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Issues in Litigating Hospital Mergers

It is often argued that the federal courts don't "like" hospital merger cases. Under that theory, the string of losses suffered by the government in these cases is attributable to the courts' finding excuses to rule against the government, because (1) they don't believe not-for-profit hospitals are likely to engage in anticompetitive activities, or (2) they are reacting to the federal government coming to town to tell the leading citizens in the community (i.e., the hospital board members) what is best for the citizens of that community.

But a close look at the relevant decisions does not support these arguments. Indeed, it is difficult to generalize about the reasons for the losing streak; each case must be examined on its own facts.

In only one of the cases lost by the enforcers, the *Butterworth* case, did a court rule against the government based on these non-antitrust arguments, even though it had found that the government had proven its prima facie case.[1] The government has prevailed where the case was tried in the town in which the hospitals were located (*Rockford*) and has lost where the court was located elsewhere (in the *Sutter Health* and *Long Island Jewish* cases) -- indeed, FTC complaint counsel lost before the Federal

[1] *Federal Trade Commission v. Butterworth Health Corp.*, 946 F. Supp. 1285 (W.D. Mich. 1996), *aff'd per curiam in unpublished decision*, 121 F.3d 708 (6th Cir. 1997).

Trade Commission in the *Ukiah* case.[2] The government has prevailed in cases where the merging hospitals were not-for-profit entities (e.g., *Rockford* and *Augusta*),[3] and has lost where the hospitals were for-profit (in the *Tenet* case).[4] *Rockford* and *Augusta* squarely rejected the nonprofit defense in ruling for the government (even though the court in *Rockford* stated the court was not "unsympathetic" to the motivations of the defendants). Even in the *Dubuque* case, where the government lost on the merits, the court rejected the non-profit argument -- using the correct analysis in my view:

> The court does not mean to imply by this decision that there is any evidence of an intent to act in an anticompetitive manner by any of the parties to the proposed merger. To the contrary, the testimony of proposed Board members . . . is extremely credible. . . . However, the fact remains, that for antitrust analysis, the court must assume that new and different Board members can take control of the corporation, and that . . .there is nothing inherent in the . . . non-profit status of the hospitals which would operate to stop any anticompetitive behavior. (emphasis added)[5]

So what are the reasons for the losses, if these arguments do not stand up to scrutiny? The government has just not been able to persuade the courts on the merits that competition will be lessened by many of these mergers. The courts have relied on the specific facts and evidence in the particular cases before them to rule against the government. In particular, the courts have not been willing to believe the testimony of health plans and others when it is contradicted by other evidence, such as statistical

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[2] *California v. Sutter Health*, 84 F. Supp. 2d 1057 (N.D. Cal.), *aff'd mem.*, 2000-1 Trade Cas. (CCH) 87,665 (9th Cir. 2000), *revised*, 130 F. Supp. 2d 1109 (N.D. Cal. 2001); *United States v. Long Island Jewish Medical Center*, 983 F. Supp. 121 (E.D.N.Y. 1997); *Adventist Health System/West*, 114 F.T.C. 458 (1991).

[3] *United States v. Rockford Memorial Corp.*, 898 F.2d 1278 (7th Cir.), *cert. denied*, 498 U.S. 920 (1990); *Federal Trade Commission v. University Health, Inc.*, 938 F.2d 1206 (11th Cir. 1991).

[4] *Federal Trade Commission v. Tenet Health Care Corp.*, 186 F.3d 1045 (8th Cir. 1999).

[5] *United States v. Mercy Health Services*, 902 F. Supp. 968, 989 (N.D. Iowa 1995).

evidence on market definition. This was true in the *Sutter Health*, *Tenet*, and *Long Island Jewish* cases. Moreover, several of the losses were in the 8th Circuit, where the precedent on relevant geographic market is particularly difficult for antitrust enforcers. Never underestimate the effect of prior decisions in similar cases on the courts.

Why did the government manage to carry its burden in some of the cases (primarily the older cases) but not in others? In my view, that is because the government has departed from two key aspects of its early enforcement efforts: (1) before asserting that competition has been lessened, establishing the ways in which hospitals compete; and (2) focusing on the non-price aspects of competition (and the benefits to consumers of that competition), not just on price competition as envisioned by health plans.

The early cases such as *HCA* and *Rockford* focused on methods of competition among hospitals and the nature of potential anticompetitive behavior. In *HCA*, the Commission stated: "Before considering the merits of this case, it is important to have a fundamental understanding of the role of physicians and third-party payors in the health care transaction."[6] Indeed, an entire 10-page section of the Commission's opinion is devoted to a description of the nature of competition in the market ("[b]ecause *HCA* denies that anticompetitive behavior . . . is likely, it is useful to consider the likely forms that any anticompetitive behavior would take").[7] The Seventh Circuit in *HCA* referred to "the Commission's detailed analysis" and its inquiry into "the probability of harm to

[6] *Hospital Corporation of America*, 106 F.T.C. 298, 457 (1985), *aff'd*, 807 F.2d 1381 (7th Cir. 1986), *cert. denied*, 481 U.S. 1038 (1987).

[7] Id. at 496.

consumers," summarizing the Commission's analysis in several pages of its opinion.[8] And in *Rockford*, two full pages of a much shorter opinion were devoted to the nature of competition in the marketplace.

Establishing the benefits of non-price competition provides another dimension in which competition can be lessened and allows enforcers to refute arguments about the "medical arms race." *HCA* described the benefits of competition for physicians and the harm from restricting such competition. In *Tenet*, the 8th Circuit noted that higher quality was a reason for patients to travel to hospitals outside of the government's geographic market, criticizing the "inordinate emphasis on price competition without considering the impact of a corresponding reduction in quality."[9]

I should also spend a minute on a debate that has been going on ever since the losses began -- whether the courts should rely more on statistical or on anecdotal information. I believe that the enforcers have been too willing to rely on what they have been told by health plans and others, and have not gone behind the stories to test the assertions of those witnesses.

For example, testimony by health plans on where their subscribers seek health care and their subscribers' willingness to travel has been contradicted by evidence that these subscribers are already traveling to seek hospital care (and not just for high level services). Similarly, in the *Sutter Health* case, a witness from an IPA who was testifying in opposition to the merger testified on cross-examination about the mechanisms the

[8] 807 F.2d at 1385, 1386.

[9] 186 F.3d at 1054.

IPA could use to steer patients away from the merging hospitals. The government should explore what a payer is basing its testimony on, before relying on that testimony.

It is not clear the outcome of any cases would have been different if these approaches had been used. But perhaps some cases would not have been brought if the enforcers realized the testimony of their witnesses would not stand up to scrutiny.

I would like to conclude with a few words about the FTC's hospital merger retrospective. While reviewing the effects of mergers several years down the road may provide useful information for setting enforcement policy, the agency should be careful about the conclusions it draws from the facts it is gathering. In particular, it is very difficult to measure whether prices have in fact increased in a market (due to the many different types of contractual arrangements that exist). Moreover, determining whether a price increase is (1) due to a merger, and (2) even if it is, whether it is a supracompetitive price increase, is fraught with difficulty. For example, if a hospital had been in financial distress before the merger, would its new owners have raised prices even if they had come from outside the market? Are there specific expense increases that were faced by the hospitals in that market or the merging hospitals in particular? All of these factors and others should be taken into account.

Thank you.