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PHYSICIAN PRACTICE GROUP ACQUISITION BECOMES ANTITRUST CASUALTY

January 2014

Adding to the Federal Trade Commission's (FTC) recent string of successful challenges to allegedly anticompetitive healthcare mergers and acquisitions, a federal district court in Idaho ruled on January 24, 2014 that St. Luke's Health System's (St. Luke's) 2012 acquisition of the Saltzer Medical Group (Saltzer) violated §7 of the Clayton Act and the Idaho Competition Act and must therefore be unwound. According to the court, the acquisition resulted in St. Luke's having 80% of the primary care physicians in the Nampa, ID area, making it the dominant provider of primary care and giving it significant bargaining leverage over health insurance plans. The court predicted that the acquisition would result in anticompetitive effects in the market by enabling the combined entity to negotiate higher reimbursement rates from health insurance plans that will then be passed on to the consumer, as well as raise rates for ancillary services, such as X-rays, to the hospital's higher billing rates.

St. Luke's acquisition of Saltzer was first challenged by two competitors – St. Alphonsus Health System (St. Alphonsus) and Treasure Valley Hospital (Treasure Valley) – in a complaint filed back in 2012. The complaint alleged, in part, that the acquisition would give St. Luke's a near monopoly in the markets for adult primary care and general pediatric physician services after St. Luke's had previously acquired more than 20 physician practices, in addition to several hospitals and outpatient surgery facilities. The complaint further alleged that the Saltzer acquisition would deal a crippling blow to St. Alphonsus, which depended on Saltzer physicians for a significant number of its inpatient admissions and a substantial amount of its revenues. The FTC and state of Idaho, which were investigating the Saltzer acquisition at the time St. Alphonsus and Treasure Valley filed their complaint, filed their own complaint in 2013. The two complaints were subsequently joined prior to trial, which commenced in September 2013.

Although requiring St. Luke's to divest itself of Saltzer's physicians and assets, the court applauded St. Luke's for its efforts to improve the delivery of healthcare in the market, noting that the acquisition of Saltzer by St. Luke's was likely intended to improve patient outcomes. The court nevertheless concluded that there were other ways for the parties to achieve those effects without running afoul of the antitrust laws. In reaching this conclusion, the court specifically rejected St. Luke's claims that the acquisition was necessary to offer coordinated patient-centered care and to support the move away from a fee-for-service reimbursement system to risk-based contracting where the provider accepts risk and accountability for patient outcomes. The court found that while employing physicians is one way to put together a unified and committed team of physicians required to practice integrated care, there are a number of organizational structures that can create the same result without giving rise to a substantial concentration of market power. While the court did not elaborate on what specific organizational structures would be permissible, it is clear that the issue of how competing providers can collaborate in ways that improve quality of care and reduce healthcare costs while also complying with the antitrust laws is, and will continue to be, a central issue in this era of healthcare reform.

Key Takeaways

- **Primary Care Physician Practice Acquisitions Can Violate the Antitrust Laws.** The St. Luke's case demonstrates the government's ability to successfully challenge a hospital's acquisition of a primary care physician practice. Prior antitrust challenges at both the federal and state levels have focused primarily on acquisitions involving physician specialists, such as cardiologists and urologists, where markets tend to be more concentrated. While primary care physician markets are typically less concentrated than the markets for specialists, the St. Luke's case signals that, at least in certain geographic areas, the acquisition of a primary care physician practice may raise similar antitrust concerns where it results in a single provider employing a significant share of the primary care physicians in the market.

- **Horizontal Overlaps Critical to Antitrust Analysis.** Hospital-physician mergers are generally viewed as raising fewer antitrust concerns than hospital mergers because hospitals and physicians stand largely in a "vertical" relationship to one another, providing mostly complementary, as opposed to overlapping, services. However, as the St. Luke's opinion makes clear, it would be a mistake for parties to a proposed transaction to discount the level of competitive, or "horizontal," overlap that exists between a hospital and an independent physician practice that it seeks to acquire. Where that overlap is significant, parties would be advised to involve antitrust counsel early on in the planning process to help minimize potential antitrust concerns and assess the likelihood of a government investigation of the transaction.

  Although the complaint filed by St. Alphonsus raised certain "vertical" antitrust concerns, including that the Saltzer acquisition would foreclose it from physicians that accounted for a significant percentage of its inpatient admissions and revenues, those concerns were not addressed in the court's opinion. While aggrieved competitors are always a source of potential complaints, whether to government enforcement agencies or filed with a court, it remains to be seen whether vertical concerns such as the foreclosure alleged by St. Alphonsus could sustain an antitrust challenge to a hospital's acquisition of a physician practice.

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- **Physician Practice Acquisitions – Both Proposed and Previously Consummated – Will Remain in the Antitrust Crosshairs.** With its victory in St. Luke's, the FTC is likely to continue to aggressively investigate and challenge physician practice acquisitions that it believes violate the antitrust laws. Because most physician practice acquisitions do not trigger mandatory pre-merger review under the Hart-Scott-Rodino Antitrust Improvements Act, many of these investigations are likely to involve consummated transactions. In addition, last year the FTC indicated a desire to conduct a retrospective study of consummated hospital-physician group transactions to determine their effect on pricing and quality of care in the market. In short, investigating hospital-physician practice tie-ups is likely to remain a significant priority for the FTC for the foreseeable future.
- **Antitrust Trumps the ACA.** The Affordable Care Act (ACA) is fueling much of the consolidation in the healthcare industry as providers respond to declining reimbursement rates and the need to align provider incentives and increase coordination to drive improvements in quality of care while also lowering healthcare costs. The St. Luke's case serves as a reminder that there are limits to the type and level of coordination that providers can engage in without violating the antitrust laws. Healthcare providers that are considering a merger or acquisition with a competitor should include as part of their analysis whether other forms of coordination – including clinical or financial integration – might achieve their business objectives while raising fewer antitrust concerns.

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