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EDITOR'S REPORT

Welcome to the new edition of the ABA Antitrust Health Care Chronicle. We are pleased to present two articles for this issue, the first of the ABA's 2022-23 year. Our first article is an interview with Lindsey Bohl, an attorney at Simpson Thacher & Bartlett in Washington, DC and, recently, lead staff attorney on the Hackensack/Englewood hospital merger investigation and challenge by the FTC. The second article is by Brendan Coffman and Nathan Mendelsohn at Wilson Sonsini Goodrich & Rosati in Washington, DC and Anna Neill at Kenny Nachwalter in Miami, FL which reviews the debate surrounding the privilege waiver by one of the defendants in the recently settled *Glumetza* reverse payment case.

If there is a topic that you would like to see covered in a Committee program or if you have any other suggestions, please contact the Committee Co-Chairs, Lauren Rackow (LRackow@cahill.com) or Amy Ritchie (aritchie@ftc.gov).

If you would like to submit an article for the Chronicle, please contact Paul Wong (paul.wong@nera.com) or Jason Albert (jalbert@secretariat-intl.com).

In This Issue

A Publication of the Health Care and Pharmaceuticals Committee of the Antitrust Section of the American Bar Association, Co-Chaired by Lauren Rackow of Cahill Gordon & Reindel LLP and Amy Ritchie.

ABA SECTION OF ANTITRUST LAW
Promoting Competition Protecting Consumers

ENFORCER INSIGHTS: LESSONS LEARNED FROM HACKENSACK/ENGLEWOOD WITH LINDSEY BOHL, FORMER FTC LEAD INVESTIGATIVE ATTORNEY

Interview by: Amy Ritchie, Attorney, Mergers IV, Federal Trade Commission; Co-Chair of the Health Care and Pharmaceutical Committee[1]

Lindsey Bohl is an antitrust attorney at Simpson Thacher & Bartlett in Washington, DC. She advises on matters involving all aspects of antitrust and competition law, including merger reviews, government antitrust investigations, antitrust litigation and counseling on a variety of competition issues. Her practice focuses on counseling clients considering M&A transactions across a wide range of industries, including healthcare, retail, consumer products, medical devices and pharmaceutical products, and technology. Prior to joining Simpson Thacher (where she also began her career in 2014), Lindsey was a staff attorney in the Federal Trade Commission's Mergers IV Division from 2019-2021. While at the FTC, Lindsey led significant healthcare and retail transaction investigations, including her role as team lead on the 2020 Hackensack Meridian Health, Inc./Englewood Healthcare Foundation investigation, and her core role on the *FTC v. Hackensack* litigation team that prevailed in challenging the proposed transaction both in the District Court of New Jersey and Third Circuit.

Lindsey Bohl
Associate, Simpson Thacher & Bartlett

Lindsey, you led the investigative FTC team that challenged Hackensack Meridian Health's plan to acquire Englewood Healthcare in New Jersey. The FTC won its challenge at the district court level and it was upheld in the Third Circuit. Can you provide a brief overview of the facts?

Absolutely, leading the team in this case was a highlight of my time at the FTC. The *Hackensack/Englewood* case involved one of New Jersey's largest hospital systems, Hackensack Meridian Health, attempting to acquire Englewood Health, a neighboring general acute care hospital about five miles away from Hackensack's flagship academic medical center (Hackensack University Medical Center, or HUMC), in Bergen County, New Jersey. Hackensack already owned or operated two of the six general acute care hospitals in the county, and was the most significant provider of inpatient services in the county, while Englewood was the third-largest inpatient services provider in the county. The FTC's complaint alleged that the acquisition would result in Hackensack controlling nearly half the inpatient general acute care services sold to commercially insured patients in Bergen County, and would eliminate important competition between Hackensack and Englewood, leading to higher healthcare prices and diminished incentives to compete on quality and access.

