

# ANTITRUST

## Class Certification

### 7th Circuit Hears Argument on Class Certification in Hospital Merger Suit

The 7th U.S. Circuit Court of Appeals has heard argument on the standards that federal courts should apply in admitting expert testimony for the purpose of deciding class certification in certain antitrust actions.

***Messner et al. v. NorthShore University HealthSystem, No. 10-2514, oral argument heard (7th Cir. Feb. 8, 2011).***

**David L. Hanselman Jr. of McDermott Will & Emery** said one of the main issues in this appeal is whether the plaintiffs can prove antitrust injury on a class-wide basis.

Hanselman does not represent any party in this case but has represented defendant Resurrection Hospital in a proposed class action alleging wrongful suppression of nurses' wages. *Reed et al. v. Advocate Health Care et al.*, No. 06 C 3337 (N.D. Ill.), (see *Andrews Antitrust LR*, Vol. 17, Iss. 7).

In the 7th Circuit case, consumers in the Chicago area who purchased inpatient and hospital-based outpatient services from Evanston Northwestern HealthCare Corp. sued NorthShore University HealthSystem, alleging it created a monopoly when ENH merged with Highland Park Hospital.

Following the merger, ENH changed its name to NorthShore University HealthSystem.

As a result of the merger, ENH allegedly "exercised its increased market power to inflate its prices for health care services above competitive levels."

The defendant opposed the plaintiffs' motion for class certification.

U.S. District Judge Joan Humphrey Lefkow of the Northern District of Illinois denied class certification, and the plaintiffs appealed.

In argument before the 7th Circuit Feb. 8, the plaintiffs asked the panel to find that the trial judge erred by not ruling on their *Daubert* motion to exclude the defendant's expert's testimony concerning whether common questions justified certification.

Courts use standards outlined in *Daubert v. Merrell Dow Pharmaceuticals Inc.*, 509 U.S. 579 (1993), to determine if a proposed expert's conclusions are based on accepted scientific methodology.



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***The plaintiffs wanted the trial court to exclude the testimony of the defendant's economist.***

The plaintiffs wanted the District Court to exclude the testimony of Boston economist Monica Noether. Their brief said her proposed testimony "asserts without support that ENH never exercised market power as a result of the merger," "offers legal conclusions," and that its "economic analyses are fundamentally defective."

The defendant's opposition brief said Judge Lefkow did not abuse her discretion in declining to perform a *Daubert* analysis.

"A district court should not be required as a condition of *denying* class certification to assess whether expert testimony offered by the non-moving party is *Daubert*-qualified," the defendant argues.

Hanselman said the pending ruling will be of interest to those who litigate antitrust cases related to hospital mergers and to anyone doing antitrust work.

"In the last few years, courts across the country have raised the bar for plaintiffs to obtain class certification," he said. "This is particularly true in antitrust cases. Courts no longer give plaintiffs the benefit of the doubt. It will be interesting to see if the 7th Circuit continues this trend."

The appeal was heard by circuit judges Diane S. Sykes, John Daniel Tinder and David F. Hamilton. [WJ](#)

**Attorneys:**

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*Defendant:* Gene C. Schaerr and Andrew C. Nichols, Winston & Strawn, Chicago

**Related Court Documents:**

Appellants' brief: 2010 WL 5745338

Opposition brief: 2010 WL 5745330

Reply brief: 2010 WL 5745339

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