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7th Circ. Paves Way For More Antitrust Actions Over Tie-Ups

By **Melissa Lipman**

Law360, New York (February 15, 2012, 8:30 PM ET) -- A recent Seventh Circuit decision reviving a lawsuit that accused a Chicago-area hospital system of abusing its increased market share in the wake of a merger lowers the bar for plaintiffs looking to lodge more private antitrust class actions over transactions, attorneys say.

In January, a three-judge panel concluded that plaintiffs suing NorthShore University HealthSystem over its 2000 acquisition of Highland Park Hospital didn't have to show that the newly-merged hospital group raised rates for all services by the same amount or percentage to meet the predominance requirement for class certification. The ruling stopped just short of certifying the suit outright, and remanded the dispute to the district court.

Though NorthShore asked the court on Jan. 27 to rehear the case, attorneys warned that the ruling as it stands provides key language on price uniformity and offers a model for plaintiffs to bring more antitrust class actions based on post-merger market share, which have long remained relatively rare, in the future.

"In antitrust class actions, defendants oftentimes argue that the plaintiffs can't prove antitrust impact on a classwide basis and often use evidence of variance in price movements as a way to demonstrate that antitrust impact is not susceptible to classwide proof," McDermott Will & Emery LLP partner David L. Hanselman Jr. said. "So I would anticipate plaintiffs lawyers seizing on this language as a way to ease their burden under Rule 23."

Rule 23 lays out the various ways plaintiffs can qualify for class certification under federal law.

NorthShore, which was known as Evanston Northwestern Healthcare Corp. when it bought its nearby rival, faced the consumer antitrust action after years of going head-to-head with the Federal Trade Commission over whether the deal was anti-competitive.

Even though the group bought Highland Park in 2000, the FTC did not lodge an administrative complaint over the deal until 2004. The agency eventually concluded that NorthShore's price hikes had been substantially higher than predicted and stemmed from the group's greater market power rather than other benign market forces.

After years of litigation, the FTC agreed to let NorthShore keep Highland Park as long as a separate team handled price negotiations with insurers for Highland Park.

In 2008, the private suits followed and were eventually consolidated as patients sought to recover damages for the overcharges they claimed to have paid for the better part of a decade while all rate negotiations were handled jointly.

In support of their class certification bid, the plaintiffs turned to expert economic analysis using the so-called difference-in-differences method, which essentially compared the percentage change in the hospitals' prices both before and after the merger to percent changes in rates at a control group of local hospitals during the same time frame.

In its decision to revive the purported class action, the panel backed that approach, saying that the plaintiffs, through their expert, had shown that common questions clearly predominate in the antitrust case.

The fact that the Seventh Circuit liked the methodology the plaintiffs' expert used, which was also used in the proceedings with the FTC, means that other plaintiffs challenging price increases following a merger will likely try to use the same method, according to Foley & Lardner LLP partner Jacqueline M. Saue.

"In the case of somebody who's challenging a hospital merger as being noncompetitive, this particular methodology obviously found favor with both the FTC and the Seventh Circuit," Saue said. "People will use that over and over again until some court says, 'No, it's flawed.'"

Not only did the panel support the plaintiffs' methodology, but it also took the district court to task for requiring plaintiffs to show a "uniformity of nominal price increases within and across contracts" in order to meet the class certification requirement that plaintiffs can prove their case by common evidence.

"Under the district court’s approach, Rule 23(b)(3) would require not only common evidence and methodology, but also common results for members of the class. That approach would come very close to requiring common proof of damages for class members, which is not required," the panel said. "To put it another way, the district court asked not for a showing of common questions, but for a showing of common answers to those questions."

The panel's broad language on the uniformity of nominal price increases issue may give plaintiffs another tool to try to win class certification in nonhealth-care cases, Hanselman said.

"I would anticipate that plaintiffs lawyers would try to use the language on uniformity of nominal price increases and try to apply that language to nonhealth-care cases," Hanselman said. "The case could be applicable in nonhealth-care situations where you have contracts that cover multiple class members."