This was a particularly interesting matter for a few reasons. First, Bergen County (the FTC's alleged geographic market) is very close to a large urban area – New York City. Second, the hospitals' claimed that Englewood, as a smaller community service hospital, was a complement, rather than a competitor to, the much larger Hackensack system. The FTC used various sources of direct evidence to rebut that claim, and to strengthen its case that the merger would harm competition in addition to showing a presumption of anticompetitive harm. Third and finally, the hospitals' claims that the transaction would have significant benefits for New Jersey residents, bolstered by commitments in their merger agreement and the New Jersey Attorney General office's recommendation to the New Jersey Superior Court to approve the transaction through its charitable assets review statute. These topics, among others, were issues the FTC grappled with throughout the

[1] Ms. Ritchie's statements are her own and do not necessarily reflect the views of the Federal Trade Commission or any individual commissioner.

investigation and litigation, and ultimately both the district court and the Third Circuit were persuaded that the FTC met its burden of demonstrating likelihood of success that the proposed merger violated Section 7 of the Clayton Act.

You mentioned Bergen County's proximity to New York City. Why did the FTC allege that Bergen County was the relevant market and not something broader?

Historically, the FTC's healthcare complaints often define geographic markets that align closely with political boundaries, such as counties, so that's nothing new. But Bergen County is a particularly densely populated county in Northern New Jersey with over one million residents. Bergen County sits directly over the George Washington Bridge from Manhattan, and the FTC's analysis clearly had to account for the extent to which New York City hospitals factored into the healthcare landscape. However, what we learned is that Bergen County residents don't visit Manhattan hospitals in significant numbers for most inpatient hospital services, and prefer to stay in the county to receive care.

The FTC arrived at a Bergen County geographic market because that is where the documents from the hospitals, testimony and documents from insurers, and data all pointed. The district court judge credited the FTC's evidence that (1) Englewood and Hackensack University Medical Center, were both located in Bergen County; (2) more than 75% of Bergen County residents receive inpatient care in Bergen County; and (3) Bergen County is an economically significant area for insurers. In particular, the court was persuaded by testimony from all major commercial insurers serving the area, where they explained that they could not sell a marketable health insurance plan to Bergen County residents without a Bergen County hospital – even if the health plan included Manhattan hospitals or hospitals in adjacent New Jersey counties. The court found the FTC sufficiently established that Bergen County was a geographic market that satisfied the hypothetical monopolist test, and the Third Circuit affirmed that finding.

The FTC's Bergen County geographic market was also notable, in that the FTC supported the market using both a patient-based approach and a facility-based approach to measure market shares and concentration in Bergen County. Patient-based means calculating market shares and concentration based on where patients reside (i.e., Bergen County patients), whereas hospital-based means measuring shares and concentration based on the where hospitals are physically located (i.e., the hospitals within Bergen County). Here, the FTC argued that all hospitals serving Bergen County patients were accounted for using the patient-based approach, even those located in New York City and other large health systems with facilities in the surrounding densely populated counties of New Jersey. The FTC's briefing also presented evidence that a geographic market consisting of just the six hospitals located in Bergen County (i.e., using the hospital-based approach) would satisfy the hypothetical monopolist test. The FTC claimed that under either proposed measure, the resulting concentration figures established a presumption of anticompetitive harm under the Horizontal Merger Guidelines.

However, the hospitals and the FTC disagreed about whether the FTC was permitted to define a geographic market using a patient-based approach. The hospitals challenged the FTC's patient-based approach to the Bergen County geographic market, arguing that under the Horizontal Merger Guidelines, a customer- (or here, patient-) based market requires evidence of price discrimination. While the district court found that price discrimination was not

required as a matter of law, the issue of whether the FTC was required to prove price discrimination for a patient-based Bergen County geographic market became a central focus of the hospitals' appeal to the Third Circuit.

What is price discrimination and what did the Third Circuit say about the need to prove price discrimination when challenging a health care transaction?

