

Hackensack Meridian/Englewood Merger Heads to Appeals Pending FTC Trial

Hackensack Meridian Health's proposed acquisition of Englewood Healthcare Foundation is the latest case to watch amidst increased federal antitrust scrutiny of healthcare mergers. While the FTC's preliminary injunction against the merger was approved by the New Jersey district court early last month, the entities continue to put up a fight pending the FTC administrative trial set for October. In this post, The Source provides a recap of the latest development in the case and a preview of what's to come.

FTC Challenge to Block Merger

Hackensack Meridian Health, formed when Hackensack University Health Network and Meridian Health merged in 2016, is the largest healthcare system in New Jersey. The hospital system covers eight counties in northern and central New Jersey, with 17 hospitals and 340 medical group practices, including a 781-bed flagship academic medical center located in Bergen County. Englewood Healthcare Foundation is a nonprofit corporation comprising the 352-bed Englewood Hospital, a physician network, and a charitable foundation. Located in Bergen County, Englewood Hospital is the third-largest provider of inpatient general acute care services (GAC) in the county. Hackensack Meridian (hereinafter "Hackensack") and Englewood originally announced their plans to merge in October 2019.

While the proposed transaction was approved by the New Jersey attorney general and New Jersey Department of Health, the FTC continued to pursue legal challenges to block the merger. In December 2020, the FTC filed an [administrative complaint](#),

along with a [lawsuit in New Jersey district court](#) seeking a preliminary injunction against the merger, alleging violation of Section 7 of the Clayton Act^[1] and Section 5 of the Federal Trade Commission Act (“FTC”) Act.^[2] In the complaint, the FTC alleged the proposed acquisition of Englewood would allow Hackensack to control three of the six inpatient GAC hospitals in Bergen County. As the two entities are rivals that “vigorously compete against each other” for inpatient general acute care services and inclusion in insurer networks, the merger would reduce competition for those services in Bergen County and give Hackensack great bargaining leverage to demand higher prices from insurers. This outcome will in turn lead to higher premiums and out-of-pocket costs and decrease the quality of care and access for patients.^[3] The hospitals, on the other hand, claimed that the deal would enable a \$400 million investment in Englewood that would have pro-competitive benefits.

Preliminary Injunction to Halt Merger

After a string of discovery disputes, hearings on the preliminary injunction took place in May and June, at which U.S. District Judge John Michael Vazquez criticized the hospitals for their “flowery” language of so-claimed pro-competitive benefits. He was unconvinced that the merged entity would pass any potential cost savings onto insurers and demanded a look at history on whether any of Hackensack’s past acquisitions have resulted in anything other than rate increases.^[4] In early August, the court issued a preliminary injunction against the merger. The [redacted opinion](#) was released a few weeks later, after requests by the parties to keep portions of the opinion under seal. In the 67-page opinion, the court found that the FTC established its prima facie case that the merger will likely lead to anticompetitive effects in the relevant product and geographic markets.

Relevant Geographic Market

In defining the relevant geographic market, which is “the area in which a potential buyer may rationally look for the goods or services he seeks,” the court applied the hypothetical monopolist test.^[5] The court examined the hospitals and facilities both in and outside of Bergen County, where the merging entities are located, and determined that the relevant geographic market is commercially insured patients in Bergen County. The court arrived at this definition based on three reasons as set forth by the FTC: “(1) Englewood and Hackensack are both located in Bergen County; (2) the vast majority of Bergen County residents receive care in Bergen County; and (3) Bergen County is an economically significant area for insurers.”^[6] The definition of the relevant geographic market is confirmed by a “willingness to pay” test, which examines the negotiating leverage that a hypothetical monopolist of Bergen County hospitals would have as to insurers. The geographic boundary of Bergen County is further corroborated by the major insurers, including Horizon Blue Cross & Blue Shield of New Jersey, UnitedHealthcare, and Aetna, who testified that Bergen County is significant at the county level because they could not market a plan that did not include a Bergen County hospital to Bergen County residents.