The ruling can also be considered a word of caution to hospitals and other health care providers as affiliations and mergers continue to prove popular within the industry, according to Ropes & Gray LLP partner Jane E. Willis.
"This is very relevant to the health care practice because the FTC is investigating mergers, and this shows you'll have more exposure to private follow-on litigation," Willis said. "This is a data point that people will start watching because this means that there's a significant risk of private litigation."

Antitrust class actions stemming from government merger challenges have historically been fairly rare compared to the follow-on litigation common in cartel cases, and all eyes will be looking to see whether the future brings more merger-based antitrust actions from the plaintiffs bar, according to King & Spalding LLP partner Jeffrey S. Cashdan, who heads the firm's Atlanta business litigation group.

"The U.S. class action plaintiffs bar often has the approach of filing on behalf of consumers purported class actions that follow on government activity … so if what you see is increased activity by the FTC or the [U.S. Department of Justice's] Antitrust Division on mergers, challenging mergers might see more activity," Cashdan said.

Still, Cashdan cautioned, these types of claims are likely to play well only in cases when the agencies are challenging deals that have already been completed.

"This is not an area that is typically ripe for consumer class action work because most of the deals are precleared, but you might have deals that are smaller and if the trend continues, you might see more cases," Cashdan said. "But I don't think you'll see a huge uptick."

Nonetheless, despite the unusual facts of the NorthShore case — given the long delay between the merger and the resolution of the FTC's challenge — the Seventh Circuit's conclusions should generally prove encouraging to plaintiffs attorneys, Willis said.

"Certainly the case shows that plaintiffs lawyers can use private antitrust enforcement as a viable tool to police post-merger prices increases by hospitals," Hanselman said. "Even in cases where there is not that type of FTC scrutiny, if, post-merger, a health care system increases prices as a result of some market power that it obtained as a result of the merger, then this case would suggest that the system could be susceptible to an antitrust class action along these lines."

However despite the panel's decision, the plaintiffs in the NorthShore case still aren't guaranteed a smooth road to class certification, attorneys say.

NorthShore has asked the Seventh Circuit panel to rehear the case, arguing that the decision improperly overturned the district court's finding that the plaintiffs' expert wasn't credible and that his methodology required a high degree of uniformity in price hikes that did not exist.

Even if the panel refuses to reconsider those issues, the district court, which will have a new judge hearing the certification request the second time around, could still refuse to sign off on the class.

One of the biggest questions left unanswered by the panel's decision, according to attorneys, was the question of how far is too far when it comes to doing the price increase comparisons. While the plaintiffs' expert said the analysis could be repeated for different procedures or other pricing variations, the complexity of the market raises the specter of the district court having to go through hundreds of minitrials, attorneys say.

"The challenge for plaintiffs not addressed by this decision really is when you have differences in the product mix … at what point in time do all those varieties predominate over common issues?" Cashdan said. "Their approach was to say that the expert witnesses could handle all the differences through adjustments. That might be true, but if you have to make 50 or 100 adjustments, you're starting to really individualize the case [and] that individualization, if severe enough, should preclude class certification."

Indeed, given the testimony from the defense's expert that the kind of approach proposed by the plaintiffs would require thousands of separate analyses, the district court could decide that the case involved too many variations for the plaintiffs to prove impact on a classwide basis, Hanselman said.

Still, while defendants often argue that the need to create a large number of subclasses means that a proposed class action doesn't meet the requirement that class treatment be superior, the plaintiffs could defeat that logic in this case, according to Saue.

"The courts can create a number of subclasses and they do so in large cases, so it wouldn't mean that it was unmanageable that you have numerous subclasses," Saue said.

A footnote in the panel's decision steers the district court toward concluding that the case meets the superiority test, though it doesn't bind the lower court as the question didn't arise in either the original district court ruling or the appellate briefs.

"There are so many common issues of law and fact relating to the issue of NorthShore's liability, however, that the superiority requirement likely poses no serious obstacle to class certification here," the panel said.

--Editing by Andrew Park.

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