Robinson+Cole

Health Law *Pulse*


**February 2015**

# Ninth Circuit and Massachusetts Superior Court Release Important Antitrust Decisions

The Ninth Circuit Court of Appeals and a Massachusetts Superior Court each recently released decisions dealing with alleged violations of antitrust prohibitions that implicate a number of important issues surrounding health care reform and the consolidation of health care providers. These cases have been closely watched by the health care community due to the current industry-wide uncertainty regarding the compatibility of federal antitrust laws with the Affordable Care Act's (ACA) health care reform provisions that incentivize provider integration and consolidation.

**NINTH CIRCUIT UPHOLDS FTC CHALLENGE OF ST. LUKE'S PHYSICIAN PRACTICE ACQUISITION**

On February 10, 2015, the Ninth Circuit Court of Appeals (Ninth Circuit) affirmed an Idaho District Court (District Court) ruling (as reported in a prior *Health Law Pulse*) that a health system's acquisition of a large physician group (Merger) violated federal antitrust law.

The St. Luke's case deals with the December 2012 acquisition of Saltzer Medical Group, the largest independent multispecialty physician group in Idaho, by St. Luke's Health System, an Idaho not-for-profit health system that includes seven hospitals and is affiliated with over 500 physicians. The Federal Trade Commission (FTC), the State of Idaho, and several private Idaho hospitals challenged the Merger in federal court on the grounds that it violated Section 7 of the Clayton Act because of alleged anticompetitive effects on the market for adult primary care physician (PCP) services in Nampa, Idaho. Section 7 of the Clayton Act prohibits mergers that may "substantially . . . lessen competition" or create a monopoly.

The District Court determined the Merger resulted in St. Luke's acquiring a nearly 80 percent market share of adult PCP services in Nampa and a market concentration in adult PCP services well above the threshold for a presumptively anticompetitive merger. The District Court noted that the Merger was the latest in a succession of physician practice acquisitions by St. Luke's that have resulted in numerous "anticompetitive effects," including, but not limited to, substantially increased referrals and reimbursement rates for St. Luke's. The Merger further enhanced St. Luke's leverage in price negotiations and in capturing referrals for hospital, specialty, and ancillary services provided by St. Luke's.

St. Luke's argued that the Merger created several efficiencies that outweighed any anticompetitive effects of the Merger. The claimed efficiencies include, but were not limited to, (1) integrating care, (2) rewarding physicians based upon value rather than volume, (3) moving to a risk-based reimbursement system, and (4) utilizing a shared electronic record system. The District Court determined that the claimed efficiencies were not merger specific and could be achieved by alternate means, such as collaborations between groups of independent physicians. The District Court held that the Merger violated Section 7 of the Clayton Act and ordered St. Luke's to divest Saltzer.

On appeal to the Ninth Circuit, St. Luke's reiterated its efficiencies defense and asked the court to consider the Merger's procompetitive benefits within the context of recent health care reform efforts that

incentivize consolidation to reduce health care costs and improve patient outcomes. While an efficiencies defense has been adopted only by district courts and is not yet accepted by the U.S. Supreme Court, the Ninth Circuit assumed the validity of an efficiencies defense but stated that efficiencies alone are not enough to rebut a finding that a merger is anticompetitive. Instead, a defendant must also show that the merger enhances competition and that the claimed efficiencies are verifiable and specific to the merger in question. The Ninth Circuit found that the District Court did not err in concluding that St. Luke's claimed efficiencies (1) would not increase competition because reimbursement rates would likely increase, and (2) were not merger specific because there was no evidence St. Luke's needed a larger number of employed physicians to provide integrated care and independent physicians, such as Saltzer, had access to St. Luke's electronic medical record system. Notably, the Ninth Circuit affirmed the District Court's holding that the potential for better patient service following the Merger does not outweigh the Clayton Act's prohibition on conduct that lessens competition or the creation of a monopoly. The Ninth Circuit affirmed the District Court's order that St. Luke's divest Saltzer.

As a result of the Ninth Circuit's decision in the St. Luke's case, health systems and physician practices seeking to consolidate must be prepared to effectively demonstrate that such consolidation will result in efficiencies that cannot be accomplished without consolidation and that such efficiencies will positively affect competition. Providers currently exploring avenues to increase capital investment and reduce health care costs may be required to consider alternatives to complete mergers or acquisitions in partnering with larger health care systems where a positive impact on competition cannot be demonstrated.

