King & Spalding

Client Alert

Antitrust & Litigation Practice Group

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FTC Successfully Challenges Non-Reportable Acquisition of Physician Group

On January 24, 2014, the U.S. District Court for Idaho held that St. Luke's Health System ("St. Luke's")'s acquisition of Saltzer Medical Group ("Saltzer"), violated Section 7 of the Clayton Act and ordered St. Luke's to fully divest itself of Saltzer's physicians and assets. The court issued a short opinion that mostly announces the outcome. The court will release its full opinion with detailed findings of fact and conclusions of law following its review of any objections by St. Luke's, Saltzer, and third parties—which must be submitted by January 27, 2014—regarding the possible release of confidential and business-sensitive information.

St. Luke's is a not-for-profit health system with headquarters in Boise, Idaho. It owns and operates six hospitals, as well as a number of other facilities and physician clinics. Prior to being acquired by St. Luke's, Saltzer was a for-profit, physician-owned, multi-specialty group comprised of 44 physician members and located in Nampa, Idaho. Saltzer was also the largest and oldest independent multi-specialty doctors' group in Idaho.

St Luke's entered in to an agreement to purchase Saltzer in the fall of 2012 for approximately $28 million. That transaction did not require a Hart-Scott-Rodino filing. On November 12, 2012, competitors St. Alphonsus Health System and Treasure Valley Hospital, which allegedly depended on Saltzer physicians for a significant portion of their inpatient admissions, filed suit in the U.S. District Court for Idaho, seeking a preliminary injunction to prevent consummation of the acquisition. Notably, St. Alphonsus had previously lost its bid to acquire Saltzer. The plaintiffs claimed that St. Luke's acquisition of Saltzer would substantially reduce competition for a number of physician services in the Nampa and Boise areas. Specifically, the plaintiffs alleged that St. Luke's dominated these markets, with market share as high as 80% in certain practices, as a result of its 20 previous acquisitions of physician groups, surgery centers, and hospitals and that the acquisition of Saltzer would reduce competition even further.

The court denied the hospitals' request for a preliminary injunction, though the court did not dismiss the hospitals' complaint. St. Luke's acquired Saltzer on December 31, 2012.

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On March 26, 2013, the Federal Trade Commission (FTC) and the State of Idaho filed a separate complaint in the same court, claiming the transaction was anticompetitive and requesting that it be unwound. Their complaint was joined with the ongoing private litigation. The matter went to trial on September 22, 2013.

The bench trial lasted approximately four weeks, with testimony from dozens of witnesses, as well as hundreds of exhibits.

The court's short opinion did not provide much analysis. At bottom, it appears that St. Luke's acquisition of Saltzer was simply one acquisition too many. The court held "it appears highly likely that health care costs will rise as the combined entity obtains a dominant market position [80% of primary care physicians in Nampa] 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."

Importantly, the court also noted that the procompetitive benefits of the transaction, while real, could be achieved without the deal. Specifically, the court acknowledged that the parties entered into the transaction "primarily to improve patient outcomes" and that it was "convinced" the merger "would have that effect if left intact." However, the court stated "[t]here 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."

* * *

This decision is noteworthy for several reasons. The FTC has won a number of challenges to healthcare mergers in the past few years (*e.g.*, ProMedica/St. Luke's), but this was a litigated challenge to a healthcare system's acquisition of a physician group, which have been resolved typically through consent orders. Moreover, the court acknowledged that healthcare reform requires that providers integrate their delivery of care and praised St. Luke's "foresight and vision" in acquiring physician groups. Nonetheless, it ordered St. Luke's to unwind the transaction, which may put providers in a tough spot as they seek to navigate the shifting healthcare landscape. In addition, like the Department of Justice's recent victory in Bazaarvoice, the FTC's victory in St. Luke's demonstrates the FTC's willingness to challenge consummated mergers and shows that parties considering transactions that do not meet the HSR reporting requirements should evaluate the potential risk of antitrust enforcement. Assuming this decision and order stand, St. Luke's divestiture of Saltzer may be complicated, as that transaction closed over a year ago. Finally, though we will analyze the court's full opinion when it is available, the FTC's complaint indicates that the parties' documents and objections from employers and payors played a key role in litigating the case and serves as a reminder that providers should carefully evaluate their documents and the extent of support from employers and payors in assessing a transaction's antitrust exposure.

Documents

The district court's opinion (Jan. 24, 2013) is available at
http://www.ftc.gov/sites/default/files/documents/cases/140124stlukesmemodo.pdf
The FTC and State of Idaho's complaint (March 26, 2013) is available at
http://www.ftc.gov/sites/default/files/documents/cases/2013/03/130312stlukescmpt.pdf