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CLIENT ALERT

Idaho District Court First to Unwind a Physician Practice Deal

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January 2014

Court finds: "Integrated care—and risk-based contracting—do not require a large number of physicians"

Introduction

On January 24, 2014, in *Federal Trade Commission v. St. Luke's Health System, Ltd. & Saltzer Medical Group, P.A.*,[1] the U.S. District Court for the District of Idaho found that the acquisition of Saltzer Medical Group ("Saltzer") by St. Luke's Health System ("St. Luke's") violated the Clayton Act and the Idaho Competition Act. The court permanently enjoined the consummated acquisition and ordered it to be unwound. This case represents the first time that a federal court has decided a case against a physician practice acquisition.

St. Luke's is a not-for-profit health system headquartered in Boise, Idaho, that owns and operates six hospitals, as well as a number of other facilities and physician clinics. Saltzer is a for-profit, physician-owned, multi-specialty group located in Nampa, Idaho (20 miles west of Boise), with approximately 44 physicians (formerly the largest independent practice in Idaho).

Key Takeaways

1. Challenged transactions like this are typically settled, usually through consent decrees, prior to trial (primarily because most markets for physician practices are not heavily concentrated).[2] This demonstrates that enforcers' concerns with increased bargaining leverage towards commercial payors, resulting in higher reimbursement, apply to comparatively smaller physician practice transactions as well.

2. Payor opinions are accorded significant weight in the decision to challenge a transaction. Both the court's opinion and the joint complaint by the Federal Trade Commission ("FTC") and the State of Idaho (explained below) extensively discuss the acquisition's effect on

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[1] Case No. 1:12-CV-00560-BLW (Lead Case), Memorandum Decision & Order (D. Idaho Jan. 24, 2014).

[2] *See, e.g.*, *In the Matter of Renown Health*, Decision & Order, No. C-4366, Fed. Trade Comm'n (Nov. 30, 2012), *available at* http://www.ftc.gov/sites/default/files/documents/cases/2012/12/121204renownhealthdo.pdf (Federal Trade Commission alleging that Renown Health, an integrated health network based in Reno, Nevada, had gained control of the market for cardiology services by acquiring the only two major cardiology groups in the area).

payors—who were undoubtedly interviewed during the litigation. The court and plaintiffs were concerned that, by acquiring Saltzer, St. Luke's could channel bargaining leverage against commercial payors and would be able to command artificially high reimbursement rates for services.

3. Courts will scrutinize the necessity of the transaction to achieve the asserted procompetitive benefits. The district court's opinion in this case suggests that parties to an acquisition will not be able to insulate aggressive and potentially anticompetitive acquisitions by touting Affordable Care Act exemplars. In this case, Judge Winmill commended St. Luke's for its advances towards accountable care and "applauded . . . its efforts to improve the delivery of health care," but he found that advances such as integrated care simply require a committed team—not a large physician practice or any other specific organizational model.[3] Because those same improvements could be achieved through alternative affiliations short of a full merger (and without the attendant increase in rates for ancillary services), the court found that St. Luke's efficiency defense was not merger-specific and therefore unavailing.

4. Antitrust enforcers will not hesitate to challenge consummated mergers and transactions that fall below the minimum reporting amount of the Hart-Scott-Rodino Antitrust Improvements Act. The St. Luke's transaction, reportedly valued between $27 and $29 million, was significantly below the $70.9 million threshold required for pre-merger notification.[4] Even in transactions without required regulatory notice, there will typically be non-governmental parties in interest that can apprise enforcers of the merger activity.

Government & Competitor Allegations

On November 12, 2012, plaintiffs St. Alphonsus Health System ("St. Alphonsus") and Treasure Valley Hospital ("Treasure Valley"), both of which allegedly heavily relied on Saltzer physicians for inpatient admissions, filed suit in the U.S. District Court for Idaho, seeking a preliminary injunction to block the acquisition. The plaintiffs claimed that St. Luke's acquisition of Saltzer would substantially reduce competition for a number of physician services in and around the Nampa, Idaho, area in violation of Section 7 of the Clayton Act and Section 48-106 of the Idaho Competition Act. The court denied the hospitals' request for a preliminary injunction, primarily because the merging parties represented that they would preserve their organizational structure for at least 12 months, but did not dismiss the complaint.

Notwithstanding the private litigation and a pending government investigation, St. Luke's closed the transaction on December 31, 2012, for an amount not to exceed $16 million.[5] St. Luke's acquired certain Saltzer assets, intangible assets, personal property, and equipment. The acquisition also transferred many of Saltzer's legal rights to St. Luke's, including, *inter*

[3] *Id.* at 3; *see also* Findings of Fact and Conclusions of Law, Federal Trade Commission et al. v. St. Luke's Health System, Ltd. & Saltzer Medical Group, P.A., No. 1:12-CV-00560-BLW-REB, at 34 (D. Idaho Jan. 28, 2013).

[4] The Hart-Scott-Rodino filing thresholds are revised annually based on the change in gross national product. Effective February 24, 2014, the threshold for pre-merger notification will be increased to 75.9 million. *See* Revised Jurisdictional Thresholds for Section 7A of the Clayton Act, 79 Fed. Reg. 3,814 (Jan. 23, 2014).

