

Blog Post

Federal Trade Commission Challenge to Northern Philadelphia Hospital Merger Fails

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The Federal Trade Commission (FTC) has failed – at least for now – in its efforts to derail a merger between Thomas Jefferson University Health System and Albert Einstein Health System, two Philadelphia-area health systems. In a decision announced on December 8, Judge Pappert, District Judge for the Eastern District of Pennsylvania, ruled that the FTC, which was joined in the action by the Pennsylvania Office of the Attorney General (PA AG), had failed to demonstrate that the merger should be enjoined. In reaching this decision, the Court held that the FTC had failed to show that there would be an insufficient number of alternative providers of hospital services in the region to limit the ability of the merged entity to increase prices post-merger. Accordingly, absent an appeal by the FTC and/or the PA AG to the Third Circuit, and a successful request for a stay of the lower Court's ruling, the merging parties will likely complete their merger in the coming weeks.

In challenging the merger, the regulators argued that the combination of these two Philadelphia providers, each of which has a significant presence in the Northern-Philadelphia suburbs, would significantly diminish patient choice for hospital services in the area. In support of that contention, the regulators submitted economic data, offered by their expert economist, that they maintained demonstrated that only those hospitals located in the northern

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Philadelphia suburbs constituted suitable alternatives for the services provided by Jefferson and Einstein. For this reason, the regulators and their expert excluded several hospitals in Philadelphia and other parts of Southeastern Pennsylvania from their analysis when calculating the combined entity's share of the relevant market. Calculated in this way, the regulators maintained that the merged entity would have an unacceptably high market share, requiring that the merger be enjoined.

The Court, however, rejected the regulators' geographic market definition. After stating that "econometric evidence can be powerful evidence, but it is not the only evidence that the courts consider in defining the relevant market," Judge Pappert concluded that many of the hospitals that had been excluded from the market by the regulators' expert would serve as suitable alternatives for the services provided by the merging parties. As such, they should have been included in the geographic market for purposes of the regulators' analysis, and the failure to include them rendered that analysis unpersuasive.

Significantly, in reaching this decision, the Court explained that, based upon the Third Circuit's ruling in another FTC hospital merger case from 2016 (*FTC v. Penn State Hershey Medical Center*), its inquiry required that it look at the potential impact of the merger on health insurers because they are the entities that directly contact with the providers. After noting that the regulators in *Penn State Hershey* presented evidence from multiple insurers that the proposed merger would make it impossible for them to offer a product that did not include the merged entity (which caused the appellate court to side with the FTC in that case), Judge Pappert noted that, in the Jefferson/Einstein case, only one of the four largest insurers in the region expressed significant reservations about the transaction. Moreover, the Court held that the insurer's testimony was of questionable credibility as it was

potentially influenced by its desire to cause harm to Jefferson (which it viewed as a nascent competitor in the health insurance market). Accordingly, having concluded that the regulators had failed to demonstrate that insurers would be harmed by the merger, Judge Pappert rejected the regulators' request for an injunction.

Notably, this is not the first time in recent years that the FTC has failed at the trial court level to enjoin a hospital merger. In fact, the *Penn State Hershey* merger, noted above, was a case in which the FTC failed at the trial level, but succeeded on appeal. Similarly, in *FTC v. Advocate Health Care*, a challenge to the merger of two Chicago-area hospital systems, the FTC also lost at the trial level, but similarly succeeded on appeal when the appellate court ruled that the trial court's ruling in that case — on a similar geographic market issue — was “clearly erroneous.”

Not surprisingly, the FTC has announced that it will appeal the District Court's ruling to the 3rd Circuit Court of Appeals, and that it will seek to have the merger delayed pending a ruling on the appeal. Accordingly, we have not yet heard the last word on this merger; stay tuned.

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