The hospital merger enforcement merry-go-round

Cory Capps, Nitin Dua, Slava Zayats*

Leading into 2015, the FTC had attained a string of wins in provider merger cases on par with its string of losses in the 1990s. That appeared to have halted when, in the span of months, the agency lost cases in Hershey, Pennsylvania and Chicago, Illinois. The halt was short-lived, because by year's end, the Third and Seventh circuit courts reversed both opinions. In this paper we review the economic analyses presented in the two cases won, at appeal, by the FTC, with a particular focus on the factors that led the circuit courts to overturn each ruling. We address relevant geographic market definition, support from payers, and the price and non-price commitments that some merging parties have advanced in recent cases.

In roughly the same time period, the FTC also opposed, unsuccessfully, the merger of the only two hospitals in Huntington, West Virginia. The FTC abandoned its challenge after the governor signed legislation creating a regulatory framework—commonly known as a certificate of public advantage (COPA)—sufficient to meet the requirements for state action immunity. Subsequently, in a merger of two systems spanning portions of Tennessee and Virginia, the FTC advocated against the grant of a COPA but did not pursue a legal challenge. We briefly summarize the central arguments advanced by parties supporting and opposing such regulatory approaches.