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## FTC Wins Action to Block Hospital-Physician Group Merger

On the heels of a string of successfully litigated hospital merger challenges,<sup>1</sup> the Federal Trade Commission (FTC) recently expanded its winning streak in the health care industry to include hospital acquisitions of physician groups.<sup>2</sup> In an opinion issued on January 24, 2014, a federal district court permanently enjoined St. Luke's Health System, Ltd.'s (St. Luke's) acquisition of Saltzer Medical Group (Saltzer), ordering St. Luke's to divest Saltzer after finding the acquisition violated Section 7 of the Clayton Act and the Idaho Competition Act.<sup>3</sup> FTC Chairwoman Edith Ramirez called the decision "an important victory that will benefit both competition and consumers in Nampa, Idaho and the surrounding areas," and reiterated that "ensuring vigorous competition between [health care] providers is, and will continue to be, a top Commission priority."<sup>4</sup>

The FTC enforcement action and court order shed a spotlight on the FTC's continued attention to the health care sector. In particular, the FTC and the court highlighted the competitive harm likely to result from a leading hospital chain acquiring the largest primary care physician group in Nampa, Idaho. While the transaction involved increased concentration in primary care physician services, the FTC and the court stressed not only the likelihood Nampa, Idaho, primary care physician services prices would increase, but also that St. Luke's would raise rates "for ancillary services (like X-rays)" and foreclose rivals as Saltzer physicians changed their referral patterns to favor St. Luke's.

The St. Luke's-Saltzer merger, not subject to the HSR Act notification requirements, closed in late 2012, after the court denied a preliminary injunction motion filed by St. Luke's competitors, St. Alphonsus Health System and Treasure Valley Hospital. In March 2013, the FTC and the Idaho attorney general joined the fray when they filed a complaint alleging St. Luke's, Idaho's largest health system, purchase of Saltzer, a 44-doctor physician practice group that had been the state's largest independent multispecialty group, would create a dominate single provider for "adult primary care physician services sold to commercial health plans" in a geographic market "no larger than the five zip codes that encompass Nampa and Caldwell, Idaho."<sup>5</sup>

- 1 See, e.g., Opinion of the Commission, *In re ProMedica Health Sys., Inc.*, Docket No. 9346 (June 25, 2012), available at <http://www.ftc.gov/os/adjpro/d9346/120625promedicaopinion.pdf>; *FTC v. OSF Healthcare System*, 852 F. Supp. 2d 1069 (N.D. Ill. 2012).
- 2 In late 2012, the FTC also challenged a hospital-physician transaction in Reno, Nev. See Order of the Commission, *In re Renown Health*, Docket No. C-4366 (Dec. 4, 2012) available at <http://www.ftc.gov/sites/default/files/documents/cases/2012/12/121204renownhealthdo.pdf> (settling the FTC's allegations that Renown Health's acquisition of two cardiology groups reduced competition in the Reno, Nev., area, Renown agreed to release its staff cardiologists from noncompete contract clauses, allowing up to 10 of them to join competing cardiology practices).
- 3 Findings of Fact and Conclusions of Law, *FTC v. St. Luke's Health System, Ltd.*, No. 13-cv-00116 (D. Idaho, Jan. 24, 2014), consolidated with lead case *St. Alphonsus Medical Center-Nampa et al. v. St. Luke's Health System Ltd.*, No. 1:12-cv-00560 (D. Idaho, Jan. 24, 2014) available at <http://www.ftc.gov/system/files/documents/cases/140124stlukesfindings.pdf> [hereinafter collectively *St. Luke's*].
- 4 Statement of FTC Chairwomen Edith Ramirez on the U.S. District Court in the District of Idaho Ruling in the Matter of the Federal Trade Commission and the *State of Idaho v. St. Luke's Health System Ltd. and Saltzer Medical Group P.A.* (January 24, 2014), available at <http://www.ftc.gov/news-events/press-releases/2014/01/statement-ftc-chairwoman-edith-ramirez-us-district-court-district>.
- 5 Complaint for Permanent Injunction at 7, *FTC v. St. Luke's Health System, Ltd.*, No. 13 CV-13-116-BLW (D. Idaho, Mar. 12, 2013) available at <http://www.ftc.gov/sites/default/files/documents/cases/2013/03/130312stlukescmpt.pdf>.

