitrust reasons.

The OSF/Rockford challenge is yet another reminder that the FTC has been aggressively investigating, and challenging, hospital mergers in what it views to be concentrated markets (in its recent challenges, the FTC alleges the transactions will consolidate the number of acute care hospitals from 3 to 2 in OSF/Rockford, from 4 to 3 in ProMedica/St.Luke's and from 2 to 1 in Phoebe Putney/Palmyra) and this recent victory indicates the FTC will continue to closely examine provider combinations. As a result, careful consideration should be given by providers contemplating a strategic transaction with particular focus on laying out a compelling procompetitive quality story for the transaction's rationale.

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