Price discrimination means the ability to sell a product or service at different prices to different buyers. The hospitals claimed that the Horizontal Merger Guidelines and relevant economic literature required the FTC to show that patients specifically in Bergen County could be charged higher prices for inpatient general acute care services compared with patients living outside the proposed market. The hospitals argued that, here, the method of pricing caused prices to be the same for patients in and out of Bergen County. The hospitals, therefore, argued on appeal that the district court erred as a matter of law by not requiring the agency to demonstrate price discrimination.

The Third Circuit disagreed with the hospitals' reading of the Horizontal Merger Guidelines as mandating proof of price discrimination—there isn't a "rigid" requirement for a patient-based market, and approaches should recognize the unique commercial realities of the healthcare landscape. The Third Circuit explained the two-stage model of competition, in which hospitals and insurers first negotiate to determine whether the hospitals will be included in networks and how much insurers will pay, and in the second stage, hospitals compete to attract patients based on non-price factors (like quality or access to care). The court found that the commercial realities in this case supported the FTC's market based on both patient and hospital locations, citing the factual record that most Bergen County residents receive inpatient general acute care services in Bergen County, and thus insurers feel they cannot offer a plan without Bergen County hospitals in-network. The Third Circuit also relied on the *St. Alphonsus Medical Center v. St. Luke's* Ninth Circuit case, a 2013 challenge to a hospital system's acquisition of a physician group, in which the FTC similarly defined and the court upheld a market based on both patient and provider (or "supplier") location considerations. It, therefore, upheld the FTC's alleged Bergen County geographic market, without requiring evidence of price discrimination.

There is a perception that market shares and HHIs solely drive the FTC's merger enforcement decisions. In *Hackensack*, the Third Circuit noted the "Direct Evidence" that the FTC presented and characterized it as "strengthen[ing] the probability that the merger will likely lead to anticompetitive effects." Can you discuss some of that direct evidence your team gathered as part of your investigation?

The direct evidence showing a loss of competition was a critical component of the FTC's case. Not only did it confirm the HHI presumption, but it also combatted the hospitals' contention that Englewood, as a smaller community hospital, was a complement, and not a competitor to, the larger Hackensack system and its academic medical center in Bergen County. In addition to economic analysis presented by the FTC's expert, Dr. Leemore Dafny, including diversion ratios showing that a high percentage of Englewood patients would choose a Hackensack hospital if Englewood were not available (and vice versa), and willingness-to-pay analyses to measure price harm, the FTC focused on three main sources of direct evidence of anticompetitive effects: (1) the hospitals' own documents identifying one another

as competitors; (2) insurer testimony and documents; and (3) qualitative examples of non-price competition between the hospitals to improve quality and services.

As you noted, this direct evidence all strengthened the FTC's *prima facie* case, and the probability that the merger would lead to anticompetitive effects. A key source of effects evidence cited in the district court and Third Circuit opinions were documents created by Englewood's consultant engaged to analyze transaction partnership prospects, identifying Hackensack as a key competitor that drew patients from similar areas. The courts also found persuasive the insurer testimony and the insurer ordinary course modeling projections that, if Hackensack University Medical Center went out of network, a large percentage of patients would turn to Englewood. Finally, both the district court and the Third Circuit cited Hackensack's historic ability to raise rates at acquired hospitals as evidence supporting the prediction that the merger would lead to anticompetitive price increases. Though the hospitals claimed that Hackensack's contracts allowing them to increase rates were unrelated to the merger, the Third Circuit pointed out that past behavior is often indicative of future behavior, and Hackensack's prior rate increases supported a reasonable inference that it would continue to negotiate higher rate increases after the merger.

Were you concerned about the parties' rebuttal evidence of potential efficiencies?

