

Opening Statement Proposed Merger of Advocate and NorthShore

*Federal Trade Commission & State of Illinois v.
Advocate Health Care Network and Advocate Health and Hospital
Corporation and NorthShore University Health System*

April 11, 2016





Advocate

- Advocate is the largest health system in Illinois with 11 GAC hospitals and one Children's hospital
- Advocate's Lutheran General Hospital and Condell Medical Center are both in the relevant geographic market



- Advocate generated \$5.2 billion in revenue for FY2014



NorthShore

- NorthShore is one of the largest systems in Chicago, with 4 major hospitals within the relevant geographic market

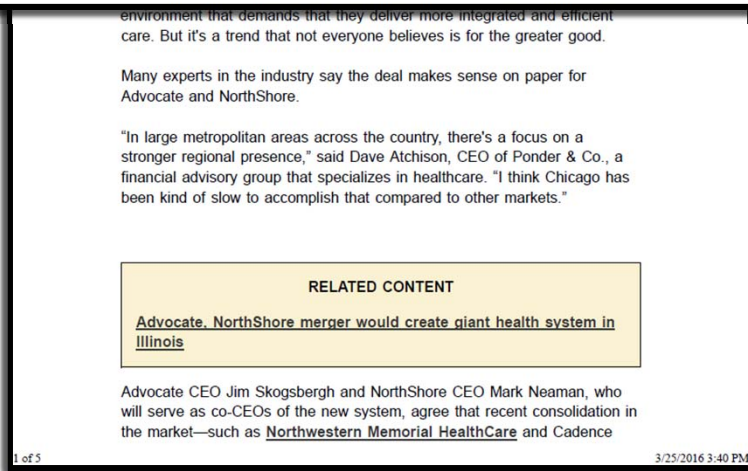


- NorthShore's annual revenues are \$1.9 billion

Merger Would Create a Healthcare “Behemoth”



“...would create a \$7 billion academic-suburban behemoth”



- The Defendants valued the transaction at \$2,200,000,000
- The Combined System would:
 - Have \$7 billion in revenue
 - Employ 2275 physicians and affiliate with an additional 5025 physicians
 - Operate 15 GAC Hospitals, 11 of which would be located in Cook and Lake Counties
- The Combined System would be:
 - Largest Health System in Illinois
 - 11th Largest Non-Profit Health System in the United States

Governing Law

High market shares and concentration levels in the relevant market create a strong presumption of illegality





Section 7 of the Clayton Act

“No person shall acquire, directly or indirectly . . . the assets of one or more persons engaged in commerce . . . ***where in any line of commerce*** or in any activity affecting commerce ***in any section of the country***, the effect of such acquisition . . . ***may be substantially to lessen competition***, or to tend to create a monopoly.”

Standards for Granting a Preliminary Injunction under § 13(b)



Preliminary injunction under § 13(b) of the FTC Act warranted when in the public interest –

1. Considering the Commission's likelihood of success on the merits; and
2. Weighing the equities.

“No court has denied relief to the FTC in a 13(b) proceeding in which the FTC has demonstrated a likelihood of success on the merits.” *FTC v. OSF Healthcare Sys.*, 852 F. Supp. 2d 1069, 1094 (N.D. Ill. 2012).

Plaintiffs Are Likely to Succeed on the Merits

- Inpatient GAC services provided to commercial payers and their members are a distinct product market
- The North Shore Area is a relevant antitrust geographic market
- Merger is unlawful under Clayton Act § 7
 - Strong presumption based on market share and concentration
 - Eliminates head-to-head competition between close—if not closest—competitors
- Entry and expansion will not be timely, likely or sufficient
- Alleged efficiencies are not cognizable and cannot save this anticompetitive merger





Philadelphia Nat'l Bank Presumption Governs Merger Analysis

U. S. v. PHILADELPHIA NAT. BANK. 321

Syllabus.

UNITED STATES v. PHILADELPHIA NATIONAL BANK ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

No. 83. Argued February 20-21, 1963.

behavior, or probable anticompetitive effects. Specifically, we think that a merger which produces a firm controlling an undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in that market is so inherently likely to lessen competition substantially that it must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects. See *United States v. Koppers Co.*, 202 F.Supp. 437 (D.C.W.D.Pa.1962).

