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## Rockford Rerun: The FTC On Hospital Mergers

Law360, New York (December 12, 2011, 2:21 PM ET) -- It was a hit for the government the first time, in the 1980s. Returning to a market where the government successfully challenged a hospital merger over 20 years ago, the Federal Trade Commission filed a complaint in U.S. District Court for the District of Northern Illinois on Nov. 18, 2011, seeking a temporary restraining order and preliminary injunction regarding OSF Healthcare System's proposed acquisition of Rockford Health System. The FTC staff also filed an administrative complaint within the agency.

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

While the antitrust enforcement agency has changed here, and the merging hospitals have switched, the FTC alleges that this case is fundamentally a rerun of the earlier Rockford case:

In the 1989 case, the district court defined a relevant geographic market identical to the market alleged in this complaint. The district court also defined a relevant product market, general acute-care hospital inpatient services, identical to a market alleged in this complaint. In fact, the district court described a market structure, levels of market concentration, and entry conditions in the earlier case that are strikingly similar to those alleged in this complaint, and, on that basis, concluded that the merger of two Rockford hospitals would "produce a firm controlling an undue percentage share of the relevant market, thus increasing the likelihood of market dominance by the merged entity or collusion."

The new complaint alleges that the merged hospital system would control 64 percent of the general acute-care inpatient services market, and that, post-merger, the two remaining firms would control 99.5 percent of the general acute-care inpatient services market.

There are, however, several new twists to the 21st century version of the Rockford story. First, the FTC also alleges that the acquisition threatens substantial competitive harm in the market for primary care physician services provided to commercially insured adults. The FTC defines this market to include physicians specializing in internal medicine, family practice, and general practice, but does not include pediatricians or obstetricians and gynecologists.

The complaint alleges that today there are only three significant primary care physician groups in the Rockford area and that, post-acquisition, OSF and SwedishAmerican would control almost 60 percent of all primary care physician services. (The Complaint indicates that due to limitations in the preliminarily available data, the primary care physician market shares alleged are based on a slightly different geographic market than that defined in the

1989 case.)

Second, the FTC alleges consumers in the Rockford market expect, if not require, health plans to offer in-network access to two of the three Rockford hospitals. Most health plans have responded to that imperative by playing the three hospitals off each other to obtain favorable rates and have included only two of the three hospitals in each of their networks. The complaint alleges health plans will continue to need two hospitals in their networks, therefore the proposed acquisition will lead to higher rates.

The FTC claims that the consolidation would give OSF greater leverage to raise rates, which would impose a significant financial burden on local employers and employees, either directly or through higher insurance premiums, co-pays and other out-of-pocket expenses. The complaint also charges that the proposed acquisition would increase the incentive and ability for OSF and SwedishAmerican to collude.

Finally, the FTC alleges that the proposed acquisition would eliminate vital non-price competition among the Rockford, Ill., hospitals, reducing the quality, convenience and breadth of services provided to local residents.

It has been noted that changes expected to result from the Federal Affordable Care Act have led providers across the country to increasingly consolidate in order to increase efficiencies and be better positioned to manage care under a global payment scheme or through an Accountable Care Organization. This Rockford action by the FTC is one of several hospital merger challenges brought by the agency over the last two years; the agency has consistently indicated that, despite these trends, it will continue an active and vigilant hospital merger enforcement policy.

Perhaps even more notable here is the challenge regarding primary care physician services. There has been less jurisprudence and less active FTC enforcement in the area of physician practice mergers and acquisitions. Even if this case proceeds to a final decision, it is quite possible that most of the focus will be on the more traditional hospital market analysis. If, in fact, there are rulings on the physician market, the case will be a more important precedent.

--By Bruce D. Sokler, Robert G. Kidwell and Christi J. Braun, Mintz Levin Cohn Ferris Glovsky & Popeo PC

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