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6 Lessons From 9th Circ. St. Luke's Decision

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Although it focuses specifically on a health care acquisition, the recent decision by the U.S. Court of Appeals for the Ninth Circuit in St. Alphonsus Medical Center v. St. Luke's Health System is instructive on a broad range of antitrust issues. Companies from all industries can learn from the lessons of St. Luke's, and this article summarizes the main points discussed in the Ninth Circuit's opinion and provides several key takeaways to help companies minimize antitrust risks in their own transactions.

On Feb. 10, 2015, the Ninth Circuit affirmed a district court's ruling that the acquisition of Saltzer Medical Group by St. Luke's Health System would substantially lessen competition among adult primary care physicians (PCPs) in Nampa, Idaho, in violation of Section 7 of the Clayton Act. In November 2012, St. Luke's acquisition of Saltzer was challenged by two rival hospitals, St. Alphonsus Medical Center and Treasure Valley Hospital, which initially lost a motion for a preliminary injunction to block the deal. The Federal Trade Commission and the Idaho attorney general then joined the litigation in March 2013, and after a 19-day bench trial, the district court ruled that the acquisition likely would have anti-competitive effects and ordered St. Luke's to divest Saltzer. St. Luke's and Saltzer appealed.

The Ninth Circuit's Opinion

Below is a summary of the main points of the Ninth Circuit's opinion:

The Geographic Market Was Limited to Nampa, Idaho

St. Luke's argued that the geographic market at issue was broader than Nampa, but the Ninth Circuit affirmed the district court's rejection of this argument in favor of the more limited geographic market. (The parties agreed that the relevant product market was adult PCP services.)

The Plaintiffs Established That the Merger Likely Would Have Anti-Competitive Effects

The Ninth Circuit adopted the district court's holding that the market share concentration for the transaction was above the threshold for presumptively anti-competitive transactions. The Ninth Circuit

also adopted the district court's holding that the combined St. Luke's/Saltzer entity could pressure insurance companies to accept higher reimbursement rates for PCPs. Here, the Ninth Circuit noted that the district court cited, as evidence of what the combined entity could do in the future, to internal documents touting the ability of the combined entity to negotiate better terms with the insurance companies and to a prior example of St. Luke's having done so in another transaction.

The Ninth Circuit rejected, however, the district court's finding that defendants also had the ability to charge higher prices for ancillary support services, ruling that this was not supported by the factual record. The Ninth Circuit did not need to address the district court's finding that difficult market entry supported plaintiffs' case, because defendants did not challenge the point on appeal.

Defendants' Efficiencies Arguments

Defendants argued that any potential anti-competitive effect of the merger was outweighed by its benefits, namely the merger would allow the parties to better serve patients via a shared, integrated electronic records system. The Ninth Circuit, however, agreed with the district court that defendants' efficiencies defense was insufficient, holding that a "successful" efficiencies defense requires proof that a merger is not anti-competitive, or, in other words, that any potential efficiency must have a corresponding benefit to consumers (such as increase in competition or decrease in price). The Ninth Circuit also held that any claimed benefit must be merger-specific and agreed with the district court's finding that the integrated records system was not merger specific because similar data tools are available to independent physicians.

Divestiture Was the Appropriate Remedy

Finally, the Ninth Circuit held that the district court properly rejected St. Luke's contentions that divestiture was not the appropriate remedy. The Ninth Circuit found that the district court had "ample basis" for holding that Saltzer could operate as an independent entity, including corroborating testimony from Saltzer employees and St. Luke's assurance to the court in its opposition to the preliminary injunction that a divestiture was feasible. Thus, divestiture was an appropriate solution where the harm of the merger clearly outweighed any potential benefits. The Ninth Circuit also held that St. Luke's proposed conduct remedy would risk "excessive government entanglement" in the market.

Key Takeaways

- Generally touting efficiencies resulting from the transaction is not enough. Efficiencies should be both merger-specific and likely to result in measurable benefits to consumers. Companies should expect judicial skepticism of general efficiencies defenses when developing their litigation strategy.

- Components of the Affordable Care Act promote health care integration and coordination of care. But under the St. Luke's opinion, health care integration, by itself, may be insufficient to overcome anti-competitive concerns. Health care companies should make sure that any integration efforts are merger-specific. They also should be prepared to explain why such integration will benefit consumers, such as through increased competition or reduced prices.

- Transactions of all sizes may be subject to challenge. This case involved two hospitals and roughly 67 PCPs. A small market will not immunize a transaction from substantial state and federal scrutiny.

- Bad documents can come back to hurt you (a familiar theme in antitrust cases). Here, the district court specifically relied on several bad documents when finding that St. Luke's likely would negotiate higher rates with insurers. Companies should consider implementing antitrust training programs that reinforce the importance of complying with the antitrust laws while ensuring that their records reflect such training.

- Divestitures are still the preferred solution. Although the agencies have been willing to consider conduct or behavioral remedies in merger consent decrees, divestiture remains a primary method of resolving anti-competitive concerns. To avoid divestiture, companies should develop fully any arguments that they cannot survive independently post-merger and that any potential government "entanglement" will not be a burden on the parties or potentially cause more harm than good to the market.

- Nonreportable transactions may be challenged by the government. Although not discussed in the Ninth Circuit's opinion, St. Luke's acquisition of Saltzer was not reportable to the FTC under the Hart-Scott-Rodino premerger notification rules. Companies engaging in nonreportable transactions that may raise anti-competitive concerns should be prepared to defend the transaction.

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