United States v. Phila. Nat'l Bank, 374 U.S. 321, 363 (1963); see also *United States v. Rockford Mem'l Corp.*, 898 F.2d 1278, 1285 (7th Cir. 1990) (Posner, J.)

The Relevant Market

Relevant Product Market
Relevant Geographic Market



Well-Recognized Product Market: General Acute Care Inpatient Services



- *United States v. Rockford Mem'l Corp.*, 898 F.2d 1278, 1284 (7th Cir. 1990) (Posner, J.)
- *ProMedica Health Sys., Inc. v. FTC*, 749 F.3d 559, 567 (6th Cir. 2014)
- *FTC v. OSF Healthcare Sys.*, 852 F. Supp. 2d 1069, 1075-76 (N.D. Ill. 2012)

The North Shore Area Is a Relevant Geographic Market



- Patients want local hospitals
 - Advocate's CEO agrees
 - Defendants' experts agree
 - Other providers agree
 - Payers agree
- Payers need local hospitals to sell health plans

Advocate's CEO Agrees that Patients Want Care Close to Home



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Advocate Health/North Shore University Medical 8/21/2015

37	39
1 covered the ability to keep members to the extent	1 Q. Did you understand the question?
2 possible within the Advocate system for a	2 A. I think I did. I think you were asking
3 particular product.	3 about what's important to the payers. I think
4 Are there any other factors that you	4 geographic reach is important to the payers so that
5 consider when Advocate is negotiating a managed	5 they can be attractive in different markets.
6 care contract?	6 BY MR. CARSON:
7 A. I think Dr. Sacks could probably --	7 Q. Is geographic reach important because
8 MR. McCANN: Objection. There's no	8 patients like to receive care close to home?
9 foundation for that question.	9 A. Yeah. I've seen the previous testimony
10 BY MR. CARSON:	10 about those questions. I think, in general,
11 Q. Continue.	11 convenience is an important factor for patients.
12 A. Dr. Sacks could probably list a number of	12 And I think, generally, patients would like to
13 them, but I have given you the ones that come to my	13 receive care close to home.
14 mind.	14 However, we see that changing. I mean,
15 Q. Okay. So those are the factors that	15 the importance of convenience is that patients, they
16 are -- that when you	
17 foremost in your	
18 MR. VORRA:	
19 objection.	
20 THE WITNESSES:	
21 generally listening	
22 discussions to other	
23 important, where	
24 looking for me or	
25 course or aren't we	

"I think, in general, convenience is an important factor for patients. And I think, generally, patients would like to receive care close to home."

1 don't click through

2 with you.

3 It's more me

4 agreeing on a part

5 is recommending

6 BY MR. CARSON:

7 Q. In your ex

8 payers that their

9 successful for bot

10 A. I think he

11 Q. In your ex

12 understanding of

13 particular provid

14 A. I think yes

15 As you know from

16 feedback from son

17 certain geography. So, clearly, that's of import.

18 Types of services provided. Obviously,

19 cost is important. Reputation of the provider so

20 that I can be attractive to the potential

21 subscriber. Those kinds of things.

22 Q. Why is geographic reach important?

23 MR. VORRA: Objection. To the payers?

24 To whom?

25 BY MR. CARSON:

17 closer to work as opposed to closer to home, does

18 that apply to all services that they're seeking?

19 A. I think it's a general rule. Now, in

20 healthcare, it's probably assumed that people will

21 travel further for more serious kind of care.

22 Perhaps primary care, a little bit convenience is a

23 factor. I will be inconvenienced, I'm more open to

24 being inconvenienced, if it's a significant

25 procedure. And I'm talking about the transplants

10 (Pages 37 to 40)

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Defendants' Experts Agree that Patients Prefer GAC Care Close to Home

- “For most hospitals, you know, the people who come to you are the people who are near.” Dudley Depo. Tr. at 238:1-18.
 - “And that just reflects that people tend to go nearby. And life experience and people that you talk to, you know, they tend to go to the hospitals that are near them.” Dudley Depo. Tr. 238:19-239:6.
- “Q. In your experience, have you found that patients tend to go to nearby or local hospitals? A. Absolutely. Q. Why is that? A. It’s convenient.” Steele Depo. Tr. at 25.

