No. 10-2514

In the
United States Court of Appeals
for the Seventh Circuit

STEVEN MESSNER, AMIT BERKOWITZ,
HENRY W. LAHMEYER, M.D., S.C., PAINTERS DISTRICT
COUNCIL NO. 30 HEALTH & WELFARE FUND,

Plaintiffs-Appellants,

v.

NORTHSHORE UNIVERSITY HEALTHSYSTEM,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division, No. 07 C 4446
The Honorable **Joan Humpfrey Lefkow**, Judge Presiding.

AMICI CURIAE CONSUMER FEDERATION OF AMERICA AND UNITED STATES PUBLIC INTEREST RESEARCH GROUP BRIEF IN SUPPORT OF PLAINTIFFS-APPELLANTS

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The Consumers Federation of America, and U.S. PIRG, the Federation of State Public Interest Research Groups

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

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INTRODUCTION

Amici Curiae Consumers Federation of America and US Public Interest Research Group (collectively "Amici") are leading advocates for competitive markets, which benefit all consumers by maintaining lower prices and promoting innovation, and developing efficiencies. Amici respectfully submit this brief in support of Plaintiff-Appellants Amit Berkowitz, Steven Messner, Henry Lahmeyer, and Painters District Council No. 30 Health & Welfare Fund ("Painters Fund") (collectively, "plaintiffs") in their appeal from the district court's denial of class certification in their class action suit seeking damages from a consummated hospital merger that the Federal Trade Commission ("FTC") found resulted in significant price increases for consumers. The FTC found "the merger enabled [the merged hospital] to exercise market power, and that [the merged hospital] used this market power to increase its average net prices to [managed care organizations] for acute inpatient hospital services by a substantial amount . . . ."[1]

This decision in this case is critical to the overall efforts to control healthcare costs. As we explain below, there has been a tremendous trend of hospital mergers that has led to significant hospital concentration and rapidly escalating healthcare costs. And these escalating hospital costs have contributed to the overall increase in healthcare expenditures. This merger is a prime example: it is undisputed that it led to cost increases of 11-18%.

Antitrust class action litigation is an important tool to forestall and remedy the anticompetitive use of market power in healthcare markets. The lower court's decision would leave consumers with no means to seek redress for the harm suffered from this merger. More generally, the decision undermines the use of class action antitrust litigation as a tool to remedy anticompetitive conduct in healthcare markets. Denial of class certification in cases like this one will elim-

[1] In the Matter of Evanston Northwestern Healthcare Corp., FTC Docket No. 9315, Opinion of the Commission (FTC Aug. 6, 2007), at 78, *available at* http://ftc.gov/os/adjpro/d9315/070806opinion.pdf.

inate an important tool to prevent anticompetitive conduct in hospital markets, deter efforts to control healthcare costs, and may have far-reaching harmful effects on consumers.

The court declined to certify a class because it believed that the post-merger increases in price that resulted from ENH's exercise of market power were not uniform over ENH's various services. As explained here, this decision was an error. The impact of this error may have far reaching deleterious impact in other types of class action litigation, where there are multiple products or services whose prices change at different rates. Taken to its logical extreme, a defendant could avoid antitrust liability by making slight variations in prices, even though it is engaged in a single common scheme inflicting antitrust injury on the class as a whole. By denying the class certification of patients who "paid for inpatient hospital services or hospital-based outpatient services"[2] directly from NorthShore University HealthSystem ("ENH"), the court has made it almost impossible for consumers harmed from this or any similar anticompetitive merger to recover damages. Restricting class action litigation in this setting deprives consumers of a critical tool to attack anticompetitive price increases by hospitals. Individual consumers lack the resources to combat anticompetitive conduct without the use of class action litigation. Without the ability to bring class action litigation, hospital patients – and any consumer of a large supplier in markets with many diverse products – run the risk of paying supracompetitive prices without redress despite the unlawful conduct in which the defendants are demonstrably engaged.

