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Hospital Merger Losses Could Prod FTC To Rethink Markets

By **Jeff Zalesin**

Law360, New York (June 14, 2016, 9:11 PM ET) -- An Illinois federal judge's Tuesday refusal to block a Chicago health system combination puts the Federal Trade Commission on a rare losing streak in hospital merger cases, and experts are anxious to see if the forthcoming opinion points to a need for the FTC to reconsider its approach to defining health care markets.

U.S. District Judge Jorge L. Alonso **issued a sealed opinion** on Tuesday denying the FTC's motion for a preliminary injunction to block the merger of Advocate Health Care and NorthShore University HealthSystem. Antitrust lawyers said the order is particularly notable since it comes soon after a Pennsylvania federal judge **ruled against** the FTC in another hospital case, taking issue with the agency's market definition.

Dionne Lomax, a member of Mintz Levin Cohn Ferris Glovsky & Popeo PC, said it was a "huge setback" for the FTC to lose two consecutive preliminary injunction bids over hospital mergers, particularly after a long period when the agency got used to winning such cases.

"I think they may have to go back and kind of rethink their strategy — in particular, how they look at the relevant geographic market, and perhaps even their litigation approach, in terms of how they present it to a court," Lomax said.

The fight over the relevant geographic market was a focal point of the Chicago merger litigation. The FTC and its co-plaintiff, the state of Illinois, argued that the deal would harm competition in Chicago's northern suburbs by combining the top two health care rivals in that area. But Advocate and NorthShore accused the government of gerrymandering its market to exclude hospitals that needed to be factored into a realistic analysis.

When Judge Alonso does release a public opinion in the Chicago case, it will likely focus on relevant market issues, Lomax said.

What isn't clear, she said, is whether the recent Pennsylvania decision significantly influenced the Illinois ruling, or whether the two cases together will reveal a shift in the approach courts take to evaluating health care market allegations.

"I'm curious as to whether this is going to be a bit of a sea change or these are just two blips on the radar that are contrary to the winning streak that we're used to from the agencies," she said.

In the Pennsylvania case, U.S. District Judge John E. Jones III declined last month to block the merger of Penn State Hershey Medical Center and PinnacleHealth System.

Judge Jones said in his opinion that the FTC's alleged market — a cluster of four counties near Harrisburg, Pennsylvania — failed because other hospitals within a 65-minute drive of Harrisburg would give patients realistic alternatives and would constrain the pricing power of the post-merger Penn State Hershey. The judge also said that the deal appeared beneficial, especially in light of "an evolving landscape of health care" changed by factors including the Affordable Care Act.

The FTC has appealed the Pennsylvania decision to the Third Circuit, disputing multiple aspects of

Judge Jones' reasoning. The agency has **argued that its market definition makes sense** because, despite the judge's focus on the significant number of Hershey patients who travel there from outside the Harrisburg area, the "commercial reality" is that insurance companies need to include Hershey or PinnacleHealth in their networks in order to sell plans to Harrisburg consumers.

It is far from clear, however, that the Chicago opinion will raise the same questions about the importance of patient travel and insurance company behavior for defining health care markets. Based on the geographic arrangement of hospitals in the Chicago area, that case might be less susceptible to a market analysis that relies heavily on patient movement than the Pennsylvania case was, according to Lomax.

Jeff Miles, an antitrust lawyer at Ober Kaler, also said that the market analysis from the Pennsylvania opinion might not carry over into the Chicago case, based on factual differences between the scenarios. He cautioned that observers shouldn't make too much of the FTC losing both preliminary injunction bids, nor should they assume that the Pennsylvania decision drove the outcome of the Chicago injunction trial.

"I think the hospitals' position on geographic market was probably stronger in the Illinois case than in the Pennsylvania case," Miles said.

Another distinction between the cases, Miles said, is that the two sets of hospitals presented different narratives to explain why they believed their mergers would produce efficiencies. The Pennsylvania health systems argued that the merger would allow Hershey to solve an overcrowding problem without undertaking an expensive construction project, while the Chicago providers argued that joining forces would enable them to offer a new insurance product that would save consumers money.

With Judge Alonso's opinion under seal, it's not yet clear what he made of Advocate and NorthShore's efficiency arguments.

But attorneys agreed that efficiencies probably were not as central to the decision as market definition was. Miles said that the Chicago hospitals' efficiency defense struck him as a weaker than their attack on the FTC's market definition, partly because, to the extent the hospitals relied on efficiencies, they faced the challenge of showing that the merger was necessary for their purported insurance innovation.

Nor is Judge Alonso likely to echo Judge Jones in invoking the Affordable Care Act as a potential justification for health care consolidation, said Matthew Piehl, an attorney at Faegre Baker Daniels.

"The Pennsylvania decision had a partisan flavor when he started talking about how the Affordable Care Act has skewed incentives and butts up against the antitrust laws," Piehl said. "I would be surprised if this judge had similar views."

But even if Judge Alonso's opinion isn't as politically charged as Judge Jones', it should signal to the FTC that today's courts won't uncritically accept the agency's views on geographic markets or efficiencies, Piehl said.

The Chicago decision wasn't as surprising as the Pennsylvania decision, but the combination of the two matters, he said.

"This should make it more difficult for [the FTC] moving forward, now that courts have some language that they can quote from other courts on market definition and efficiencies," Piehl said.

If the back-to-back losses are a sign of possible trouble ahead for the FTC, they are also a source of anxiety for some supporters of the agency's work on health care competition.

Barak D. Richman, an antitrust professor at Duke University School of Law, praised the FTC for opposing what he described as anti-competitive hospital mergers and said he was alarmed by the two preliminary injunction denials. He said that he hoped the Pennsylvania decision would be reversed on appeal, and it would be "really unfortunate" if that ruling were used as a basis for the

Chicago ruling.

"I thought the courts had realized that we can't police hospital monopolies without their help, and this is a distressing reversion to an unfortunate history when the courts were really tragic barriers to adequate antitrust enforcement," Richman said.

Representatives of Advocate and NorthShore welcomed Judge Alonso's order in a Tuesday statement, while Debbie Feinstein, the director of the FTC's Bureau of Competition, said in a statement that the ruling was "disappointing." Each party either declined to comment on the consecutive preliminary injunction denials or didn't respond to a request for comment.

The FTC is represented in-house by J. Thomas Greene, Kevin Hahm, Sean P. Pugh, Christopher Caputo and Jennifer Milici.

Advocate is represented by John R. Robertson, Leigh Oliver and Robert F. Leibenluft of Hogan Lovells and Robert W. McCann, Kenneth M. Vorrasi, John L. Roach IV and Jonathan Todt of Drinker Biddle & Reath LLP.

NorthShore is represented by Dan K. Webb, David E. Dahlquist and Michael S. Pullos of Winston & Strawn LLP.

The case is Federal Trade Commission et al. v. Advocate Health Care et al., case number 1:15-cv-11473, in the U.S. District Court for the Northern District of Illinois.

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