Published on *The National Law Review* https://www.natlawreview.com

New Antitrust Theory: Cross-Market Effects

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Antitrust concerns about hospital mergers have historically focused on mergers of hospitals that compete for patients in the same local market.

Recently, the Federal Trade Commission (FTC) has been considering other legal theories under which to challenge mergers. In addition to focusing on labor markets and related monopsony effects, the FTC has also shown interest in “cross-market” effects on prices. The cross-market theory suggests that mergers between hospitals that are not in the same local patient market—i.e., mergers of hospitals that do not compete for the same set of patients—can result in price increases in certain limited circumstances.

One of the criteria for a cross-market case is that the hospitals share “common customers,” which would allegedly allow the hospitals to gain bargaining leverage in their negotiations with those customers. Common customers include plan sponsors such as employers or labor unions whose members use the services of two hospitals. This is distinct from an in-market merger because the specific members who use one system rarely use the other. Instead, one set of the plan sponsor’s members uses one hospital system, and a distinct set of the sponsor’s members uses the other. In most cases, the fraction of common customers between two given systems will decrease as they are farther apart. To date, the cross-market hospital merger theory is untested in courts.

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National Law Review, Volumess XIII, Number 243

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