STATEMENT OF INTEREST OF *AMICI CURIAE*

The Amici are public interest groups and advocates for competitive health care markets. Pursuant to Fed. R. App. P. 29 Amici have moved for leave of court to file this brief. Amicus Consumer Federation of America ("CFA") is composed of over 280 state and local affiliates representing consumer, senior-citizen, low-income, labor, farm, public power, and cooperative

[2] *Id.*

organizations, with more than 50 million individual members. CFA represents consumer interests before federal and state regulatory and legislative agencies, participates in court proceedings as *amicus curiae*, and conducts research and public education.

Amicus US PIRG, the federation of state Public Interest Research Groups ("US PIRG"), works on behalf of American consumers through public outreach to advocate for affordable health care and prescription drugs. US PIRG's mission is to deliver result-oriented public interest activism that protects health, encourages a fair, sustainable economy, and fosters responsive, democratic government.

These leading consumer organizations have a long history of advocating for access to affordable health care and controlling costs without compromising quality. Amici have a strong interest in preserving competition in hospital markets and in protecting the ability of consumers to challenge anticompetitive conduct. Amici submit this brief because the merger at issue led to demonstrably higher prices and absent class certification consumers will go uncompensated. More generally, Amici are concerned about the rapidly increasing costs of hospital care caused by increased hospital concentration, and are concerned that the decision below will undermine the critical role of private class action lawsuits in combating harm from anticompetitive practices and deterring future anticompetitive conduct.

ARGUMENT

The Court should reverse the district court's holding and certify plaintiffs' proposed class because the underlying decision will permit substantial harm from a merger already determined to be anticompetitive to go unremedied. First, it is undisputed that the merger resulted in significant price increases, and the only reason the FTC did not order divestiture in its challenge to the merger was due to the "extraordinary" circumstances of the case. Second, hospital costs continue to increase at an alarming rate, and hospital mergers, which have led to highly

concentrated markets in many areas of the country, are a substantial reason for these increases. Private antitrust litigation is an important tool for protecting competition in these markets. Third, class action litigation serves a vital role in protecting consumers by allowing those harmed to seek redress in an economically feasible manner, and the ability of consumers to police these markets deters anticompetitive conduct. Fourth, the district court's opinion makes it virtually impossible to certify a class in any market in which there are multiple products or services that undergo non-uniform variable price increases.

The district court decision would only permit the certification of a class where prices increased similarly across an entire range of diverse products and services – whether offered by hospitals, or by other suppliers of goods and services. If this decision is not reversed, consumers will be unable to bring class actions in markets consisting of multiple product lines with differing price increases (even where the variation in price increases is *solely* the result of factors unrelated to the conduct at issue despite the fact that the actual exercise of market power is uniform). This result is inconsistent with the objectives of the Federal Rules[3] and sound public policy.

I. IT IS UNDISPUTED THAT ENH RAISED ITS PRICES SIGNIFICANTLY AFTER THE MERGER

Consumers suffered substantial harm from the merger of Evanston Northwestern Healthcare Corporation and Highland Park Hospital. After the merger, ENH raised its prices significantly across a wide array of products and services. After a lengthy administrative trial, both an FTC administrative law judge and the full Commission concluded, "there is no dispute that ENH

[3] Fed. R. Civ. P. 23.

substantially raised its prices shortly after the merging parties consummated the transaction."[4] Both the plaintiffs' *and the defendants*' experts' econometric evidence revealed that the merger "gave the combined entity the ability to raise prices through the exercise of market power."[5] The FTC staff's economist concluded the merger increased average net prices by 11% to 18% and the defendants' economist estimated an average net price increase of 11% or 12%.[6] Divestiture may have been the appropriate remedy, but the FTC had not begun an investigation prior to the consummation of the merger.[7]