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Payers Need Local Hospitals

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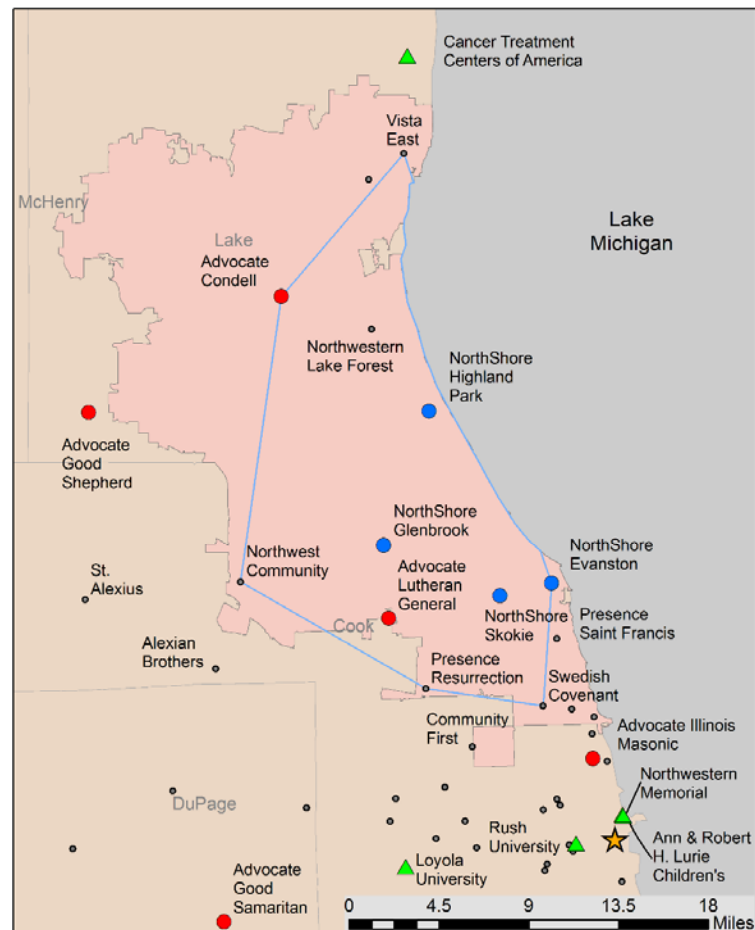
Geographic Market Definition

- Relevant geographic market determined by asking “whether a hypothetical monopolist could impose a small but significant nontransitory increase in price (“SSNIP”) in the proposed market.”
 - *Saint Alphonsus Med. Ctr.-Nampa Inc. v. St. Luke's Health Sys., Ltd.*, 778 F.3d 775, 784 (9th Cir. 2015).
- Fact-specific inquiry.
- Geographic markets can be “based on the locations of suppliers [that] encompass the region from which sales are made.” Horizontal Merger Guidelines, § 4.2.1.



The North Shore Area Is a Relevant Geographic Market – a Monopolist Could Impose a SSNIP

- Hospitals: 11
 - Population: 847,000
 - Area: 270 square miles
- Denver, CO – 663,862 (153 sq. mi.)
 - Atlanta, GA – 456,002 (133 sq. mi.)
 - New Orleans, LA – 384,230 (169 sq. mi.)



● Advocate Hospital ▲ Destination Hospital NorthShore's Service Area ★ Downtown Chicago
● NorthShore Hospital ● Other Hospital North Shore Area

Sources: PX05095, AHA Hospital Data

U.S. Census Bureau population estimate as of 7/1/2014;
land area as of 1/1/2014

https://en.wikipedia.org/wiki/List_of_United_States_cities_by_population

Market Share and Concentration

Market share and HHIs exceed thresholds for presumptive illegality by a wide margin



