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E-ALERT | Antitrust Counseling

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ST. LUKE'S MERGER DECISION SHOWS TENSION BETWEEN ANTITRUST PRINCIPLES AND HEALTH CARE INDUSTRY TRENDS

In late January, the U.S. Federal Trade Commission (FTC) prevailed in a challenge to a hospital merger involving an issue of great significance to the current health care marketplace: the acquisition of physician practice groups. In *Saint Alphonsus Medical Center-Nampa v. St. Luke's Health System*,[1] the U.S. District Court for the District of Idaho held that St. Luke's Health System's acquisition of the Saltzer Medical Group violated section 7 of the Clayton Act and the Idaho Competition Act. The case is not only the latest in a long line of cases applying merger principles to the health care industry, but also shows the tension between those principles and the promotion of more efficient health care through the integration of health care providers.

ST. LUKE'S LITIGATION AND DECISION

Private plaintiffs filed the initial complaint against St. Luke's in 2012; the FTC and Idaho filed in 2013 and the cases were consolidated. After a bench trial, the court predicted that the merger between St. Luke's and Saltzer would give St. Luke's 80 percent of the market for adult primary care services for commercially insured patients in Nampa, Idaho, allowing the combined entity to raise prices charged to health plans and to charge higher, hospital-based prices for ancillary and certain other services.

St. Luke's raised both efficiency and market entry defenses. First, it suggested that the merger would allow it to move toward more efficient, risk-based reimbursement provided to a team of physicians and to provide the Saltzer doctors with a high-end electronic health record system. While the court agreed that the primary purpose and effect of the merger would be to "improve patient outcomes" through a more "integrated" medical system, it concluded that these efficiencies were not merger-specific and that there were other ways to accomplish the same goals. The court also rejected St. Luke's market entry defense finding that the difficulty of recruiting family doctors to Nampa would make market entry unlikely.

The court ordered St. Luke's to divest the Saltzer physicians and assets, noting that divestiture is the favored remedy in section 7 cases. The court rejected St. Luke's alternative proposal to negotiate health plan reimbursement rates separately from Saltzer, finding this sort of remedy appropriate only where divestiture was unworkable. St. Luke's has said that it will likely appeal.

HEALTH CARE INDUSTRY AND ANTITRUST ENFORCEMENT TRENDS

The *St. Luke's* case is particularly significant given the recent growth in physician practice group acquisitions. Pressure for more integrated care is no doubt one factor helping to drive this growth. Efforts toward informal alliances to integrate care were codified in the Affordable Care Act, which

[1] No. 12-cv-00560, 2014 WL 272339 (D. Idaho Jan. 24, 2014) (memorandum decision and order); *see also St. Luke's*, 2014 WL 407446 (findings of fact and conclusions of law).

provided for the establishment of Accountable Care Organizations (ACOs) through which providers work collaboratively to manage and coordinate care for Medicare beneficiaries. In October 2011, the FTC and the U.S. Department of Justice (DOJ) released a Statement of Antitrust Enforcement Policy regarding ACOs.[2] The ACO Statement set forth an antitrust "safety zone" for ACOs meeting criteria established by the Centers for Medicare and Medicaid Services but explicitly excluded merger transactions, noting that these would continue to be evaluated under the Agencies' Horizontal Merger Guidelines.

Federal and state antitrust enforcers have taken note of hospital–practice group mergers. In 2012, the FTC and the Nevada Attorney General settled charges against Renown Health of Reno, Nevada. Renown had acquired two cardiology practices, giving it an alleged 88 percent market share in adult cardiology services in Reno. The cardiologists' contracts included non-compete clauses preventing them from competing with Renown for two years after leaving. Under the settlement, Renown agreed to suspend the non-compete agreements until at least six, and up to ten, cardiologists had terminated their contracts. In Washington state, the FTC and the Washington Attorney General investigated a hospital's acquisition of two cardiology practices in the Spokane area and preliminarily concluded it would have anticompetitive effects. As a result, the hospital abandoned the acquisition in February 2011. Finally, in Maine, the state Attorney General challenged Maine Medical Center's acquisition of two cardiology groups. The AG and the hospital entered into a consent decree limiting the rates the combined entity could charge and preventing the inclusion of non-compete clauses in the physicians' contracts.