Notwithstanding this undisputed increase in prices, the court determined that it could not certify the class because the plaintiffs' proposed methodology did not, in the court's opinion, establish uniform impact on all or nearly all consumers. The court's conclusion was error and inconsistent with the precedent in this court. *See Kohen v. Pacific Investment Management Company LLC ("PIMCO")*, 571 F.3d 672, 677 (7th Cir. 2009) (the "possibility or indeed inevitability" that a class will include uninjured parties "does not preclude class certification."). When there is evidence that the post-merger firm increased prices generally across a variety of products, as it did in this case, the comparative weight of the increased price on any individual consumer should not negate the certification of a class of individuals who are in fact harmed. *In re PolyMedia Corp. Sec. Litig.*, 432 F.3d 1, 17 (1st Cir. 2005) ("Exercising its broad discretion . . . the district court must evaluate the plaintiff's evidence . . . critically without allowing the defendant to turn the class-certification proceeding into an unwieldy trial on the merits."). Individual

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[4] In the Matter of Evanston Northwestern Healthcare Corp., FTC Docket No. 9315, Opinion of the Commission (FTC Aug. 6, 2007), at 4, *available at* http://ftc.gov/os/adjpro/d9315/070806opinion.pdf.

[5] *Id.* at 5.

[6] *Id.* at 27.

[7] In the Matter of Evanston Northwestern Healthcare Corp., FTC Docket No.9315, Opinion of the Commission on Remedy (FTC Apr. 28, 2008), at 11, *available at* http://ftc.gov/os/adjpro/d9315/080428commopinionon remedy.pdf.

issues of damages, which varying prices across varying products may pose, should not be a deterrent to class certification, and the court erred by failing to certify the class.

II. HOSPITAL MERGERS ARE A LEADING FACTOR IN INCREASING HEALTH-CARE COSTS MAKING THE NEED FOR CLASS ACTION RELIEF EVEN MORE IMPORTANT

During the past decade, there has been tremendous consolidation in the hospital industry. In many markets, such as the market at issue in this case, hospitals have acquired market power, leading to increased costs for consumers. The harm created by mergers exacerbates the recent trend of continually increasing health care costs. Data from the Centers for Medicare and Medicaid Services show that private sector payments to hospitals have grown at rates far in excess of inflation. From 1999–2007, private sector payments to hospitals grew from $131.4 billion to $246.1 billion, a cumulative average growth rate of 8.7% per year.[8] The adverse impact of the wave of hospital consolidation was confirmed in a recent report by the National Institute for Health Care Management:

> The inpatient hospital market in the United States was transformed by a wave of hospital consolidation during the 1990s, which witnessed more than 900 mergers and acquisitions. Many cities came to be dominated by two or three large hospital systems, and by 2003 almost 90 percent of Americans in metropolitan areas faced a 'highly concentrated' hospital market, according to U.S. antitrust standards.[9]

This report further finds that "the weight of empirical evidence indicates that hospital prices generally increase following consolidation in the hospital market, sometimes by very significant amounts."[10]

In response to the apparent harm to consumers from increased hospital consolidation, in 2002 under the direction of then-Chairman Timothy Muris, the FTC created the Merger Litiga-

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[8] 2007 National Health Expenditures Web Tables, Table 12.

[9] William B. Vogt, *Hospital Market Consolidation: Trends and Consequences*, NIHCM Foundation, Expert Voices, November 2009.

[10] *Id.*

tion Task Force with the mandate to review consummated hospital mergers with the objective of "develop[ing] new strategies for trying" hospital merger cases where the mergers led to consumer harm.[11] The task force identified and challenged the ENH merger, which led to the FTC litigation, determination of a violation, and ultimately the case at bar.