Generally Accepted Market Concentration Thresholds

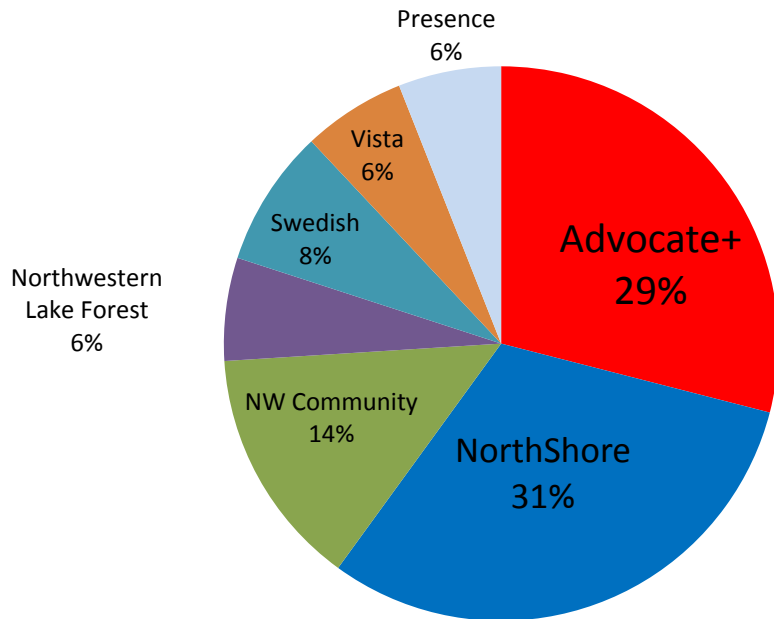


- “High levels of concentration raise anticompetitive concerns, and the HHI calculation provides one way to identify mergers that are likely to invoke these concerns.”
 - *FTC v. OSF Healthcare Sys.*, 852 F.Supp. 2d 1069, 1079 (N.D. Ill. 2012).
- “[A] merger that increases HHI by more than **200 points**, to a total number **exceeding 2500**, is presumptively anticompetitive.”
 - *ProMedica Health Sys., Inc. v. FTC*, 749 F.3d 559, 568 (6th Cir. 2014).



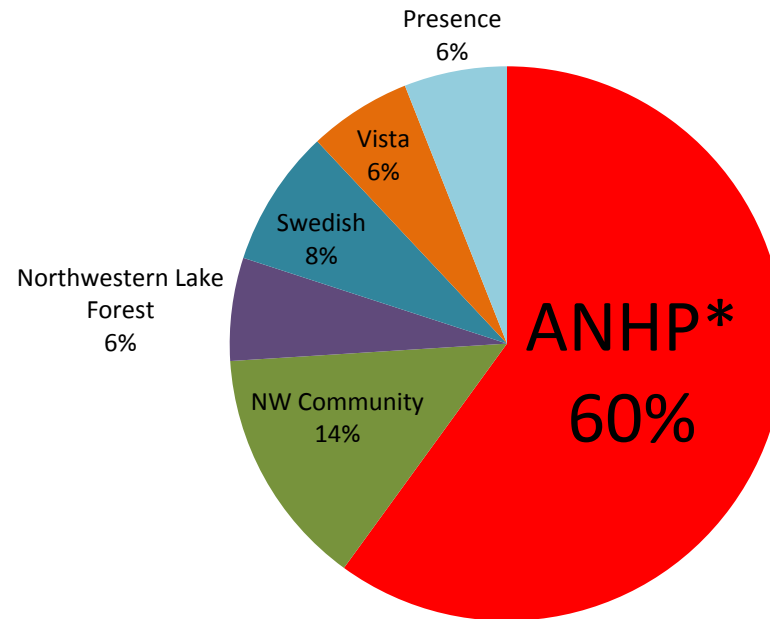
North Shore Area Market Shares

Pre-Merger



+Advocate Condell and Lutheran General

Post-Merger



*NorthShore hospitals plus Advocate Condell and Lutheran General



Concentration Levels Far Exceed Anticompetitive Thresholds

- Post-merger HHI and delta far exceed Merger Guidelines presumptions for market power
- Post-merger HHI is 3,943
- The change in HHI is 1,782

