

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

FEDERAL TRADE COMMISSION)	
and STATE OF ILLINOIS,)	
)	
Plaintiffs,)	No. 15 C 11473
)	
v.)	Judge Jorge L. Alonso
)	
ADVOCATE HEALTH CARE,)	
ADVOCATE HEALTH AND)	
HOSPITALS CORPORATION, and)	
NORTSHORE UNIVERSITY)	
HEALTHSYSTEM,)	
)	
Defendants.)	

ORDER

Defendants’ Motion to Exclude Tenn’s Testimony

Defendants have moved pursuant to *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) to exclude the testimony of plaintiffs’ expert Dr. Tenn.¹ *Daubert* requires the Court to determine, among other things, whether “[an] expert is qualified in the relevant field and . . . the methodology underlying [his] conclusions is reliable.” *Ammons v. Aramark Unif. Servs., Inc.*, 368 F.3d 809, 816 (7th Cir. 2004) (quoting *Zelinski v. Columbia 300, Inc.*, 335 F.3d 633, 640 (7th Cir. 2003)).

Defendants do not argue that Tenn is unqualified, but they say his methodology is unreliable because he ignored the competitive impact of certain hospitals when he created his geographic market. The Court disagrees. Tenn constructed his geographic market using the hypothetical

¹The Seventh Circuit has assumed that *Daubert* applies to bench trials but has noted that “the usual concerns of the rule – keeping unreliable expert testimony from the jury – are not present in such a setting.” *Metavante Corp. v. Emigrant Sav. Bank*, 619 F.3d 748, 760 (7th Cir. 2010).

monopolist test, as the FTC's Merger Guidelines instruct. *See* Horizontal Merger Guidelines, §§ 4.1-4.2, available at <https://www.justice.gov/sites/default/files/atr/legacy/2010/08/19/hmg-2010.pdf>. He analyzed admissions to all of the hospitals in the Chicago metropolitan area to identify the set of competitors from which defendants' hospitals draw patients. (DX6000, Tenn Report ¶ 83 & Tables 4, 8.) He also calculated diversion ratios for all of these hospitals to determine where patients who currently seek care at defendants' hospitals would seek care if those hospitals implemented a small but significant price increase. (*Id.* Table 9.) Thus, his hypothetical monopolist analysis accounts for competition from all area hospitals, not just those that are included in his proposed geographic market.

Defendants also take issue with Tenn's exclusion of so-called "destination hospitals," *e.g.*, Northwestern Memorial, Rush University Medical Center, and University of Chicago Medical Center, from his geographic market. But Tenn explained that he excluded those hospitals because they "do not fill MCOs' [stated] need for local in-network providers in the northern suburbs as alternatives" to defendants' hospitals. (*Id.* ¶ 85.) Whether that is an accurate or appropriate assumption is a topic for cross examination, not a reason for excluding Tenn's testimony.

In addition, defendants challenge Tenn's competitive effects analysis:

Typically, an economist executes [the FTC's hospital merger simulation] model in two parts: first (*i.e.*, in "Stage 1"), by estimating patients' "willingness-to-pay" ("WTP") for inpatient hospital services, which is a measure of these hospitals systems' bargaining leverage *vis-à-vis* commercial payers (such as BlueCross or Cigna) with which they bargain, for numerous hospital systems located in the geographic area of the proposed merger. Then (*i.e.*, in "Stage 2"), economists use a regression analysis to estimate the relationship between that "WTP" and overall hospital system pricing observed at these hospital systems. The estimated relationship between "WTP" and hospital prices is assumed to represent the bargaining power "split" between hospital systems and commercial payers.

(Defs.' Mem. Supp. Mot. Exclude Tenn at 11.) Tenn performed the Stage 1 analysis, but not the Stage 2 regressions, which defendants say renders his testimony invalid.

At base, defendants are arguing that there is only one acceptable method of estimating the competitive effects of a hospital merger. However, the Merger Guidelines do not mandate the use of any particular method, and the academic literature suggests that there are a number of models that can be used, all of which have advantages and limitations. *See, e.g.,* Cory S. Capps, *From Rockford to Joplin and Back Again: The Impact of Economics on Hospital Merger Enforcement*, *The Antitrust Bulletin* Vol. 59, No. 3 (Fall 2014); Charles River Associates, *Predicting the Price Effects of Hospital Mergers* (March 2014); Keith Brand & Christopher Garmon, *Hospital Merger Simulation*, *Am. Health Lawyers Ass'n, Antitrust Practice Group Briefing* (Jan. 2014); David Dranove & Andrew Sfekas, *The Revolution in Health Care Antitrust: New Methods and Provocative Implications*, *Milbank Quarterly*, Vol. 87, No. 3 (2009); *see also* *FTC v. OSF Healthcare Sys.*, 852 F. Supp. 2d 1069, 1086 (N.D. Ill. 2012) (noting that there is “no authority indicating that a merger simulation is required in order to obtain a preliminary injunction”). Accordingly, Tenn’s failure to use the analysis defendants espouse is not basis for excluding his testimony.

For all of these reasons, defendants’ motion to exclude Tenn’s testimony [306] is denied.

SO ORDERED.

ENTERED: April 6, 2016

A handwritten signature in black ink, appearing to be "JL Alonso", enclosed within a large, hand-drawn oval.

HON. JORGE L. ALONSO
United States District Judge