

## FTC wins two key hospital merger challenges in federal courts



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In the past 30 days, the U.S. Court of Appeals for the [Seventh Circuit](#) and [Third Circuit](#) delivered resounding victories to the Federal Trade Commission (FTC) in two separate hospital merger challenge cases, reversing decisions from Chicago and Pennsylvania district courts that would have allowed the mergers to go forward. The primary issue in both cases was defining the always-elusive “relevant geographic market” in which hospitals compete. The circuit courts’ adoption of the FTC’s model – which assumes narrow geographic markets and heavily relies on potential price effects on insurers, not patients – represents the latest in a string of FTC hospital merger enforcement victories and emboldens the FTC to continue its aggressive pursuit of its hospital merger enforcement agenda.

### THE CASES

The Seventh Circuit case involved the FTC’s challenge to the proposed merger of NorthShore University HealthSystem, which operates four hospitals in Chicago’s north suburbs, and Advocate Health Care Network, which operates nine hospitals in the Chicago area. In the Third Circuit case, the FTC challenged the proposed merger of the two largest hospitals in the Harrisburg, Pennsylvania, area – Penn State Hershey Medical Center and PinnacleHealth System. In both cases, the district courts denied the FTC’s motions for preliminary injunction based on the courts’ holdings that the FTC did not properly define the relevant geographic market, a necessary prerequisite to determining whether a proposed merger is sufficiently likely to be anticompetitive and warrant injunctive relief

### THE APPELLATE COURTS’ DECISIONS

The Seventh and Third Circuits reversed the district courts, holding that they incorrectly applied the “hypothetical monopolist” test to define the relevant geographic market. Under the DOJ Antitrust Division’s Horizontal Merger Guidelines, if a hypothetical monopolist could impose a “small but significant

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non-transitory increase in price” (SSNIP) – typically about 5 percent – in the proposed market, the market is properly defined. If, however, consumers would respond to a SSNIP by purchasing the product from outside the proposed market, thereby making the SSNIP unprofitable, the proposed market definition is too narrow.

The Seventh and Third Circuits held that the district courts’ reliance on patient flow data (i.e., the number of patients that enter the proposed market) to define the relevant market is particularly unhelpful in hospital merger cases due to the “payor problem” and the “silent majority fallacy.” Specifically, both circuit courts held that the district courts improperly focused on the likely responses of patients to price increases and instead should have analyzed insurers’ likely responses because insurers – not patients – will feel the impact of price increases and thus will determine where their insureds (the patients) can obtain services. And the silent majority fallacy is the false assumption that patients who travel to obtain care at academic medical centers would turn to other hospitals in the area if there was a SSNIP because academic hospitals provide highly complex medical services that are not available at other local area hospitals.

Additionally, although the Third Circuit acknowledged that determining the relevant geographic market should take into account the commercial realities of the specific industry, it held that the district court erred in focusing on actual agreements between the hospitals and payors. Specifically, in denying the FTC’s preliminary injunction motion, the district court found it “extremely compelling” that the hospitals had already entered into contractual agreements with two of the largest payors to maintain the existing rate structure, ensuring that post-merger rates would not rise for five years with one insurer and ten years with the other. The Third Circuit, however, cautioned that private contracts are not to be considered in determining the relevant private market. The rationale was that if such private contracts impacted a court’s analysis, any merging entity could enter into similar agreements to impermissibly broaden the scope of the relevant geographic market and escape effective enforcement of antitrust laws

### KEY TAKEAWAYS

Many experts viewed these as “must-win” cases for the FTC. The FTC’s hospital merger enforcement program would have been in serious jeopardy if the courts rejected the government’s narrow relevant geographic market definition. As it stands now, though, the Seventh and Third Circuit decisions are merely the latest in an unprecedented string of victories for the FTC that have served to unravel numerous hospital mergers since 2007 and will likely embolden the government to become even more aggressive in challenging hospital mergers in the near future. Indeed, a recent Modern Healthcare survey notes that 70 percent of a group of approximately 84 national healthcare leaders believe that “the pace of consolidation among healthcare players will continue or accelerate” and 72 percent believe that “government scrutiny of healthcare deals will grow ... no matter who wins” the fall presidential election. Hospitals contemplating mergers and related antitrust issues should retain experienced antitrust counsel at the outset to provide tailored, practical advice that will enable them to stay on the right side of the antitrust laws.

For questions regarding antitrust issues and the role our antitrust attorneys can play in developing effective compliance strategies individually tailored for your company’s needs, please contact one of the attorneys listed below.



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