Antitrust Implications and Lessons Learned from the Ninth Circuit Decision in *St. Luke’s*

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*This webinar is sponsored by the Antitrust PG*

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Overview

• Background
  – Trends in hospital and physician consolidation
  – Why are hospitals acquiring physicians?

• Recent decisions
  – Recent decisions: St. Luke’s, Partners, ProMedica

• Lessons learned
Background
Before 1994: agencies win some, lose some

California v. Sutter (2001)
FTC v. Tenet (1999)
U.S. v. LUMC (1997)
FTC v. Freeman (1995)
FTC v. Lee County (1994)
FTC v. Adventist Health (1994)
FTC v. University Health (1991)
U.S. v. Rockford Mem’l (1990)
HCA v. FTC (1986)

FTC v. Inova (2008)
FTC v. OSF Rockford (2012)
FTC v. ProMedica (2014)
FTC v. Phoebe Putney (2013)
FTC v. Reading (2012)
FTC v. Renown Health (2012)

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FTC v. Phoebe Putney (2013)
FTC v. Reading (2012)
FTC v. Renown Health (2012)
Background: physician consolidation

*Joining Forces*

Share of doctors practicing at hospitals who are also employees

- Specialists
- Primary-care physicians

Source: Advisory Board Co. 
The Wall Street Journal

*Wall Street Journal*
September 13, 2012
Stats & Data 2013

COMPETITION

ANTITRUST ENFORCEMENT

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POLICY INITIATIVES

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Enforcement Actions by Sector
Fiscal Years 2009-2013

- **Health Care - Pharmaceuticals**: 14%
- **Energy**: 5%
- **Manufacturing & Chemicals**: 29%
- **Retail Goods & Services**: 11%
- **Technology**: 8%
- **Health Care - General**: 32%
- **46%** (Total)

JANUARY - DECEMBER 2013
FEDERAL TRADE COMMISSION
Recent Decisions
Recent decisions

Three significant developments

• Last year:
  – Sixth Circuit rules against ProMedica merger

• January:
  – Massachusetts court rejects Partners merger

• February 10:
  – Ninth Circuit rules against St. Luke’s merger
Background: ProMedica

• Four systems in Toledo, Ohio
  – 4-3 merger
  – But 3-2 in OB

• High market shares

• No efficiency defense

• Claim made that St. Luke’s was “flailing”
Background: Partners

- Partners HealthCare System sought to acquire South Shore Hospital and Hallmark Health, in metro Boston; investigated by the DOJ and Mass AG
- Partners and the Mass AG entered into a proposed behavioral consent
  - Component contracting + price caps + growth restrictions
  - Mass Health Policy Commission: transaction would result in higher prices
- Mass state judge established a Tunney Act “lite” process to receive public comments and hosted several lengthy hearings
- Judge rejected the proposed consent: not in public interest and not administrable
- Partners announced it has abandoned the South Shore Hospital acquisition
- Partners/Hallmark transaction pending DOJ HSR review
Background: St. Luke’s

• First fully litigated FTC challenge to physician deal

• FTC scrutiny of physician deals before *St. Luke’s*:
  – 2011: Providence acquisition of cardiologist groups in Spokane, WA (closing letter)
  – 2012: consent order with Renown Health, Reno, NV
Background: St. Luke’s

History

• St. Luke’s proposed acquisition of Saltzer Group
  – ~40 member, multi-specialty
• Saint Alphonsus, rival system, sued
• Acquisition closed
• FTC sued; litigations consolidated
• Trial
• Ninth Circuit decision
• St. Luke’s indicated Monday may seek rehearing
Background: St. Luke’s

- **Nampa** was the geographic market
- Large market shares for adult PCPs
- Efficiency defense rejected
- Divestiture ordered
Lessons learned
Lessons learned

• No conflict between ACA and antitrust laws
• Focus: horizontal competition
• Narrow geographic markets
• Large market shares
• Treatment of efficiencies
• Role of competitors, state AGs
• Use of (bad) documents
• Credible evidence
• Remedy: divestiture or oversight
• Cost of litigation
No conflict between ACA and antitrust laws
Competition among ACOs can accelerate advancements in quality and efficiency. All of these benefits to Medicare patients would be reduced or eliminated if we were to allow ACOs to participate in the Shared Savings Program when their formation and participation would create market power.
Focus: horizontal competition
Focus: horizontal competition

• Horizontal mergers remain the target
• Adult PCPs in Nampa
Focus: horizontal competition

“It’s tough to make predictions, especially about the future”

*Saint Alphonsus and FTC v. St. Luke’s* (slip op. at 11)
Vertical theories?