The Burden Shifts to Defendants After FTC Makes its Prima Facie Case



- Once the FTC makes its prima facie showing based on market shares and concentration, the burden shifts to Defendants
- Defendants can attempt to rebut the presumption by producing evidence showing that the merger will not cause competitive harm or through evidence that the merger would generate significant efficiencies
- If Defendants successfully rebut the presumption, the burden of producing additional evidence shifts to the government and merges with the burden of persuasion

Anticompetitive Effects

*Evidence confirms the acquisition's
likely competitive harm*



Eliminating Close Competition Matters



- “As a general rule, the merger of two closely substitutable hospitals will increase the combined system's bargaining leverage because the alternative ... of not contracting becomes less attractive from the perspective of health plans.” *FTC v. OSF Healthcare Sys.*, 852 F. Supp.2d 1069, 1075-76 (N.D. Ill. 2012) (quotations and citations omitted).
- “Courts have recognized that a merger that eliminates head-to-head competition between close competitors can result in a substantial lessening of competition.” *FTC v. Sysco Corp.*, 113 F. Supp. 3d 1, 60 (D.D.C. 2015).
- *FTC v. Swedish Match*, 131 F. Supp. 2d 151, 169 (D.D.C. 2000) (finding a likelihood of unilateral price increase where merger would eliminate one of Swedish Match's “primary direct competitors”)



Unilateral Competitive Effects

- Advocate and NorthShore are close, if not closest, competitors





Unilateral Competitive Effects

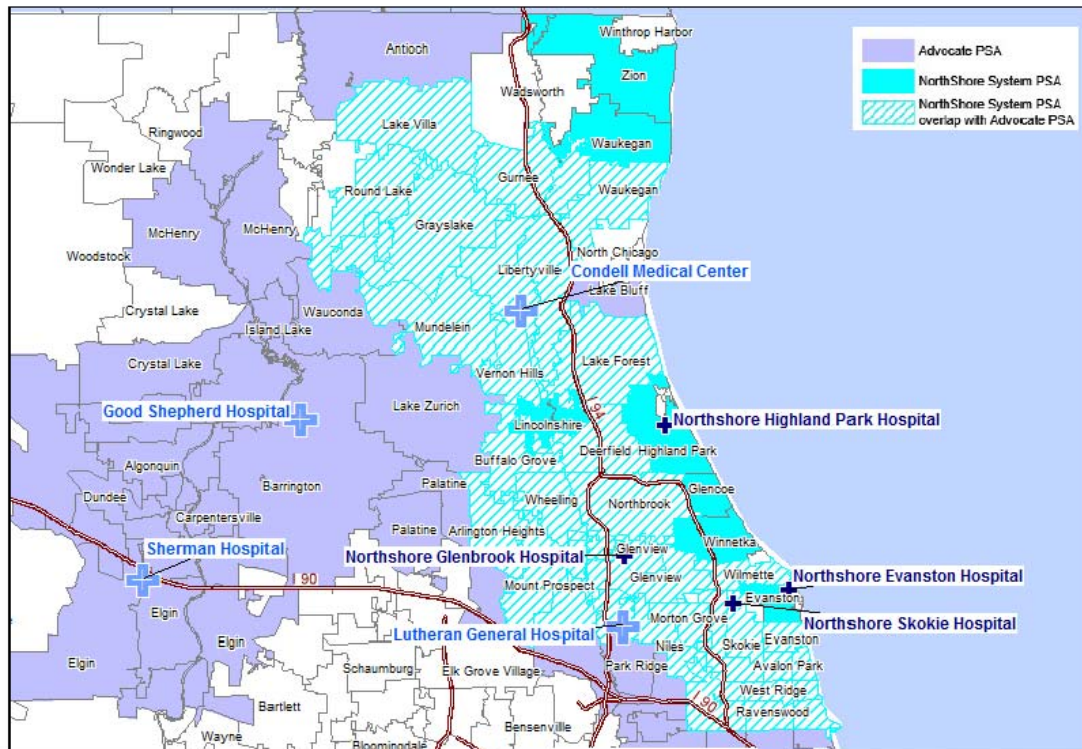
- Advocate and NorthShore are close, if not closest, competitors

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Advocate and NorthShore are Head-to-Head Competitors in the North Shore Area