**MASSACHUSETTS COURT REJECTS PROPOSED SETTLEMENT BETWEEN PARTNERS AND MASSACHUSETTS ATTORNEY GENERAL**

On January 29, 2015, a Massachusetts Superior Court rejected a proposed settlement (Proposed Settlement) between Partners HealthCare System (Partners) and the Massachusetts attorney general's (AG) office that would have allowed Partners to acquire South Shore Health and Hallmark Health Corporation (Proposed Acquisitions). Superior Court Judge Janet Sanders delivered a significant setback to Partners' plans by concluding that the Proposed Settlement did not reasonably and adequately address anticompetitive harms that would have resulted had the Proposed Settlement been accepted and the Proposed Acquisitions finalized. The Proposed Settlement was opposed by competitors of Partners, the Massachusetts Health Policy Commission (HPC), newly elected AG Maura Healey, and antitrust experts, among other prominent health care stakeholders.

Partners is a Massachusetts not-for-profit corporation that operates nine hospitals, a psychiatric hospital, and other providers, and negotiates payor contracts on behalf of approximately 6,200 PCPs. South Shore Health is a Massachusetts not-for-profit corporation that operates a large hospital and has a managed care network of more than 400 physicians (South Shore). Hallmark Health Corporation is a Massachusetts not-for-profit corporation that operates two hospitals and a number of outpatient facilities and has a managed care network of more than 400 physicians (Hallmark). Partners' proposed acquisition of South Shore and Hallmark would have added three hospitals and approximately 800 physicians to the Partners system. The AG brought a complaint alleging that the acquisitions violated Massachusetts state consumer protection laws and would result in eliminating competition, thereby resulting in higher reimbursement rates to Partners and higher health care costs to consumers.

The Proposed Settlement, negotiated between Partners and former AG Martha Coakley, would have allowed Partners to acquire South Shore and Hallmark's two hospitals under certain conditions. The Proposed Settlement stipulated the following:

1. It required Partners to comply, for six and a half years, with a price cap on rates for commercial business, which comprise 60 percent of Partners' revenues, and a more stringent price cap on activities for which Partners bears commercial risk, which comprise 11 percent of Partners' revenues.

2. It allowed health insurers to contract with Partners for components of its services instead of being required to accept its entire network of services, thereby reducing Partners' ability to negotiate higher reimbursement rates for a set period of time.

3. It prohibited Partners from prospectively negotiating with insurers on behalf of physicians unaffiliated with Partners, preventing such physicians from receiving Partners' higher reimbursement rates.

4. It imposed a temporary restriction on future acquisitions by Partners that would have required AG approval of any future hospital acquisitions in eastern Massachusetts for seven years and capped

physician growth for five years, using as a baseline January 1, 2012, when the number of Partners' physicians was the highest.

Courts may not approve a settlement in an antitrust action unless the court determines that such settlement is in the public interest. Judge Sanders found that the Proposed Settlement failed to reasonably and adequately address the anticompetitive effects of the Proposed Acquisitions because it would not effectively keep health care costs down and its remedies would require constant monitoring and be unreasonably difficult to enforce. Judge Sanders stressed that many of the restrictions are temporary and that the proposed price caps would allow Partners to increase its prices in a market where it already charges the highest prices. She placed particular importance on the HPC's findings that the Proposed Acquisitions would allow Partners to use greater leverage to obtain higher prices once the Proposed Settlement's restrictions expire. As a result of this decision, Partners recently announced that it has withdrawn its bid to acquire South Shore and is considering its next steps with respect to the planned acquisition of Hallmark.

Judge Sanders' decision also validates the stature of the HPC as an important independent health care monitor in Massachusetts, as the decision characterizes as "particularly invaluable" the HPC's findings regarding the Proposed Acquisitions and its determination that the Proposed Settlement's limited restrictions on Partners would be ineffective in addressing anticompetitive harms.

The St. Luke's and Partners decisions are particularly important guidance for health care organizations considering mergers, acquisitions, or other forms of consolidation. These decisions suggest that, even though the ACA seems to encourage consolidations among providers that will result in efficiencies or increased care coordination, antitrust considerations may prevail.

---

If you have any questions, please contact a member of Robinson+Cole's Health Law Group:

Lisa M. Boyle | Leslie J. Levinson | Brian D. Nichols | Theodore J. Tucci

Pamela H. Del Negro | Christopher J. Librandi | Meaghan Mary Cooper

Nathaniel T. Arden | Conor O. Duffy

---