The hospitals presented strong arguments, but did not adequately substantiate their efficiencies. In addition to traditional cost-savings efficiencies, hospital merging parties often cite benefits such as improved patient quality, expanded capacity, and new service line offerings. This case was no exception, and hospitals argued that the merger would benefit New Jersey residents in the form of healthcare cost savings, expansion of complex service lines, increased capacity, and quality improvements, pointing directly to various commitments outlined in their merger agreement. However, the FTC closely scrutinizes efficiencies claims, holding them to a high standard that includes demonstrating that any claimed efficiencies are verifiable and not speculative, and merger specific. The FTC investigative team found that the parties' substantiated efficiencies were insufficient to outweigh the transaction's anticompetitive effects.

The FTC went into the litigation knowing that neither the Supreme Court, nor the Third Circuit had found efficiencies in a presumptively anticompetitive horizontal merger great enough to offset the anticompetitive harm. In the controlling precedent from the 2016 *FTC v. Penn State Hershey Medical Center* case, an earlier hospital merger litigation, the Third Circuit expressed skepticism that such an efficiencies defense even exists. Revisiting the efficiencies defense five years later in *Hackensack*, the Third Circuit left open the possibility that an efficiencies defense may be viable. The opinion (authored by Judge Fisher, same author of the earlier *Hershey* opinion) expressly disagreed with the *Hackensack* district court's interpretation of *Hershey* as requiring "extraordinary" efficiencies to offset anticompetitive harms in every case where the government establishes its *prima facie* case. Instead, it framed efficiencies as a "sliding scale" in which the magnitude of the efficiencies needed to overcome a *prima facie* case depends on the strength of the likely adverse competitive effects of a merger.

While leaving the avenue for a successful efficiencies defense open, the district court and Third Circuit agreed with the FTC that the

hospitals fell short of substantiating many of their efficiencies claims. First, as to the potential cost-savings, the district court found these too speculative, and heavily weighed the acquiring system's track record from previous acquisitions, citing that the hospitals did not present evidence of historical cost-savings being passed on to commercial insurers or flowing to patients. Similarly the district court also found the hospitals' capacity relief and service line expansion claims to be speculative or not merger-specific, pointing out the hospitals' lack of planning documents as to how service optimization plans would be implemented, ongoing Hackensack expansion projects pre-dating the merger, and available capacity at other nearby Hackensack hospitals. Finally, with respect to quality improvements, while acknowledging that certain capital investments could improve facilities and equipment at Englewood, the district court found that the alleged quality benefits were also not merger-specific, because Englewood was already a high-quality hospital, scoring better than Hackensack on multiple important performance measures. The Third Circuit agreed that most of the hospitals' claimed benefits were speculative or non-merger specific, and the few benefits established did not constitute efficiencies significant enough to offset the likely anticompetitive effects.

The New Jersey Attorney General's office found that the merger was in the public interest under a non-antitrust statute – the New Jersey Community Health Care Assets Protection Act ("CHAPA"). The Third Circuit opinion briefly addresses this finding in its decision. What is your takeaway from that?

The New Jersey State Attorney General concluded that the merger was in the public interest, and recommended to the Superior Court of New Jersey to approve the transaction. Even though this was not necessarily an antitrust review process, it was a challenging needle for the FTC to thread. Many states have charitable asset review statutes similar to New Jersey's CHAPA review, which require a recommendation or approval from the state Attorney General's office for certain types of acquisitions of non-profit hospitals. While the New Jersey CHAPA analysis included a public interest determination, this is independent of an antitrust analysis, and relies on different factors. Under the state's CHAPA review process, New Jersey's Attorney General concluded that the transaction was in the public interest around the same time the FTC filed its antitrust complaint. The hospitals emphasized the state's support for the transaction from this CHAPA review in briefing throughout the litigation, and as you note, the Third Circuit opinion clearly factors this into its analysis. It was also notable that, unlike most previous hospital enforcement cases, the state did not join the FTC's antitrust complaint.

While state Attorney General support for the merger was not the deciding factor in *Hackensack*, the Third Circuit made clear that a court would be "remiss not to consider a state's assessment of the effects of a merger within its borders," and concluded that the district court should have included the interests of the community, as assessed by the state Attorney General, in analyzing the likely effects of a merger. Thus, local stakeholder views and the assessment of a state Attorney General may be something that courts consider more closely in future cases.