NorthShore University Health System Primary Service Area overlap with Advocate

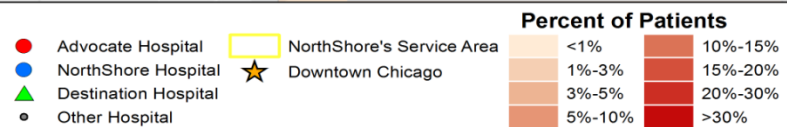
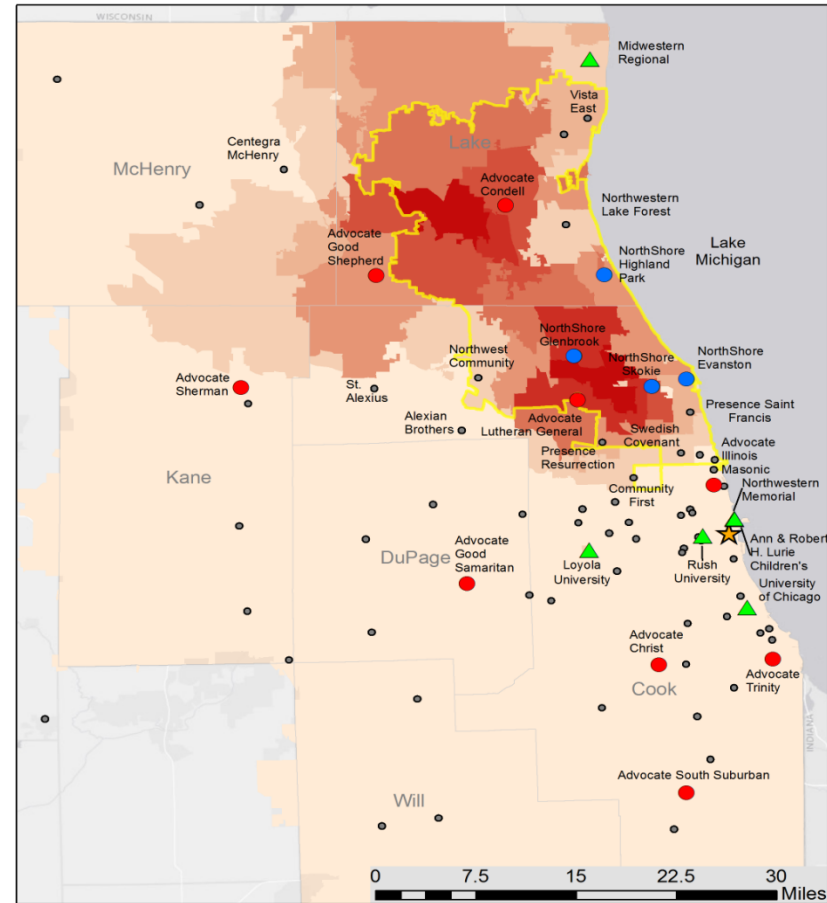


AHC00060032
PX04032-009

Patients View NorthShore and Advocate as Substitutes



- A significant fraction of patients in the North Shore Area view Advocate or NorthShore as their first or second choice

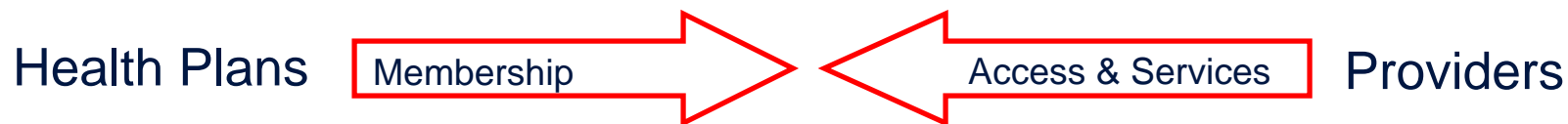


Sources: PX05095, AHA Hospital Data



Bargaining Leverage Overview

- Bargaining Leverage: Health Plans vs. Providers
 - Health plans and providers determine rates through bilateral negotiations
 - Each side's leverage is determined by the other side's "*outside option*"



- The acquisition makes health plans' outside options ***much less attractive***, giving Advocate/NorthShore the ability to extract higher reimbursements from health plans

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Payers Cannot Offer a Marketable Product without Advocate or NorthShore



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Payers Say the Merger Will Deny Them Adequate Alternatives



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Defendants Cannot Rebut the Strong Presumption of Illegality

Defendants fail to carry their burden on entry or efficiencies



Entry & Expansion

Entry will not offset the acquisition's anticompetitive effects



Entry Must Be Timely, Likely, and Sufficient



Timely

“[E]ntry must be rapid enough to make unprofitable overall the actions causing those effects and thus leading to entry, even though those actions would be profitable until entry takes effect.”