- St. Al’s: St. Luke’s PCPs won’t refer to St. Al’s
  - This will damage hospital competition
- District court: agreed referrals likely to change
  - But ... the court did not use this finding
- Court of Appeals
  - Concurred
“There has been a dramatic increase in vertical integration in other areas of the health care industry. For example, many hospitals and/or health plans are affiliating with medical clinics and physician practices.”

Christine Varney, “New Directions at the FTC: Efficiency Justifications in Hospital Mergers and Vertical Integration Concerns (May 1995)
“Provider networks are expected to achieve significant economies of scale and scope resulting in lower costs of providing care ...  

“However, competitive harm may result from some types of vertical mergers.”

Christine Varney, “New Directions at the FTC: Efficiency Justifications in Hospital Mergers and Vertical Integration Concerns (May 1995)
“While the private plaintiffs challenged the transaction under a vertical theory ... the Commission’s challenge was based strictly on a horizontal theory. Indeed, antitrust challenges by the federal antitrust agencies based on vertical theories of harm are rare.”

Deborah L. Feinstein, Antitrust Enforcement in Health Care: Proscription, not Prescription, Fifth National Accountable Care Organization Summit (June 2014)
“[A] vertical provider transaction could raise concerns, e.g., if a hospital acquired so many physicians in a particular specialty that a competing hospital would be unable to provide that service because it lacks access to the needed physicians ...”

Deborah L. Feinstein, Antitrust Enforcement in Health Care: Proscription, not Prescription, Fifth National Accountable Care Organization Summit (June 2014)
Narrow geographic markets
Narrow markets

- Evidence for Nampa as geographic market
  - Residents “strongly prefer access to local PCPs”
  - Insurers need local PCPs to market plan
  - One-third saw PCPs outside Nampa
    - But those people drove east (to Boise) for work
    - Did not prove willingness to travel for others
Saltzer is Dominant in the “Nampa Market”

“This begins to show the dominance of Saltzer in the Nampa market. . . . Out of roughly 80 physicians in Nampa, Saltzer represents 47. If you add the Mercy Group, we have the opportunity to work exclusively with 54 of the 80.”

Ed Castledine,
Director of Business Development
Disparate market theories?

- Health plans market to employers who often require broad geographic coverage (certainly broader than individual patients require)
- Employers are less likely to select plans that have important "holes" in geographic coverage
  - Because of this, large hospital systems may be able attain higher prices by threatening to pull out of plan’s provider network
Narrow markets: SSNIP test
Large market shares
Large market shares

Market shares in the relevant market, by visits

- St. Luke’s: 12.3%
- Saint Alphonsus: 12.0%
- Primary Health: 4.8%
- Terry Reilly: 0.9%
- All Others: 4.5%

St. Luke’s and Saltzer account for nearly 80% of PCP services in Nampa

October 2, 2013
Treatment of efficiencies
Efficiencies: legal standard

• Supreme Court has never expressly approved efficiencies as rebuttal to prima facie §7 case
  – Cites to Brown Shoe (1962) ...
  – But, four circuits appear to accept defense

• FTC treatment of efficiencies
  – “cautiously recognized”

• No court has ever found efficiencies sufficient
Efficiencies: legal standard

• “We remain skeptical about the efficiencies defense in general and about its scope in particular”

• Here, court assumes defense, defines it narrowly:
  – Must have “evidence that the proposed merger will create a more efficient combined entity and thus increase competition”
  – “Requires proof that a merger is not, despite the existence of a prima facie case, anticompetitive”
Efficiencies: economics

• Two types of efficiencies
  – Lower costs, e.g.:
    • Economies of scale
    • Risk based contracting leading to lower medical utilization
    • Better network management (e.g. redirection of care from academic hospitals to community hospitals)
  – Improved quality of care, e.g.:
    • Integrated care
    • Better population health management

• Who benefits from lower costs?
  – Not enough to lower costs for the providers
  – Require pass through to consumers (patients, employers, payers)

• Key questions for antitrust
  – Do efficiencies offset antitrust risk?
Efficiencies: Snapshot of the arguments and evidence in St. Luke’s

**St. Luke’s**

- Risk based contracting
  - Berkeley Report on the benefits of fully integrated delivery systems, including the ability to offer risk based contracting
  - Examples of the Kaiser Permanente and Cleveland Clinic integrated models

- Benefits of EMR interoperability
  - Could not move Saltzer physicians to EPIC without employment

**Plaintiffs**

- Integrated care and risk based contracting do not require a large number of physicians
  - E.g. In Idaho, independent physician groups are successfully using risk based contracting
  - Description of VA hospital system

- EMR interoperability is essential, but acquisition is not necessary to achieve desired outcome
  - E.g., St. Luke’s Affiliate program

Disagreement was over whether the efficiencies were merger-specific.

