# FTC Successfully Blocks Hackensack Meridian Merger with Big Win in 3rd Circuit Appeal

In the latest healthcare antitrust action, Hackensack Meridian and Englewood Healthcare officially terminated their merger plans after the Third Circuit Court of Appeals handed down a big win for federal regulators in the merger challenge. Last month, after multiple amicus briefs filed by various stakeholders in the appeals court, a three-judge panel affirmed the lower court's preliminary injunction to block the merger, holding that the Federal Trade Commission (FTC) established a prima facie case showing that the proposed merger is likely to substantially lessen competition and that the hospitals' procompetitive claims do not outweigh the alleged anticompetitive effects. As healthcare entities continue to actively pursue mergers and affiliations during –and in part driven by– the coronavirus pandemic, this circuit court decision not only effectively terminated the high-profile merger in New Jersey, but it may also set important precedents for both federal and state antitrust enforcement across the country. In this post, we recap the facts and procedural history of this major case and examine some of the legal arguments explored on appeal in this recent enforcement action.

**Background**

Hackensack Meridian and Englewood announced their plans to merge in October 2019. Hackensack Meridian Health is the largest

healthcare system in New Jersey and Englewood Hospital is the third-largest provider of inpatient general acute care services (GAC) in Bergen County. 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 the proposed acquisition would reduce competition for GAC services in Bergen County and give Hackensack great bargaining leverage to demand higher prices from insurers, which will in turn lead to higher premiums and out-of-pocket costs and decrease the quality of care and access for patients. The district court agreed with the FTC and issued a preliminary injunction in August 2021. For detailed analysis of the FTC challenge and district court ruling, see **previous coverage** in Litigation and Enforcement Highlights on the Source Blog.

On appeal, the legal standard applied is that the FTC must establish a prima facie case that the effect of the proposed merger is likely to be anticompetitive in the proper relevant market, which includes both a product market and a geographic market. **In oral arguments made to the Appellate Court on December 7, 2021**, Hackensack and Englewood contended 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. In support of the FTC, multiple stakeholders, including The Source, **filed amicus briefs** to the 3rd Circuit. Amici ranged from **state attorneys general** to a long list of **healthcare antitrust experts and economists**. For details

of the amicus briefs filed on appeal, see **previous coverage** on the Source Blog. On March 22, the 3rd Circuit issued an opinion in favor of the FTC and affirmed the lower court's preliminary injunction blocking the merger pending FTC's administrative trial on the merits.

**Geographic Market Definition**

While the parties agree on the relevant product market of inpatient (general acute care) services) sold to commercial insurers, the main contention is the definition of the geographic market. The definition of the relevant geographic market is "that area in which a potential buyer may rationally look for the goods or services he seeks."[1] The FTC proposed a patient-based geographic market, which is defined by all hospitals, whether located in Bergen County or not, used by commercially insured patients who reside in Bergen County. The FTC's market definition was based on the economic significance of Bergen County: 1) both Hackensack and Englewood are located there, 2) most Bergen County residents receive care there, and 3) the insurers' perspective that they cannot feasibly offer a plan to Bergen County residents that does not include a Bergen County hospital. The hospitals rejected this definition as not feasible because 1) the FTC did not meet a showing of price discrimination in the proposed market; and 2) the proposed market does not pass the hypothetical monopolist test. The 3rd Circuit opinion rejected both of these arguments.

First, the court held that a showing of price discrimination is not required for a patient-based market. In response to the hospitals' argument that the FTC did not prove that patients in the proposed market could be charged higher prices than patients living outside the proposed market, the court held that price

discrimination is just one—but by no means the only—method to define a customer-based geographic market under the federal Merger Guidelines, which specifically allows for flexibility and a fact-specific process.[2] The court rejected case law presented by the hospitals, stating that they involve traditional markets that are different than the healthcare market, which involves "a two-stage model of competition."[3]

Second, rather than relying on price discrimination, the 3rd Circuit affirmed the proposed patient-based market simply because it passed the hypothetical monopolist test. To confirm that Bergen County satisfies the hypothetical monopolist test, the FTC expert performed a "willingness to pay" analysis, which measures the bargaining leverage of a hospital by estimating the value that patients place on having access to that hospital. The test examines the negotiating leverage that a hypothetical monopolist of Bergen County hospitals would have with respect to insurers. The court noted that "the more value patients assign to the hospital, the more desirable that hospital is to an insurer's network, and the higher the price an insurer is willing to pay to include that hospital in its network."[4]

Using this analysis, the 3rd Circuit agreed with the district court ruling, which found that the geographic boundary of Bergen County is corroborated by major insurers 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. In response to the hospitals' argument that the FTC analysis only considered the bargaining leverage of insurers and not patients, the 3rd Circuit court affirmed that in the healthcare industry patient preferences and insurer preferences "cannot be viewed in separate, isolated spheres."[5] Again, the 3rd Circuit emphasized here that the court should not "take too rigid a view of the healthcare market"; hence, the lower court did not

clearly err in its application of the hypothetical monopolist test.