[5] Findings of Fact and Conclusions of Law, *supra* note 3, at 9.

alia, the power to negotiate health plan contracts on Saltzer's behalf, establish rates and charges for services provided by Saltzer physicians, and the power to manage day-to-day employee and financial matters. In addition, Saltzer, on behalf of its physicians, entered into a five-year professional services agreement ("PSA") with St. Luke's, pursuant to which Saltzer physicians agreed to provide health care services exclusively on behalf of St. Luke's and refrain from employment or financial affiliation with other health systems or hospitals during the term of the PSA.[6]

On March 26, 2013, the FTC and the State of Idaho filed in the same court a joint complaint alleging that the transaction was anticompetitive and requesting that it be unwound. This action was joined with the ongoing St. Alphonsus/Treasure Valley private litigation. The plaintiffs alleged that the transaction created a single dominant provider of adult primary care physician services in the Nampa area, with the combined entity commanding a nearly 60 percent share of that market that "likely will lead to higher health care costs and loss of valuable non-price competition."[7] Further, the FTC and Idaho Attorney General alleged that the combined entity would increase St. Luke's bargaining leverage with commercial health plans, and higher negotiated prices would be passed on to local employers and their employees. The four-week bench trial began on September 22, 2013.

Opinion from the District Court for the District of Idaho

The court found that adult primary care physician services sold to commercially insured patients in Nampa constitute the relevant product and geographic markets for purposes of analysis under Section 7 of the Clayton Act. In these relevant product and geographic markets, the court found the post-acquisition Herfindahl-Hirschman Index ("HHI") (a measure of market concentration) to be 6,219 with a post-acquisition increase of 1,607.[8] Because an HHI above 2,500 indicates a highly concentrated market and a post-acquisition increase of over 200 points raises a presumption of enhanced market power, the court found the transaction to be presumptively anticompetitive under Section 7 of the Clayton Act.

Significantly, the court found that "it appears highly likely that health care costs will rise as the combined entity obtains a dominant market position [80 percent of Nampa's primary care physicians] that will enable it to (1) negotiate higher reimbursement rates from health insurance plans that will be passed on to the consumer, and (2) raise rates for ancillary services (like x-rays) to the higher hospital-billing rates."[9] Notably, the court focused on the increased rates that would be paid to the physicians post-transaction when services would be considered "hospital-based" even if those services were performed in the same Saltzer office-based location as before the acquisition.[10] The court did not address whether those "hospital-based" rates were a function of the payors' payment policies.

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[6] *Id.* at 6, 9–10.
[7] Complaint for Permanent Injunction, Federal Trade Commission et al. v. St. Luke's Health System, Ltd. & Saltzer Medical Group, P.A. at 2, No. 1:12-CV-00560-BLW-REB (D. Idaho Mar. 26, 2013).
[8] Findings of Fact and Conclusions of Law, *supra* note 3, at 17. The HHI statistic is calculated by squaring the market share of each firm competing in the market and then summing the resulting numbers. For example, for a market consisting of four firms with market shares of 30, 30, 20, and 20 percent, the HHI is 2,600 ($30^2 + 30^2 + 20^2 + 20^2 = 2,600$).
[9] Memorandum Decision & Order, *supra* note 1, at 3.
[10] Findings of Fact and Conclusions of Law, *supra* note 3, at 24.

In ordering St. Luke's to divest its affiliation with Saltzer, the court remarked that any cognizable procompetitive benefits of the transaction could be achieved through alternative affiliations short of organizational integration. Judge Winmill acknowledged that the acquisition was intended "primarily to improve patient outcomes" and that the court was "convinced" the acquisition "would have that effect if left intact."[11] However, the court found that "there are other ways to achieve the same effect that do not run afoul of the antitrust laws and do not run such a risk of increased costs. For all of these reasons, the Acquisition must be unwound."[12]

Next Steps – Unwinding the Transaction

St. Luke's is reportedly considering an appeal to the U.S. Court of Appeals for the Ninth Circuit. Although Saltzer is entitled to retain the almost $9 million that it received from St. Luke's for goodwill and intangibles, the future remains uncertain as to how or when the parties will unscramble the merged entity.[13] Judge Winmill's ruling does not prescribe a timeframe or deadline by which the relationship must be unwound. St. Luke's will be responsible for reconstituting Saltzer as an independent practice; it is difficult to predict how or when this will occur, as the parties have been working together since the end of 2012 and undoubtedly will want to ensure that their patients continue to receive access to and continuity of care.

Resources

- The FTC and State of Idaho's Complaint for Permanent Injunction (Mar. 26, 2013) is available at: http://www.ftc.gov/sites/default/files/documents/cases/2013/03/130312stlukescmpt.pdf.
- The district court's Memorandum Decision and Order (Jan. 24, 2014) is available at: http://www.ftc.gov/sites/default/files/documents/cases/140124stlukesmemodo.pdf.
- The district court's Findings of Fact and Conclusions of Law (Jan. 28, 2014) is available at: http://www.ag.idaho.gov/consumerProtection/pendingActions/FindingsOfFact_01242014.pdf.

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This Client Alert was authored by **Patricia M. Wagner, Ross K. Friedberg,** *and* **Daniel C. Fundakowski**. *For additional information about the issues discussed in this Client Alert, please contact one of the authors or the Epstein Becker Green attorney who regularly handles your legal matters.*

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[11] Memorandum Decision & Order, *supra* note 1, at 3.
[12] *Id.*
[13] Findings of Fact and Conclusions of Law, *supra* note 3, at 12.

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