Sources: St. Luke’s Finding of Facts and Conclusions of Law and Public Trial Transcripts
Efficiencies: oral argument
Role of competitors, state AGs
Role of competitors, state AGs

• Competitors can use antitrust for offensive purposes
  – In Partners, four competitor physician/hospital entities sought to intervene in consent decree proceeding – technical intervention was denied but Judge instituted public comment window at suggestion of the competitors, which provided basis for her rejection of the consent
  – In St. Luke’s, initial complaint was filed by competitors and likely laid a fertile ground for later FTC and AG involvement

• State AGs will continue to be intimately involved in all matters of healthcare
  – Touches all constituencies – easy way to pick up political capital
  – Local flavor of these disputes means local knowledge is essential
  – Joint investigations with federal agencies common but states may also choose to pursue their own efforts without federal involvement
Use of documents

Better cost is a worthy goal and I totally back that. I also understand market forces involved. But—let’s be realistic. Employing physicians is not achieving better cost; it’s achieving better profit.

Dr. Thomas Huntington, St. Luke’s Treasure Valley Board Member
St. Luke’s is a “Dominant” Healthcare Provider

- We have to be concerned with aligning if appropriate with the strongest partner. No one would disagree that St. Al’s is not the dominant provider in the valley.
- We are already linked in many ways to St. Luke’s because we all know they are and will likely remain the dominant provider, i.e., we have chosen to locate / move many practices to.

Dr. Randell Page, Saltzer’s Contracts Committee Chair
St. Luke’s Treasure Valley recognizes that market share in primary care is a key success factor, critical to sustaining a strong position relative to payer contracting and supporting ancillary, procedural, inpatient, specialty and other services. For purposes of this analysis, primary care is defined as family medicine, internal medicine, OB/GYN and pediatrics.
Record evidence confirms that the acquisition will likely result in anticompetitive effects

- Dr. Randell Page, Chair of Saltzer’s Contracting Committee, wrote:
  - If Saltzer closed its pending deal with St. Luke’s, it may be able to re-open contract negotiations with Blue Cross, “as there would be the clout of the entire network”
What Does the Acquisition Change?

- Pre-Acquisition, an independent St. Luke’s was competitively significant.

The reason these organizations should care is that an independent St. Luke’s Hospital can keep the little systems a little more honest. The MCOs lose clout if St. Luke’s is no longer independent.
Acquisition Leads to Increased Leverage and Higher Rates

- ProMedica was aware of its bargaining leverage with health plans
“An SLH affiliation with ProMedica has the greatest potential for higher hospital rates. … a lot of negotiating clout.”

… ProMedica brings to the table … incredible access to outstanding pricing on managed care agreements. *Taking advantage of these strengths may not be the best thing for the community in the long run.* Sure would make life much easier right now though.”

Presentation to St. Luke’s Board of Directors, 10/30/09 (PX01030 at 20, i/c)
Credible evidence
What evidence is credible

• Actual evidence *as opposed* to “trust” me arguments

• Quality documents describing deal rationale:
  – Discuss purported efficiencies
  – Consistency across documents
  – Prepared before antitrust strategy to clear deal
  – Explain why efficiencies are merger-specific
What evidence is credible: examples

- Evidence from prior transactions
  - E.g. analysis showing prior increases in scale allowed the firm to lower unit (or marginal) costs
  - E.g. analysis showing transaction allowed parties to “keep care local”
- Analysis of production technology
- Analysis showing potential for network re-optimization
- Simulations showing the magnitude of cost savings required to offset any competitive concerns
- Testimony of business people/clinicians
Remedy: divestiture or oversight
ProMedica, Partners, and now St. Luke’s:

• Structural remedies far preferred over conduct remedies

• Unscramble the eggs?
  – Fine!
Cost of litigation
Now: the post-litigation litigation

“The Boise health system told the Idaho Statesman last month that its unreimbursed bills so far total $8.1 million.”