Likely

“The Merger Guidelines explain that *for entry to be considered likely, it must be a profitable endeavor*, in light of the associated costs and risks.”

Sufficient

“Under the Merger Guidelines, *for entry or expansion to be sufficient, it must replace at least the scale and strength of one of the merging firms* in order to replace the lost competition from the Acquisition.”

Horizontal Merger Guidelines, § 9 and *FTC v. ProMedica Health Sys., Inc.*, No. 11-cv-47, 2011 WL 1219281, at **31-34 (N.D. Ohio Mar. 29, 2011).



Entry is Highly Unlikely

- Entry is restricted by Illinois Certificate-of-Need (“CON”) requirements for hospital construction
 - CON process is lengthy and costly
 - Applications are routinely disapproved, e.g. Advocate’s application for a new hospital at Round Lake
- Hospital construction is costly and takes significant time
- Outpatient/physician offices are not hospitals

Defendants Fail to Demonstrate “Extraordinary” Efficiencies



- “High market concentration levels require proof of ***extraordinary efficiencies***, . . . and courts generally have found inadequate proof of efficiencies to sustain a rebuttal of the government’s case.”
 - *United States v. H&R Block, Inc.*, 833 F. Supp. 2d 36, 89 (D.D.C. 2011); see also *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 721-22 (D.C. Cir. 2001); *Horizontal Merger Guidelines*, § 10
- “No court . . . has found efficiencies sufficient to rescue an otherwise illegal merger.”
 - *FTC v. ProMedica Health Sys.*, No. 11-cv-47, 2011 WL1219281, at *57 (N.D. Ohio, Mar. 29, 2011)

Efficiencies Must Be Verifiable and Merger-Specific



Verifiable

“The court must undertake a rigorous analysis . . . to ensure that those ‘efficiencies’ represent more than mere speculation and promises”

- *United States v. H&R Block, Inc.*, 833 F. Supp. 2d 36, 89 (D.D.C. 2011)

“Efficiency claims will not be considered if they are vague, speculative, or otherwise cannot be verified by reasonable means.”

- *Horizontal Merger Guidelines*, § 10

Merger-Specific

“[E]fficiencies must be ‘merger-specific’ to be cognizable as a defense.”

- *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 721-22 (D.C. Cir. 2001)

“The Agencies credit only those efficiencies . . . unlikely to be accomplished in the absence of either the proposed merger or another means having comparable anticompetitive effects. These are termed merger-specific efficiencies.”

- *Horizontal Merger Guidelines*, § 10

Claimed Cost Savings are Vague, Speculative, and Unverifiable



- Claim: merger will generate cost savings
 - Overwhelming majority in category “All other (tbd).”
- Claim: Advocate’s cost of care is lower than NorthShore’s and merger will lower NorthShore’s cost of care.
 - No evidence that Advocate’s total cost of care is lower.
 - No plan to lower NorthShore’s costs.

The Equities Weigh Heavily in Favor of Granting Injunctive Relief

Strong public interest in enforcing antitrust laws outweighs Defendants' speculative efficiencies





Overwhelming Public Interests At Stake

- Two public interests:
 - (i) effective enforcement of antitrust laws
 - “Congress’s specific public equity consideration in enacting the provision” *FTC. v. OSF Healthcare Sys.*, 852 F. Supp. 2d 1069, 1094 (N.D. Ill. 2012)(quoting *FTC v. Whole Foods Market, Inc.*, 548 F.3d 1028, 1035(D.C. Cir. 2008))
 - (ii) effective relief after the merits proceeding
 - “[T]he difficulty of unscrambling merged assets often precludes an effective order of divestiture.” *FTC. v. OSF Healthcare Sys.*, 852 F. Supp. 2d 1069, 1095 (N.D. Ill. 2012)(quoting *FTC v. Dean Foods Co.*, 384 U.S. 597, 607 n.5 (1967)).



