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# Recent FTC Antitrust Actions Against Hospitals and Physician Groups

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There has been significant recent action by the Federal Trade Commission (FTC) challenging hospital mergers and collective actions by physician groups. Antitrust health care issues have been and continue to be a priority at both the FTC and the Department of Justice and also with state attorneys general, particularly with respect to hospitals and physician groups. In fact, the FTC's most recent challenge to a hospital merger was joined by the state attorney general.

## FTC Final Order in Evanston Hospital Merger Case – Separate Negotiating Teams

In August 2007, the FTC issued its opinion concluding that the 2000 acquisition of a competing hospital by Evanston Northwestern Healthcare in Chicago violated federal antitrust laws. *In the Matter of Evanston Northwestern Healthcare Corporation*, FTC Docket 9315, August 6, 2007. The FTC had challenged that acquisition in a 2004 administrative complaint. The FTC's decision was based on evidence of significant post-acquisition price increases and internal documents discussing the ability of the combined hospitals to increase prices in a manner which the FTC regarded as anticompetitive. Significantly, the FTC did not order divestiture in that case because of extraordinary circumstances. Specifically, the FTC concluded that divestiture would be very disruptive because the hospitals had already combined many important services. The Commission instead ordered the parties to submit proposals for separate negotiating teams as a way to restore competition.

After substantial briefing by the parties, on April 28, 2008, the Commission issued its Final Order establishing the remedies to restore competition. However, the Commission again emphasized in its Opinion accompanying the Final Order that divestiture is the much preferred remedy, but due to key improvements already undertaken by the parties, divestiture could actually harm competition: "We cannot stress enough, however, that the circumstances of this case are extraordinary." The FTC pointed to the development and implementation of a cardiac surgery program, stating that divestiture would have a substantial negative impact on this program, including insufficient volume to maintain the program. According to the FTC, "divestiture will almost always be ordered when a merger is challenged, or faces the threat of a challenge, before the merger is consummated or before improvements are made at the acquired facility."

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## Recent FTC Actions Against Hospitals and Physician Groups, *continued*

The highlights of the FTC's Final Order are briefly set forth below:

- The Order requires separate negotiations by a managed care organization (MCO) with each hospital to be the "default setting," with firewalls separating the negotiating teams for each hospital. An MCO can ask for joint negotiations, but the joint negotiating team must be separate from the other negotiating teams and must be "walled off" from the other separate negotiating teams.
- Importantly, the FTC rejected the hospitals' contention that the order be limited to inpatient services only, recognizing that MCOs bargain for a full range of hospital services, including inpatient and outpatient services, "sometimes trading off the price of inpatient and outpatient services to get an acceptable total price." According to the FTC, "MCOs typically do not contract separately for inpatient and outpatient services." While recognizing this important concept, the FTC still has taken the position in many cases that inpatient services provided to MCOs are a separate market.
- Dispute Resolution – If negotiations cannot be resolved, the parties are to submit first to mediation and then to binding arbitration in accordance with the American Arbitration Association rules. Unless otherwise agreed, the arbitration is to be "Final Offer" arbitration, meaning each side is to submit its best and final offer and the arbitrator is to pick one. The FTC regards this approach as attractive because it can induce the two sides to reach their own agreement or risk the possibility that a relatively extreme offer of the other side may be selected. Finally, the arbitrator must make its decision based on pricing and terms that are fair and reasonable "assuming competition between the hospitals as would exist but for the merger." The FTC provides no guidance on how the arbitrator is to make this determination.

The hospitals can still appeal the FTC's Opinion and Order to a federal appellate court. Further, following the FTC's decision, class actions have been filed against the hospitals alleging unlawful monopolization.

The FTC has clearly emphasized in its Opinion and Final Order that the relief here is limited to the extraordinary circumstances of this case, specifically the integration of services that occurred in the seven to eight years following the acquisition. This FTC action also shows that the FTC will investigate consummated acquisitions and will focus on post-acquisition conduct and internal documents in assessing competitive effects.

### New FTC Challenge to Hospital Acquisition

Following on the heels of the *Evanston* decision, in early May 2008, the FTC challenged in federal court and in an FTC administrative proceeding a proposed hospital acquisition in northern Virginia. Significantly, the Virginia Attorney General also joined the FTC in challenging this acquisition. This acquisition was first announced in August 2006, indicating that the FTC had been conducting a lengthy investigation. The FTC sought a temporary restraining order and a preliminary injunction in federal court to block the deal and at the same time instituted an administrative proceeding. Shortly after the FTC filed these actions, the parties called off the proposed acquisition and the FTC declared victory.

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## Recent FTC Actions Against Hospitals and Physician Groups, *continued*

According to the FTC complaints, if the acquisition were consummated, the new entity would control 73% of the hospital beds in northern Virginia and the two hospitals are closest competitors. In a very unusual step, the FTC assigned one of its commissioners (who, we are told, did not participate in the issuance of the complaint) to act as the administrative law judge in the administrative case and the FTC also committed to a "Fast Track" administrative procedure.

Allegations in the complaints included:

- The merger would eliminate a critical head-to-head competitor; health insurers, employees and health plan enrollees have all benefited from this competition.
- The hospitals are two financially sound high-quality hospitals and quality at the acquired hospital is comparable to and at times superior to the purchaser's quality, as measured by numerous objective quality criteria (which are not specified). The acquired hospital also has the capacity to fund capital investments and quality improvements on its own or with another merger partner and is currently successfully engaged in capital investment and quality improvement projects.
- The hospitals do not dispute that health care prices will increase as a result of the merger.
- The product market is limited to inpatient (overnight stay) services sold to private payers, but tertiary services such as cardiac surgery and transplants are excluded.
- The hospital to be acquired had only a 6% share by number of licensed beds versus 67% for the purchaser. After the acquisition only four small independent hospitals would remain in the market.
- Entry is difficult because state regulatory approval can take significant time and competitors such as the purchaser can and do oppose such approvals, substantially prolonging the approval process.

This action shows that despite recent losses in hospital merger cases in federal court, the FTC remains committed to investigating hospital mergers and challenging acquisitions it regards as anticompetitive.

## U.S. Court of Appeals Affirms FTC Decision Regarding Collective Action by Physician Groups

On May 14, 2008, the U.S. Court of Appeals for the Fifth Circuit unanimously affirmed a 2005 FTC decision that certain collective activities of North Texas Specialty Physicians (NTSP) constituted horizontal price-fixing in violation of the antitrust laws. *North Texas Specialty Physicians v. FTC*, No. 06-60023 (5th Cir. May 14, 2008). In particular, the Court of Appeals concluded that this physician group violated the antitrust laws by negotiating agreements among its participating physicians on price and other terms, by refusing to deal with payors except on collectively agreed upon terms and by refusing to submit payor offers to participating doctors unless the terms of the offer complied with NTSP minimum fee standards. In addition, NTSP discouraged payors and NTSP physicians from negotiating directly with each other. The Court of Appeals also rejected the argument that NTSP was a clinically integrated single entity and therefore was not engaging in collective action.

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## Recent FTC Actions Against Hospitals and Physician Groups, *continued*

The FTC has a history of vigorously pursuing physician groups with success, and this decision will reinforce the FTC's enforcement of the antitrust laws against physician groups.

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