Anticompetitive Effect

Having established the relevant geographic market, the court then turned to the evaluation of anticompetitive effect in that market. The court utilized the Herfindahl-Hirschman Index (“HHI”) as a measure of market concentration, with HHI of 2,500 or higher considered to be “highly concentrated” and increases of more than 200 points in HHI “presumed to be likely to enhance market power.”^[7] FTC’s evidence demonstrated that the post-merger HHI in this case would be 2,835 with a change in HHI of 841 points, both significantly higher than the criteria for highly concentrated. In fact, the level of post-merger HHI indicates that Hackensack would

control almost half of the market share in Bergen County. Moreover, as supported by the testimony of commercial insurers, including major insurers Horizon Blue Cross & Blue Shield of New Jersey, UnitedHealthcare, Aetna, and Cigna, Hackensack and Englewood do in fact compete for the same patients and the insurers view them as competitors. Expert testimony also indicated that the merger would have a price impact of roughly \$31 million per year based on the patient-based willingness to pay model.[\[8\]](#)

Procompetitive Effects

On the other side of the scale, the hospitals raised three procompetitive effects that they argued will lower costs and increase the quality of health care for the community to outweigh any anticompetitive effects: (1) upgrades and increased capacity at Englewood; (2) expansion of complex services at Hackensack's flagship hospital in Bergen County; and (3) cost-savings from service optimization between the entities.[\[9\]](#) The court, however, was skeptical of most of the claims. First, as to upgrades to Englewood, the court noted that some of the commitment to improvements are not specific to Englewood, while others are not enforceable by Englewood. Second, the court was doubtful of claims for expansion and optimization at Hackensack facilities in Bergen County, opining that Hackensack didn't appear to have capacity restraints and that the optimization plan "reads like an advocacy piece created for the current litigation" to justify the merger after the fact.[\[10\]](#) Most importantly, regarding the hospitals' claim of cost savings from optimization, the court used history as a guide by examining Hackensack's acquisition of two other hospitals in New Jersey in 2016 and 2018. Given that those mergers did not present any evidence of cost savings being passed through to payers, the court was unconvinced that any so-claimed cost savings from the proposed merger will be passed through in this case.[\[11\]](#)

In balancing the anticompetitive effects to the market and the

potential procompetitive effects, the court concluded that “these benefits do not amount to extraordinary efficiencies that offsets the likely anticompetitive effect of the merger.” As a result, the court held that the hospitals failed to rebut the FTC’s prima face case that “there is a reasonable probability that the challenged transaction will substantially impair competition” in violation of Section 7 of the Clayton Act. Further, rather than determining whether the merger is in the public interest, the court pointed out that the ruling granting the preliminary injunction merely indicates that at this stage, the injunction is in the public interest.

Appeal to 3rd Circuit Pending Administrative Trial

The preliminary injunction ruling is an encouraging win for FTC’s enforcement efforts, particularly after its recent loss in the [Jefferson-Albert Einstein](#) merger challenge in Philadelphia. In most cases, a preliminary injunction in the district court would seal the fate of the deal, leading the entities to abandon the transaction. Hackensack, however, is putting up a fight despite the setback. On August 26, shortly after the opinion was released, the hospitals filed an appeal of the injunction with the 3rd Circuit Court of Appeals.

[In the appeal](#), Hackensack and Englewood contend that the district court erred in the geographic market definition, the likelihood of price increases, and the evaluation of the procompetitive benefits of the acquisition. Specifically, the hospitals argue that the geographic market based on county lines is an arbitrary political boundary and does not reflect commercial realities of the market. Additionally, the hospitals claim that the district court erroneously used patients’ willingness to pay as the standard, which has no bearing on insurers’ willingness to pay.[\[12\]](#)

Regardless of the outcome of the appeal, the FTC’s in-house

[administrative trial](#) is scheduled to begin in less than a month, on October 12. This is a trial on the merits and will be the first healthcare antitrust proceeding since President Biden issued an [executive order](#) in July aimed at revitalizing antitrust efforts to curb healthcare consolidation and ensure access to affordable healthcare services. Healthcare providers and antitrust experts all over the country are paying close attention to this case, as the outcome may be a guidepost for more enforcement efforts to come.

[1] 15 U.S.C. § 18.

[2] 15 U.S.C. § 45.

[3] Jeannie O’Sullivan, *FTC Wants NJ Hospital Merger On Ice During Antitrust Row*, Law360 (May 10, 2021).

[4] Bryan Koenig, *NJ Hospitals Merger Met With ‘Jaundiced Eyes’ In FTC Suit*, Law360 (June 2, 2021).

[5] Opinion with Findings of Fact & Conclusions of Law, at 33, *FTC v. Hackensack Meridian Health, Inc. and Englewood Healthcare Foundation*, No. 2:20-cv-18140 (Aug. 4, 2021).

[6] *Id.* at 35.

[7] *Id.* at 44.

[8] *Id.* at 48.

[9] *Id.* at 55.

[10] *Id.* at 60.

[11] *Id.* at 64.

[12] *FTC v. Hackensack Meridian Health, Inc. et al.*, USCA No.

21-2603 (Aug. 26, 2021).