Chairwoman Ramirez has indicated the FTC's interest in the potential for vertical transactions to cause competitive harm, citing hospital-physician combinations in particular.<sup>6</sup> Tellingly, the *St. Luke's* complaint highlighted numerous competitive concerns arising from vertical aspects of the transaction, notwithstanding the fact that the FTC framed its challenge in *St. Luke's* as a horizontal combination between direct competitors for the provision of primary care physician services. For example, the FTC alleged the merger would likely allow St. Luke's to raise its rates "for ancillary services – like labs and X-rays," areas in which St. Luke's and Saltzer did not compete prior to the merger. Similarly, the FTC alleged that health plans would also pay higher rates for other services, such as surgeries, as a result of St. Luke's already higher billing rates and its physician referral policies that would direct patients to St. Luke's in-house facilities, foreclosing physician referrals to competing inpatient and outpatient facilities.<sup>7</sup> While the parties pointed to the contractual provisions allowing Saltzer physicians to retain discretion to refer patients to any practitioner or facility regardless of its affiliation with St. Luke's, the court concluded, citing referral patterns subsequent to past St. Luke's physician group acquisitions, that the Saltzer physicians would in practice change their referral patterns (*e.g.*, for surgery and imaging services) to disfavor St. Luke's rivals.<sup>8</sup>

The court ordered the complete divestiture of the acquired assets, appearing largely to have agreed with the FTC's complaint. In its Findings of Fact and Conclusions of Law, the court found that the combined entity "includes 80% of the primary care physicians in Nampa" and that health care costs would likely rise given the merged entity's ability to (1) negotiate higher reimbursement rates with commercial health care plans that would be passed on to consumers; and (2) raise rates for ancillary services (like x-rays) to the higher hospital-billing rates.<sup>9</sup> The court relied heavily on internal documents and St. Luke's track record in other communities in drawing its conclusions regarding the likely anticompetitive effects.<sup>10</sup>

Similarly the court was not swayed by St. Luke's efficiencies defense. While it acknowledged the acquisition was driven by "St. Luke's desire to improve quality and reduce costs by moving toward value-based or risk-based care and away from fee-for-service care" and "was intended by St. Luke's and Saltzer to improve patient outcomes," the court concluded that the claimed efficiencies were not merger-specific and thus were not cognizable.<sup>11</sup> The court stressed that "it is a committed team – and not any one specific organizational structure – that is the key to integrated medicine."<sup>12</sup> Specifically, the court found no empirical evidence St. Luke's needed additional employed physicians to transition to integrated care and risk-based contracting and noted that other Idaho independent physician groups are using risk-based contracting successfully.<sup>13</sup> Despite ultimately siding with the FTC, the court applauded St. Luke's efforts to improve the delivery of health care but concluded that there were alternatives to achieve the same effects that did not violate the antitrust laws.<sup>14</sup>

*St. Luke's* is a significant win for the FTC. It signals an expansion of the FTC's historical focus on horizontal hospital mergers to include hospital-physician group acquisitions that, from the FTC's per-

6 See Remarks of FTC Chairwomen Edith Ramirez at George Washington Univ. Merger Transactions Symposium - Retrospectives at the FTC: Promoting an Antitrust Agenda, at 11 (June 28, 2013) available at [http://www.ftc.gov/sites/default/files/documents/public\\_statements/retrospectives-ftc-promoting-antitrust-agenda/130628aba-antitrust.pdf](http://www.ftc.gov/sites/default/files/documents/public_statements/retrospectives-ftc-promoting-antitrust-agenda/130628aba-antitrust.pdf).

7 Complaint for Permanent Injunction at 16, 19.

8 *Id.* at 26.

9 *St. Luke's* at 3.

10 See generally *St. Luke's* at 21-27.

11 *St. Luke's* at 3, 29, 47.

12 *Id.* at 34.

13 *Id.*

14 *Id.* at 3.

spective, are likely to substantially lessen competition.<sup>15</sup> Given the FTC's demonstrated willingness to aggressively investigate and litigate health care transactions, hospitals contemplating mergers or physician group acquisitions – even if not HSR Act reportable – should consult antitrust counsel in the early stages of considering a transaction to address potential antitrust risk, to review potential alternative transaction structures, and to assist in identifying potential merger-specific efficiencies that may minimize that risk. Parties need to be particularly diligent if higher post-merger rates are anticipated and prepared to provide compelling supportable justifications (*e.g.*, clear metrics showing quality-adjusted prices will actually be lower) that the rate increases do not result from enhanced post-merger market power. Additionally, hospitals should take care to consider the vertical implications of potential transactions, which received far more attention in the FTC's complaint than might be expected given the nature of the horizontal overlap.

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<sup>15</sup> See also Order of the Commission, *In re Renown Health*, Docket No. C-4366 (Dec. 4, 2012) available at <http://www.ftc.gov/sites/default/files/documents/cases/2012/12/121204renownhealthdo.pdf>.