

INSIGHTS

Ninth Circuit Holds that Acquisition Violates Antitrust Laws

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On February 10, 2015, the U.S. Court of Appeals for the Ninth Circuit affirmed a district court decision finding that the merger of two healthcare providers in Idaho violated antitrust laws. [St. Alphonsus Medical Center-Nampa Inc. et al. v. St. Luke's Health System Ltd. et al.](#), No. 14-35173 (9th Cir. Feb. 10, 2015). Companies considering mergers and acquisitions should take note of several important aspects of the decision.

This case involved a 2012 merger between St. Luke's, an Idaho-based, not-for-profit healthcare system, and Saltzer Medical Group, the largest physician group in Nampa, Idaho. In November 2012, Saint Alphonsus Health System, the only hospital in Nampa, filed a complaint seeking to enjoin the merger. The preliminary injunction was denied. In March 2013, after the parties merged, the Federal Trade Commission (FTC) and the State of Idaho filed a complaint under federal and state antitrust laws. The district court consolidated the two complaints and after a nineteen-day bench trial found the merger would likely have anticompetitive effects in the market for adult primary care physician (PCP) services in Nampa, and ordered divestiture of Saltzer. St. Luke's appealed, arguing that anticipated post-merger efficiencies excused the potential anticompetitive price effects. A three-judge panel of the Ninth Circuit disagreed.

The Ninth Circuit first considered whether the relevant geographic market had been properly defined, and accepted the district court's determination that Nampa, Idaho was the relevant market. The evidence showed that even in the face of a potential price increase, the majority of consumers prefer a local PCP. Furthermore, consumers are rarely direct purchasers of healthcare and rely upon insurance providers to list covered physicians. Evidence presented at trial indicated that insurance providers need to include Nampa PCPs in their networks to offer a competitive product.

The second issue examined was whether the FTC successfully argued a prima facie case that the merger would likely lead to anticompetitive effects. At trial, the FTC established its case by proving the post-merger entity's high market share together with significant barriers to entry, its ability to negotiate higher PCP insurance reimbursement rates, and its ability to charge higher hospital billing rates for ancillary services. On appeal, St. Luke's did not contest the market share calculation.

The Ninth Circuit upheld the district court's finding that pre-acquisition statements and past actions by the merging parties made it likely that St. Luke's would raise insurance reimbursement rates for PCP services. An email between St. Luke's executives discussed

increasing pressure on insurers, and Saltzer executives' internal correspondence stated that "the clout of the entire network" would enable them to negotiate more favorable terms. Moreover, following a previous acquisition in Twin Falls, St. Luke's had exerted its post-merger leverage to force higher reimbursement rates on insurers. This "natural experiment" reinforced the documentary evidence.

Interestingly, however, the Ninth Circuit rejected the district court's finding regarding ancillary services, because the trial court made no findings about St. Luke's market power in that service market, and the documentary evidence merely indicated a desire to increase revenues from ancillary services, which could occur in a variety of ways not necessarily involving higher prices.

The Ninth Circuit then considered whether St. Luke's had successfully rebutted the presumption of anticompetitive effects. The defendants' arguments focused on the alleged efficiencies from the merger; specifically, that it would allow St. Luke's to move toward the Affordable Care Act mandate of integrated care and risk-based reimbursement.

Despite expressing skepticism about an efficiencies defense, 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." The Court also noted that efficiencies must be merger-specific and verifiable, as explained in the FTC/DOJ Horizontal Merger Guidelines.

Applying these principles to the present case, the Ninth Circuit stated that "[i]t is not enough to show that the merger would allow St. Luke's to better serve patients." The Court noted that the district court did not find that the merger would increase competition or decrease prices. Acknowledging St. Luke's "laudable" goal of improving patient care, the Ninth Circuit nevertheless concluded that "the Clayton Act does not excuse mergers that lessen competition or create monopolies simply because the merged entity can improve its operations." The Ninth Circuit thus rejected the argument put forward by some healthcare providers and policy advocates that the Affordable Care Act's goal of greater integrated care requires more consolidation of providers, including hospitals and physician practices, and may justify otherwise anticompetitive mergers.

This case provides a number of useful takeaways, not only for those considering acquisitions in the healthcare sector, but for other industries as well:

- Internal correspondence and documents of merging parties, whether prepared in the ordinary course of business or specifically for the transaction, continue to play a key evidentiary role in the merger review process. Since the burden of proving harm to competition rests with the government, it will need sufficient evidence to support its theories of anticompetitive effects in order to prevail in court. Conversely, merging parties will bear the onus of putting forth credible evidence to support efficiencies claims and other defenses.
- Generic efficiencies arguments will not carry much weight with antitrust agencies or courts. This decision suggests that, in addition to demonstrating that claimed efficiencies are merger-specific and not merely speculative, transaction parties should show that they would have a positive effect on competition. Further, efficiencies arguments are likely to have a better chance of success during the investigation stage of a merger review before

the antitrust agencies, rather than in litigation.

- Antitrust agencies will investigate and challenge even smaller deals that are not reportable under the Hart-Scott-Rodino Act if they are likely to have anticompetitive effects.