Private Equities Afforded Little Weight

- The risk that the parties may abandon the merger is a private equity and “cannot overcome the significant public equities weighing in favor of a preliminary injunction.”
 - *FTC v. Sysco Corp.*, 113 F. Supp. 3d 1, 87 (D.D.C. 2015)(quoting *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 727 (D.C. Cir. 2001)).
- Courts “must afford [private equities] little weight, lest we undermine section 13(b)’s purpose of protecting the ‘public-at-large, rather than the individual private competitors.”
 - *FTC. v. Univ. Health, Inc.*, 938 F.2d 1206, 1225 (11th Cir. 1991).



Adding Subscribers to an Insurance Product is Not a Public Interest

- Defendants' argument:
 - No access to large group market for Advocate-only insurance product.
 - A managed care organization could market a NorthShore-Advocate product to large groups.
- Defendants must show through credible evidence that the merger will lower prices or improve quality.
 - *FTC v. OSF Healthcare Sys.*, 852 F. Supp. 2d 1069, 1095 (N.D. Ill. 2012) (equities favor injunction “because defendants have not shown that the merger would lower prices, whereas the FTC has shown that the merger would likely lead to higher prices”).

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Other Narrow Network Products are Available



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The HPN is Old Wine in a New Bottle

- “The product will be an HMO...”
 - BlueCare Direct with Advocate Healthcare, “Key Deal Terms,” PX04200-026.
- ““We call it a high-performing network,’ said Dr. Sacks. ‘It was a term we stole from a consultant a year ago to kind of get away from the negative connotations of narrow [HMO] network.’”
 - Reed Abelson, *Trying to Revive H.M.O.’s, but Without Those Scarlet Letters*, N.Y. Times, Feb. 28, 2016, see also Sacks (Advocate) Depo. at 238:14-22.



Get Less; Pay Less

- Blue Cross Advantage/Precision
 - “BlueAdvantage HMO offers one of the largest provider networks of primary care physicians (PCPs) and hospitals in the state.”
- BlueCare Direct with Advocate
 - No choice
- The HPN product can only be sold at a discount of 10-15%.
 - PX04200 at AHC01213587



Including NorthShore in the HPN Will Not Lower Costs or Improve Quality

- Defendants claim that the merger will bring NorthShore capabilities that lower costs and improve quality:
 - risk-based contracting (“RBC”), and
 - population health management (“PHM”).
- NorthShore performs **better** than Advocate on quality and cost measures.
- NorthShore does not need the merger for RBC or PHM.

NEXT SLIDE CONFIDENTIAL

NorthShore is Already Doing Successful Population Health Management



- “[M]ultiple efforts relative to population health,” including chronic disease management, hiring case managers, targeted programs for high-risk patients and clinical standardization. Murtos (NorthShore) Depo. at 34:15-19.
- NorthShore has a Care Transformation Team that is a “Population Health & Value Based Capabilities Work Team.” PX5013-003.

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NorthShore is Already Engaged in Risk-Based Contracts, and is Seeking More



- NorthShore has a partial capitation contract for physician services for two BlueCross products. Washa (NorthShore) Depo at 77:9-13; 115: 6-22.
- NorthShore entered into a commercial ACO agreement with BlueCross in 2014. PX05171-008.
- NorthShore has approached payors to discuss participating in a global risk product. PX07014-001-2, PX07013-001
- NorthShore will continue to move towards risk-based contracting regardless of whether the merger is enjoined. Neaman Depo. at 134:10-22.

Conclusion

*A Preliminary Injunction
Should Issue*





Conclusion

- Market share of 60% and post-merger HHI of 3,943 creates a legal presumption that this merger will have anticompetitive consequences
- Testimony, documents, and empirical evidence confirm the acquisition's likely anticompetitive effects
- There are no verifiable, merger-specific efficiencies that justify taking the risk of this acquisition
- The evidence warrants issuance of a preliminary injunction under § 13(b) of the FTC Act