You've since left the FTC and rejoined private practice. What advice do you give your clients as a result of your experience in *Hackensack/Englewood*?

Many takeaways from the *Hackensack/Englewood* case have informed my analysis and advice since I rejoined Simpson Thacher

earlier this year, but here are just a few, including some that are more broadly applicable outside of the healthcare context.

First, the FTC does not necessarily apply one specific formula to defining a relevant geographic market and demonstrating that the market passes the hypothetical monopolist test. Market definition is highly fact-specific, and may be informed by a combination of party documents, insurer documents and testimony, and economic analyses. In *Hackensack*, the FTC alleged one proposed market in its complaint, Bergen County, and approached the hypothetical monopolist test, market shares, and concentration two different ways to establish that under either approach, the presumption of anticompetitive harm was met. Antitrust counsel should consider various approaches the FTC may take based on the unique facts and circumstances of a particular case, recognizing that there is no one-size-fits-all.

Second, and this is nothing new, but internal documents generated by the parties and their external consultants in connection with the transaction are critical evidence for the FTC, and *Hackensack* was no exception. For merging parties considering a transaction in any industry, it's important to engage antitrust counsel early in the process as these documents analyzing transaction partners and prospects, and potential merger benefits are generated.

Third, the merging parties' track record, including with respect to insurer negotiations, may be important. The FTC, and subsequently both the district court and Third Circuit considered previous acquisitions as part of the analysis of potential anticompetitive effects and in declining to credit certain efficiencies claims.

Finally, while efficiencies defenses may continue to be challenging once a court finds the FTC has established its *prima facie* case, the Third Circuit opinion leaves open the possibility of a successful efficiencies defense for a presumptively unlawful merger, framing the question as a sliding scale. According to the Third Circuit, the alleged efficiencies' magnitude needed to overcome the government's *prima facie* case depends on the alleged adverse effects of the deal. Based on this benchmark, merging parties will likely be best positioned when they can show that claimed cost-savings will be passed through to consumers and demonstrate robust planning as to how merger benefits will be achieved.

Finally, you undertook this investigation in the middle of the pandemic, shepherding it up to the appellate level. When you reflect on the totality of the experience, what stands out to you?

As much as I enjoyed all of the investigative work at the FTC, leading a trial team along with a group of extremely talented and experienced litigators, and watching investigative findings come together in a trial presentation, was a fantastic experience that has strongly informed my ability to advise clients regarding risk both in the context of merger investigations and likelihood of litigation success. Merger trials don't come along with the greatest frequency, so having that (Zoom) courtroom experience, including up to the appellate level, has been really valuable as a practitioner. I'm extremely grateful for that opportunity and for the wonderful FTC team.

One final observation - hospital merger enforcement in particular is an area where there is quite a bit of established judicial precedent, including at the appellate level across a number of circuit courts. In *Hackensack*, while the FTC cites the Horizontal Merger Guidelines, it also relied on a strong foundation of litigated healthcare provider

merger precedent, including *Hershey* in the Third Circuit, *St. Alphonsus v. St. Luke's* in the Ninth Circuit, and *FTC v. ProMedica* in the Sixth Circuit, among other cases. With the revised Merger Guidelines forthcoming, it will be interesting to see whether there is a change in the theories of harm or types of healthcare enforcement cases the FTC pursues. The Horizontal Merger Guidelines are frequently cited by courts in merger challenges as persuasive but also non-binding. While the current (2010) Guidelines have been met with general acceptance, including by the courts, it remains unknown to what extent the FTC and DOJ will revise those Guidelines and whether courts will similarly adopt the revisions. To the extent there is any tension between the revised Guidelines and the hospital merger precedent, I'll be interested to see how that gets resolved both in terms of the types of cases the FTC brings and how they fare in court.