

Client Alert

Antitrust & Litigation Practice Group

February 12, 2015

Ninth Circuit Upholds the FTC's Challenge to the St. Luke's/Saltzer Combination

On February 10, 2014, the U.S. Court of Appeals for the Ninth Circuit affirmed a district court decision, which held that St. Luke's Health System's ("St. Luke's") acquisition of Saltzer Medical Group ("Saltzer") violated Section 7 of the Clayton Act. In the first federal appellate court antitrust decision regarding a physician merger, the Ninth Circuit also affirmed the divestiture remedy ordered by the district court.

St. Luke's was a not-for-profit health system headquartered in Boise, Idaho. It owned and operated six hospitals, as well as a number of other facilities and physician clinics. Prior to being acquired by St. Luke's, Saltzer was a for-profit, physician-owned, multi-specialty group comprised of 44 physician members and located in Nampa, Idaho (St. Luke's did not have a hospital in Nampa). Saltzer was also the largest and oldest independent multi-specialty doctors group in Idaho.

St. Luke's entered into an agreement to purchase Saltzer in the fall of 2012 for approximately \$28 million. That transaction did not require a Hart-Scott-Rodino filing. On November 12, 2012, competitors St. Alphonsus Health System and Treasure Valley Hospital filed suit in the U.S. District Court for the District of Idaho, seeking a preliminary injunction to prevent consummation of the acquisition. The competitors claimed that if St. Luke's purchased Saltzer, competition would decrease for a number of physician services in the Nampa and Boise areas. The district court, however, denied the preliminary injunction request. St. Luke's acquired Saltzer on December 31, 2012.

On March 26, 2013, the Federal Trade Commission (FTC) and the State of Idaho filed a separate complaint in the same court, claiming that the acquisition was anticompetitive and requesting that it be unwound. The district court joined their complaint with the ongoing private litigation.

The district court ultimately concluded that the merger violated the Clayton Act. As a remedy, the district court ordered divestiture. After receiving that unfavorable result in the district court, St. Luke's appealed to the Ninth Circuit.

Early in its opinion, the Ninth Circuit set the tone for the decision: "[T]he job before us is not to determine the optimal future shape of the country's

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health care system, but instead to determine whether this particular merger violates the Clayton Act.” Recognizing the standard for review by the appellate court was “whether a finding of fact is ‘clearly erroneous’, and not whether there is a ‘compelling case’ for an alternative finding,” the Ninth Circuit found no clear error or abuse of discretion in the lower court’s decision.

The Ninth Circuit’s opinion is a fairly straightforward structural application of most of the 2010 Horizontal Merger Guidelines issued by the FTC and Department of Justice (“Merger Guidelines”). The court upheld a relatively narrow geographic market definition, which resulted in a concentrated market with few alternatives for payors. Specifically, the court agreed with the district court’s geographic market definition (Nampa, Idaho), where the combined market shares for St. Luke’s and Saltzer were very high and the market was very concentrated, stating that “[t]he district court calculated the post-merger HHI in the Nampa PCP market as 6,219, and the increase as 1,607.” In addition, the court held that St. Luke’s and Saltzer were each other’s closest competitors, focusing on documents from the parties predicting post-transaction leverage in negotiations with payors. Thus, according to the court, “the acquisition limited the ability of insurers to negotiate with the merged entity,” and the FTC met its burden in establishing a *prima facie* case that the transaction substantially lessened competition under Section 7 of the Clayton Act. Notably, there was virtually no discussion of barriers to entry.

Although the Ninth Circuit acknowledged that “a defendant can rebut a *prima facie* case with evidence that the proposed merger will create a more efficient combined entity and thus increase competition,” it shared the district court’s skepticism regarding efficiencies. The court stated, “We remain skeptical about the efficiencies defense in general and about its scope in particular. It is difficult enough in Section 7 cases to predict whether a merger will have future anticompetitive effects without also adding to the judicial balance a prediction of future efficiencies.” St. Luke’s argued that the “merger would benefit patients by creating a team of employed physicians with access to Epic, the electronic medical records system used by St. Luke’s.” The district court, however, determined that even if the predictions were correct, they “were insufficient to carry St. Luke’s burden of rebutting the *prima facie* case.” The Ninth Circuit agreed with the district court.



This decision is noteworthy for several reasons. First, it is a big victory for the FTC. The FTC has won a number of challenges to healthcare mergers in the past few years (*e.g.*, *ProMedica/St. Luke’s*), but this was a litigated challenge to a healthcare system’s acquisition of a physician group. Second, the Ninth Circuit decision creates some favorable law for the FTC (and the Department of Justice) on efficiencies, which the Agencies have frequently argued should be viewed with suspicion. Third, the decision reminds us that provider combinations—whether they are hospital mergers, physician acquisitions, or exclusive physician networks—that involve bad documents and strong payor opposition in concentrated markets will invite substantial scrutiny from the FTC. Such scrutiny cannot be overcome by pointing the FTC to the Affordable Care Act’s (“ACA”) mandating provider consolidation. That said, the decision should not be interpreted as a rejection of the ACA; rather, it reflects the FTC’s position that the ACA does not justify anticompetitive transactions.

Documents

The U.S. Court of Appeals for the Ninth Circuit opinion (Feb. 10, 2015) is available at <http://cdn.ca9.uscourts.gov/datastore/opinions/2015/02/10/14-35173.pdf>.

St. Luke’s U.S. Court of Appeals for the Ninth Circuit brief is available at <http://www.ftc.gov/system/files/documents/cases/140612briefofappellants.pdf>.

St. Alphonsus Health System and Treasure Valley Hospital’s U.S. Court of Appeals for the Ninth Circuit brief is available at <http://www.ftc.gov/system/files/documents/cases/140716stlukeansweringbrief.pdf>.

The FTC and the State of Idaho's U.S. Court of Appeals for the Ninth Circuit brief is available at <http://www.ftc.gov/system/files/documents/cases/140813stlukeansweringbrief.pdf>.

The U.S. District Court for the District of Idaho's opinion (Jan. 24, 2013) is available at <http://www.ftc.gov/sites/default/files/documents/cases/140124stlukesmemodo.pdf>.



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