In the ongoing healthcare debate it has become increasingly clear that hospital mergers are a major cause of increased healthcare costs. Substantial evidence suggests that the recent trend of hospital consolidation alone is a major contributor to escalating healthcare costs. Two landmark studies demonstrate the adverse effect of the recent hospital merger wave. A 2004 joint DOJ/FTC study, *Improving Healthcare: A Dose of Competition*, examined all aspects of healthcare competition, including hospital mergers,[12] and determined that "even if a hospital merger is likely to create cognizable efficiencies, those cognizable efficiencies likely will not be sufficient to reverse a hospital merger's potential to harm consumers in the relevant market by preventing price increases in that market."[13]

A 2006 study commissioned by the prestigious Robert Wood Johnson Foundation, *How Has Hospital Consolidation Affected the Price and Quality of Hospital Care?*, surveyed and synthesized a large body of independent studies concerning the effect of hospital mergers on prices. Reviewing 87 studies, 32 of which focused directly on hospital competition and pricing,[14] the article describes the consistent evidence that hospital mergers invariably result in higher prices

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[11] Timothy Muris, Chairman, Fed. Trade Comm'n., Remarks Before the 7th Annual Competition in Health Care Forum: Everything Old is New Again – Health Care and Competition in the 21st Century (November 7, 2002) *available at* http://www.ftc.gov/speeches/muris/murishealthcarespeech0211.pdf.

[12] Department of Justice and Federal Trade Commission, *Improving Health Care: A Dose of Competition*, July 2004, http://www.ftc.gov/reports/healthcare/040723healthcarerpt.pdf.

[13] *Id.* at 28.

[14] Claudia Williams, Robert Town, & William Vogt, *How Has Hospital Consolidation Affected the Price and Quality of Hospital Care?*, The Synthesis Project Policy Brief, The Roger Wood Johnson Foundation, No. 9, Feb. 2006, at 14-18.

for consumers, including increases of 40% where the merging hospitals are closely located, and at least 5% nationwide.[15]

It is not surprising that hospital mergers can lead to the exercise of market power and significantly increase health care costs. There are significant barriers to entry in hospital markets, and hospitals often do not offer the same specialized services.[16] As a leading healthcare antitrust scholar has observed, hospitals merge to increase profits, as "the merger wave is best understood as a successful effort to gain leverage in the marketplace, which hospitals used to deflect the price and volume discipline threatened by managed care contracting."[17] At least one state has confirmed this intuition. A study by the Massachusetts Attorney General, Martha Coakley, earlier this year, concluded that price variations paid by insurers to providers are directly correlated to market leverage – in other words, when a hospital has leverage over an insurer it exercises that power by increasing prices, and "it tend[s] to get higher prices . . . [and those higher prices are] not adequately explained by quality of care, patient severity, or the status of the hospital as a teaching or disproportionate care hospital."[18]

When hospital mergers create market power and lead to higher prices, consumers are harmed. The FTC opinion focused on the price increases to various managed care organizations for the simple reason that those are the entities that actually negotiated pricing with ENH. However, health plans do not operate in a vacuum. The prices they negotiate are then *directly* paid by individual patients whose plan designs feature percentage cost-sharing (e.g., the patient pays

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15 *Id* at 4.

16 Thomas L. Greaney, *Night Landings On An Aircraft Carrier: Hospital Mergers And Antitrust Law*, 23 AM. J. L. & MED. 191, 202 (1997).

17 Thomas L. Greaney, *Competition Policy and Organizational Fragmentation in Health Care*, 71 U. PITT. L. REV. 217, 232 (2009).

18 Martha Coakley, Massachusetts Attorney General, Report for Annual Public Hearing: Examination of Health Care Cost Trends and Cost Drivers, (March 16, 2010) *available at* http://www.mass.gov/Cago/docs/healthcare/final_report_w_cover_appendices_glossary.pdf.

