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Antitrust & Litigation Practice Group

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FTC Successfully Challenges ProMedica-St. Luke's Merger

On December 5, 2011, the FTC obtained an administrative decision that requires ProMedica to divest itself of St. Luke's Hospital. The Administrative Law Judge (ALJ)'s 246-page opinion, which was released to the public on January 5, 2012, is available at:

<http://www.ftc.gov/os/adjpro/d9346/120105promedicadecision.pdf>. Although this case is only the second filed FTC hospital merger challenge since 2007, it is part of a series of recent cases brought by the FTC in the healthcare sector, indicating a continuing trend of heightened FTC scrutiny of provider combinations.

ProMedica acquired St. Luke's in August 2010 in a non-reportable acquisition. In January 2011, the FTC announced its intent to challenge the deal, which, according to the FTC, gave ProMedica control of nearly 60% of the market for general acute-care inpatient hospital services and over 80% of the market for obstetrical services. In March 2011, the U.S. District Court for the Northern District of Ohio enjoined the transaction, and on December 5, following a full administrative trial on the merits, an ALJ concluded that the transaction would "substantially lessen competition," in violation of Section 7 of the Clayton Act.

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Key elements of the ALJ's Initial Decision include:

- A finding that the acquisition of St. Luke's by ProMedica, and the resulting reduction of providers in the market for general acute-care inpatient hospital services would increase ProMedica's bargaining power with commercial payors, leading to consumer harm in the form of higher reimbursement rates.
- A rejection of ProMedica's arguments that: (1) the market response to the combination would provide sufficient competitive constraints; (2) the pro-competitive benefits and increased efficiency resulting from the merger outweighed any anticompetitive effects; (3) the deal should be allowed to proceed because St. Luke's was a "weakened competitor;" and (4) a viable alternative remedy to unwinding the merger would be the establishment of a separate "firewalled" negotiation team that would negotiate and administer contracts on

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behalf of only St. Luke's, and none of ProMedica's other hospitals (*i.e.*, the remedy that addresses the FTC's competitive concerns in its successful challenge of the Evanston/Northwestern merger).

- A holding that the FTC failed to demonstrate that the market for inpatient obstetrical services constituted a separate, relevant market. The ALJ also declined the FTC's invitation to exclude from the relevant product market the tertiary services that ProMedica hospitals provide but St. Luke's does not.

ProMedica has appealed the ALJ's decision to the entire Federal Trade Commission, and should it lose at the FTC, it may appeal that decision to the Sixth Circuit Court of Appeals. Unless it obtains relief on appeal, the administrative order requires ProMedica to divest itself of St. Luke's to a pre-approved purchaser no later than 180 days from the date that the order becomes final. Until the point of divestiture, the order requires ProMedica to bear the cost of keeping St. Luke's operational.

Although the ultimate outcome of this case is yet to be determined, recent healthcare enforcement actions brought by the FTC indicate that, for the foreseeable future, provider combinations will continue to receive significant FTC scrutiny irrespective of whether they are subject to formal review by the FTC under the Hart-Scott-Rodino Act. As a result, hospitals and physician practices that are contemplating a strategic transaction should make sure they focus on the pro-competitive rationale for the transaction, and when appropriate, make sure that commercial payors and employers understand how the transaction can benefit them by improving healthcare and lowering overall healthcare costs.

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