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APRIL 9, 2012

Rockford Returns — Part II:

Court Grants FTC's Preliminary Injunction Against Hospital Merger to Preserve Status Quo for Preliminary Hearing

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In 1989, the Antitrust Division of the United States Department of Justice (DOJ) successfully challenged a proposed merger between Rockford Health System (Rockford) and SwedishAmerican Health System (SwedishAmerican), two of the three major general acute-care hospital systems in the Rockford, Illinois region. *United States v. Rockford Mem'l*, 717 F.Supp. 1251, *aff'd*, 898 F.2d 1278 (7th Cir. 1990).

On April 5, 2012, the United States District Court for the Northern District of Illinois granted the Federal Trade Commission's (FTC) motion seeking relief under Section 13(b) of the FTC Act enjoining Rockford from being acquired by the area's third hospital system, OSF Healthcare Systems (OSF)[1] *FTC v. OSF Healthcare System*, No. 11-cv-50344 (N.D. Ill. filed Apr. 5, 2012) (pending an administrative trial at the FTC on the merger). The trial is scheduled to begin before an FTC Administrative Law Judge on April 27, 2012. While similar to seeking preliminary injunctive relief in federal court, the FTC has argued successfully in this and other recent cases that its burden under Section 13(b) is lighter than the normal showing required for a preliminary injunction.

The FTC's complaint alleged that the merged hospital system would control 64% of the general acute care (GAC) inpatient services market and would result in a significant market concentration increase. The Court found that the FTC had, with its market share and market concentration evidence, established a prima facie case, and that the defendants had to overcome the presumption of illegality. Because an action for preliminary relief is narrow and not a call for the court to resolve the merits of the case, "all that is necessary is that the merger create an appreciable danger of [anticompetitive] consequences in the future. A predictive judgment, necessarily probabilistic and judgmental rather than demonstrable is called for." *Id*. at 20 (citations omitted).

The FTC argued that the acquisition threatened substantial competitive harm in the market for GAC inpatient services sold to commercial health plans, the cluster product market usually at issue in these cases. Notably, the FTC also alleged a separate product market for primary care physician (PCP) services. The District Court decided it did not need to make findings regarding the allegations concerning the PCP market to resolve the question of injunctive relief. The Court did observe that the FTC's PCP market claim was less likely to succeed compared to the claim involving the GAC market. The Court reasoned that the proposed merger would raise only "potential" competitive concerns due to an only "moderately concentrated market" for PCP services, that the PCP market was not subject to prohibitive barriers to entry such as those in the GAC market, and insurance companies would not, subject to the merger, hold as much bargaining leverage with respect to physician contracting as they did with contracting for GAC services. The issue remains alive in the case, and presumably the FTC staff will continue to pursue it at the administrative trial.

The defendants claimed that the continued existence of SwedishAmerican as a strong competitor would reduce the probability that the proposed merger would substantially lessen competition and argued that insurance companies would be able to prevent rate increases by exclusively contracting with SwedishAmerican. The Court disagreed on both points, finding that the FTC need not show that all competition be eliminated as a result of the

proposed merger and characterizing a defeat of post-merger price increases as ignoring the "current realities" of Rockford's health insurance market. It agreed with the FTC's claims that the merger would give the combined system greater bargaining leverage to raise rates.

During the 1990s, when the government lost a string of hospital merger cases, the cases often turned on the relevant geographic market, and particularly in the Butterworth, Michigan case, a stipulation offered by the merging parties committing not to raise prices for a specified time period. *See FTC v. Butterworth Health Corp*., 946 F. Supp. 1285 (W.D. Mich. 1996), *aff'd per curiam*, 121 F.3d 708 (6th Cir. 1997). In this case, the geographic market was not contested. The merging parties did offer a proposed stipulation, but it did not go as far as the *Butterworth* stipulation committed and was rejected by the Court. The parties would have agreed to relief that prevented OSF Northern Region hospitals from requiring any managed care organization (MCO), as a condition of contracting with the OSF Northern Region hospitals, to either: (1) exclude SwedishAmerican, or (2) include OSF on a system-wide basis or any other individual OSF hospital outside of the OSF Northern Region. The District Court noted that the stipulation failed to limit OSF Northern Region's ability to exercise its market power to achieve price increases.

The defendants attempted to rebut the FTC's prima facie case by asserting that the proposed merger would result in substantial efficiencies, including annual, recurring cost savings based on clinical integration and one time capital avoidance savings, and improve quality of care. The Court acknowledged that efficiencies could be relevant in a merger case and credited that the defendant's expert "did a thorough job." *FTC v. OSF Healthcare System*, No. 11-cv-50344, at 35. However, the government's experts claimed, and the Court agreed, that estimated savings due to clinical effectiveness were not certain to be achieved through the proposed merger. Similarly, the Court found that the defendants' claims that the proposed merger would improve quality of care and provide vital non-price benefits to the Rockford community were non-merger specific, and thus could not overcome the FTC's case. The key strand here is that the parties had made no commitments to actually execute on these possible efficiencies. Thus, as the Court remarked at one point, "[g]iven this conflicting expert testimony and the uncertainty surrounding whether, and to what extent, the proposed consolidations would take place after the merger was consummated, the court cannot find that this port of defendants' efficiency defense is sufficient to rebut the FTC's case." *Id*.

Changes expected from the Federal Affordable Care Act include growing consolidation among providers in order to increase efficiencies and better manage care under a global payment scheme or through an Accountable Care Organization. Despite this trend, the FTC continues to maintain an active hospital merger enforcement policy by bringing several hospital merger challenges over the last two years, including this case. The parties in this action will now proceed with the administrative trial on the merits conducted by the FTC on all underlying antitrust claims, and it will be well worth continuing to monitor this action.

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Endnotes

1 *See* Mintz Levin's client advisory on the FTC's complaint in this case in *Rockford Rerun: The FTC on Hospital Mergers*, http://www.mintz.com/publications/3006/Rockford_Rerun_The_FTC_on_Hospital_Mergers (Dec. 12, 2011).