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Healthcare Law Alert

August 2015

COURT ORDERS DIVESTITURE OF ST. LUKE'S ACQUISITION OF A PHYSICIAN PRACTICE GROUP

Introduction

On February 10, 2015, the United States Court of Appeals for the Ninth Circuit ruled in favor of St. Alphonsus Medical Center and affirmed the district court's order of divestiture by St. Luke's Health System of an acquired physician practice group. The case arises out of the 2012 merger of two health care providers, St. Luke's Health System and Saltzer Medical Group, in Nampa, Idaho. The Federal Trade Commission and the State of Idaho sued, alleging that the merger was anti-competitive and violated Section 7 of the Clayton Act, 15 U.S.C. § 18, and other State law provisions. The District Court Judge found that the merger violated Section 7 and ordered divestiture, and the appeal was brought to the Ninth Circuit Court of Appeals.

According to the AHLA, this case represents the first time that the Federal Trade Commission has litigated a challenge to a physician acquisition through trial, and is seen as a significant victory for the Federal Trade Commission.

Clayton Act

Section 7 of the Clayton Act bars mergers whose effect "may be substantially to lessen competition, or to tend to create a monopoly." 15 U.S.C. § 18. An analysis of a violation of Section 7 of the Clayton Act will involve an analysis of the probabilities to create a monopoly and to lessen competition. The analysis requires, "not merely an appraisal of the immediate impact of the merger upon competition, but a prediction of its impact upon competitive conditions in the future; this is what is meant when it is said that the amended Section 7 was intended to arrest anti-competitive tendencies in their incipiency." (St. Alphonsus Med. Ctr., No. 14-35173. p.11, 2015).

Background
Healthcare Market in Nampa, Idaho

Nampa is the second largest city in Idaho, with a population of approximately 85,000. Prior to the merger, St. Luke's was a not-for-profit health care system that operated an emergency clinic in Nampa, and Saltzer Medical Group was the largest independent, multispecialty physician group with 34 physicians. The only hospital in Nampa was operated by St. Alphonsus. The largest adult primary care physician provider, or "PCP," in the Nampa market was Saltzer, which had 16 primary care physicians. St. Luke's had eight PCPs and St. Alphonsus had nine.

In 2012, St. Luke's acquired Saltzer's assets and entered into a five-year professional service agreement with the Saltzer physicians. Saltzer received a $9,000,000 payment for goodwill. The purpose of the formal affiliation was to move toward an integrated patient care and risk-based reimbursement model.

Procedural History

In November 2012, several private hospitals filed a complaint in the District of Idaho, alleging anti-competitive effects on the relevant markets for primary care physician services. The District Court found that although St. Luke's and Saltzer genuinely intended to move toward a better health care system with integrated patient care, the post-merger entity held a huge market share and created a substantial risk of anti-competitive price increases in the adult PCP market.

The Relevant Market

Under a Clayton Section 7 claim, the court must determine the relevant product and geographic market as a necessary predicate to determine whether the Act has been violated. This is a factual question that depends on the characteristics of the industry. The relevant geographic market is "the area of effective competition where buyers can turn for alternative sources of supply." (St. Alphonsus Med. Ctr., No. 14-35173. p.13, 2015) (citations omitted). A common method to determine the relevant geographic market, which was used by the District Court, is to find whether a hypothetical monopolist could impose a small but significant non-transitory increase in price (SSNIP). If enough consumers would respond to the SSNIP by purchasing the product from outside the proposed geographic market, making the SSNIP unprofitable, then the proposed market definition is too narrow. Once the relevant geographic market is determined, a case is established if the plaintiff proves that the merger will probably lead to anti-competitive effects in the market, which can be shown by high market share.

The District Court utilized, and the Ninth Circuit confirmed, the use of the Herfindahl-Hirschman Index ("HHI"), which is a commonly used tool to measure market share. Based on this analysis, the District Court correctly noted that the post-merger HHI number (6,219) was more than double the threshold for a saturated market, because an HHI Index of greater than 2,500 is deemed to be a highly concentrated market. The increase in the HHI as a result of the merger was 1,607, or more than seven times the respective threshold for a presumptively anticompetitive merger, as mergers that increase HHI more than 200 points are "presumed to be likely to enhance market power."

The Rebuttal

The primary argument in rebuttal was the procompetitive effects of the merger and the argument that the merger would allow St. Luke's to move toward an integrated care and risk-based reimbursement model. The Court rejected this argument and found that the Supreme Court has never expressly approved an efficiencies defense to a Section 7 claim despite a Circuit split on this issue. Ultimately, the Court found that a successful efficiencies defense could be used to rebut a plaintiff's case under Section 7, but would require proof that the merger is not anti-competitive. The Court explicitly held that it is not enough to show that the merger would allow St. Luke's to better serve patients. The purpose of the Clayton Act is to focus on competition, so efficiencies and the quality of patient care were not dispositive.

The Remedy

The remedy in an antitrust case is the measure that is effective to restore competition. The customary form of relief in a Section 7 case is divestiture. The Ninth Circuit upheld the District Court's decision to order divestiture of St. Luke's acquisition of Saltzer Medical Group. Even though the District Court might have been within its discretion to opt for a conduct remedy, the Circuit Court found there was no abuse of discretion in not ordering a conduct remedy. The Circuit Court noted that divestiture is very simple to administer and is the preferred remedy, as conduct remedies are problematic because they require ongoing supervision by the government.

Proponents of the decision see it as a win for consumers and competitors in the Nampa, Idaho area. Critics are concerned that this case represents a failure by courts to fully acknowledge value-based care delivery arrangements that benefit consumers in the typical antitrust analysis.

According to St. Luke's, it is taking its time to review the decision and decide on its next steps, including unwinding its ownership of Saltzer Medical Group.

This *Healthcare Law Alert* was written by **Sandra Jarva Weiss, Esq.,** Chair of the Healthcare Law Group and member attorney with Norris McLaughlin & Marcus, P.A., and **Julie M. Macomb, Esq.**, associate attorney with Norris McLaughlin & Marcus., P.A. If you have any questions regarding the information in this alert or any related matters, please feel free to contact Sandra by email at sjarvaweiss@nmmlaw.com or Julie at jmacomb@nmmlaw.com.