

# LEGAL DEVELOPMENTS

February 27, 2004

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***In the matter of Evanston Northwestern Healthcare Corp. and ENH Medical Group, Inc:***  
**FTC administrative complaint signals increasing willingness to challenge consummated mergers**

The Federal Trade Commission this month filed an administrative complaint challenging a hospital merger consummated over four years after FTC clearance under the Hart-Scott-Rodino Antitrust Improvements Act ("HSR Act"). The FTC's complaint seeks divestitures based primarily on evidence of post-merger price increases. While not unexpected, this challenge highlights the FTC's increasing willingness to challenge consummated mergers, and its new efforts to seek out mergers that have had anticompetitive effects.

In the summer of 2002 the FTC created a Merger Litigation Task Force ("Task Force") to review and challenge "consummated transactions that may have resulted in anticompetitive price increases." Unlike the FTC's (and Antitrust Division's) typical forward-looking review of proposed mergers under the HSR Act, the Task Force was designed to examine the actual effects of consummated mergers.

Last week's three count administrative complaint against the Evanston Northwestern Healthcare Corporation (ENH) and the ENH Medical Group (ENHMG) appears to be the first fruit of the Task Force's labors. The complaint alleges that the merger of ENH with nearby

Highland Park Hospital over four years ago violated section 7 of the Clayton Act. In addition to alleging an increase in market concentration caused by the merger (the usual basis for *pre*-consummation challenges to mergers), the complaint alleged actual *post*-merger price increases to each of eight customers (health plans). These increases ranged from 15% to over 50% for some plans, increases that were significantly higher than the price increases of other comparable hospitals. The complaint seeks divestiture of Highland Park, restoration of its pre-merger competitive position, and a ban on future transactions between it and ENH except as approved by the FTC.

The complaint also alleges that following the integration of the Highland Park Independent Physician Association into ENHMG, the combined group fixed prices of physician services in violation of section 5 of the FTC Act. Specifically, the complaint alleges that ENHMG illegally negotiated for uniform prices for the salaried physicians and non-salaried independent physicians who, absent the merger, would compete in the sale of physician services. It is reasonable to conclude that the FTC learned of this separate alleged violation in the course of its merger investigation.

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Axinn, Veltrop & Harkrider LLP practices in the areas of antitrust and trade regulation, intellectual property and complex commercial litigation. The firm provides ongoing advice and services to Fortune 500 clients in the antitrust aspects of M&A transactions. The firm also counsels clients in a wide range of other areas, including deceptive acts and practices, health care, consumer protection, FDA law and various regulatory areas.

The FTC's action here again demonstrates that price increases imposed after a merger might attract FTC scrutiny. (See AVH *Legal Developments* dated April 6, 2001, [www.avhlaw.com/CM/Newsletters75.asp](http://www.avhlaw.com/CM/Newsletters75.asp).) If the FTC concludes that a merger was anticompetitive it may seek a costly divestiture or other relief. Even if the FTC concludes that a merger was not anticompetitive, simply responding to an FTC investigation is costly in terms of legal fees and is a distraction for company personnel. Finally, an FTC merger investigation may result in otherwise unlikely scrutiny of a company's business practices unrelated to the merger.

The FTC's Task Force is focusing on hospital and retail mergers, but companies in all

industries should analyze and consider likely customer reaction in deciding on the timing and magnitude of price increases instituted following a merger. A customer complaint that a merger resulted in higher prices will be the most likely source of future FTC investigations of consummated mergers. Thus, taking steps to minimize the likelihood that customers will blame price increases on consummated mergers is the best way to prevent the FTC from opening an investigation.

If you would like to know more about this or any other issue, please contact Bill Rubenstein (860-275-8180) or Mike Keeley (212-728-2231).