In re Evanston Northwestern: Plaintiff Class Certified Following the FTC's Succesful Challenge to a Consumated Hospital Merger

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In re Evanston Northwestern, currently pending in federal district court in the Northern District of Illinois, represents the first private class action antitrust lawsuit brought as a result of a hospital merger. At issue in Evanston is the 2000 acquisition of Highland Park Hospital by rival Evanston Northwestern HealthCare Corp. Four years after the completion of the merger, the FTC filed a retroactive administrative complaint, alleging that the merger had significantly lessened competition for general acute care hospital services in Chicago's north shore area. See FTC Press Release. The delayed timing of the FTC's case was noteworthy because the parties had filed a premerger notification, as required by the Hart-Scott-Rodino Act, after which the FTC declined to take action against the deal. In an effort to reverse a trend of losing hospital merger cases, in 2002, the FTC began a retrospective evaluation of certain consummated hospital mergers to determine whether those mergers caused anticompetitive effects. Also of note was the relief sought by plaintiffs in the subsequent class action, because merger cases usually involve injunctive relief and not damages.

The FTC prevailed in 2005, when an Administrative Law Judge (ALJ) ordered full divestiture of Highland Park from Evanston

Northwestern. When the ALJ's decision reached the full Commission, it was affirmed on the merits|however, the Commission ordered an alternative remedy to divestiture: it required the parties to establish separate, independent teams to negotiate contracts with managed care organizations in order to promote competition among the hospitals. See FTC Press Release. With the FTC's findings of actual competitive harm resulting from artificially high prices in hand, class action plaintiffs filed a private antitrust lawsuit against the hospital in 2008, seeking treble damages. See the complaint.

After surviving a motions to dismiss and for summary judgment, plaintiffs sought class certification under Federal Rules of Civil Procedure 23(b)(3). Initially, the district court declined to certify the class because of predominance issues. See the district court's opinion. In general, class action plaintiffs must allege, and ultimately be able to show at trial, that questions of law or fact common to the class predominate over questions pertaining to individual members. As the district court explained in its initial opinion on the motion for class certification, "plaintiffs must present affirmative evidence to demonstrate that there is a method of proving classwide impact." Because the plaintiffs had not shown that Evanston Northwestern increased prices at a uniform rate across the various hospital services—which would have demonstrated class-wide impact—the district court denied the motion for class certification.

Plaintiffs filed an interlocutory appeal of the district court's denial of their class certification motion in the Seventh Circuit Court of Appeals. At the appellate level, the question before the court was whether the district court had abused its discretion in denying class certification. The Court of Appeals explained that under the proper predominance standard, plaintiffs' burden at the class certification stage was to demonstrate "that the element of antitrust impact is capable of

proof at trial through evidence that is common to the class rather than individual to its members." See the Seventh Circuit's opinion. After reviewing the plaintiffs' proposed methodology Court held that such a methodology would allow for common proof of the antitrust impact on patients covered by each individual hospital-insurer contract. The proposed methodology—a difference-in-differences analysis—is a technique that measures the effect of an event at a given period in time by computing the difference in the outcome before and after the event for both control and treatment groups and then computing the difference between the differences across the two groups (the "DID estimate").

In reaching its decision, the Court of Appeals recognized that "insurers and health care providers negotiate contracts that cover not a single service but *complex bundles of many different services and products*." Although the Court of Appeals ultimately vacated the district court's opinion, it warned in dicta that "[plaintiffs'] approach does not deal sufficiently with all of the relevant variations that could confound the antitrust impact analysis." Accordingly, predominance issues may become relevant again in assessing liability and damages.

On remand, the district court certified the class, but noted that certification issues could be revisited later on per Rule 23(b)(3). See the post-remand opinion. There are lingering issues involving some of the plaintiffs' binding arbitration agreements, and it may be the case that arbitration is the best way to resolve the dispute, which would make class certification inappropriate under Rule 23(b)(3). But, as of now, the lawsuit is proceeding as a class action.