20% of the negotiated rate) and by "self-funded" employers. Self-funded employers directly pay the covered healthcare costs of their employees; the health plan's mission in servicing self-funded employers is simply to negotiate price and administer benefits—but the burden of higher costs falls directly on the employer, not the health plan. Since 2003, over half of the U.S. workforce has been covered by a self-funded plan; by 2009, the percentage had reached 57%.[19]

The exercise of market power by hospitals is a significant source of escalating health care costs. As explained below, class action litigation is the only practical way for customers to secure redress when hospitals exercise that power through anticompetitive conduct. The trial court's decision would harm consumers by eliminating the only meaningful tool by which they can secure relief against the price increases resulting from hospital consolidation.

III. CLASS ACTION LITIGATION SERVES A VITAL ROLE IN ALLOWING CONSUMERS TO SEEK REDRESS IN INSTANCES OF HARM RESULTING FROM ANTICOMPETITIVE CONDUCT

Absent class action antitrust litigation, consumers have little ability to forestall ongoing anticompetitive conduct or seek redress from past anticompetitive conduct. The Supreme Court has recognized the important role that class actions play in protecting individuals, especially in antitrust actions. *See Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 617 (1997) ("'The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor.'") (quoting *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (7th Cir. 1997)); *Hawaii v. Standard Oil Co. of Cal.*, 405 U.S. 251,

[19] Kaiser/HRET Employer Benefits 2009 Annual Survey, Exhibit 10.1, *at* http://ehbs.kff.org/?page=charts&id=2&sn=25&ch=1146.

262, 266 (1972) (recognizing that by enacting the antitrust laws, "Congress encouraged [private parties] to serve as 'private attorneys general,'" and "Rule 23 . . . provides for class actions that may enhance the efficacy of private actions").

Class action litigation also serves as a deterrent to large parties from engaging in anticompetitive and socially harmful behavior. *See Blue Shield of Va. v. McCready*, 457 U.S. 465, 472-73 (1982) (identifying compensation and deterrence as the twin goals of the antitrust laws); William F. Baxter, *Separation of Powers, Prosecutorial Discretion, and the "Common Law" Nature of Antitrust Law*, 60 TEX. L. REV. 661, 691 ("Private litigation, particularly in cases in which the injuries resulting from the unlawful conduct are not widespread, is an effective tool both in identifying existing violations and in deterring future violations by the offender or by others similarly situated."). The private treble-damages action has always been "a bulwark of anti-trust enforcement," *Perma Life Mufflers, Inc. v. Int'l Parts Corp.*, 392 U.S. 134, 139 (1968), and remains so today. Indeed, private enforcement is the predominant way that the antitrust laws are enforced, and the treble-damages remedy provides most of the deterrent value of the monetary sanctions against antitrust violations. But without class actions, the treble-damages remedy would be ineffective in deterring anticompetitive conduct from a merged entity flexing its acquired market power.

Congress has echoed the views of the Supreme Court regarding the importance of class actions. In the Class Action Fairness Act, Congress found that "[c]lass action lawsuits are an important and valuable part of the legal system when they permit the fair and efficient resolution of legitimate claims of numerous parties by allowing the claims to be aggregated into a single action." 28 U.S.C. §§ 1711-1715 (2006). The court's opinion inappropriately limits the effectiveness of class action litigation by imposing an incorrect burden to demonstrate predominance.

IV. THE COURT'S RULING MAKES IT ALMOST IMPOSSIBLE TO CERTIFY A CLASS IN CASES OF ANTICOMPETITIVE CONDUCT IN A MARKET WITH MULTIPLE AND DIVERSE PRODUCTS AND SERVICES

The lower court, in its Opinion & Order, 1:07-cv-04446 (March 30, 2010) ("Op."), ruled that the plaintiffs failed to demonstrate "predominance"[20] because the plaintiff's model for assessing classwide impact "relied on the assumption" that price increases due to the merger would be distributed evenly across the hospital's various services. Op. at 57. The court reasoned that "an assumption that ENH increased its prices at a uniform rate" while calculating impact was inappropriate and sufficient to preclude class certification. *Id.* The court's rationale is erroneous and a clear basis for reversal. Whether each service or product increased in price at the same rate is beside the point when assessing whether there is classwide impact. It is well established that "the fact that damages may have to be ascertained on an individual basis is not, standing alone, sufficient to defeat class certification." *McLaughlin v. Am. Tobacco Co.,* 522 F.3d 215, 231 (2d Cir. 2008) (citing *In re Visa Check,* 280 F.3d 124 (2d Cir. 2001)); *See also PIMCO*, 571 F.3d 672.

