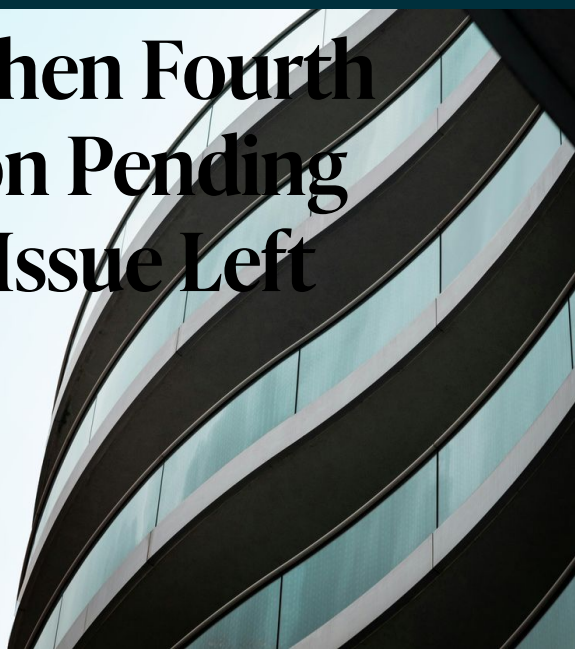
axinn

Hospital Deal Collapses When Fourth Circuit Agrees to Injunction Pending Review of FTC Loss – Key Issue Left Unresolved



3 MIN READ

June 20, 2024, 8:39 AM
By: Richard B. Dagen

The FTC lost its challenge to Novant's acquisition of two hospitals owned by Community Health Systems ("CHS") but obtained an injunction pending appeal. Soon after learning the injunction was granted, Novant dropped the proposed acquisition. Reactions are likely to be mixed: on one side, the FTC and others will likely claim another victory for consumers – that there was clear error that would have been fixed in the Fourth Circuit (or Supreme Court); on the other, critics will say this is another example of how the decks are stacked against merging parties, even when they win in the district court.

This post addresses neither side. Rather, the focus of this piece is on one of the critical aspects of the district court decision – how "imminent" does the failure of a firm, here a hospital, have to be to rebut a presumption of lessening of competition?

The District Court in the Western District of North Carolina found that "unique circumstances" rebutted the FTC's prima facie case that the acquisition of the CHS hospitals by Novant would be anticompetitive. The court first found that even though concentration levels and the change in concentration "at least slightly exceeded" the thresholds in both the 2010 and 2023 Merger Guidelines, the FTC only passed the thresholds by a "thin margin," primarily attributable to Novant's high pre-merger share.

Here, the "unique circumstances" were based on testimony from CHS that "over the next three to five years we really believe that the financial performance of LNR [Lake Norman Regional Medical Center] is in decline and, we believe, will continue to decline …" The court then found that the deteriorating condition of LNR would most likely result in its closing in the "foreseeable future," thereby rebutting the FTC's presumption of illegality. Though not cited in the opinion, the underpinning for such a conclusion is found in *U.S. v. General Dynamics*, 415 U.S. 486 (1974), where the Supreme Court explained that current statistical evidence, "does not as a matter of logic, necessarily give a proper picture of a company's ability to compete."

In its papers seeking an emergency injunction, the FTC maintained that the court failed to apply (or properly apply) the "failing firm defense" or the "weakened competitor defense," the latter which, the FTC notes, courts have referred to as the "Hail Mary pass of presumptively doomed mergers."

The FTC Emergency Motion noted that the court did not cite *Int'l Shoe v. FTC*, 280 U.S. 280 (1930), which permits an otherwise anticompetitive merger only where the target "resources [are] so depleted and the prospect of rehabilitation so remote that it face[s] the grave probability of a business failure."

Additional appellate review likely would have turned on the space between firm exit in the court's "foreseeable future" versus the FTC's "prospect of failure must be imminent." Since the court credited testimony that LNH's condition would continue to deteriorate for three to five years, that closure would not occur until some point after three years. Additional clarity on the relevant time horizon would have been very helpful for antitrust counseling, particularly in the hospital merger area where community hospitals are struggling throughout the country with no significant prospect for improvement. This case on appeal would have put that position front and center, possibly leading to a circuit split and the first substantive Supreme Court case in 50 years.

As a natural experiment that may be informative for future antitrust outcomes, now that Novant has abandoned the transaction, we may be able to study and observe the costs and benefits of this enforcement action in a short (i.e., "foreseeable" and/or "imminent") period and determine whether the FTC challenge was a success.

> **"We are steadfast in our belief that these facilities and their patients would have greatly benefited from joining Novant Health, but with the FTC's continued roadblocks we do not see a way to finalize this transaction," Winston-Salem-based Novant said in a statement.**
>
> www.charlotteobserver.com/...

Related People

Richard B. Dagen

Related Services

Antitrust

To subscribe to our publications, click here.

News & Insights

- GCR Live: Law Leaders Europe 2025
  SPEAKING ENGAGEMENT **ANTITRUST**

- AHLA Annual Meeting 2025
  SPEAKING ENGAGEMENT **ANTITRUST**

- SABA North America Annual Conference 2025
  SPEAKING ENGAGEMENT **ANTITRUST**

- Navigating Compliance: How the 2025 Hart-Scott-Rodino Updates Are Impacting Businesses
  WEBINAR **ANTITRUST**

- NJSBA Annual Meeting and Convention 2025
  SPEAKING ENGAGEMENT **INTELLECTUAL PROPERTY**

- Hartford HealthCare Black and Red Gala 2025
  SPONSORSHIP **ANTITRUST**

- Informa CompLaw Antitrust West Coast Conference 2025
  SPEAKING ENGAGEMENT **ANTITRUST**

- AHLA Health Care Transactions Program 2025
  SPONSORSHIP **ANTITRUST**

- IAM Live: Auto IP USA 2025
  SPEAKING ENGAGEMENT **INTELLECTUAL PROPERTY**

- ACI 21st Annual Paragraph IV Conference
  SPEAKING ENGAGEMENT **INTELLECTUAL PROPERTY**