

Federal Trade Commission Suffers Setback in Major Hospital Merger Case

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On Tuesday, June 14, 2016, U.S. District Judge Jorge Alonso of the Northern District of Illinois declined to grant the Federal Trade Commission (FTC) a preliminary injunction to temporarily stop a merger between Downers Grove, Illinois-based Advocate Health Care (Advocate) and Evanston, Illinois-based NorthShore University HealthSystem (NorthShore). After years of victories in cases involving mergers and acquisitions among hospitals and health systems, this is the second loss in a row for the FTC following May's decision by a Pennsylvania federal court judge to refuse to grant the FTC a preliminary injunction to stop a merger between Penn State Hershey (Pennsylvania) Medical Center and PinnacleHealth System in Harrisburg. The FTC is appealing that decision.

Many observers believe this decision may encourage greater health care provider consolidation. The FTC's recent losses may signal a shift in how courts view the government's arguments regarding harm to competition in health care merger cases. However, it will be important to monitor the outcome of the FTC's appeal in the Pennsylvania case, as well as the FTC's decision of whether or not to appeal in this case.

In the Advocate/NorthShore case, the FTC alleged that a combined Advocate and NorthShore would have enough bargaining leverage with insurers to increase prices because insurers would have a tough time creating marketable networks without Advocate and NorthShore hospitals. The FTC said a merger would lead to an 8 percent, or \$45 million, price increase and that the combined systems would control 60 percent of general acute care inpatient hospital services in Chicago's northern suburbs. The systems maintained that if their market were properly defined, that figure would be closer to 28 percent. The systems also promised that, if allowed to merge, they would offer a new insurance product that would cost 10 percent less than the lowest-priced comparable product currently available, saving consumers \$210 million to \$1.1 billion a year.

Arguments in the Advocate/NorthShore case focused largely on whether the FTC had correctly defined the relevant geographic market. The systems argued that the FTC wrongly excluded a number of competitors from the market definition. Judge Alonso found that the FTC had not shown a likelihood that it would ultimately win the case on its merits. The court's full opinion has been kept under seal because it currently contains "competitively sensitive information." The FTC and the health systems have until Friday to review the opinion and submit redactions before it is publicly released.

The FTC may now appeal the matter to a higher court or continue its own administrative challenge, although it is unusual for the government to continue administrative proceedings without an injunction in place preventing the parties from consummating the merger.

For more information, please contact Michael F. Iasparro or your regular Hinshaw attorney.

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