There is good reason for this standard – class actions allow injured persons who might otherwise be unable to afford litigation the chance to seek redress. This Court has explained that the factors underlying the history and development of class actions are "persuasive of the necessity of a liberal construction of [Rule 23]" and that "its policy is to favor maintenance of class actions." *Weeks et al. v. Bareco Oil Co.*, 125 F.2d 84, 88 (7th Cir. 1941); *see also King v. Kansas City S. Indus., Inc.*, 519 F.2d 20, 26 (7th Cir. 1975). Class certification is particularly appropriate in antitrust cases because the nature of the harm affects a large group, and each individual member of the group normally lacks the capacity to seek redress. As the Supreme Court has ex-

[20] Predominance is the first test a class must satisfy under Fed. R. Civ. P. 23(b)(3), succeeded by the superiority test. The district court concluded that the plaintiffs' proposed class satisfied the antecedent elements of Fed. R. Civ. P. 23(a) numerosity, commonality, typicality, and adequacy of representation.

plained, "predominance [of common issues] is a test readily met in certain cases alleging . . . violations of the antitrust laws." *Amchem Products, Inc.*, 521 U.S. at 625.

The lower court's decision to address the particular factual circumstances of the impact on each potential class member undermines the objective of class action lawsuits. As the Second Circuit has explained, "the fact that damages may have to be ascertained on an individual basis is not, standing alone, sufficient to defeat class certification," and that "any other rule would eliminate antitrust class actions." *McLaughlin*, 522 F.3d at 231; *In re Visa Check*, 280 F.3d at 140. Limiting access to class certification is particularly dangerous in antitrust litigation because "[t]he combination of requiring a showing that all or nearly all class members were injured with a new emphasis on resolving facts—even facts relevant to the merits—at the class certification stage, could be read as creating a wholly new and artificial standard, a standard insufficiently connected to any issue appropriate for consideration at either the class certification stage or at trial."[21]

The lower court's opinion achieves this very undesirable scenario by requiring the plaintiff to demonstrate at the certification stage that the price increase experienced by every potential class member was the direct result of the hospital exercising market power uniformly across various services. The court's decision sets an unreasonable burden on the plaintiff class that is inconsistent with the purpose of Federal Rule of Civil Procedure 23 and sound antitrust policy.

CONCLUSION

Based on the foregoing arguments, the *Amici Curiae* respectfully request that this Court overturn the district courts' denial of class certification.

[21] Joshua P. Davis & Eric L. Cramer, *Antitrust, Class Certification, and the Politics of Procedure*, 17 GEO. MASON L. REV. 969 (August 2010).

Dated: August 9, 2010

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CIRCUIT RULE 31(e) CERTIFICATION

The undersigned hereby certifies that I have filed electronically, pursuant to Circuit Rule 31(e), versions of the brief and all of the appendix items that are available in non-scanned PDF format. The undersigned also certifies the disk/CD is virus free.

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Kenneth A. Wexler

CERTIFICATE OF SERVICE

The undersigned, being first duly sworn, deposes and states that two copies and one pdf of the *Amici Curiae* Consumer Federation of America and United States Public Interest Research Group Brief in Support of Plaintiffs-Appellants were served upon the below-listed counsel of record by first-class mail, proper postage prepaid by depositing the same in the United States Mail at Chicago, Illinois on the 9th day of August, 2010:

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this 9th day of August, 2010.

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Notary Public