**Anticompetitive Effect**

Having established the relevant market, the second part of the prima facie case is that the proposed merger will lead to anticompetitive effect in that market, which can include price increases and reduced quality. Led by California Attorney General Rob Bonta and Pennsylvania Attorney General Josh Shapiro, a coalition of 25 attorneys general filed an amicus brief noting that the states have seen a wave of hospital consolidation that resulted in large healthcare systems with market power and ability to raise prices. They argued that "mergers increasing the bargaining power of large healthcare systems result in higher prices without any substantial improvements in quality for consumers."

The 3rd Circuit opinion held that the FTC may establish anticompetitive effects based on high market concentration as measured by the Herfindahl-Hirschman Index (HHI) alone. The FTC showed that the proposed merger would increase the HHI by 841 points to 2,835, crossing the highly concentrated market threshold of 2,500, and the combined entities would control 47% of the market, indicating the merger is presumptively anticompetitive. In addition to HHI indicators, the 3rd Circuit panel pointed to direct evidence of anticompetitive effects. Most importantly, evidence showed that the hospitals viewed each other as competitors. Moreover, insurers also saw Hackensack as Englewood's closest competitor and testified that the merger would give the merged entities more leverage in negotiations against the insurance companies.

The hospitals also rejected the FTC's expert analysis of a post-

merger price impact of $31 million, arguing it is unreliable simply because it did not use the best claims data available to show any correlation between patient preferences and hospital prices in New Jersey. The FTC responded that the hospitals did not use proper methodology in analyzing their preferred data. The 3rd Circuit also found that after adjusting for flaws, a new FTC analysis of the hospitals' preferred data properly found a statistically significant relationship between changes in patient preferences and changes in price.[6] Finally, the court found that the district court did not err in relying on previous Hackensack merger contracts that showed anticompetitive price increases, as it is a matter of common sense that "past behavior is often indicative of future behavior."[7] Taken together, the court held that the HHI numbers and direct evidence establishes a strong prima facie case of anticompetitive effects.

**Procompetitive Effect**

Since the court held that the FTC established a prima facie case that the merger may substantially lessen competition, the burden then shifts to the hospitals to show that the anticompetitive effects will be offset by procompetitive benefits. The hospitals claimed that the proposed merger would offer benefits including upgrades and increased capacity limits at Englewood, the expansion of complex tertiary and quaternary care at Hackensack, cost-savings from service optimization between the hospitals, and quality improvements at both Hospitals.

The 3rd Circuit panel opined that the existence of procompetitive benefits does not mean the absence of anticompetitive harms, and to use the efficiencies defense, the efficiencies must (1) "offset the anticompetitive concerns in highly concentrated markets"; (2) "be merger-specific" (i.e.,

the efficiencies cannot be achieved by either party alone); (3) "be verifiable, not speculative"; and (4) "not arise from anticompetitive reductions in output or service."[8] The 3rd Circuit also clarified that use of the efficiencies defense is based on a sliding scale and each case is fact-specific – the magnitude of the efficiencies required depends on the strength of the likely anticompetitive effects. As such, the appeals court disagreed with the lower court and held that not every case requires a showing of extraordinary procompetitive effects. Even so, the claimed efficiencies in this case were insufficient to offset the likely anticompetitive effects because most of the benefits were speculative or non-merger specific, and there was no evidence that any savings would be passed on to consumers.

Finally, the 3rd Circuit acknowledged that the district court should've addressed the New Jersey AG's finding that the merger is in the public interest of the state. While that assessment is independent of an antitrust analysis, it should be included as part of the analysis of the effects of the proposed merger. Nonetheless, even taking such assessment into account, the 3rd Circuit concluded that the modest quality improvements and benefits to the community are not significant enough to overcome the strong prima facie case.

**Hospitals Abandon Merger**

Given the win for FTC on appeal, on April 5, the hospitals officially terminated their merger agreement and abandoned the proposed acquisition, ahead of the FTC in-house **administrative trial** scheduled for April 22. Since its inception and all the way to its high-profile appeal to the 3rd Circuit, this case has generated intense interest and attention from various stakeholders in health policy. The outcome on appeal in favor of

federal antitrust enforcement no doubt sets important legal precedents that may have strong implications for both federal and state enforcement efforts affecting healthcare providers markets around the country.

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[1] Opinion of the Court, at 10, *Federal Trade Commission v. Hackensack Meridian Health, Inc.; Englewood Healthcare Foundation*, USCA No. 21-2603 (Mar. 22, 2022).

[2] Id. at 13.

[3] Id.

[4] Id. at 16-17.

[5] Id. at 20.

[6] Id. at 25.

[7] Id. at 27.

[8] Id. at 29.