IMPLICATIONS FOR FUTURE HOSPITAL–PRACTICE GROUP MERGERS

As the first recent litigated challenge to a physician practice acquisition, *St. Luke's* may foreshadow future court battles and increased leverage for antitrust enforcers. Physicians and hospitals wishing to partner may face a number of challenges. First, if they choose to merge, federal regulators will evaluate the merger under the Horizontal Merger Guidelines. Although physician practice acquisitions are unlikely to trigger Hart-Scott-Rodino pre-merger review, competitors may alert enforcers to antitrust concerns or sue separately. Moreover, *St. Luke's* shows that courts and enforcers are willing to unwind already-consummated transactions.

Several factors may affect whether a merger is allowed to proceed or, if already consummated, remain intact. Market definitions are key and may be relatively narrow. For example, the market will be limited not only by the geographic area, which may be sparsely populated, but also might be limited by physician specialty, patient age, and payer mix. In *St. Luke's*, for example, the market was for adult primary care services paid for by commercial payers in Nampa, Idaho. Additionally, it is not entirely clear how much market share is too much. In the Renown Health matter, the FTC agreed to a settlement that could leave Renown with a market share as high as 70 percent, yet the government has challenged lower market shares as well. Finally, although non-compete clauses in physician contracts may increase the likelihood of enforcement actions (as in Renown), omission of such clauses (as in *St. Luke's*) will not necessarily offset potential anticompetitive effects.

Mergers in small or rural markets or medically underserved areas will be particularly difficult. First, combined market share may be high if a local hospital acquires one of the few mid- to large-size physician practices in an area. Narrow geographic market definitions may exacerbate the effect. For example, in St. Luke's, the court excluded nearby Boise from the relevant market which made St. Luke's market share higher than it could have otherwise been. Moreover, where an area has had

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[2] *See* U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, STATEMENTS OF ANTITRUST ENFORCEMENT POLICY REGARDING ACCOUNTABLE CARE ORGANIZATIONS PARTICIPATING IN THE MEDICARE SHARED SAVINGS PROGRAM (2011), *available at* http://www.gpo.gov/fdsys/pkg/FR-2011-10-28/pdf/2011-27944.pdf [hereinafter ACO STATEMENT OF POLICY].

difficulty recruiting providers, the merged entity may not be able to show that competitor entry will mitigate any anticompetitive effects. Although the FTC and DOJ Statement of Enforcement Policy regarding ACOs addresses some of the challenges faced by rural ACOs, merging entities are assessed under the merger guidelines.

Arguments for consolidation as a quality improvement mechanism may not overcome anticompetitive effects. First, even where providers have tried (and failed) to integrate informally, as in *St. Luke's*, courts and enforcers may find that there remain other ways to integrate. Moreover, technological developments may undermine the argument that mergers are necessary to promote integration. As data sharing becomes cheaper and more prevalent, it may be easier to integrate care between providers.

Comparison of *St. Luke's* with the Renown and Maine cases also illustrates the different remedies that may be available when a merger is found to be anticompetitive. In *St. Luke's*, the court favored divestiture and rejected the proposed conduct remedy (separate rate negotiations). However, in Renown, the FTC was willing to let Renown restructure its contracts, rather than fully divest, to allow physicians to leave and compete with the hospital. Similarly, in the Maine case, the state AG set limits on price increases. This split in remedies is due in part to how far each merger had proceeded. It may also illustrate a difference between the remedies enforcers are willing to accept in settlement negotiations versus those a court may impose. Ultimately, however, federal antitrust regulators are unlikely to accept the types of price restrictions imposed in the Maine case in place of more stringent structural or conduct remedies.

In short, parties considering physician practice group acquisitions need to take into account the wide range of factors influencing enforcement decisions. Parties should involve antitrust counsel early on when considering such mergers.

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